

An appeal

- by -

542617 B.C. Ltd. And 572069 B.C. Ltd.
operating as Sears Indoor Clean Air Services
("SICA")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David Stevenson

FILE No.: 2001/261

DATE OF DECISION: June 26, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by 542617 B.C. Ltd. and 572069 B.C. Ltd. operating as Sears Indoor Clean Air Services (“SICA”) of a Determination that was issued on March 7, 2001 by a delegate of the Director of Employment Standards (the “delegate”). The Determination concluded that SICA had contravened Part 3, Sections 20(1) and (2), Part 4, Section 40(1), Part 5, Section 45 and Part 7, Section 58(1) of the *Act* in respect of the employment of Scott Beare (“Beare”) and ordered SICA to cease contravening and to comply with the *Act* and to pay an amount of \$36,214.96.

The Determination found 542617 B.C. Ltd. and 572069 B.C. Ltd. to be associated companies pursuant to Section 95 of the *Act*. That finding has not been appealed.

A significant portion of the Determination, \$17,929.56 plus interest, was based on a conclusion that SICA had contravened Section 20 of the *Act*.

In its appeal, SICA says the Determination is unfair to the small company and has created a flood of similar complaints. SICA asks that the Determination be varied to assess SICA only for overtime, statutory holiday pay and annual vacation pay based on the minimum wage in the *Act*.

ISSUE

The issue in this appeal is whether SICA has demonstrated any error in the Determination sufficient to justify the Tribunal exercising its authority under Section 115 of the *Act* to vary the Determination.

FACTS

SICA was a franchise operation providing furnace and duct cleaning services. The service provided involved attaching a truck mounted vacuum to the duct work in a house to remove dust and dirt from the heating system.

The Determination contained a list of undisputed facts:

- Beare was an employee of SICA.
- Beare paid for the gasoline used in the employer’s (SICA’s) truck.
- On occasion, Beare worked more than eight hours in a day.
- Beare was required to pay for a helper’s wages.

The Determination concluded that Beare commenced his employment with SICA on or about January 27, 1999 and ended his employment on January 15, 2000. Beare alleged he worked from 10 to 16 hours a day during his employment, but had not kept any record of his hours worked. SICA provided the Director with a computer printout showing the hours worked and wages paid to Beare. The information was contained on “invoice sheets”, which showed the date of a job, some hours, payments and deductions from earnings. The information provided by SICA showed Beare had worked some overtime hours. The Director accepted the information provided by SICA as the best available evidence upon which to base a decision.

Beare had signed a contract of employment upon commencing his employment with SICA. That contract specified that remuneration was based on a flat rate of \$70.00 a house, plus \$2.00 a plate and \$10.00 a grill, installed. The “invoice sheets” totalled the amount Beare earned on each house he cleaned and deducted other amounts to reach a net earning for each house he cleaned. The Director concluded that Beare was paid on a flat rate basis and the rate consisted of \$70.00 a house, \$2.00 a plate and \$10.00 a grill sold and installed. The Director used paragraph (b) of the definition of “regular wage” in Section 1 of the Act and established a Gross Pay and Wage Rate Schedule, which showed Beare’s regular wage over the course of his employment. The Determination noted that the regular wage rate fluctuated in each pay period, because both the wages earned and the hours worked in a pay period varied from period to period.

The Determination rejected an argument from SICA that the flat rate was inclusive of all statutory entitlements under the *Act*. The Determination also rejected an argument that the “invoice sheet” was only a record of the cost of doing a job, and was not a record of deductions from Beare’s wages. On that point, the Determination stated:

. . . the document outlines Beare’s remuneration consistent with the employment agreement and delineates deductions from that remuneration as specified in the contract employment. The fact is, requiring Beare to rent [SICA’s] equipment in order to do the job, pay for his helper’s wages and pay for the cost of screws, plates and grills is a contravention of Section 21 of the *Act*.

It was undisputed that Beare was also required to buy the fuel for the truck he drove. SICA indicated during the investigation that it was unable to provide an accounting of the fuel costs deducted from Beare’s wages. SICA said the fuel receipts were given to Beare for income tax purposes. Beare said that was not so. Beare claimed he spent \$30.00 to \$50.00 a day on fuel. In the absence of any information from SICA on the fuel cost and because the estimate provided by Beare was consistent with information received from other complainants, the Director concluded Beare was required to pay \$40.00 a day in fuel costs on those days that he worked.

In its appeal, SICA says the Director’s conclusion about the cost of fuel is incorrect. SICA contends that the amount found by the Director to be Beare’s fuel costs are high. SICA has provided a letter from an office employee in support of this part of the appeal. There was no additional material or documents provided by SICA on this aspect of the appeal.

ARGUMENT AND ANALYSIS

SICA argues the Director was wrong to have found that the “remuneration” set out in Schedule “B” of the agreement between Beare and SICA, \$70.00 a house, \$2.00 for grills sold and \$10.00 for plates sold, was Beare’s rate of pay. That argument was raised during the investigation and was answered in the Determination in the following passage:

Despite what the contract of employment stipulates, and the evidence provided by the “invoice”, [SICA] contends that the rate of pay should not be based on the flat rates specified in the contract of employment. [SICA] was unable to provide an alternate interpretation of Beare’s pay rate, and has failed to persuade me that the contract is something other than stipulated.

It would be worthwhile to set out the relevant provisions of the contract of employment:

REMUNERATION

- 7. For Duties, as set out above, Company agrees to remunerate Technician as per Schedule “B”, Remuneration Details, attached hereto and forming part of this agreement.

...

EXPENSES

- 13. Technician shall be responsible for all normal expenses incurred in performance of Duties by Technician, including all oil and fuel for vehicles and air duct cleaning equipment, screws, fasteners, plates, grills, tape and such tools, (except as described in paragraph 16), as may be necessary to perform Duties. Technician shall be reimbursed for all other expenses actually and properly incurred by him in connection with Duties, however, Technician must furnish such bills or invoices marked paid as required by Company.

...

SCHEDULE “B”

REMUNERATION DETAILS

DUCT CLEANING PER HOME	\$70.00
PLATES	\$ 2.00 PER PLATE
GRILL	\$10.00 PER GRILL
COMMERCIAL	AS AGREED PER JOB

DOUBLE OR LARGE JOBS AS PER EXTRA TIME FOR THAT DAY
GST (IF APPLICABLE)

RENTAL AND PURCHASES

HOOR RATE FOR TRUCK AND EQUIPMENT LEASE	\$5.00 PER HOUR
PLATES	\$1.00
GRILLS	\$7.00
SCREWS	\$15.00 PER BOX OF 1000
OFFICE SCHEDULING PER APPOINTMENT	\$3.00
DUCT CLEANERS ARE RESPONSIBLE FOR HIRING THEIR OWN HELPERS	

IT IS AGREED THAT THE ABOVE TOTALS INCLUDES THE FOLLOWING:
OVERTIME, ACCUMULATED STATUTORY HOLIDAY PAY, 4% HOLIDAY PAY
AND LIABILITIES INCURRED TO MEET MINIMUM WAGE REQUIREMENTS.

SICA also argues that the “remuneration” indicated in the Schedule was only an amount that identified the total budget for any particular job and the amount against which the actual “job costs” were applied. The Determination also responded to that argument, stating:

[SICA] contends that the “invoice” document is a record of the cost of doing a job and is not a record of deductions from Beare’s wages. I disagree; the document outlines Beare’s remuneration consistent with the employment agreement and delineates deductions from that remuneration as specified in the contract of employment.

The “invoice” documents were provided as part of the material before the Tribunal in this appeal. In my view, the responses found in the Determination were reasonably supported by a reading of the contract of employment and those documents.

While I confess to some sympathy for SICA and its directors, I can find no error in the conclusions and analysis set out in the Determination. Accordingly, there is nothing that would justify varying the Determination.

This is an unfortunate situation, because I am quite certain that the “remuneration” SICA had agreed to pay to Beare would have been different if it understood the requirements and prohibitions contained in the *Act*, specifically the requirement to pay overtime, statutory and annual vacation pay separately from an employee’s regular wage and the prohibitions found in Section 4 and Section 21. Like the Director, however, I can find no alternate basis for establishing the rate of pay for Beare that would not have the effect of nullifying the requirements and prohibitions mentioned and I am not allowed to do that.

In the appeal, SICA also alleges that another delegate, who had initially been involved in the investigation of the complaint, told a representative of SICA that Beare’s complaint would be

dismissed. That allegation is denied by the Director, who says the other delegate had no opportunity to make any decision on the merits of the complaint. Even if the other delegate had made the statement alleged, that cannot have the effect of denying an individual the minimum statutory rights provided by the *Act* (see *Maurer Construction Ltd. operating Maurer Log Homes*, BC EST #D140/00 and *Re Director of Employment Standards (the "Director") and Jannex Enterprises (1980) Limited*, BC EST #RD163/01)

SICA has appealed the calculation of fuel costs and has provided a copy of a Master Card bill for a one month period in late 1999, together with a statement from one of the office staff of SICA. This is information that ought to have been provided to the Director during the investigation. In any event, the information is inadequate for the purpose of considering whether the fuel cost assessment in the Determination was wrong. I am not inclined to review the conclusion of the Director based on incomplete material, supported by additional argument and information that should have been provided during the investigation. That does not foreclose SICA from asking the Director to reassess the decision made. The Director is in the best position to know whether the additional information might affect the basis for the Determination. If there is an obvious mistake and fairness demands an adjustment to the Determination, the Director has that authority under Section 86 of the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 7, 2001 be confirmed in the amount of \$36,214.96, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal