

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-

City of Surrey
("Surrey ")

-of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

File No.: 98/330

DATE OF DECISION: October 27, 1998

DECISION

The appeal is based on written submissions by Adam Albright, counsel for the Appellant, the City of Surrey and Allan Black, counsel for the Surrey Fire Fighters' Association, Local 1271 (the "Association").

OVERVIEW

This is an appeal by City of Surrey ("Surrey"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards ("the Director") issued April 30, 1998. The Director found that Surrey contravened Sections 16, 17(1), 21(2), 25(1), 40(1)(2), 45, 58(1)(2) and 88 of the Act in failing to pay wages, minimum daily pay, vacation pay, statutory holiday pay, daily or weekly overtime, course fees which were the employer's business cost, and failing to purchase special clothing for the employees and clean and maintain it. Pursuant to Section 28 of the Act, the Director Ordered that Surrey pay \$204,793.90 to the Director on behalf of the employees (the "employees").

Surrey sought, and on July 9, 1998, was granted, a suspension of the Determination pending the outcome of this appeal and a reconsideration of D411/97, a decision of the Employment Standards Tribunal dated April 130, 1998.

ISSUE TO BE DECIDED

The ground of this appeal is that the Director erred in determining that persons receiving firefighting instruction by the Fire Academy of the Justice Institute (the "Fire Academy") are employees of Surrey during the time of instruction.

FACTS

It is helpful to review the history of determinations, appeals and reconsiderations involving the parties to this appeal.

On March 26, 1997, the Director issued a Determination finding that 24 people who were being trained as firefighters at the Fire Academy were "persons being trained by an employer for the employer's business" when they were students, and that they were entitled to be paid at the minimum wage rate set out in the *Employment Standards Act*.

The Determination was appealed by Surrey. The Tribunal upheld the Determination (BC EST #D411/97), and as noted above, that Decision was upheld by the reconsidering panel.

Subsequently, the Tribunal heard further submissions on three other issues arising on appeal (BC EST #DO77/98). One of those issues was whether its Decision was applicable to persons other than the 24 who were the subject of the Determination. The Tribunal held that its jurisdiction was limited to the 24 individuals named in the Determination. The Tribunal said "...to the extent that there are common issues, our decision(s) in the present appeals should give the parties some guidance as to the proper resolution of such issues." .

Subsequently, the Director investigated another 32 complaints that Surrey had failed to comply with the Act. The Association took the position that there was nothing distinguishing these complainants from the 24 who were the subject of the first Determination.

Surrey did not participate in the investigation and made no submissions to the Director, although it was given two extensions of time to do so. The Director's delegate reviewed the facts, Tribunal decisions BC EST #DO77/98 and BC EST #D411/97 and determined that the complainants were employees of Surrey as defined by the *Act*.

Surrey appealed this Determination on May 28. At the same time, it sought that the appeal be held in abeyance pending the reconsideration of BC EST #D411/97 .

On September 25, 1998, the Tribunal reconsidering decision BC EST #D411/97 found that there was no basis for a reconsideration, denied the appeal and upheld the Determination (BC EST #D433/98).

ARGUMENT

Surrey advanced a number of arguments on appeal. Those arguments included the same grounds it advanced in its argument for reconsideration of Decision BC EST #D411/97 and arguments based on the law of agency.

The Director took no position, contending that the parties to the Determination were fully represented by counsel and that the issues had been fully argued in the previous appeal.

The Association argued that as Surrey failed to participate in the investigation, even after having been given two extensions, at their request, to do so, the Tribunal either had no jurisdiction to consider the arguments of Surrey at this point, or should refuse to exercise it.

The Association relied upon Tribunal decisions in *John Ladd's Imported Car Company operating as John Ladd BMW* (BC EST #D313/96) and *Tri-West Tractor Ltd.*(BC EST #D268/96) in support of its position.

Further arguments were advanced by the Association in the event the Tribunal allowed the appeal to proceed on the grounds advanced by Surrey. In light of my decision to dismiss the appeal, it is not necessary to summarize those arguments.

DECISION

The burden of establishing that a determination is in error rests with the Appellant.

Having reviewed the Director's determination, previous Tribunal decisions involving these parties, as well as the reconsideration of one of those decisions, I am not persuaded that the Determination is in error .

As the Association points out, Surrey did not make any representations to the Director's delegate at the time the investigation was being conducted. Surrey, in response, stated that "The City's argument was to why the persons at issue were not 'employees' of the City was already well known to the Director's delegate given the submissions and hearing held with regard to the 'first

determination' which was made by the same delegate on 26 March 1997. Accordingly, there was no purpose served in repeating arguments which the delegate had refused to accept on several occasions. " (letter of August 10, 1998).

Further, Surrey stated "there was no indication from the delegate at that time or any other time that the filing of an argument that had been heard and rejected so many times by this same delegate had to be filed again to preserve the City's right to challenge the new Determination."

With respect to counsel for Surrey, there was nothing before the Director's delegate which indicated that it was relying on previous submissions. Further, there is no obligation or duty on the Director to advise Surrey that any argument had to be "filed again." The Director gave Surrey two time extensions to file a response to the complaint. Having heard nothing from Surrey, the Director was entitled to presume that no position would be taken, and in fact, did just that.

The Director stated that "the employer has chosen not to participate in the investigation and has presented no position on the above allegations." There was no communication from Surrey at all which set out its position on this matter .

Consequently, the Director's delegate issued his determination based on the information provided by the complainants, as well as the previous Tribunal decisions noted above. One of those decisions was subsequently confirmed by the reconsidering panel.

Surrey states in its submission of August 10, 1998 that "The legal issues raised in this appeal are identical to those raised in respect of Determination D411/97 and the reconsideration application of that matter." As the issues raised and disposed of by the Tribunal in those two appeals are identical to those raised here, I find that there is no basis for this appeal. I note that Surrey itself also stated "It is clear that the resolution of BC EST #D411/97 should resolve the issues between the parties." (letter of August 10, p 7). I find nothing in the facts which distinguishes this group of complainants from those falling within the purview of the Tribunal's decision in BC EST #D411/97.

Surrey also advanced arguments on the issue of agency. As noted, previous decisions of the Tribunal have determined that those issues ought to have been raised before the Director's delegate in the first instance. Surrey made no submissions on that point, either to the delegate at the time he investigated this complaint, nor to the delegate upon investigation of other similar complaints. As those issues were not advanced at that time, it will not be considered by the Tribunal on appeal. In *Tri West Tractor* (supra), the Tribunal stated that it " ...will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

Consequently, the appeal is dismissed.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination, dated April 30, 1998 be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal