

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Pro-Can Construction Group Corporation

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 99/17

DATE OF DECISION: March 29, 1999

DECISION

OVERVIEW

This is an appeal by Pro-Can Construction Group ("Pro-Can") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination dated December 22, 1998 by a Delegate of the Director of Employment Standards (the "Delegate") operating under the auspices of the Skills Development & Fair Wage Compliance Team.

The Delegate found that Pro-Can failed to pay "fair wages" as required by the *Skills Development and Fair Wage Act* (the "*SDFWA*") to an apprentice employee by not paying the minimum "benefits" required by the regulation to the *SDFWA* ("*the Regulation*"). The apprentice employee had been employed by Pro-Can for other projects but this determination related to the one public funded project in which Pro-Can and the employee were involved. The Delegate found Pro-Can liable to pay the employee \$3,345.15.

The Delegate also imposed a zero penalty against Pro-Can without identifying whether this was for failing to keep the required bookkeeping entries or for failing to pay a fair wage. No reasons are set out for the penalty.

Pro-Can has appealed on the basis that the apprentice employee was paid a total wage in excess of the minimum fair wage required by the *SDFWA*. Pro-Can says that although the failure to distinguish between the wage and benefit portion may be a failure to comply with the *Regulation* it does not mean that the employee was actually underpaid.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether there was any error in law by the Delegate in the application of the *SDFWA* and *Regulation* in finding that the employer had failed to pay a fair wage as required by the *SDFWA*.

FACTS

The facts are not substantially in dispute. Pro-Can worked on a publicly funded project covered by the *SDFWA*. Pro-Can employed on this project an employee Jorge Sorto ("Sorto") as an apprentice carpenter. Pro-Can paid Sorto \$16.00 per hour. The only benefits he was paid were for statutory and holiday pay. Pro-Can did not identify any portion of the \$16.00 per hour as being in lieu of benefits.

Pro-Can admits that Sorto is owed \$248.00 in unpaid wages but disputes the \$3,345.49 as determined by the Delegate.

ANALYSIS

The relevant provisions of the *SDFWA* and *Regulation* are as follows:

"fair wages" means wages and benefits determined in accordance with the *Regulations*;

Purposes of the Act

2. *The following are the purposes of this Act:*

- (a) *to ensure skill development training in the construction industry;*
- (b) *to ensure high quality work standards on publicly funded construction projects by requiring that employees hold the appropriate qualifications;*
- (c) *to ensure employees receive fair wages for work performed on publicly funded construction projects.*

Requirement to pay fair wages

5. *All employees of a contractor, subcontractor or any person doing or contracting to do the whole or any part of the construction to which this Act applies must be paid fair wages in accordance with the Regulation.*

The *Regulation* provides scales of pay and benefits for various categories of employees and that apprentices must be paid the appropriate percentage of the minimum rate plus the minimum benefit amount as set out in the *Regulation*. In this case, by regulation, Sorto was entitled to a minimum wage of \$10.81 per hour and minimum benefits of \$4.00 for a total of \$14.81 per hour. He was actually paid \$16.00 plus holiday and Stat. pay of \$1.75 per hour for a total of \$17.75 per hour.

The *Regulation* further provides as follows:

Fair Wages

3. (2) *If the employer is providing benefits less than the amount required by the appropriate Schedule, the difference between the value of benefits provided and the amount required by that Schedule must be*

- (a) *paid as part of the hourly rate, and*
- (b) *clearly set out in the employee's pay statement and the employer's records as a benefit top-up.*

There is no dispute in this case that Pro-Can did not comply with regulation 3(2)(b). If Pro-Can was paying less than \$4.00 per hour as "benefits" then the wage should have been broken down to show that the difference between the \$1.75 and \$4.00 (\$2.25) per hour was considered a benefit top-up and properly recorded in the records.

It is apparent that Section 3 of the regulation does recognise, however, that there may be cases where an employer is paying less than the \$4.00 amount as "benefits" as required by the Schedule. The *Regulation* does not forbid such a practice provided that the \$4.00 is paid as part of the hourly rate. This, of course, includes the proviso that the balance of the hourly rate may not fall below the minimum level.

In this case, if Pro-Can had complied with *Regulation* 3(2), \$2.25 of the hourly rate should have been shown as a benefit top-up, leaving the balance of the hourly rate to be \$13.75 per hour. The minimum hourly rate required for an apprentice carpenter in Sorto's position is \$10.81 per hour. Sorto was, in fact, paid \$2.94 per hour more than the minimum standard set-out in the *SDFWA*.

By definition "fair wages" is the combined amount of wages and benefits. The *SDFWA* does not purport to regulate all wages in public sector construction projects but to ensure that all employees working on such public sector projects receive a "fair wage" determined in accordance with the *Regulation*.

The *Regulation* provides in section 3 (1) for a minimum fair wage as set out in the appropriate Schedule. The "fair wage", being the minimum combined wage and benefits, for Sorto was \$14.81 per hour. He was paid combined wages and benefits totalling \$17.75.

Section 5 of the *SDFWA* only requires that all employees are to be paid fair wages in accordance with the *Regulation* which only requires that employers pay the minimum amounts as prescribed in the Schedules.

In this case the effect of the Delegate's determination is to require the employer to pay the employee \$20.00 per hour as opposed to the \$14.81 minimum fair wage as required by the legislation. In my opinion this is not the intent or purpose of the *SDFWA* and would, in effect, be counterproductive of the other stated purposes of the act.

I conclude that the Determination herein concerning wages should be varied. However, there is an admission the \$248.00 (plus interest) is owing and therefore the Determination will be varied to reflect this amount owing.

THE PENALTY DETERMINATION

I turn now to the penalty determination. Although the penalty assessed is zero it is still significant as it is a first step in an increasing schedule of penalties.

The penalty determination in this case is appended to the Determination discussed above. In the substantive Determination it is clear that the Delegate perceived two problems. Firstly that the employer was not paying a fair wage and secondly that the employer did not keep the proper record under regulation 3 (2)(b). The penalty determination does not identify which of these concerns is being penalised and gives no reasons for the imposition of the penalty.

Section 81(1)(a) of the *Employment Standards Act* requires the Director to give reasons for the determination and this Tribunal has held that a penalty determination must indicate clearly on its face the reasons for the penalty.

" A penalty determination, being in the nature of a quasi-criminal proceeding, ought to indicate clearly on its face the precise reason the determination was being issued so that a party who receives the penalty determination can have no doubt about the nature of the allegation made against them."

Re: Westminster Chevrolet Geo Oldsmobile Ltd. [1997] BCEST #D210/97 see also

Re: Chamberlain (c.o.b. Super save Gas) [1997] BCEST #D374/97

In this case the penalty determination does not set out any reasons for the penalty on its face. The reasons for the penalty might have been clear to anyone reading the whole of the document except that, here, there are two different possible grounds for the imposition of a penalty. In such case it is impossible for the recipient to know for what infraction he is being penalised and the penalty determination must be cancelled.

ORDER

I order, under Section 115 of the *Act*, that the Determination is varied to alter the amount owed by Pro-Can to \$248.00 plus interest.

I further order that the Penalty Determination is also cancelled.

John M. Orr
Adjudicator
Employment Stanadrds Tribunal