

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Andrew Irvine
("Irvine")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 97/154

DATE OF H_EARING: June 23, 1997

DATE OF D_ECISION: July 10, 1997

DECISION

APPEARANCES

for the Appellant: in person
for Monteith Pacific Construction Ltd.: Michael Monteith

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Andrew Irvine (“Irvine”) of a Determination of a delegate of the Director of Employment Standards (the “Director”), dated February 20, 1997, in which the delegate concluded Monteith Pacific Construction Ltd. (“Monteith”) had not contravened the *Skills Development and Fair Wage Act* (the “Fair Wage Act”) in respect of Irvine’s employment as it had paid Irvine wages and benefits in excess of that required to be paid under the *Fair Wage Act*. Irvine says the Determination is wrong because the delegate addressed the three occasions he worked on the project one period of work, rather than as three separate terms, as he should have.

ISSUES TO BE DECIDED

The main issue on this appeal is whether Irvine was covered by the *Fair Wage Act* at any time during his employment with Monteith. The secondary issue is whether, if he was covered by the *Fair Wage Act*, he was received the wages and benefits required to be paid by that Act.

FACTS

Irvine was hired by Monteith in mid January, 1996 as a Civil Engineering Technician/Project Manager. During the time Irvine was employed, Monteith was involved on a project to which the *Fair Wage Act* applied, the Ray Watkins Elementary School in Gold River, B.C. (the “project”) and Irvine worked on that project. He was hired at a wage of \$11.00 an hour and worked a 40 hour week in the Kelowna office of Monteith. He performed primarily administrative functions related to the project. After approximately three months his salary was increased to \$12.50 an hour for a forty hour week. His duties and responsibilities, while in the office were administrative in nature, including the preparation of plans for parts of the work to be performed on the project, coordinating the purchase and delivery of materials to the project site, maintaining records of the purchases, dealing with suppliers and contractors and arranging site meetings.

From time to time Irvine was required to attend the site of the project, which he did on three occasions which are at the heart of this appeal.

On the first two occasions Irvine attended the site, all expenses related to traveling to the site was paid. While in Gold River his accommodation was paid. Also he received \$25.00 a day as a “living out allowance”. In January, he was sent to Gold River to relieve the Site Superintendent who was required to be absent for approximately three weeks. In late May and early June, he spent another 7 or 8 days on site attending to some problems with the work done by the framing contractor.

During the first two visits to the site, his duties and responsibilities as Civil Engineering Technician/Project Manager were consistent with the duties and responsibilities described above. He continued to coordinate the purchasing and delivery of construction material and perform the paperwork associated with that task. As well, he performed much of the necessary paperwork associated with the administration of the construction project generally, arranged and attended site meetings and addressed progress problems.

For a period from June 18, 1996 until September 13, 1996 Irvine's job changed. He was asked, and he agreed, to become what was in effect an assistant site superintendent. In that capacity he continued to be involved in coordinating the purchase and delivery of materials coming to the site and the administrative paperwork associated with the project. As well he spent a lot of time working with the carpenters on the site doing the layout for Phase two, work that included laying out the foundation, plumbing conduit, the slab and the exterior drainage from drawings which he had prepared. He had a supervisory responsibility for the proper construction of parts of Phase 2 of the project and performed little, if any, actual "trades" work.

When Irvine worked on the site for the period from June 18, 1996, Monteith paid him an amount of \$700.00 a week which was identified on the cheques paid to Irvine as "expenses". Michael Monteith said this amount was paid to bring Irvine into line with what an "assistant superintendent" on a construction project would receive as compensation without changing Irvine's weekly wage of \$500.00 a week. He says he didn't wish to create any false expectations that would make it difficult to re-adjust Irvine's wage once the project was concluded and Irvine returned to his administrative position in the office.

During this period Monteith also paid the rent for the apartment occupied by Irvine. Irvine says the \$700.00 was paid to cover overtime which he would be required to work but could not claim, to compensate for the use of his truck for company business and as a "living out allowance" (as Monteith had done on the other two occasions). He also suggested some of the \$700.00 expense payment should be allocated to his having to continue to pay for his apartment in Kelowna even though he was not using it, to having to stay in crowded conditions in the apartment in Gold River, to medical benefits promised but not given and to being left for a part of the time to coordinate the project without the input of Mr. Monteith who was away on holiday.

To the extent it becomes necessary to reach a conclusion about the \$700.00 expense payment to Irvine, for the most part, I accept the explanation of Mr. Monteith over the argument of Irvine. There is nothing in the evidence that would cause me to accept that Monteith and Irvine had any discussion, understanding or agreement that the amount would relate to anything other than the job which Irvine had agreed to perform for the period involved. There was no evidence of discussion about medical, truck rental or "living out allowance". Respecting the truck, Monteith agreed to pay for six months of insurance and for all maintenance costs associated with the use of Irvine's truck for the project. If there was to be any consideration of paying Irvine a rental rate for the truck as well, I would have expected to be told of some discussion about that. In fact, both sides agreed there was none. Similarly, there was no evidence either medical coverage or "living out allowance" was discussed in the context of the \$700.00 expense payment. I do accept, however, that some portion of the \$700.00 was to compensate Irvine for any overtime he would be required to put in as the "assistant superintendent". Such a condition would be a normal element of the kind of the job being performed by Irvine. I will accept for the purpose of this appeal Irvine performed, on average, between 6 and 7 hours of overtime a week relating to his job as "assistant superintendent", not the 10 hours suggested by him.

The relevance of this conclusion is limited. There was no claim by Irvine for overtime pay when he filed his original complaint. If his appeal raised a question of whether he was entitled to overtime premiums while he was employed at Monteith, that part of the appeal would be summarily dismissed. As I viewed his position, the reference to overtime was only raised on appeal in the context of attempting to rationalize the \$700.00 expense payment made to him during the June 18 to September 13 period. In that context, and only for the limited purpose for which Irvine advanced the argument, I have accepted Irvine performed, on average, between 6 and 7 hours of overtime in a week. The relevance of the overtime assessment arises in deciding whether the wages paid to Irvine met the requirements of the *Fair Wage Act*. That assessment only arises if it is decided Irvine was covered by the *Fair Wage Act* while he was employed on the project.

ANALYSIS

The *Fair Wage Act* is intended to facilitate skill development in the construction industry and to ensure high quality work standards and fair wages on publicly funded construction projects. This appeal raises an issue relating to the fair wage aspect of the legislation. Section 5 of the *Fair Wage Act* states:

5. All employees of a contractor, sub-contractor or any other person doing or contracting to do the whole or any part of the construction to which this Act applies must be paid fair wages in accordance with the regulations.

Section 4 of the *Fair Wage Act* stipulates the trade qualifications required to be held by all employees of the contractor. The Regulations to the *Fair Wage Act* set out comprehensive schedules of the wages and benefits payable to persons coming within the trades identified in those schedules.

In the *Fair Wage Act*, “construction” is identified as meaning:

the construction, renovation, repair or demolition of property and the alteration or improvement of land that is undertaken by a tendering agency using Provincial money.

When the *Fair Wage Act* is analyzed, what is apparent is that it is intended to regulate those persons who perform work directly involved in and related to the physical act of constructing, renovating, repairing or demolishing property and altering or improving land. The *Fair Wage Act* is not intended to regulate the employment of persons not involved in the performance of work directly related to the physical aspect of “constructing”. The employment of persons in clerical, technical and administrative positions related to the administration of a construction project is not intended to be regulated by the *Fair Wage Act*, even when that work is performed on a construction site. Persons in positions such as stenographer, receptionist, word processing operator, purchasing clerk, draftsman and laboratory or quantities technician would fall into this group. The list is not intended to be exhaustive, but rather demonstrative of clerical, technical and administrative categories that may exist on site during a construction project but which are not related to the “trades” functions which are regulated by the legislation.

Irvine worked in a technical and administrative capacity not directly related to the physical aspect of “constructing”. As such he is not a person whose employment is intended to be regulated by the *Fair Wage Act* and his claim for wages and benefits under the *Fair Wage Act* was properly dismissed. His appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated February 20, 1997, be confirmed.

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David Stevenson
Adjudicator
Employment Standards Tribunal