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.R. Stucco Ltd.
("DR")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/56

DATE OF DECISION: May 6, 1998

DECISION

OVERVIEW

This is an Appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by D.R.Stucco Ltd. ("DR") from a Determination of a delegate of the Director of Employment Standards (the "Director") dated January 7, 1998 ordering DR to pay an amount of $21,753.51 in respect of the employment of Corey Sweet ("Sweet"), Joseph LaSalle ("LaSalle"), Rob Bamford ("Bamford") and Sean Bailey ("Bailey").

The Director concluded in the Determination that DR had failed to comply with the requirements of the *Skill Development and Fair Wage Act* (the "*SDFWA*") and the *Skill Development and Fair Wage Regulation* (the "*SDFWR*") in respect of the employment of Sweet, LaSalle, Bamford and Bailey. DR says the Determination is wrong in several areas, but principally in its conclusion that Sweet, LaSalle, Bamford and Bailey were employees of DR. It is also submitted that, in any event, the total hours worked and the start date for Bailey are incorrect, Bailey did not hold an interprovincial Red Seal Certificate, as he claimed, Bamford was overpaid on his final pay cheque by thirty (30) hours, some overtime calculations are wrong and DR was not credited for holiday pay already paid to the four individuals.

The Tribunal has decided this appeal does not require an oral hearing.

ISSUES TO BE DECIDED

There are two issues raised by this appeal. The first is whether the four individuals were employees as that term is defined in the *SDFWA*. The second issue is whether DR has shown the Director was wrong in respect of the other matters raised in the appeal.

FACTS

Based on the materials on file and the submissions of the parties, the relevant facts are few and are not in dispute. They are as follows:

1. DR was employed as a contractor on the Fernie Aquatic Centre, a construction project to which the *SDFWA* applied.

2. Sweet, LaSalle, Bamford and Bailey were employed by DR to perform certain work on the project. None of the individuals held the trade qualifications required under Section 4 of the *SDFWA*.

3. DR failed to comply with the requirements of the *SDFWA*.

Additionally, DR says two facts are in dispute. First, they say the start date shown for Bailey is incorrect. DR asserts the conclusion of the Director that Bailey commenced his employment on the project site on February 20, 1997 is wrong. The material on file, from which the conclusion of the Director was made, shows Bailey was on site February 20, 1997 performing "site determination". The material also shows that after that date he was not on the project site again until April 1, 1997, when he performed "scaffold preparation", and from that day until July 2, 1997 was on the site regularly. His presence on the site for all of these days related to the contract undertaken to be performed by DR. Section 5 of the *SDFWA* says:

> ***5*** *All employees of a contractor, subcontractor 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 regulation.*

Unless their principal argument is accepted, that Bailey was not an employee, DR has not shown the conclusion of the Director that Bailey was entitled to receive fair wage for all time he was on the project site from February 20, 1997 to July 2, 1997 is wrong.

Second, DR appeals the calculation of total hours worked on the project by Bailey. This part of their appeal appears to be based on an assumption that the "hours worked" sub-total used by the Director to calculate the fair wage earnings for Bailey ought to be the same as hours actually worked by Bailey. That is not so. Based on the material on file, the sub-total shown is supposed to represent total equivalent number of straight time hours after the overtime requirements of the *Act* are applied to the actual number of hours worked. Having said that, however, the sub-total calculated by the Director does seem high when applied against the summary of hours provided by Bailey, which were adopted by the Director in the overtime calculation report.

DR also says the conclusion respecting Bamford is wrong because Bamford was overpaid on his final paycheque by thirty (30) hours. There is nothing on file supporting this assertion and no material was filed by DR with the appeal. Similarly, no information was filed in support of the assertion by DR that holiday pay paid to the individuals was not credited to DR in the final calculation of wages and benefits owing. From the information on file, it appears that DR was credited with the amounts paid to the individuals as holiday pay when the Director made the calculation of wages and benefits owing under the *SDFWA*.

ANALYSIS

The main ground of appeal by DR involves an question of the interpretation of the definition of *"employee"* in Section 1 of the *SDFWA*. The definition reads:

> ***1*** *In this Act:*

"employee" *means:*

(a) a person in receipt of or entitled to wages for labour or services performed for another,

(b) a person an employer allows, directly or indirectly, to perform work or service normally performed by an employee, and

(c) a person being trained by an employer for the purpose of the employer's business.

DR argues, that as a matter of statutory interpretation, in order to come within the definition of *"employee"* for the purpose of the *SDFWA* a person must meet all three criteria listed. The argument made by DR rests on two points. First, the section uses the word *"means"* when identifying the attributes that will identify an employee for the purposes of the *SDFWA*. In most contexts, using *"means"* restricts the words following to their grammatical and ordinary sense and, while one may look to the scheme and object of the act to assist in determining the full scope of the meaning of the words, one may not enlarge the words to add significance to them beyond their grammatical and ordinary sense. Second, the word *"and"* is used, implying the three subsections are conjunctive and a person must meet all three parts of the definition before being considered an employee under the *SDFWA.*

The Director replies that the criteria listed are separate criteria, and meeting any one of them is sufficient to bring a person within the definition of *"employee"*.

I agree with the position of the Director on the definition of *"employee"* in the *SDFWA*. Simply put, the definition does not identify the three criteria relevant to the definition of *"employee"* in the context of one person, as suggested by DR, but identifies the three criteria in the context of three persons, each being described by some attribute that will assist in identifying that person as an employee under the *SDFWA*. In order for the argument of DR to have some force, the definition section would have to read in either of two ways.

First, it could read:

1 *In this Act:*

"employee" *means a person who:*

(a) is in receipt of or entitled to wages for labour or services performed for another,

> *(b) is allowed by an employer, directly or indirectly, to perform work or service normally performed by an employee, and*
>
> *(c) is being trained by an employer for the purpose of the employer's business.*

That wording would, arguably, combine all the criteria applicable to the definition into one person. But that is not what the legislature has done. The drafters of the *SDFWA* have chosen to identify three criteria, any one of which may be held by *"a person"* and, if so held, would have the effect of that person being determined to be an employee under the *SDFWA*.

Second, the subsection could read:

> ***1*** *In this Act:*
>
> ***"employee"*** *means:*
>
> *(a) in addition to the criteria in paragraphs (b) and (c), a person in receipt of or entitled to wages for labour or services performed for another,*
>
> *(b) in addition to the criteria in paragraphs (a) and (c), a person an employer allows, directly or indirectly, to perform work or service normally performed by an employee, and*
>
> *(c) in addition to the criteria in paragraphs (a) and (b), a person being trained by an employer for the purpose of the employer's business.*

However, that reading would require me vary the section to add a qualifying phrase to each of the paragraphs that would have the effect of incorporating the criteria of the other two paragraphs into the first. I have no authority or reason to do that.

I do agree the definition of *"employee"* in the *SDFWA* is restrictive. That is the effect of using the word *"means"* as opposed to the word *"includes"*, which is used in the definition of *"employee"* in the *Act*. There is no other reason for that than the obvious one: the focus of the *SDFWA* is work performed on fair wage projects. It was not intended by the drafters that persons on leave from the employer or those on layoff with a right of recall should be considered employees for any purpose under the *SDFWA*. However, that conclusion does not result in a further conclusion that all criteria must be present in one person before that person is an *"employee"* under the *SDFWA*.

A more expansive definition of the term *"employee"*, one which encompasses the greatest number of workers on a fair wage project, is also consistent with the scheme and object of the *SDFWA*. The purposes of the *SDFWA* are found in Section 2:

> ***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.*

DR argues all of those purposes could relate to the "training" requirement in the definition. That is true, but subsections (b) would be unnecessary if the focus of the purposes of the *SDFWA* was only to ensure the training of persons in the construction industry. The reference in subsection (b) to *"appropriate qualifications"* is followed in Section 4 with an outline of the trade qualifications required on fair wage projects. Four trade qualifications are listed and, of those four, only two relate to "training". The other two relate to persons who have already been trained and would be considered "journey persons", either with a provincial ticket in their trade or with an interprovincial Red Seal in a recognized trade. The argument of DR suggests those persons would not be an *"employee"* under the definition in the *SDFWA* because they would not meet the "training" criteria in paragraph (c) and, by inference, the employer could compensate those persons at wages and benefits considerably less than what they would be required to compensate a "trainee" under Schedule 3 in the *SDFWR*. It should also be noted that Section 3 of the *SDFWR*, which outlines the fair wage rates and benefits, allows for persons in "training", *ie*. those who are registered as apprentices according to the requirements of the *SDFWA* to be paid a percentage of the amounts required to be paid to person with complete trade qualifications. The result propounded by DR would also be inconsistent with the basic obligation under the *SDFWA*, which is set out in Section 5:

> ***5*** *All employees of a contractor, subcontractor, 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.*

That obligation is structured in broad terms. There is no sound reason, and none has been suggested by DR, why that obligation should be limited in the manner suggested by DR.

For the above reasons, I dismiss the main argument of DR that one or more of the four individuals not meet the definition of *"employee"* under the *SDFWA*.

DR has also suggested there is some effect to not having been notified by the Project Manager that the project was one to which the *SDFWA* applied. That point was raised in the appeal, but was not argued in the March 17, 1998 submission following the appeal. The material on file indicates the requirement to pay fair wage on the project was contained in DR's contract, in subsection 6(2), which stated:

> The Province of British Columbia Fair Wage Policy applies to this contract. Attached for your information is the schedule of Fair Wage Minimum Hourly Rates and Skills Development Policy. However, it is the contractor's responsibility to be conversant with all the Fair Wages Policy and the most current wage schedule.

In any event, while an allegation that the Project Manager failed to notify DR of the application of the *SDFWA* to the project may be an issue between those parties, it is irrelevant to whether DR was required to pay fair wage to its employees on the project. That obligation arises clearly from the *SDFWA*.

In respect of the alternative arguments concerning the calculation of the hours of work and start date for Bailey, the alleged overpayment to Bamford and the failure to credit holiday pay paid to the individuals, the burden in this appeal is on DR to show the Director was in error. As indicated above, that burden has been met only in respect of the issue of the hours of work calculations for Bailey. The appeal on the other matters is dismissed and the hours of work issue will be referred back to the director to recalculate based on the information on file.

The referral back will not affect any other part of the Determination, all other aspects of which have been considered in the context of this appeal.

ORDER

Pursuant to Section 115, I order the Determination, dated January 7, 1998, be confirmed, with the exception of the issue of the hours of work of Bailey which are referred back to the Director for recalculation. Interest will accrue on all amount payable in accordance with Section 88 of the *Act*.

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David Stevenson
Adjudicator
Employment Standards Tribunal