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 -

Fran Davis
("Fran Davis")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	1999/15
DATE OF HEARING:	April 23, 1999
DATE OF DECISION:	May 6, 1999

DECISION

APPEARANCES

Fran Davis	in person
Shan Davis Carmen Davis	for Shan Davis operating Davis Construction

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Fran Davis ("Fran Davis") of a Determination a delegate of the Director of Employment Standards (the "Director") dated December 21, 1999. The Determination concluded that Fran Davis was owed any wages by his former employer, Shan Davis operating Davis Construction ("Shan Davis"). Fran Davis says the calculation of his claim for wages owed done by the Director is wrong and he is owed $2115.12.

Fran Davis raises several reasons for asserting the Determination is wrong. I will do no more at this stage than summarize his arguments:

1. The Determination incorrectly based his wage rate on an hourly rate for the Fernie and Hamilton jobs, when, in fact, those jobs were to be paid on a wage of 16% of contract labour price ("16% salary") and $15.00 an hour for any "extra" work.

2. The Determination did not take into account 61.5 hours of "extra" work performed on the Hamilton job which was not paid.

3. The Determination did not use correct information to determine hours of work on jobs that were paid at an hourly rate.

4. The Determination did not address unauthorized deductions made from wages.

5. The Director failed to ascertain the gross amount of the contracts for the jobs that were paid on a wage of 16% salary.

During the submissions on the appeal, the Director raised the question of whether the employment of Fran Davis was covered by the *Act*. This issue must be addressed because constitutional jurisdiction over the employment relationship is fundamental to the validity of the Determination and, of course, to the authority of the Tribunal to consider the appeal.

Based on the material on file and the information and evidence provided by the parties, the facts relating to this issue are as follows:

1. Fran Davis was employed by Shan Davis operating Davis Construction from September 1, 1997 to February 13, 1998 (the "period"). During the period Fran Davis resided in British Columbia.

2. During the period, Davis Construction was operated out of the home of Shan Davis in Elko, British Columbia. It performed work in British Columbia, Alberta and Montana.

3. During the period, Fran Davis worked on projects in British Columbia, Alberta and Montana. In his first week of employment he worked on a project in Canmore, Alberta, then spent approximately two weeks on a project in Calgary, Alberta. He worked in British Columbia on a house addition in Fernie for about 8 days, on a roofing job for a ½ day, a home renovation for 3 days and on a project for Gentech for 2 days.

4. In late November, he commenced working on a home construction project in Hamilton, Montana. From November 24, 1997 to February 13, 1998, he worked mainly on that job. Each week, he and Shan Davis traveled to that job on Sunday or Monday from their residences in British Columbia and returned home on Friday.

5. During the period he was paid by Davis Construction from an account at the Toronto-Dominion Bank in Elko.

6. During the period Davis Construction maintained no workers' compensation coverage in British Columbia and, for the Hamilton job, obtained insurance coverage in Montana for its workers.

7. Davis Construction's accountant is located in Alberta.

In *Can-Achieve Consultants Ltd.*, BC EST #D463/97 (reconsideration of BC EST #D099/97), the Tribunal examined the constitutional limits of the *Act*. While noting that the definitions of "employee", "employer" and "work" in the *Act* are expansive the Tribunal recognized that there are presumptive constitutional limitations in the legislation:

> There is a presumption that the Legislature intends its enactments to respect its constitutional limitations, including the constitutional limitation prohibiting extra-territorial legislation. . . .
>
> What this presumption means in effect is that the "statutory interpretation" question cannot be finally determined without reference to the

> constitutional limits of provincial legislative power. While it is fair to say from reading the *Act* as a whole that the Legislature wanted to legislate as broadly as it could, it is also fair to say that it did not intend to exceed the limits of its constitutional jurisdiction. To the extent that a literal reading of the *Act* would exceed these constitutional limitations, the legislation must be "read down". As noted by Sullivan, at p. 336: "By presuming that extra-territorial effects are not intended, the legislation is effectively read down to avoid application that would violate the constitutional limitations".
> (pages 8-9)

The Tribunal will have constitutional jurisdictional over an employment relationship if a sufficient connection can be found between the person's employment and the province. A "real presence" performing employment obligations in the province is essential and a number of factors are relevant, including where the employment relationship was established, whether the place of business of the employer is situate in the province, whether the residence of the employee is in the province, whether the worker is required to work both in and out of the province and the extent to which other jurisdictions may legitimately claim jurisdiction over the person's employment.

On the facts of this case, I conclude there is a sufficient connection between the employment relationship and the province and that the *Act* applies. I will turn now to the merits of the appeal.

ISSUE TO BE DECIDED

The only issue to be decided is whether Fran Davis has met the burden of persuading the Tribunal that the Determination ought to be varied or canceled because the Director erred in fact or in law.

FACTS

In addition to the facts outlined above, the following facts are relevant:

1. Fran Davis was employed at an hourly rate of $12.00 on all work except the Fernie job and the Hamilton job. On the Fernie job, I accept he was paid a flat fee of $700.00, without reference to the number of hours worked. Fran Davis has not shown that he was to be paid a salary equivalent to 16% salary for that job and any aspect of the appeal that relies on the Tribunal reaching that conclusion is dismissed.

2. Fran Davis was employed at 16% salary on the Hamilton job. The contract total was $30,454 USD. Fran Davis left the employ of Davis Construction before

completion of the job. Davis Construction submits that the total amount of the contract that was completed when Fran Davis left was $24,169 USD, and I accept that submission. To the extent Fran Davis disagrees with that figure, the onus is on him to show it is wrong and he has not met that onus. I also accept that Fran Davis worked 328.5 hours, including 19.5 overtime hours, on the Hamilton job, discounting the "extra" work.

3. Fran Davis worked 32 hours doing "extra" work. To the extent Fran Davis disagrees with that figure, the onus is on him to show it is wrong and he has not met that onus.

4. The Director concluded that Fran Davis had been paid a total amount of $9106.00 in gross wages during his employment. That conclusion was based on information provided to the Director by Davis Construction during the investigation of the complaint and has not been appealed.

5. Neither Fran Davis nor Davis Construction maintained an accurate record of hours worked by Fran Davis. Fran Davis appeals the conclusion of the Director respecting the hours worked and in that context filed a summary of "discrepancies" between the conclusion of the Director and information provided by Davis Construction on April 10, 1998. In his appeal, Fran Davis states:

> The Determination did not use the proper information given to him by Davis Construction and myself to make his hourly assessments. By this I mean that the Determination does not include hours that were not disputed by both parties. Please refer to the hourly breakdown chart that I submitted with this package dated January 12, 1999.

I simply do not accept that argument. What Fran Davis does not state in his appeal is that the conclusion of the Director respecting the hours he worked is not entirely inconsistent with information that *he* provided to the Director during the investigation, at least where he was able to provide any information. An example of this arises most clearly in reference to the period September 15 - 27, where the Director concluded Fran Davis had worked no hours for Davis Construction. Fran Davis says this conclusion is wrong. He notes that Davis Construction, in the April 10, 1998 document, included the following statement:

September 15-19		
Regular Hours	17.5 @ $12.00	$210.00

However, the information provided by Fran Davis for the period appears to confirm that he did not work any hours in that period. Also, the April 10, 1998 document was not the only material provided by Davis Construction and was not

the only material reviewed by the Director before reaching any conclusion about the hours worked by the appellant.

I am satisfied from a review of the material that the Director used the best evidence available to determine the hours of work of the appellant and did that on an analysis of all the information available and not simply on the one document examined by the appellant, who has provided no adequate evidence or other reason why I should not accept the Director's conclusion. If the appellant is to satisfy the burden on him, which is to show the Director's conclusion is wrong, he must do more than show a few "discrepancies" between that conclusion and *one* of the documents considered by the Director during the investigation. He has failed to show the conclusion about hours worked is wrong and that aspect of the appeal is dismissed.

ANALYSIS

The appeal is based predominantly on a disagreement with factual conclusions made by the Director. The burden is on the appellant to show those factual conclusions are wrong. For the most, part he has failed to meet that burden. To summarize:

he has failed to show the calculation of total hours worked is wrong;
he has failed to show he worked 61.5 hours on "extras" on the Hamilton job, as opposed to the 32 hours that the Director concluded he had worked;
he has failed to show Davis Construction made any unauthorized deductions from his wages;
he has failed to show he was to be paid 16% salary for the Fernie job;
he has failed to show he kept "accurate track of hours" for all work other than the Fernie and Hamilton jobs; and
he has failed to show any basis for a claim for travel or accommodation, which he asked the Tribunal to "consider" in the appeal.

The material does, however, show the director has made two minor errors in the calculation of wages payable. The Hamilton job was paid on a 16% salary. There is no dispute that the salary was based on the gross contract labour price. Because Fran Davis was not paid an hourly rate on the Hamilton job, the Director was required to convert his wage rate to an hourly rate, using one of the formulas provided in the definition of *"regular wage"* in Section 1 of the *Act*, which reads:

"regular wage" *means*

(a) if an employee is paid by the hour, the hourly wage,

(b) if an employee is paid on a flat rate, piece rate, commission, or other income incentive basis, the

> *employee's wages in a pay period divided by the employee's total hours of work during that pay period,*
>
> *(c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employee's normal or average weekly hours of work,*
>
> *(d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work, and*
>
> *(e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work;*

In this case, the Director should have applied paragraph *(b)*, as the wage rate Fran Davis received for that job is properly characterized as a "flat rate". As indicated above, Davis Construction acknowledges that Fran Davis earned $5413.85 CDN for the work he completed on that job. He work 338.25 hours. Applying the formula found in paragraph *(b)*, his hourly rate for that job was $5413.85/338.25 = 16.00 an hour. In reaching the number of hours worked, I have removed 32 hours of "extra" work from the total hours and extrapolated the overtime hours to straight time.

When the Calculation Report is redone on an hourly rate of $16.00 for the Hamilton job, the Total Wages Earned should have been shown as $9131.96 and the vacation pay on that amount would be $365.28 for a Total of $9496.24, of which $9106.00 was paid by Davis Construction. As a result of this calculation, the appellant is owed $390.24, plus interest.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 21, 1998 be varied to show an amount owing of $390.24, together with whatever interest has accrued pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal