

**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 -

Frederick Middleton  
("Middleton")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**A**DJUDICATOR: David Stevenson

**F**ILE N<sub>O.</sub>: 1999/370

**D**ATE OF **D**ECISION: August 5, 1999

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Frederick Middleton (“Middleton”) of a Determination which was issued on May 20, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination considered whether Middleton’s former employer, Spectrum Developments Ltd. operating as Claude’s Fine Woodworking (“Claude”), had failed to provide wage statements, pay regular and overtime wages, vacation pay, statutory holiday pay and length of service compensation. The Director concluded that Middleton was owed some overtime pay and some vacation pay. The Director found the claims for regular wages and statutory holiday pay to be unfounded and concluded he was not entitled to length of service compensation because he was employed in the construction industry.

Middleton appeals the factual conclusion that he was employed in the construction industry. If he is successful on that point, he would be entitled to length of service compensation in an amount equal to one weeks’ wages as he was employed for longer than three consecutive months but less than 12 months.

### ISSUES TO BE DECIDED

The only issue to be decided is whether Middleton has shown the Director was wrong to conclude he was employed in the construction industry.

### FACTS

Middleton was hired as a carpenter by Claude on May 14, 1998. The outline of facts in the Determination states, on the length of service compensation issue:

**Employer** - Claude stated that Middleton was required to perform installations and work on projects such as the construction of furniture at a construction site. As evidence Middleton worked as a carpenter in the construction industry, Claude submitted a copy of Middleton’s termination letter indicating the job site Middleton worked on September 4, 1998, was left in a manner that was unacceptable. Claude stated he had been unhappy with Middleton’s work performance for some time and did not discuss the situation with Middleton hoping that his work would improve. Claude stated that Middleton’s work duties included woodworking, painting, installation of doors and windows and other odd jobs.

**Employee** - Middleton claims that Claude employed two crews: one crew to work in the shop as woodworkers and the other to work on construction sites. Middleton claims he was hired to work in the woodworking shop as a furniture builder and without notice on September 4, 1998, was terminated for “just cause”. Middleton stated that the problem Claude had with his work performance was never communicated to him.

Under the findings of fact, the Determination states:

The information pertaining to the tasks Middleton performed for Claude such as painting, installation of windows and windows, etc. indicate that Middleton was employed in the construction industry and therefore exempt from entitlement to length of service compensation. I therefore find that Middleton’s claim for CLOS is unfounded.

In his appeal Middleton states:

On May 12, 1998, I responded to an ad in the Victoria Times-Colonist for a carpenter to work in a woodworking shop. Occasionally I was required to leave the shop and install items we had manufactured in the shop such as Murphy beds, doors, cabinets, etc. As installation of items built in the shop was not always necessary and as the outings were shared with my two co-workers, I spent the vast majority of my time in the shop.

Neither the Director nor Claude have filed any comments on the appeal submission.

## ANALYSIS

Section 65 of the *Act* excludes some employees from the benefits provided by Sections 63 and 64 of the *Act*. In this case, the applicable provision is subsection 65(1)(e) which reads:

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

(e) employed at a construction site by an employer  
whose principle business is construction;

In my opinion, the Determination has failed to address the language of the exemption. It is deficient in two respects. First, it does not address whether the principle business of the employer is construction. It is not apparent from either the Determination or the material on file whether Claude is principally in the construction business or principally in the business of manufacturing furniture, some of which is manufactured for construction projects and delivered to and installed at construction sites. Second, the conclusion of fact made in the Determination is inconsistent with the language of the exemption. The Determination concludes that Middleton “was employed in the construction industry”, while the language of the exemption requires a conclusion that the employee was “employed at a construction site”.

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 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 are 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 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 construction employment.

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 appeal succeeds to the extent that the conclusion of the Director on length of service compensation is being referred back to address the deficiencies in the analysis of the claim.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated May 20, 1999 be referred back to the Director.

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**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**