

**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 -

Degelder Construction Co. B.C. Ltd.  
("Degelder")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Richard S. Longpre

**FILE NO.:** 98/453

**DATE OF HEARING:** September 21, 1998

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

**DECISION**

**APPEARANCES**

John Bates

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Degelder Construction Co. B.C. Ltd. ("Degelder") of a Determination by a delegate of the Director of the Employment Standards Branch, dated June 22, 1998 (File No. 14930).

The delegate addressed two issues in a complaint filed by Mr. John Bates. First, whether Bates was owed compensation for length of service when his employment ended with Degelder in 1997. Second, whether Bates was owed compensation from Degelder's Superintendents Bonus Plan (the "Bonus Plan"). The delegate dismissed the first issue in Bates' complaint and concluded Degelder owed Bates a bonus of \$5,474.00. Degelder appealed the latter conclusion.

On August 21, 1998, the Tribunal sent the parties a Notice of Hearing. The hearing was scheduled for 9:00 a.m. on September 21, 1998. Degelder was not in attendance when the hearing commenced as scheduled. I waited a period of time for a Degelder representative to arrive. Before starting the hearing, I telephoned Mr. Carl Stewart, Vice President & General Manager with Degelder. He had made the appeal submissions on Degelder's behalf. He told me that he would not be attending the hearing. The hearing began with only Bates in attendance.

**ISSUE TO BE DECIDED**

Degelder's appeal addressed the delegate's Determination that Bates was owed the superintendents' bonus.

**FACTS**

Bates was hired by Degelder on June 25, 1996, as a construction superintendent, reporting to the project superintendent. Bates was assigned to a specific construction project and was put on a three month trail period. On October 23, 1996 Bates received a letter from Degelder confirming his employment. The October 23 letter reads:

This will confirm that effective October 15, 1996, as per our previous discussions, your salary has been increased from \$4,000/month to \$5,000/month. We also have put you on the employee benefit plan with costs to be split 50/50 between yourself and Degelder Construction Co. B.C. Ltd. You also are entitled to participate in the superintendent's project bonus plan while it is in effect. Our

company policy is for vacations not to be taken until after the project you are working on is complete.

The other employment conditions of your hire are unchanged.

Stewart signed the letter on Degelder's behalf. Bates commenced work as the superintendent on Degelder's construction project at 1111 Lonsdale in North Vancouver.

The Lonsdale project was divide into two job. The first, Job No. 210, was for the "base building" at the Lonsdale project. The second, Job No. 219, was for the "tenant improvements" at the same building. Job No. 210 began in October 1996 and finished in August 1997. Job No. 219 started well after Job No. 210 but was scheduled to finish around the same time. Bates worked on both the base building and the tenant improvements jobs.

Bates made two arguments in filing his original complaint. The Determination sets out the arguments as follows:

.....the complaint contends there were two separate and distinct projects at the Lonsdale site. One was for the base building (Project 210) and the other was for a contract for tenant improvement (Project 219). In support of this contention, the complainant produced a fax from the owners that they were "very impressed with the site" and praised him for his "good work". He was also presented a solid gold coin e the owners visiting from Switzerland. His claim for the bonus was for Project 210 only and according to the formula under the plan, he was entitled to a bonus of \$5,475.00.

The Determination set out Degelder's response as follows:

.....the employer agrees that there was a performance bonus plan for superintendents. The calculation of the bonus was based on a number of factors, one of which is the client's satisfaction. The employer alleges that the clients were not happy with the complainant's performance and that in accordance with the bonus plan, the complainant was not entitled to any bonus. The employer argues that they determined the bonus factor and that it was not an automatic entitlement.

As noted above, the delegate dismissed Bates' request for severance pay. The delegate conclude, however, that Bates was entitled to receive the superintendents' bonus as he had calculated. The Determination reads:

The definition of "wages" in the *Act* includes "money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency....but does not include money that is paid at the

discretion of the employer and is not related to hours of work, production or efficiency”.

The performance bonus plan takes into account a number of factors that is used in the calculation of the bonus, namely, profit, budget, schedule, safety violation and client satisfaction. In my view, the payment of bonus is not something that is dependent entirely on the discretion of the employer. Rather, I find that it is an incentive to the employee to work hard to meet the targeted goals of the employer and, therefore, related to production and efficiency. The bonus is thus wage recoverable under the Act.

I accept the complainant’s evidence that he had met all the criteria necessary to enable him to obtain the bonus in respect of project 210. The employer has not provided any evidence to the contrary. I, therefore, determine that the complainant is entitled to the bonus calculated in accordance with the formula in the plan. As the employer has not challenged the complainant’s calculation of the bonus, I accept his calculation that the bonus works out to be \$5,475.00.

Degelder’s appeal is based on four major points. First, Job No.’s 210 and 219 were one project and not two projects as found in the Determination. Second, at least in the early stages, Bates carried out his duties well on Job No. 210. He did not do well towards the end of Job No. 210 and he did not do well on Job No. 219. This resulted in his loss of a bonus on the project. Third, a bonus is calculated by multiplying several factors: a sum is reached and then paid to the superintendent. One factor measures customer satisfaction. The customer’s satisfaction on Job No. 219 was rated “unhappy” or “zero”. When multiplied with the other factors, Bates received no bonus payment. Fourth, payment of the Bonus Plan was at Degelder’s discretion. Their submission reads: “A bonus is not guaranteed.”

Degelder relied on a letter from a representative of the building’s owner. Degelder said the letter confirmed the building owner’s dissatisfaction with Bates. The letter was supposed to be attached to Degelder’s July 13 1998 submission. The letter was not attached to the submission. Had Degelder attended the hearing, they could have produced the letter and requested that it be entered as an exhibit to the hearing. That did not happen and the letter was not in evidence before me.

In reply to Degelder’s written submissions, Bates made the following points. He introduced a bar graph demonstrating that Job No. 210 was separate and distinct from Job No. 219. He reviewed Degelder’s submission and argued that it acknowledged that Degelder did not have Job No. 219 at the time it obtained Job No. 210. It may have been understood that Degelder would get the second job but that depended on both the cost Degelder was going to charge and the building owner’s satisfaction with Job No. 210. He noted that there was a third project in the building which was put out to tenders as a result of the owner’s unhappiness with the second job. Finally, Bates requested a salary of

\$5500 per month after his trial period. Degelder told him the salary would be \$5000 per month plus inclusion in the Bonus Pan.

Bates reviewed the Degelder's summary of the Bonus Plan. The Bonus Plan sets out each of the five factors and the objective measurement of each factor. The Bonus Plan also sets out examples of measuring each factor. Bates said that where Degelder had some discretion, he used a lower rating for the factor in determining the bonus owed to him. For example, under the "client satisfaction" factor for Job No. 210, Bates used "satisfied" and not the "happy" rating.

Bates also said that after Job No. 210 was complete, he contacted Degelder's project manager and Stewart. Both Company representatives assured Bates that he would receive his bonus. Neither said that his bonus was dependent on the outcome of Job No. 219. He filed his complainant when his bonus was not paid.

## **ANALYSIS**

In the original complaint, Bates had the obligation to prove his case. In appealing that Determination, the onus fell on Degelder to prove its case. As noted earlier, Degelder did not attend the hearing, give evidence at the hearing nor allow Bates to cross-examine Degelder witnesses on some or all statements that were made in their written submissions. Because of this, little weight can be put on the evidentiary claims in their submissions. I asked Bates to reply to the main points in Degelder's submission.

At the outset, the Determination refers to project 210 and project 219. This is not correct. Degelder and Bates referred to them as Job No. 210 and Job No. 219.

Bates' letter of employment refers to the "the superintendent's project bonus plan". Job No. 210 and Job No. 219 overlapped for at least some period of time and were one project. These support Degelder's submissions. However, a document, prepared by Degelder, sets out the actual Bonus Plan. The Bonus Plan, itself, distinguishes between how the bonus is measured and when the bonus is paid. The document specifically refers to the calculation of the bonus as being "based on the target set at the start of each job". It goes on to read that the superintendent is "Paid at total completion of project". I understand this to mean that the bonus is based on the targets of the job. Payment is made when the project is completed. This point was reinforced by the two members of Degelder's management who agreed to pay Bates his bonus after Job No. 210 was completed. It is also reinforced by Degelder's submissions which draw a clear distinction between a "job" and a "project". Further, Bates noted that Degelder's August 14 submission distinguished the two contracts for the two jobs. These distinctions allowed for a separate calculation of the Bonus Plan on each job.

Degelder agreed that at one point in time the client was satisfied with Bates' performance on Job No. 210. In referring to the client not being happy with Bates, however, Degelder's first submission refers to "the later stages of the project". Its second submission says that

as a result of their dissatisfaction, the client was “not using [Degelder] for the remainder of the tenant improvements”. Put in context of their argument, Bates' appeared correct in arguing that the problems occurred on the tenant improvement work, Job No. 219.

Degelder argued that the amount of the bonus and the payment of the bonus were based on the Company's discretion. As the delegate noted in his Determination, if payment of the bonus was at the Company's discretion, the bonus would not fall under the *Act*. The Bonus Plan was a term of Bates' contract with Degelder. His contract does not suggest that he would not be paid the bonus if he met its terms. Further, the Bonus Plan, itself, states that Company discretion will not applied in determining the amount paid. The Bonus Plan reads: “Bonus to be adjusted based on measurable objectives”. The measurable objectives were: net profit, financial results on general conditions and work done by our own forces, performance with respect to schedule and specific criteria of safety performance. The Plan sets out specific criteria for each factor that would be measured objectively. The only subjective factor was customer satisfaction. As noted, I did not have evidence that the owner's dissatisfaction applied to Job No. 210.

There is one final issue. Degelder says the Determination awarded Bates a bonus greater than was paid on “larger, longer and more difficult” projects. I understand their frustration if that is the case. However, Degelder did not provide an alternate amount. I was left with only one calculation of the five factors. This left me with only one amount, \$5,475.00.

There is no basis to overturn the delegate's Determination. The bonus was a “wage” as defined under the *Act*. Bates earned the bonus on Job No. 210. At the completion of the project, he was entitled to payment.

**ORDER**

Pursuant to Section 115 of the *Employment Standards Act*, the delegate's Determination of Bates' complaint, dated June 22, 1998, is confirmed. Degelder is required to pay Bates \$5,475.00 plus outstanding interest which the delegate will calculate.

**Richard S. Longpre**  
**Adjudicator**  
**Employment Standards Tribunal**