

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 -

D. E. Installations Ltd.
("D.E.I.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATORS: Norma Edelman
Casey McCabe
Mark Thompson

FILE NOS.: 97/252 & 97/512

DATE OF HEARING: March 30, 1998

DATE OF DECISION: April 21, 1998

DECISION

APPEARANCES

Robert Docherty on behalf of D.E. Installations Ltd.

Catherine Hunt counsel for the Director of Employment Standards

OVERVIEW

Pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) D.E. Installations Ltd. (D.E. I.) appealed Determinations which were issued by the Director of Employment Standards (the “Director”) on March 24, 1997 and June 20, 1997. The March 24, 1997 Determination imposed a penalty of \$500.00 for D.E.I.’s failure to provide records to the Director as required under Section 46 of the *Employment Standards Regulation* (the “*Regulation*”). The June 20, 1997 Determination found that D.E.I. had contravened the *Act* and the *Skills Development and Fair Wage Act* (the “*Fair Wage Act*”) and the *Skills Development and Fair Wage Regulation* (the “*Fair Wage Regulation*”) and was liable for the sum of \$96,207.26 representing unpaid wages and interest owed to 22 employees.

In written reasons issued on January 14, 1998 (BCEST #D397/97) this Panel cancelled the March 24, 1997 Determination and made the following order regarding the June 20, 1997 Determination:

We further order that the Determination issued on June 20, 1997 be confirmed in all respects with the following two exceptions: a) it is varied with respect to Rebrov to reflect his status as an apprentice from January 1996 to July 1996, and b) no decision has been made on the issue of the calculation of total liability. Regarding the calculation issue, D.E.I. is hereby put on notice that unless it advises the Tribunal in writing on or before February 13, 1998 that it wishes the hearing of its appeal on this issue to go forward, this aspect of the appeal will be dismissed as abandoned.

On February 13, 1998 D.E.I. advised the Tribunal that it wished the issue of calculations to proceed to a hearing.

A Notice of Hearing was forwarded to the parties on February 23, 1998. The Notice indicated the hearing was scheduled for March 30, 1998 and it included the following instructions:

SPECIAL INSTRUCTIONS:

The Director of Employment Standards is requested to provide the Tribunal and the other parties with a copy of its amended calculations no later than March 16, 1998.

D.E. Installations Ltd. is requested to provide the Tribunal and the other parties with detailed reasons for disagreement with the amended calculations provided by the Director of Employment Standards no later than March 16, 1998.

On February 23, 1998 the Tribunal received amended calculations from the Director. The Tribunal did not receive a reply from D.E.I. within the above-noted time limit.

On March 17, 1997 the Director wrote to the Tribunal requesting that it dismiss D.E.I.'s appeal on the basis that it "has not participated in the appeal process and has not supplied sufficient reasons for appeal on the issue of the calculations."

In a reply dated March 19, 1998 D.E.I. stated that the Director's request should be denied on the following basis: D.E.I. had already provided detailed reasons for disagreement as per attachment 3 of its appeal submission; the format and methodology of the Director's calculations had not changed since the initial hearing date and they were still incorrect; and D.E.I.'s letter of February 13, 1998 conformed with the "special instructions" in the Notice of Hearing.

In a letter dated March 23, 1998 the Tribunal advised D.E.I. that the February 13, 1998 letter did not conform with the "special instructions" as it simply stated that D.E.I. disagreed with the Director's calculations and no particulars were provided. Further, although D.E.I. had made earlier submissions on the issue of calculations, it did not make a submission with respect to the Director's amended calculations of February 23, 1998. The Tribunal ordered that unless D.E.I. provided detailed reasons for disagreement with the Director's amended calculations by March 25, 1998 the Tribunal would dismiss the appeal as abandoned.

On March 25, 1998 D.E.I. forwarded a submission to the Tribunal outlining its position on the Director's amended calculations.

Accordingly, at a hearing at the Tribunal's Vancouver offices on March 30, 1998 this Panel heard further submissions from D.E.I. and the Director on the issue of calculations. The Director and D.E.I. were also afforded the opportunity to make post-hearing submissions on the issue of "pay not accounted for". D.E.I. and the Director made submissions on March 31, 1998 and April 1, 1998 respectively. D.E.I. replied to the Director's submission on April 8, 1998.

ISSUE TO BE DECIDED

What wages are owed to the 22 employees named in the June 20, 1997 Determination?

FACTS AND ARGUMENTS

The Director's amended calculations of February 23, 1998 show that as of January 26, 1998 the 22 employees named in the June 20, 1997 Determination are owed \$87,425.04 including interest.

D.E.I. does not dispute that it owes wages to certain of the 22 employees. What it does dispute is the amount. In its submission of March 25, 1998 D.E.I. indicates that it owes a total of \$59,836.25 including interest. This total was subsequently adjusted at the hearing as D.E.I. indicated that some of its figures were in error and it also conceded to certain figures of the Director. In the end, the difference between the Director's and D.E.I.'s totals is approximately \$26,000.00.

According to the Director, D.E.I.'s calculations are incorrect for the following reasons.

First, D.E.I.'s calculations for total wages earned are based on straight time wages only and do not account for overtime which was earned and paid by D.E.I.

Second, D.E.I.'s calculations for total wages earned are based on the hours listed on the pay statements and these hours do not necessarily reflect the actual hours worked by the employees. In some instances the wages paid in a pay period are in excess of the hours and wages shown on the pay statements that were made available to the Director. Given the incomplete records, the Director argues that the calculations must be based on amounts paid and not amounts earned.

Third, D.E.I.'s calculations are based on the rates set out in the *Fair Wage Regulation* adjusted for apprentices and these rates are in some instances lower than what D.E.I. actually paid to the employees. The Director argues that the *Fair Wage Regulation* sets out minimum wage and benefit rates (Section 3) and if an employer pays wages and benefits in excess of the minimums it cannot retroactively reduce these rates.

Fourth, D.E.I. has incorrectly calculated benefits in those cases where it has offset paid benefits, which were in excess of the \$4.00 minimum, against the wage rates paid. This is contrary to the *Fair Wage Regulation* (Section 3, subsection 3).

Fifth, D.E.I.'s claim that there is "pay not accounted for" by the Director is not supportable. Most of the amounts involved have either already been included in the Director's February 23, 1998 calculations or they are for hours worked outside the calculation period. The remaining amounts concern a payout which was not counted as paid or as earned; certain cheques which appear to be for expenses, or if they are for

wages, it cannot be established what they are specifically for; an error which is in D.E.I.'s favour; and a payout where D.E.I. has not provided a cheque or any other document to show it was for wages owed in the calculation period.

D.E.I. argues that its figures are accurate. Its calculations are based on time cards which were used by the Director in her calculations and these should prevail. Further, it has taken overtime into account by way of including the Director's Miscellaneous Adjustment figures (which concern overtime and minimum daily hours) in its calculations. Moreover, the wage rates are accurate for apprentices and journeymen and the employees are not entitled to more than the mandated wage scales notwithstanding the fact that D.E.I. paid them a higher rate in some cases. D.E.I. further argues that there is "pay not accounted for" by the Director. These amounts were listed initially in D.E.I.'s Attachments 4, 5 & 6 which were entered at the hearing on October 28, 1997. Copies of cheques showing the amounts involved were provided for nine of the ten affected employees. In its submission of March 31, 1998 D.E.I. said the cheques corresponded, for the most part, to monies paid as either holiday pay or top up. It further stated that it is "clearly apparent" these amounts are pay for hours worked in the calculation period and are not accounted for by the Director. In its April 8, 1998 submission D.E.I. conceded to the Director on five of the ten employees. Consequently, D.E.I.'s final position is that the Director has not accounted for all payments made to the following 5 employees: John Lineker, Alex Rebrov, Ervin Robicheau, Mike Sargeant and Daniel Stamatovic.

ANALYSIS

The burden is on D.E.I. to show that the Director has erred in her calculations.

We are satisfied that D.E.I. has not met that burden.

One of the differences between D.E.I.'s calculations and the Director's calculations is that the Director, in contrast to D.E.I., has properly accounted for overtime in her calculations of earnings. Although D.E.I. argues that it accounted for overtime when it included the Director's Miscellaneous Adjustment column into its calculations, these amounts concern overtime which D.E.I. did not pay. The overtime that D.E.I. overlooks in its calculations for earnings is overtime which it paid when it was earned by the employees.

By not including overtime in its calculations of total earnings, D.E.I. undervalues total earnings. D.E.I. also undervalues total earnings by basing its calculations on the hours shown on the pay statements. The records which were made available to the Director show a discrepancy between hours worked and wages paid in a pay period. The latter amount is sometimes in excess of the former amount. The Director's method of calculation takes this discrepancy into account. D.E.I.'s calculations do not account for this discrepancy and it fails to explain why the wages paid are greater than hours worked in certain pay periods. Accordingly, we concur with the Director that it was appropriate to consider information beyond the pay statements in order to determine what amount of wages, if any, were owed to the 22 employees.

We also accept the Director's arguments that D.E.I. has miscalculated benefits and cannot retroactively reduce the rate of pay it paid to its employees. Section 3 of the *Fair Wage Regulation* clearly states that if an employer pays benefits in excess of that which is required, the excess cannot be set off against wages. Where D.E.I. has offset benefits against wages it is contrary to the *Fair Wage Regulation*. Section 3 of the *Fair Wage Regulation* also states that the wage rates and benefits to be paid to the trades are minimums. If an employer pays wages and benefits in excess of the minimums set out in the *Fair Wage Regulation* it cannot retroactively reduce those rates. By retroactively changing certain rates, D.E.I. has again distorted the true earnings of the employees by causing the earnings in its calculations to be less than what they should be.

Finally, regarding the amounts referred to as "pay not accounted for", D.E.I. has not shown that the Director's calculations respecting Lineker, Rebrov, Robicheau, and Sargeant should be reduced, and we are satisfied that the "pay not accounted for" in Stamatovic's case causes an increase, and not a decrease, in the amount he is owed by D.E.I.

D.E.I. claims it paid Lineker \$553.81 and this amount was not accounted for by the Director. A cheque dated March 22, 1996 was provided by D.E.I. to support its position. According to the Director this amount was included in the pay period ending March 17, 1995. D.E.I. says this cannot be the case as a pay period ending "for 3/17/95 cannot include a cheque from 3/22/96". Even if this were true, however, D.E.I. has not established that this cheque was for wages earned in the calculation period. The calculation period for Lineker runs from January 1995 to November 1995 and the cheque is dated four months after November 1995. Moreover, the cheque in itself does not indicate it is for wages. If it was, the period when it was earned is still not apparent, nor is it known if the amount is gross or net. We do not agree with D.E.I. that it is "clearly apparent" that this cheque, or any of the cheques provided by D.E.I., represent pay for hours worked in the calculation period. Neither is it clear whether these cheques are for vacation pay or top ups.

D.E.I. further claims it paid Rebrov \$1175.00 and this amount was not accounted for by the Director. D.E.I. said that it provided cheques to the Tribunal and the Director to support its position and the cheques represent advances or loans made to Rebrov. The Director states that she did not receive the cheques. Neither did the Tribunal. In the absence of any evidence to support the position that Rebrov was paid an additional \$1175.00 for work performed during the calculation period, we accept the Director's calculations regarding Rebrov.

The Director claims that of the two amounts which D.E.I. says were not accounted for in her calculations for Robicheau, one was included, and the other was not included in payouts but neither was it counted as an earning. For Sargeant, the Director claims that one of the amounts which D.E.I. says was not accounted for in the calculations was included, and others appear to be for expenses and not wages. In its April 8, 1998 reply submission D.E.I. states that it is looking into this matter and wants until May 14, 1998 to provide a response. We decline to give an extension to D.E.I. D.E.I. has been given every

opportunity to put its position forward and to substantiate its position with appropriate documents. It has failed to do so with respect to Robicheau and Sargeant.

We find no calculations by D.E.I. that persuasively contradict the Director's calculations. Further, we conclude that no adjustments need to be made to the Director's amended calculations dated February 23, 1998 for "pay not accounted for" except the calculations for Stamatovic. D.E.I. says the Director made an error in not adding \$1015.50 to the gross wages paid column. The Director agrees this was an error but says it is an error in D.E.I.'s favour. We agree that this amount should be added into the Director's calculations. By so doing, the amount owed to Stamatovic increases from \$1697.72 to \$1805.14 due to a concomitant increase in the Vacation and Stat Adjustment column.

ORDER

Pursuant to Section 115 of the *Act* we order that the June 20, 1997 Determination be varied to show that \$87,532.46 plus interest calculated after January 27, 1998 is owed by D.E.I. to the 22 employees as set out in the attached Appendix A.

Casey McCabe
Adjudicator
Employment Standards Tribunal

Norma Edelman
Registrar
Employment Standards Tribunal

Mark Thompson
Adjudicator
Employment Standards Tribunal