

CONSTRUCTION WORKERS AND THE EMPLOYMENT STANDARDS ACT

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The stated purpose of employment standards legislation, including the British Columbia *Employment Standards Act* (ESA), is to promote the fair treatment of both employers and employees in the workplace. The ESA ensures minimum standards of compensation and employment conditions. It confers rights on both employees and employers and is usually interpreted broadly when there is a need for such interpretation.

An employer cannot contract out of the minimum standards of the ESA, including an employee's entitlement to compensation when the employer terminates the employment relationship without cause. The amount payable as compensation in such instances depends on a number of factors, including the length of the employment relationship. According to the ESA, severance pay, as it is often called, is compulsory following the termination of an employment relationship that has lasted three or more months.

However, some workers, notably temporary and fixed-term workers, are exempt from the ESA's severance provisions. The rationale for this exemption is that temporary and fixed-term employees know when the employment relationship is set to end at its outset. Severance pay on termination of temporary and fixed-term employees would, in reality, amount to even more notice being given than the ESA requires.

There is one other specific and notable exception to the ESA's provisions for compensation on termination of an employment relationship. Section 65(1)(e) of the ESA excludes an employee who is "employed at one or more construction sites by an employer whose principal business is construction." Why are construction workers exempt from this benefit? The answer seems to be that construction workers, like temporary and fixed-term employees, are well aware that the employment relationship will end at a specific time. They are hired for a single project and leave when their role in that project is over.

Construction workers assume that, as is dictated by the nature of their job, they will move from work site to work site and from employer to employer throughout their careers. In that respect, their work is different from most other employment situations. Like fixed-term and temporary employees, construction workers ostensibly have notice of termination when they start a particular

job; that being so, when that employment relationship ends, they too are not entitled to more notice.

The ESA defines “construction” as the “construction, renovation, repair or demolition of property or the alteration or improvement of land.” It is therefore reasonable to assume that individuals employed at one or more construction sites by a contractor would fall immediately into the “construction worker exemption;” however, the Employment Standards Tribunal seems to be reading the construction worker exemption narrowly.

The opportunity to remove an employee out of the construction worker exemption has recently presented itself in two identifiable situations:

- Where the employer is unable to bring itself within the definition of “construction” set out in the ESA.
- Where the employee can demonstrate that his or her employment has achieved a degree of permanence that does not accord with the statutory purpose and intent of the ESA’s Section 65 exemptions.

In the first instance, the Tribunal exempts work that is only ancillary to construction, such as gravel extraction, concrete coring and testing for road work. In the second, an employee who has remained with one employer from construction project to construction project can likely argue that the employment relationship in question was permanent and therefore outside the scope of the construction worker exception. For example, the Tribunal recently held that a plumber, who had a five-year exclusive working relationship with a construction company and worked on multiple projects over that time, was not subject to the construction worker exemption; consequently, the employer had to pay severance.

While construction workers may implicitly understand that their employment relationships are temporary in nature, employers need some degree of certainty to avail themselves of the ESA’s exemption with respect to severance pay on termination of the employment relationship. This certainty must address two variables: the nature of the employer’s work and the nature of the employment relationship. Consulting a lawyer about the employment relationship at the outset, and at points when that relationship is set to change or is extended, is likely to provide the employer with the certainty it will surely want — both at the inception of the employment relationship and at its termination.