

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Frederick Middleton  
("Middleton")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 1999/370

**DATE OF DECISION:** February 8, 2000

**DECISION**

**OVERVIEW**

On August 5, 1999, the Tribunal issued a decision, BC EST #D321/99 (the “original decision”) on an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Frederick Middleton (“Middleton”) of a Determination which was issued on May 20, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination had concluded, among other things, that Middleton was not entitled to length of service compensation in respect of his employment with Spectrum Developments, operating as Claude’s Fine Woodworking (“Claude”) because Middleton was employed in the construction industry.

The appeal was partly successful and the matter was referred back to the Director to review two aspects of the Determination, whether Claude’s principal business was construction and, if so, whether Middleton was employed at a construction site. On November 9, 1999, the Director submitted a report on the matters that were referred back. The report concluded that Claude’s principal business was in construction, but that Middleton was not employed on a construction site. The report recommended that the Determination be varied to include a conclusion that Middleton was entitled to one week length of service compensation in the amount of \$361.25 and that Middleton was owed a total of \$568.37 by Claude.

The report was provided to Middleton and Claude, who were invited to file submissions on it. Both Middleton and Claude filed replies.

Before considering those replies, it is necessary to summarize the original appeal, as the reply filed by Claude to the Director’s report included submissions on six issues that had been considered in the Determination. It should be noted first that Claude did not appeal any aspect of the Determination. The appeal was brought by Middleton and raised only one issue, which was stated as follows in the original decision:

The only issue to be decided is whether Middleton has shown the Director was wrong to conclude he was employed in the construction industry.

That statement of the issue was based directly on the appeal filed by Middleton, which stated:

While I am pleased about some of the findings in the Determination dated May 20/99, I’m confused about and would like to appeal on one point - compensation for length of service.

The time limits for filing an appeal of the Determination have long passed and, accordingly, this decision will not address any issues other than whether Middleton was entitled to length of service compensation. All other matters are timed-barred.

**ISSUES TO BE DECIDED**

The only issue in this appeal is whether Middleton was entitled to length of service compensation.

## ANALYSIS

There is no disagreement with the Director's conclusion that Claude's principal business during the period of Middleton's employment, May 14, 1998 to September 4, 1998, was construction. On October 26, 1999, Claude provided the Director with a comprehensive outline detailing his business activities during that period. That outline clearly justifies the conclusion reached by the Director.

The factual issue has settled on two matters: first, whether Middleton gave Claude just cause for his dismissal on September 14, 1998; and, second, whether Middleton was employed on a construction site.

I have no hesitation in concluding that the incident described by Claude as the reason for dismissing Middleton does not constitute just cause under the *Act* and does not discharge Claude from the statutory obligation to pay length of service compensation if Middleton were otherwise entitled to it.

In the Director's report, the following statement addresses the question of whether Middleton was employed at a construction site:

Middleton claims he was employed in a woodworking shop for the vast majority of the time he worked. This claim is not disputed by Claude. . . . The woodworking shop was not a construction site and therefore the exemption [in subsection 65(1) of the *Act*] does not apply to Middleton.

Claude made a lengthy submission to the Tribunal, dated December 6, 1999. While the submission details some of the work performed by Middleton at the site of three houses being built and a renovation job being done by Claude, the submission never addresses the conclusion of the Director that Middleton was employed in the woodworking shop for the vast majority of the time he worked. Nor does it comment directly on a submission filed by Middleton, which was provided to Claude on November 24, 1999, where he says:

. . . I was hired to work in Claude's Fine Woodworking shop or "warehouse" at 561 Hillside Avenue. This can be borne out by the ad in The Times - Colonist of May 11<sup>th</sup> or 12<sup>th</sup>, 1998, to which I responded.

I accept that Middleton was hired to work in the woodworking shop, that he spent a vast majority of his time worked there and that he spent some time during his employment work at construction sites.

Generally speaking, Section 63 of the *Act* establishes a statutory liability on employers to pay employees with more than 3 consecutive months of employment an amount of length of service compensation upon termination of their employment. This liability is deemed to be discharged if, among other things, an employee is dismissed for just cause. There are no circumstances present in this case that would justify a conclusion that Middleton was dismissed for just cause. Section 65 of the *Act* identifies some employees to whom Section 63 does not apply, including those:

(e) *employed at a construction site by an employer whose principle business is construction,*

Claude argued that Middleton, even if he did some of his work at the shop, was “part of the construction industry” and like other workers in that industry would expect to be laid off at the end of the project on which they were employed. The answer to that argument is found in the following sentence from the original decision:

Exceptions and exemptions to the *Act* are typically narrowly construed and their interpretation and application should be consistent with the *Act’s* objectives and purposes.

In the circumstances of this case, the exception in Section 65 for construction employees requires that those employees be employed “*at a construction site*”. There are a myriad of employers who can claim to have their principal business in construction whose employees never set foot on a construction site. Like the employees in the woodworking shop, the employment of these employees is often indirectly affected by the ebb and flow of available construction work. However, the legislature chose to exclude only those employees employed at a construction site from the application of Section 63. Claude has offered no reason that would be consistent with the objectives and purposes of the *Act* to extend the exclusion to employees employed for a vast majority of the time at a shop location off the construction site.

In the final analysis, Claude has not shown that the conclusion of the Director is wrong. The Director concluded that Claude was an employer whose principal business was construction but that Middleton was not employed at a construction site. No reason has been shown to disturb that conclusion and accordingly Middleton is entitled to length of service compensation in the amount calculated by the Director.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated May 20, 1999 be varied to show the amount owing as \$568.37, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**