BC EST #D442/00
Reconsideration of BC EST #D153/00

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Daryl-Evans Mechanical Ltd.
(" DEM ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL C. L. Roberts
Lorne Collingwood
Fern Jeffries

FILE No: 2000/427

DATE OF DECISION: November 9, 2000

DECISION

This is a decision based on written submissions by Peter Gall, Heenan Blakie, solicitor for Daryl-Evans Mechanical Ltd. ("DEM"), John E. Tyler ("Tyler"), and Graeme Moore for the Director of Employment Standards (the "Director").

OVERVIEW

This is an application by Daryl-Evans Mechanical Ltd., under Section 116(2) of the *Employment Standards Act* ("the *Act*"), for a reconsideration of Decision BC EST #D153/00 (the "Original Decision") which was issued by the Tribunal on April 12, 2000.

The Original Decision varied a Determination made by a delegate of the Director on December 15, 1999. The delegate concluded that Tyler was not entitled to length of service compensation, and that, although DEM contravened section 21 of the *Act* regarding unauthorized deductions, did not order payment to Tyler.

The Tribunal varied the Determination by finding that Tyler was entitled to compensation for length of service.

ISSUE TO BE DECIDED

Whether the Tribunal erred in law in the interpretation and application of sections 63 and 65 of the *Act*.

FACTS

DEM is a company that provides plumbing, gas fitting and other mechanical services for both new and existing buildings. Tyler was employed as a plumber with DEM from March 6, 1994 to July 15, 1999. The Director's delegate found that DEM's work was primarily construction, that Tyler worked as a plumber on construction sites, and that, by operation of section 65(1)(e) of the *Act*, Tyler was not entitled to compensation for length of service.

On appeal, the adjudicator found that Tyler's employment "achieved a degree of permanence that does not accord with the statutory purpose and intent of Section 65." His reasoning is as follows:

> "...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 materials in the file and in the submissions, the conclusion that DEM is an employer whose principal business in 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 (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,* BCEST#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 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 A*ct* is remedial legislation and interpretation that extends it 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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"I also consider the following comments from the Supreme Court 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 decision of this Court, it ought to be interpreted in a abroad 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 it 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 within 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, weighs 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 those 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.

ARGUMENT

DEM contends that the adjudicator erred in law in deciding that the exemption is not for construction workers. It argues that it "must be presumed that the Legislature, by specifically including an exemption for construction workers in s. 65(1)(e), intended to provide something different and distinct from the exemptions set out in s. 65(1)(b) and (c) for employees employed for definite term or for specific work to be completed within a 12 month period".

DEM contends that the exemption is clear on its face and that the wording admits no uncertainty. It argues that once the employee is found to be employed at a construction site and the employer's principal business is found to be construction, the termination pay provisions in section 63 and 64 do not apply. DEM argues that the adjudicator created an exception to section 65(1)(e) where one does not exist.

DEM further argues that the policy considerations referred to by the adjudicator have no place in an analysis of a statutory provision where it is clear and unambiguous.

Tyler agrees with the Adjudicator, arguing that his analysis correctly interpreted the *Act*.

The Director recognises that "there may be instances where a review of the purpose and intent of legislation can produce a result different than that [sic] may appear in the words of a particular

section of the Act." Although the Director "stands by" the Determination, she "does not dispute the reasoning of the Adjudicator".

ANALYSIS

The Tribunal has established a two stage analysis for an exercise of the reconsideration power (see *Milan Holdings Ltd. (*BCEST #D313/98). At the first stage, the panel decides whether the matters raised in the application in fact warrant reconsideration.

> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. *(Milan Holdings, p. 7)*

The Tribunal has held that a reconsideration will only be granted in circumstances that demonstrate that there has been a breach of the rules of natural justice, where there is compelling new evidence that was not available at the new hearing, or where the adjudicator made a fundamental error of law (*Bicchieri Enterprises Ltd. (*BCEST #D335/96).

The scope of review on reconsideration is a narrow one (see *Kiss* BC EST#D122/96): 1. failure by the adjudicator to comply with the principles of natural justice, 2. mistake in stating the facts, 3. failure to be consistent with other decisions which are not distinguishable on the facts, 4. significant and serious new evidence that would have led the adjudicator to a different decision, 5. misunderstanding or a failure to deal with a significant issue in appeal, and 6, a clerical error in the decision.

In our view, this is an appropriate case for exercising the reconsideration power. DEM has raised a significant issue of law that compels a review because of the importance of the interpretation of this section to the parties and the implications this determination will have for future cases.

Employees are entitled to compensation or notice unless specifically exempted by section 65.

Section 65 identifies those employees who are not entitled to compensation, termination pay, or notice of termination. Those includes employees who work for temporary periods, who are employed for a definite term, and those who are employed at a construction site by an employer whose principal business is construction:

> *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,*
>
> *...*
>
> *(e) employed at a construction site by an employer whose principal business is construction, or*
>
> *(f) who has been offered and has refused reasonable alternative employment by the employer*

Construction is defined in section 1 to mean "the construction, renovation, repair or demolition of property or the alteration or improvement of land."

On review, the panel arrives at the same conclusions as the Adjudicator, but for an additional reason, which is addressed by DEM in its appeal.

We do not take issue with DEM's argument that the plain reading of the legislation states that once an employee is found to be employed at a construction site, and the employer's principal business is construction, the termination pay provisions do not apply. However, the evidence is that Tyler worked continuously for DEM at many construction sites, not just one. The evidence is also that he worked on a number of other job sites for DEM that were not construction sites.

Exceptions to benefit-conferring legislation must be narrowly interpreted. Section 65(1)(e) refers to a construction site, not to construction workers, as DEM argues, nor does it include "persons working on construction sites" as the delegate concluded. In our view, this section is designed to provide relief from the termination pay provisions for employers to the extent that they employ workers to work on a single construction project. However, where an employer has many construction and renovation projects, and an employee is continuously employed by that employer, we are of the view, as the Adjudicator was, that the exception from the termination provision does not apply. We have arrived at this conclusion based on the strict wording of the legislation, as well as the principle that exceptions should be narrowly construed, and the interpretation and application of the *Act* should be consistent with its objectives and purpose.

The purposes of the *Act* include ensuring that employees in British Columbia receive at least basic standards of compensation and conditions of employment, and to promote the fair treatment of employees and employers.

DEM relies on *Honeywell Ltd. v. British Columbia (Director of Employment Standards)* [1997] B.C.J. No 2290 (B.C.S.C.). which held that where an employee is found to be employed at a construction site and the employer's principal business is found to be construction, the termination pay provisions do not apply. The decision deals primarily with the issue of what is, and what is not a construction site, and does not address the issue of what is meant by reference to "a construction site" in the current *Act.* The decision was issued after proclamation of the current *Act*, which established the Tribunal as a body of some expertise to which deference must

be shown. (*Mitchell v. British Columbia (Director of Employment Standards*) [1998] B.C.J. No 3005, B.C.S.C.)

DEM also contends that the legislature had the opportunity to amend or eliminate the exemptions which were part of the old *Act* and Regulations in 1994. DEM contends that the legislature chose not to do that but, rather, to preserve the status quo recommended by Professor Thompson at p. 146 of his report. We do not consider the report to have recommended the status quo at all. Professor Thompson said that "exceptions should be limited" (at p. 29), that "coverage be more inclusive" and "apply as broadly as possible" (at p. 31). While we agree that he recommended that there be no change to the status quo at p. 146, we note that he was referring specifically to "employers and employees who rely on hiring halls", not a person in Tyler's situation. Moreover, the panel notes that "an employee employed in the construction industry" was exempt from the group termination provisions under the old *Act* and that the legislature chose not to adopt that broad wording, wording that, had it been adopted, would have provided for an exemption for construction workers. In choosing wording that refers to a construction site, the legislature maintained the exemption for employees like those hired through hiring halls, employees that are employed to work on a single construction site and know that, once the work is complete, their employment will be terminated.

DEM contends that s. 65(1)(e) provides for something different through 65(1)(b) and (c). We agree. Section 65(1)(e) governs employees that are not employed for a definite term but an indefinite term, and employees that are not employed for specific work which must be completed within a 12 month period but work which may last far longer than that.

The panel finds that to interpret this section in the manner urged by DEM would violate the spirit and intent of the *Act* to deprive workers of their rights on termination.

Tyler's employment did not fall within those categories of employment exempted in sections 63 through 65. As an employee of some permanence who was not employed to work on a single site, we find that he is entitled to the protection of the *Act*.

ORDER

The determination is confirmed.

C. L. Roberts	***Lorne D. Collingwood***	***Fern Jeffries***
C. L. Roberts		
Panel Chair	**Adjudicator**	**Tribunal Chair**
Employment Standards Tribunal	**Employment Standards Tribunal**	**Employment Standards Tribunal**