Employment Standards TRIBUNAL

An appeal

- by -

JCR Construction Ltd.
("JCR" or "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2002/589

DATE OF HEARING: February 28, 2003

DATE OF DECISION: March 11, 2003

DECISION

APPEARANCES:

James Rogers, for JCR Construction Ltd.

Shan O'Hara, for Ross Stuart and Scott Tyler

Gerry Omstead, for the Director of Employment Standards

OVERVIEW

This is an appeal by an employer, J.C.R. Construction Ltd. ("JCR" or "Employer"), from a Determination dated November 8, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("*Delegate*") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Employer seeks to appeal the findings that two employees were entitled to wages pursuant to the *Skills Development and Fair Wage Act, R.S.B.C. 1996, c. 427* ("*provincial legislation*"). The Employer had contracted with a federal entity to renovate a swimming pool situated on federal lands. The Employer hired carpenters during the course of construction. The Employer appears to have paid wages in accordance with the federal fair wage legislation but did not pay the rate set out in the *Skills Development and Fair Wage Regulation, B.C. Reg. 296/94 (the "Regulation")* made pursuant to provincial legislation. The Employer argues that the Delegate was without jurisdiction to investigate, to apply the provincial legislation, and it was "federal legislation" which should have governed the project. This issue is governed by the decided authorities, in particular, Quebec (Minimum Wage Commission) v. Construction Montcalm Inc., [1979] 1 S.C.R. 754. I therefore dismissed the appeal, the Employer having abandoned other grounds of appeal alleged in the Notice of Appeal and written submissions, at the hearing.

ISSUE:

Is a British Columbia company, under contract with a federal entity, engaged in the renovation of a swimming pool situate on "federal land", obliged to pay wages pursuant to the *Skills Development and Fair Wage Act, R.S.B.C. 1996, c. 427* and *Skills Development and Fair Wage Regulation, B.C. Reg. 296/94*?

FACTS

I decided this case after an oral hearing, after a consideration of the oral evidence, documentary evidence and submissions of the Employer, the Employees and the Delegate. The Employees in this case were represented at the hearing, for the purposes of this appeal, by the United Brotherhood of Carpenters and Joiners of America, Local 1598 (the "Carpenters Union").

JCR Construction Ltd. was the successful bidder to renovate a pool, situated on lands owned by the Department of National Defence, at CFB Esquimalt, British Columbia. The Employer had entered into a written contract, which included Fair Wages Schedules, with Defence Construction (1951) Limited. The Fair Wages Schedules attached to the contract were schedules pursuant to federal legislation. The

Employer is a company incorporated pursuant to the laws of British Columbia, and ordinarily carries on construction activities in British Columbia.

The Labour Conditions which formed part of JCR's contract with Defence Construction (1951) Canada Limited included the following terms:

> 02 All persons in the employee of the contractor, subcontractor, and any other person doing or contracting to do the whole or any part of the work contemplated by the contract, shall during the continuance of the work:
>
> i) be paid fair wages that is, such wages as are generally accepted as current for competent workers in the district in which the work is being performed for the character or class of work in which such workers are respectively engaged; and
>
> ii) in all cases, be paid no less than the minimum hourly rate of pay established by the Labour Department of Human Resources Development in the Fair Wage Schedules which form a part of this contract as Appendix A to these Labour Conditions; and

Schedule 3A annexed to the contract provided that:

> a) That during the term of this contract, the fair wage rates listed herein may be revised in accordance with the labour conditions; and
>
> b) That in carrying out any of the work contemplated by this contract, the contractor is also subject to any applicable provincial laws and regulations; and

Under the contract, the "fair wage rate" referred to straight wages, and did not include compensation in the form of benefits (for example, medical dental or pension plans). The fair wage under the federal legislation as of October 29, 1999 for carpenters in British Columbia was not less than $21.62 per hour. Under the provincial fair wage act, the minimum compensation for a carpenter is $25.62 per hour, consisting of $21.62 rate/hour, and $4.00 benefits per hour.

The Employer hired two carpenters, Ross Stuart and Scott Tyler. Both employees responded to an advertisement in a local newspaper, the Times Colonist, the text of which read as follows:

> Certified Carpenters. Fair
> Wage Project. $21.68 /hr.
> Exp. in concrete forming,
> framing & demolition
> Fax resume to: 380-7724

The work was performed by the employees during October to December of 2000. During the time period the employees worked, the employees received pay and wage statements. Both the employees were laid off for a shortage of work. Immediately after the layoff, both employees filed complaints with the Carpenters Union, who filed an anonymous complaint with the Branch. From the comments made by the principal of the Employer and the Carpenters Union, it appears that at the time of the complaint the Carpenters Union was not the certified bargaining agent for the employees of JCR Construction Ltd.. The Carpenters Union filed the complaint on an anonymous basis to protect the employees' interest in preventing "retaliation" or "blackballing" in the industry. From the wage statements, it appears that the employees were paid $21.68 per hour, and the wage statement shows $17.68 under a regular wage

column and $4.00 under an "other column". The Delegate found that the $4.00 represented a payment for the minimum benefit requirement under the provincial legislation. The Delegate found that the Employer did not pay the full hourly rate, and each employee was "short" $4.00 per hour. There were some additional overtime claims.

The Delegate found that Mr. Stuart was entitled to the sum of $1,519.78, consisting of wages of $1375.01 plus $144.77 in interest. The Delegate found that Mr. Tyler was entitled to overtime of $129.72, $1,284.00 in regular wages, plus $148.85 in interest for a total of $1,562.57.

In a letter dated January 4, 2001 Defence Construction Canada notified JCR Construction Ltd. that:

> Subsequent to the recent B.C. Provincial court ruling on the Fair Wage Schedule included as part of the Labour Conditions governing your contract, we hereby advise that the wage schedules are no longer in effect for this contract.

It appears that the Employer paid an hourly rate in excess of the Fair Wage Schedule which was attached to his contract with Defence Construction (1951) Limited. It is also apparent that the Employer did not comply with the provisions of the provincial legislation. The Delegate found however that the Employer contravened sections 17 and 40 of the Act, and ordered the Employer to cease contravening the *Act*, and ordered the Employer to comply with the *Act*.

Employer's Argument:

The Employer filed an appeal alleging that the Delegate erred in finding the facts and applying the law. The Employer confirmed that it took no issue with the hours worked or the calculations made by the Delegate, on the basis of the application of the provincial legislation. At the appeal hearing, however, the Employer stated that the sole issue for consideration was a jurisdictional issue, whether the provincial legislation applied to his contract with the federal government. The Employer's position was that the Delegate had no jurisdiction to investigate or apply the terms of provincial regulation to his federal contract. The Employer argued that he complied with the applicable federal legislation attached to his contract.

Employee's Argument:

The Union on behalf of the Employees argues that this Employer is ordinarily engaged in construction in the province of British Columbia. It argues that the workers were engaged for a provincial fair wage project, and that the employees should be paid in accordance with the provincial legislation.

Delegate's Argument:

The Delegate says that the applicable law is the *Skills Development and Fair Wage Act, R.S.B.C. 1996, c. 427* and *Skills Development and Fair Wage Regulation, B.C. Reg. 296/94*. The Delegate relies on the decision of the Supreme Court of Canada in Quebec (Minimum Wage Commission) v. Construction Montcalm Inc., [1979] 1 S.C.R. 754 (the "Quebec Minimum Wage Case").

ANALYSIS

In an appeal, pursuant to the *Act*, the burden rests with the appellant, in this case the Employer, to demonstrate an error in the Determination, such that I should vary or cancel the Determination.

While the Employer advanced a number of arguments in his written submission alleging errors made by the Delegate in the Determination, the Employer abandoned the grounds of appeal alleged in the notice of appeal, and sought to persuade me that the error made by the Delegate was a "jurisdictional" error. The Employer argued that the matter was covered by federal legislation, that the Delegate should not have embarked on the investigation of this "federal matter", the Delegate should not have issued a Determination, and that the Employer had complied with the federal legislation.

I note that this case was argued by JCR on the basis that it had a federal contract, and therefore federal legislation applied. The argument is premised on a misunderstanding of constitutional law, and particular the division of powers set out in sections 91 and 92 of the *Constitution Act, 1867, 30 & 31 Victoria, c. 3. (U.K.)* ("*Constitution Act*"). The real argument is that the federal government has the legislative power over matters of defence, by virtue of section 91(7) of the *Constitution Act*, which refers to militia, military and naval service and defence, and works situate within a province declared to be an advantage of Canada or for one or more provinces ("federal undertakings") set out in s. 92(10)(c),*Constitution Act*. In effect, the argument is that the power to legislate on employment matters is incidental to the federal legislative power in relation to defence and federal undertakings. The provincial legislature, however, has legislative power over property and civil rights within the province (s 92(13), *Constitution Act*). The right to legislate in respect of labour relations, including employment law, except with certain defined limitations, is a power which falls to the province under section 92(13) of the *Constitution Act*, as a matter of property and civil rights.

In my view, the Employer's argument turns on a point of law, which has been decided previously by the Supreme Court of Canada. At the hearing, the Delegate produced to me a decision of the Supreme Court of Canada, *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc., [1979] 1 S.C.R. 754.* This case involved a constitutional issue as to whether the minimum wage laws of the province of Quebec applied to the employees of a Quebec construction company, conducting a construction project at an airport, on lands owned by the federal government. In my view, this case disposes of the Employer's argument that it is the federal fair wage, and not the provincial fair wage legislation that applies to his contract:

> This issue must be resolved in light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: Toronto Electric Commissioners v. Snider [1925] S.C. 396. by way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: re the validity of the Industrial Relations and Disputes Investigation Act [[1955] S.C.R. 529.] (the Stevedoring case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only it if is demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one; in re the application of the Minimum Wage Act of Saskatchewan to an employee of

> a Revenue Post Office [[1948] S.C.R. 248.], (the Revenue Post Office case); Quebec Minimum Wage Commission v. Bell Telephone company v. Canadian Union of Postal Workers [[1975] ! S.C.R. 178.] (the Letter Carriers' case). The question of whether an undertaking, service or business is a federal one depends on the nature of its operation: Pigeon J. in Canada Labour Relations Board v. City of Yellowknife [[1977] 2 S.C.R. 729.] at p. 376. But, in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of a "going concern", (Martland J. in the Bell Telephone Minimum Wage case at p. 772), without regard for exceptional or casual factors, otherwise the Constitution could not be applied with any degree of regularity; Agence Maratime Inc. v. Canada Labour Relations Board [[1969] S.C.R. 851.] (the Agence Maratime case); the Letter Carriers' case.

I note that this matter was considered in an earlier decision of the Tribunal arising from the same project, and the Employer takes issue with the reasoning of the Adjudicator in JCR Construction Ltd., BCEST #D373/01:

First, there is, in my opinion, little support for JCR's jurisdictional argument. The fact that JCR was under contract with a federal entity, Defence Contracting Canada, to do renovation work on federal property, CFB Esquimalt, is not by itself sufficient to establish federal jurisdiction over the employment of workers involved in the work."

While I agree with the conclusions drawn by the Adjudicator, a more detailed explanation of the analysis which forms the basis for this conclusion, can be found by way of analogy, in the *Quebec Minimum Wage* case:

> The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the Johannesson case. This is why decisions of this type are not subject to municipal regulation or permission: the Johannesson case; City of Toronto v. Bell Telephone Co. [[1905] A.C. 52.]; the result in Ottawa v. Shore and Horowitz Construction Co. [(1960), 22 D.L.R. (2d) 247.] can also be justified on this ground. Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities, and therefore, upon its suitability for the purposes of aeronautics. **But the mode or manner of carrying out the same decisions in the act of constructing an airport stand on a different footing. Thus, the requirement that workers wear a protective helmet on all construction site including the construction site of a new airport has everything to do with construction and with provincial safety regulations and nothing to do with aeronautics**: see R. v. Beaver Foundations Ltd. [(1968), 69 D. L.R. (2d) 649.] and R. v. Concrete Column Clamps (1961) Ltd. [[1972] 1 O.R. 42.] See also Re united Association of Journeymen, etc. Local 496 and Vipond Automatic Sprinkler Co. Ltd. [(1976), 67 D. L.R. (3d) 381.], where Cavanagh J. of the Alberta Supreme court held that "the fact of construction of a building called an air terminal does not ... show that he construction is connected with aeronautics" and that, while an aerodrome is a federal work, employees construction such a building are subject to provincial labour relations legislation. In my opinion that wages shall be paid by an independent contractor like Montcalm to his employees engaged in the construction of runways is a matter so far removed from aerial navigation or from the operation of an airport that it cannot be said that the power to regulate this matter forms an integral part of primary federal competence over aeronautics or is related to the operation of a federal work, undertaking, service or business. (For the purpose of the main submission, it is unnecessary to express any view as to whether Parliament could, in a

> provision of an ancillary nature, incidentally touch upon the conditions of employment of workers engaged in the construction of airports. (my emphasis)

I note that the court specifically rejected the notion that the "momentary" nature of the construction project undertaken, is a significant factor to the analysis of whether "construction" is a matter of federal or provincial legislative jurisdiction.

I note that JCR is a BC company, that works in British Columbia. All its employment or labour contracts on construction projects generally would be subject to provincial law. At the applicable time, construction projects involving government money involved the provincial legislation. The ordinary business of JCR, to use the language of the Quebec Minimum Wage Case, is the business of building. There is nothing peculiarly "federal" about the business of building:

> In submitting that it should have been treated as a federal undertaking for the purpose of its labour relations while it was doing construction work on the runways of Mirabel, Montcalm postulates that the decisive factor to be taken into consideration is the one work which it happened to be constructing at the relevant time rather than the nature of its business as a going concern. What is implied, in other words, is that the nature of a construction undertaking varies with the character of each construction project or construction site or that there are as many construction undertakings as there are construction projects or construction sites. The consequences of such a proposition are far reaching and, in my view, untenable: constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project. This would produce great confusion. For instance, a worker whose job it is to pour cement would from day to day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the Constitution was meant to apply in such a disintegrating fashion.
>
> To accept Montcalm's submission would be to disregard the elements of continuity which are to be found in construction undertakings and to focus on causal or temporary factors, contrary to the Agence Maritime and Letter Carriers' decisions, building contractors and their employees frequently work successively or simultaneously on several projects which have little or nothing in common. They may be doing construction work on a runway, on a highway, on sidewalks, on a yard, for the public sector, federal or provincial, or for the private sector. One does not say of them that they are in the business of building runways because for a while they happen to be building a runway and that they enter in to the business of building highways because they thereafter begin to do construction work on a section of a provincial turnpike. Their ordinary business is the business of building. What they build is accidental. And there is nothing specifically federal about their ordinary business.

In my view, the reasoning in the Quebec Minimum Wage Case, disposes completely of the jurisdictional objection of the Employer to the application of the provincial legislation for construction work performed pursuant to a contract with the federal crown on federal lands within British Columbia. The business of "building", is a matter of provincial jurisdiction falling under the "property and civil rights" aspect of the Constitution. The law related to employment contracts for this "building project" is the provincial law. The Quebec Minimum Wage Case cannot be distinguished as "a case having application only to construction in Quebec because they do things differently there", as suggested by the Employer.

For all the above reasons, I conclude that the *Skills Development and Fair Wage Act, R.S.B.C. 1996, c. 427*, together with wage schedules set out in the *Fair Wage Regulation, B.C. Reg. 296/94.* , applies to the employment of these employees. I find that the Delegate did not err in embarking on the investigation,

and issuing a Determination. I note that the grounds advanced by the Employer in the written appeal are insufficient to result in a cancellation of the Determination, and it is unnecessary for me to provide written reasons, given the position taken by the Employer in this appeal. Given that the Employer abandoned all issues raised in the Notice of Appeal, and written submissions, I therefore dismiss this appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated November 8, 2002 is confirmed, together with interest in accordance with section 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal