Employment Standards TRIBUNAL

An appeal

- by -

Heron Construction & Millwork Ltd.
("Heron")

- 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 (as amended)

TRIBUNAL MEMBER: Carol Ann Hart

FILE No.: 2008A/64

DATE OF DECISION: September 2, 2008

DECISION

SUBMISSIONS

Brad Wallis	on behalf of Heron Construction and Millwork Ltd.
Sukh Kaila	on behalf of the Director
Ricky Leung	on his own behalf

OVERVIEW

1. This is an appeal by Heron Construction and Millwork Ltd. ("Heron"), pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*), of a Determination of the Director of Employment Standards (the "Director") issued on May 13, 2008 (the "Determination").

2. Following an investigation, the Delegate of the Director (the "Delegate") determined that Heron had contravened section 63 of the "*Act*" by failing to pay compensation for length of service to Mr. Ricky Leung. The Delegate ordered Heron to pay $1924.00 to Mr. Leung in wages, and imposed a penalty under section 29(1)(c) of the *Regulation* in the amount of $500.00.

3. Heron contends that the Delegate failed to observe the principles of natural justice in making the Determination.

4. The Tribunal has concluded that an oral hearing is not required in this matter, and that the appeal can be properly addressed through written submissions. I note that neither party requested an oral hearing.

BACKGROUND

5. According to the Determination, Ricky Leung was employed by Heron from January 26, 2004 to January 5, 2007, earning $25.00 per hour. Mr. Leung was notified by Heron on Friday, January 5, 2007 that he would be temporarily laid off from his employment. On April 5, 2007 Mr. Leung was called to return to work on Monday April 9, 2007, which he did.

6. In the appeal submissions for Heron dated June 16, 2008, and signed by Brad Wallis, it was indicated that Mr. Leung was still working for Heron.

ARGUMENT

For the Appellant

7. Mr. Wallis wrote that Heron Construction & Millwork Ltd. was a general contractor. The millwork built in its workshop was for jobs for which Heron was hired as a general contractor. When employees came to work for Heron they were advised that they might be working in the shop or on site. Mr. Wallis maintained that Mr. Leung had worked both on-site and in the shop as a construction worker.

8. In his submission, Mr. Wallis referred to the evidence given by Mr. Leung, as outlined in the Determination, that he did not generally work on weekends and had not worked on weekends in 2007. It was Mr. Wallis' submission that the first day of the layoff period should therefore be Monday, January 8th 2007 (and not Saturday, January 6, 2007, as the Delegate had found in the Determination). He then noted that Mr. Leung was called back to work on Thursday, April 5, 2007 to start on Monday, April 9, 2007. Mr. Wallis contended that Mr. Leung was recalled within the 13-week period from the first day of the layoff, and was therefore not entitled to any compensation.

For the Director

9. The Delegate submitted that the arguments of the appellant were the same as those which had been considered by the Delegate before issuing the Determination. He requested that the Determination be confirmed.

For the Respondent

10. Mr. Leung maintained that the Tribunal should confirm the Determination which had been decided correctly by the Delegate.

ANALYSIS

11. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

12. Although on the Appeal Form Heron indicated that the only basis for its appeal was a denial of natural justice, it is apparent from the written submissions made by Heron that its concern was with the correctness of the conclusions reached by the Delegate. On that basis, the grounds for appeal are more appropriately characterized as an allegation that the Director erred in law [section 112(1)(a)]; or possibly that there is "new evidence" [section 112(1)(c)]. In essence, Heron takes the position that the Delegate erred in concluding that Mr. Leung was not employed at one or more construction sites, and that he was entitled to compensation for length of service.

13. As noted by the Tribunal in *Triple S Transmission Inc.*, BC EST #D141/03, although lawyers generally understand the fundamental principles underlying the rules of natural justice and the other grounds identified under the *Act*, the grounds for an appeal "*are often an opaque mystery to someone who is untrained in the law*." The Tribunal member expressed the view that the Tribunal should not "*mechanically adjudicate an appeal based solely on the particular "box" that an appellant has – often*

without a full, or even any, understanding – simply checked off." The Tribunal member further wrote as follows at page 3 of the decision:

> When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

14. I agree that "a large and liberal view" should be taken in light of submissions made on behalf of Heron, and will therefore address each of the statutory grounds of appeal to decide the following three issues:

(a) Did the Director fail to observe the principles of natural justice in making the Determination?

(b) Is there new evidence which has become available that was not available at the time the Determination was made?

(c) Did the director err in law in making the Determination?

(a) Did the Director fail to observe the principles of natural justice in making the Determination?

15. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker.

16. Although Heron alleged that the Delegate failed to observe the principles of natural justice, it did not develop any argument of breach of natural justice. There is no evidence that the process, including the hearing conducted by the Delegate on December 5, 2007, was unfair. The Determination reflects that both parties attended the hearing, and had the opportunity to present evidence and explain their positions. It was not alleged that the Delegate had refused to consider evidence or submissions, or was not an independent decision maker.

17. The allegation that the Delegate failed to act in accordance with the principles of natural justice is dismissed.

(b) Is there new evidence which has become available that was not available at the time the Determination was made?

18. There was no new documentary evidence provided with the written submission of Heron dated June 16, 2008. Any evidence referenced in that written submission of Heron would have been available at the time the Determination was made. Consequently, I cannot find that this ground for appeal is applicable.

(c) Did the Director err in law in making the Determination?

19. Section 63 of the *Act* contains provisions regarding the liability of an employer to pay compensation for length of service. Exceptions to the requirement to pay compensation for length of service are set out in section 65 of the *Act* which provides as follows:

> ***Exceptions***
> 65 (1) Sections 63 and 64 do not apply to an employee
>
> (a) employed under an arrangement by which
> (i) the employer may request the employee to come to work at any time for a temporary period, and
> (ii) the employee has the option of accepting or rejecting one or more of the temporary periods,
>
> (b) employed for a definite term,
>
> (c) employed for specific work to be completed in a period of up to 12 months,
>
> (d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act,
>
> (e) employed at one or more construction sites by an employer whose principal business is construction,
>
> (f) who has been offered and has refused reasonable alternative employment by the employer.

20. If an employer can establish that any of the exceptions set out in section 65 apply, it is not required to pay an employee compensation for length of service even though an employee is being dismissed without cause.

21. At issue in this case is whether the employer can rely on the exception in section 65(1)(e) of the *Act.* In order to do so, and based solely on the wording of that section, the following two requirements must be met:

> (a) the employer's principal business is construction; and
>
> (b) the employee was employed at one or more construction sites.

22. Because it was undisputed that the employer's principal business was construction, it was not necessary for the Delegate to provide a detailed analysis of that issue. In the Determination, the Delegate formulated the issue to be considered as follows: *"Is the Complainant a construction worker as defined by the Act?"*

23. The Delegate considered whether Mr. Leung fell under the exemption set out in section 65(1)(e) of the *Act.* He wrote as follows in the Determination:

> Both, Complainant and Employer agree that the Complainant primarily provided labour as a cabinet maker at the Employer's workshop. The Employer specifies that the Complainant worked approximately 22 weeks at the construction site(s) during calendar year 2006.

> In order to be exempt under Section 65(1)(e) of the *Act*, the Complainant must have provided labour at one or more construction sites. Here, the Complainant's labour is divided between time spent in the Employer's workshop and time spent on the construction site(s). However, the majority of the Complainant's work was performed at the Employer's workshop and not at the construction site. I find the Employer's workshop to be the Complainant's primary work location.

24. The Delegate further concluded, in reliance on the Tribunal's decision in *John Tyler,* BC EST #D 153/00 that the complainant's period of nearly three years of employment should be characterized as permanent, and it was therefore inconsistent with the purpose and intent of section 65 of the *Act*. He found that Heron was required to pay Mr. Leung compensation for length of service, and the exemption in section 65 did not apply.

25. None of the two requirements in section 65(1)(e) specifies that the employee must be a "construction worker". The issue which should have been clearly articulated and considered by the Delegate was the following: Was Mr. Leung employed at one or more construction sites?

26. Mr. Justice Pitfield considered the issue of whether an employee was employed at a construction site in *Honeywell Ltd. v. The Director of Employment Standards*, 1997 CanLII 4191 (BCSC). He wrote in part as follows at paragraphs 36 and 38:

> [36]… 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 a number of sites, the predominant kind of work in which he was engaged overall…
>
> [38] An employee's predominant kind of work at any site should be determined by reference to time consumed in repair or alteration functions relative to total effort at the site. Time is the most objective measure in the context of employment.

27. As set out above, a functional analysis should be used to identify the predominant kind of work performed by the employee. The parties agreed that Mr. Leung mainly worked as a cabinet maker at the employer's workshop. Does the work done by Mr. Leung in Heron's workshop constitute employment at a construction site?

28. In section 1 of the *Act*, the following definition is prescribed for "construction":

> **"construction"** means the construction, renovation, repair or demolition of property or the alteration or improvement of land

29. The *Act* and the *Regulation* do not contain a definition of the phrase "construction site". The word "site" is defined by the Concise Oxford Dictionary to be "*a place where some activity is or has been conducted*". The words "construction site" must therefore be taken to mean a place where construction, as defined in section 1 of the *Act*, is performed.

30. The definition of "construction" in the *Act* includes "construction of…property". The *Act* and the *Regulation* do not define the word "property". "Property" is defined by the Concise Oxford Dictionary to be: "*something owned; a possession, esp. a house, land, etc.*".

31. It is evident that the definition of "construction" in the *Act* is very comprehensive. Care must be taken to ensure that the term is applied in an appropriate manner given the context of the *Act.* Because section 65

establishes statutory exceptions to the usual rights of employees to receive either written notice or pay in lieu of notice, the exceptions are to be narrowly construed, and the employer must bring itself strictly within the statutory language (see *M.J.M. Conference Communications of Canada Corp.*, BC EST #D 182/04; and *Re Daryl-Evans Mechanical Ltd. et al.*, [2002] BCSC 48).

32. Generally, the exceptions in section 65 of the *Act* apply to employees who work for temporary periods of either unknown or fixed duration. It often happens in construction that employees are hired for one particular project and then let go once their part in that project has been completed (see *Middleton*, BC EST #D321/99; and *E. Nixon Ltd.*, BC EST #D573/97). It was undisputed that the principal business of Heron is "construction"--*i.e.*, the "construction, renovation, repair or demolition of property or the alteration or improvement of land". However, while both parties acknowledge that Mr. Leung did some work at construction sites, I am not persuaded that the second requirement of the exception in section 65(1)(e) of the *Act* is met when a functional analysis of all of his work is undertaken.

33. In *E. Nixon Ltd*, Supra, the Tribunal concluded that a sand and gravel pit operation did not fall within the meaning of "construction site" in section 65(1)(e) of the *Act.* The Member wrote in part as follows at pages 3 to 4:

> The reference in subsection 65(1)(e) to "construction site" evokes the typical notion of a construction project, which involves the erection of a single, large, permanent structure at a fixed location. Such an undertaking involves a complex network of participants, many of whom specialize in some segment of the operation. The owner is the client, the purchaser of the product of the operation. It hires an architect and/or engineer to design and oversee construction. The contract is put out for bid, sometimes in its entirety, sometimes in stages. The successful bidder often does much of the contracted work itself and manages those parts of the contract for which it is responsible. It may subcontract other parts of the work to specialized construction employers, who come on site only for the purpose of making a specific contribution to the project. Employees working on construction sites for construction employers often exhibit the same specialization as their employers, coming to the construction site only to perform the function required of them and, when they are finished, leave the site and, more often than not, leave the employ of the construction employer.
>
> Construction employers do not normally maintain a regular work force, but normally acquire employees as and when required. Persons employed on construction sites are employed for a finite term which is generally predictable, either by the duration of their role in the project or by the duration of the project itself. It is this characteristic of employment in construction, resulting from both the way individual construction projects are organized and the erratic pattern of construction activity generally, that justifies the exception in the *Act.* Knowledge on the part of the employee of the finite aspect of the duration of their employment is the same characteristic shared by some of the other exceptions found in subsection 65(1).

34. A workshop does not constitute a construction site merely because the employer is a general contractor, and the work done in the workshop is for construction jobs. Heron's workshop where Leung provided most of his labour lacks the usual characteristics of a construction project which would allow it to be considered work at a "construction site" for the purposes of the *Act*. There is no identifiable construction project. There was no predictability to the duration of employment. In fact, Mr. Leung was employed by Heron for nearly three years before he was laid off.

35. Using a functional analysis, and considering the overall circumstances and the nature of the work in which Mr. Leung was engaged, his predominant kind of work cannot be characterized as employment "*at*

one or more construction sites". I do not find that the Delegate erred in concluding that, on the facts of this situation, the exemption in section 65(1)(e) did not apply.

36. I turn now to the second issue considered by the Delegate: "If the Complainant is not a construction worker, is he owed compensation for length of service pay under the Act, and if so, in what amount?"

37. Section 1 of the *Act* contains the following definitions:

> "**temporary layoff**" means
> (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks…
>
> "**termination of employment**" includes a layoff other than a temporary layoff;

38. The *Act* then provides in section 63(5) that an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

39. The Delegate applied the policy interpretation of the Employment Standards Branch that the 20-week period begins on the first day of the layoff and the 13-week period is exceeded on the first day of the 14th week of layoff. The layoff is deemed to be a termination of employment once the 13-weeks of layoff is exceeded.

40. In *James Cullen*, BC EST#D243/00, the Tribunal held that when an employee is on a temporary layoff, the employee's last day of employment is not when the employee last worked but when the temporary layoff ends and the employee has not been recalled back to work.

41. The Delegate correctly concluded that the first day of the layoff period was Saturday, January 6, 2007, and that Heron did not recall Mr. Leung within 13 weeks from layoff, as he had returned to work on April 9, 2007. I conclude that the Delegate was correct in finding that Mr. Leung's employment had been terminated and that he was entitled to compensation for length of service. I do not find that the Delegate erred in law in making the Determination.

42. For all of the above reasons, Heron has not met the onus of persuading me that the Determination is wrong. The appeal is dismissed.

ORDER

43. I order pursuant to Section 115 of the Act, that the Determination dated May 13, 2008 is confirmed.

Carol Ann Hart
Member
Employment Standards Tribunal