BC EST #D578/97
Reconsideration of #D309/97

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 -

The Director of Employment Standards
("The Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/790

DATE OF DECISION: February 19, 1998

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DECISION

OVERVIEW

This is a reconsideration under Section 116 of the *Employment Standards Act* of Decision BC EST #D309/97 which was issued by the Employment Standards Tribunal on August 5, 1997. That Decision varied two Determinations issued by the Director of Employment Standards on March 19, 1997. The adjudicator concluded that Edward Munro ("Munro" or the "employee") was owed money for unauthorized payroll deductions and unpaid statutory holiday pay for one day but not for overtime or compensation for length of service.

The Director applies for reconsideration on the grounds that the adjudicator erred in finding that Munro was not owed compensation for length of service.

ISSUE TO BE DECIDED

The issue is whether the application for reconsideration should be allowed.

FACTS

Beginning in August, 1994, Munro was employed by Side-Winder Contracting Ltd. ("Side-Winder" or the "employer") as a boomman. Side-Winder is a towing/booming contractor in the logging industry and typically hires employees to work during the logging season. A number of employees have worked for the company on a seasonal basis for a number of years. Munro worked for Side-Winder between August 1994 and November 1994 and again in February 1995, until termination in September, 1995. Side-Winder claimed that it dismissed Munro for just cause.

ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

> 116(1) On application under subsection (2) or on its own motion, the tribunal may
> (a) reconsider any order or decision of the tribunal, and cancel or vary the order or decision or refer the matter back to the original panel.

This is not an opportunity to revisit the evidence or reconsider the original arguments. Rather, a reconsideration application will succeed in narrow circumstances. Typical examples were outlined in *Zoltan Kiss (BC EST # D 122/96)*:

- failure to comply with the principles of natural justice
- mistake of fact
- decision inconsistent with prior decisions indistinguishable on their facts

- significant new evidence not available to the first adjudicator
- mistake of law
- misunderstanding of or failure to deal with a serious issue
- clerical error

The key question in this appeal is whether the adjudicator in BC EST #D309/97 committed an error of law by finding that section 63 of the *Act* did not apply to Munro's employment because it fell within the exception created by section 65(1)(c). I find no error of law or other ground for reconsideration, so this application fails.

Section 63(1) of the *Act* provides compensation where an employee has been dismissed without proper notice under section 63(2) or without just cause. Exceptions to this provision are outlined in section 65(1):

> 65(1) Sections 63 and 64 do not apply to an employee
> employed under an arrangement by which
> the employer may request the employee to come to work at any time for a temporary period, and
> and the employee has the option of accepting or rejecting one or more of the temporary periods,
> employed for a definite term,
> employed for specific work to be completed in a period of up to 12 months,
> employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act,
> employed at a construction site by an employer whose principal business is construction, or
> who has been offered and has refused reasonable alternative employment by the employer.

In order for section 65(1)(c) to apply, the employment must take place for "specific work" and be completed within a 12 month period. It applies to the facts of this case as Munro was hired to perform boom work during the 1995 logging season and the period of employment spanned approximately 7 months.

It has been argued by the Director that Munro's employment is not covered by section 65(1)(c) because Munro and Sidewinder did not agree, at the outset, to the amount of time this arrangement would continue. Cited in support of this argument is *David J. Wiebe* (BC EST #D451/97) which requires the employer at the point of hire to state the length of the employment before the exception in section 65(1)(b) will apply. The adjudicator in BC EST #D309/97 did not superimpose a time element on section 65(1)(c) and I endorse that approach. This provision applies where an employee is hired to perform certain work rather than a variety of services on an indefinite basis. It is not necessary, as it is in the case of employment for a definite term, that at the outset of the arrangement the parties know the length of the contract; that would be unworkable as it would depend on artificial and preconceived (and often wrong) estimates of the time necessary to perform certain

work. All that must be acknowledged at the outset is that the arrangement is intended to cover a specific task or set of tasks. As long as the work performed falls within the scope of the original agreement and the employment relationship lasts less than one year, the circumstances in which Sidewinder and Munro found themselves, section 65(1)(c) exempts the arrangement from the notice requirements of section 63.

The Director urges me to distinguish between seasonal employment, the situation which is submitted to be the case here, and specific work:

> A person could be hired on an indefinite term, but work seasonally; expecting to be laid-off and recalled from lay-off from time to time, as work conditions dictated. The difference turns on the parties' expectations and commitments. In the first situation, the parties are committed to a long-term relationship, where employer expects the employee to be laid-off and recalled from lay-off from time to time, as work conditions dictated. This is different from the person hired to perform a particular work function for the season. The difference turns on the parties' expectations and commitments. In the first situation, the parties are committed to a long-term relationship, where employer expects the employee to be available for work when required, and the employee expects to be recalled to work; in the other, they are not.

Even if I accept the Director's contention that there is a difference between seasonal employment and employees hired for specific work, I do not agree that Sidewinder and Munro agreed that he was a permanent employee who would return season after season. The evidence is that Munro was re-hired after one mutually agreeable season and that some other employees had been hired for several seasons. I cannot infer from this an intention to create a permanent employment relationship subject to seasonal fluctuations.

ORDER

Pursuant to Section 116 of the *Act*, I confirm the Original Decision, BC EST #D309/97.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal