BC EST D#107/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Jase L. Eaton

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NO.: 96/776

DATE OF DECISION: March 7, 1997

BC EST D#107/97

DECISION

OVERVIEW

This is an appeal by Mr. Jase L. Eaton pursuant to Section 112 of the *Employment Standards Act* ("the *Act"*) of Determination No. CDET 004863, dated November 29, 1996, by Pat Cook as a delegate of the Director of Employment Standards. The appeal was decided without an oral hearing, based on written submissions.

The Determination found that Mr. Eaton's former employer, Unique Fender Mender Ltd., had not violated the *Act* in its payment of wages to Mr. Eaton during the period of his employment.

ISSUE TO BE DECIDED

Is Mr. Eaton's owed wages under an apprenticeship agreement with Unique Fender Mender Ltd ?

FACTS

Mr. Eaton and Mr. Ron Morris, owner of Unique Fender Mender Ltd., signed an apprenticeship agreement on March 10, 1993, effective February 21, 1993, to apprentice Mr. Eaton as an Automotive Collision Repair Technician. The agreement was to expire on February 20, 1997. The agreement was a standard form issued by the Ministry of Advanced Education, Training & Technology. It included a table with a wage scale as a "Percentage of Employer's Journeyperson Wage", commencing at 50 per cent for the first six months of a four-year term and increasing by five per cent increments to 90 per cent of the journeyperson's rate for the last six month period. The agreement stated that where there is no collective agreement in place, the journeyperson wage shall be the greater of the provincial minimum wage or the percentage in the table of the employer's journeyperson's wage according to the apprentice's experience.

On February 24, 1993, Unique Fender Mender Ltd. applied to register Mr. Eaton as an apprentice with the Ministry of Advanced Education, Training & Technology. The application contained an hourly rate of $10.00 for the apprentice wage. The "journeyman" rate was listed as $20.00. The application stated that there were three journeymen in the trade and a total of five employees in the company. Between February and July 1993, the employer received an employment/training subsidy from Employment and Immigration Canada of $4.00 per hour for a total of 680 hours for Mr. Eaton's apprenticeship.

The Director's Delegate found that the $20 hourly wage rate in the application for registration of an apprentice was arbitrary. The apprenticeship counselor entered the $20.00 figure as the journeyman wage on the basis that it was twice the $10.00 starting rate already determined for Mr. Eaton, and the normal formula for apprenticeship agreements is

that the wage paid increases by 100 per cent during the term of the agreement. The Apprenticeship Branch of the Ministry of Skills, Training and Labour informed the Delegate that the prevailing rate for an autobody repair person in 1993 was approximately $12.00, rising to $14.00 in 1994 and $16.00 in 1995. The 1996 rate for an experienced journeyperson was between $19.00 and $20.00, and slightly lower in smaller shops, which presumably would include Unique Fender Mender. In support of his complaint, Mr. Eaton found similar rates in the Port Coquitlam area late in 1996. In her Determination, the Delegate found that there were two journeypersons employed by Unique Fender Mender Ltd., Mr. Morris and an individual with ten years' experience. Mr. Morris, as the owner/journeyperson, was paying himself $6.875 per hour, and the other journeyperson was earning $17.50 per hour, which increased to $18.50 per hour shortly after the apprenticeship began. There were no wage increases after February 1993.

During the entire term of his employment, Mr. Eaton received $10.00 from Unique Fender Mender Ltd. His complaint was that he did not receive any increases according to the schedule in the apprenticeship agreement. According to Mr. Eaton, he asked Mr. Morris about receiving a wage increase while he was employed, but no action resulted. Mr. Morris stated that he started Mr. Eaton at a higher wage rate than normal because of the federal subsidy and Mr. Eaton's performance did not warrant any further increase. According to Mr. Eaton, he attempted to contact his apprenticeship counselor without success. In August 1995, he spoke with another counselor at the Ministry of Skills, Training and Labour who wrote out a wage scale based on the apprentice agreem ent with the dates when increases might take affect. The counselor gave a copy of the document to Mr. Eaton with the notation that he might have to contact the Employment Standards Branch in connection with his rate of pay. Mr. Eaton spoke with several other counselors with the Apprenticeship Branch of the Ministry of Skills, Training and Labour during the course of his employment and his complaint who informed him that the apprenticeship agreement was a contract and that the employer is bound by the rate in the application to register an apprentice.

Mr. Morris's position is that Mr. Eaton's pay did not increase because he did not perform as well as expected. His motivation varied, and his attendance in the second half of 1994 was poor. In February 1995, Mr. Eaton met with Mr. Morris and a counselor, when it was decided that his rate of pay would not be increased until his performance improved. In her Determination, the Delegate found that Mr. Eaton attended school three times during the course of his employment. In the first session, in October 1993, his mark was slightly below the class average. He was one per cent above the failure level in his second session. In the final session, he failed his final exam, although he passed the course. In addition, he was absent two days for each session, when three days' absence would have caused a failure.

Mr. Eaton pointed out that he passed all of his classes, and that he attended the third session one year earlier than the normal schedule. Mr. Eaton stated that he had difficulty in contacting his counselor and never was able to resolve the timing of his third class session. Mr. Eaton denied that he ever agreed to a freeze on his wages in February 1995. When his wage rate did not increase, and his counselor did not return his telephone calls, Mr. Eaton sought and found another apprenticeship in March 1996.

ANALYSIS

The basis of Mr. Eaton's appeal is the "journeyman's rate" in the application for registration of an apprentice completed by Unique Fender Mender Ltd. However, Mr. Eaton's contract of employment with Unique Fender Mender Ltd. was the apprenticeship agreement, which refers to the "employer's journeyperson" rate. While it is difficult to determine a rate in such a small establishment with an owner performing work himself, it is clear that the "employer's journeyperson rate" was substantially less than $20.00. This conclusion supports the Delegate's finding that the $20.00 rate in the registration form was arbitrary. In fact, the average of the wage Mr. Morris was receiving and the rate of the other (experienced) journeyperson was $12.687, very close to the average rate for 1993 the Apprenticeship Branch supplied to the Delegate. Therefore, the rate of pay Mr. Eaton received at the commencement of his apprenticeship was substantially higher than 50 per cent of the employer's journeyperson rate. Moreover, when he resigned his employment, Mr. Eaton was receiving slightly more than the 80 per cent of the employer's journeyperson rate that the employer was obligated to pay under the apprenticeship agreement. Community averages are clearly not binding under an apprenticeship, but they are useful in determining whether or not the employer's stated rate is unreasonable, which it was not in this case. Therefore, I conclude that Unique Fender Mender Ltd. did not violate the apprenticeship agreement with Mr. Eaton.

There were conflicting statements about Mr. Eaton's work and school history. The record contains no specifics on the meeting of Mr. Eaton, Mr. Morris and an unnamed counselor that agreed to hold Mr. Eaton's wages at $10.00. In light of my conclusion about his rate of pay, it is not necessary to decide on the quality of his work or his performance in school.

ORDER

After reviewing the evidence and argument, I find that Determination CDET No. 004863 should be confirmed.

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Mark Thompson
Adjudicator
Employment Standards Tribunal

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