# 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 -

Craig Norton and Alain Berube
("Norton" and "Berube")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 98/265 and 98/266

**DATE OF DECISION:** September 14, 1998

## DECISION

## OVERVIEW

This decision deals with two appeals filed pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*), one by Alain Berube ("Berube") and the other by Craig A. Norton ("Norton"), of a Determination which was issued on April 2, 1998 by a delegate of the Director of Employment Standards (the "Director"). The Determination, among other things, concluded Berube and Norton were, for the purposes of the *Act*, employees of Insulpro Industries Ltd. and Insulpro (Hub City) Ltd. ("Insulpro"), two companies treated by the Director as one person under Section 95 of the *Act*, and ordered Insulpro to pay Berube and Norton wages calculated by the Director to be owed to them under the *Act*.

Insulpro has filed its own appeal of the Determination, raising a number of issues, including whether Berube and Norton are employees under the *Act* or are independent contractors and not covered by the *Act*. That issue has not yet been decided, so these appeals will be addressed as though the individuals are employees under the *Act*, accepting that this decision will be nullified if the individuals are found to be independent contractors.

The Tribunal has decided the two appeals can be considered together and can be decided without a hearing.

## ISSUES TO BE DECIDED

The appeals raise three issues. The first issue is whether the Director erred in determining the "hourly rate" of the individuals when calculating the wages owed to them under the *Act*. The second issue is whether the individuals can show the Director was wrong to deny a claim to treat "travel time" as time worked. The third issue is whether either of the individuals has standing to bring an appeal on behalf of another employee of Insulpro, Handrick P Christofferson ("Christofferson"), whose claim for overtime pay, statutory holiday pay, minimum wage and minimum daily pay was denied for lack of evidence.

## FACTS

Insulpro operates an insulation installation business in several locations in the province, including Nanaimo. Berube and Norton were employed by Insulpro to install insulation in homes and apartments. There are several types of insulation installation, including attic, spray and/or crawl space and batt insulation. While Berube and Norton installed all types of installation for Insulpro, their main type of work was installing batt insulation.

The Director concluded that Insulpro estimated insulation jobs and arranged for crews to perform the work. Berube and Norton were part of such crews. One of the principal complaints of the individuals has been that Insulpro regularly underestimates the length of time needed to do the work and, as a result, more hours are required to be worked than what might be indicated by the job estimate. Payment for the work was primarily on a piece rate basis, although some aspects of the work and some small jobs were paid at an hourly rate of $15.00. The rates were set by Insulpro.

The work to which the individuals were assigned required them to travel, sometimes up to 70 kilometres a day, from their residence to the job and return.

Handrick P. Christofferson, another individual who worked mainly as a batt insulation installer for Insulpro, also filed a complaint which was investigated by the Director. His complaint was also decided in the Determination. Like Berube and Norton, Christofferson filed a record of hours he worked each day. The record provided by him was found to include hours during which he did not engage in work and, ultimately, the record was not accepted by the Director as a sufficiently reliable basis upon which to reach any final conclusions about the number of hours he did work. Christofferson has filed an appeal with the Tribunal from that conclusion.

## ANALYSIS

However an employer chooses to pay an employee, the *Act* contains a formula for converting that pay to "regular wages". In the context of an hourly rate of pay and pay based a piecework or on production, that formula is stated as follows:

> ***"regular wages"*** *means*
>
> *(a) if an employee is paid by the hour, the hourly wage,*
>
> *(b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period,*

For the purposes of the *Act*, the compensation paid or payable to an employee is required to be converted to an hourly rate, regardless of the method of payment. This allows the compensation paid to an employee to be tested against the obligation on an employer to pay at least the minimum wage prescribed in the Regulations to the *Act*, which in most cases is prescribed as an hourly rate.

There is no dispute that Insulpro priced some jobs and some work which was done by the individuals at an hourly rate, but there is no basis for saying that amount represents the "hourly wage" of the individuals for all work done by them for Insulpro. There is no

indication, and no material from which to base a conclusion, that the number of hours shown for work which was paid on an hourly rate was also the number of hours worked buy the individual. The appeals suggest the $15.00 an hour rate was applied to work which was not worth doing if the piece rate was applied to it. Berube states in his appeal: "At this point an hourly rate of $15.00 an hour would become the incentive rate." If the job took longer than the time allotted by Insulpro, the effective hourly wage decreased and if it could be done more quickly, the effective hourly wage increased. But neither of those scenarios assist in determining there was any specific "hourly wage" that the individuals would be paid, either generally or for certain types of work.

The example given by Berube in his appeal illustrates further the problem the individuals must overcome to demonstrate the Director miscalculated the wage rate:

> A job out of town to install rigid insulation. It will take a crew of one or two installers one hour to drive there and back. It will take 40 mins. to install this material because the work space is 3 feet high. There are 10 sheets of rigid insulation to install. The total wages for this job if calculated by Insulpro's piece rate would be $10.00. . . .
>
> A scenario such as the one above would not be unusual.

In the example, there is no reference to how much would be paid for the job. There are, however, several possibilities, each resulting in a different conclusion about what the *hourly wage* would be for the work. If the travelling was not "work", as that term is defined in the *Act*, and two installers were involved, then any amount other than $20.00 for the job would result in an hourly wage that was greater or lesser than $15.00 an hour. If the travelling was "work"and two installers were involved, then any amount other than $80.00 for the job would result in an hourly wage that was greater or lesser than $15.00 an hour. If the job was estimated by Insulpro at 4 hours and two installers were involved, the hourly wage would be approximately $11.25 an hour, but if one installer were involved, it would be approximately 22.50 an hour (if the travelling was "work"). None of these scenarios support a conclusion the hourly rate paid for the job ought to be treated as the hourly wage of the individuals. There is nothing to indicate that the rate given to a job by Insulpro was only for the *work* performed by the individuals on that job. In fact, it is apparent that the hourly rate given to the job incorporated other factors unrelated to work, or as Berube put it, "the hourly rate of $15.00 would become the incentive rate". In my opinion, the best the individuals can say is that they worked on some jobs which were valued at a certain hourly rate. However, under the *Act*, it is the *employee* that must be paid by the hour and, in the circumstances of this case, that pay must be for work before it is considered to be an "hourly wage".

In this case, it is not difficult to support the conclusion of the Director that the individuals were not *"paid by the hour"*, but were paid on what is best described as a *"flat rate, piece rate, . . . or other incentive basis"*, even when doing those jobs which were paid on an hourly basis.

I cannot say the Director erred in calculating the "*regular wage"* of the individuals.

On the second issue, the individuals have not shown there was any error in the conclusion of the Director that the time spent travelling to and from job sites was not "work". The *Act* defines "work":

> ***"work"*** *means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

The basic character of wages under the *Act* is payment for work performed by an employee for an employer. Many employees travel significant distances to get to and from work. The *Act* presumes that time taken by an employee to travel to and from their place of work is not "work" and an employee is not entitled to payment for it. An employee can overcome this presumption by showing the travelling ought to be considered as labour or service *for the employer*. That is a factual issue and the burden is on the employee. Several factors that might be relevant to the issue were identified by the Tribunal in *Miller*, BC EST #D208/97, but none have been shown by the individuals to be present in this case. The individuals have not shown any error on this issue.

On the third issue, there is nothing on the file relating to Christofferson's complaint to indicate that either Berube or Norton have been authorized to act as his agent in matters relating to that complaint. There is also nothing the face of the Determination relating to Christofferson, that would suggest the conclusion of the Director has any direct or material impact on the rights of either Berube or Norton under the *Act*. There is also the fact that Christofferson has filed his own appeal to the Determination, challenging those conclusions that affect his complaint. As a result, the appeals by Berube or Norton are superfluous, or legally frivolous. Under paragraph 114(1)(c), the Tribunal has a discretion to dismiss any appeal if it is satisfied "*the appeal is frivolous, vexatious or trivial or is not brought in good faith"* and I exercise that discretion in this circumstance. I wish to add that a conclusion that this aspect of the appeal is legally frivolous does not carry any implication about the motives of the individuals in appealing that part of the Determination. In this context, it simply means the issue is already before the Tribunal and it is unnecessary for us to address it more than once.

## ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 2, 1998 be confirmed as it relates to the matters under appeal.

**David Stevenson**
**Adjudicator**
**Employment Standards Tribunal**