EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

Employment Standards Act, S.B.C. 1995, c. 38

-by-

Tana L. Gilberstad

("Gilberstad")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/348

DATE OF DECISION: April 11th, 1997

DECISION

FACTS

This is an application filed by Tana L. Gilberstad ("Gilberstad") pursuant to section 116 of the Employment Standards Act (the *"Act"*) for reconsideration of an adjudicator's decision to vary Determination No. CDET 002254 (the "Determination"). The Determination, issued by the Director of Employment Standards on May 15th, 1996 as against Wigmar Construction (B.C.) Ltd. ("Wigmar"), was in the amount of $16,031.59. This latter sum was held to be due to Ms. Gilberstad by reason of her employment by Wigmar as a First Aid Attendant from May 8th, 1995 to February 22nd, 1996 at a construction site governed by the provisions of the *Skills Development and Fair Wage Act* (*"SDFWA"*) and the accompanying regulations.

The Director held that although Wigmar paid Gilberstad at an hourly rate of $14.00--a rate in excess of that payable for a first-term apprentice carpenter ($12.81)--Gilberstad was never registered as an apprentice carpenter and was, in fact, hired as, and performed the functions of, a first aid attendant. Accordingly, the Determination was issued reflecting the hourly rate payable to a first aid attendant, namely, $20.90 per hour plus an additional $4.00 per hour on account of benefits.

Wigmar appealed the Determination to the Tribunal. The primary thrust of Wigmar's appeal was that Gilberstad was hired as apprentice carpenter and that she was subsequently terminated, on February 22nd, 1996, when she failed to properly register as an apprentice after having been given ample opportunity to register.

The appeal was heard on November 8th, 13th and 15th, 1996. The parties agreed that Gilberstad worked on a "fair wage" site--the Royal B.C. Museum Building Upgrade Project No. 71981--from May 8th, 1995 to February 22nd, 1996 and that she was paid at a rate of $14.00 per hour. Wigmar's evidence was that Gilberstad, who held a first aid certificate, was hired at a rate slightly above the apprentice carpenter rate of $12.81 per hour to reflect the fact that 15% to 20% of her time would be occupied with first aid duties. As noted above, Wigmar alleged that

Gilberstad neglected or refused to complete and file the necessary apprenticeship forms and was, therefore, terminated for cause.

Gilberstad's evidence was that she was hired solely to fulfill the functions of a first aid attendant. She admitted to attending a meeting conducted by an apprenticeship counsellor but stated that she attended only out of curiosity and at no time did she actually intend to enroll as an apprentice carpenter.

In a written decision issued on November 22nd, 1996, the adjudicator held, following an earlier Tribunal decision, *D.E. Installations*, that an oral agreement could constitute an "apprenticeship agreement" under section 1 of the *SDFWA* and that Gilberstad was, in part, hired as an apprentice carpenter. The adjudicator found that Gilberstad was, in fact, hired to fulfill three job functions, namely, that of a first aid attendant, an administrative clerk and an apprentice carpenter. The adjudicator allocated her typical work day among the three job functions and then applied the appropriate wage rates for each job as set out in the *SDFWA* and accompanying regulations--first aid attendant (3.5 hours per day at $24.90 per hour); administrative clerk (1.75 hours per day at $23.90 per hour) and apprentice carpenter (2.75 hours per day at $12.81 per hour). In the net result, the adjudicator varied the Determination such that the sum of $8,834.86, plus interest, was held to be due and owing to Gilberstad.

REQUEST FOR RECONSIDERATION

Gilberstad's request for reconsideration was filed on her behalf by the British Columbia Provincial Council of Carpenters and is contained in a letter to the Tribunal dated December 23rd, 1996. The reconsideration request is based on three grounds:

i) alleged errors in stating facts;

ii) inconsistency with other Tribunal decisions; and

iii) an error of law.

I will deal with each of these grounds in turn.

ERROR IN FINDINGS OF FACT

The adjudicator had conflicting evidence before him. Gilberstad's testimony (which the adjudicator specifically noted was given in an "evasive" and less than fully forthright manner) was that she was hired solely as a first aid attendant. On the other hand, the employer maintained that she was hired into the dual position of first aid attendant and apprentice carpenter. As noted above, the adjudicator, based on the evidence that he had before him (and in particular, the evidence of the project site administrator/co-ordinator), found that Gilberstad performed three separate job functions and allocated her time (and wage entitlement) accordingly.

This Tribunal has repeatedly stated that it will not use its reconsideration power to set aside an appeal award on the basis of alleged factual errors unless the findings of fact are entirely unsupported by the evidence. Clearly, this finding is not perverse, as it can be supported by the evidentiary record before the adjudicator.

I wish to respond directly to a submission made on behalf of the Director that:

> An employee can properly only be one classification and that classification being the one of primary responsibility. To do otherwise, is to create a situation where it would be impractical, if not impossible, to apply either the *Employment Standards Act,* or the *Fair Wage Act.*
>
> It would be as if an employee had a number of part-time jobs with the same employer, which were worked on a consecutive basis, or concurrent basis; each job with a different wage rate, and different set of entitlements, Gilberstad is either a First Aid Attendant, or an Administrative Clerk, or an Apprentice Carpenter; not all. Given our understanding of the evidence we say, Gilberstad was a First Air (sic) Attendant, who was available primarily for first aid purposes, and, from time to time, performed clerical and other tasks.
>
> (Director's Written Submission dated January 27th, 1997, p. 5).

In my view, an employee may well be hired to perform different job functions and, in such circumstances, is entitled to be paid at the prescribed wage rate for each

separate function. While this sort of arrangement may be impractical, it is hardly impossible to administer. Indeed, unionized employers very often have to pay their employees at differing rates based on work performed outside of their usual job classification. In my mind, such a bookkeeping exercise is no more inherently difficult than accounting for differing wage rates due to overtime or time worked on statutory holidays. Further, it must be remembered that it is the employer who engages an employee to fulfill a variety of job functions and it is the employer who will bear the ultimate responsibility to ensure that the employee is paid according to the job function performed. Tellingly, the employer in this case does not complain whatsoever about the administrative burden imposed by reason of an employee being paid at different rates for different job functions.

Under the analysis proposed by the Director, an employee who occasionally worked in a higher paying job classification would nonetheless only be paid at the lower rate because that rate was attached to the employee's primary job function.

INCONSISTENCY WITH OTHER TRIBUNAL DECISIONS

The issue raised with respect to this ground concerns the definition of "apprentice" under the *SDFWA.* As noted above, the adjudicator held, following an earlier Tribunal decision, *D.E. Installations* (BC EST #D275/96, issued October 30th, 1996), that an oral agreement could constitute an "apprenticeship agreement" under the *SDFWA.* Gilberstad says that this finding runs contrary to two other Tribunal decisions, namely, *Wigmar Construction* (BC EST #D068/96, issued May 14th, 1996--the so-called "Suhr" decision) and *Wigmar Construction* (BC EST #D269/96, issued October 1st, 1996--the so-called "Crampton" decision). I might add that a further decision, *North American Construction* (BC EST #D264/96, issued September 23rd, 1996) also supports the position advanced by Gilberstad.

The "Suhr" decision did not specifically address the issue now before me, namely, whether or not there can be an oral apprenticeship agreement under the *SDFWA.* Adjudicator Suhr held that the apprenticeship in question terminated on June 23rd, 1995 prior to the employee's engagement by the employer. In the Crampton decision, the adjudicator held that:

> Section 4(1) of the *Skills Development and Fair Wage Act* requires **all** employees to be registered under the *Apprenticeship Act* or to hold a certificate. [The employee] was not registered as an apprentice, nor did he hold a certificate...
>
> Because [the employee] was not registered as an apprentice he is entitled to be paid at the lowest wage rate in Schedule 3 of the *Skills Development and Fair Wage Regulation* (i.e., the "labourer" wage rate).
>
> The responsibility for complying with Part 2 of the *Skills Development & Fair Wage Act* rests with the employer (i.e., the contractor or sub-contractor).
>
> (emphasis in original text).

Thus, the employee was entitled to be paid at the significantly higher wage rate payable to "labourers" as compared to "apprentices". Again, as in the Suhr decision, the specific question of whether or not an oral apprenticeship agreement could satisfy the requirements of the *SDFWA* was not directly addressed.

In *D.E. Installations,* the employee was hired on the express understanding that he would serve as an electrical apprentice. After having been hired, the employee completed a form entitled "Application to Register an Apprentice" but subsequently refused to sign a standard form "Apprenticeship Agreement". Thus, a formally registered apprenticeship agreement was never in place. The adjudicator held, firstly, that there had been a valid oral agreement between the employee and the employer whereby the employee was engaged as an apprentice electrician. Secondly, the adjudicator held that the *SDFWA* does not mandate a written apprenticeship agreement, nor does it mandate that an apprenticeship agreement be registered with the Apprenticeship Branch of the provincial government. I would note that the adjudicator did not refer to section 4(1) of the *SDFWA;* on the other hand, this latter subsection was specifically noted by the adjudicators in the Suhr and Crampton decisions and by Adjudicator Wolfgang in *North American Construction.*

In my view, section 4(1) of the *SDFWA* is critical to the analysis of this case. I agree with both Adjudicators McConchie (*D.E. Installations*) and Sollis that an apprenticeship agreement may be written or oral and need not necessarily be registered with the Apprenticeship Branch in order for a person to be an "apprentice" under the *SDFWA.*

However, section 4(1) of the *SDFWA* requires that all "apprentices" working at a "fair wage" site must either be registered under the *Apprenticeship Act* or hold a valid B.C. certificate of apprenticeship. The only exception permitted is where the apprenticeship in question is not recognized under the *Apprenticeship Act* [*cf.* s. 4(2) of the *SDFWA*]. In this latter instance, but only in this latter instance, an unregistered oral apprenticeship agreement could nonetheless constitute a valid apprenticeship agreement for purposes of determining wages due to an employee under the *SDFWA.* Although not relevant to this case, I might also add that if an employee is engaged as an apprentice, the employer must ensure that the apprentice is properly supervised [*cf.* s. 4(2) of the *SDFWA*]. Failing such supervision (which, in effect, is "on-the-job training"), the employer will not be able to pay the apprentice at the lower "apprenticeship" rates provided for in the *SDFWA* and Regulations.

In this case Adjudicator Sollis held that Gilberstad, although hired, at least in part, as an apprentice carpenter, never was registered as such under the *Apprenticeship Act* although she could have been registered, if she wished, as an apprentice carpenter. Thus, the exclusion set out in section 4(2) of the *SDFWA* is not relevant here. Further, I agree with my colleagues Suhr, Crampton and Wolfgang that it is the employer's obligation to ensure that an apprentice is properly registered or otherwise certified if that employer wishes to take advantage of the lower prevailing hourly wage rates for apprentices working at "fair wage" sites. Given that Gilberstad was not registered as an apprentice carpenter, the employer was obliged to pay her at the rates provided for under the *SDFWA* and Regulations for the actual job functions that she performed on behalf of the employer.

In light of my conclusion that Adjudicator Sollis erred in his analysis regarding whether or not Wigmar was entitled to pay Gilberstad as an apprentice carpenter, I do not propose to deal with the third ground (which is closely related to the second ground) advanced in support of the request for reconsideration except to say I

agree, in the circumstances of this case, that the adjudicator did make an error of law.

Although, on the facts of this case, Gilberstad performed various functions for the employer, it is also true that she was hired to be a first aid attendant and an apprentice carpenter and did fulfill both of those functions while employed by Wigmar. She also performed other duties. In my view, the most appropriate course of action would be to issue an award whereby Gilberstad would be paid for 44% of her hours at the first aid attendant hourly rate ($24.90)--as directed by Adjudicator Sollis--and the balance of her working hours at the hourly rate payable for general labourers or on-site clerks ($23.90).

Thus, the total amount due to Gilberstad may be calculated as follows:

First Aid Attendant:	685 hours x $24.90	= $17,056.50
General Labourer/Clerk:	[343 + 530] hours x $23.90	= $20,864.70
Subtotal		= $37,921.20
Less Wages Paid by Wigmar		= $23,208.64
Balance Due and Owing		= $14,712.56

ORDER

The application to vary the decision of the adjudicator in this matter is granted. I order, pursuant to section 116(1)(b) of the *Act*, that the original Determination No. CDET 002254 be varied and that a new Determination be issued as against Wigmar in the amount of $14,721.56 together with interest to be calculated by the Director in accordance with section 88 of the Act.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal