

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

JDL Drywall Ltd.

(“JDL”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/256

DATE OF HEARING: September 13, 1996

DATE OF DECISION: September 17, 1996

DECISION

APPEARANCES

No appearance	by JDL Drywall Ltd.
No appearance	by Larry Abrams
No appearance	by Rick J. Friesen
Forbes John Tweedie	on his own behalf
Murray Superle	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by JDL Drywall Ltd. (“JDL”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 001760 issued by the Director of Employment Standards (the “Director”) on March 26, 1996. The Director determined that JDL and Richard Martens owed each of Larry Abrams (“Abrams”), Rick J. Friesen (“Friesen”) and Forbes John Tweedie (“Tweedie”) the sum of \$2,135.93 representing unpaid wages. The total value of the Determination is \$6,407.79. The Director, in the Determination, also found that JDL and Richard Martens were associated businesses, trades or undertakings within section 95 of the Act.

Richard Martens has not appealed the Determination.

JDL has appealed on the ground that Richard Martens, who was a subcontractor of JDL, was the employer of the employees in question. In its letter filed in support of its appeal, JDL does not specifically challenge the Director’s conclusion that JDL and Richard Martens were associated businesses under section 95, however, I assume that JDL also intended to put that matter in issue. Unfortunately, JDL did not appear at the appeal hearing and thus I can only make inferences about its case based on its letter dated April 12, 1996 which was appended to the Appeal form.

I was advised by the investigating employment standards officer, and by Tweedie, that the principal of JDL, Mr. Derald Sieben, apparently no longer carries on business in British Columbia and has returned to Leduc, Alberta. JDL's letter appended, to its appeal form, shows an address in Leduc, Alberta.

I was advised at the outset of the hearing by the investigating employment standards officer, Mr. Superle, that neither Abrams or Friesen were likely to attend the hearing, and neither did so. I understand that Abrams settled his claim directly with Richard Martens (and confirmed this settlement by way of a letter to the Employment Standards Branch) and that Mr. Martens made a cash payment to Friesen in the amount of \$800 on account of Friesen's claim. At the appeal hearing, Tweedie advised me that he, too, received a cash payment directly from Richard Martens in the sum of \$600.

ISSUES TO BE DECIDED

JDL's appeal raises two issues, namely:

- i) Who was the employer of the employees in question?; and
- ii) In any event, was JDL associated with Richard Martens within the scope of section 95 of the Act?

FACTS AND ANALYSIS

As neither JDL, Abrams or Friesen appeared at the appeal hearing, I am basing my decision on the sworn testimony of Tweedie and on the representations made to me by Mr. Superle on behalf of the Director.

The three complainants all worked as drywallers at a construction project in West Vancouver known as the Caulfeild Middle School project. This project was governed by the provisions of the *Skills Development and Fair Wage Act*. Accordingly, by regulation, drywallers working on the project are entitled to an hourly wage of \$21.58 together with a further \$4.00 per hour representing "benefits" (total hourly compensation = \$25.58).

JDL was a subcontractor at the Caulfeild site; the general contractor was Granwest Constructors Ltd. Derald Sieben, on behalf of JDL, executed a statutory declaration

on October 26, 1995 in which it agreed to abide by all terms and conditions of the “fair wage” law. JDL says that it, in turn, subcontracted with Richard Martens to do drywall work at the site and that it was Martens who hired the complainant employees to work at the site. JDL says that if the complainant employees are owed any wages, they should seek recovery from Martens and not from JDL.

Tweedie testified that he was first contacted by Richard Martens concerning working at the Caulfeild site; Tweedie was previously acquainted with Martens and understood him to be a supervisor with JDL (JDL denies that Martens was a supervisor with JDL). According to Tweedie, there were five drywallers working on the site during the early to latter part of November 1995. During this two-week period Tweedie says that:

- Richard Martens worked as a “foreman” on the site;
- Martens took instructions from Derald Sieben, the principal of JDL;
- Derald Sieben was on the site every day;
- Sieben issued specific instructions to the drywallers as to where and how they should do their work (e.g., “where to tape” ; “how many coats of filler to use”);
- he (Tweedie) understood he was working for JDL;
- JDL supplied all of the equipment that was used on the job including a power drill, scaffolding, and ladders (JDL’s name was painted on these various items);
- he (Tweedie) kept a daily record of his hours (which were the same for all of the complainant employees) and provided a summary to the investigating employment standards officer; and
- the Determination accurately sets out the hours worked by each of the complainant employees.

In light of this uncontradicted evidence, I am satisfied that the complainant employees were, in law, employees of JDL and thus JDL is responsible for the payment of their wages. JDL exercised control over their work and provided the necessary equipment in order for the drywallers to do their work. In other words,

all of the classic indicia of an employment relationship between the complainant employees and JDL are in evidence.

Further, even if the complainant employees could not be characterized as employees of JDL, I am satisfied that the Director was properly entitled to consider Richard Martens and JDL to be associated businesses within section 95 of the Act and, therefore, jointly and severally liable for any unpaid wages.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 001760 be varied and that a new determination be issued which provides as follows:

- i) As to Abrams, his claim is reduced to zero, it having been settled;
- ii) As to Friesen, his claim is adjusted to reflect a cash payment on or about May 1, 1996 in the amount of \$800;
- iii) As to Tweedie, his claim is adjusted to reflect a cash payment on or about May 1, 1996 in the amount of \$600;
- iv) In addition to the adjusted claims set out above, each of Friesen and Tweedie shall be entitled to vacation pay pursuant to section 58(1)(a) of the Act and interest to be calculated by the Director in accordance with section 88 of the Act.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal