

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-

488432 Alberta Ltd.
operating as KDH Drywall

(“KDH Drywall”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/632

DATE OF DECISION: December 17, 1997

DECISION

OVERVIEW

This is an appeal brought by Dwayne Nelson on behalf of 488432 Alberta Ltd. operating as KDH Drywall (“KDH Drywall”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on August 1st, 1997 under file number 055782 (the “Determination”).

The Director determined that KDH Drywall owed its former employee, Scott O. Ford (“Ford”), the sum of \$5,129.88 on account of unpaid wages due to Ford by reason of the provisions of the *Skills Development and Fair Wage Act* (the “Fair Wage Act”) and the *Skills Development and Fair Wage Regulation* (the “Fair Wage Regulation”).

ISSUE TO BE DECIDED

In a letter dated August 13th, 1997, appended to the appeal form filed by KDH Drywall, Dwayne Nelson, on behalf of KDH Drywall, asserts that Ford was not a KDH Drywall “employee” but rather was a “sub-contractor working on a sub-contract basis” and, accordingly, KDH says that the Determination should be “cancelled and KDH absolved of all they are accused of for this sub-contractor”.

FACTS

During the period July to October 1996, Ford worked on a job-site, purportedly as a sub-contractor to KDH Drywall, as a drywaller. There is no dispute as to whether or not the project in question was a site governed by the provisions of the *Fair Wage Act*. The only issue raised by KDH Drywall in its appeal concerns Ford’s status under this latter legislation. It is to that issue I now turn.

ANALYSIS

Section 5 of the *Fair Wage Act* provides as follows:

5. All employees of a contractor, subcontractor *or any other person doing or contracting to do the whole or any part of the construction to which this Act applies* must be paid fair wages in accordance with the regulations. (my italics)

While the Director determined that Ford was an employee of KDH Drywall, the Director also determined that, in any event, Ford fell within the phrase, italicized above, “any other person

doing...any part of the construction to which this Act applies”. Clearly, the legislative intent, as embodied in section 5 of the *Fair Wage Act*, was to ensure that all persons, not merely “employees” of a contractor or a sub-contractor, providing labour on a “fair wage” job-site would be paid according to the *Fair Wage Regulation*.

In light of the fact that KDH has only challenged the Determination as to the finding that there was an employment relationship between the parties, but does not take issue with the Director’s determination that Ford was “any other person” as defined in section 5 of the *Fair Wage Act*, I am satisfied that KDH Drywall’s appeal ought to be dismissed.

I might add that, in my opinion, while there might be some arguable points in KDH Drywall’s favour on the “employment relationship” issue, it cannot be seriously suggested that Ford was not entitled to be paid pursuant to the *Fair Wage Regulation* in view of the wide ambit of section 5 of the *Fair Wage Act*.

Further, in light of the definition of “employee” contained in section 1 of the *Fair Wage Act*, one might reasonably conclude that Ford was an employee of KDH Drywall, at least for the purposes of the *Fair Wage Act*. I might add that, in my view, it is this latter definition, and not the definition of “employee” contained in section 1 of the *Employment Standards Act* (i.e., the definition referred to in the Determination), that governs in the case at hand.

ORDER

Subsequent to the filing of the appeal in this matter, the Director’s delegate advised the Tribunal, by way of a memorandum dated September 8th, 1997, that due to the fact that Ford did not hold the particular level of certification upon which the calculation set out in Determination was based, Ford’s unpaid wages and interest (to August 1st, 1997) amounted to \$3,892.31 and not \$5,129.88 as set out in the Determination.

Accordingly, and pursuant to section 115 of the *Act*, I order that the Determination in this matter be varied such that the amount of unpaid wages due to Ford be fixed in the amount of **\$3,892.31** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal