

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 -

Daniel Steven Hagel, Director/Officer of
432123 B.C. Ltd. operating as
H & R Steamtech
("Steamtech")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE No:	97/593
DATE OF HEARING:	October 07, 1997
DATE OF DECISION:	October 30, 1997

DECISION

APPEARANCES

Brian James Rados and
Daniel Steven Hagel

For 432123 B.C. Ltd.

Mary O'Byrne and
Gerry Omstead

For the Director

John Paul Santos, Shawn McDonald,
Peter McRaid, Daniel P. Mari,
and Jarret Kennedy

For Themselves

Bill Fowler
Council

Secretary/Treasurer, Victoria Labour

OVERVIEW

This is an appeal by Daniel Steven Hagel ("Hagel"), a director and President of 432123 B.C. Ltd. operating as "H & R Steamtech", herein after referred to as "Steamtech" or "the Company", pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination (File No. 053018) dated July 16, 1997 by the Director of Employment Standards (the "Director").

This is a case involving the application of the *Skills Development and Fair Wage Act*, R.S.B.C. 1996, c. 427 (the "*Fair Wage Act*"). The Determination found that between July 17, 1996 and into the Spring of 1997 the Company employed a number of labourers to work on the exterior cleaning at St Ann's Academy in Victoria which was a construction project that was funded by the Provincial Government and therefore subject to the provisions of the *Fair Wage Act*. Under Schedule 1 to the *Fair Wage Act* the employee/labourers were entitled to a minimum wage of \$23.90 per hour (including benefits). The Determination found that while the Company's records indicated payment to employees at the rate of \$23.90 employees were actually paid in cash \$10.00 per hour without proper pay slips, deductions, or benefits.

The Company separately appealed on the basis that, although there were some problems in the first few months, the Director's delegate failed to take into account or give proper weight to the evidence produced by the Company that all employee wages were brought up to date by December 1996 and that thereafter each of the employees was paid in full at the proper rate and each employee had signed acknowledgments of receipt of payment in full.

Hagel has appealed on the basis that all employees were paid in full and therefore there is no liability for him as a director of the Company.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether on a proper evaluation of the evidence produced by the Company that the Director's delegate should have found that each and all of the employees were paid in full and in accordance with the *Fair Wage Act* thereby discharging any liability for Hagel as a director of the Company.

FACTS

Hagel was a director and president of 432123 B.C. Ltd. which operated a business known as H & R Steamtech. Steamtech was the successful bidder for a contract to undertake the exterior masonry cleaning at St. Ann's Academy, a building being substantially renovated with funding provided by the Provincial Government. There was no issue with the fact that this project was one to which the *Fair Wage Act* applied. Under Schedule 1 of the *Fair Wage Act* labourers must be paid a minimum wage of \$18.19 plus benefits of \$5.71 per hour amounting to a total wage of \$23.90 per hour. Under the Company's bid and the accepted contract the Company was entitled to bill-out labour to the British Columbia Building Corporation (BCBC) @ 34.00 per hour. The difference being the cost of doing business and profit.

The Company hired certain labourers to carry out the work. The Company claims that, initially, they told the employees that they would be paid an "advance" of \$10.00 per hour without deductions (UIC, CPP, Tax, etc.) and that at the completion of their employment or the project they would be paid the balance @ \$23.90 less deductions. The Company says that in October or November it was brought to their attention that this procedure was not in accordance with the *Employment Standards Act* and that they then corrected their procedure. The Company says that by December 1996 all employees were paid correctly and up to date and that from then onwards all employees were paid in full @ \$23.90 per hour and that each employee signed an acknowledgement of receipt of such payments. The Company produced the signed receipts for each employee.

The employees all testified that they were hired on the basis that they would receive \$10.00 per hour without deductions but that they were never told they would receive the difference in any form and that in fact they never received any more than the \$10.00 per hour. They do not deny that they were willing to work for the \$10.00(net) cash wage.

The employees testified that on each pay day Mr Rados, who was the Secretary/Treasurer of the Company, or Hagel would attend the worksite and present to each employee individually a document which set out the hours that they worked and the pay due @ \$23.90 per hour. Mr Rados would have each employee sign that these hours were correct and that they had received the full amount @ \$23.90 per hour. When the document was signed Rados would then confirm the actual hours worked and pay those hours in cash at \$10.00 per hour. No pay slip was given to show any deductions or benefits.

ANALYSIS

At the Hearing of this Appeal I heard evidence from Mr Rados and Mr Hagel on behalf of the Company. They were unable to produce an alleged journal of hours worked by the employees. They agreed that they originally hired and paid at the rate of \$10.00 per hour but relied on the signed acknowledgements and receipts to show that they had paid all the employees properly and in full. However each of the employees testified that they had never received more than the \$10.00 and that the documents were signed because there was no choice.

An important aspect of this hearing was the assessment of credibility. The Company witnesses claimed that at the outset they had "wanted to do everything right" and produced a handwritten unsigned note allegedly from their lawyer approving the advance payment process. The lawyer was not called to testify. From the testimony it appeared that this company did everything wrong. Their records are either non-existent, inconsistent, or fabricated. Regardless of the burden of proof I have no doubt that the evidence given on behalf of the company was not credible.

In contrast, the evidence given by the employees was consistent throughout, both internally and as between the witnesses. The evidence of the employees was also in harmony with the preponderance of the probabilities in all of the circumstances of the case: *Faryna v. Chorney*, [1951] 4 WWR (NS), 171, B.C.C.A. I accept their evidence as being given fairly and honestly.

I find that the Company set up a deliberate scheme to avoid the provisions of the *Fair Wage Act*. While charging out the labour to BCBC at a rate in excess of \$30.00 per hour the Company deliberately and intentionally only paid the employees \$10.00 per hour in cash. The Company records were fabricated to show that the employees were paid \$23.90 and the employees were forced to sign receipts for the fabricated amounts in fear of losing their jobs.

I would dismiss Hagel's Appeal and find that pursuant to Section 96 of the *Act* Hagel is personally liable, as a director of the Company, for up to two months' unpaid wages for each employee.

ORDER

I order, under Section 115 of the *Act*, that the Determination, as it applies to Hagel, is confirmed.

John Orr
Adjudicator
Employment Standards Tribunal