

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Kosick Holdings Ltd.
("KHL")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Hans Suhr

File No.: 96/521

Date of Decision: December 17, 1996

DECISION

APPEARANCES

L.G. Dellow	Counsel for Kosick Holdings Ltd.
Mike Kosick	for Kosick Holdings Ltd.
Dante Pagdilao	for Kosick Holdings Ltd.
Dave Middleton	for Kosick Holdings Ltd.
Don Nielsen	on his own behalf
Rob Joyce	for the Director of Employment Standards

OVERVIEW

This is an appeal by Kosick Holdings Ltd. (“KHL”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 003716 issued by a delegate of the Director on August 16, 1996. In this appeal, KHL claims that the Director erred in determining that none of the work activities of Don Nielsen (“Nielsen”) are covered by the Oil Patch Variance and further that the Director erred in finding that Nielsen had not quit his job.

Written submissions were received on behalf of KHL and Nielsen, and information was provided by the Director. Subsequently an oral hearing was held in Fort St. John on December 6, 1996.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Were Nielsen’s work activities, either all or a part of, covered by the OILPATCH INDUSTRY OVERTIME VARIANCE ?
2. Was Nielsen terminated by KHL or did he quit ?

FACTS

I heard testimony from four witnesses, Dave Middleton (“Middleton”), Dante Pagdilao (“Pagdilao”) and Mike Kosick (“Kosick”) on behalf of KHL, and, Nielsen on his own behalf.

Middleton testified that he has been the dispatcher for KHL for the last 8 years and that Nielsen has worked for KHL on and off for 4 to 5 years, mainly as a mechanic but also as a crusher operator on occasion. Middleton further stated that he has worked as a dispatcher

since 1974 and with respect to education, he left school after grade 9. Middleton further stated that he did not consider the legal consequences of using the term laid off as opposed to fired.

Middleton further stated that in the absence of Mike Kosick, he and Fred Goodings were in charge of KHL with the authority to hire or fire employees. Middleton also stated that he has only fired the odd employee as most of the others would quit before he got the opportunity to fire them.

Middleton further stated that while KHL operated graders for road maintenance, a backhoe for oil field work and various pieces of construction equipment, the main function of KHL was gravel crushing and hauling. The cost of the gravel crushing unit used by KHL is approximately \$750,000.00 and the cost of moving it from one pit to another would be about \$30,000.00 and required the use of 3 to 4 trucks. Middleton further stated that KHL operates a number of private gravel pits, none of which are located within the boundaries of any municipality.

Middleton further stated that the road maintenance work performed was mainly on oil field roads and, on the very odd occasion, for the Ministry of Transportation and Highways contractors in the area.

Middleton further stated that while the gravel crusher operated by KHL in 1994 and 1995 could be operated by 3 employees, usually 4 employees were involved. The gravel crusher would normally be operated in a number of different pits each year dependent upon the requirements for material and the location of that material.

Middleton further stated that the typical operation of the crusher at one of the pits was to crush rocks into the specified type of gravel required and that gravel would then be stockpiled for future use as demand arose. The length of time that the crusher would spend in a particular pit would depend on the need for the various types of product produced.

Middleton further stated that while the main customers for the gravel produced by KHL were the Oilpatch companies, the odd load would be sold to private individuals.

Middleton further stated that the gravel produced at the Pee Jay pit, located 60 miles north of Fort St. John was used exclusively for work in the Oilpatch. Typically, approximately 60% of the gravel was used for road maintenance with the balance used on oil field leases. Of the 60 % for road maintenance, 1/2 would be used for new roads and 1/2 for existing roads. The gravel from the Pee Jay pit would typically be utilized in an area extending 100 miles north, east and west of the pit, with 99% of the gravel being hauled by KHL gravel trucks. Once the gravel is delivered to the location, the gravel is spread where the customer indicates or on the odd occasion, stockpiled for future use. On some occasions oilpatch roads are surfaced with sandstone (shale) instead of gravel.

Middleton further stated that on some days Nielsen worked on the crushing unit producing product specifically for the Oilpatch companies and any overtime work on those specified days should be covered by the Oilpatch Variance. Those dates are indicated on the time

sheets (Exhibit #1) which were prepared by Nielsen and specifically concern the following days: August 15, 18, 1994; June 13, 14, 15, 21, 22, 23, 24, 26, 26, 27, 28, 29, 30, 1995; August 21, 26, 29, 30, 31, 1995; September 6, 7, 8, 9, 14, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 1995; and October 2, 3, 1995.

Middleton further stated that Nielsen did just about anything that needed to be done, on most of the above days Nielsen operated the crusher and occasionally worked as a mechanic or truck driver.

Middleton further stated that Nielsen's last day of work was October 27, 1995 and prior to that date, KHL had no thought of laying Nielsen off. On October 27, 1995, Middleton states that Nielsen came into the office and said that he had serviced the truck he had been using and that he would be gone for awhile as he was heading to Slave Lake to visit his brother. Middleton further states that Nielsen did not ask if it was O.K. to take time off, nor did Nielsen say how long he would be gone. Middleton further stated that Nielsen did not leave a telephone number or address for his brother in Slave Lake, however, if Middleton needed to get ahold of him, another brother, Jim Nielsen, also worked for KHL and Middleton would go through him to contact Nielsen in Slave Lake.

Middleton further stated that on other times Nielsen has said he was going away for a while and KHL worked around those absences

Middleton further stated that the next time he saw Nielsen was in December of 1995, around the 11th when Nielsen came into the shop and began to work on a truck which was broke down. Middleton states that he was not really surprised that Nielsen showed up, but that he had not been expected. Middleton further states that when Kosick came in to the office the next day he, Middleton, advised Kosick that Nielsen was back to work and was working on that specific truck and asked if Kosick wanted that particular truck repaired, to which Kosick replied No.

Middleton further stated that neither he nor Fred Goodings had recalled Nielsen to work. Middleton further stated that after Kosick spoke to Nielsen, Nielsen left. After December 12, 1995, Middleton stated that neither he nor Fred Goodings recalled Nielsen to work.

Under cross examination by Nielsen, Middleton testified that:

- KHL had not built any new leases or new roads in 1994 and 1995;
- he did not recall Nielsen advising him at some earlier time that Nielsen would be going to Slave Lake when crushing season was over nor does he recall Nielsen telling him he would only be gone for 1 week;
- he did not recall speaking to Nielsen about returning to work between mid November and December 8, 1995 although it was possible that Nielsen did come in and speak to him in regard to a list of repairs to the crusher equipment which were, according to Nielsen, necessary;

- he did not say anything to Nielsen about being at work on December 12 or 13.

Under cross examination by the delegate of the Director, Middleton testified that:

- Nielsen was a good worker;
- KHL has a 'cat' for road building but don't use it.
- the roads are graveled when KHL is called by the oil companies or a contractor working for the oil companies;
- KHL is usually called to gravel after the service rig has left as the oil companies don't want to spend a lot on money before they know the well is a producer;
- it's possible that Nielsen said something about taking time off but he doesn't remember;
- there have been other situations where employees just up and take off and then come back to work as the style of management at KHL is informal and efforts are made to accommodate an employee's needs;
- he did not take Nielsen's comments on October 27 as a quit, merely took it as Nielsen was taking some time off;
- he did not tell Nielsen that he couldn't take the time off and further that he did not attempt to contact Nielsen between October 27 and December 11, 1995;
- he did not even try to get ahold of Nielsen while Nielsen was away;
- Nielsen did not talk to him about coming back to work but may have said something about the work needed on the crusher;
- on December 11, 1995 when Nielsen came into work, Nielsen came into the office and advised that he was going to move the truck into the shop to start repairs;
- he asked Fred Goodings if Nielsen had spoken to him about returning to work and Fred Goodings said he hadn't;
- he has actually fired very few people as mostly they quit before they get fired;
- at the Pee Jay pit they would have crushed and stockpiled material amounting from 10,000 to 13,000 cu. meters for later use in the oilpatch;
- in the spring of 1996, approximately 200 to 300 cu. meters were left in the Pee Jay stockpile;

- if KHL is stockpiling at a pit, long hours are necessary because there is usually another job to get to, summertime is the time to do the crushing in order to take advantage of the good weather
- private hauling is a very small part of KHL's business;
- KHL's pit in South Taylor also has buildings, power and some equipment is kept on site;
- in mid February 1996 things began to get busy at KHL and he talked to Nielsen's brother Jim to see what Nielsen was doing and was advised that Nielsen was working;
- he never called Nielsen back to work after December 12, 1995;
- Joe Kosick is an authority in the company (KHL).

Pagdilao testified that he was employed as the Accountant / Office Manager for KHL in 1994 and 1995 and was an employee of KHL until the end of July 1996.

Pagdilao further stated that the Record of Employment ("ROE") (Exhibit #2) was issued at Nielsen's request. Nielsen was in the office handing in his time slips and asked for a "lay off slip" (ROE) and when asked by Pagdilao why, Nielsen replied that "Mike (Kosick) laid me off". The ROE indicates that the reason for issuing was "A", which is the code for lay off - shortage of work.

Kosick testified that he was an officer of KHL being the secretary/treasurer of the company. Kosick further stated that he had been born in Dawson Creek, grew up in the region and had been involved in the gravel business since he was 12 years old. Kosick further stated that he had graduated from High School and had rejected a number of scholarship offers to continue his involvement in KHL.

Kosick further stated that on December 12, 1995 he was asked by Middleton what we (the company) were doing with this truck (the one Nielsen was working on), as there are more important things to do. Kosick then went to speak to Nielsen just before noon on December 12, 1995 and Nielsen said that the truck need to be fixed. Kosick then questioned Nielsen as to his whereabouts from October 27 to December 12. Kosick further stated that other employees had advised him that Nielsen hadn't wanted to work in the shop earlier in the year, so why now. Kosick further stated that he never really discussed when Nielsen was coming back or what, the discussion was more with respect to why fix the truck now as crushing would not begin until the late spring and that it would cost too much to repair this truck.

Kosick further stated that he never told Nielsen that he was laid off or to see Dante (Pagdilao). Kosick also stated that KHL might have had between 15 to 20 employees in the fall of 1995 and that the employee group tends to be very transient due to the seasonal nature of the work.

Kosick further stated that the normal crushing season for KHL begins after the road bans have been lifted (early June) and continues until late October. Kosick further stated that while some crushing companies operate year round, KHL doesn't like to do that as year round operation has adverse effects on the equipment.

Kosick further stated that the KHL pit near South Taylor was partially fenced as some equipment such as a loader, is left there all year round. Kosick also stated that KHL has experienced a relatively small amount of vandalism and theft from the pit. Kosick further stated that some of the crushing equipment is also stored at the pit because of lack of space at KHL's Fort St. John yard.

Kosick finally stated that he understands that the purpose of the Oilpatch Variance is to recognize the demands of the industry because it is seasonal and remote, with those demands requiring that work must continue until the job is done and further the variance recognizes the need to be able to compete with businesses across the border in Alberta.

Under cross examination by Nielsen Kosick testified that:

- he wrote a letter to the Employment Standards Branch office in Dawson Creek dated March 8, 1996 (Exhibit #3) in which he stated "During his (Nielsen's) comeback in December, work was so slow especially in the oilpatch that we don't have no choice but to lay him off. We mentioned to him that as soon as the oilpatch pick up, we will let him come back and work for us again."

Under cross examination by the delegate of the Director Kosick testified that:

- while from time to time KHL operates in a "camp" setting, during the 1994 - 95 period in dispute the only camp situation Nielsen was involved in was with respect to crushing being performed for the highways contractor, Northland Road Services, in Fort Nelson.

Nielsen testified that around on March 30, 1995 the crusher was moved from Fort St. John to Fort Nelson to crush for Northland Road Service (highways contractor) and Mike (Kosick) asked him to look after the crusher. On June 6, 1995 the crusher was moved to the Moore pit in Taylor. On June 11, 1995 the crusher was moved from Taylor to the Pee Jay pit. On July 15, 1995 the crusher was moved to Bear Flats and then back to KHL's pit near Taylor on August 10, 1995 where it remained until it was shut down on October 26, 1995. Nielsen further states that the next day he cleaned up the service truck he was driving and finished up the work.

Nielsen further states that he had advised Middleton approximately 1 to 2 weeks earlier that when the crusher was shutdown, he (Nielsen) was going to take some time off work to go to Slave Lake to visit his brother. Nielsen also states that on October 27, after finishing his work, he told Middleton that as the crusher was now shutdown he would be taking the time off to go to Slave Lake.

Nielsen further states that he spent 1 week in Slave Lake and then returned home to Fort St. John and worked around his house.

Nielsen further states that between November 20 and December 8 he visited the KHL office and spoke to Middleton on several occasions with respect to the work that needed to be done to the crusher so the company did not face the same problems as this year when they had to perform repairs to the crusher on the go instead of in advance. Nielsen also states that Middleton agreed that the work needed to be done.

Nielsen further states that he discussed the repairs to the truck with Reg Foster (“Foster”), the mechanic/welder in the shop, and Foster said that the truck was repairable so Nielsen came into work on December 11 to begin the repairs.

Nielsen finally stated that on December 11, 1995, Joe Kosick, president of KHL, was helping him get the truck moved into the shop and Joe Kosick did not say anything about Nielsen being at work, in fact, Joe Kosick seemed happy to have Nielsen back.

Under cross examination by counsel for KHL Nielsen testified that:

- he would be 41 years old in January 1997;
- he left school mid way in grade 11;
- he has worked in the oilpatch industry since he was 16 years old;
- he has been laid off before;
- he was laid off by Mike Kosick on December 12, 1995;
- after December 12, 1995, he next worked in the summer of 1996 for Terra Nova Contracting;
- between December 12, 1995 and summer 1996 he did not work for anyone for wages;
- he hung around Fort St, John until the first week of February 1996 and then went to Edmonton, Red Deer Slave Lake to visit relatives and then went back to Fort St. John by the last week of February;
- he is not sure on what date he asked for his ROE but believes it was when he handed his time in for December 11 and 12;
- his brother picked up the ROE and his final cheque;
- he applied for UIC benefits and while he doesn't recall exactly when, it may have been sometime late January of 1996;

- he grossed approximately \$92,000.00 during his last 22 months of employment;
- he probably had \$8,000.00 to \$9,000.00 in the bank around October 27, 1995;
- he is always looking for work as the work at KHL is seasonal and while he was in Edmonton and Red Deer in February 1996 visiting relatives he also was looking for work;
- he finished the work in his basement between October 27 and December 8, 1995;
- on October 27, 1995, if Middleton had said he was to stay at work or quit, he (Nielsen) would have stayed at work;
- he hadn't advised KHL that he would be away from town in Edmonton, Red Deer and Slave Lake;
- after December 12, 1995 he was never called back to work by KHL and if he had been, he would have returned;
- he did not view his job as one where he could come and go as he saw fit;
- he did not view his job as one where he had the option of accepting or rejecting work assignments from the dispatcher;
- he doesn't recall refusing work at any time.

Under cross examination by the delegate of the Director, Nielsen testified that:

- in 1994, he worked mainly in the shop as a mechanic;
- in 1995, he worked mainly as a mechanic;
- the gravel being crushed was being stockpiled;
- he only operated the crusher when the regular operator Vern McEachern was on holidays;
- he did not use a truck to haul gravel in either 1994 or 1995;
- his job in South Taylor in 1995 was moving gravel from the crusher to the stockpile;
- Joe Kosick advised the employees that as soon as the one pile was full the crusher was to be shutdown;
- when the crusher was shutdown, it usually involved cleaning, wrapping and parking it or sometimes the crusher was left as is;

- on his last day of work he cleaned and serviced the service truck he had been using;
- it was his own decision to take time off as he had been working long hours for the past seven months;
- he had advised Middleton approximately 1 week or so earlier that he would be taking time off when the crusher was shutdown;
- Middleton didn't seem to have a problem with him taking the time off;
- he went into KHL's office several times between mid November and early December and discussed doing the repairs on the crusher and equipment in advance;
- on the last visit to KHL's office, Middleton said "Yes, we should get at it and get it done" in regard to the repairs;
- he worked on December 11 and part of the day on the 12th when Mike (Kosick) told him he would have to be laid off as it was kind of slow;
- he was flabbergasted at being laid off as he had not been around the shop for seven months and knew that there was lots of work to be done;
- he expected to be called back to work but has never been contacted by KHL since December 12, 1995;
- his brother still works there and KHL could have contacted him through his brother if they wanted to call him back;
- he had asked for time off in the past and had never been refused.

ARGUMENT

With respect to the issue of whether Nielsen quit or was terminated, counsel for KHL argues that the employment relationship is clearly a two way street. As Nielsen is a four year employee, KHL must give him annual vacation of at least two weeks each year, however, in this case, Nielsen made a unilateral decision to take indefinite time off work which is tantamount to a quit. In January 1996 Nielsen decides to leave the Fort St. John area and does not tell KHL that he is leaving or where he is going or even when he will be back. Nielsen does not return till the end of February 1996 so even if KHL had attempted to call him back to work, he would not have been available. Counsel further argues that the management personnel of KHL were not cognizant of the legal consequences of the term "lay off" and in fact, the actions of Nielsen constitute a quit rather than a termination by KHL.

With respect to the Oilpatch Variance, counsel for KHL argues that I must give regard to Section 8 of the *Interpretation Act*, R.S.B.C. 1979 Chapter 206 which states:

“Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”

Counsel further argues that “Enactment” is defined by Section 1 of the *Interpretations Act* as meaning “an Act or a regulation or a portion of an Act or regulation.” “Regulation” is defined in Section 1 of the *Interpretation Act* as meaning “a regulation, order, rule, form, tariff of costs or fees, proclamation, letters patent, commission, warrant, bylaw or other instrument enacted (a) in execution of a power conferred under an Act; or (b) by or under the authority of the Lieutenant Governor in council ...” Counsel further argues that the Overtime Variance Definitions are within the definition of “enactment” and therefore Section 8 of the *Interpretation Act* should be applied. Alternatively, counsel argues that Section 8 of the *Interpretation Act* provides an excellent guide as to how the Overtime Variance Definitions should be interpreted.

Counsel further argues that in the case of “construction”, it should be noted that North Eastern British Columbia is subject to extremely variable weather conditions in the course of the year and that roads are typically constructed out of gravel or shale. These roads become rutted as a result of heavy traffic and are subject to erosion, washouts and frost heaves. KHL’s position is that oilpatch roads are therefore never completely finished, they are always in a state of “construction”.

Counsel further argues that the objects of the Oilpatch Variance is to assist in creating an environment in British Columbia where the exploration for and the production of natural gas and oil is economically viable and to provide, to some extent, for a level playing field for the exploration for and production of oil and natural gas in British Columbia relative to the Province of Alberta. In short, the Oilpatch Variance has, as its object, the promotion of economic activity in the oil patch in North Eastern British Columbia.

Counsel further argues that the Oilpatch Variance recognizes the fact that much of the work done in the oil patch is seasonal and that when work is available it must be performed with speed. The conditions that exist in the oil patch necessarily lead to overtime.

Counsel further argues that it makes good economic sense to stockpile the gravel as it would be economically impractical to make gravel on a “demand” basis.

Counsel further argues that Nielsen was involved in the procession of raw material into a finished product for use in the oilpatch.

Counsel finally argues that I should rule that crushing gravel destined for the oilpatch is covered by the definition of “construction” contained in the Oilpatch Variance.

The delegate argues that with respect to the issue of compensation for length of service, the facts are clear:

- the ROE clearly indicates that Nielsen was laid off and this is further confirmed by Kosick's letter dated March 8, 1996;
- Nielsen was not called back to work;
- Nielsen advised Middleton that he was taking time off;
- Middleton further stated that the employment relationship was very flexible and tolerant and that Nielsen, as well as other employees had previously taken time off on short notice;
- there is no evidence that Nielsen quit his employment, in fact, Middleton agreed that he did not consider that Nielsen had quit, merely that he was taking some time off;
- that whether October 27 as indicated on the ROE or December 12 is the last day of work, there is still an entitlement to compensation for length of service.

With respect to the Oilpatch Variance, the delegate argues that the definitions which accompany the variance are very clear and should not be expanded beyond what the clear reading of them states. The delegate further argues that the pit at South Taylor could also fit the meaning of "yard" as stated in the variance definitions as yard does not mean that the property has to be next door to KHL's offices, merely that the property is owned or under the control of KHL.

ANALYSIS

At the outset I must say that I was not persuaded that the level of education, sophistication or understanding of the *Employment Standards Act* by any of the parties to this appeal was relevant to the merits of the issues.

The purposes of the *Act* are set forth in Section 2 which states:

Purposes of this Act

2. The purposes of this Act are to
 - (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,
 - (b) promote the fair treatment of employees and employers.
 - (c) encourage open communication between employers and employees.

- (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,
- (e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and
- (f) contribute in assisting employees to meet work and family responsibilities.

In order to promote the intent of the *Act* as set forth in Section 2, the Director has been given certain powers and discretionary authority under the *Act*. Among those powers is the power to grant variances.

The Director's power to grant a variance is set forth in Section 73 which states:

Power to grant variance

- 73.** (1) The director may vary a time period or requirement specified in an application under section 72 if the director is satisfied that
- (a) a majority of the employees who will be affected by the variance are aware of its effect and approve of the application, and
 - (b) the variance is consistent with the intent of this Act.
- (2) In addition, if the application is for a variance of a time period or a requirement of section 64 the director must be satisfied that the variation will facilitate
- (a) the preservation of the employer's operations,
 - (b) an orderly reduction or closure of the employer's operations, or
 - (c) the short term employment of employees for special projects.
- (3) The director may
- (a) specify that a variance applies only to one or more of the employer's employees,
 - (b) specify an expiry date for a variance, and
 - (c) attach any conditions to a variance.
- (4) On being served with a determination on a variance application, the employer must display a copy of the determination in each workplace, in locations where the determination can be read by any affected employees.

On March 1, 1995, the Director revoked the Oilpatch Industry - Overtime Variance which had previously been issued on August 7, 1981 and replaced it with a new variance which states:

Pursuant to Section 31 and 35 of the *Employment Standards Act*, I vary the overtime provisions under s.30(1) and the hours free from work provisions under S.35(1) and (2) of the *Employment Standards Act*, as follows:

Employees employed in the oil or natural gas well drilling, and the oil/natural gas well servicing industry, and employed in connection with oilpatch operations as defined by the Director of Employment Standards shall be paid at not less than time and one half (1 1/2) for each hour worked in excess of 8 hours in any one day and 40 hours in any one week, with all overtime to be calculated on the employee's regular hourly rate of pay.

Except for an emergency and employer shall ensure that each employee has at least 8 consecutive hours free from work between each shift worked.

This Variance expires on September 30, 1995.

On August 2, 1995, the variance was extended until September 30, 1996.

Attached to this variance were a number of conditions entitled "**OILPATCH INDUSTRY - OVERTIME VARIANCE DEFINITIONS**" and those relevant to this appeal are as follows:

1. Employees employed in the following areas will be covered by the Oilpatch Variance:
 - c) "construction" means the work performed in the road construction, to a site, the site preparation in regard to an oil or natural gas well.
2. An employee employed *outside* the municipal boundary, will be covered by the Oilpatch Variance in the above areas.
3. An employee while employed in an *office, shop or yard* is *not* covered by the Oilpatch Variance.

There is no dispute that Nielsen was employed as a mechanic, both in KHL's shop and in the field with the crusher and, from time to time, he also worked as the crusher operator. The days for which overtime payment is in dispute are the days that Nielsen worked on the crusher in the field at one of the pits utilized by KHL, with none of those pits being located inside any municipal boundary. The critical issue in this part of the appeal is whether or not the work performed by Nielsen on the crusher, either as a mechanic or an operator, is covered by the Oilpatch Variance.

The evidence was that the material being processed (crushed) was stockpiled for future use and, depending on the location of the pit, that future use was either primarily or exclusively for the oilpatch. Nielsen was not involved in any work on either an oilpatch road or site.

The variance issued by the Director is an exception to the minimum requirements as set forth in the *Act*, and, while I agree that the minimum requirements of the *Act* should be interpreted with regard to Section 8 of the *Interpretation Act*, R.S.B.C. 1979 Chapter 206, that is, in a manner that is “fair, large and liberal”, I am of the view that **exceptions to those minimum requirements such as this variance must be interpreted in the most narrow manner** in order to preserve the intent and purposes of the *Act*.

“Construction” is defined in *Black’s Law Dictionary* (6th Edition) as:

“The creation of something new, as distinguished from the repair or improvement of something already existing.”

The evidence was that KHL, in 1994 and 1995, was not involved in the building of any new oilpatch roads or new sites.

I conclude therefore that any maintenance work performed on oilpatch roads or sites is not “construction” as contemplated by the Director’s definitions accompanying the Oilpatch Industry Overtime Variance.

With respect to the type of work performed by Nielsen, that is the maintenance or operation of the crusher or other equipment associated with the processing of material for future use in the oilpatch industry, I must consider such work in the context of the Director’s definitions accompanying the Oilpatch Industry Overtime Variance. I conclude that the **preparation of materials** for use in the oilpatch industry, be it the refining of fuel for the equipment used in the construction of roads and sites or the crushing of gravel used for the construction of those roads and sites, **is not covered** by the Oilpatch Industry Overtime Variance.

Nielsen is therefore entitled to be paid the appropriate rates for the overtime worked pursuant to Section 40 of the *Act*. The overtime adjustment owing to Nielsen is as calculated by the delegate in the amount of **\$3,897.66**.

With respect as to whether the gravel pit owned by KHL in South Taylor would fit the definition of “yard” as contemplated by the Oilpatch Industry Overtime Variance Definitions, I am persuaded that in these particular circumstances, that pit is not a “yard”.

With respect to issue #2, whether Nielsen was terminated or quit his employment, the evidence provided by both the ROE issued and the letter from KHL dated March 8, 1996, clearly indicate that Nielsen was laid off due to shortage of work.

The onus in a layoff situation is on the employer to initiate a recall to work. While it may seem appropriate for the laid off employee to keep the employer apprised of their

whereabouts during a layoff, in the absence of any provisions in a contract of employment there is no requirement for an employee to do so. The fact that Nielsen was away from Fort St. John during his period of lay off does not relieve KHL from the onus of proving that they attempted to recall Nielsen to work and he was either unavailable or unwilling to return. In any event, it is clear from the evidence that Middleton was aware that Nielsen could have been contacted, if required, through his brother Jim who was working for KHL at the relevant times.

There was no evidence that KHL made any attempt to recall Nielsen to work.

I therefore conclude that Nielsen was laid off by KHL.

An employers right to lay off employees is not restricted in any way by the requirements of the *Act*, however, when a lay off exceeds a “temporary lay off” as defined in the *Act*, such lay off is then deemed to constitute termination. “Temporary layoff” is defined as:

“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 30 consecutive weeks;

With respect to Nielsen’s return to work on December 11 and part of December 12, 1995, that period of time would be considered as falling within a “week of layoff” and is therefore part of the layoff which commenced October 28, 1995. “Week of layoff” is defined in Section 62 of the *Act* as:

Definition

- 62.** In this Part **“week of layoff”** means a week in which an employee earns less than 50% of the employee’s weekly wages, at the regular wage, averaged over the previous 8 weeks.

I conclude that Nielsen’s period of lay off exceeded that of a “temporary layoff” and pursuant to Section 63 (5) of the *Act*, Nielsen is therefore deemed to have been terminated after the completion of his work on October 27, 1995 and Nielsen is subsequently entitled to compensation for length of service.

I must then consider the liability faced by KHL with respect to compensation for length of service. The liability on an employer with respect to compensation for length of service is set forth in Section 63 of the *Act*. Section 63 states:

Liability resulting from length of service

- 63.** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages compensation for length of service.
- (2) The employer's liability for compensation for length of service increases as follows:
- (a) after 12 consecutive months of employment, to an amount equal to 2 week's wages;
 - (b) after 3 consecutive years of employment, to an amount equal to 3 week's wages plus one additional week's wages for each additional year of employment, to a maximum of 8 week's wages.
- (3) The liability is deemed to be discharged if the employee
- (a) is given written notice of termination as follows:
 - (i) one week's notice after 3 consecutive months of employment;
 - (ii) 2 week's notice after 12 consecutive months of employment;
 - (iii) 3 week's notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 week's notice;
 - (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
 - (c) terminates the employment, retires from employment, or is dismissed for just cause.
- (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
- (a) totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
 - (b) dividing the total by 8, and
 - (c) multiplying the result by the number of weeks' wages the employer is liable to pay.
- (5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

It was conceded by KHL that if Nielsen was entitled to compensation for length of service, such compensation would be based on four years of service. The amount of compensation owing to Nielsen is therefore calculated pursuant to Section 63 (4) as follows:

Total wages at regular rate for last 8 weeks	= \$4,896.00
divided by 8 (4896 ÷ 8)	= \$ 612.00

times 4 weeks entitlement (612 x 4) =\$2,448.00

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 003716 be varied to be in the amount of **\$6,345.66** plus whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal

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