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 -

John Tyler
(" Tyler ")

\- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/019

DATE OF DECISION: April 12, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by John Tyler ("Tyler") of a Determination that was issued on December 17, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination addressed two aspects of a complaint that had been filed by Tyler against his former employer, Daryl-Evans Mechanical Ltd. ("DEM"): a claim for length of service compensation and a claim for reimbursement of unauthorized deductions. The Determination concluded, in respect of the former, that Tyler was not entitled to length of service compensation and, in respect of the latter, that, while Section 21 of the *Act* had been contravened, no remedy would be ordered paid to Tyler.

Tyler challenges both aspects of the Determination.

The Tribunal has decided an oral hearing is not necessary in order to properly address this appeal.

ISSUES TO BE DECIDED

The issue is whether Tyler has shown that the Director erred in concluding that he was not entitled to compensation for length of service and that the employer should have been ordered to pay Tyler what had been deducted from his wages in contravention of Section 21 of the Employment Standards Act (the "*Act*").

FACTS

Tyler was employed by DEM from March 1994 to July 15, 1999 as a plumber. The Determination generally described DEM as "a company which provides plumbing, gas fitting and general mechanical services for both new and existing buildings".

The Director concluded that Tyler was not entitled to length of service compensation because he had been working on construction sites for an employer whose primary business is construction.

While employed, Tyler was supplied with a company vehicle that he used to travel to and from work and work sites. There was also some personal use involved. An amount of money, designated as "gas money", was deducted each month by DEM from his pay cheque. This amount was a token payment to help cover the vehicle purchase price and the cost of insurance, maintenance and gas, all of which were paid for by DEM. Tyler had full knowledge of the deduction and the reason for it, but had not authorized the deduction in writing.

ANALYSIS

The Determination is a clear and well thought out document. It approaches each of the two aspects of the complaint in a logical and comprehensive manner. Notwithstanding, I find that the

Director has committed an error of law under the *Act* on the matter of length of service compensation.

Section 63 of the *Act* contains provisions relating to an employer's liability to pay an employee length of service compensation on termination of employment. Subsection 63(1) of the *Act* states:

> *63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one weeks' wages as compensation for length of service.*

It is important to note that length of service compensation is, from the employee's perspective, a statutory benefit earned with continuous employment. It is a minimum statutory benefit. From the employer's perspective, it is a statutory liability that accrues to each employee with more than 3 consecutive months of employment. While length of service compensation is often referred to as "termination" or "severance" pay, it is related to termination only to the extent that a termination of employment, actual or deemed, triggers the benefit or liability, depending on the perspective.

Section 65(1) of the *Act* identifies certain employees who are not entitled to length of service compensation and, specifically, paragraph 65(1)(e) says:

> *65. (1) Section 63 and 64 do not apply to an employee*
>
> *(e) employed at a construction site by an employer whose principal business is construction; . . .*

The Director concluded that Tyler was not entitled to length of service compensation because this provision applied:

> The evidence supports the Employer's statement that his company is primarily construction. Since the Complainant was working on construction sites, there is no compensation for length of service owing to the company.

Based on the material in the file and in the submissions, the conclusion that DEM is an employer whose principal business is construction is unassailable. I do not agree, however, that Section 63 did not apply to his employment. In his appeal, Tyler states

> I interpret [paragraph 65(1)(e)] as meaning a person who enters a construction site office looking for employment at that particular construction site for the duration of the project.

While I do not agree entirely with that statement, it more accurately captures the intent and purpose of subsection 65(1) than does the Determination. In *Frederick Middleton*, BC EST #D321/99, the Tribunal said:

> In considering whether an employee is exempted from the statutory benefits provided by Sections 63 and 64 of the *Act*, the purpose for the exceptions found in Section 65, particularly those listed in subsection 65(1)(a) to (e), should be considered. Generally, the exceptions apply to employees who work for temporary periods, of either uncertain or fixed duration, and whose employment prospects past the temporary periods are unknown. It is deemed neither fair nor appropriate that these employees, who in effect have notice at the outset of their employment that it will be of a limited or fixed duration, should be entitled to additional notice or compensation in lieu of notice. Construction, in particular, is characterized by the fact that workers are generally hired for a single project and let go when their role in that project is complete. They simply do not expect to work permanently for one employer. They know the nature of their employment and take it for granted that they must be prepared to move not only from site to site but also from employer to employer. There is nothing in the Determination or in the material to show that Middleton's employment was fixed by the duration of any particular construction project or was grounded in the characteristics of a construction project.
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> The *Act* is remedial legislation and an interpretation that extends its protection to as many employees as possible is favoured over one that does not, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.). 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.
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> (page 4)

I also consider the following comments from the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.*, (1998) 154 D.L.R. (4th) 193 to be applicable:

> Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits - conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2 at p. 10, 142 D.L.R. (3d) 1; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513 at p. 537, 48 D.L.R. (4th) 193). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the ESA, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act (emphasis added).

I accept the likelihood that Tyler's employment involved working on a succession of jobs that would have fallen with the definition of construction in the *Act*. I also accept the likelihood that from time to time his employment involved working on jobs that would not be considered construction under the *Act* and were not performed at a construction site. Neither of those

possibilities, however, weigh heavily in deciding whether Tyler was entitled to length of service compensation. Rather, it is that his employment, in all the circumstances, achieved a degree of permanence that does not accord with the statutory purpose and intent of Section 65. Tyler's employment with DEM was not of a temporary or fixed duration. His employment was not ended because the project he was employed on was completed. According to DEM, Tyler was dismissed for reasons relating to his attitude, his workmanship and his limited qualifications. Whether these reasons are valid or not, the point is that he had no reason to expect that his employment would be ended when it was. In other words, the circumstances of his termination are not the same as those contemplated by Section 65 where, as the excerpt from *Middleton* indicates, the employee has effective notice from the outset of employment that it will end at some specific or identifiable time in the future. Even at that, I note that paragraph 65(1)(c) provides that an employee hired for specific work that is not completed within 12 months would be entitled to length of service compensation and, under subsection 65(2), an employee employed for a definite term or for specific work whose employment continues for at least 3 months after completing the definite term or specific work also would become entitled to length of service compensation.

The result in this case is really no different. There is no evidence that Tyler was, in fact, originally employed by DEM *"at a construction site"*, but even if he was, the continuation of his employment following the completion of his work at that site and the continuation of his employment through a succession of construction projects, and generally, for a period of more than five years has spent the exception in paragraph 65(1)(e) and, as such, he was entitled to length of service compensation.

In respect of the second aspect of this appeal, as I stated earlier, the Determination is a clear and well-thought document. All of the relevant statutory provisions have been identified and considered. I can find no error in the analysis and, in the circumstances, the result is neither unreasonable nor unfair.

The Determination correctly notes that the Director has discretion under subsection 79(3) of the *Act* and that such discretion should be exercised in a manner that is consistent with the purposes of the *Act*. The Determination clearly considers the competing purposes, including those identified in Section 2, in exercising that discretion. The Tribunal has consistently adhered to the view first expressed in *Jody L. Goudreau et al* (BC EST # D066/98), that because the Director is "an administrative body charged with enforcing minimum standards of employment..." and "...is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate", the circumstances under which it would interfere with the Director's exercise of her discretion in administering the Act are limited:

> The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

> . . . a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".
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> *Associated Provincial Picture Houses v. Wednesbury Corp. [1948] 1 K.B. 223 at 229*

Applying the above principle, I can find no basis upon which to interfere with the Director's discretion to not grant a remedy to Tyler for the contravention of Section 21 of the *Act* by DEM.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 15, 1999 be varied to show that Section 63 of the *Act* has been contravened by DEM and that DEM is liable to pay length of service compensation to Tyler. The actual calculation of the amount owing as a result of the contravention is referred back to the Director.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal