

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

In the matter of the *Employment Standards Act*, 2007

And in the matter of the Decision of
The Employment Standards Appeal Office File No. 20-31452/16, Order 2479

BETWEEN:

Cementation Canada Inc.

Appellant

-and-

Lester Bonnell

Respondent

Appeal from a decision of an Adjudicator under the *Employment Standards Act*,
S.N.W.T. 2007, c. 13.

Heard at Yellowknife, NT on April 10, 2018.

Reasons filed: July 27th, 2018

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Appellant: Glen Rutland

Counsel for the Employment Standards Appeal Office: Trisha Paradis

No one appearing for the Respondent

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REASONS FOR JUDGMENT

1. Introduction and Background

[1] This is an appeal by the Appellant employer from the decision of an Adjudicator under the *Employment Standards Act*, S.N.W.T. 2007, c. 13 (the “Act”). It was heard together with the appeal in *Cementation Canada Inc. v. Bryan Lavallee* (CV2017 000 313) as the issues are the same. The citation for my decision in that appeal is *Cementation Canada Inc. v Lavallee*, 2018 NWTSC 37

[2] The Respondent Lester Bonnell did not appear on this appeal or file any materials in response to it.

[3] Mr. Bonnell was an employee of the Appellant, working at the Diavik Diamond Mine (“Diavik”). The Appellant was contracted by the owner of the mine to develop and construct the underground part of the mine. Mr. Bonnell was employed by the Appellant for approximately five and half years. He was laid off

without notice and filed a complaint with the Employment Standards Officer (“ESO”) pursuant to s. 61 of the Act, claiming termination pay. The Appellant argued that Mr. Bonnell was not entitled to termination pay because of a regulation under the Act which exempts employees in the “construction industry”. The ESO determined that Mr. Bonnell was not employed in the construction industry and made an order in his favour for termination pay in the amount of \$16,153.85.

[4] The Appellant appealed the decision of the ESO to an Adjudicator under s. 71 of the Act. The Adjudicator dismissed the appeal and confirmed the order for termination pay. The Appellant then appealed the Adjudicator’s decision to this Court pursuant to s. 81.1 of the Act.

[5] The grounds of appeal relied on by the Appellant are as follows:

1. That the Adjudicator erred in failing to decide whether the Employment Standards Officer had breached her duty of procedural fairness;
2. That the Adjudicator’s interpretation and application of the statutory provision exempting employees in the construction industry from termination pay was unreasonable.

[6] This appeal is brought pursuant to s. 81.1 of the Act, which provides for an appeal on any point of law raised before the Adjudicator.

[7] I am satisfied that each of the grounds relied on by the Appellant engages a point of law. Procedural fairness is a question of law: *Carter v. Northwest Territories Power Corp.*, 2014 NWTSC 19. The interpretation of legislation, although it may be informed by the factual context, also engages a point of law.

[8] On a statutory appeal to this Court from the decision of an administrative decision-maker, the standard of review must be determined. I will refer to this in relation to each of the grounds of appeal.

2. Did the Adjudicator err in failing to decide whether the Employment Standards Officer had breached her duty of procedural fairness?

[9] The issue before the ESO was whether Mr. Bonnell was employed in the construction industry. If he was, he would not be entitled to termination pay, pursuant to s. 4.1 of the *Employment Standards Regulations*, NWT Reg 020-2008.

[10] The Appellant and Mr. Bonnell submitted written material to the ESO. In her written decision finding that Mr. Bonnell was not employed in the construction industry, the ESO stated that she had spoken to an unnamed source within the Workers' Safety and Compensation Commission ("WSCC"). That source provided information to her that Diavik was, at the time Mr. Bonnell was employed there, an operating mine and that there was no construction project that he would be working on. That source also advised her that the Appellant's employees at Diavik worked as miners and not as part of a construction crew.

[11] The ESO also stated in her decision that she had spoken to representatives of the Northwest Territories and Nunavut Chambers of Mines and the Mine Training Society. Based on the information provided, she found that Diavik was an operating mine, actively engaged in mining kimberlite, from which diamonds are extracted. She concluded that the Appellant's employees were miners. Therefore, the statutory exemption from termination pay for employees in the construction industry did not apply.

[12] The information obtained by the ESO from the sources referred to above (which I will refer to as the "outside sources") was not disclosed to the parties before the ESO released her decision on Mr. Bonnell's claim.

[13] On appealing the ESO's decision to the Adjudicator, the Appellant raised the fact that the ESO had consulted the outside sources. The Appellant also placed before the Adjudicator material that contradicted the information from those sources. In her decision in the case of Mr. Bonnell, the Adjudicator made no reference to this aspect of the Appellant's appeal.

[14] This is an appeal from the Adjudicator's decision and so the standard of review for her failure to address the actions of the ESO in consulting the outside sources must be considered.

[15] In order to determine the standard of review, it is necessary first to determine how this ground of appeal should be characterized. The Appellant frames it as an issue of procedural fairness, which would mean that the question on appeal is whether the Adjudicator was correct: *Carter v. Northwest Territories Power Corp*, 2014 NWTSC 19

[16] Counsel for the Employment Standards Appeals Office, who made submissions solely on the standard of review, submitted that it is not an issue of procedural fairness, but rather an issue of adequacy of the Adjudicator's reasons, for which the standard of review is reasonableness: *Newfoundland and Labrador*

Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62. She submitted that the Adjudicator was not obliged to address every argument made by the Appellant and that the Appellant was given every opportunity to present its arguments on this issue; accordingly, in her submission, the Adjudicator did not act unfairly.

[17] Although the Appellant raised the ESO's consultation of outside sources before the Adjudicator, it was not explicitly characterized by the Appellant in its submissions to her as a question of procedural fairness. The Appellant argued that the information from the unnamed sources was incorrect, contradicted by the Appellant's material, or irrelevant. (Record, Volume 2, Tab91, paragraphs 25 to 27). The Appellant did submit that the information obtained from the WSCC source that there were no construction projects at Diavik went directly to the main issue, that is, whether Mr. Bonnell was employed in the construction industry.

[18] Notwithstanding that the Appellant did not characterize the issue as one of procedural fairness in its submissions to the Adjudicator, I am satisfied that it was flagged for her as of sufficient importance that it should have been dealt with by her. Since she did not refer to the issue, rule on it or explain why she need not rule on it, the Appellant and this Court on review cannot know whether she simply overlooked the issue, or determined that there was nothing wrong with the ESO consulting the outside sources.

[19] On balance, I would not characterize the issue on this appeal as one of procedural fairness. It is really a failure to deal with the argument that certain evidence was improperly obtained, or contradicted by other evidence, or irrelevant and in my view that goes to the adequacy of the Adjudicator's reasons rather than a breach of procedural fairness on her part.

[20] The standard of review for adequacy of reasons is reasonableness. The Court's task is to review the reasons together with the outcome to determine whether the decision under review is reasonable. It does not appear to me that the Adjudicator used any of the information from the outside sources in coming to her decision, and so the failure to deal with the ESO's consideration of the information from outside sources does not in itself render her decision unreasonable.

[21] I do not mean to indicate by this that the issue about consultation of outside sources was not worthy of consideration. The ESO, as an administrative decision maker, owes a duty of procedural fairness to the parties to a claim which she is asked to decide. Although the content, or extent, of the duty of fairness will vary according to the circumstances, the ESO has a duty to ensure that her decisions are

made using a fair and open procedure:; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Carter v. Northwest Territories Power Corp.*, 2014 NWTSC 19.

[22] There are a number of factors to be considered when determining the content of the duty of procedural fairness. Among them are the nature of the decision being made, the process followed in making it, the nature of the statutory scheme, the importance of the decision to those affected by it and the legitimate expectations of the person challenging the decision. In this case, the decision was important to the parties in terms of its financial consequences and also to the Appellant, and possibly others doing the same type of work, in terms of a precedent for the consequences of laying off employees without notice. The decision to be made by the ESO hinged on whether Mr. Bonnell was found to be employed in the construction industry or not. The information obtained from the WSCC in particular was clearly relevant to that issue.

[23] In a contested proceeding, fairness requires that the decision maker act on the information presented by the parties, allowing them to challenge or support it as they see fit, and not receive other information outside that proceeding. As the Appellant pointed out, the *Employment Standards Act* does not contain a provision like s. 82 of the *Residential Tenancies Act*, R.S.N.W.T. 1988, c. R-5, which permits a rental officer to obtain information additional to the evidence at a hearing. Even so, s. 82 of the *Residential Tenancies Act* requires that the rental officer inform the parties and give them the opportunity to explain or refute the information.

[24] In this case, it is not completely clear how the Employment Standards Officer came to speak with the outside sources. Had she required further information in order to make her decision, she should have raised that with the parties before determining how to obtain the further information. She did not do that. Obtaining the information unilaterally was a breach of her duty of procedural fairness: *National Bank of Canada v. Lajoie*, 2007 FC 1130; *Baptiste v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1382.

[25] Having obtained the information without notice to the parties, had the ESO wanted to use that information, she had a duty to provide it to the parties and give the Appellant an opportunity to refute it: *Baptiste v. Canada*.

[26] As part of its argument on the issue of procedural fairness, the Appellant also complained of the ESO referring in her decision to previous cases which had not been submitted by the parties and for which the ESO did not provide names or

citations. This issue was also raised before the Adjudicator, however she did not refer to it in her decision. Since the Adjudicator made her own decision on the merits of the case and did name and cite various cases in doing so, I am satisfied that I need not address this issue further except to say that when an administrative decision maker relies on previous cases it is always preferable to provide them to the parties for their comments on whether or how those cases are applicable. If for some reason that is not done, the decision should identify the cases so that the parties can consult them in assessing whether there are grounds for appeal.

[27] The Appellant also submitted that certain information and documents in the Record give rise to an apprehension that after releasing her decision, the ESO located, and included as part of her file, information that would substantiate the conclusions in her decision. Since the Record was filed pursuant to Rule 601 of the *Northwest Territories Rules of Court* as a requirement of the appeal to this Court and was not before the Adjudicator, this does not involve a point of law raised before the Adjudicator and is not properly the subject of a s. 81.1 appeal. The appropriate way to raise this issue might be by way of a challenge to the Record, although I leave that for consideration another day. However, since it was raised, I will simply observe that any factual material that an administrative decision maker might gather after rendering their decision is irrelevant. A court on appeal can consider only information the decision maker took into account in making the decision, not material that the decision maker discovered later or that the decision maker thinks will support the decision they have already made.

[28] For the reasons stated, I would not give effect to this ground of appeal.

3. Was the Adjudicator's interpretation and application of the statutory provision exempting employees in the construction industry from termination pay unreasonable?

[29] The Adjudicator decided that Mr. Bonnell was not employed in the construction industry and was therefore entitled to termination pay. She determined that the short term nature of construction work is a factor in determining whether someone can be said to be employed in the construction industry.

[30] The relevant statutory provisions are as follows:

Employment Standards Act:

In this Act, (...)

“work of construction” means a building, mine, (...)

37. (1) No employer shall terminate the employment of an employee who has been employed by that employer for a period of 90 days or more, unless the employer

(a) gives the employee a written notice of termination indicating the date the notice is given and the date on which the employment is terminated; or

(b) pays the employee termination pay.

(...)

45. No employer shall employ a youth in any of the following activities unless the employer first obtains the approval in writing of the Employment Standards Officer:

(...)

(b) constructing, reconstructing, repairing, altering or demolishing any work of construction, including the preparation for or the laying of the foundations of any work of construction.

Employment Standards Regulations:

4.1 Subsection 37(1) of the Act does not apply to an employee who is employed

(a) in the construction industry;

(b) for less than 180 days in a year, seasonally or intermittently, in an activity, business, work, trade or profession;

(c) in an activity, business, work, trade or profession, for a definite term or task for a period not exceeding 365 days where at the end of the term the employment is terminated; or

(d) in an activity, business, work, trade or profession for less than 25 hours.

(“Regulation 4.1”)

[31] The *Employment Standards Act* does not contain a definition of “construction industry”. Under the now repealed *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, which was replaced by the *Employment Standards Act*, the *Employment of Young Persons Regulations*, R.R.N.W.T. 1990, c. L-3, did include a definition of “construction industry” as follows:

“construction industry” means an industry in which persons are employed for the purpose of clearing brush and trees or constructing, re-constructing, repairing, altering or demolishing any building, harbour, dock, pier, road, tunnel, bridge, viaduct, sewer, drain, well, telegraphic or telephone installation, electrical undertaking, gasworks, pipeline, waterway or other work of construction

including the preparation for or the laying of foundations of any such work or structure

[32] That regulation was also repealed.

[33] Regarding the standard of review to be applied to the Adjudicator's decision, the Appellant takes the position that it is reasonableness. I agree. The Supreme Court of Canada has directed that the first step is to determine whether the jurisprudence has established a standard of review: *Dunsmuir v. New Brunswick*, 2008 SCC 9. In this case, the jurisprudence has established that the standard of review for the decision of an arbitrator under the *Employment Standards Act* is reasonableness: *Medic North v. Harnish*, 2011 NWTSC 46; *Chaykowski v. 506465 NWT Ltd.*, 2016 NWTSC 19.

[34] Reviewing a decision for reasonableness requires that the reviewing court show deference in that the matter before the administrative decision maker may give rise to a number of possible, reasonable conclusions. The reviewing court will look at both the reasons and the outcome to determine whether "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*; *Carter v. Northwest Territories Power Corp.*

[35] The Appellant submits that the Adjudicator erred in deciding that the short term nature of construction work is a factor in determining whether a worker is employed in the construction industry. The Appellant submits that her decision in that regard is contrary to the legislation in the Northwest Territories and also to previous cases which have dealt with the same issue. These errors, the Appellant says, led the Adjudicator to make a decision that is not reasonable.

[36] In her decision, the Adjudicator reviewed the Act, which she stated lacks clarity. She found that construction workers had been included in the exemptions in Regulation 4.1 because like the other workers to which it applies, their work is short term. She agreed with the ESO's view that the variables of project scope and availability of skilled workers made it difficult to specify a time as was done with subsections (b), (c) and (d) of the Regulation. She noted that other jurisdictions in Canada cite the short term nature of construction work as a reason for including the construction industry in their exemptions in similar legislation.

[37] After observing that, "The construction industry is characterized by short-term projects", the Adjudicator referred to the Ontario Court of Appeal's decision in *Scapillati v. A. Potvin Construction Limited*, 1999 CanLII 1473, where the Court

quoted the Ontario Minister of Labour who introduced the Ontario legislation as saying:

On-site construction workers are excluded from severance pay coverage because of the special nature of the industry, where employment is typically irregular and intermittent; that principle is recognized by all jurisdictions in Canada through exclusion from the termination provisions.

[38] The Adjudicator referred to another adjudicator's decision as recognizing the length of employment as a factor in determining whether an employee is a construction employee. In that decision, *851791 NWT Ltd. v. Pelletier*, 2013 CanLII 89790 (NWT LSB), the adjudicator was dealing with an employee with 13 years service, who had historically worked on a number of projects for his employer, some of which involved maintenance work. The adjudicator in that case found that the employee worked during various seasons. His decision was that the employee could not be classified as a constructional or seasonal employee.

[39] The *Pelletier* decision is not very detailed but as I read it, the adjudicator in that case found that the employee was not employed in the construction industry because he also did maintenance work. The adjudicator also rejected the employer's argument that the work was seasonal. In my view, the decision is not authority for the proposition that the short term nature of construction work was intended to be a factor in determining whether an employee is employed in the construction industry under the legislation in the Northwest Territories.

[40] The Adjudicator in this case disagreed with the decision by an adjudicator in *JSL Mechanical Installations Ltd. v. Martiniuk*, 2011 CanLII 62153 (NWT LSB), where he rejected the argument that the termination pay exception is restricted to short term construction work. In *Martiniuk*, the adjudicator referred to the definition of "construction industry" in the former *Employment of Young Persons Regulations* and the lack of any time element in the current Regulation and concluded:

The words "construction industry" in the Act would seem to contemplate something broader than work on a single project or on new construction and had the legislators wished to restrict the notice exception to a type of project or period of time they would have made the legislation more explicit.

[41] The adjudicator came who decided *Martiniuk* came to the same conclusion in *JSL Mechanical Installations Ltd. v. Alsgard*, 2011 CanLII 62152 (NWT LSB).

[42] The Appellant points out that the decision in *Martiniuk* is consistent with remarks made by the Minister who introduced the *Employment Standards Act* in the Legislative Assembly of the Northwest Territories in August 2007. In those remarks, the Minister referred to the regulations under the Act as exempting “classes of employers and employees” from the general provisions of the Act. He also said that the intention was to ensure that definitions were clarified and not substantially changed from what was then understood by the definitions (Hansard, August 16, 2007). Although the definition of “construction industry” contained in the repealed *Employment of Young Persons Regulations* under the *Labour Standards Act* was not included in the *Employment Standards Act* or its regulations, there is consistency. There was no time restriction in the definition of construction industry in the repealed legislation, the Minister’s remarks suggest that there would not be substantial change and there is no time restriction in s. 4.1(a) of the current regulation. The decisions in *Martiniuk* and *Alsgard* recognize that.

[43] In *Millennium Construction Ltd. v. Nel*, 2012 CanLII 102409 (NWT LSB), the Adjudicator who heard this case quoted the decision in *Martiniuk* with approval. She adopted the *Martiniuk* definition of construction industry and in her own decision relied on the definition that had been contained in the *Employment of Young Persons Regulations*. In the case now before me, however, she acknowledged only that that definition may throw some light on the issue but distinguished it because it is no longer in the legislation and had been contained in regulations focused on the protection of young people, not protection of all workers.

[44] The length of Mr. Bonnell’s employment with the Appellant was substantially longer than was the case in *Nel*, where the employee worked for 10 months. The Adjudicator appears to have found the lengthier employment hard to reconcile with the reasoning for the exemption from notice or termination pay as set out in *Scapillati*, referred to above.

[45] Notwithstanding what was said in *Scapillati*, in two Ontario cases claims for termination pay by employees of this Appellant, Cementation Canada Inc., working in circumstances similar to Mr. Bonnell were rejected because the employees were found to be employed in the construction industry. In *Hollos v. Cementation Canada Inc.*, [2007] O.E.S.A.D. No. 388, the Ontario Labour Relations Board found that in building a mine shaft, the Appellant was engaged as a business in the construction industry. The fact that the Appellant’s employee worked underground in that case did not mean that the employee was employed in the mining industry, as he had argued. The Board stated that the correct focus of

the inquiry is on the nature of the work the employee was engaged in and whether his activities fell within the definition of “construction industry” in the Ontario statute. The Appellant’s work was construction of a structure or tunnel, which fell within the statute’s definition of “construction industry” and the employee was engaged in that work. Therefore, the Board held, the exemption from termination pay applied.

[46] In *Hollos*, at paragraph 14 of its decision, the Board also commented on the purpose of the exclusion of the construction industry from the termination pay provision:

Moreover, the work of [Cementation Canada Inc.] is transitory and project oriented. Employment lasts as long as the project’s estimated duration, and sometimes not even that long. The duration of the work depends upon circumstances beyond [Cementation’s] control. This is true generally of the construction industry, and is essentially the reason the notice of termination exemption exists.

[47] Similarly, in *Harvey v. Cementation Canada*, April 4, 2014, Employment Standards Officer, Ministry of Labour (Ontario), it was found that the Appellant was contracted for construction of a mine, not production mining. The Appellant’s employee, who was laid off after more than two and a half years, was found to be a construction employee and not entitled to termination pay.

[48] In this case, in paragraph 29 of her decision, the Adjudicator stated that the construction industry is characterized by short-term projects and that construction workers are aware of that when they are employed. As I have noted above, she quoted from the *Scapillati* case, where Ontario’s Minister of Labour remarked that the typically irregular and intermittent nature of construction employment was the reason construction workers were excluded from termination pay. However, the Adjudicator inferred from that that the short term nature of construction work should be a factor in determining whether an employee can be said to be working in the construction industry.

[49] In my view, the Adjudicator erred in making that inference. It is contrary to previous cases in this jurisdiction and to the legislation itself.

[50] Absent a statutory time restriction, it is not the length of the employment or the construction project, but the lack of control that the construction industry employer has over the length of the employment or project, that justifies the exclusion, as stated by the Board in the *Hollos* case. If the legislature should

choose to amend the statute by restricting the availability of the exemption to a specified length of time, that would be up to it. However, as the statute now stands, the length of time over which the construction work takes place or the employee is employed in it is not a consideration. The Adjudicator erred in finding that it is.

[51] The Adjudicator's decision that the length of employment or the project the employee works on is relevant to whether the employee can be said to be employed in the construction industry could lead to great uncertainty. One would have to determine what is short versus long term and that might depend on the nature of the work that is being done.

[52] The Adjudicator also went on to consider whether the type of work Mr. Bonnell did could be considered construction work. Early on in her decision she stated that he worked as a scoop operator. She found that the Appellant was his employer. She described Mr. Bonnell's work as follows (at paragraph 32):

(...) For most of his employment, Mr. Bonnell was involved in mucking out lateral drifts that passed through the kimberlite orebody. It stands to reason that if the drifts Mr. Bonnell was mucking passed into kimberlite, much of the material that he was removing was kimberlite which could contain diamonds and this material would have been taken to the processing plant. Mr. Bonnell was, therefore, engaged in harvesting diamonds, at least for a good part of the time, and this is the work of a miner. The fact that Mr. Bonnell's purpose was to muck out a drift does not negate the fact that he was harvesting diamonds. Nor does the fact that he was not personally involved in processing the kimberlite or that he worked for a construction supervisor or that he removed kimberlite by a different process than a production miner would.

[53] After referring to some areas of the Appellant's evidence that she found problematic, the Adjudicator went on to find that Mr. Bonnell "mucked out lateral drifts within the kimberlite orebody, removing kimberlite that had the potential to contain diamonds" (paragraph 36).

[54] Although not explicitly stated in her decision, the material that was before the Adjudicator indicates that lateral drifts are horizontal tunnels driven along the mineral vein, and thus part of the infrastructure of the mine. "Mucking" refers to the process of removing the muck (ore or waste rock that has been broken up by blasting) from the face (end of the drift tunnel). (Record, Volume 1, Tab 59).

[55] Material submitted to the Adjudicator by the Appellant referred to the distinction between development miners (whose job is to construct and develop the

mine so that mining of the ore can take place) and production miners (whose job is to mine the ore to retrieve what is or will become the desired product). While these appear to be terms of art in the industry, as suggested by counsel for the Appellant, they simply reflect the fact that there are two groups of workers with different goals. It is reasonable to assume that some, if not all, of the workers employed as development miners would have had previous experience and skills as production miners, as did Mr. Bonnell, if only because of the work being located underground. That, however, does not mean that they are doing the same work. From the point of view of performance, a factor relevant to the employer of the production miners would likely be the amount of ore they mine. That factor would not be relevant to the employer of the development miners, who would be concerned with the pace and quality of construction.

[56] In my view, the Adjudicator overlooked this distinction. She focused instead on similarities in aspects of the physical day to day work rather than the ultimate goal of each employer.

[57] The Adjudicator found that the line between the work done by Mr. Bonnell as a development miner mucking out lateral drifts in the orebody and that of a production miner harvesting ore is not as clear as submitted by the Appellant. She stated, at paragraph 35:

(...) It might be more accurate to view “development miners” and “production miners” as working, not in two different industries (construction and mining), but working in tandem in different but equally important roles in the mining industry, both with the overarching objective of removing ore from the mine.

[58] The Adjudicator went on to express the opinion that the only justification for treating the two different groups of employees differently in relation to termination pay would be if there were a time factor involved, that is if one group of employees were engaged in a short term project which had an obvious end. She found that the Appellant had not proven that to be the case.

[59] That part of the Adjudicator’s analysis does not take into account the reality that the two groups of employees working at the mine had different employers. The group to which Mr. Bonnell belonged was employed by the Appellant, which did not have control over the length of time its work constructing the mine would last. The other group, the production miners, were employed by the mine owner which, subject to there being product to mine, had control over how long both construction and mining would continue.

[60] In the evidence before her, the Adjudicator had a letter from Diavik (Record, Tab 91, Exhibit “G”) explaining that all the production mining in the Diavik underground is conducted by Diavik’s workforce. That letter also states, “All pre-production development work and a portion of the supporting construction activities are carried out by KCMD workforce”.

[61] The reference to KCMD has to be explained. The Appellant had submitted to the Adjudicator that Mr. Bonnell’s employer was actually Kitikmeot Cementation Mining and Development, “KCMD”, a joint venture between the Appellant and another company. The Adjudicator found that while certain documents showed that KCMD was a contractor at Diavik, all of the documents referencing Mr. Bonnell’s employment indicated that the Appellant was his employer and so she concluded that he was employed by the Appellant. Nothing turns on this as there was no finding or evidence that the Appellant was doing any work at Diavik other than through the joint venture.

[62] The letter from Diavik also stated that pre-production development of the mine consists of activities that occur ahead of production to prepare future areas for production mining. The letter listed a number of such work activities, including “developing production drill drifts within the orebody”. Some other activities in the list are: developing the mine’s ramp access system deeper; developing the levels to access the orebodies; building ventilation bulkheads, doors and regulators. It is clear from the letter that the activities it refers to are aimed at creating or contributing to the infrastructure that is required so that production mining can take place.

[63] Although the Act does not contain a definition of construction industry, it is clear from the definition of “work of construction”, notwithstanding that it is used only in s. 45, that the statute contemplates that a mine can be constructed, just as a building can. The employees of an employer engaged to construct or develop a mine or parts of a mine prior to mining taking place are, logically, working in the construction industry. Their role is not to mine the ore, but to construct infrastructure so that others can mine the ore. Once one area of the mine is constructed, the employees engaged in that construction move on to another area. This is reflected in the Handover Checklists (Record, Tab 91, Exhibit “F”) that indicate on their face that they are to be filled out once development has been completed in an area and it is ready for Diavik’s production or engineering

activities. Completion of the form is stated to indicate acceptance of conditions at the date of handover.

[64] As I have said, the Adjudicator fell into error by imposing a time requirement that the Act does not contain. Although she accepted that the Appellant was engaged for mine development work (that is, construction), she focused on a possible consequence of the work of Mr. Bonnell, (potential harvesting of diamonds while removing material from drifts being constructed) and compared it to the work being done by the employees working for Diavik, whose job was to mine the ore. She found that only if the Appellant's employee was working on a short term project could different treatment in regard to notice or termination pay be justified.

[65] Section 4.1(a) of the Regulation simply requires that an employee be employed in the construction industry for the exemption to apply. The Appellant was engaged to construct and develop the mine and Mr. Bonnell worked for the Appellant, constructing and developing parts of the mine. That the work he did to achieve that goal was similar to, or performed in close proximity to, the work of others, is not relevant in determining whether he was employed in the construction industry and does not contradict the fact that his work was for purposes of construction of the mine, which is the job his employer was contracted to do. I also wish to be clear that this applies to Mr. Bonnell's employment with this Appellant. In different employment with a different employer, Mr. Bonnell may not fall within the Regulation 4.1(a) exemption.

[66] I bear in mind that the Adjudicator's decision is to be given deference, however her erroneous finding that the short term nature of construction work is intended to be a factor in determining whether an individual is employed in the construction industry under the Act diverted her from the fact that Mr. Bonnell was working for an employer who was engaged to construct the mine and he was thus employed in the construction industry.

[67] Based on the plain language of the statutory exemption and the Adjudicator's findings as to the facts, her decision that Mr. Bonnell was not employed in the construction industry is not reasonable. It is not defensible in respect of the law or the facts.

[68] The next question is whether I should remit this matter to the Adjudicator or another adjudicator to decide without restricting the applicability of Regulation

4.1(a) to short term construction work. Counsel for the Appellant submitted that although that is a possible remedy, a proper interpretation and application of the Regulation to the facts in this case leads to only one reasonable conclusion and therefore this Court should simply render a decision in accordance with that conclusion. I have considered that the Court's approach in matters of judicial review should be characterized by restraint, however I agree with the Appellant that the only reasonable conclusion on the law and the evidence is that in his employment with the Appellant, Mr. Bonnell was employed in the construction industry.

[69] Accordingly, the appeal is allowed and the order for termination pay is quashed.

V.A. Schuler
J.S.C.

Dated in Yellowknife, NT this
27th day of July, 2018

Counsel for the Appellant: Glen Rutland

Counsel for the Employment Standards Appeal Office: Trisha Paradis

No one appearing for the Respondent

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

In the matter of the *Employment Standards Act*, 2007

And in the matter of the Decision of
The Employment Standards Appeal Office File No. 20-
31452/16, Order 2479

BETWEEN:

Cementation Canada Inc.

Appellant

-and-

Lester Bonnell

Respondent

**REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER**
