BC EST # D286/96
(Reconsideration of BC EST # D076/96)

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

Employment Standards Act, S.B.C. 1995, c. 38

-by-

Finlay Forest Industries Inc.

("Finlay Forest")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	96/132
DATE OF DECISION:	October 10, 1996

DECISION

OVERVIEW

Finlay Forest Industries Inc. ("Finlay Forest") has filed an application, pursuant to section 116 of the Employment Standards Act (the "Act"), for reconsideration of an adjudicator's decision to vary Determination No. CDET 000938 issued by the Director of Employment Standards on January 29, 1996 (the "Determination"). Pursuant to the original Determination issued by the Director, Finlay Forest was ordered to pay the sum of $1,034.25 to Gail Patricia Bowman on account of two weeks' severance pay.

Finlay Forest appealed the Determination arguing, *inter alia*, that the Director failed to take into account section 43(b) of the Employment Standards Act (S.B.C. 1980 as amended). Finlay Forest also appealed on the ground that the Director did not properly calculate the amount of severance pay allegedly owing to Ms. Bowman.

The adjudicator, relying on section 128(3) of the Employment Standards Act, 1995 (the "transitional" provision), held that Bowman's complaint, which was filed on October 13, 1995, was governed by the 1995 Act (this point is now conceded by Final Forest to be correct).

The adjudicator held that Bowman was employed under a series of "definite term" contracts spanning the period October 6, 1993 to August 25, 1995, inclusive, and that she was entitled to two weeks' severance pay in lieu of notice which he calculated to be $1,049.76. The adjudicator varied the Determination to reflect this latter amount.

Counsel for Finlay Forest seeks a reconsideration on the ground that the adjudicator misapprehended the true nature of the contractual relationship between Finlay Forest and Bowman, especially after September 30, 1994. According to Finlay Forest's counsel, the parties entered into a new contractual arrangement on or about October 3, 1994 pursuant to which Bowman was employed only as a "casual" employee and thus, in light of section 65(1)(a) of the 1995 Act, she was not entitled to any notice of termination or severance pay in lieu thereof.

ANALYSIS

Finlay Forest's request for reconsideration is contained in their legal counsel's letter to the Tribunal dated August 12, 1996. Finlay Forest's counsel submits that Bowman was employed under a series of definite term contracts until September 30, 1994 and pursuant to a "casual" contract as and from October 3, 1994. However, Finlay Forest's submission on this latter point is, in my view, undermined by at least two factors:

• if Bowman was, in fact, terminated on September 30, 1994, why was there no Record of Employment issued to Bowman at that time?;

• if Bowman was, in fact, a casual employee after October 3, 1994, why was she continuing to work essentially full-time hours throughout November 1994 to May 1995? I note that Bowman worked the following hours each month during this period:

Month	Hours Worked (including overtime)
November 1994	155.0
December 1994	160.5
January 1995	150.0
February 1995	112.5
March 1995	142.5
April 1995	112.5
May 1995	140.5

Indeed, so far as I can gather from the material on file, it would appear that Bowman worked at least as many hours in the months immediately after October 3, 1994 as she did in the months preceding October 3, 1994.

In light of the above, one can reasonably conclude that the employer's attempt to re-characterize Bowman's employment status after October 3, 1994 was a mere cloak to avoid possible liability under the severance pay provisions of the Employment Standards Act. I also am of the view that in early June 1995 (and certainly by late August 1995), when the employer unilaterally (and significantly) reduced the number of hours that it required Bowman to work, the employer could be taken to have constructively (if not actually) dismissed Bowman, thereby triggering an obligation to pay two weeks' severance pay pursuant to section 63 of the Act. In any event, whether one treats June 9th as the termination date (the Director) or August 25th (the original adjudicator), the severance pay calculation is

not significantly different. I do not see any error in the original adjudicator's methodological approach to the calculation of the amount owing on account of two week's severance pay.

ORDER

Finlay Forest's application to vary or cancel the decision of the adjudicator in this matter is refused.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal