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 -

Wigmar Construction (BC) Ltd.
("Wigmar")

- of a Determination issued by -

The Director of Employment Standards
(The "Director")

ADJUDICATOR: Ralph Sollis

FILE NO: 96/348

DATE OF HEARING: November 8, 13 & 15, 1996

DATE OF DECISION: November 22, 1996

DECISION

APPEARANCES

Bruce B. Jordan	Counsel for the appellant
Gerald H. Hartwig	On behalf of Wigmar Construction (BC) Ltd.
Wayne Cox	Representing the respondent
Tana L. Gilberstad	On her own behalf
Wayne H. Dennis	For the Director of Employment Standards

OVERVIEW

This is an appeal by Wigmar Construction (BC) Ltd. ("Wigmar"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*") against Determination Number CDET 002254 issued by the Director of Employment Standards ("the Director") on May 15, 1996. The Determination concluded that Wigmar 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 Tana Gilberstad ("Gilberstad").

As the Determination indicated, fair wages owing under the 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 purpose of the Fair Wage Act. Accordingly, the Director's delegate had the authority to issue a Determination, and did so, ordering that Wigmar pay the sum of $16,031.59 to the Director for wages owing to the complainant.

Wigmar has appealed the Determination alleging that the Director erred in issuing the Determination and that the complainant was an apprentice within the meaning of the Apprenticeship Act and therefore was not entitled to the wages she claimed under the Fair Wage Act.

ISSUE TO BE DECIDED

The issues in this case are:

1. Was Gilberstad paid the fair wage while employed by Wigmar on the Royal B.C. Museum Project?

2. If not, what should have been the correct rate of pay for the work she performed for Wigmar?

The parties agreed that the following facts were not in dispute.

A. Gilberstad was employed by Wigmar on the Museum Project from May 8, 1995 to February 22, 1996.

B. Gilberstad was paid $14.00 per hour during her full period of employment.

C. Her place of employment was at the Royal B.C. Museum Building Upgrade Project #71981 (Contract 002).

D. Wigmar under the terms of the contract and applicable legislation was subject to the terms and conditions of the Fair Wage Act and Regulations on this project.

FACTS

Over a period of two days I heard the sworn evidence of the following witnesses for the appellant;

Charline Gerald H. Hartwig ("Hartwig"), Colin Stokkeland ("Stokkeland"), Jim Hale ("Hale"), Barber ("Barber"), and Norman R. Quin ("Quin"). The complainant Tana Gilberstad and Shan O'Hara ("O'Hara") were the only witnesses for the respondent.

The position of Wigmar was that Gilberstad was hired by Hartwig after several interviews and was selected over several other candidates because she was prepared to accept this dual position of First Aid Attendant and Apprentice Carpenter. Hartwig testified that he was committed to the policy of the Independent Contractors & Businesses Association ("I.C.B.A.") of hiring and training women in construction trades. Gilberstad had the required first aid certificate and was eager and willing to obtain employment in the construction industry. The agreed salary of $14.00 per hour was in excess of a first term apprentice carpenter rate ("$12.81 per hour") and was to reflect the added responsibility for first aid. Wigmar had in its possession the schedule of fair wages setting out the gross rate of $24.90 per hour for first aid attendants.

Wigmar expected that Gilberstad would spend approximately 15% to 20% of her time on first aid duties and the balance would be in performing assorted duties for Stokkeland, the Construction Superintendent and helping the carpenters at the job site.

At some point Stokkeland gave Gilberstad a list of duties that she was to perform under the heading of "First Aid Attendant." Although there were 21 specific duties, many were of a one time nature and many did not relate to first aid responsibilities. As an example she completed a daily site report which contained information as to the work completed by not only Wigmar's employees but also those of the sub-contractors.

Lastly, Wigmar contends that an Apprenticeship Counsellor visited the job site and spoke to five or six employees who had been hired as apprentice carpenters. This included Gilberstad who was given a contract of apprenticeship form to complete and return to Wigmar's office. The other employees completed their forms and were ultimately indentured as apprentices either to Wigmar or I.C.B.A.

Gilberstad was the only exception who did not sign up as an apprentice. Gilberstad's refusal to become apprenticed led to her termination on February 22, 1996.

Gilberstad's evidence was that she was almost solely employed as a First Aid Attendant. She confirmed that she performed other related duties such as completing the daily site reports but that very little time was spent in working with carpenters or learning the carpentry trade. She denied that there was any conversation with Hartwig or any other person from Wigmar about becoming a carpenter apprentice and that her best recollection of the hiring interview was that she would be working with carpenters. This she understood to mean that she would be providing first aid to carpenters at the museum job site. She stated that as requested she attended the meeting with the Apprenticeship Counsellor but solely for curiosity and that at no time did she have any intentions of becoming an apprentice carpenter.

ANALYSIS

The resolution of this appeal involves several questions: (1) did Wigmar and the complainant have a subsisting oral contract that the complainant was to serve Wigmar in the capacity of First Aid Attendant/apprentice carpenter during the material times? (2) if so, was this contract an "apprenticeship agreement" within the meaning of the Fair Wage Act.

The issue as to what constitutes an "apprenticeship agreement" was ably addressed by adjudicator McConchie in BC EST #D 275/96 decision. The following is quoted from that decision:

> 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 evidences - 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 government 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 the Company was in compliance with the *Act* in treating the complainant as an apprentice.

The evidence as to whether Gilberstad was an apprentice is at variance with that of several witnesses for the company. Both Stokkeland and Quinn testified that Gilberstad performed work at the museum project that was compatible with that of other first term apprentice carpenters.

On the other hand Gilberstad's evidence, was on occasions, evasive and she either refused to answer questions on cross examination or incurred lengthy delays as if she was weighing the implications of each of her answers.

Quinn testified as project site administrator and project co-ordinator that Gilberstad worked from 3 to 4 hours per day on first aid matters and 1½ to 2 hours on administrative functions and the balance in helping on the construction site.

Mr. Jordon on behalf of Wigmar characterized Gilberstad's employment as First Aid Attendant/Apprentice Carpenter. I disagree.

I believe that Gilberstad was a First Aid Attendant, Administrative Clerk and Apprentice Carpenter.

On the basis of Quinn's evidence, who I found to be a credible witness, the complainant averaged 3½ hours per day as First Aid Attendant for which the gross hourly fair wage is $24.90, 1¾ hours per day Administrative functions with a gross hourly fair wage $23.90 and the balance of 2¾ hours per day as apprentice carpenter (50% of the journeyman's rate) $12.81 per hour.

I have, therefore, recalculated the amount owing to Gilberstad as follows:

First Aid Attendant
3½ hours per day or 44% x 1558 = 685 hours x $24.90 = $17,056.50.

Labourer/helper on site clerk or equivalent
1¾ hours per day or 22% x 1558 = 343 hours x $23.90 = 8,197.70.

Apprentice Carpenter
2¾ hours per day or 34% x 1558 = 530 hours at $12.81 = 6,789.30

Total	32,043.50
Wages Paid	23,208.64
Balance	$8,834.86

ORDER

Pursuant to Section 115 of the Act, I order that Determination #CDET 002254 be varied by reducing the amount owing by Wigmar to the complainant to $8,834.86 plus interest in accordance with the Employment Standards Act & Regulations.

Ralph Sollis
Adjudicator
Employment Standards Tribunal