Employment Standards TRIBUNAL

An appeal

- by -

Nova Construction Ltd.
("Nova")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Carol L. Roberts

FILE No.: 2001/768

DATE OF DECISION: January 16, 2002

DECISION

This is a decision based on written submissions by Bill Gilbertson on behalf of Nova Construction Ltd., Kirk Lensen, and Joanne Kemble on behalf of the Director of Employment Standards.

OVERVIEW

This is an appeal by Nova Construction Ltd. ("Nova"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued October 12, 2001. The Director found that Nova had contravened Section 63 of the Act in failing to pay Kirk Lensen compensation for length of service, and Ordered that Nova pay $1,883.18 in wages and interest to the Director on Mr. Lensen's behalf.

ISSUE TO BE DECIDED

Whether the Director erred in determining that Lensen was entitled to compensation for length of service.

FACTS

The following facts as set out by the Director's delegate, are not in dispute.

Nova, a company that is no longer in business under that name, operated a construction company. Lensen worked for Nova as a first aid attendant/safety officer, and was laid off on November 12, 1999, without written notice and without compensation for length of service.

The delegate found that Lensen worked continuously from June 6, 1998 to November 12, 1999 at a number of construction sites, and thus did not fall within the section 65(1)(e) exception to the statutory obligation to pay length of service compensation under section 63. The delegate concluded that Lensen's employment was terminated without notice, and was entitled compensation for length of service.

Nova disputes the delegate's finding that Lensen was employed on an ongoing basis and that he worked at various sites operated by Nova.

ARGUMENT

Nova says that Lensen was hired as an hourly construction worker, not salaried staff, for a specific project on June 6, 1998. It says that, when the project ended, he was terminated. Nova enclosed Lensen's ROE, dated July 2, 1999 in support of this position. Nova says that Lensen

was rehired July 20, 1999 for a new project, and terminated November 11, 1999, when that project ended. Nova also says that, while employed with Nova, Lensen also worked on a number of other projects. Nova says that Lensen received an ROE at the end of the first project and was well aware that he was an hourly employee.

Mr. Lensen contended that the time sheets submitted by Nova demonstrated that he was employed from May 24 to November 20, 1999, moving from job site to job site. He acknowledges that he was laid off, but that he was recalled after only a few days.

The delegate sought confirmation of the Determination.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Section 63 of the Act provides that an employer is liable for compensation for length of service after three consecutive months of employment.

Section 65(1)(e) provides that section 63 does not apply to an employee employed at a construction site by an employer whose principal business is construction.

I accept, based on the ROE provided by Nova, that Lensen was employed continuously as a first aid attendant from June 1, 1998 to July 2, 1999, at which time he was laid off due to a shortage of work.

Lensen was rehired on July 20, 1999 as a construction safety officer, and laid off again on November 12, 1999.

Nova's documentation does not support its assertion that Lensen was hired as an hourly construction worker. He was hired as a first aid attendant/construction safety officer, as identified on the ROEs prepared by Nova. I accept Lensen's submissions that his job involved visiting job sites performing inspections and addressing WCB concerns at each of those sites. If he had any spare time, he was asked to perform carpentry work. The nature of this work does not exclude him from the application of section 65(1)(e).

There is no dispute that Nova's principal business was construction. Further, Nova's own documents indicate that, during the time Lensen was employed, his services were used on a number of projects. For example, during the pay period October 24 to November 6, 1999, Nova's time sheets show that Lensen worked on job numbers 366, 417 and 446. Therefore, I am unable to find that the delegate erred in concluding that Lensen was employed by Nova at a number of construction sites.

Section 65(1)(e) refers to employees at a (singular) construction site. In Daryl-Evans Mechanical Ltd. BC EST #D442/00, the Tribunal decided that the exclusion set out in section 65(1)(e) is to be narrowly construed:

> Exceptions to benefit-conferring legislation must be narrowly interpreted. Section 65(1)(e) refers to a construction site, not to construction workers...In our view, this section was designed to provide relief from the termination pay provisions for employers to the extent that they employ workers to work on a single construction project. However, where an employer has many construction and renovation projects, and an employee is continuously employed by that employer, we are of the view, as the Adjudicator was, that the exception from the termination provision does not apply. We have arrived at this conclusion based on the strict wording of the legislation, as well as the principle that exceptions should be narrowly construed, and the interpretation and application of the Act should be consistent with its objectives and purpose.

This decision was recently affirmed by the Supreme Court of British Columbia (Daryl-Evans v. Empl. Standards, [2002] BCSC 48)

The evidence is that Lensen worked in excess of three months. I am unable to find that the delegate erred in concluding that the section 65(1)(e) exclusion did not apply, and that Lensen is entitled to length of service compensation. I deny the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated October 12, 2001 be confirmed in the amount of $1,883.18, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal