

An appeal

- by -

David Hurn

- 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: Carol L. Roberts

FILE No.: 2003A/79

DATE OF DECISION: May 27, 2003

DECISION

OVERVIEW

This is an appeal by David Hurn of a Determination of a delegate of the Director of Employment Standards issued February 1, 2002. Mr. Hurn filed a complaint alleging that his employer, Accura Alarms Security Service Ltd. (“Accura”) had failed to pay him fair wages, contrary to s. 5 of the now repealed *Skills Development and Fair Wage Act* (“*SDFWA*”). The delegate concluded that the *SDFWA* had not been contravened, and that no wages were outstanding.

The parties were advised by the Tribunal’s Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. This decision is based on written submissions by Kevin Blakely, Barrister and Solicitor, on behalf of David Hurn, Glenn A. Muir on behalf of Accura Alarms Security Service Ltd., and Ed Wall on behalf of the Director of Employment Standards.

ISSUE TO BE DECIDED

Whether the delegate erred in law in concluding that Mr. Hurn’s work did not fall within the scope of the *SDFWA*.

FACTS

Clara Industrial Services Ltd. (“Clara”) is a general contractor, and at the relevant time was constructing a bridge for the Ministry of Transportation and Highway (“MOTH”) in Nelson, B.C. The project was subject to the provisions of the *SDFWA*.

Accura and Clara entered into a contract under which Accura was to provide security patrols by licensed guards during the hours the construction crews were not working. Mr. Hurn worked as a security guard for Accura from May 23 to September 25, 2002.

Chuck Chatten, whose position is not identified in the Determination, wrote to the delegate on January 9, 2003. His letter advised the delegate that he spoke with Mr. Hurn about his job, and that Mr. Hurn told him that his job duties were to patrol a fenced compound at one end of the bridge, and the offices and lay down area at the other end of the bridge. According to Mr. Chatten’s letter, Mr. Hurn also provided traffic control duties when the traffic lights failed, removed and replaced traffic cones and lane delineators, and cleared hazardous debris from the road on several occasions.

The delegate reviewed the *SDFWA* and found that, because it had construction as its central focus, it applied only to “employees who are physically involved in construction, renovating, repairing or demolishing property, or who are altering or improving land”. The delegate concluded that, because Mr. Hurn was not performing work that could be characterized as construction, or any activities that “could be interpreted from a reading of the legislation to be intended to be covered”, the employer had not contravened the *SDFWA*.

ARGUMENT

Mr. Hurn's counsel contends that the delegate erred in law in finding that Mr. Hurn was not entitled to the protection of the *SDFWA*. He argues that the delegate did not set out the full scope of Mr. Hurn's duties, and that Mr. Hurn was entitled to the benefits of the legislation because he was a worker within the designation of "labourer/helper/on-site clerk or equivalent," as provided under the Regulations.

The delegate contends that Mr. Hurn's duties were fairly and accurately described by Mr. Chatten, and that Mr. Chatten's letter "clearly represents the scope of the duties as they were described to the Director's delegate by the appellant."

Accura contended that the delegate did not err in concluding that the *SDFWA* did not apply to Mr. Hurn. Accura argues that it was not performing "construction work", that it was contracted solely to perform security patrols, and that Mr. Hurn did not fall under the "labourer/helper, on-site clerk or equivalent". Accura's lengthy submission included significant details regarding the nature and scope of Mr. Hurn's work. I have not considered Accura's evidence regarding Mr. Hurn's job duties, as there is no evidence this material was before the delegate at the time he made his Determination.

Accura's submission also refers to Tribunal decisions regarding the reconsideration powers of the Tribunal. I have not considered these submissions, since this is an appeal from a Determination rather than an application for reconsideration.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made

The *SDFWA* was intended to ensure skill development training in the construction industry, and to ensure that employees receive fair wages for work performed on publicly funded construction projects. (s. 2(a) and (c)).

The *SDFWA* applied to all construction contracted for a by a tendering agency (s. 3). Section 5 provides that

All employees of a contractor, sub-contractor or any other 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 regulations.

Construction is defined as

the construction, renovation, repair or demolition of property and the alteration or improvement of land that is undertaken by a tendering agency using provincial money (s. 1)

Mr. Hurn worked for a security company contracted to provide security services to the contractor of a bridge construction project. In order for Mr. Hurn to receive the benefit of the *SDFWA*, he must have been doing, or contracted to do, “construction, renovation, repair or demolition of property” or “the alteration or improvement of land”, in whole or in part.

In my view, Mr. Hurn’s job cannot be said to fall within this definition.

The Tribunal has held that the *SDFWA* was intended to regulate only the persons involved in the performance of work directly related to the physical aspect of “construction”, even when that work is performed on a construction site. The test is the *nature* of the work performed, not the location or the time it was performed. Simply because an employee’s work is undertaken at a project that falls within the ambit of the *SDFWA* does not entitle the employees to be paid the “fair wages” provided for in that *Act*. (*Andrew Irvine* (BC EST #D312/97) and *Aries Property Maintenance* (BC EST #D209/99)).

There is no evidence Mr. Hurn was involved in the physical aspect of construction. As a security guard, whatever work Mr. Hurn performed occurred when the construction crew was off duty, and no construction work was being undertaken.

Mr. Hurn’s primary responsibilities were to perform security patrols. Even if Mr. Hurn set up traffic cones and cleared the job site of hazardous debris, those tasks were performed for the purpose of protecting Clara’s assets rather than anything integrally connected with the construction of the bridge. There is no evidence Mr. Hurn assisted any of the construction tradespeople on site or tidied up the site during the course of, or at the end of the work day, or erected traffic cones as part of the construction process. Whatever tasks he undertook in this area were for the purpose of ensuring the security of the site rather than the construction, renovation, repair or demolition of property.

Furthermore, in my view, it cannot be said that Mr. Hurn was a “labourer/helper, on-site clerk or equivalent”. As noted by Adjudicator Stevenson in *Irvine*, the duties and responsibilities of those classifications are generally established and understood in the construction industry, and for that reason, are recognized by Regulation. Security guards contracted to third parties are not so recognized.

I am unable to conclude that the delegate erred in finding that the *SDFWA* did not apply to Mr. Hurn.

ORDER

I Order, pursuant to Section of the Act, that the determination, dated February 1, 2003, be confirmed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal