

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 -

Sunco Construction Services Ltd.
("Sunco")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Mark Thompson

FILE No.: 97/509

DATE OF DECISION: October 15, 1997

BC EST #D475/97
Reconsideration of BC EST #D202/97

DECISION

OVERVIEW

This was an application by Sunco Construction Services Ltd. (“Sunco”) under Section 116(2) of the *Employment Standards Act* (the “Act”) for reconsideration of Decision No. 202/97 (the “Decision”) issued by the Tribunal on May 20, 1997. The Decision arose from an appeal by Sunco of a Determination issued by a Delegate of the Director of Employment Standards (the “Director”) on March 4, 1997. The Director determined that Sunco owed a former employee, Mr. Sean Austin (“Austin”) \$4,584.44 for unpaid wages. The reconsideration was decided based on written submissions from Sunco, the Director and Austin.

Sunco hired Austin as an apprentice drywaller, and he worked on a project covered by the *Skills Development and Fair Wage Act* (SDFWA) from November 20, 1995 to April 12, 1996. Austin’s wage rate was \$15.11 per hour. He filed a complaint with the Employment Standards Branch on June 17, 1996, alleging that he should have been paid \$18.34 per hour, based on his experience as an apprentice. In the course of investigating the complaint, the Director’s Delegate found that Austin was not registered as an apprentice with Sunco. Consequently, Austin was entitled to be paid at the general labourer’s rate provided for in the SDFWA regulation. The Determination found that the difference between the wages that Austin should have received and his apprentice rate, including interest was \$4,584.44.

Sunco appealed the Determination on March 19, 1997. Two grounds were advanced for the appeal. Sunco hired Austin as an apprentice and determined that he was registered with the Apprenticeship Branch. A representative of the Apprenticeship Branch told Sunco not to transfer Austin’s apprenticeship agreement to Sunco because the agreement involved a union. Therefore, Austin was an apprentice as defined in the *Apprenticeship Act* and the SDFWA. Sunco also challenged the Determination on the grounds that it went beyond Austin’s complaint, which was based on his alleged entitlement to a higher rate of pay because of the number of hours he had completed as an apprentice. In addition, Sunco requested an oral hearing.

The Adjudicator found that it was the employer’s obligation to ensure that an apprenticeship agreement is properly registered if the employer wishes to pay the hourly rate applicable to apprentices at a “fair wage” site. After reviewing the relevant provisions of the *Apprenticeship Act*, the Adjudicator found that an employer must obtain prior written approval of the Director of the Apprenticeship Branch before transferring an apprenticeship agreement, a requirement Sunco had not met in Austin’s case. The Decision confirmed the Determination because no apprenticeship agreement existed between Austin and Sunco and Austin was therefore entitled to the lowest non apprentice rate under the SDFWA Regulation.

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Sunco's request for reconsideration of the Decision was based on the following grounds. The Adjudicator erred in law when he found that Section 4(1) of the SDFWA required that an apprentice had to be party to a registered apprenticeship agreement under the *Apprenticeship Act*. Second the Determination went beyond the complaint filed when it determined that Austin was not an apprentice. Austin was an apprentice and had a registration number issued by the Apprenticeship Branch. In this case, the Apprenticeship Branch had told Sunco not to transfer the agreement. The Director's Delegate had in effect initiated his own investigation into compliance with the *Employment Standards Act* in the course of issuing the Determination. Finally, Sunco argued that the Adjudicator should have held an oral hearing to hear evidence from all parties concerned.

ISSUE TO BE DECIDED

There are two issues to be decided in this case. Do the circumstances of the Decision No. D202/97 warrant reconsideration by the Tribunal? If the Decision is to be reconsidered, did the Adjudicator err in finding that Austin should receive the labourer's rate of pay for the period in question?

RECONSIDERATION OF DECISIONS

The Tribunal has ruled on a number of occasions that Section 116 of the *Act* should not be used to permit a dissatisfied party to re-argue the case it presented to the original Adjudicator unless stringent conditions are met. These conditions include: the Adjudicator failed to comply with the principles of natural justice; the original decision contained a mistake in its statement of the facts; and the original decision contained a serious error in the application of the law. Furthermore, the power of reconsideration granted the Tribunal under Section 116 should be invoked sparingly, i.e., when the breach of the principles stated above is serious. See *Zoltan T. Kiss*, BC EST #122/96; *Ravens Agri-Services & Products Inc.* BC EST #D136/97.

ANALYSIS

In this case, the grounds advanced by Sunco in its application for reconsideration of BC EST #D202/97 were virtually identical with the arguments it presented in support of its appeal of the Determination. In other words, no new issues of law were raised. Nor did Sunco produce significant evidence that contradicted the facts before the Adjudicator in the original Decision.

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Section 4(1)(a) of the SDFWA requires that an employee covered by the Act be registered under the *Apprenticeship Act* or hold a valid certificate of apprenticeship. Austin was registered with the Apprenticeship Branch. The Adjudicator found that his agreement with a previous employer had not been assigned to Sunco and that the necessary approval of the director of the Apprenticeship Branch had not been obtained. Moreover, the Tribunal has previously decided that an employer covered by the SDFWA is obligated to ensure that an apprentice is properly registered if it is to take advantage of the hourly rate for apprentices. See *Gilberstad* BC EST #D129/97, a reconsideration of *Wigmar Construction* BC EST #331/96. The Adjudicator dealt with this issue in the Decision by analyzing both the *Apprenticeship Act* and the SDFWA.

Section 79(3) of the *Act* gives the Director the power to issue a determination when she “is satisfied that a person has contravened a requirement of this Act.” There is no statutory authority limiting a determination to the grounds set out in the original complaint. To the contrary, the *Act* gives the Director considerable latitude to uncover possible violations of the law prior to issuing a determination.

There were no substantial issues of fact in the case that would have been resolved by an oral hearing. The adjudicator based his decision on a substantial file. In support of its request for reconsideration Sunco added additional information which reinforced the statements it presented for its appeal.

In summary, Sunco has not demonstrated that the requirements for canceling the original decision. No new issues of law or fact were presented with the request for reconsideration. It did not demonstrate any violation of the principles of natural justice, a failure to consider relevant facts or a serious error of law in the decision in question.

ORDER

For these reasons, pursuant to Section 116 of the *Act*, I decline to vary or cancel the Decision.

Mark Thompson
Adjudicator
Employment Standards Tribunal