Employment Standards TRIBUNAL

An appeal

- by -

Herman Hystek operating as Superior Door Services
("Superior")

- 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: Norma Edelman

FILE No.: 2001/791

DATE OF DECISION: March 7, 2002

DECISION

OVERVIEW

This is an appeal by Herman Hystek operating as Superior Door Services ("Superior") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination issued by a delegate of the Director of Employment Standards on October 24, 2001. The delegate found that Superior contravened Section 63 of the *Act* in failing to pay Ron Clubine ("Clubine") compensation for length of service and ordered it to pay him $1652.52 in wages and interest.

The appeal was decided based on the written decisions of the parties. I have concluded that the delegate did not err in concluding that Clubine was entitled to compensation for length of service.

ISSUE TO BE DECIDED

Did the delegate err in determining that Clubine was entitled to compensation for length of service?

FACTS AND ARGUMENT

Superior is a business that installs garage doors and operators. Clubine commenced work at Superior on November 9, l998 as a door mechanic at a rate of pay of $18.00 per hour. He was laid off work on March 17, 2000 without notice or compensation for length of service. He was not recalled back to work.

In the Determination the delegate stated that the parties agreed that Clubine was employed on an ongoing basis and worked at various job sites that the employer had a contract with to install garage doors and operators. Accordingly, the delegate found that Clubine did not fall within the Section 65(1)(e) exception to the statutory obligation to pay length of service compensation under Section 63.

Superior appealed the Determination on November 14, 2001. It disputes the conclusion that it owes compensation for length of service to Clubine. It says it is in the construction business and that Clubine was hired on a job to job basis. It does not say, however, that Clubine only worked at one site. It does not challenge the delegate's statements that Clubine was employed on an ongoing basis and worked at various sites.

The delegate and Clubine were invited to reply to the appeal. Both filed submissions.

In her reply the delegate said it is not disputed that Superior is in the construction business and that Clubine worked at construction sites. She further says the exemption in Section 65(1)(e) of

the *Act* does not apply to employees who work at multiple construction sites. Rather, it applies to employees who work at one site only, with the knowledge that the employment will end at the completion of the project and with no expectation of a continuing employment relationship. The exemption is not intended to apply to circumstances where the employee continues to work for the employer at multiple locations over time, as occurred in this case, which results in a continued employment relationship.

In his reply Clubine says he worked at numerous locations on a daily basis servicing existing underground parking gates, doing repairs and replacement of residential doors and operators, supplying additional labour on industrial overhead door installations, fulfilling maintenance schedules and sales estimating.

Superior was given the opportunity to file a final reply, but did not do so.

ANALYSIS

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

Section 63 of the *Act* provides than an employer is liable for compensation for length of service after an employee works three consecutive months. If an employee works for more than 12 months and less than 3 years, he/she is entitled to compensation for length of service in the amount of 2 weeks wages. .

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

As it was not disputed on the appeal, I accept that Superior's principal business is construction; Clubine worked continuously from November 9, l998 to March 17, 2000; and that while employed, Clubine worked at a number of construction sites.

Section 65(1) (e) of the *Act* refers to employees at a 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 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 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 Clubine worked continuously for approximately one and one-half years at various construction sites for Superior. I am unable to find that the delegate erred in concluding that the Section 65(1)(e) exclusion did not apply, and that Clubine is entitled to length of service compensation in the amount of 2 weeks wages as calculated by the delegate..

ORDER

I order pursuant to Section 115 of the *Act*, that the Determination be confirmed.

Norma Edelman, Vice-Chair
Adjudicator
Employment Standards Tribunal