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 -

Industra Thermal Service Corporation,
operating as Alexander Fireproofing
("Alexander")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/626

DATE OF DECISION: May 6, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Industra Thermal Service Corporation, operating as Alexander Fireproofing ("Alexander"), from a Determination of a delegate of the Director of Employment Standards (the "Director") dated July 23, 1997. The Determination considered complaints from two former employees of Industra, Kingston Jones ("Jones") and Sidney Brock Maynard ("Maynard"). The Director concluded Alexander had contravened Section 17(1) of the *Employment Standards Act* (the *"Act"*) by failing to pay Jones and Maynard the wages each was entitled to under their contract of employment. The Director ordered Alexander to pay to Jones and Maynard the amount of $555.20 and $2189.08 (later amended to $1966.88), respectively.

Alexander, who is represented in this appeal by their bargaining agent, Construction Labour Relations Association of B.C. ("CLRA"), says the Director had no jurisdiction or authority over the complaints and, in alternative, exceeded jurisdiction by including overtime hours in the Determination because, it is asserted, overtime hours had been credited to a time bank and according to Section 17(2)(a) of the *Act* those hours do not fall within the wage payment requirement contained in Section 17(1) of the *Act*.

The Tribunal has decided this appeal can be concluded without an oral hearing on the basis of the comprehensive submissions filed on behalf of the Director and Alexander.

ISSUE TO BE DECIDED

The issue is whether Jones and Maynard should have been paid wages based on the requirements of the *Skills Development and Fair Wage Act* (the *"SDFWA"*) and *Skills Development and Fair Wage Regulation* (the *"SDFWR"*) or according to the terms of the collective agreement under which each was employed.

FACTS

There is no dispute on the essential facts and the following is a summary of the key facts:

1. The B.C. Building Corporation ("BCBC") entered into commercial contractual agreement with Axor Engineering Construction Group Inc. ("Axor") under which Axor agreed to purchase land from BCBC, construct a building, according to specifications decided by BCBC, and lease a portion of the building back to BCBC. The project was identified as the Selkirk Waterfront Project (the "project").

2. The *SDFWA* and *SDFWR* did not apply to the project because the project was not construction by a tendering agency using Provincial money. Notwithstanding, BCBC and Axor agreed, as a term of their contract, that Axor, and any contractor or subcontractor working under or through them, would comply with the *SDFWA* and *SDFWR* on the project.

3. Alexander entered into a commercial contract with Axor to supply and install firespray and thermal insulation. Point 5 of their Contract Document states:

5. Skills Development and Fair Wage Act of British Columbia shall govern.

Also included in the Contract Document was a document referred to as "Tender Documents #113", which contained the following statement:

> The Sub-contractor has familiarized himself with the Skills Development and Fair Wage Act, and shall comply with the Act for the purpose of this contract.

Alexander signed that document.

4. For the purpose of carrying out the terms of the contract, Alexander employed Jones and Maynard under the terms of a collective agreement negotiated on their behalf by CLRA with the Operative Plasters' and Cement Masons' International Association, Local Union No. 779 ("Local 779" or the "Union"). The collective agreement was in full force and effect during the relevant period of time.

5. While it is not entirely clear from the documents, it appears Jones and Maynard were hired directly by Alexander with the intention that they would work as apprentice plasterers and told they would be required to join Local 779. Neither were members of Local 779 at the time of their employment, although both were hired to perform work that was within the traditional construction jurisdiction of Local 779.

6. While my conclusions about the operation of the collective agreement are not intended to be determinative of any issue that may arise under it, nothing on the facts is inconsistent with a conclusion that the employment of both employees was covered by the terms and conditions of the collective agreement. The collective agreement appears to allow employers to hire persons directly, and not through the hiring hall, to become "apprentices" and, provided the employer otherwise complies with Article 11.00, those persons are not required to be members of the union until they have passed a two (2) month probationary period (Article 11.203).

7. Maynard made application to join Local 779 on March 7, 1997. Jones says he never made application to join Local 779 and union dues, which were deducted

from his cheque by Alexander, were returned to him by Local 779 at his request. Local 779 disputes the final point and says no dues were returned to him. Nothing turns on that factual dispute.

8 Neither Jones nor Maynard were registered as apprentices, either under the terms of the collective agreement or under the *Apprenticeship Act* [as it then was called].

9. The rate of pay for Jones and Maynard was $12.01 an hour, consistent with the requirements of the collective agreement for first term apprentices.

10. No dispute has arisen as between the Union and Alexander relating to the employment of Jones or Maynard.

ANALYSIS

The Determination

The reasons given by the delegate for reaching the conclusion that the hourly wage of Jones and Maynard were those found in the *SDFWA* and *SDFWR* are captured in the following portion of the Determination:

> Having contracted to provide certain services on the Selkirk site in compliance with the *SDFWA* the employer has *de facto* agreed to certain conditions of employment respecting their employees who worked on the site, particularly as it relates to the wage rates that employees are entitled to be paid for working on that particular project as established by sections 4 & 5 of the *SDFWA* and section 3 of the *SDFWR*.
>
> Collectively, the above referenced sections of the *SDFWA* and *SDFWR* are interpreted as meaning:
>
> (a) that the minimum compensation for an employee must be equal to or greater than the rates and benefits for the labourer/helper classification (*ie.* Minimum rate per hour of $19.90 plus minimum benefits per hour of $4.00 equals minimum compensation per hour of $23.90) unless,
>
> (b) the employee holds a British Columbia certificate of qualification in a designated trade, in which case the employee would be entitled to the minimum rate per hour plus the minimum benefits per hour for the trade as outlined in the Fair Wage Schedule, or

> (c) the employee is registered as an apprentice under the *Apprenticeship Act* in a designated trade, in which case the employee would be entitled to a minimum wage rate per hour equivalent to the percentage of the trade rate set out in the Schedule as is determined under the Provincial Apprenticeship Agreement plus the total minimum benefits per hour as set out in the Schedule.
>
> Given that, pursuant to section 1 of the *Act*, "conditions of employment" means all matters and circumstances that in any way affect the employment relationship of employers and employees, I must conclude that your employees who worked on the Selkirk site are entitled to be paid the minimum wage rates and benefits as established by the *SDFWA* as a condition of their employment on that particular site.

It is apparent from that part of the Determination the delegate concluded Alexander had *de facto* agreed to pay the *SDFWA* minimum wage to Jones and Maynard for work on the project. It is also apparent the agreement upon which the Determination is based is the commercial contractual agreement between Alexander and Axor to comply with the *SDFWA* on the project.

Arguments

Alexander's main position is summarized in a submission filed on their behalf by CLRA, dated January 30, 1998:

Our position on this matter is clear, and can be summarized as follows:

> (a) CLR was authorized to sign the [collective agreement] on Alexander's behalf as a result of Alexander having assigned their bargaining rights to CLR. Therefore, as long as Alexander remains a member of CLR, CLR will retain the exclusive right to negotiate all terms and conditions of employment applicable to Alexander's union member employees.
>
> (b) The Union has the exclusive right to negotiate all terms and conditions of employment applicable to their members. In fact, individual Union members are required to sign away their right to negotiate directly with their Employer, on their own behalf, upon joining the Union.
>
> (c) <u>The [collective agreement] specifically states that all wage rates contained therein are on a "SHALL" be paid basis, as opposed to on a "MINIMUM" allowable basis.</u>
>
> (d) Alexander therefore had no right to negotiate terms and conditions within their contract with Axor which were contrary to the [collective agreement],

regardless of whether or not such terms and conditions exceeded those contained within the [collective agreement], without authorization from both CLR and the Union.

(e) The Union has no disagreement with Alexander over the straight time hourly rate paid to Mr. Jones and Mr. Maynard by Alexander on the [project]. In fact, Alexander authorized the Union Business Manager to act on their behalf with the Branch during the period when Mr. Corrigal was originally researching the applicant's allegations.

(f) As a result, the [collective agreement] should be found to take precedence over the contract between Alexander and Axor, and any damages suffered by Axor should be pursued, at Axor's discretion, by Axor via the courts.

That last reference reflects the position of Alexander that enforcement of the contractual obligation between it and Axor, to compensate employees according to the requirements of the *SDFWA*, would be a civil matter between them and not a matter to be decided under the *Act*. Alexander also makes five alternative arguments, only one of which has any merit. They say, in the event their main argument fails, that the delegate nevertheless erred by not crediting Alexander with "benefits" paid to, or on behalf, of Jones and Maynard when the total minimum hourly wage rate was applied. I agree with that argument and, if necessary, will provide my reasons for that conclusion later in this appeal. I will also touch upon why I conclude the other arguments are not accepted, if that becomes necessary.

In reply, the Director argues the position of the delegate is supported by the definition of *"wages"* in the *Act*, which reads:

> ***"wages"*** *includes*
>
> *(a) salaries, commissions and money, paid or payable by an employer to an employee for work,*
>
> *(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,*
>
> *(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*
>
> *(d) money required to be paid in accordance with a determination or an order of the tribunal, and*

> *(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefits, to a fund, insurer or other person,*
>
> *but does not include*
>
> *(f) gratuities*
>
> *(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*
>
> *(h) allowances or expenses, and*
>
> *(I) penalties.*

Specifically, the Director focuses on that part of the definition found in paragraph (a): money that is *"paid or payable by an employer to an employee"*. The Director argues the obligation on Alexander to pay wages under section 17(1) is sufficiently broad to include money that is payable to an employee even if the obligation to pay that money arises in a commercial contractual agreement that can only be enforced at the instance of a third party, in this case, Axor. The Director says the money does not lose its essential characteristic for the purposes of the *Act*, which is that it is *payable* by the employer for work, merely because Alexander had no authority to alter the terms of the collective agreement or that the non-payment of such money would not be considered a breach of the collective agreement.

The Director argues the delegate was not wrong to conclude, for the purposes of the *Act*, that money *payable* to Jones and Maynard could include what Alexander agreed would be paid its employees when it contracted with Axor that the "*SDFWA* shall govern". There is no issue, the Director adds, that the agreement by Alexander to apply the *SDFWA* (and co-incidently, to pay the minimum compensation required by the *SDFWA*) is an agreement which is enforceable in the courts by Axor. That being so, it is consistent with the purposes of the *Act* to conclude the required minimum compensation is *payable* and, if *payable* by an employer to an employee for work, is *wages*, which the Director has the jurisdiction and authority to collect.

I note, in the context of the above argument, that while Alexander does not specifically concede their contractual liability to Axor neither do they argue that the contractual liability is not a real one. They do not argue that the agreement to apply the *SDFWA* is void or unenforceable. In their submission to the Tribunal dated January 30, 1998, they state:

> Make no mistake, Alexander does not deny the existence of the contract between themselves and Axor. Nor do they deny that one of the terms and conditions of such contract was the obligation that Alexander compensate individuals who were not either a qualified Journey person or a registered Apprentice on the basis of a $23.90 per straight time hour wage compensation package. Furthermore, Alexander readily admits that they were, at all times, aware of such an obligation, and there was never any intention not to adhere thereto.

Conclusion

Notwithstanding the somewhat ingenuous position taken by Alexander, I agree with them on the main issue in this case. That issue, as framed by the Director, is whether the commercial contractual obligation assumed by Alexander to comply with the *SDFWA*, which I shall refer to as the "fair wage" term, supersedes the collective agreement and governs the "rights of the unregistered apprentices", Jones and Maynard. The answer to that issue depends on whether the "fair wage" term is *"wages"* as defined in the *Act*. In my opinion, a separate commercial obligation which is not a condition of employment of an employee and not enforceable at the instance of the employee cannot be considered as *"wages"* for the purposes of the *Act*.

As noted above, the Director argues that the definition of *"wages"* in the *Act* is sufficiently broad to include both the collective agreement and the "fair wage" term. As attractive as that argument may be on the surface, it incorrectly presupposes the "fair wage" term was a condition of employment. The *Act* defines "*conditions of employment"*:

> ***"conditions of employment"*** *means all matters and circumstances that in any way affect the employment relationship of employers and employees;*

That term is interpreted broadly and includes matters such as wages, payment of wages, benefits, hours of work and job responsibilities. The conditions of employment may be verbal or written or may, as it is in this case, be contained in a collective agreement. Where the conditions of employment are contained in a collective agreement, then, as a matter of law, that collective agreement represents the totality of the terms and conditions of employment applicable to persons whose employment is governed by it.

That does not mean the collective agreement cannot be varied by the parties to it or supplemented by statutory obligations, as would be the case if the project were one to which the *SDFWA* applied. But in this case, the *SDFWA* does not apply and Alexander has assigned its authority to bargain, or change, conditions of employment for its employees to CLRA. Alexander had no legal authority to agree to what the Director is, in effect, treating as a variance to the collective agreement and an addition to the conditions of employment applicable to Jones and Maynard.

Similarly, Jones and Maynard had no individual right to create or agree to terms and conditions of employment different than those contained in the collective agreement between CLRA and Local 779. That authority belonged exclusively to Local 779. This is not even a case where different or additional terms and conditions of employment could have arisen at the hiring stage. The collective agreement was in full force and effect on the project and, as indicated above, addressed the conditions upon which Jones and Maynard could be, and were, hired.

It is apparent from a reading of the *Act* that the focus for the authority of the Director under the *Act* is the employment relationship and the rights and duties arising in the context of that relationship. There is no doubt the Director has the authority to define and enforce the employment relationship for the purposes of ensuring compliance with and enforcement of the *Act*. If there were no collective agreement involved, the Director would be entirely justified in concluding it was a condition of the employment of Jones and Maynard that Alexander pay wages according to the requirements of the *SDFWA*. Such a conclusion could be implied from the apparent obligation found in the contract between Alexander and Axor. However, there is no room for such a conclusion in this case. The individuals and Alexander would need the legal authority, which they do not have, to enter into individual contracts of employment. In the absence of that authority, the totality of the conditions of employment for Jones and Maynard are found in the collective agreement. Alexander cannot legally agree to anything different and the Director has no jurisdiction to imply additional terms into the collective agreement[1]. In the circumstances, neither Jones, Maynard nor Local 779 could enforce the commercial agreement to pay "fair wage" on the project and the collective agreement does not contain the condition of employment sought to be enforced by the Director in this case. In those circumstances, I cannot conclude, as the Director has submitted I should, that the "fair wage" term is a condition of employment.

Further, as a matter of jurisdiction, there is no support for suggesting the Director has the authority to define both the obligation contained in a commercial contractual agreement and the scope of that obligation, both of which have been done in this case. The Director argues that the commercial contractual obligation should be considered as wages *payable* because that obligation represents a benefit to the employees which the Director is justified in enforcing as an aspect of the statutory purpose "*to promote the fair treatment of employees and employers"*.

There are two responses to that argument. First, it ignores another purpose of the *Act*, "*to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act"*. Second, and more fundamentally, a statement of purpose cannot be relied upon to support a claim of jurisdiction to interpret or enforce

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[1] This comment does not preclude the possibility that some statutory obligation may be imposed on the parties to a collective agreement that would alter the conditions of employment for employees covered by it, as would occur if the project was covered by the *SDFWA*.

commercial contractual arrangements if that jurisdiction is not otherwise supported on a fair reading of the *Act*. As I noted above, the focus of the authority of the Director under the *Act* is the employment relationship. The Director has no jurisdiction under the *Act* to interpret and enforce commercial agreements. As Alexander correctly pointed out in their submission, the courts have that jurisdiction.

For the above reasons, the appeal succeeds. The "fair wage" term cannot be considered a condition of the employment of Jones and Maynard and is not included in the definition of "*wages*" under the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated July 23, 1997 (and varied September 11, 1997), be canceled.

David Stevenson
Adjudicator
Employment Standards Tribunal