Employment Standards TRIBUNAL



An appeal

\- by -

Lockerbie & Hole Industrial Inc.

\- 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

**TRIBUNAL MEMBER:** Frank A.V. Falzon

**FILE No.:** 2005A/3 & 2005A/4

**DATE OF DECISION:** May 27, 2005

# DECISION

## OVERVIEW

Lockerbie & Hole Industrial Inc. ("the employer") appeals two December 21, 2004 Determinations issued by a Delegate of the Director of Employment Standards. For convenience, my reasons on both appeals are addressed in this single set of reasons.

The Determinations under appeal ordered the employer to pay John Graydon and Dale Schultz (the employees) compensation for length of service pursuant to s. 63 of the *Employment Standards Act* ("the *Act*") following their terminations without cause in August and October 2003. The Delegate conducted an oral hearing of the complaints on October 7, 2004.

One of the core statutory rights customarily conferred by employment standards legislation is the right to a measure of severance pay whenever an employee who has worked for a sufficient period of time is fired without cause or notice. In British Columbia, the statutory formula for individual employees, set out in section 63, makes an employer liable to pay an amount equal to a week's wages after 3 consecutive months of employment. That liability increases to a maximum of 8 weeks' wages if the employee has been employed for 8 or more years. In this case, each employee was employed for 6 and ½ years before being terminated without cause or notice.

As with all statutory rights, there are boundaries and exceptions. As set out in the Delegate's Determination and as argued before the Tribunal, this case turns on whether the employer can successfully rely on the exception set out in section 65(1)(e) of the *Act*, which provides:

> 65(1) Sections 63 and 64 do not apply to an employee
>
> (e) employed at one or more construction sites by an employer whose principal business is construction.

## Some history

Before turning to the Determination and the facts of this case, it will be useful to orient the reader with a brief history of section 65(1)(e).

Prior to the 1995 amendments to the *Act*, section 10(b) of the *Employment Standards Act Regulation* provided that Part 5 of the Act as it then stood "does not apply to a person employed to work at a construction site by an employer whose principal business is construction".

The major legislative reform to the *Act* undertaken in 1995 did not alter the substantive language of the regulation on this subject, other than to move it into s. 65(1)(e):

> 65(1) Sections 63 and 64 do not apply to an employee
>
> (e) employed at one or more construction sites by an employer whose principal business is construction.

In the year 2000, an issue arose before the Tribunal as to whether an employer who hired an employee to work on multiple construction sites could claim the benefit of the exemption. In November 2000, the Tribunal (BCEST No. 442/00) answered that question "no", holding as follows in a reconsideration decision:

> In our view, the section is 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 to the termination provision does not apply.

An application for judicial review of the Tribunal's decision was considered by the Court in *Darryl-Evans Mechanical Inc. v. British Columbia (Director of Employment Standards)*, [2002] B.C.J. No. 30 (S.C.). The broad implications of the Tribunal's decision within the construction industry was stressed by four umbrella employer associations, each of which was granted leave to intervene in that case. Each association argued strenuously before the Court that the Tribunal's narrow interpretation of the exemption was contrary to the economic and practical realities of the construction industry: see paras. 22-35. While acknowledging merit in the petitioners' arguments against the Tribunal's decision, the Court held that the Tribunal's decision to construe the previous section narrowly was not patently unreasonable (para. 87, 89):

> While there is a good argument that employees of longstanding who have worked on many projects are not entitled to notice because of the wording of section 65(1)(e), that argument was made before the Tribunal and considered and rejected in its reasons. If I were to adopt the position put forth by the petitioner and the relevant intervenors, I would, in my view, be entering into an area which the legislature has reserved for the Tribunal. In other words, I would be enforcing another view of the industry and of the practical issues facing construction contractors simply because I might have decided the matter differently…
>
> …it is not up to the court to rewrite legislation to make the necessary changes, either adding specificity or clarifying the wording so that the exemption is without doubt a blanket one. That task lies with the legislature.

As is evident from these and other passages from the Court's judgment, the question in *Darryl-Evans* was not whether the Tribunal's decision was correct or incorrect. In accordance with the strong privative clause in the *Act* and the general jurisprudence governing the standard of review, the Court properly limited its review role to determining whether the Tribunal's interpretation of former section 62(1)(e) was patently unreasonable or clearly irrational. Faced with ambiguous legislation, it was for the Tribunal to determine the "correct" legislative intent, for the Court to limit its review to rationality, and for the Legislature to amend the legislation if not satisfied with the Tribunal's interpretation.

The judgment in *Darryl-Evans* was rendered January 11, 2002. Just four months later (May 30, 2002), the Legislature brought into force section 32 of the *Employment Standards Amendment Act, 2002*, S.B.C. 2002, c. 32:

32. ***Section 65(1)(e) is amended by striking out*** "employed at a construction site" ***and substituting*** "employed at one or more construction sites".

Given the legislative and judicial history described above, it is impossible not to take this specific reform as an unequivocal statement of the Legislature's view that it prefers the position of the petitioners in the *Darryl-Evans* case to the position taken by the Tribunal in its reconsideration decision.

Counsel for the employees seeks to argue that the new wording of section 65(1)(e) is nothing more than a restatement of section 28(3) of the *Interpretation Act* ("In an enactment, words in the singular include the plural…") which was considered by the Court in *Darryl-Evans*. What this submission overlooks, however, is the Court's finding that, as with all *Interpretation Act* provisions, section 28(3) is subject to a contrary intent appearing in the relevant enactment. The specific amendment to section 65(1)(e) leaves no question as to any contrary intention on this subject. The intention on the issue of "one site" or "more than one site" is now expressly stated within the four corners of section 65(1)(e). I therefore disagree with counsel's submission that a Tribunal finding contrary to our previous decision in *Darryl-Evans* would be to declare that the Supreme Court decision was wrongly decided. This submission misunderstands what the Supreme Court decision was about. The Supreme Court did not decide that the Tribunal's interpretation of the former section was the "best", "preferred" or "correct" interpretation. It was the Tribunal's job to decide on the "best", "preferred" or "correct" interpretation. It is apparent that given the standard of review applied, the Court would have upheld the Tribunal's decision had it gone the other way.

It our duty at all times to obey the intent of the legislature. It is one thing to adopt a particular interpretation in the face of genuine ambiguity, which was clearly present under the former section. But where the Legislature has clearly set out its intent, as it has done since May 2002, it is our job to implement that intention. That intention, in plain language, is that an employer can rely on section 65(1) when two conditions are met:

(1) The employer's principal business is construction, and

(2) The employee is employed at one or more of those construction sites.

**<u>The Delegate's reasons</u>**

The Delegate's reasons for Determination recognize that that *Act* changed since the *Darryl-Evans* case, and that as a result of the change to section 65(1)(e), "a person could no longer qualify for compensation pay by working at more than one construction site" (p. 1). For the Delegate, the key judicial decision on point was not *Darryl-Evans*, but rather *Honeywell Ltd. v. Director of Employment Standards*, [1997] B.C.J. No. 2290 (S.C.). The Delegate held that the onus was on the employer to convince the Delegate that the employees were "employed at one or more construction sites by an employer whose principal business is construction."

The first question was whether the employees were "employed at one or more construction sites". The Determination states that despite the agreement of the employees and employer witnesses that their work was construction work, the evidence failed to satisfy him, according to the relevant legal test in *Honeywell*, that the employees worked at "a place where construction is done" and that construction was "the predominant kind of work in which the employee was engaged overall." Both employees had broad job descriptions as "construction and maintenance superintendents whose responsibilities covered estimating, business development, emergency response and site management", and each performed office work. In the circumstances, the Delegate held that the employer failed to provide reliable evidence to demonstrate that construction was the predominant work undertaken by the employees.

The Determination also addressed the second part of the statutory test – i.e., whether the employer's principal business is construction. Again the Delegate relied on *Honeywell* case, and in particular the Court's statement that if an employer operates more than one business, determining the principal business requires the finder of fact to compare the "gross revenue, operating costs, expenses, income, capital employed and employee time and effort in relation to each in order to determine which is the principal business". The Delegate held "Lockerbie presented no evidence that satisfied this test."

**Appeals**

The Employer takes issue with both findings in the Determinations. The Employer argues that it did not call additional evidence about its primary business or whether the employees worked at one or more construction sites because each was admitted by the employees and was uncontested in evidence. The Employer says:

> Given the complete agreement of every witness who was called to the hearing it is incomprehensible how the Delegate could make a finding of fact contrary to all the evidence presented."
>
> The relevant point of contention between the parties was to what degree did the complainants work on construction sites versus office work. There was no dispute that they engaged in both activities. Likewise, there was no dispute that the Employer was a construction company.
>
> In order for administrative hearings to proceed expeditiously, where the parties agree to certain facts, one party is no longer obligated to call evidence on a matter that is not in contention. It is a breach of natural justice to undermine and/or ignore agreed facts set out by the parties.

**Analysis**

It will be useful to briefly summarize the *Honeywell* decision, which decision was relied upon by the Delegate but not mentioned in the submissions of counsel. The Court in *Honeywell* made the following findings as regarding section 10(b) of the *Employment Standards Regulation* (quoted above):

- Two conditions must be satisfied if the exemption is to apply. The employee must be employed at a "construction site", and the principal business of the employer must be "construction". Neither condition requires that the employee be a construction worker *per se*. (para. 29)

- In determining whether an employee is employed at a construction site, "the determination should be made on the basis of a functional analysis which will identify the predominant kind of work in which the employee was engaged at any single site, and in the case of an employee who works at a number of sites, the predominant kind of work in which he was engaged overall." (para. 36) "An employee's predominant kind of work at any site should be determined by reference to time consumed in repair or alteration functions relative total effort at the site. Time is the most objective measure in the context of employment." (para. 38)

- "The character of the petitioner's principal business is a question of fact which should be determined objectively with reference to factors which have long been accepted as relevant in the context of similar determinations for federal and provincial income tax purposes. Those factors include an identification of the nature of the petitioner's business(es) and if more than one a comparison of gross revenue, operating costs, expenses, income, capital employed and employee

> time and effort in relation to each in order to determine which is the principal business." (para. 43).

*Honeywell* was decided under the law as it stood in 1994, but the substantive issues it decided, which extend beyond the narrow issue decided in *Darryl-Evans*, have not materially been impacted by the ensuring legislative revisions. Indeed, paragraph 36 of *Honeywell* makes clear that the Court in that case proceeded on the premise that the former section applied to construction work at multiple sites, as section 63(1)(e) now expressly provides. I therefore find that the Delegate was correct to apply the *Honeywell* case to the facts before him. The question is whether he did so correctly in respect of the two branches of statutory test as set out by the Court.

Dealing with the second branch first, it is my view that the Delgate erred in law when he concluded that the employer did not prove that its principal business was construction. The Delegate's error was to assume that a detailed evidentiary foundation for the "income tax" test as set out by the Court in *Honeywell* had to be demonstrated even when the parties agree as to the nature of the employer's business. It must be remembered that the lack of detailed analysis on this issue was an error in *Honeywell* because the nature of the business was a core question at issue between the parties in that case:

> "The second aspect of the test in paragraph 10(b) of the Regulation is the question whether the "principal business" of the employer is construction. There is no evidence that the issue was addressed by the respondent when considering the complaints *notwithstanding that the question whether the petitioner's business was construction as opposed to manufacture and sale of machinery and equipment in 1994 was raised in the complaint….*"

There is no suggestion in this case that the nature of the employer's business was at issue between the parties, nor is there anything in the record that suggests that there is any other business that could otherwise be considered a principal business. In these circumstances, it was sufficient for the employer to lead witness evidence testifying to the nature of the business, and to cross-examine the employees who conceded this point and never made it an issue. It was not fair or reasonable, and not a proper reading of the *Honeywell* decision, to foist an additional evidentiary burden on the employer in respect of this issue.

My conclusion differs, however, on the question whether the Delegate erred in determining whether the employees were employed at one or more construction sites. The relevant legal question on this point was the predominant kind of work in which the employees were engaged overall. As the employer admits, "the relevant point of contention between the parties was to what degree did the complainants work on construction sites versus office work." I agree that this was a central and legally relevant point of contention between the parties, particularly since (a) the employer did not argue that "office work" is construction work, (b) the job descriptions included work that is not necessarily construction work, and (c) Graydon gave evidence that "most of their income came from doing office work not site work", and Schultz "did not agree that most of his time was spent on sites" (Determination, p. 3; see also evidence of Judd). In these circumstances, the employees' answer in cross-examination to the general question whether they worked at one or more construction sites was not conclusive, and did not answer the more specific "predominant kind of work" question required by *Honeywell*, which was of course the key legal question at the hearing on which a finding of fact would have to be made.

Given the relevant legal inquiry and the significance of the exemption, the Delegate was in my view correct to require in these circumstances that the employer adduce sufficient evidence to satisfy him on the more precise question that construction was the predominant kind of work in which the employees were engaged.

It is obvious from his reasons that the Delegate carefully considered the oral and documentary evidence before him. As to the latter, the Delegate found Exhibit “A” (breakdown of site time vs. office time) could not be accepted at face value, for reasons which are entirely reasonable.

This Tribunal’s appellate mandate does not authorize it to we-weigh evidence or substitute findings of fact for those of the Delegate. Nor was there any breach of procedural fairness on the first issue, as the Delegate did not go behind a fact that the employees expressly agreed to. To the contrary and as noted above, the employees did not agree on the key question of fact which the Delegate had to decide under Honeywell regarding the predominant type of work in which they were engaged.

There is one final issue I on which I will comment briefly before closing. During the course of submissions, the employer made a request, which it ultimately decided not to pursue, pertaining to whether this Tribunal might order that a Delegate produce his or her hearing notes in order to resolve an evidentiary issue. Because I do not think the Tribunal should be encouraging such requests to be made willy-nilly, I propose to make brief comment on this submission. Without finally deciding whether the Tribunal could ever lawfully order such notes to be produced, there are two reasons why it would be highly exceptional to do so. First, there is a reliability concern. Note-taking by a Delegate is not the same as note-taking by a court reporter or hearing secretary. This is because a decision-maker’s hearing notes are a personal *aide memoire* and as such are not created for the purpose of recording the entire proceeding for third parties. Second, there is a deliberative privilege concern, as such notes are closely linked with the deliberative process: see generally *Ellis-Don Ltd. v. Ontario Labour Relations Board*, [2001] 1 S.C.R. 221. There were no extraordinary circumstances that would have persuaded me to make such an order had this issue been pressed here, particularly since, as the employer here ultimately conceded, the key evidence of the parties is summarized in the Determinations themselves.

## ORDER

The Employer could only succeed on this appeal if it had been able to demonstrate that the Delegate erred on both branches of s. 65(1)(e). Having failed to do so, the appeals are dismissed.

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**Frank A.V. Falzon**
**Member**
**Employment Standards Tribunal**