



decision was unreasonable because its effect was to inequitably require the same wage rate for unskilled “stud welding” as for work done by a licensed skilled trade journeyman welder.

[3] For the reasons set out below, the application is dismissed. In summary, the Applicant knew and responded to the case it had to meet and there was no procedural unfairness. The Schedule for the Sewer and Watermain field of work which applied in this case did not distinguish between certified and uncertified welders, “skilled” and “unskilled” work or “spot [stud] welding” and “welding”. It assigned a wage rate to “welders”. It was agreed that “stud welding” was a form of welding and that the worker in issue performed this task 90% of the time. The decision was not unreasonable because the Schedule required the same wage to be paid to an uncertified worker who was working as a welder. The evidence fell short of establishing that there was a past practice of the Office accepting that workers who performed stud welding were not entitled to be paid the wage rate for welders under the Schedule.

### **Background**

[4] In 2021, the Applicant entered into a contract with the City for the installation of cathodic protection for existing ductile iron watermain pipes at various locations throughout the City (“the Contract”).

[5] The Manager of the Fair Wage Office exercises authority delegated by City Council in Chapter 67 of the Municipal Code. This includes authority to receive and investigate complaints relating to rates of pay which are set by the Fair Wage Schedule.

[6] In September, 2021, the Office received a complaint alleging that the Applicant was not paying its employee, James Steeves, the fair wage rate guaranteed to welders under the Policy, despite Mr. Steeves performing welding work for the Applicant.

[7] As a result of the complaint, the Office began an investigation. On November 19, 2021, the Manager attended the Applicant’s job site and observed six employees conducting work pursuant to the Contract. Mr. Steeves was observed performing welding. The Office wrote to the Applicant requesting payroll records for the six employees and provided the Applicant with a copy of the Policy. On December 20, 2021, the Applicant responded with paystubs and timesheets for the requested employees. On January 12, 2022, the parties had a meeting to discuss the investigation.

[8] After the meeting, the Applicant provided detailed written submissions on why it believes the work of James Steeves which it described as “bonding a stud to an existing watermain” (“stud welding”), should not qualify as work done by welders for the purpose of the Policy. This included details on the certification requirements for certified welders.

[9] On March 18, 2022, the Office requested additional information from the Applicant “to help us determine the wage issue with James Steeves.” The Office requested specific documentation such as records describing James Steeves’ work and hiring documentation. The Office also suggested a further meeting to discuss.

[10] A subsequent meeting was held on April 13, 2022 wherein the Applicant was given a further opportunity to make oral submissions. The Applicant reiterated its position that there is a distinction between stud welding work and welding work under the Policy.

[11] The Office sent a follow-up email to the Applicant requesting that it send the previously requested information by May 4, 2022. On May 4, 2022, the Applicant requested additional time to provide a response.

[12] On August 30, 2022, the Office followed up on its request for information “regarding welding and other work done by James Steeves.” The subject line of the letter included “Information re CP Systems” Position that James Steeves is not a Welder”. The letter stated:

Please provide the Fair Wage Office with all information you wish to rely on to substantiate your position that [James Steeves] should not be paid the applicable Sewer watermain Fair Wage Schedule welder’s rate.

[13] On September 15, 2022, the Office received submissions from Counsel for the Applicant addressing whether James Steeves should qualify as a welder for the purpose of the Policy, along with timesheets and paystubs for Mr. Steeves. The Applicant again made submissions on the work done by James Steeves--specifically the distinction between welding done by certified and non-certified welders. It further noted that “CPS has dealt with this very issue on at least to(sic) prior occasions with Fair Wage Toronto and, on each occasion, Fair Wage has accepted that these operators are not acting as welders.” The Applicant did not provide any supporting documentation or further details with respect to these previous discussions.

[14] On October 13, 2002, the Office issued the Decision concluding that James Steeves was a welder for the purposes of the Policy and therefore the Applicant was in violation by failing to pay him the minimum hourly wage rate guaranteed to welders under the Schedule. In the Decision, the Office summarized the undisputed facts, which included that stud welding is a form of welding and that James Steeves’ work for the Applicant required him to weld 90% of the time. The Office acknowledged the Applicant’s submissions that stud welding does not require certification but held that the Schedule does not distinguish between certified and uncertified welders. With respect to the Applicant’s submissions on its previous discussions with the Office, the Decision found that “every Fair Wage Policy investigation is decided on its own facts.”

### **Issues**

[15] Issue 1: Was the Applicant deprived of procedural fairness because it was not given fair notice, or because it was not provided with adequate disclosure?

Issue 2: Did the Decision unreasonably conclude that the Applicant’s worker should be paid as a “welder” under the Policy?

### **Statutory Framework**

[16] The Sewer and Watermain Fair Wage Schedule that was in effect at the time of the investigation applied to the contract between the Applicant and the City. It is divided into “Open Cut” Sewer classifications and “Tunnel Work” classifications. The “Open Cut” classification which is relevant to this case, sets the wage that must be paid to a “fusion welder” and a “welder”. The schedule does not define these terms.

[17] Under subsection 67-A8 of the Fair Wage Policy, where there is a dispute as to which wage rate is to be paid to any worker, the decision of the Office shall be final and binding upon all

parties. The Office determined that Mr. Steeves was a welder and required the Applicant to pay the higher hourly rate and fringe benefits payable pursuant to the Schedule for welders.

### **Standard of Review**

[18] Issues of procedural fairness are reviewed in this Court on a correctness standard through the lens of the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*.<sup>3</sup>

[19] The standard of review on Issue 2 is reasonableness. (*Canada (Minister of Citizenship and Immigration v. Vavilov*)<sup>4</sup>.

### **Issue 1: Was the Applicant deprived of procedural fairness because it was not given fair notice, or because it was not provided with adequate disclosure?**

[20] The Applicant submits that the initial notice that it received from the Office simply requested payroll sheets for certain workers, and that nothing suggested that the issue at hand was whether the workers were welders. The Applicant argues that this is a violation of the City's procedural fairness duty and relies on *Queensway Excavating & Landscaping Ltd. v. Toronto (City)*, 2019 ONSC 5860. The Applicant submitted that the City also failed to disclose certain interviews, correspondence and photographs prior to the Decision and its conduct overall violates the procedural fairness principle that a party is entitled to know the case against it. The Applicant further argued that the Decision introduced a threshold not found in the Policy when it found that Mr. Steeves was a welder because he welded 90% of the time. This threshold was not known to the Applicant prior to the Decision.

### **The Applicant Was Not Deprived of Procedural Fairness**

[21] The decision in *Queensway* dealt with a determination by the Office that Queensway had violated the Policy by failing to pay its employees the total number of hours worked. The originating notice issued by the City only requested Queensway's payroll information and provided no specifics about the allegations that Queensway had underpaid its employees. The Court held that Queensway was entitled to know it was being accused of failing to pay its employees for hours worked and that the Office's notice letter requesting payroll information failed to provide adequate notice.

[22] In this case, although the Office's initial notice to the Applicant was vague, prior to the Decision, the Applicant was informed of the purpose of the investigation and the case it was to meet and made submissions in response. The Applicant was given fair and adequate notice that the Office was investigating whether Mr. Steeves' work qualified him as a welder under the Policy. The Applicant was given several opportunities to provide oral and written submissions on the issue. The Applicant explicitly acknowledged the scope of the investigation on a number of occasions and provided submissions directly on the issue that was ultimately decided.

[23] The City was not required to disclose every document in its possession.<sup>5</sup> The Applicant has not established that it was not informed of all of the facts considered to be relevant or that there

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<sup>3</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

<sup>4</sup> *Canada (Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65.

<sup>5</sup> *Greenberg v. Canada (National Parole Board)*, 10 W.C.B.222, 48 N.R. 310 (F.C.C.A.) at para 12.

was any prejudice to its participation in the decision-making process as a result of any non-disclosure.

[24] There was nothing procedurally unfair about the Office taking into account the fact that Mr. Steeves spent 90% of his time welding. This did not introduce a novel threshold requirement. It was common sense and ordinary logic for the Decision to conclude that a “worker who is required to weld the vast majority of the time qualifies as a welder under the Policy.”

[25] There was no procedural unfairness.

**Issue 2: Did the Decision unreasonably conclude that the Applicant’s worker should be paid as a “welder” under the Policy?**

[26] The Applicant makes the following arguments:

1. “Stud welding” is a simple task. It is illogical to hold that repetition of a simple task elevates it to a skilled task. It is unreasonable that an unskilled labourer performing automatic welding be paid the same as a journeyman skilled welder and more than an apprentice welder.
2. The Decision fails to address why automatic stud welding is to be paid at the level of a skilled trade, despite that argument having been raised by the Applicant.
3. The Policy “excludes automatic welding from the pay rates paid to a skilled trade journeyman welder”.
4. It is unreasonable for the Office to depart from prior decisions, which happened “on identical facts” in 2010 and 2013 where the Office determined that the Applicant was compliant with the Policy. It is insufficient for the Decision to merely state that “every Fair Wage Policy investigation is decided on its own facts”.

**The Decision did not unreasonably conclude that the Applicant’s worker should be paid as a “welder” under the Policy**

[27] The Schedule sets out six different classifications to which the Policy applies:

- A. General
- B. Heavy Construction
- C. Industrial, Commercial and Institutional;
- D. Road building;
- E. Sewer and Watermain; and
- F. Utility.

[28] Each of these classifications is further divided into different types of work with different corresponding fair wage rates. This division furthers the overarching purpose of the Policy which is to ensure that workers employed by City contractors receive remuneration that is consistent with the prevailing wages and benefits in their class of work.

[29] In the case of the Sewer and Watermain classification, there are two classes of welder: “welder” and “fusion welder”. Neither are defined terms under the Schedule. For sewer and watermain work, the class of “welder” does not distinguish between certified and uncertified welders or skilled and unskilled welders.

[30] The rates are informed by discussions between the Office and employee and employer groups and associations including relevant apprenticeship programs for construction-related trades. They are established either on the lowest rate established by collective bargaining or market and industrial surveys, in accordance with the prevailing wages for non-union workers in the geographic area.<sup>6</sup>

[31] In arguing that the Decision is unreasonable, the Applicant is relying on classes of work (semi-automatic welding and rod welding) under the Heavy Construction classification of the Policy. This is an entirely different category of work than that which is at issue in the Decision which is Sewer and Watermain.

[32] The purpose of the Policy is to ensure that workers are paid consistently with the prevailing wages in their field of work. It was not unreasonable for the Office to conclude that Mr. Steeves should be paid the fair wage rate guaranteed to welders under the Schedule for workers performing welding in his field—Sewer and Watermain construction work,—without reference to a different classification of work in the Schedule.

[33] There was nothing unreasonable about the Decision taking into account the fact that Mr. Steeves spent 90% of his time welding. I reject the Applicant’s characterization of this factor as the Office elevating an unskilled job to the level of a skilled job based on repetition. It was a matter of common sense and ordinary logic to conclude that a “worker who is required to weld the vast majority of the time qualifies as a welder under the Policy”.

[34] The Decision was not unreasonable by virtue of not engaging with skilled/unskilled labour distinctions, because the relevant category of work under the Policy—Sewer and Watermain—does not reference “skilled” and “unskilled” work or distinguish between “stud welding” and “welding”. It is far from clear that an apprentice welder would receive a lower rate under the Sewer and Watermain schedule for welding than was found to be applicable to Mr. Steeves. The Policy does not require that a worker be certified as a welder to be entitled to the rate of pay guaranteed to welders under the Sewer and Watermain category. The determination of whether a worker falls within a specified job class is premised on the Office’s determination of the type of work actually performed by the worker, not on the worker’s certification.

[35] While the Applicant referred to prior Office decisions in 2010 and 2013, it has not produced any evidence of any prior decision of the Office. The City’s own records contradict the Applicant’s assertion that the 2010 and 2013 “investigations” were on “identical facts”. The precise issue of whether stud welding qualified to be paid the rate of pay of welder was not addressed. Even if the Applicant had established that the Decision was inconsistent with prior decisions of the Office, conflicts or inconsistencies between decisions of the same administrative decision maker do not justify intervention on judicial review, provided the decisions are within the decision maker’s jurisdiction and the “bounds of rationality.”<sup>7</sup>

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<sup>6</sup> Para.. 67-A6, subpara. B, of the Fair Wage Policy.

<sup>7</sup> *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, 2001 SCC 4, pp.238-239, para.28.

[36] I also reject the Applicant’s argument that the Decision was illogical because it did not follow a rational chain of analysis. The Applicant conceded that stud welding is a type of welding and that Mr. Steeves’ work required him to weld 90% of the time. There was no issue that the Sewer and Watermain Construction Schedule applied to this contract. There was no distinction in that field between certified and uncertified welder. It was logical to conclude that Mr. Steeves was a welder in the Sewer and Watermain Construction field and was entitled to be paid at rate not less than the Schedule rate for a welder in that field.

**Affidavit of Patrick Mountain**

[37] The Applicant relies on an affidavit of Patrick Mountain, President of the Applicant, which largely focuses on the differences between “stud welding” completed by Mr. Steeves and the more technically complex welding. The Affidavit also notes that the Applicant does not possess records from prior audits that the Office undertook.

[38] The court’s role on judicial review is to review the decision made. The record to be reviewed should therefore be confined to the materials that were before the decision maker at the time it rendered the decision. The general rule is that an affidavit containing material that was not before the decision maker is not admissible on judicial review. There are no exceptional circumstances present to vary from the general rule.

[39] The Applicant’s arguments regarding the equity or consistency of rates within the Policy are not within the scope of this Application and the fact that the Office declined to address these arguments in its reasons is not a basis for a finding that the Decision was unreasonable.

[40] In determining that Mr. Steeves was entitled to the pay rate guaranteed to welders under the Sewer and Watermain category of the Policy, the Office was making a decision within its sphere of expertise and is owed a degree of “respectful appreciation” by the reviewing court.<sup>8</sup>

[41] The Applicant has not met the onus of establishing that the decision was unreasonable or procedurally unfair. A review of the record and context as a whole demonstrates that the Decision was made after engaging in a highly specialized and factual- driven exercise, which is entitled to deference. The record shows that the Decision was logical and consistent with the purpose of the policy. The Decision was not unreasonable.

**Conclusion**

[42] The application is dismissed. In accordance with the parties’ agreement, the Respondent is entitled to costs in the agreed upon amount of \$7500.00.

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Backhouse J.

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<sup>8</sup> *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2022 SCC 62 at para.13.

I agree

\_\_\_\_\_ Gomery J.

I agree

\_\_\_\_\_ Nishikawa J.

**Date Released: September 18, 2023**

**CITATION:** 1460973 Ontario Ltd. v. City of Toronto, 2023 ONSC 5213  
**DIVISIONAL COURT FILE NO.:** 625/22  
**DATE:** 20230918

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**Backhouse, Gomery and Nishikawa JJ.**

**BETWEEN:**

1460973 ONTARIO INC. o/a C.P. Systems

Applicant

– and –

City of Toronto

Respondent

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**REASONS FOR DECISION**

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**BACKHOUSE J.**

**Date of Release: September 18, 2023**