BC EST #D275/96

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

D.E. Installations Ltd.

("D.E. Installations" or the "Company")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John McConchie
FILE NO.:	96/238
DATE OF DECISION:	October 30, 1996

DECISION

OVERVIEW

This is an appeal by D.E. Installations Ltd. pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination No. CDET 001500 issued by the Director of the Employment Standards Branch (the "Director") and dated March 13, 1996. The Determination found the Company had contravened the *Skills Development and Fair Wage Act* S.B.C. 1994, c. 22,("*Fair Wages Act*"), and its Regulations in respect of wages owing to the complainant Steve Szucs ("Szucs").

As the Determination indicated, fair wages owing under *Fair Wage Act* are deemed to be wages for the purpose of the *Employment Standards Act*. The collection, review and appeal procedures of the *Employment Standards Act* apply for the purposes of the *Fair Wage Act*. Accordingly, the Director's delegate had the authority to issue a Determination, and did so, ordering that the Company pay the sum of $5,409.88 to the Director for wages owing to the complainant.

The Company has appealed the Determination alleging that the Director erred in fact and law in issuing the Determination. It argues that the complainant was an "apprentice" within the meaning of the *Apprenticeship Act*, and therefore was not entitled to the wages he claimed under the *Fair Wage Act*.

This matter has proceeded on the basis of the materials on file without the need for an oral hearing.

FACTS

The complainant has worked for the Company off and on over the past five or six years. He was rehired on or about April 13, 1995 and began work on May 1, 1995. As the Company's submissions have it, Robert Docherty, the Company's electrical superintendent, hired the complainant under the express understanding that he was to serve as an electrical apprentice. Docherty's conversation with the complainant was witnessed by an employee, Kwok Chim, who provided a statement to this same effect. It was not clear to me from the complainant's written submission whether he disputes the fact of the conversation or only the legal interpretation which the Company places on its. However, as they so often do, the surrounding circumstances are of great assistance on this issue, and I will return to this matter later.

After his hire, the complainant completed a form entitled "Application to Register an Apprentice" in which he identified his occupation as "Electrician (helper)".

The form stipulated that the complainant was to have a 48-month apprenticeship beginning October 1, 1995 and ending on March 30, 1999 with 6 months credit for previous experience. The complainant filed the form with the Apprenticeship Branch.

Between May and October 1995 the complainant was employed by the Company on the L.A. Matheson School project. This was a "Fair Wage" project under the *Fair Wage Act* and its *Regulations*. The Company says that the complainant worked as an apprentice electrician on this project. For his part, the complainant claims pay as a "labourer" but also acknowledges in his submission that he performed "electrician's work not labourer's work" during this period. The reason why the complainant claims pay as a labourer will be discussed shortly.

On October 10, 1995 the company received a letter from the Ministry of Skills, Training and Labour notifying it that:

> "In accordance with the terms of the Apprenticeship Agreement, *your apprentice's* in-school training has been scheduled on the following dates and at the College/Institution: your apprentice Istvan Szucs has been mailed a Confirmation of Attendance notice for the following training: Electrical Work Level: 01 Class: ELW500 Start Time: 0800 Start Date: 1996-05-21 End Date: 1996-07-28 at B.C. Institute of Technology (Burnaby).
>
> "*Your apprentice* must confirm that he/she will be attending this assignment. Failure to do so before 1996-05-06 will result in cancellation of the assignment and completion of the apprenticeship will be delayed as a result. Should the apprentice no longer be working for your company please advise an Apprenticeship Counsellor at the above location immediately." (my emphasis)

In mid-October, 1995 the Company received a standard form of Apprenticeship Agreement from the Apprenticeship Branch and signed it in preparation for its return to the Branch. When the Company took the agreement to the complainant for signature on October 17, 1995, he refused to sign it. He had had conversations with others about his wage rate and had become convinced that the Company did not have a legal right to restrict him to an apprentice's wage so long as he did not sign the apprenticeship agreement. As he recalls it, the Company's superintendent Docherty became quite angry at hearing this news. The complainant was laid off on October 20 1995.

The *Fair Wage Act* prescribes certain minimum wages for various positions. If the complainant was an "apprentice" within the meaning of that Act then the Company was in compliance with that Act. If not, then the Company was underpaying the complainant by a significant measure. The rate

for a Labourer/Helper/on-site clerk or equivalent is $19.90 per hour plus $4.00 per hour in benefits.

The complainant decided to submit a complaint to the Employment Standards Branch rather than sign the apprenticeship agreement. He filed a claim under the *Employment Standards Act* on October 18, 1995 arguing that, while he had been doing electrician's work, he had not signed the apprenticeship agreement and believed that he should be paid at least as a Labourer.

The issue for the Director of Employment Standards was whether the complainant was an "apprentice" within the meaning of the *Fair Wage Act*. That Act defined apprentice to mean "a person who, to receive training, enters into an apprenticeship agreement or a registered apprenticeship agreement as defined in the Apprenticeship Act."

The *Apprenticeship Act* itself provides in identical terms that the term "apprentice" means "a person who, to receive training, enters into an apprenticeship agreement or a registered apprenticeship agreement." Under the *Apprenticeship Act*, an "apprenticeship agreement" means an apprenticeship agreement not registered under the *Act* and a "registered apprenticeship agreement" means an apprenticeship agreement registered by the director of apprenticeship. The *Act* goes on to define "training" as "training for employment that is not excluded by the minister in writing or provided under the University Act or the College and Institute Act."

In the face of this legislation, the Employment Standards Branch officer charged with dealing with the matter wrote to Ian Hodgetts, Supervisor of Trade Certificate Programs to inquire of him whether in his opinion the complainant was an apprentice within the meaning of the *Apprenticeship Act* at the material times. By letter of January 29, 1996 Mr. Hodgetts replied to the officer's letter. He confirmed that the contract of apprenticeship between the complainant and the Company had never been formally registered with the Apprenticeship Branch. His letter reads as follows:

> *"an apprentice is defined in the act as a person who enters into an apprenticeship agreement or a registered apprenticeship agreement.*
>
> *An "apprenticeship agreement" means an agreement NOT registered with the branch, while a "registered agreement" means that it has been formally registered in our office.*
> *Since Mr. Szucs did not actually sign the agreement form, neither of these cases apply and in consequence, he was never an apprentice within the meaning of the act."*

In the Determination which is under appeal in these proceedings, the Officer reviewed the legislation and then reached the following conclusions about the complainant's status:

> *"I take [the letter from the Supervisor of Trade Certificate Programs of the Apprenticeship Branch E-Mail of February 8, 1996] to mean that even if Mr. Szucs was doing the work of an electrician or electrician's helper, unless he has a signed apprenticeship agreement, he is not an apprentice within the meaning of the Apprenticeship Act."*
>
> *"Since the Apprenticeship Branch does not consider Mr. Szucs to be an apprentice within the meaning of the Apprenticeship Act, I determine that he cannot be an apprentice under the Skills Development and Fair Wage Act. Hence, the only pay rate that he can have under the Act for the work performed is that of a labourer."*

As a consequence of this finding, the Officer determined that the Company was in breach of the *Fair Wage Act* and liable to payment of the sum of $5,409.88.

ISSUES TO BE DECIDED

The issue in this appeal is whether the complainant was an "apprentice" within the meaning of the Fair Wage Act while he was in the employment of the Company in 1995.

The Company argues that it hired the complainant expressly to be an apprentice electrician and this is the job which he did while in the Company's service. It says that there is nothing in the *Fair Wage Act* which requires an apprenticeship agreement to be in writing. The Company and the complainant had an enforceable oral contract that the Company would engage the complainant and the complainant would work for the Company as an apprentice electrician on certain stipulated terms. The complainant's refusal to sign the agreement is immaterial to the validity of the oral contract. The Board should have dismissed the complaint.

While he did not deny that he had been hired as an apprentice or that he had completed and filed the Application for Apprenticeship with the Branch, the complainant said in his reply that the Company had told him every year since 1990 that it would send him to school and never had. The implication of the complainant's statement was that the Company's characterization was simply a ruse to avoid making appropriate payments under the *Fair Wage Act*. The complainant argued that while he had not signed the apprenticeship agreement in October when it was tendered by the Company he still intended to sign it when he wanted to "take the course and get my ticket." However, since he had not signed it while employed by the Company, he should be paid at least at the rate of Labourer.

ANALYSIS

The resolution of this appeal involves two questions: (1) did the Company and the complainant have a subsisting oral contract that the complainant was serve the Company in the capacity of apprentice during the material times? (2) if so, was this contract an "apprenticeship agreement' within the meaning of the *Fair Wage Act*?

If these questions are both answered in the affirmative, then the Company has met its obligations under the *Fair Wage Act* and the Determination will be set aside. If not, then the Determination must be confirmed.

Was there a subsisting oral contract? In my view, the evidence as it is disclosed in the submissions and documents accompanying them makes it clear that the Company and complainant had a valid oral contract that the

complainant would be engaged by the Company as an apprentice. I accept Docherty's evidence that he hired the complainant on this express understanding. This is substantiated by the fact that the complainant filed an application to register himself as an apprentice under the *Apprenticeship Act*. In the application he described his work as "electrician (helper)." The complainant also agreed that he performed electrician's work and not labourer's work on the L.A. Matheson project. The Apprenticeship Branch subsequently wrote to the Company to discuss training for "your apprentice" Mr. Szucs. As one document tendered in the proceedings proved, it was still doing so as late as May 1996. On the whole, the evidence makes it clear that the complainant was offered and accepted a position as an apprentice and that both parties performed their obligations under the contract at least through to October 20, 1995.

However, that does not end the matter as the Company was not free to make an agreement with the complainant on wages which were below those prescribed in the *Fair Wage Act*. If, despite their oral agreement, the complainant was not an "apprentice" within the meaning of the *Fair Wage Act*, then the agreement does not assist the Company in this case.

Does an oral agreement satisfy the definition of "apprenticeship agreement" under the *Fair Wage Act*? It is worth reproducing once again the relevant provisions of the *Fair Wage Act*:

> Section 1 (Interpretation)
>
> "apprentice" means "a person who, to receive training, enters into an apprenticeship agreement or a registered apprenticeship agreement"
>
> "apprenticeship agreement" means an apprenticeship agreement not registered under this Act.
>
> "registered apprenticeship agreement" means an apprenticeship agreement registered by the director of apprenticeship."

In my judgement, this definition is satisfied on the facts of this case. The complainant was "a person who, to receive training, enter[ed] into an apprenticeship agreement" – the definition of *apprentice*. His "apprenticeship agreement" was an "apprenticeship agreement not registered under the Act". This is confirmed by Mr. Hodgett's letter of January 29, 1996. There is nothing in the *Fair Wage Act* that stipulates that an apprenticeship agreement must be in writing.

It may be that the Apprenticeship Branch itself imposes formal requirements for registered apprenticeship agreements which would not be met on the facts of this case, but an apprenticeship agreement does not have to be registered in order to receive that legal characterization.

There is nothing unusual about the absence of a requirement that the contract of apprenticeship be in writing. Most employment contracts never take formal written form. The terms of most oral contracts of employment are evidenced – as in this case – by the incidental documentation which follows their formation and is, in essence, the residue of their performance. This includes such things as pay slips, job descriptions, lists of duties, or – as here -- applications to register with governmental bodies in particular capacities. If the legislature wished to preserve a particular employment status – such as that of "apprentice" – to those having written contracts of employment it could have easily done so.

The *Interpretation Act* (R.S.B.C. 1979, c. 206) in section 29 states that:

> the terms "writing", "written", or a term of similar import includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form"

In drafting the *Fair Wage Act*, the Legislature could have used any of these terms to distinguish between oral and written apprenticeship agreements but it did not. It is my conclusion that the agreement which was entered into between the Company and the complainant on or about April 17, 1995 was an "apprenticeship agreement" within the meaning of the *Fair Wage Act*. It follows that the Company was in compliance with the *Act* in treating the complainant as an apprentice.

In my opinion, this interpretation accords with the employment relations common sense of the situation which has been under discussion in this case. The Company and the complainant had a clear agreement as to the complainant's status at the beginning of his employment in April. There was nothing illegal or improper about its terms. The sole allegation was that it had not been *perfected* by being evidenced in a formal written agreement in acceptable form for registration under the *Act*. The Company performed its part of the bargain and, until late October, so did the complainant. Although the complainant sought to argue that the Company was merely using the apprenticeship agreement as a ruse to pay him less than fair wages, there was no evidence of this. In fact, the allegation is refuted by the simple fact that it was the complainant and not the Company who refused to sign the written agreement for registration with the Apprenticeship Branch. The parties had a contract and, when it came to the point of putting signatures to the document which would permit them to register their agreement with the Apprenticeship Branch, the complainant decided that he would not do so. He did not do so because he believed that by not signing he could defeat the agreement in a legal sense.

Our law will not usually serve this kind of purpose. Arguably, it would be a recipe for employment relations mistrust if parties could enter and take the benefit of lawful contracts only to seek later to defeat them on the basis of alleged defects in formality. Law generally prefers substance over form, unless it says so. It did not stipulate otherwise in the language of the *Fair Wages Act*.

The appeal has succeeded. The Company had an apprenticeship agreement with the complainant who was an "apprentice" under the *Fair Wage Act*. The Company was in compliance with the *Act*.

ORDER

Pursuant to Section 115, I order that Determination No. CDET 001500 be cancelled.

John McConchie
Adjudicator
Employment Standards Tribunal

JLM:jel