Employment Standards TRIBUNAL

An appeal

- by -

Skeena Project Services Ltd.
(the “employer”)

- 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: Sheila McDonald

FILE No.: 2000/681

DATE OF HEARING: February 21, 2001

DATE OF DECISION: April 23, 2001

DECISION

APPEARANCES:

Lorne Sexton	The Employer
Mr. Heath Muller	The Employee

OVERVIEW

An appeal was made by Skeena Project Services Ltd. against the Determination issued on September 15, 2000 by Mr. John Dafoe, a delegate of the Director of the Employment Standards Branch (the "Director") under file number 034-533 (the "Determination"). At the hearing Mr. Lorne Sexton gave oral evidence as the employer and Mr. Muller gave evidence as the employee.

THE DETERMINATION

The Determination outlines that Mr. Muller was employed as a civil technologist by Skeena Project Services Ltd. from May 1994 until his termination on July 20, 1999 with only short seasonal layoffs interrupting his service. Mr. Muller was paid 2 weeks pay in lieu of notice by the Employer on termination.

In April or May 1999, Mr. Muller was hired by Alcan Smelters & Chemicals Ltd. ("Alcan") to work part time on its docks. The work with Alcan was on an on-call basis and Muller intended to continue working for the Employer while accepting shifts at Alcan when requested. The Employer was made aware of Muller's intent to work for both companies. At the time of Muller's hiring by Alcan, the Employer was in a period of seasonal slowdown with only a limited number of days of work available each week.

Mr. Muller alleged that he was owed compensation for length of service by his former Employer having been terminated without just cause or notice.

The Director examined three issues: 1) Was Muller exempted from the benefits of Section 63 of the *Employment Standards Act* (the "*Act*") by virtue of falling under Section 65(1)(a) of the *Act*; 2) If Muller was not exempted from Section 63, did he resign his position and 3) if Muller did not resign, was he dismissed with just cause.

The Director determined that Mr. Muller was not exempted from the benefits of Section 63 of the *Act*. That Muller did not resign his position with the Employer and that Muller was dismissed without just cause. He found that the Employer had contravened Part 8, Section 63(2) of the *Act* and ordered the Employer to pay Mr. Muller $1,580.85 in compensation for length of service and $121.25 in interest totaling $ 1,702.10.

ISSUES

There are three issues to be determined in this case:

1. Was Mr. Muller exempted from the benefits of Section 63 of the *Act* by virtue of falling under Section 65(1)(a) of the *Act* which states :

   "65 (1) Sections 63 and 64 do not apply to an employee

   employed under an arrangement by which

   the employer may request the employee to come to work at any time for a temporary period, and

   the employee has the option of accepting or rejecting one or more of the temporary periods."

2. If Muller was not exempted from Section 63 of the *Act*, did he resign his employment with the Employer?

3. If Mr. Muller did not resign, was he dismissed with just cause?

THE EMPLOYERS EVIDENCE

Mr. Lorne Sexton stated that he had employed Mr. Muller from May 1994 to July 20, 1999 as a Civil Technologist with seasonal layoffs. He stated that he had up to six other technologists working for him as well during that period. He stated that he had paid Mr. Muller two weeks pay in lieu of notice.

He stated that Mr. Muller had told him he was seeking to get on at Alcan but he would continue to work with Skeena Project Services Ltd. as the work at Alcan was part time. Mr. Sexton said that he felt that Mr. Muller had changed his employment relationship with the employer by going to work part time with Alcan which meant in Mr. Sexton's opinion that Mr. Muller had the option of accepting or rejecting work on short notice. He said that Mr. Muller had given him notice that at some point he would be leaving the employer. He said that having an employee who accepted or rejected work on short notice was problematic to meet client needs.

Mr. Sexton stated that he had problems with other employees who wanted to get hours too. He said as the work came in Mr. Muller would take it. He stated that other employees were getting resentful about the amount of work Mr. Muller was getting. He said that he asked Mr. Muller for a schedule of when he was available but he did not get it. He said he did not feel that Mr. Muller had the latitude to reject work.

EMPLOYEES EVIDENCE

Mr. Muller said that he began seeking employment somewhere else as there was a slowdown in the work the Skeena Project Services Ltd. was getting. He took an on call job at Alcan. He said that he continued to work 3-5 days a week at Skeena while working on call for Alcan. He stated that he came into work one morning and Mr. Sexton handed him a letter letting him know that he was terminated because he was not available to work full time for Skeena. At the same time Mr. Sexton said that he could not guarantee full time work.

Mr. Muller stated that at no time did he say he wanted more money at Skeena or he would quit. He said he was basically asking for a raise. He said at the time of his termination other employees were getting as many hours as he was.

THE FACTS AND ANALYSIS

The first issue to be addressed is whether Mr. Muller was exempted from the benefits of Section 63 of the *Act* by virtue of falling under Section 65(1)(a) of the *Act.* Mr. Sexton argues that Mr. Muller had unilaterally changed his employment status to temporary on-call work, and was therefore exempt from the provisions under the *Act* under Section 65. As pointed out by Mr. Dafoe in his December 1, 2000 letter to the Tribunal Mr. Sexton argues that permanence of the employment relationship is not a relevant factor in determining whether an employee falls under the exemption.

As Mr. Dafoe further points out in his letter, this has been dealt with in a number of previous appeals. In *Frederick Middleton ("Middleton"),* BC EST # D#321/99, 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.

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.

The Tribunal has further said in *John Tyler ("Tyler")*, BC EST #D153/2000:

It is important to note that length of service 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 the 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.

Skeena Project Services Ltd. employed Mr. Muller as a civil technologist from May 1994 until his termination on July 20, 1999, with only short seasonal layoffs interrupting his service. His employment was clearly of an ongoing nature not temporary. As Mr. Dafoe points out in the Determination he was clearly not hired to work on this or that temporary project, but rather was working on a wide range of contracts on an ongoing basis. The fact that he did not always work full time was because the Employer did not always have projects for him to work on due to the nature of their business.

Based on the evidence I conclude that Mr. Muller did not change his employment status to temporary on call work for Skeena Project Services Ltd. Mr. Muller began working on call for Alcan which Mr. Sexton was aware of and appeared to be willing to accommodate until mid July. In my opinion he is entitled to benefits under Section 63 of the *Act.*

The second issue is whether Mr. Muller resigned from his position. There is no evidence that indicates Mr. Muller resigned. It is clear that Mr. Sexton's letter dated July 20, 1999 terminated Mr. Muller's employment with Skeena Project Services Ltd.

The third issue was whether Mr. Muller was dismissed with just cause. In the Determination Mr. Dafoe points out that a review of the payroll records shows that in May 1998 Mr. Muller worked 18 days and in May 1999, 15 days; in June 1998, 15 days and in June 1999,18 days; in July 1998, 13 days and in July 1999, 11 days. This does not support the Employer's argument that Mr. Muller was making himself unavailable for work. The Employer was aware of Mr. Muller's on call work with Alcan and had no objection until mid July. In fact, by his own verbal evidence Mr. Sexton stated that he had other employees wanting to get hours too who were becoming resentful of Mr. Muller.

There is no evidence either written or given at the hearing to show that the Employer has met the onus of proving that they had just cause to terminate Mr. Muller.

ORDER

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

SHEILA MCDONALD

Sheila McDonald
Adjudicator
Employment Standards Tribunal