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 -

International Brotherhood of Electrical
Workers, Local 230
("Local 230")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATORS: David Stevenson
Geoff Crampton
Richard Longpre

FILE NO.: 97/876

DATE OF DECISION: April 28, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by the International Brotherhood of Electrical Workers, Local 230 (Local 230), on behalf of certain individuals employed by Loewen Communications Inc. ("Loewen"), from a Determination of a delegate of the Director of Employment Standards (the "Director") dated November 10, 1997. The Determination considered a complaint that Loewen had employed the individuals on construction to which the *Skills Development and Fair Wage Act* (the "*SDFWA*") and the *Skills Development and Fair Wage Regulation* (the "*SDFWR*") applied and had failed to pay to those individuals the minimum compensation required to be paid under to column 4, Schedule 3 of the *SDFWR*. The position of Local 230 was that the individuals were electricians and should have been paid the electrician's rate of $23.74 an hour and the minimum benefits of $4.00 an hour.

The Director concluded Loewen had contravened the *SDFWA* and *SDFWR* and ordered payment of varying amounts to three of the individuals. The Director determined three of the individuals were not performing work normally performed by an electrician and, based on that conclusion, determined the hourly rate of the individuals according to subsection 3(6) of the *SDFWR*, which states:

> *3. (6) If a trade classification is not listed in the appropriate Schedule, compensation must be equal to or greater than the rates and benefits outlined in that Schedule for the labourer-helper classification or equivalent.*

The Determination contains that conclusion in the following terms:

> The company was contracted to do part of the construction work on the project. There [sic] work was related to the installation of cables throughout the school. A check with the Apprenticeship Branch indicated the work performed by the employees would not have been considered work normally done by an electrician.

Local 230 has appealed, taking issue with the conclusion that the work does not come within the trade classification of electrician.

The Director also concluded the complaint relating to one of the individuals, Bob Arndt, could not be addressed as there was no basis upon which to conclude he was, or was not, an employee of Loewen. That part of the Determination states:

> With respect to the issue raised concerning Bob Arndt, it would appear from a pay stub provided by the I.B.E.W. that he worked 16 hours and for the company and was paid at the rate of $23.90 per hour. Mr. Arndt has not filed a complaint with the Branch. The company has not provided any documentation with respect to Mr. Arndt. I cannot assume that Mr. Arndt was an employee and subsequently I have not found either for or against the company on this matter.

While Local 230 has continued to assert Mr. Arndt is an employee, no additional information concerning his status under the *Act* has been submitted. Also, the decision of the Director not to pursue the complaint as it related to Mr. Arndt has not been appealed by Local 230.

The work at issue in this appeal was performed, the complaint filed and the Determination made before the *Industry Training and Apprenticeship Act*, S.B.C. 1997, c. 50 was brought into force. This appeal must be decided without reference to that *Act* or the consequential amendments on the *SDFWA* caused by the proclamation of that *Act*.

ISSUE TO BE DECIDED

The issue is whether the Director was correct in concluding the individuals on whose behalf an Order was made were not, for the purposes of the *SDFWA*, performing work in the trade classification of electrician in Schedule 3 of the *SDFWR*.

FACTS

Loewen was sub-contracted by Brewis Electric Company Ltd. to work at the Ladysmith Secondary School construction project. The project was one to which the *SDFWA* applied. The work involved installing cable, wiring and equipment related to a public announcement and communication system for the school.

Of the three individuals to whom the Order applied, one, Jay Searson, was a journeyman electrician, another, Wendi Shanks, was an apprentice electrician and the other, Mark O'Brien, had no trade designation known to Local 230. One or more of the individuals acquired employment by responding to an advertisement placed by Loewen through Human Resources Development Canada for "Electrician, Communications-Equipment Apprentice".

In 1995, the Apprenticeship Board (as it then was), acting pursuant to its authority under the *Apprenticeship Act* (as it then was), designated the trade of "Electronic Communication Technician", which it identified as a trade involving "the installation, maintenance and repair of data and communication systems, equipment and cabling". The Board also established an industry training program for the trade as contemplated

under the *Apprenticeship Act* for trades that are "designated", but no "Certificate of Qualification" for this trade has ever been issued by the Board (now the Industry Training and Apprenticeship Commission (the "ITAC")).

Also in 1995, the Apprenticeship Board listed the trade of electrician as one requiring compulsory certification and compulsory apprenticeship for those employed in that trade. In the designation, "Electrician" was described as including a person who:

> (I) lays out, assembles, installs, repairs, maintains, connects, programs or tests electrical fixtures, apparatus, control equipment and wiring for systems of alarm, communication, light, heat or power in buildings or other facilities,
>
> . . .
>
> (v) installs in or draws electrical conductors through conductor enclosures, raceways or wireways,
>
> . . .

ANALYSIS

As in most appeals under the *Act*, Local 230, as the appellant, carries the burden of persuasion. Local 230 must persuade us that the delegate was wrong when he concluded that the work performed by the employees was not work normally done by an electrician. In this appeal, that means Local 230 must show that the delegate erred in finding that the work performed by the affected individuals fell outside the trade classification of electrician for the purposes of the *SDFWA*. If they cannot persuade us to that conclusion, or if we conclude the work performed is properly characterized as falling outside the accepted parameters of the trade classification of electrician in the *SDFWA*, the appeal will not succeed.

In its appeal, Local 230 argues that the work being performed by Loewen on the project was clearly "electrical work", as that term is defined in the *Electrical Safety Act* and described in the Apprenticeship Board's compulsory certification documents. It further argues that provisions of the *Electrical Safety Act* require persons performing "electrical work" to be either a "registered Alarm and Communication exempt ticket holder" or a qualified electrician. It says that because none of the individuals were "registered Alarm and Communication exempt ticket holders", by default, the work could only be performed by a qualified electrician and, if performed by a qualified electrician, should have been paid at the electrician rate shown in column 2, Schedule 3 of the *SDFWR*. It is worth noting that the definition of "electrical work" in the *Electrical Safety Act* is sufficiently broad that it could include the work performed by the individuals on the project. There was, however, disagreement about whether the definitions or requirements of that Act had any relevance to the issue raised in this appeal.

The Director did not directly file a response to the appeal, but has deferred to the ITAC to respond to the issued raised. On January 30, 1998, Mr. Mark Tatchell, Regional Manager, Coastal Region for the Branch, invited the ITAC to file a submission on the appeal. In the correspondence he noted, in part:

> Under s. 4 of the *SDFWA*, employees performing work on the project covered by the *SDFWA* must be:
>
> a) registered under the *Apprenticeship Act* (now the *Industry Training and Apprenticeship Act*);
> b) hold on [sic] B.C. certificate of apprenticeship;
> c) hold on [sic] B.C. certificate of qualifications, and
> d) hold a certificate within [sic] interprovincial Red Seal, recognized by the director of apprenticeship, except for a trade designated under s. 22(1) of the *Apprenticeship Act*.
>
> The trades listed in schedule 3 of the *SDFWR* are based on the trade descriptions found in the regulations of the *Industry Training and Apprenticeship Act*. As the Industry Training and Apprenticeship Commission ("ITAC") has the authority for interpreting the trade descriptions it is appropriate for ITAC to made [sic] a submission to the Tribunal on this appeal.

We have a concern about the process that resulted in the submission from the ITAC. In our opinion, the ITAC should not have made any submission directly to the Tribunal without first acquiring standing in the proceeding, either as an intervenor or as an interested party. In the absence of any standing to submit directly on the issues raised on the appeal, the proper course would have been for the Director to have appended the position of the ITAC to a submission from the Branch. However, Local 230 has not objected either to the procedure by which the Tribunal has received the submission of the ITAC or the direct participation of the ITAC in the appeal and, for the purposes of this appeal, we shall view their submission as an "appendix" to the position of the Director, not a submission on their own behalf.

The submission of the ITAC, over the signature of Mr. Ian Hodgetts, Supervisor, Certification and Standards, supports the Determination. Before considering the main point raised by the submission, there is one matter we shall address. The following comment appears in the submission under the heading "Background":

> In making this determination, Mr. Ormstead [sic] relied upon Part 2 Section 4 of the *Skills Development and Fair Wage Act* and the interpretation that the work of a *Communications Electrician* was excluded from the requirement to hold certification by Section 4.2(2) of the *Act*.

There is nothing in the Determination referring to Section 4 of the *SDFWA* and, more specifically, there is nothing indicating the delegate relied on any part of that section in reaching the conclusion that the work performed by the individuals was not work normally done by an electrician. The relevance, in any event, of whether subsection 4(1) applied to the work in question to whether the work fell into the trade classification of electrician in Schedule 3 of the *SDFWR* is not clear and has never been fully explained in any submission filed by or on behalf of the Director. Accordingly, we have not included that point in our consideration of the issue.

The main point of the submission of the ITAC is found in the following passage:

> In July, 1995, the Provincial Apprenticeship Board agreed to the introduction and development of a separate trade to be known as *Electronic Communications Technician*. . . . This request for separate designation was supported and moved by the I.B.E.W. Local 213. Graduates of this program who are indentured to I.B.E.W. Local 213, receive a *Certificate of Apprenticeship* from the Industry Training and Apprenticeship Commission *and a Certificate of Apprenticeship* from the I.B.E.W. International in the trade of *"Sound and Communications Technician"*.
>
> All of the foregoing illustrates quite clearly that the trade work within the communications field is quite separate from any other trade and that is known and accepted as such in the industry.
>
> Since this trade does not presently carry a *Certificate of Qualification*, issued by this office, it does not require certification under the *Skills Development and Fair Wage Act.*
>
> I have not addressed any requirement for certification or supervision under the provisions of the *Electrical Safety Act* since they have no effect upon the determination made under the provisions of the *Skills Development and Fair Wage Act*.

Local 230 responded to the submission of the ITAC, reiterating the principle elements of its argument:

> . . . Mr. Hodgetts refused to comment on any requirement for Certification or supervision under the provisions of the *Electrical Safety Act* which is the basis of our appeal. The *Electrical Safety Act* stipulates to work in the [sic] this sector you must be an exempt ticket holder (Electronic Technician) or a qualified electrician. Bob Arndt, Jay Searson and Wendi Shanks are not Electronic Technicians and therefore by default they must be paid at the electrician's rate as per Schedule 3 of the *Skills Development and Fair Wage Act.*

We disagree with the position of Local 230. Any question about the hourly rate to be paid for work included in the *SDFWA* must be decided on an assessment of the work performed and whether that work falls logically into one of the trade classifications in Schedule 3 of the *SDFWR*. We agree with the position of the ITAC that the requirements of the *Electrical Safety Act* cannot be allowed to affect that decision. The point here is that Local 230, even assuming the work must be performed by a qualified electrician to meet the requirements of the *Electrical Safety Act*, has not indicated why the work must be considered as being within the trade classification of electrician for the purposes of the *SDFWA*. The principle rationale for their position appears to be that if a qualified electrician is performing the work, that person must be paid the hourly rate of electrician, regardless of the work being performed. In our opinion that would be akin to the tail wagging the dog. As we said above, the proper focus for determining the appropriate hourly wage under Schedule 3 of the *SDFWR* is the work being performed, not the trade qualifications of the individual performing the work.

Turning to the work in question, we note neither the *SDFWA* nor the *SDFWR* define "trade" or "trade classification". Section 2 of the *SDFWA* sets out its purposes:

> *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.*

It is consistent with those purposes, and is demonstrated by several of the substantive provisions in Part 2 of the *SDFWA*, that the practices and policies of the ITAC, which is mandated by its empowering legislation to develop the very sort of trade classification system upon which column 2, Schedule 3 of the *SDFWR* is based (see paragraph 4(1)(g) of the *Industry Training and Apprenticeship Act*), will be important in helping to define the scope of the trade classifications listed in the *SDFWR*. The ITAC stated in its submission:

> . . . the trade work within the communications field is quite separate from any other trade and that is known and accepted as such in the industry.

Local 230, in response to the submission in which that comment is found, stated:

> The I.B.E.W. Local 230 fully understands and recognizes the exclusion of Electronic Technicians from the *Skills Development and Fair Wage Act*.

Based on the above considerations and on the material on file, including a description by Mr. Arndt of his duties, we conclude that the work being performed is properly characterized as being in the communications field. It is also apparent that work in the communications field is accepted in the industry as being separate from work falling in the trade classification of electrician. The result is that for the purposes of the *SDFWA*, the work performed by the individuals is not work in the trade classification of electrician. Local 230 has not shown the delegate was wrong and the appeal is dismissed.

One final word. The Tribunal has no jurisdiction to add trade classifications to Schedule 3 of the *SDFWR*. That is a legislative function. In the absence of any other trade classification in Schedule 3 for the work, there was no error by the Director in attributing the hourly rate prescribed by subsection 3(6) of *SDFWR* to the work. It is unfortunate that the Director stated in one submission that the delegate had concluded the individuals were "labourers". That is not an accurate statement of the effect of subsection 3(6) of the *SDFWR*. The subsection is not intended to identify the work that is being performed. It is, in essence, a "default" provision that designates the appropriate hourly rate under the *SDFWA* for work that does not otherwise fall into one of the designated trade clasifications. It does not denigrate from the skills and abilities of the individuals that the legislature chose to use the labourer trade classification as the benchmark for the default hourly wage rate.

ORDER

Pursuant to Section 115 of the *Act*, we order the Determination be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal

Geoffrey Crampton
Chair
Employment Standards Tribunal

Richard Longpre
Adjudicator
Employment Standards Tribunal