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 -

D.E. Installations Ltd.
("D.E.I.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATORS:	Casey McCabe Norma Edelman Mark Thompson
FILE NO.:	97/252 & 97/512
DATE OF HEARING:	August 13, 1997, October 14 and October 28, 1997
DATE OF DECISION:	January 14, 1998

DECISION

APPEARANCES

Robert Docherty Qwok Chim	))	on behalf of D.E. Installations Ltd.
Catherine Hunt Dave MacKinnon Helénè Beauchesne	)))	on behalf of the Director of Employment Standards
Randy Grabia		on his own behalf
Richard Smith		on his own behalf

OVERVIEW

This is an appeal by D.E. Installations Ltd. ("D.E.I."), under Section 112 of the *Employment Standards Act* (the "*Act*"), against Determinations which were issued on March 24, 1997 and June 20, l997 by a delegate of the Director of Employment Standards. The March 24, l997 Determination imposed a penalty of $500.00 for D.E.I.'s failure to provide records to the Director as required under Section 46 of the *Employment Standards Regulation* (the "*Regulation*"). The June 20, 1997 Determination found that D.E.I. had contravened the *Act* and the *Skills Development and Fair Wage Act* (the "*Fair Wage Act*") and the *Skills Development and Fair Wage Regulation* (the "*Fair Wage Regulation*") and was liable for the sum of $96,207.26 representing unpaid wages and interest owed to 22 employees.

D.E.I. denies that it contravened the *Regulation* and seeks to have the March 24, l997 Determination cancelled. D.E.I. challenges the June 20, 1997 Determination on a number of grounds. D.E.I. specifically appeals the finding that certain employees are owed minimum daily pay under Section 34 of the *Act*. In addition, D.E.I. says that the Director's delegate erred in deeming certain projects as being subject to the *Fair Wage Act*. D.E.I. further says that the Director's delegate erred in his conclusions on the trade status of certain employees. Finally, D.E.I. argues that the calculations of the Director's delegate are incorrect.

The burden is on the Appellant, D.E.I., to show on a balance of probabilities that the Determinations ought to be varied or cancelled.

ISSUES TO BE DECIDED

There are several issues to be decided in this appeal.

- Did D.E.I. contravene Section 46 of the *Regulation* and, thereby, make itself liable to a penalty under Section 28 of the *Regulation*?

- Are James Ablitt, Scott Docherty, Eric Hirvonen, John Lineker, Ervin Robicheau, Daniel Stamatovich, Kevin Torgenson, Dave Hamilton and Len Frinskie owed minimum daily pay?

- Was the Royal Columbian Hospital project subject to the *Fair Wage Act*?

- Was the Victoria General Hospital project subject to the *Fair Wage Act*?

- Is the status of the trades correct for Joe Baker, Ismail Jiwa, Alex Lazar, Alex Rebrov and Allan Rost?

- Are the calculations of the Director's delegate accurate?

THE PENALTY DETERMINATION

The March 24, l997 Determination sets out the following facts and findings to support the imposition of a penalty:

> **Facts**
>
> On June 20, 1996 and again on December 13, 1996, Demands for Employer Records were issued by Dave MacKinnon, Industrial Relations Officer. A copy of these Demands is attached. On March 20, 1997 you were given one final extension of time to noon Friday, March 21, 1997. You failed to produce or deliver the records described in the Demands.
>
> **Finding**
>
> You contravened Section 46 of the ***Employment Standards Regulation*** by failing to produce or deliver the records as and when required. The penalty for this contravention is $500.00 which is imposed under Section 28 of the ***Employment Standards Regulation***.

The Demand for Employer Records which was issued to D.E.I. on June 20, 1996 required disclosure for the period March l994 to June 20, l996 of all records relating to wages, hours of work, and in particular, records of daily hours worked; all records an employer is

required to keep pursuant to Section 28 of the *Act* and Section 46 of the *Regulation*; and all records an employer is required to keep pursuant to Section 9(1) of the *Skills Development and Fair Wage Act*. It required D.E.I. to deliver the records on or before July 4, 1996 with a notice that failure to comply may result in a penalty against D.E.I. The date for delivery of the records was subsequently extended to July 12, 1996.

On July 12, 1996 the Director's delegate advised D.E.I. that he had only received time cards, and on July 27, l997 he sent a facsimile message to D.E.I. indicating this was a final request to deliver complete records no later than 4 p.m. August 23, l996 or he would proceed with a $500.00 penalty.

During September and November of l996 D.E.I. provided additional records to the Director's delegate. As well, during this period, D.E.I. asked the Director's delegate to provide clarification on the period of time allowed to audit or review records.

On December 13, 1996 the Director's delegate issued another Demand for Employer Records to D.E.I. The Demand required disclosure for the period March l994 to August 17, l996 of all records relating to wages, hours of work, and conditions of employment, and all records an employer is required to keep pursuant to Part 3 of the *Act* and Part 8, Section 46 & 47 of the *Regulation*. The Demand contained two attachments, one of which indicated each record required and under the heading of "Other Records", D.E.I. was required to provide photocopies of "Records of persons who were issued T4 or other confirmation relative to earnings" in 1994 and 1995, as well as statutory declarations and updated statutory declarations for fair wage projects worked in March l994 to August l996. The Demand also contained a notice that unless the records were delivered on or before noon on January 27, l997 a $500.00 penalty may result.

D.E.I. responded to this Demand and delivered further payroll records to the Director's delegate on January 27, 1997. Prior to the delivery of the records, D.E.I. wrote to the delegate's Regional Manager on January 24, 1997 to express its view that the Demand requested records to be produced which were in excess of two years. D.E.I. requested a response and a clarification.

On March 6, 1997 the Director's delegate wrote to D.E.I. and delivered by hand a "supplementary request for documents further to demand issued December 13, 1996". This supplementary request required delivery of records including phone numbers of employees and "...record of persons who were, or are entitled to be, issued T4 or other confirmation relative to earnings in l996...on or before noon Friday, March 06, 1996" (later corrected to March 6, l997). The statutory declarations were re-requested to be delivered on or before March 12, 1997.

D.E.I. wrote to the delegate's Regional Manager on March 7, l997 to complain that the supplementary request information was "outside the Branch's mandate" and that without an answer to its letter of January 24, l997 it could not "submit to...requests for supplementary information, which may be outside of your mandate guidelines." On March 7, l997 D.E.I. also wrote the delegate and requested a list of employees that the delegate had requested

phone numbers for in the supplementary request for records. According to D.E.I. the list was necessary because the original daily time records were in the possession of the Director's delegate at that time.

On March 10, l997 the Director's delegate extended the deadline for delivery of the supplementary information to on or before noon March 12, l997. D.E.I. replied to the Director's delegate on March 12, l997 and set out, at length, its analysis of the many pieces of correspondence which had been exchanged and concluded by requesting the Regional Manager to provide the clarification earlier requested "...so that I may provide to you information to which you would be entitled."

On March 20, l997 the Director's delegate wrote to D.E.I. and stated he was advised by his Regional Manager that in D.E.I.'s discussion with the Director of Employment Standards, D.E.I. had given an assurance it would deliver the requested records. On that basis he granted a final extension of time for delivery of copies of l996 T4's with phone numbers of each person entitled to a T4 or other confirmation of earnings for l996 and a copy of all statutory declarations and updated statutory declarations issued in relation to any fair wage project where D.E.I. employees performed work between l994 and l996 to on or before noon March 21, l997.

On March 24, 1997 the Director's delegate sent correspondence by facsimile to D.E.I.'s solicitor to advise that its client "...had not delivered requested information by either the March 7 deadline, the March 12 extension or the March 21 final extension." He also confirmed to D.E.I.'s solicitor that a $500 penalty had been imposed on D.E.I. "...for failure to deliver as requested."

On March 26, l997 D.E.I. wrote to the Director's delegate to advise him that it had not received any correspondence regarding the March 21, l997 final extension. D.E.I. also wrote the Director of Employment Standards to confirm it had previously advised her that it would comply with the delegate's request for information if it was within the Branch's mandate and if the delegate provided the names of the employees.

On April 15, l997 the Director's delegate issued a further Demand for Employer Records to D.E.I. The records sought by the delegate were the same as set out in his March 20, l997 letter plus original cancelled cheques in relation to any wages paid to any employee for work performed between January l995 and August l996. The Demand required D.E.I. to deliver these records to the Director's delegate by noon on April 30, 1997. It also contained a notice that failure to comply may result in the imposition of a $500 penalty.

On **April 30, l997 D.E.I. delivered the above records to the Director's delegate.**

D.E.I. argues in its appeal that the penalty issued against it should be cancelled as it was never notified of the March 21, 1997 extension. D.E.I. states that after the deadline of March 21, 1997 had expired it "...discovered through documentation sent to our solicitors" that a penalty had been imposed.

The Director's delegate states that he faxed the March 20, l997 letter to D.E.I. and its solicitor on March 20, l997. He said he could provide a copy of the fax sheet to confirm the latter, but he has nothing to confirm the fax was sent to or received by D.E.I. on March 20, l997.

Counsel for the Director of Employment Standards argues that nothing turns on the March 20, l997 fax in any event. D.E.I. knew what it was required to produce as early as June 20, l996 and the March 20, l997 fax was a reiteration of the March 6, 1997 and March 10, 1997 requests which were received by D.E.I. Counsel argues that effective June 20, l996 the Director's delegate was in a position to issue a penalty against D.E.I. Some records were provided by D.E.I. but not all were provided until after the penalty and a third Demand were issued which proves that the records were always available and shows that the penalty achieved its purpose. Counsel for the Director contends that D.E.I. failed to deliver records which the Director is entitled to request and the penalty should be upheld by the Tribunal.

D.E.I. argues that it was unable to comply fully with the Demands it did receive because the Director and her delegate and Regional Manager never clarified the appropriate time period for a review and did not provide to D.E.I. a list of employees until after the penalty was issued. D.E.I. claims that if this information had been provided earlier it would have complied with the known deadlines and, in fact, it did comply after it received this information.

In reply, counsel for the Director contends that D.E.I. had enough information to comply prior to the penalty being issued on March 24, l997. She states that the onus is on D.E.I. to advise who its employees are and, further, there is nothing in the *Act* which limits requests for records to two years.

Section 28 of the *Act* requires employers to keep detailed payroll records for each employee.

Section 85(1)(f) of the *Act* permits the Director to require a person to produce or deliver any records for inspection that may be relevant to an investigation.

Section 46 of the *Regulation* states:

> A person who is required under section 85 (1) (f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.

The penalty was imposed by the Director's delegate under authority given by Section 98 of the *Act* and Section 28 of the *Regulation.*

Section 28 of the *Regulation* establishes a penalty of $500.00 for each contravention of Section 46 of the *Regulation.*

In this case the panel has concluded that D.E.I. did not contravene Section 46 of the *Act.*

This conclusion is based solely on the issue of service of the March 20, l997 letter. Accordingly, we find it unnecessary to make any conclusions regarding the circumstances surrounding D.E.I.'s failure to fully comply with requests for records prior to March 20, l997, with one exception and that concerns the issue of whether the Director can request records in excess of a two year period. We agree with the Director that there is no provision in the *Act* which limits the records which the Director (or her delegate) may review prior to making a Determination. Although Section 80 of the *Act* limits the Director's jurisdiction to recover unpaid wages to two years, there in nothing in the *Act* which prohibits her review of records beyond that period which is often necessary in order to properly calculate wages that may or may not be owed to employees.

We turn now to the March 20, l997 letter. While it is clear that D.E.I. received the Demands issued June 20, l996 and December 13, l996, and the supplementary request of March 6, l997 with a follow-up letter of March 10, l997 indicating a deadline of March 12, l997 to comply, there is no evidence to confirm that D.E.I. was sent or received the March 20, l997 letter with its deadline of March 21, l997 for compliance. Although D.E.I.'s solicitor may have been sent a copy of the March 20, l997 (and in a letter dated August 18, l997 this is expressly denied by the solicitor) we are not satisfied the solicitor was representing D.E.I. on the matters which are before the Tribunal. Correspondence submitted by counsel for the Director on this point indicates only that the solicitor was representing D.E.I. on a lawsuit between D.E.I. and D.G.S. Construction Ltd. For these reasons it is not established that D.E.I. was properly served the March 20,l997 letter.

Section 46 of the *Act* provides that a penalty can be issued for failure to deliver records "as and when required". D.E.I. had until March 21, l997 to deliver certain records. It did not receive the notice, however, and therefore it could not comply "as and when required".

We do not agree with counsel for the Director that nothing turns on the fact that D.E.I. did not receive the March 20, l997 letter in time to comply. In our opinion, everything turns on the deadline for compliance. The Tribunal takes a strict view that fair procedures must be followed when serving Determinations and Demands for Employer Records. A penalty can only be issued if a employer fails to deliver records within a specific time frame. Although D.E.I. was placed on notice effective June 20, l996 regarding disclosure of records and that a penalty could be imposed for failure to comply, the penalty could not be imposed until after the deadline for compliance had expired. The last deadline given by the delegate was March 21, l997. This is the deadline which caused the penalty and not the several previous deadlines which were not complied with fully by D.E.I. Insofar as D.E.I. did not receive the March 20, l997 letter until after the deadline for delivery of records had expired, and therefore could not comply, the penalty was improperly imposed by the Director's delegate at that time.

MINIMUM DAILY PAY

The June 20, 1997 Determination found that D.E.I. owed certain employees minimum daily pay under Section 34 of the *Act* which states that where an employee starts work she/he is entitled to a minimum of 4 hours pay unless the work is suspended for a reason completely beyond the control of the employer.

D.E.I. disputes that the following 9 employees are entitled to minimum daily pay: James Ablitt, Scott Docherty, Eric Hirvonen, John Lineker, Ervin Robicheau, Daniel Stamatovich, Kevin Torgenson, Dave Hamilton and Len Frinskie.

The Director's delegate testified that he concluded these employees were owed minimum daily pay from a perusal of D.E.I.'s records which showed they had worked less than 4 hours on certain days. He stated that he did not contact any of these employees to determine the reason for working less than 4 hours on the mentioned days but was satisfied from an examination of the records that there were days that D.E.I. failed to pay the minimum daily hour requirement.

D.E.I. did not call any of the affected individuals as witnesses but rather relied on an undated letter signed by Mike Sargent ("Sargent") who at the relevant times was a foreman at D.E.I. Sargent stated in his letter that he had personal knowledge that no employee was ever called into work for less than 4 hours. He further stated " . . . any time sheet that shows an employee working less than 4 hours is the result of the employee leaving work as a result of some personal issues." He also stated in his letter that at no time was he aware of any employee being sent home by D.E.I. Sargent was not called as a witness.

D.E.I. argues that if an employee reports for work and asks to leave for personal reasons such as sickness or an appointment then the employer should not be liable for the 4 hour minimum daily pay. D.E.I. argues that instances such as sickness or leaving work to keep another appointment are reasons completely beyond the employer's control. D.E.I. relies on Sargent's letter to support its contention that on any occasion where employees are shown as working less than 4 hours on any given day it was due to the employees leaving work on their own accord and that at no time has it required an employee to report for less than 4 hours work.

We are not satisfied that D.E.I. has discharged its onus on this issue. Despite the hearsay nature of Sargent's undated letter D.E.I. has led no specific evidence with regard to any of the days in which the Director's delegate found that an employee had not been paid the daily minimum. In *Johnny's Other Kitchen Ltd.* (BC EST #D279/97) the Tribunal determined that there was an obligation on an employer to provide evidence that an employee had asked to leave early. In *Hall Pontiac Buick Ltd.* (BC EST #D073/96) the Tribunal found that despite the fact that an employee left work early or was suspended for the day the employer was required to pay the daily minimum because all of the circumstances which resulted in the employee working less than 4 hours were within the employer's control. The only reason that relieves an employer from this requirement is a suspension of work for a reason that is completely beyond the employer's control. D.E.I.

has not presented any evidence to show that the affected employees received less than 4 hours pay on certain days for a reason beyond the employer's control. We adopt the reasoning in the above decisions and dismiss D.E.I.'s appeal on this point.

THE ROYAL COLUMBIAN HOSPITAL AND VICTORIA GENERAL HOSPITAL PROJECTS

D.E.I. appeals the finding of the Director's delegate that two projects, one located at the Royal Columbian Hospital in New Westminster, British Columbia and the other at the Victoria General Hospital in Victoria, British Columbia were jobs within the scope of the *Fair Wage Act*. The projects were referred to during the course of the hearing as "MRI" projects and we will refer to these projects by that name in this decision.

ROYAL COLUMBIAN HOSPITAL MRI PROJECT

Counsel for the Director called as a witness Edward Dodson ("Dodson") who is a Registered Architect in the Province of British Columbia and was the presiding architect at the Royal Columbian Hospital MRI Project. Dodson testified that he was familiar with the tendering procedure in the project and that the project was highly technical in nature. He testified that the room in which the equipment was to be located must be isolated and vibration free. Due to the complexity of the job contractors for the project were pre-qualified. The project was advertised and three contractors with experience in this type of construction were selected. These contractors were provided with plans and specifications and were invited to submit a bid. The successful bidder was Niki Construction Ltd. ("Niki") with a contract price of $331,649.00 which included an increase of some $9,100.00 due to the supply of additional work. As part of the tender documents the contractors are supplied with plans and a specification book. The specification book is important because it sets out, amongst other things, certain requirements regarding labour and products. Dodson noted that Niki's bid did not include the cost of the magnetic resonance machinery which was approximately 1.5 million dollars.

In a letter to Niki dated April 3, 1996 Dodson confirmed that Niki had received the set of plans and the specification book. It should be noted that included in these documents was a section devoted to the electrical specifications which were compiled by Reid Crowther and Partners. Dodson referred to these electrical specifications and in particular to Section 1.0 General and subsection 1.1.1 which states:

> The General Conditions, Supplementary Conditions and Division 1 are a part of this specification and shall apply to this Division.

Dodson further referred to Section 1.2 Quality Assurances .1 Codes, Rules, Permits & Fees .1 of the document which states:

> Comply with all laws, ordinances, rules, regulations, codes and orders of all authorities having jurisdiction relating to this work.

Dodson testified that the general requirements in the electrical specifications were tied to the general requirements of the contract and required the subcontractor to comply with all applicable laws such as the Electrical Code of British Columbia, the Building Code of British Columbia and the Labour Acts that are the law of the day.

It is notable that under the Supplementary General Conditions to the Royal Columbian Contract, Section 27.5 reads:

> The Contractor and his Subcontractors shall pay promptly fair wages and maintain fair working conditions as required by Bill 37 – Skill Development and Fair Wage Act.

Dodson referred to this section of the general conditions in his testimony. He testified that he assumed the project was a fair wage job and he administered the project as though it were at all times a fair wage job. He further testified that it was his interpretation of the construction documents that the fair wage policy would apply to the job as well as the *Fair Wage Act*. In a nutshell that portion of the fair wage policy upon which Dodson was cross-examined was the policy that requires all jobs tendered in excess of $250,000.00 to fall within the scope of the *Fair Wage Act*. Dodson further testified that at no time did he feel that the exemptions as set out in Section 3.2 of the *Fair Wage Act* would apply to the Royal Columbian MRI Project. Dodson emphasized that not only was Niki's portion of the job some $331,000.00 but the machine itself was worth approximately 1.5 million dollars which brought the job to a total cost of just under 2.0 million dollars.

Dodson was questioned in cross-examination as to whether he had filed a Project Report Form for the project. Dodson answered that he had not and that such Project Report Forms are usually filed by the owner. He acknowledged that there was a requirement under Section 3.4 of the Supplementary General Conditions which would require that a Project Report Form be submitted to the Policy and Legislation Branch of the Ministry of Labour and Consumer Services. Dodson testified that he did not file a Project Report Form and that as an architect he never has and doesn't expect that he ever will. There was an agreement between counsel for the Director's delegate and D.E.I. that the Project Report Form for the Royal Columbian Hospital MRI project had not been filed but that a draft of the Project Report Form had been completed.

D.E.I. argues that the tendering agency, i.e. Dodson as presiding architect and Royal Columbian Hospital the owner, at no point confirmed during the tendering process that the project was a fair wage job. Therefore, D.E.I. argues that it bid the job as though it were not a fair wage job the consequence of which was that it estimated a lower wage cost than it would have had it been informed that the job was a fair wage job. D.E.I. argues that Dodson had informed Niki that he (Dodson) was surprised that the price came in excess of $250,000.00 and that the original construction project cost estimate referred to $245,376.00. Dodson denied in his testimony that he had told Niki that he was surprised that the price exceeded $250,000.00 or that he had ever proceeded on an assumption other than the job was a fair wage job. We accept Dodson's testimony on this point.

D.E.I. further argues that the tender documents do not confirm that the project is a fair wage site. We disagree. As indicated above, Section 27.5 of the Supplementary General Conditions clearly states that the contractor and subcontractors shall pay fair wages and maintain fair working conditions as required by the *Fair Wage Act.* A fair reading of the tender documents would lead to no other conclusion but that this project would be subject to the requirements of the *Fair Wage Act*.

D.E.I. argues that the tendering agency did not submit a Project Report Form and by not doing so D.E.I. is relieved of an obligation to pay wages pursuant to the *Fair Wage Act* because the submission of such a report form is required under the tender documents. We disagree. We view the failure to submit a Project Report Form as a technical breach of the specifications which does not affect the requirements of the *Fair Wage Act* or the policy surrounding the *Fair Wage Act*. We view the Royal Columbian MRI Project as a fair wage job.

Finally, D.E.I. notes that where a tender document states that if a project is estimated to be above the $250,000.00 level, which labels it as a fair wage job, and the successful bid is under $250,000.00, the fair wage rates would still prevail. D.E.I. argues that the converse of this must be true, that is, where the job is not declared by the tendering agency to be a fair wage job and the bids come in at a price in excess of $250,000.00 those subcontractors who have bid the job believing that it was not a fair wage job should be entitled to maintain the wage scale upon which their bid was predicated. For the reasons stated above this argument must fail. We accept Dodson's evidence that the Royal Columbian Hospital MRI project was considered from the very beginning to be a project which fell within the scope of the *Fair Wage Act*. The onus rests on the contractors and subcontractors on a project to read and understand the specifications of the job.

VICTORIA GENERAL HOSPITAL MRI PROJECT

D.E.I. argues that the Director's determination that the Victoria General Hospital MRI Project is a fair wage site is incorrect. D.E.I. argues that the purchase order/requisition issued by the Victoria Hospital Society to General Electric Medical Systems ("General Electric") does not form a contract for construction that would fall under the terms of the *Fair Wage Act*.

D.E.I. argues that no contract with terms or conditions exists between the Victoria Hospital Society or any contractor for this site. It further argues that no contract with any terms exists between D.E.I. and General Electric or its subcontractor Niki. D.E.I. argues that there exists no contracts with terms and conditions as contemplated in the regulations between the Victoria Hospital Society and General Electric other than the purchase order/requisition and certain letters dated April 25, 1995, July 4, 1995 and the acceptance letter dated November 14, 1995. D.E.I. further argues that it is not tied to any contract with the hospital and since it performed $76,000.00 worth of work for Niki, a subcontractor, and since that amount is less than $250,000.00 prescribed in the *Fair Wage Regulations*,

the work performed at the Victoria General Hospital MRI Project is not work at a fair wage job site. In essence D.E.I. argues that the Victoria General Hospital MRI Project is covered under Section 2(1)(e) of the *Fair Wage Regulation* which exempts deliveries of materials to a construction site other than deliveries of asphalt mix and processed aggregate products; or, alternatively, the project is exempt under Section 2(1)(f) of the *Fair Wage Regulation* in that the materials being delivered were portable prefabricated buildings or fixtures constructed off site; or, alternatively, that the project falls under Section 2(1)(g) of the *Fair Wage Regulation* as a construction project that the tendering agency estimated will require the expenditure of less than $250,000.00 of Provincial money.

The Greater Victoria Hospital Society issued a purchase order to General Electric on September 29, 1995 in the amount of $2,149,542.00. General Electric's price included the supply of the magnetic resonance imaging unit and detailed the remainder of the project as a "turn key project" to develop the area proposed for MRI operations at the Victoria General Hospital for the total amount of: $549,395.00 + $38,457.65 PST + $38,457.65 GST for a total of $626,310.30. Furthermore, design and engineering fees of $88,000.00 + $6,160.00 GST = $94,160.00 were added. The total purchase order amount was $720,470.30.

We view the purchase order between Victoria General Hospital Society and General Electric as the contract for the work. The Victoria General Hospital Society is an entity that is funded by Provincial monies. Since the work to be completed by General Electric exceeds $250,000.00 we find that the Victoria General Hospital MRI Project is a fair wage site as contemplated by the *Fair Wage Act*. The fact that a subcontractor such as D.E.I. or a contractor with whom it has a subcontract such as Niki are not in a direct contractual relationship with the Victoria General Hospital Society does not support an argument that the cost of the individual subcontracts i.e. D.E.I.'s $76,000.00 contract with Niki, is the criteria upon which to judge whether the *Fair Wage Act* applies. We find that the turn key project purchase order price of $549,395.00 to be determinative. The decisive factor is the overall cost of the work not the price of the respective subcontracts. If the price of the respective subcontracts were determinative it would be too easy to circumvent the intent and purpose of the *Fair Wage Act* by simply breaking down projects into as many contracts and subcontracts as would be required to ensure that none of those contractors performed work that exceeded $250,000.00 in value.

We further find that there is no positive duty on an owner or an architect to inform contractors whether a job is a fair wage job or not. Rather, we find that the onus is upon the contractors and subcontractors to determine that by inquiry. We find that the failure to tender the project does not exclude this project from the *Fair Wage Act*. We repeat that the overall cost of the project exceeded $250,000.00 and therefore, by virtue of policy and Section 2(1)(g) the *Fair Wage Regulation* the Victoria General Hospital MRI Project was a fair wage job.

D.E.I. argues that since a Project Report form was not filed the Victoria General Hospital MRI Project is not subject to the *Fair Wage Act*. We do not accept that the failure to file a Project Report Form as determinative of any issue regarding qualification or compliance of a project with the *Fair Wage Act*. It would simply be too easy for an owner or a tendering agency to thwart the purpose and intent of the Act by failing to file such a form. We do not accept that the failure to file the Project Report Form meant, in the eyes of the tendering agency, that the job was not a fair wage project. Public monies were involved and the total cost of the job exceeded $250,000.00. For these reasons we find that the Victoria General Hospital MRI Project was a fair wage job. The fact that D.E.I.'s portion of that project was only $76,000.00 does not exempt it from this finding. Neither does the fact that D.E.I. does not have a contract with General Electric or the Victoria General Hospital save D.E.I. from its obligations with regard to this project under the *Fair Wage Act*. Subcontractors bid at their peril if they do not ascertain the scope and specifications of their work beforehand.

D.E.I. also argues that the Director's delegate exceeded his jurisdiction when he made determinations regarding the Royal Columbian Hospital MRI Project and the Victoria General Hospital Society MRI Project under the *Fair Wage Act*. In particular D.E.I. argues that because there were no complaints from individuals that the Director's delegate did not have the jurisdiction to investigate and make the determinations that he did. We disagree. Section 8 of the *Fair Wage Act* reads:

> "Fair wages owing under this Act are deemed to be wages for the purpose of the *Employment Standards Act*, and the collection, complaint and appeal procedures of that Act apply for the purpose of this *Act*."

Furthermore, Section 76(3) of the *Act* allows the Director to conduct an investigation without receiving a complaint to ensue compliance with that Act. That Section reads:

> 76(3) Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.

We find that the aforementioned legislation allows for investigation and determination by the Director's delegate. For this reason we dismiss this aspect of the argument by D.E.I.

TRADES STATUS

The June 20, 1997 Determination examined the trade status of D.E.I.'s labour force employed at various sites. The Director's delegate relied on information provided by the Apprenticeship Branch of the Ministry of Labour, D.E.I.'s payroll records, statutory declarations filed by D.E.I. pursuant to the *Fair Wage Act* and information supplied by complainants. The Determination reached conclusions on the status of 22 persons employed by D.E.I. After discussions with the Director's delegate subsequent to the Determination, D.E.I. appealed the Determination in respect of five former employees: Joe

Baker ("Baker"), Ismail Jiwa ("Jiwa"), Alex Lazar ("Lazar"), Alex Rebrov ("Rebrov") and Allan Rost ("Rost"). The Director's delegate examined a total of seven statutory declarations filed in connection with the L. A. Matheson Secondary School site ("LAM") between February 16, 1995 and March 25, 1996. In addition, the Director's delegate wrote to D.E.I. on November 1, 1996 with a draft list of employees who might be included in a determination. D.E.I. replied by letter of November 7, 1996 with an attachment listing a number of individuals as journeymen, apprentices or labourers.

The statutory declarations contained the name, trade classification, certificate or apprenticeship number and the hourly compensation. The compensation was stated at the level required by the *Fair Wage Regulation*. The text of the Declaration included a statement that the exhibit attached contained "a complete and accurate list of all persons employed, or to be employed, by the Subcontractor to perform work on the Project and the particulars of their qualifications and compensation."

The fact basis for D.E.I.'s appeal differed slightly for each individual. The Determination classified Baker as a labourer from August through October 1995, and an apprentice from October 1995 through August 1996. D.E.I. had paid Baker at the apprentice rate throughout his employment. In addition, D.E.I. asserted that the Apprenticeship Branch erred by failing to provide Baker for time worked in the trade prior to October 1, 1995, and it presented a statement from the Apprenticeship Branch to that effect dated October 21, 1997. It further argued that an employer has the right to determine credit for time worked by an apprentice and pointed to an earlier decision of the Tribunal, *D.E. Installations Ltd.*, BC EST #D275/96. D.E.I. acknowledged that Baker was entitled to unpaid wages and presented calculations based on his revised apprentice status. It further argued that amendments to the *Fair Wage Act* effective on July 30, 1997 had supported its position.

Counsel for the Director pointed out that Baker had not signed the Apprenticeship Branch form. Moreover, Baker was not included in any of D.E.I.'s statutory declaration, although payroll records revealed that he had worked for D.E.I. almost one year. Counsel for the Director presented a letter to the Director's delegate from the Assistant Director of Apprenticeship in the Apprenticeship Branch stating that an apprenticeship contract is considered to be "registered" when the agreement is signed by a representative of the Branch or marked received by the Branch in its offices, and by the apprentice and the employer. The Determination based Baker's progression through the apprenticeship on the date of his application, not his registration, so that the Determination produced a lower rate of pay than the Apprenticeship Branch would have stated.

In Baker's case, counsel for the Director stated she believed that he had left the province and the trade and pointed out that the Determination favoured D.E.I. with respect to Baker. In any case, Baker was unavailable to give evidence, and no statement from him was presented to the Tribunal. After the conclusion of the hearing, D.E.I. requested that a decision on Baker's status be suspended until he could return to the province, at Baker's convenience.

The Determination classified Jiwa as a journeyman electrician and ordered that he be paid at the rate specified in the *Fair Wage Regulation*. The Determination also found that the Apprenticeship Branch had no record of a trade qualification for Jiwa and that Jiwa had not been included in any of D.E.I.'s statutory declarations although he worked on the LAM site in June 1995 and from August 1995 to February 1996. The Determination ordered that Jiwa be paid $23.74 per hour for the period of his employment at LAM, i.e., the minimum rate specified for a journeyman electrician in the *Fair Wage Regulation*.

D.E.I. argued that Jiwa had claimed to be a journeyman before he ever worked on the LAM contract and had never given management any reason to doubt his status. In addition, the attachment to D.E.I.'s letter of November 7, 1996 listed Jiwa as a journeyman. At the hearing, D.E.I. argued that Jiwa should be classified as a labourer, since he was not recognized as a journeyman or an apprentice. Counsel for the Director argued that D.E.I. had held out Jiwa as a journeyman electrician and should be required to pay him at the rate specified in the *Fair Wage Regulation* for that position.

Much the same argument applied to Lazar. The Determination found that he was not registered as a journeyman electrician, but had been put forward as a qualified electrician in D.E.I.'s statutory declaration of July 31, 1995 and October 3, 1995. D.E.I. argued that Lazar had presented himself as a qualified journeyman when he was hired. During his employment, Lazar had not given management any reason to doubt his qualification. However, since the *Fair Wage Regulation* recognized only three categories of employees, Lazar should be classified as a labourer and paid accordingly. Counsel for the Director argued that D.E.I. should be required to pay Lazar the journeyman rate, since it classified him in that position.

D.E.I. stated in its statutory declarations of October 3, 1995 and March 25, 1996 as well as in the November 7, 1996 letter that Rost was a journeyman electrician. The Determination found no record that he possessed such a trade qualification and ordered that he be paid the rate for an electrician contained in the *Fair Wage Regulation*. D.E.I. argued that Rost had represented himself as a qualified electrician and been employed in that capacity prior to working on the LAM project. At no time did he give management any reason to doubt his qualifications. However, D.E.I. argued that Rost should be classified as a labourer for purposes of the *Fair Wage Act*. Counsel for the Director argued that D.E.I. had held Rost out to be a journeyman electrician and he should receive the rate of pay required for that position by the *Fair Wage Regulation*.

The Determination found that D.E.I. stated that Rebrov was both a labourer and a journeyman electrician in its letter of November 7, 1996. D.E.I. did not list him as an employee on the LAM project in any of its statutory declarations. The Determination found his trade qualification in the Apprenticeship Branch, but did not specify an effective date. It ordered that he be paid as a journeyman for the period of his employment on the LAM project. D.E.I. presented evidence at the hearing that Rebrov had been placed with D.E.I. by the United Chinese Community Enrichment Services Society (SUCCESS) as a trainee for the period January 23 to February 16 and February 26 to March 22, 1996. According to Mr. Docherty, Rebrov had been accepted as a trainee or apprentice until he could pass

the provincial examination. Rebrov had worked as an electrician in Europe, but needed to demonstrate that he had the set of skills required for journeyman status in this province. He did pass the examination in July 1996 and became a journeyman.

D.E.I. argued that Rebrov was an "unregistered apprentice" from April 19, 1996 to July 22, 1996 and was entitled to be paid at the apprentice rate until he became a journeyman. Moreover, D.E.I. made a loan to Rebrov, and that amount should be deducted from any wages owed to him.

The provisions of the *Fair Wage Act* have been the subject a number of cases before this Tribunal, and both D.E.I. and counsel for the Director based their arguments on the prior decisions. None of the previous decisions was applicable to all of the facts of this case however, in particular the use of statutory declarations by the Employer. Section 6(1) of the *Fair Wage Act* provides for statutory declarations as follows:

> A contractor, subcontractor or any other person doing or contracting to do the whole or any part of the construction to which this Act applies must provide a statutory declaration to the tendering agency
> a) recognizing their obligations to comply with this Act, and
> b) before the first progress payment is made under the contract, specifying the following for each employee:
> i) the employee's name and trade in which the employee is working, as the trade is described in the regulations;
> ii) the employee's certificate or apprenticeship number and, for apprentices, the apprenticeship level;
> iii) the wage rate and benefit paid per hour;
> iv) any other information required by the regulations.

In addition, Section 9(1) of the *Fair Wage Act* imposes requirements on employers to keep records as follows:

> Employers must keep the following for each employee for a period of one year after the completion of a construction project:
>
> a) a record of the employee's trade;
> b) a copy of the employee's certificate of apprenticeship, certificate of qualification or apprenticeship agreement, where applicable, and, for an apprentice, a record of the apprenticeship level;
> c) a record of the wages and benefits paid to the employee;
> d) a record of the benefits earned by the employee for each benefit allowed by the regulations;
> e) a record of the wages and benefits being received by the employee;
> f) any other information required by the regulations.

Section 4(1) of the *Fair Wage Act* requires all employees of a contractor or subcontractor to be registered under the Apprenticeship Act, hold a certificate of apprenticeship or a

certificate of qualification. Bill 43, enacted on July 30, 1997, amended some provisions of the *Fair Wage Act*, but had not been proclaimed on the date of the second hearing in this case, so it had no effect on these proceedings. Section 5 of the *Fair Wage Act* requires that all employees on a fair wage site be paid at the rates contained in the *Regulations* to the *Act*.

In this case, D.E.I. filed a statutory declaration in respect of the LAM site stating that Lazar and Rost were journeymen electricians. By its own admission, D.E.I. did not maintain the records of Lazar's and Rost's qualifications as required by Section 9(1) of the *Fair Wage Act*, since they were not certified journeymen. In addition, as late as November 6, 1996, D.E.I. informed the Director's delegate that these two individuals were journeymen. In its appeal, D.E.I. sought to reduce their status to labourers on the grounds that they lack the proper qualifications. It presented no evidence as to the work they performed to justify this retroactive reclassification. See *Wigmar Construction (B.C.) Ltd.* BC EST #D068/96. In fact, Mr. Docherty stated that their work was satisfactory as journeymen.

D.E.I. paid Baker at the apprentice rate from August 1995 to August 1996, although he was not registered as an apprentice until October 1995. It sought to have the terms of Baker's apprenticeship altered in October 1997 by agreement between itself and the Apprenticeship Branch. The Director's delegate and D.E.I. agreed that Baker should have been paid at the apprentice rate from October 1995 through August 1996. We accept the Director's argument that DE.I. cannot unilaterally change the terms of Baker's apprenticeship more than a year after the termination of his employment on the LAM site, even with the agreement of the Apprenticeship Branch. These proceedings were exceedingly protracted, and all parties had ample opportunity to present written statements or oral evidence. We find no justification for further delay until Baker is available to testify regarding his circumstances.

Both the Director and D.E.I. acknowledged that Rebrov became a journeyman July, 1996, so there is no dispute about his rate of pay after that date. The disagreement covers the period of January 1996 to July 1996. Based on the evidence presented to the Tribunal, it was clear that Rebrov was not employed as a journeyman at least for the period of January 23 to February 16 and February 26 to March 22, 1996. Section 1 of the *Fair Wage Act* defines an "apprentice" as a person who "to receive training, enters into an apprenticeship agreement or a registered apprenticeship agreement as defined in the *Apprenticeship Act*." Clearly, there was no registered apprenticeship agreement in this case. Nor did D.E.I. comply with the requirements of Sections 4, 6 and 9 of the *Fair Wage Act.* As late as November 7, 1996, D.E.I. listed Rebrov as both a labourer and an electrician. On the balance of probabilities, we conclude that Rebrov was an apprentice from the date of his employment in January 1996 until his registration as an electrician in July 1996, by virtue of an agreement with D.E.I. See *Tana L. Gilberstad*, BC EST #D129/97. No evidence was presented of a written authorization from Rebrov to withhold any amount from wages owed to him, so his wages should be calculated in the normal fashion.

D.E.I. acknowledged that it had employed Jiwa as an electrician, although it never listed him on a statutory declaration. At the hearing, D.E.I. sought to reclassify Jiwa retroactively as a labourer. It presented no evidence of the work he performed. The Determination found that Jiwa should be classified as a journeyman, and counsel for the Director pointed out that Jiwa was listed as a journeyman in D.E.I.'s letter of November 7, 1996. Attachments to the Determination found that D.E.I. paid Jiwa the same rate as Lazar from September 1, 1995 through August 16, 1996, although Jiwa received slightly less than Lazar from April 28, 1995 until August 18, 1995, in those pay periods in which Jiwa worked on the LAM site. On the balance of probabilities, we find that Jiwa was employed as a journeyman on the site and should be compensated accordingly.

CALCULATIONS

We have not heard D.E.I.'s appeal with respect to the calculation of its total liability. In the event the parties cannot resolve that matter among themselves, this issue will be set down for a hearing in due course. In order to ensure a timely resolution of this appeal, and consistent with the Tribunal's statutory mandate to ensure that disputes under the *Act* are resolved in a "fair and efficient" manner, D.E.I. is directed to advise the Tribunal in writing on or before 4 p.m. February 13, 1998 if it wishes to pursue the issue of calculations.

ORDER

Pursuant to Section ll5 of the *Act* we order that the Determination issued on March 24, l997 imposing a penalty on D.E.I. be cancelled. We further order that the Determination issued on June 20, 1997 be confirmed in all respects with the following two exceptions: a) it is varied with respect to Rebrov to reflect his status as an apprentice from January 1996 to July 1996, and b) no decision has been made on the issue of the calculation of total liability. Regarding the calculation issue, D.E.I. is hereby put on notice that unless it advises the Tribunal in writing on or before February 13, 1998 that it wishes the hearing of its appeal on this issue to go forward, this aspect of the appeal will be dismissed as abandoned.

Casey McCabe
Adjudicator
Employment Standards Tribunal

Norma Edelman
Registrar
Employment Standards Tribunal

Mark Thompson
Adjudicator
Employment Standards Tribunal