

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 -

E. Nixon Ltd.
("Nixon")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/746

DATE OF DECISION: January 14, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by E. Nixon Ltd. (“Nixon”) of a Determination which was issued on September 22, 1997 by a delegate of the Director of Employment Standards (the “Director”). The Determination resulted from a complaint by Ian J. Nash (“Nash”) and concluded that Nixon had contravened the *Act* by failing to pay Nash length of service compensation following his termination after 13 weeks of layoff in a 20 week period. The Director ordered Nixon to pay \$4160.02. Nixon has appealed the Determination.

Nixon argues two reasons in support of the appeal. First, it says their principal business is construction and they claim the exemption from Section 63 of the *Act* found in subsection 65(1)(e) of the *Act*. Second, it says, in any event, Nash disentitled himself to length of service compensation because he refused to report for work when he was requested to.

The Tribunal has decided this appeal may be disposed of without a hearing on the basis of the material on file.

ISSUES TO BE DECIDED

Nixon has raised two issues: whether its principal business is construction; and whether at any point in time before his termination Nash disentitled himself to length of service compensation.

FACTS

Construction is defined in the *Act*:

1. (1) In this Act:

“**construction**” means the construction, renovation, repair or demolition of property or the alteration

Nixon operates a business on a property, identified by Nixon as the Goldstream Meadows Property, adjacent to the Island Highway near Victoria, B.C. The material on file indicates the operation is a typical sand and gravel pit operation, meaning material, in this case, soil, gravel and rock, is being extracted from the ground, sifted, screened and washed, separated, stockpiled and sold to the general public or other businesses and, depending on the nature of

the sale, may be delivered to the customer. Nixon also brings some raw material to the pit for processing and sale. The property upon which the pit is located may, at some future time, be developed. At the present time, there are no development plans and the business being carried on by Nixon on the property is not related to any specific construction project.

Nash commenced his employment with Nixon on July 9, 1990. He originally worked for Nixon as a tireman at the business location of Burnside Tire. When that business closed he was assigned by Nixon to their gravel pit operation, which at that time was located across the road from where it presently is. On October 4, 1996, Nash was laid off. It was not unusual that he was laid off during the winter months as business slows down at that time. What was unusual for this lay off was its duration. In the twenty weeks following the initial date of lay off, Nash worked for only five weeks. Nixon attempted to recall him for temporary assignments during the lay off, but was either unable to communicate with him or failed to receive a timely reply from him and called another person for the work. Nash, for his part, communicated with Nixon from time to time about the availability of work.

ANALYSIS

The definition of construction in the *Act* is comprehensive. Such a broad definition raises certain difficulties, not the least of which is its limits. Technically, one could include in the definition such activities as minor household repairs and gardening. In the context of the *Act*, this is hardly appropriate. The *Act* is intended to have a general application to employees in the province. Provisions of the *Act* that allow for exceptions to the application of basic standards of compensation and conditions of employment are strictly construed. The exception relied on by Nixon in this appeal is found in subsection 65(1)(e), which says:

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

The definition of “construction” and the exception from the benefits established by Sections 63 and 64 of the *Act* for an employee employed at a construction site is based upon a typical perspective of the construction industry and on an acceptance that the normal employment relationship in construction makes it appropriate to except construction employers from the notice requirements of the *Act*.

The reference in subsection 65(1)(e) to “construction site” evokes the typical notion of a construction project, which involves the erection of a single, large, permanent structure at a fixed location. Such an undertaking involves a complex network of participants, many of whom specialize in some segment of the operation. The owner is the client, the purchaser of the

product of the operation. It hires an architect and/or engineer to design and oversee construction. The contract is put out for bid, sometimes in its entirety, sometimes in stages. The successful bidder often does much of the contracted work itself and manages those parts of the contract for which it is responsible. It may subcontract other parts of the work to specialized construction employers, who come on site only for the purpose of making a specific contribution to the project. Employees working on construction sites for construction employers often exhibit the same specialization as their employers, coming to the construction site only to perform the function required of them and, when they are finished, leave the site and, more often than not, leave the employ of the construction employer.

Construction employers do not normally maintain a regular work force, but normally acquire employees as and when required. Persons employed on construction sites are employed for a finite term which is generally predictable, either by the duration of their role in the project or by the duration of the project itself. It is this characteristic of employment in construction, resulting from both the way individual construction projects are organized and the erratic pattern of construction activity generally, that justifies the exception in the *Act*. Knowledge on the part of the employee of the finite aspect of the duration of their employment is the same characteristic shared by some of the other exceptions found in subsection 65(1).

The activity being conducted by Nixon at the Goldstream Meadows Property lacks the usual characteristics of a construction project to allow it be considered work at a “construction site” for the purposes of the *Act*. There is no identifiable construction project. There is no evidence of any bid process or construction contract between Nixon and the owner, or an architect/engineer, project manager or general contractor, relating to the development of some stage of a project. There is no presence of other persons, such as surveyors, soil analysts and engineers, all of whom would be involved even at the excavation or site preparation stage of a construction project. There is no predictability to the duration of employment at the property. The absence of any characteristics of a typical construction project militates against the property being found to be a “construction site”.

When the definition of **construction** in the *Act* speaks of the “*alteration or improvement of land*” that reference must also be interpreted as requiring some relationship to an identifiable construction project. In this case, there is no indication that the alteration of the land taking place, which can easily be attributed as a normal incidence of a sand and gravel pit operation, relates in any way to such a project. Similarly, and quite apart from the failure of Nixon to demonstrate any “improvement” of any nature to the land as a result of its activity, it has not been shown that the activity of Nixon on the property represents an “improvement” of that land relative to a construction project.

Additionally, Nixon has failed to establish that it is an employer whose principal business is construction. I am satisfied from the material on file that the purpose for Nixon being located on the Goldstream Meadows Property is not to do construction work, but to access a source of

material relative to its real business, which is the extraction, processing and sale of top soil, sand and gravel. According to the Director, a conclusion that Nixon does not have its principal business in construction is reinforced by the fact the Goldstream Meadows Property, upon which their business is located, is, by definition, a “mine” and the activities of Nixon on the property are substantially regulated by the *Mines Act*, R.S.B.C., ch. 293 and Regulations.

For the above reasons, the argument that Nash was employed on a construction site by an employer, Nixon, whose principal business is construction is dismissed.

The second issue relates to whether Nash disentitled himself to length of service compensation.

Section 63 of the *Act* places a statutory liability upon an employer to pay length of service compensation to each employee upon completion of three consecutive months of employment. In a sense, length of service compensation is an earned statutory benefit conferred upon an employee. The amount of compensation increases as the employee’s length of service increases to a maximum of 8 weeks’ wages. An employer may effect a discharge from this statutory obligation by providing written notice to the employee equivalent to the length of service entitlement of the employee or by providing a combination of notice and compensation equivalent to the entitlement of the employee. An employee may cause an employer to be discharged from the statutory obligation by doing one of three things: first, self terminating employment; second, retiring from employment; and third, giving just cause for dismissal.

Based upon his length of service, Nash became entitled to 6 weeks compensation at the time he was terminated. Nash was laid off for a period longer than a “temporary layoff”, which in the circumstances, means he was laid off for more than 13 weeks in a period of twenty consecutive weeks. By application of subsection 63(5) Nash was deemed to have been terminated at the beginning of the layoff, October 4, 1996.

It is common ground that Nixon did nothing to effect a discharge of their statutory obligation to pay Nash length of service compensation. The question is whether Nash caused the obligation of Nixon to be discharged by doing any one of the three things identified above: self terminating employment, retiring from employment or giving just cause for dismissal. The forgoing list is exhaustive and represent the only forms of employee conduct that will result in a disentitlement of length of service compensation. On the facts it cannot be said Nash has conducted himself in a way that would disentitle him from receipt of compensation. Nixon argues that Nash did not return to work during the 20 week period because he was unavailable when the employer called or did not reply to the calls promptly. Neither of those facts, even if accepted, show Nash had quit or retired and do not demonstrate cause for dismissal. In fairness, Nixon does not allege Nash conducted himself in a manner that would disentitle him to compensation. It simply says the termination was “his fault” for not being available or promptly returning calls. On application of Section 63 of the *Act* the question of “fault” is neither relevant nor applicable, unless it is raised in the context of cause for dismissal. That is not the case here and Nixon has not

established Nash disentitled himself to length of service compensation upon his termination. This aspect of the appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination of the Director, dated September 22, 1997, be confirmed in the amount of \$4160.02 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

.....
David Stevenson
Adjudicator
Employment Standards Tribunal