

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 City of Vancouver

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 1998/700

DATE OF DECISION: May 31, 1999

DECISION

OVERVIEW

This is an appeal by the City of Vancouver ("Vancouver") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated October 15, 1998 by the Director of Employment Standards (the "Director").

The Director found that certain complainants, who were being trained as fire fighters at the Justice Institute Fire Academy ("JIFA"), were in fact employees of Vancouver 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.

In addition to the *Surrey* cases the Corporation of Delta was found liable to pay wages to employees training as fire fighters at JIFA. The *Delta* Determination was also appealed and the Tribunal confirmed the Determination (BC EST #D226/99).

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

ARGUMENT AND ANALYSIS

In the appeal herein Vancouver sets out four (4) primary grounds of appeal. These four primary grounds mirror the arguments raised in the *Surrey* and *Delta* cases. In the *Delta* case the appellant stated 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*". In this appeal Vancouver says that "*we advance the same arguments that we made*

in

the Delta submission". The submissions made by Delta adopted all arguments raised by the employer in the *Surrey* cases.

In total, there is nothing in the facts or arguments included in the primary grounds of 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* or *Delta*, at least on the facts that were before the Director's delegate at the time of the investigation.

Where the appellant has endeavoured to introduce new facts and evidence on this appeal, 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* and *Delta* 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 on any of the primary issues.

The appellant made a series of "alternative arguments" to have the Determination varied. These arguments are as follows:

1. the Director erred in her calculation of vacation pay;
2. the Director erred in providing statutory holiday pay on one occasion to one group of complainants when there was no entitlement;
3. the Director incorrectly added interest to one employee who did not file a complaint;
4. Vancouver was not given an opportunity to respond to a special clothing issue;
5. the calculation of the special clothing amounts was incorrect;
6. the interest calculations are unclear.

The essence of Vancouver's argument on the first point is to seek to set-off vacation pay paid, in excess of the minimum, to some complainants for a period after they attended JIFA against amounts that should have been paid while attending JIFA. This is not appropriate. The employees are entitled to the minimum requirement during their training period.

On the second point, it is conceded by counsel for the employees that it is appropriate to reduce the Determination by \$616.00.

On the third point, it is conceded by counsel for the employees that it is appropriate to reduce the Determination by \$323.39.

On the fourth and fifth points I am not satisfied that the appellant has met the onus of persuading me that the Director was in error on this point. There is no agreement by the parties as to the facts and therefore I have no firm basis for overturning the findings of the Director or varying the calculations in any way.

On the sixth point Vancouver says that it does not know if the calculations were correct. Unfortunately, this means that it does not know if they are incorrect. It is not for this Tribunal to investigate in the absence of an assertion that there is an error. The onus is on the appellant to point-out and establish such error otherwise the Director's calculation will stand.

In the *Delta* case the appellant made a further submission, which I am assuming Vancouver has adopted, 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 submitted 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 or Vancouver and were fire fighters in training but would not become fire fighters as such until after they had completed their training. They are employees by virtue of their being trained but they are not "fire fighters" as contemplated by the *Regulation* until they commenced their fire fighting duties. Therefore section 34(1)(k) does not apply to these employees while attending JIFA.

In conclusion I confirm the primary principles of the Determination but vary the amount owing to reflect a reduction of \$939.39 (\$616.00 + \$323.39) together with any resulting interest reduction.

ORDER

I order, under Section 115 of the *Act*, that the Determination is varied to reflect a reduction in the amount owing of \$939.39 together with any interest accrued on this amount. In all other respects the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal