EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

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

- by -

"77826 BRITISH COLUMBIA LTD."
(Formerly National Metal Corporation Ltd.)

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Barry Goff
FILE NO.:	96/205
DATE OF FIRST HEARING:	June 25, 1996
DATE OF SECOND HEARING:	October 2, 1996
DATE OF DECISION:	January 6, 1997

DECISION

APPEARANCES:

For the Appellant: Bernard Lodzkar

For the Respondent: James Murray Walsh

Witness for the Respondent: Les Buss

For the Director of Employment Standards: Morry Levin

OVERVIEW:

This is an appeal brought by 77826 British Columbia Ltd. (Formerly National Metal Corporation Ltd., referred to as "National"), pursuant to Section 112 of the Employment Standards Act (the "Act") from Determination No. CDET 001441 issued by the director of Employment Standards (the "Director") on March 6, 1996. The determination required National to pay compensation for length of service to James Murray Walsh ("Walsh") in the amount of $1077.09.

ISSUE TO BE DECIDED:

The issue is whether Walsh is entitled to length of service compensation.

FACTS:

In May, 1993, Walsh commenced work as a burner for National which operates a scrap yard. He injured his right eye at work on September 14, 1994, received treatment, and returned with a doctor's letter confirming his fitness to return to work. Walsh stated that the employer had requested the doctor's confirmation. Walsh returned to work with a patch over his right eye and performed work as a shear operator. His eye injury prevented him from returning to the burner's job. Walsh took time off work from March 2 to approximately April 12 to have an operation on his eye through the Workers' Compensation Board (the "WCB"). National contacted the WCB regarding Walsh's status and received a reply on April 26, 1995 which provides in part:

> "There is no indication of any restrictions and the claimant has been cleared to return to his regular employment"

Walsh returned to work and was advised by National's operations manager, Ken Thompson, that a second medical opinion was required confirming his fitness to return to

work. Walsh stated that Thompson said he would make all arrangements and call Walsh when an appointment was confirmed. Walsh's evidence was that Thompson never called and he did not call Thompson because he expected Thompson to call him.

Thompson was no longer employed by National at the time of the hearing and was not called to give evidence.

National did not call Walsh back to work. Walsh secured UIC benefits and subsequently found temporary alternate employment on May 29, 1995 which became full-time employment.

The ILWU received certification from the Labour Relations Board ("LRB") on February 6, 1995 to represent the employees of National. National and the ILWU appeared before the LRB on nineteen occasions. The relationship was altogether hostile, a collective agreement was not achieved and the ILWU was decertified.

Bernie Lodzkar testified on behalf of National. He understood that Walsh had been instructed by Thompson to provide a second opinion himself before returning to work. National had provided a Record of Employment (ROE) to Walsh which had been requested by the International Longshoremens' Union ("ILWU") on May 10, 1995. The ILWC's request for the ROE also stated that Walsh did not wish to terminate his employment with National.

In the course of its representation of Walsh, the ILWU also made application on May 15, 1995 to the BC Council of Human Rights ("BCCHR") to secure re-employment for Walsh on the grounds that National had violated the Human Rights Act by failing to recall Walsh because of a physical disability.

Les Buss, business agent for the ILWU, testified that the request for an ROE was only made to enable Walsh to apply for UIC benefits. He also stated that he would have filed an unfair labour practice application with the LRB but felt he did not have grounds to support such an application. The application to the BCCHR was the only recourse available to him.

ARGUMENT:

Morry Levin, the Director's delegate, argued that National's failure to return Walsh to work after the WCB had cleared him and its continued failure to return him with reasonable dispatch following its request for a second opinion of his medical fitness constitutes constructive dismissal as contemplated by the provisions of Section 66 which state:

> If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

Levin submits it is a principle of the common law that where the terms and conditions of employment have been fundamentally altered by an employer without the express

agreement of the employee, the change constitutes a constructive dismissal. In this case the change is clear and drastic. Walsh was not returned to work.

Levin concedes that the constructive dismissal concept does depend in some cases on the reason provided by the employer. In this case, the employer wanted further confirmation in April of Walsh's fitness to return to work. It did not seek that confirmation at all, let alone without delay. Levin contends that a two to three week interval might be considered a reasonable delay in returning an employee to work, depending on the nature of the test to take place and the degree of specialization required. However, in these circumstances where three months have passed since Walsh's clearance to return to work by the WCB, this is an inordinate amount of time and supports the proposition that Walsh has been constructively dismissed.

Levin relies on Martindale Sash and Door Ltd. & United Brotherhood of Carpenters and Joiners of America, reported at [1971] 12 L.A.C. 324, to support his contention that the failure to recall amounted to a constructive dismissal. Levin submits that the Martindale case is similar to Walsh's but Walsh's case is stronger in that there was no cause by the employer to suspect that Walsh was not capable of performing work. Levin notes that Lodzkar initially stated in evidence that National called the doctor but could not say who called and then Lodzkar concluded that the doctor must have been called because it was company policy and finally remembered that he called the doctor but could not produce any correspondence to confirm this activity. In addition, Levin says that National had no reasonable grounds as in the Martindale case to request further confirmation of his state of health. Walsh had performed a job as a shear operator with a patch over his eye and then returned to work without a patch which should have permitted him to work as burner or a shear operator.

Lodzkar argued that National had never dismissed Walsh. The fact that National continued to pay his health and welfare premiums until July, 1995, confirms that National considered Walsh an employee. The Union also considered him an employee throughout which is demonstrated by its letters on his behalf to National and the BCCHR.

The evidence shows that National approached the WCB and that Walsh made no effort to contact the WCB to determine his own status.

Walsh was considered an employee by the ESB and the Union at least until May 15, less than ten days prior to his employment elsewhere.

Lodzkar argues that the Labour Relations Code supersedes the obligations under the Act because the Code requires an employer to deal with the Union rather than the employees. In this case Walsh had secured representation from the Union throughout and should not now be permitted to seek redress through another agency because he is dissatisfied with the Union's efforts.

Finally, Lodzkar argues that Walsh found other employment and therefore resigned from his position with National. It was only after National found out by accident that Walsh had taken another job that it stopped paying for his health and welfare package.

ANALYSIS:

Section 63(1) of the Act places a statutory obligation on an employer to compensate an employee for length of service after three months of consecutive employment.

The employer may provide written notice, notice and money, or money in lieu of notice to discharge its obligation under Section 63(1).

Compensation under Section 63(1) is not required when an employee voluntarily resigns, retires or is discharged for cause.

Two other sections of the Act are particularly relevant in this case. Section 66 (supra) and Section 69(1) apply. Section 69 (1) provides:

> If the provisions of a collective agreement in relation to an individual termination of employment, including the layoff and right of recall provisions, when considered together, meet or exceed an employee's entitlement under section 63, those provisions replace section 63 for the employees covered by the collective agreement.

National and the ILWU did not conclude a collective agreement, therefore the provisions of section 63(1) still apply to National. That is the complete answer to the employer's arguments that the provisions of the Labour Relations Code supersede the obligations of the Act. In addition, this answers the employer's contention that the ILWU's action on behalf of Walsh limits in any way his rights under the Act.

The Director's Delegate deemed Walsh terminated. It was not the employer's overt action but its lack of action that led him to this conclusion. National received an affirmative reply from the WCB regarding Walsh's state of health. In spite of the WCB's assurance, National asserts it required Walsh to obtain a second medical opinion before it would allow Walsh to return to work. The uncontradicted evidence of Walsh was that the employer's representative was to have made the arrangements for that second opinion to be obtained and did not notify Walsh of any such arrangements. That evidence is confirmed by Walsh's initial complaint to the ESB in August, 1995. National had several opportunities to refute that evidence by calling its former manager of operations or providing the director's delegate an opportunity to interview Thompson at any time after the complaint was filed.

There is also the uncontradicted evidence of Walsh that he was not called back at any time following his availability for work on April 26, 1995.

National, by its own admission, considered Walsh to be an employee until it became aware that he was employed elsewhere. It concluded that Walsh had resigned without contacting Walsh to ascertain the true state of affairs.

In my view, National could not avoid its obligations under section 63(1) by concluding Walsh's alternate employment constituted a resignation when National in the first instance

had ignored Walsh's right to be recalled to work or to be terminated with notice. Under the circumstances it is clear that Walsh's terms and conditions of employment were significantly altered by National which constitutes a termination under the Act as found by the Director's Delegate.

ORDER:

Pursuant to Section 115 of the Act, I order that Determination No. CDET No. 001441 be confirmed.

Barry Goff
Adjudicator
Employment Standards Tribunal

BJG:sc