BC EST #D126/98
Reconsideration of BC EST #D458/97

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Sound Contracting Ltd.
(the "Employer" or "Sound")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Mark Thompson

FILE NO.: 97/927

DATE OF DECISION: April 7, 1998

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DECISION

OVERVIEW

This is a reconsideration under Section 116 of the *Employment Standards Act* (the "*Act*") of Decision #D458/97 which was issued by the Employment Standards Tribunal on October 29, 1997. The Decision confirmed a Determination by the Director of Employment Standards (the "Director") on March 4, 1997. The adjudicator concluded that the *Skill Development and Fair Wage Act* (SDFWA) applied to a construction project on which employees of Sound Contracting Ltd. (the "Employer" or "Sound") worked. The Decision further found that the Employer had violated Section 5 of the SDFWA. The Employer sought a reconsideration of the Decision, asserting that the SDFWA did not apply to the construction project in question. It did not question the Director's calculation of wages owed to employees if the SDFWA applied to the construction project in question.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the adjudicator's conclusion that the Employer was subject to the SDFWA was correct.

FACTS

The Employer contracted with the City of Parksville (the "City") for the construction of an intersection of Pym Street and Highway 19 (the "Project"). The Project was tendered in August 1995, and Sound was the low bidder. However, the contract was not awarded due to the City's lack of funds. Instead, the City and Sound negotiated a new contract for the Project, which they signed in March 1996. Work on the Project started the following month. In their submissions to the adjudicator, the Employer and the Director agreed that a representative of Sound initialed the Instructions to Tenderers and the Tender Form. They further agreed that the City did not request any Statutory Declarations with respect to wages from the Employer during the project. The City did not submit a Project Report From to the Director. Sound did not contest the amount found to be owing in the Determination, if the SDFWA applied to the Project. As the adjudicator noted in her decision, the parties submitted "an uncontested signed but unsworn affidavit" from the director of finance of the City, which stated that the City and the provincial government agreed to the Project, which the City estimated would cost $1,300,000. The City, the Province and the Federal Government subsequently agreed to share the costs of the Project, each government paying one-third of the total cost of the Project.

The parties jointly submitted three documents to the adjudicator. The Invitation to Tender the Project contained a clause stating "The Province of British Columbia 'Skills Development Fair Wage Act' will apply to this Contract." The Instructions to Tenderers contained a statement that the tenderer should examine contract documents and could not

claim any misunderstanding in respect of the conditions in the documents after submitting a tender. Article 22 of the Instruction to Tenderers contained a statement "The Province of British Columbia 'Skills Development and Policy Fair Act' will apply to this contract. Finally, the Tender Form signed by Sound on March 15, 1996 contains a statement that the parties agreed to be bound by the requirements in the Instruction to Tenderers.

The Employer appealed the Determination on the grounds that it was unaware that the SDFWA applied to the Project. It advanced several arguments in support of its position as follows. There was no evidence that the Employer saw the Invitation to Tender on which the Determination relied. The Instruction to Tenderers referred to the "Fair Wage Act" in the heading and the "Skills Development and Fair Wage Policy" in the text. Neither of these documents is an statute in force in British Columbia. Any ambiguity in a contract should be construed against the party which wrote the contract. The City was acting as an agent of the Ministry of Skills Training and Labour as it then was and hence the statute should be construed against the Ministry. The Employer was not privy to the agreements among the three levels of government concerning payment for the Project. It was not in a position to know if the Province was paying more than $250,000 on the Project. The City did not require the Employer to file a Statutory Declaration as required by the SDFWA. The Employer also argued that the SDFWA *Regulations* do not require a contractor to report any failure to comply with the SDFWA. Furthermore, the city did not notify the Employer that it was not complying with the SDFWA until after the contract was completed. Had the City named the SDFWA properly and required statutory declarations from the contractor, the Employer would have realized that it was required to comply with the wages in the *Regulations*.

The Director argued that the SDFWA did not require notice. Section 3 of that statute states that it "applies to all construction that is contracted for by a tendering agency." Contract documents provided adequate notice to Sound that the SDFWA applied to the Project. The typographical error in the contract documents were insufficient grounds on which to invalidate the requirements of the SDFWA. In addition, the Ministry of Skills, Training and Labour was not a party to the contract, and inaction by the City does not affect the statutory obligations imposed by the SDFWA. Finally, the principle of estoppel applies only with respect to the facts and cannot be applied to defeat a statutory obligation.

The adjudicator divided the issue of the application of the SDFWA to the Project into several parts. She found that the SDFWA was clear that the Project came under its provisions since it did not fall under one of the exceptions contained in the *Regulations*. The SDFWA does not require that notice be provided to contractors/employers that the statute applies to them. There was no dispute that the City was a tendering agency. Even if the SDFWA required notice, the Employer had adequate notice of its potential liability on the Project. The firm had worked under the requirements of the SDFWA previously, and the Instructions to Tenders stated that a provincial "Fair Wage Act" would apply. The City's noncompliance with the SDFWA did not affect the operation of the Determination and the appeal from it. In fact, the SDFWA requires a contractor to provide a statutory declaration to the tendering agency. A tendering agency is under no obligation to request a

statutory declaration. Finally, the time period for wages owing in the Determination fell within the limits of the *Act* The adjudicator upheld the Determination of March 4, 1997.

The Employer based its request for reconsideration on several aspects of the Decision and raised a total of 16 arguments in support of its case. Many of the arguments repeated the same point, so they can be combined into six groups.

The first group of arguments were that the contract for the Project was not tendered, but was negotiated by Sound and the City, and thus the documentation used in the tendering project should not be binding on Sound. It pointed out that there was no evidence that it had seen the Invitation to Tender on which the adjudicator relied. Moreover, since the final contract was not tendered, the Invitation to Tender was invalid. In addition, the Invitation to Tender contained no proper reference to the SDFWA. Sound further argued that it was not subject to the Instructions to Tenderers pertaining to the Project because the Project was not tendered. It maintained that the SDFWA was never mentioned by the City during the project. The text of the Instructions to Tenderers did not contain a proper reference to the SDFWA, so "it was never intended to be enforced or to apply" to the Project (emphasis in the original). Sound argued that the Tender Form on which the adjudicator relied contained provisions that could not apply to the Project as it was carried out, so that the Tender Form should not be taken literally. Similarly, Sound argued that the Project was not contracted by a tendering agency, so that the SDFWA did not apply. The final contract documents did not provide a notice that the SDFWA applied to the Project. Although Sound had complied with the SDFWA on other occasions, this fact should lead to the opposite conclusion to that drawn by the adjudicator, i.e., that the SDFWA did not apply in this case.

The second group of arguments relates to the funding for the Project. Sound completed its work on August 28, 1996, and the contract was totally completed on October 16, 1996, when the builders' lien holdback was due for release. Sound argued that the Provincial Government did not pay the City for the Project until October 16, 1996, so that the contractor had no knowledge that the Provincial Government would be funding the Project until it was completed. Sound argued that since the Provincial Government did not contribute to the Project prior to its beginning, or before it ended, the Project was not funded by the Provincial Government as contemplated by the SDFWA. Sound alleged that there was no "clear proof" that the provincial Government ever provided $250,000 for the Project.

The Employer also pointed out that the City did not fulfill its statutory obligations under the SDFWA by requiring the Employer to file statutory declarations. Therefore, Sound argued, the SDFWA did not apply. Other enforcement mechanisms in the SDFWA were not employed, again supporting the argument that the Project was not covered by the SDFWA.

The Employer objected to the adjudicator's reliance on an unsworn affidavit by an official of the City as inadequate proof that the SDFWA was intended to apply to the Project.

The Employer also questioned the Tribunal's jurisdiction because the SDFWA did not apply and argued that the Charter of Rights barred enforcement of the statute against it. It argued that other employers had worked on the Project and may not have been audited.

Since the SDFWA was not enforced, the principle of estoppel should be applied. The Employer would have changed its practices had it known that the SDFWA would apply to the contract.

Counsel for the Director argued in the first instance that Sound had not presented compelling new evidence or shown the adjudicator made a fundamental error of law. Furthermore, the Director maintained that the adjudicator had an adequate evidentiary basis for her decision that the Provincial Government contribution to the Project brought it under the SDFWA. The Director further pointed out that the SDFWA does not specify when a Provincial Government contribution must be made to cause a construction project to be covered by the SDFWA. The SDFWA does not require notice of its application, and in any case the adjudicator concluded that Sound had adequate notice that the SDFWA would apply to the Project. Sound's argument that the City was not a "tendering agency" under the SDFWA was based on a misunderstanding of the SDFWA and did not rely on any new evidence. The adjudicator properly found that the Director acted within the time limits in the *Act*. Finally, the Employer did not present any evidence that the Director enforced the SDFWA unfairly, even if the Tribunal had the authority to apply the Charter of Rights and Freedoms.

ANALYSIS

The appellant in a Request for Reconsideration of a Tribunal Decision bears the onus of demonstrating that the original decision was fundamentally flawed. In particular, a reconsideration should succeed only when there is a fundamental error in law, when significant and new evidence has become available that would have led the adjudicator to a different decision or the decision in question is inconsistent with other decisions which are not distinguishable on the facts. See *Zoltan T. Kiss*, BC EST #D122/96.

In this case, the Employer did not present any new evidence that would have led the adjudicator to reach a different decision. The major evidentiary issue it raised was the status of the unsworn affidavit of an official of the City stating that the City estimated that the Province would contribute more than $250,000 to the Project. Sound emphasized that the affidavit was unsworn. However, the adjudicator noted that the parties had submitted the affidavit jointly at the oral hearing before her. Had the Employer wished to contest the truth of the statements in the affidavit, it had ample opportunity in the original proceeding. It cannot challenge evidence it previously accepted in a reconsideration. Similarly, the Employer argued that there was no evidence that it had seen the Invitation to Tender for the Project. That document was presented to the adjudicator by both parties in the original hearing, and the adjudicator noted that a representative of Sound initialed both the Invitation to Tender and the Tender Form.

Sound emphasized that the Project was not tendered, so that the SDFWA, which states in Section 3 that the statute shall apply to "all construction that is contracted for by a tendering agency." Section 1 of the SDFWA defines a "tendering agency" as a "public institution that receives Provincial money for construction." As the adjudicator correctly pointed out in her Decision, the City was a tendering agency under the definition section of the SDFWA. The application of the SDFWA does not depend on the process by which a government body and a contractor agree on the terms of a project. Coverage under the SDFWA depends on the status of the purchaser of the construction, the City of Parksville in this case. Moreover, the SDFWA does not require a tendering agency to notify a contractor that the statute will apply to a project, as the adjudicator stated in her Decision. Absence of a formal notice cannot be taken to mean that a clear statutory requirement is abrogated. The same conclusion applies to the Employer's argument that the City's failure to require statutory obligation to require statutory declarations negated the effect of the SDFWA. In fact, as the adjudicator stated in her Decision, the SDFWA imposes an obligation on a contractor to provide statutory declarations. The statute does not impose an obligation on a tendering agency to require statutory declarations.

The Employer's argument on estoppel raised in the reconsideration was the same as it presented to the adjudicator, and I concur with the adjudicator's conclusion that the City's failure to comply with the SDFWA did not create an estoppel for these proceedings. This dispute is between the Director and Sound. If estoppel were to exist, Sound would have to address its claim to the City. Moreover, the adjudicator based her Decision on Section 8 of the SDFWA and Section 80 of the *Act*, which set out the Director's authority to collect wages, even some time after the completion of work.

The thrust of Sound's arguments on these points is that it was unaware that the SDFWA would apply to the Project when it contracted to carry out the work on the Project. Even if this assertion had been plainly stated (which it was not) and were true, that fact would not nullify the effect of the SDFWA. This argument repeated the Employer's position before the adjudicator, and no new evidence or points of law were reaised in the reconsideration. Furthermore, based on the evidence on the record, I agree with adjudicator's conclusion that there was adequate notice to the Employer that the SDFWA would apply. While the Invitation to Tender and other documents provided by the City contained incorrect references to a government fair wage policy, it is simply not credible that the Employer was not aware that fair wage legislation would not apply to this Project.

Without taking a position on the authority of this Tribunal to apply the Charter of Rights and Freedoms, the Employer's argument on this point must fail on evidentiary and legal grounds. The *Act* gives the Director wide authority to investigate possible violations. The Employer presented no evidence to the adjudicator nor in its request for reconsideration that the Director had acted improperly in investigating the wages Sound paid to its employees on the Project. There is no basis for concluding that the Director discriminated against Sound in any way.

ORDER

For these reasons, pursuant to Section 116 of the *Act*, I decline to cancel or vary Decision BC EST #D458/97.

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Mark Thompson
Adjudicator
Employment Standards Tribunal