

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 -

Pacific Waters Ventures Ltd
("Pacific")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 97/572

DATE OF HEARING: October 08, 1997

DATE OF DECISION: November 13, 1997

DECISION

APPEARANCES:

Heidi Hughes	Counsel for the Director
David Oliver	Director's Delegate
Douglas H. Christie	Counsel for Pacific Waters Ventures Ltd.
Ken Waters	President, Pacific Waters Ventures Ltd.

OVERVIEW

This is an appeal Pacific Waters Ventures Ltd ("Pacific") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination (File Nos. 082936 and 082838) 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*") and Section 95 of the *Employment Standards Act*. The Determination found that between January 11, 1997 and March 03, 1997 Bruce Watt hired and paid employees to work on the demolition of Sir James Douglas School site, which was a site covered by the *Fair Wage Act*, at rates less than the rate specified in the Act. Amongst the employees hired at the site was the complainant in this matter, Tim Walsh.

The Determination also found that the demolition contract was awarded to Pacific and that Pacific, through its President, Ken Waters, exercised control and direction over Bruce Watt and the activities of the employees so that Pacific and Bruce Watt should be treated as one person pursuant to Section 95 of the *Act*. By application of Section 95 Bruce Watt and Pacific become jointly and separately liable for payment of unpaid wages. Under section 96 of the *Act* a director or officer is personally liable for up to 2 months unpaid wages for each employee.

The Company has appealed on the basis that Pacific was not informed by the head contractor and had no notice that the job site was covered by the fair wage legislation and secondly that Bruce Watt was a subcontractor and the companies were not associated in any way.

ISSUE TO BE DECIDED

The two issues to be decided in this case are:

1. whether knowledge of the nature of the job site is necessary for the fair wage legislation to render an employer liable to pay the regulated wage rates; and
2. whether a subcontractor for labour should be considered associated with the contractor thereby creating a liability for unpaid wages by the contractor;
3. whether Tim Walsh was an employee entitled to fair wages.

FACTS

School District 61 (Greater Victoria) put out to tender the demolition and re-construction of Sir James Douglas Elementary School in Victoria. School District 61 was clearly a "tendering agency" within the meaning of the *Fair Wage Act* as the School District is a public institution that receives public money for construction. The "head contract" was awarded to Homewood Constructors Ltd ("Homewood") who subcontracted the demolition portion.

Pacific bid on the demolition portion of the contract. The tender documents used for this subcontract were extracted from the original School Board tender and titled "Section 02050 DEMOLITION". The pages were all headed "Sir James Douglas Elementary School - School District 61 (Greater Victoria)". The tender documents are detailed and contain a further portion entitled "Supplemental General Conditions". The demolition tender four page document states in paragraph 1.3.1 that the contractor must "perform all work in accordance with Part 8 of the B.C. Building Code, and all pertinent municipal and provincial regulations..." but does not specifically refer to the *Fair Wage Act*. The Supplemental General Conditions (the "SGA") which formed part of the head contract provides as follows:

2. G.C 3.9 LABOUR AND PRODUCTS; add new paragraphs:

3.9.4 The Skills Development and Fair Wage Act and Regulations apply to this project.

3.9.5 Where any part of the Work is sub-contracted by the Contractor or his Sub Contractors, the Contractor or Sub-Contractor must:

Contractor

- .1 Place conditions in the Sub-Contract that will ensure compliance by the Sub-contractor with the Skills Development and Fair Wage Act, and*
- .2 Be responsible for the carrying out of any conditions referred to in paragraph (a) (sic) above.*

3.9.6 The owner is empowered under the Skills Development and Fair Wage Act to do all or any of the following if the Contractor fails to comply with the Act:

- .1 *Terminate the Contract*
- .2 *Suspend payment under the Contract until compliance with the Act occurs*
- .3 *Hold back funds sufficient to cover the claims for unpaid fair wages. (emphasis added)*

Ken Waters, the president of Pacific, testified, at the hearing of this appeal, that when he bid on the demolition sub-contract he was not informed that the project was one to which the fair wage legislation applied. He testified that, in fact, he was told by Homewood that it did not apply. No one from Homewood was called to testify.

Pacific was the successful bidder for the demolition sub-contract and the sub-contract was witnessed by a document titled "PURCHASE ORDER" which provided for a total price of \$95,000.00 (plus GST). The description of the services required were described in part as follows:

Provide all *labour*, material, tools and other equipment, services and supervision required for the complete demolition of the existing buildings to the full intent of the drawings, specifications Section 02050 DEMOLITION, and Addenda issued by Marshall & Garyali Architects, all general conditions of the prime "Stipulated Price Contract", *supplemental general conditions*, general requirements and in particular DIVISION 2, Section 02050, leaving the cleared site clean, safe and ready for new construction. Store and protect all items noted to be salvaged and reused or turned over to the owner as noted and as indicated in the drawings, specifications and addenda. B.C.C.A.#200 Subcontract Conditions apply. (emphasis added)

Waters for Pacific testified that he decided to set up an arrangement with Bruce Watt ("Watt") to further sub-contract to Watt, a long time employee of Pacific, all the labour for the job. Pacific would provide all the equipment, material, tools or other services and Watt would hire and be responsible for all the labour on the site. The invoices from Pacific to Homewood were for all the work done on the sub-contract including labour. Pacific then would pay Watt the monies owed to the employees.

Watt did arrange the hiring of a number of employees to work on the demolition but although Watt was supposedly responsible for all the hiring it was apparent from the evidence of the employees that Waters hired-on some of the employees himself directly. Waters attended at the site frequently, gave instruction to a number of the employees and provided tools for them. Waters also attended with the payroll funds on payday. One of the employees, John Rose, for example, testified that he was hired personally by Waters and that he took 95% of his direction from Waters. Rose testified that Waters told him that Watt was the onsite "foreman". He testified that although Waters would bring the payroll cash to the site it was Watt that did the actual payment.

The employees further testified that toward the end of the project Waters advised the employees that Watt was longer the foreman, that he had been let-go, and Waters asked all the employees to stay on to get the job finished on time. Dunstan testified that he didn't get any pay for the last two weeks of the job. Scott Vanderheyden was initially hired by Watt at \$8.50 per hour but when he raised the issue that he should be getting at least \$10.00 it was Ken Waters that authorised the higher rate. Vanderheyden

and a number of the employees testified that if employees wanted a wage advance it was Waters that advanced the money. The advance was deducted from the cash pay given to the employee on the next payday. Eric Kaufman testified that he was paid in cash at \$10.00 per hour which was his agreed upon rate. He says that his pay was not always accurate and that he had received advances in cash from Waters which were deducted from his pay.

Ken Waters testified that he was unaware that the project was governed by the fair wage legislation. He submitted a bid for the demolition project but did not produce the invitation to tender or his accepted proposal at the hearing. He agreed that he provided the tools and equipment for the job as they were needed and that he was actively involved at the job site. He stated on cross-examination that the job was 70-75% labour. He testified that he had previously employed Watt at 3 job sites over the previous 2 years. He testified that he knew the job was a public school project but denied thinking that it might be covered by the *Fair Wage Act*.

The employees, who were either hired by Waters or Watt, were paid an hourly rate in the range of \$8.00 - \$12.50 and not the rate of \$23.90 as required by the schedule to the *Fair Wage Act*. Because the investigation of this matter was initiated by the Director and not individual complainants the Director's delegate estimated hours of work for the employees he could identify and made the Determination accordingly. A number of employees have since filed individual complaints and/or submitted actual hours worked during the period of the demolition project.

ANALYSIS

Mr. Christie, counsel for Pacific, argued that the employees are simply opportunists. He says that they were paid at the rate they agreed upon and were simply using the opportunity of the Director's investigation to "crucify" the contractor (Pacific) who had bid fairly on the project based on the normal hourly rates for labour. He submits that the employees are using the bureaucracy to exploit the situation.

Counsel further argued that it was the head-contractor's (Homewood) obligation to make it clear in the invitation to tender that it was a fair wage site and that it should have been included in the actual sub-contract. He submits that Homewood should be held responsible and not Pacific.

Counsel also argued that the demolition portion of the project should not be considered part of the fair wage project because it is not "construction" funded by Provincial money.

I do not agree with Mr Christie's assessments of the motives of the employees but in any case I find that their motives are irrelevant. Whether or not they agreed to accept employment at a certain rate of pay does not allow the employer to avoid the provisions of the *Fair Wage Act* or the *Employment Standards Act*. The *Employment Standards Act* provides in section 4 that the requirements of the *Act* cannot be waived and while the *Fair Wage Act* does not have a similar provision I would find that it would be contrary to the purpose of the legislation to allow it to be waived. Even if the provisions of the

Fair Wage Act could be waived I would find that in this case there was no such waiver as the evidence of Waters was that the legislation was never actually contemplated by himself or the employees.

Whether or not Homewood misled Pacific about the nature of the contract the fact remains that it was a fair wage construction project. It may well be that Pacific has some recourse against Homewood but, even if Pacific did not know that the legislation applied, Pacific would still be bound by it. On the facts before me I would find that Pacific ought to have known that the project was one to which the legislation applied. Pacific knew it was tendering on a school and the supplementary conditions make it very clear that the legislation applies. The onus is on the employer to investigate what legislation and regulations apply to the workplace in which it is operating.

In my opinion the Demolition portion of the contract is "construction" within the definition in the *Fair Wage Act* and can not be severed from the overall contract. The *Fair Wage Act* defines "construction" as construction, renovation, repair or demolition of property.

I would also find that Pacific and Bruce Watt should be treated as one person for the purpose of enforcement under the *Act*. Waters, on behalf of Pacific, clearly exercised control and direction at the worksite. He hired employees. He fired Watt. He supplied the tools and equipment. He gave advances to employees in cash from his own pocket which were later deducted from the payroll. He gave directions on the work to be performed and the quality of the work performed. All of these factors indicate to me an exercise of control and direction within the meaning of Section 95 of the *Act*.

In conclusion I find that Bruce Watt and Pacific paid the employees working on demolition at the Sir James Douglas School site less than the rate of pay specified in the schedule to the *Fair Wage Act*. I also find that Watt and Pacific should be treated as one person.

In this Determination the Director's delegate found that the employers records were inadequate and found that, although there was no record of Tim Walsh in the company's records, he was an employee as he had claimed. Pacific led no evidence at the hearing to refute the finding by the Director that Tim Walsh was an employee.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.

JOHN M. ORR
ADJUDICATOR
EMPLOYMENT STANDARDS TRIBUNAL