

**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 -

The Corporation of Delta

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No:** 1998/693

**DATE OF DECISION:** May 31, 1999

## DECISION

### OVERVIEW

This is an appeal by the Corporation of Delta ("Delta") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated September 18, 1998 by the Director of Employment Standards (the "Director").

The Director found that certain complainants, who were being trained as firefighters at the Justice Institute Fire Academy ("JIFA"), were in fact employees of Delta during their training and were therefore entitled to wages.

It is significant to note that The City of Surrey ("Surrey") was found liable for the payment of wages to trainees at JIFA because the Director determined that the trainees were employees of Surrey. Surrey appealed to this Tribunal and in decision #D411/97, dated September 25, 1997, the Tribunal confirmed the Determination.

Despite this decision further issues arose and the Tribunal agreed to hear further arguments. This resulted in tribunal decision #D077/98, dated March 4, 1998, which found that four (4) individuals should be removed from the Determination but, otherwise, concluded that all other matters raised by Surrey had been dealt with by the Tribunal.

Surrey applied to the Tribunal for a reconsideration of the decision and the reconsideration decision (#D433/98) was given on September 25, 1998. The reconsideration panel of the Tribunal denied the appeal and the original decision (#D411/97) was confirmed.

Subsequent to the original Determination the Director investigated another 32 complaints arising out of the same circumstances. Surrey did not participate in the investigation and the Director's delegate found, on the basis of decisions #D077/98 and #D411/97 that the complainants were also employees. Surrey appealed this Determination and the appeal was again dismissed in a decision #D488/98 dated October 27, 1998.

I have set out the history of the *Surrey* cases because the appellant herein repeats and applies the same arguments in relation to Delta as were made by Surrey.

### ARGUMENT AND ANALYSIS

In the appeal herein Delta sets out four (4) grounds of appeal. The written submission notes that the first three arguments mirror the arguments raised in the *Surrey* case and goes on to state that "*We frankly do not expect the Tribunal to decide in our favour on these arguments but we set them out in order to preserve our right to raise these arguments in Judicial Review proceedings*". Delta then raises a fourth argument which they submit is determinative of the appeal and compels the Tribunal to cancel the Determination.

The submissions made by Delta adopt all arguments raised by the employer in the *Surrey* cases and, in total, there is nothing in the facts or arguments, including the fourth ground of appeal, submitted on this appeal that has not been previously dealt with by this Tribunal in decisions #D411/97, #D077/98, #D488/98, and the reconsideration decision #D433/98.

I have reviewed all of the arguments made in the previous decisions, the extensive submissions made therein, the decisions themselves, the substantial submissions provided in this appeal, and can find no reason to depart from the previous decisions or to distinguish this case from the cases in *Surrey*, at least on the facts that were before the Director's delegate at the time of the investigation.

The appellant has also endeavoured to introduce new facts and evidence on this appeal but in my opinion all of these facts were available to be placed before the Director's delegate and all of the arguments were, or could have been, made at the time of the investigation. I am not prepared to allow for the introduction of such new facts on this appeal: *Tri-West Tractor Ltd*, BCEST No.D268/96.

The stated purposes of the *Act* include the need to provide a fair and *efficient* procedure for resolving disputes. The issues in this case and those in the *Surrey* cases have been thoroughly argued and extensively analyzed and it would be contrary to the intent of the legislation to allow this matter to be extended even further.

For the reasons set out in the previous decisions of the Tribunal, as referred to herein, I find that the Director's delegate has properly set out the facts and applied the earlier decisions in coming to his Determination and I am not satisfied that the appellant has met the onus of persuading me that the Determination is wrong.

Subsequent to the filing of the appeal the appellant made a further submission that the Director had awarded certain employees overtime pay and that this is contrary to section 34(1)(k) of the *Employment Standards Regulation*. Section 34 provides that Part 4 (hours of work and overtime) of the *Act* does not apply to:

- (k) *a fire fighter employed by a paid fire department as defined in the Fire Department Act;*

The appellant submits that if the complainants were employees of Delta while attending JIFA then they are not entitled to overtime.

In my opinion the complainants were employees of Delta and were firefighters in training but would not become firefighters as such until after they had completed their training. They are employees by virtue of their being trained but they are not "firefighters" as contemplated by the *Regulation* until they commenced their firefighting duties. Therefore section 34(1)(k) does not apply to these employees while attending JIFA.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination is confirmed.

**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**