

**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 -

Andrew Irvine  
("Irvine")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 97/154

**DATE OF HEARING:** June 23, 1997

**DATE OF DECISION:** July 10, 1997

**DATE OF *CORRIGENDUM* :** December 4, 1997

***CORRIGENDUM***

**OVERVIEW**

On July 10, 1997 the decision in this appeal was released. The appeal was dismissed and the Determination of the Director was confirmed. The reasons for dismissing the above Appeal were, in part, based on a conclusion that the appellant, Andrew Irvine, was not covered by the *Skill Development and Fair Wage Act* (the “*Fair Wage Act*”) while employed by Monteith Pacific Construction Ltd. This was not a conclusion the Director had relied on when making the Determination.

The Director takes issue with some comments in the decision relating to the application of the *Fair Wage Act*, although she takes no position with the result. The concern that has been raised is whether the decision purports to exclude the trade classification of “on-site clerk” from the *Fair Wage Act*, even though that trade classification is specifically referenced in Schedule 3 of the *Regulations* to the *Fair Wage Act*. The portion of the decision giving rise to the concern is found at pages 5 and 6 and states:

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 .

I intend to clarify the comments the Director has found offensive.

**ANALYSIS**

Before I address the matter which has warranted the *Corrigendum*, I should review the legal basis upon which I am able to clarify my own decision.

As a general rule, the principle of *functus officio* precludes a judicial decision-maker (which would include an adjudicator of the Employment Standards Tribunal) from reopening a decision once it is made. However, the application of the general rule is less formalistic and more flexible in respect of decisions of administrative tribunals. The relaxation of a strict application of the principle is said to be warranted if it allows the tribunal to complete the function committed to it by the enabling legislation. In *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; 62 D.L.R. (4th) 577, Sopinka, J. Speaking for a majority of the Supreme Court of Canada made the following comments:

As a general rule, once a tribunal has reached a final decision in respect of the matter that is before it in accordance with its enabling statute, the decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if it is authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. Ross Engineering Corp.*, *supra*.

To this extent the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceeding rather than on the rule which was developed with respect to formal judgments of a court whose decision was subject to full appeal. For this reason, I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation.

(Pages 861-62, S.C.R.; 596-97, D.L.R.)

It is important to the administration of the statutory functions of the Tribunal that its decisions be understood and, if their intended application is misconstrued, clarified. The scheme of the Legislature relating to the function of the Tribunal is not advanced by foreclosing the Tribunal from ensuring its decisions have sufficient clarity to be usefully applied in circumstances raising similar issues.

The “on-site clerk” is a recognized occupational classification in the construction industry. The duties and responsibilities of that classification are generally established and understood by those

engaged in the construction industry. My decision does not exclude that occupational classification from the *Fair Wage Act*.

There are types of “clerical, technical and administrative” which are “demonstrative” of those categories of person who, in my opinion, would not be covered by the *Fair Wage Act*. Based on my own understanding of the duties and responsibilities associated with the “on-site clerk” classification, I can say such a person would not occupy one of those categories.

I have no jurisdiction to elaborate on what duties and responsibilities I consider are included in the “on-site clerk” classification. That question was not an issue that was before me in this case and is unnecessary to the conclusion I reached. That question may arise as an issue in a future case, but I have no jurisdiction to comment upon it in this case.

**David Stevenson  
Adjudicator  
Employment Standards Tribunal**

DS/bls