BC EST # D202/97

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-

Sunco Construction Services Ltd.
("Sunco")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE NO.:	97/177
DATE OF DECISION:	May 20th, 1997

DECISION

OVERVIEW

This is an appeal brought by Sunco Construction Services Ltd. ("Sunco" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on March 4th, 1997 under file number 78003 (the "Determination"). The Director determined that Sunco owed its former employee, Sean Austin ("Austin"), the sum of $4,584.44 on account of unpaid wages due to Austin by reason of the *Skills Development and Fair Wage Act* and accompanying Regulations (the *"SDFWA"*).

FACTS

On or about November 20th, 1995, Austin was hired by Sunco as an apprentice drywaller. Austin worked at the Douglas College construction site in Coquitlam, B.C. from November 20th, 1995 to April 12th, 1996 and was paid at an apprentice rate. It is common ground that the Coquitlam Douglas College campus site was a "fair wage" project subject to the provisions of the *SDFWA*.

In his written complaint, filed with the Employment Standards Branch on June 21st, 1996, Austin maintained that an an apprentice with "over 3300 hrs in apprenticeship" he was entitled to $18.34 per hour rather than the $15.11 per hour that he was actually paid.

The Director held that because Austin's apprenticeship with Sunco was not registered with the Apprenticeship Branch, Austin was entitled to be paid at the general labourer's rate provided for in the *SDFWA* Regulation ($19.90 per hour plus $4.00 per hour as benefits) rather than at the $15.11 per hour apprenticeship rate. Accordingly, the Director held that Sunco was obliged to pay Austin the further sum of $4,584.44 (inclusive of interest).

When Sunco hired Austin it did not transfer his apprenticeship from Austin's former employer because it was apparently told by an officer at the Apprenticeship Branch that it need not do so as the Apprenticeship Branch's policy then in effect was not to transfer an apprenticeship from a unionized to a nonunionized employer. I would parenthetically note that this supposed advice has never been reduced to writing on the letterhead of the Apprenticeship Branch, nor did Sunco send any sort of confirming letter.

ISSUES TO BE DECIDED

Sunco's appeal of the Determination is based on the following arguments:

- Sunco hired and paid Austin as an apprentice, and that at all material times Austin was an "apprentice", within the meaning of the *Apprenticeship Act* and the *SDFWA*; and

- Austin's apprenticeship was not transferred from Austin's former employer to Sunco on the advice of the Apprenticeship Branch.

ANALYSIS

Section 4(1) of the *SDFWA* requires that all "apprentices" working at a "fair wage" site must either be registered under the *Apprenticeship Act* or hold a valid B.C. certificate of apprenticeship. The only exception permitted is where the apprenticeship in question is not recognized under the *Apprenticeship Act* [*cf.* s. 4(2) of the *SDFWA*]. It is clear that Austin was an "apprentice" as defined under the *SDFWA* in that an apprenticeship agreement, in which Austin was the named apprentice, was registered with the Apprenticeship Branch.

However, it is the employer's obligation to ensure that an apprenticeship agreement is properly registered (naming the particular employer in question *as the employer*) if that employer wishes to take advantage of the lower prevailing hourly wage rates for apprentices working at "fair wage" sites (see *Wigmar Construction*, BC EST #D269/96, October 1st, 1996, G. Crampton, Chair).

I draw the foregoing conclusion from the following provisions of the *Apprenticeship Act:*

Section 15 — Parties to apprenticeship agreement

> 15. An apprenticeship agreement for registration under this Act may be entered into by the person to be an apprentice and, as his principal, his employer or a person authorized in writing by the minister.

Section 16 — Termination of agreement

> 16.(1) The director of apprenticeship may refuse to register or may cancel registration of an apprenticeship agreement that, in his opinion, is not in the best interests of the apprentice.

(2) A party to an apprenticeship agreement, registered or not, may terminate it without the consent of the other parties.

(3) Where a registered agreement is terminated, the apprentice and the principal shall each notify the director in writing.

(4) With the prior written approval of the director and agreement of the parties, a registered agreement may be assigned to another principal.

Section 17 — Further training

17. Where a registered agreement is terminated or assigned or an agreement is registered after designation of the trade, the director shall determine what further training or experience the apprentice must complete to qualify for a certificate of apprenticeship.

Section 18 — Limit on number of apprentices

18. An employer shall not employ more apprentices than allowed by order of the director.

Thus, under section 15 of the *Apprenticeship Act,* a person may enter into an apprenticeship agreement with a particular designated employer. By reason of section 16, that agreement may be terminated or assigned. However, in the latter event (*i.e.*, assignment), it is the "new" employer's statutory obligation to obtain "prior written approval" of the Director of Apprenticeship [section 16(4)]--*there is no evidence before me that such "prior written approval" was obtained in this case*.

The requirement for "prior written approval" is no mere formality; it is the mechanism which may trigger the Director of Apprenticeship's inquiry as to whether further training (section 17) is required or if the new "assignee employer" is otherwise suitable [see sections 16(1) and 18].

As Austin's apprenticeship agreement was not properly transferred to reflect Sunco's status as the employer of record, I agree with the Director that Austin was entitled to be paid at the lowest wage rate set out in Schedule 3 of the *Skills Development and Fair Wage Regulation* (*i.e.,* the "labourer" wage rate)--see *Gilberstad*, BC EST #D129/97, April 11th, 1997, and the cases cited therein.

One may sympathize with the employer in this case if, as alleged, it received incorrect or incomplete verbal advice from the Apprenticeship Branch regarding the need to transfer Austin's apprenticeship agreement. However, the statutory obligations imposed on all employers regarding transferring apprenticeships was not satisfied in this case.

The fact that the employer may have recieved erroneous advice may give rise to some sort of claim as against the Apprenticeship Branch (I pass absolutely no judgment on the merits of such a claim), however, inasmuch as Sunco failed to meet its statutory obligations vis-à-vis the transfer of Austin's apprenticeship, the Determination must stand.

ORDER

Pursuant to Section 115 of the *Act,* I order that the Determination in this matter, issued on March 4th, 1997 under file number 78003 be confirmed as issued in the amount of $4,584.44 together with whatever further interest that has accrued, pursuant to Section 88 of the *Act,* since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal