Employment Standards TRIBUNAL

An appeal

- by -

Peter A. Millick
("Millick")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2004A/192

DATE OF HEARING: March 29, 2005

DATE OF DECISION: April 7, 2005

DECISION

APPEARANCES

Martha Sandor	on behalf of Peter A. Millick
Martin Williams	on behalf of J.A.W. Fabricators Co. Ltd.

SUBMISSIONS

Martha Sandor	on behalf of Peter A. Millick
Gillian MacGregor	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Peter A. Millick ("Millick") of a Determination that was issued on September 27, 2004 by a delegate of the Director of Employment Standards (the "Director").

Millick had filed a complaint with the Director alleging his former employer, J.A.W. Fabricators Co. Ltd. ("J.A.W. Fabricators"), had contravened Section 63 of the *Act*.

Following an oral hearing, the Director issued the Determination, which found J.A.W. Fabricators had established just cause to terminate Millick and consequently there was no contravention of the *Act* by J.A.W. Fabricators. and no wages owing to Millick.

Millick says the Director committed several errors of law in making the Determination.

The Tribunal reviewed the appeal, the Determination and the record and concluded an oral hearing was necessary in order to decide this appeal. There are three reasons for the decision of the Tribunal to conduct an oral hearing on the appeal. First, the appeal raised a genuine issue that the Director had failed to consider the application of Section 66 of the *Act* in the circumstances of the case. Second, some of the comments found in the Determination were not supported by the record and appeared to be inconsistent with the evidence provided by the parties to the Director and the findings recorded by the Director in the Determination. Third, the Director failed to make findings of fact in the Determination that were relevant to the question of just cause.

ISSUE

The issue in this appeal is whether Millick has shown the Director erred in law in concluding there was just cause to terminate his employment.

THE FACTS

The Determination sets out the following facts:

> Mr. Millick worked for J.A.W. Fabricators from November 1, 1995 until November 13, 2003. He always worked day shift, from 7:40 am to 4:00 pm.
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> 7:40 am to 4:00 pm are the regular hours of operation of J.A.W. Fabricators. On occasion, J.A.W. Fabricators accepts work that requires an afternoon shift, from 4:00 pm to 12:30 am. This work is project based and short term, usually less than eight weeks.
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> In October 2003, J.A.W. Fabricators accepted a job that would require an afternoon shift. Martin Williams testified J.A.W. Fabricators estimated the project would take two weeks to complete. Mr. Millick was assigned to the project. He started to work afternoon shifts on October 15, 2003.
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> The project was not completed within the two week estimate. On or about October 30, 2003, Mr. Millick asked to return to day shift. Mr. Williams told Mr. Millick he would be returned to day shift as soon as the project was completed. Mr. Millick said he would work afternoon shift for two more weeks, but would not do a fifth week.
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> By mid November, 2003, the project was still not complete. On November 13, 2003, Mr. Millick told Mr. Williams he would not work afternoon shift any longer and he would not be reporting to work the following week[1]. J.A.W. Fabricators gave Mr. Millick a letter saying that his services were no longer required as he refused to work his scheduled shift.

For reference, the body of the letter stated:

> This letter is to confirm your notice to quit from our company as of November 15, 2003 12:30 am because you do not want to work next week's shift. We therefore will be terminating your employment today, due to your refusal to work your scheduled shift.

The letter was dated and given to Millick on November 13, 2003. While the letter refers to Millick having "quit", the Director found no evidence that Millick had done so.

Although it is not reflected in the Determination, Millick provided a description of events leading to his termination in his complaint that included the following:

> I approached the manager on Nov. 12/03 to ensure someone else would be working the afternoon shift the following week because I was not available for a 5th week of afternoons. Nov. 13/03, I received a telephone voice-message to come in and pick up my tools and that I was not required to work my next shift. I went into the office on the same day and was handed a letter of termination.

In the analysis of the just cause issue, the Determination states, in part:

> Very little evidence was provided by either the employer or Mr. Millick. There is no dispute about the events, however. Mr. Millick was told to work afternoon shifts for two weeks. Mr. Williams maintains Mr. Millick volunteered to work the shift, and Mr. Millick claims he was told he had to work the shift. Nothing turns on the manner in which Mr. Millick was assigned to the shift however, so there is no need to consider the question. The employer underestimated the time

[1] The discussion described in this sentence actually took place on November 12, 2003.

> needed for the project. How long the project would have finally taken is not known since the project was abandoned after Mr. Millick was terminated[2]. It is clear from the evidence of both parties, that afternoon shifts are rare, short lived and project based. Mr. Williams and Mr. Millick knew the project would end in a matter of days or weeks. Neither party expressed any concern or stated there was any likelihood of the afternoon shift becoming a permanent requirement.
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> Prior to the start of the fifth week of the project, Mr. Millick announced he would not report to work the following week if he was still on the afternoon shift. He did not give the employer any reasonable explanation for the refusal.
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> Wilful disobedience to a lawful and reasonable order may be cause for dismissal, since it repudiates the essential basis of the employer/employee relationship. The employer has the right to direct and control and the employee must comply with the employer's instructions. Wilful disobedience is just cause for termination without notice or compensation if it is combined with such factors as the order being lawful and reasonable, within the scope of the employee's duties, involving a matter of some importance and no reasonable explanation given for the disobedience.

The Director reviewed each of the listed factors and decided J.A.W. Fabricators had just cause to terminate Millick for wilful disobedience.

As required under Section 112 of the *Act*, the Director has provided the Tribunal with a copy of the record that was before the Director at the time of the Determination.

The record includes the following:

- a copy of the November 13, 2003 letter;
- a copy of the complaint and information form;
- payroll records for periods Oct 20 to Nov 1, 2003 and Nov 3 to Nov 12, 2003;
- a letter from Millick to Employment Standards dated December 5/03;
- the information notice included in the Employment Standards Branch Self-Help Kit at page 5;
- a second copy of the November 13, 2003 letter; and
- a copy of pages 10, 12 and 13 of the Employment Standards Branch Self-Help Kit.

The record provided does not include any witness statements, although it is clear the Director conducted an oral hearing.

Additional facts were provided at the hearing.

Millick started working the afternoon shift on Monday, October 20, 2003. He was asked by Mr. Williams to work that shift. While Millick may have felt the request from Mr. Williams was an order, he raised no objection or argument at the time and gave every indication to Mr. Williams he was voluntarily accepting the afternoon shift assignment. Near the end of the first two weeks, Millick called Mr. Williams and asked to rotated back to day shift. Millick said it was unfair to him and hard on his family. Mr. Williams explained to him why he would have to stay on nights. Millick agreed to work another two weeks on the afternoon shift but told Mr. Williams he wouldn't be available to work the afternoon shift after that.

[2] This statement of fact is wrong. At the hearing before the Tribunal, Mr. Williams indicated the project was not abandoned but was completed by J.A.W. Fabricators on or about November 20.

The second two week period was scheduled to run from Monday, November 3, 2003 to Friday, November 14, 2003. On November 12, a discussion between Millick and Mr. Williams took place. There was some dispute between Millick and Mr. Williams about what was said during the discussion. On balance, I find that Millick told Mr. Williams he was not available to do a fifth week on the afternoon shift and that he wanted to be placed back on day shift. Mr. Williams told Millick he had to stay on the afternoon shift as there was no spot for him on day shift. Millick replied, "Then I guess I won't be coming in".

Millick was never informed by Mr. Williams, or any other representative of J.A.W. Fabricators, that he would be fired if he refused of failed to work or continue to work the afternoon shift. At the hearing, in response to the question of whether he had told Millick on November 12 that he would be fired if he didn't show up for the afternoon shift the following week, Mr. Williams said, "I wasn't going to fire him."

Millick had asked for a day off on November 13 and that had been arranged. He was scheduled to work the afternoon shift on November 14 and had given no indication he would not work that shift.

ARGUMENT AND ANALYSIS

Millick has the burden, as the appellant, of persuading the Tribunal there is a reviewable error in the Determination. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

(a) the director erred in law:

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was made.

In this appeal, counsel for Millick sets out and argues five errors of law committed by the Director:

a) applying the incorrect law and/or failing to assess the termination according to principles of constructive dismissal within the meaning of Section 66 of the *Act*;

b) failing to apply the appropriate analysis regarding termination for wilful disobedience;

c) making findings of fact and drawing inferences not reasonably supported by the facts;

d) overlooking relevant facts;

e) relying on irrelevant facts.

Section 66 of the *Act* reads:

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

The term "conditions of employment" is defined in Section 1 of the *Act* as meaning "all matters and circumstances that in any way affect the employment relationship of employers and employees". The test for determining whether a substantial change has occurred is an objective one that should take into account the particular features of the employment relationship (see *Task Force Building Services Inc.*, BC EST #D047/98).

Millick testified that during his eight years of employment his hours of work were 7:30 am to 4:00 pm. He said those hours of work were important to him and he would not have taken employment with J.A.W. Fabricators if he had to work evening hours. He had occasionally been asked to work on a weekend when the operational requirements of J.A.W. Fabricators required it, but said he had never been asked to work an afternoon shift.

Mr. Williams could recall only two prior occasions where J.A.W. Fabricators had operated an afternoon shift. On both of those other occasions, like this occasion, the afternoon shift was temporary and project driven. He agreed Millick had never been asked to work the afternoon shift on either of those occasions. He said the afternoon shift was introduced in this case because J.A.W. Fabricators believed operating an afternoon shift was necessary to their ability to take on and complete the project. Millick was asked to work on the afternoon shift because it was felt he was qualified to do the work which was going to be done on afternoon shift.

Millick agreed to work the afternoon shift for the initial two week period and for the second two week period. He gave no indication to Mr. Williams when he accepted the assignment that he felt a condition of his employment was being unilaterally and substantially changed. He accepted the initial two week assignment without comment and the second two week assignment with only the comment that he felt it was "unfair".

On the facts, several considerations arise on the Section 66 issue. The first, and most obvious, is whether, objectively, a condition of employment was substantially altered. The second consideration is whether some effect should be given to the fact that Millick, at least in the first instance, accepted his assignment to the afternoon shift. Mr. Williams said that if Millick had said at the outset he did not want to work the afternoon shift, J.A.W. Fabricators could not have taken the project. The principle of fairness operates in Section 2 of the *Act*. The third consideration is that the Director has some element of discretion under Section 66 to consider the employment terminated. The point here is that since the Director has not considered the effect of Section 66, it is probable the Tribunal's remedial authority would be limited to referring the matter back to the Director. The fourth consideration is whether, even if I agree Section 66 applies, subsection 65(1)(f) of the *Act*, would preclude entitlement to length of service compensation since there was no perceivable alteration to any aspect of Millick's employment other the temporary change in his hours of work.

In the final analysis, however, I do not need to reach any final conclusion on these considerations specifically or on the application of Section 66 generally as I find the Director failed to apply the correct legal analysis on the issue of just cause for dismissal.

The Tribunal has consistently applied several principles to questions of just cause for dismissal. These principles were identified in *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST #D374/97:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer.

2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:

    1. A reasonable standard of performance was established and communicated to the employee;

    2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;

    3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

    4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The Tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

It is apparent from the Determination that the Director found that Millick's dismissal to be justified on the fourth principle, seemingly characterizing his announcement to Mr. Williams on November 12 that he would not work the afternoon shift for the fifth week as "wilful disobedience". The Tribunal has engaged in a comprehensive analysis of the law regarding "wilful disobedience", identifying the elements which must exist before "wilful disobedience" will constitute just cause for dismissal (see *James Stephens*, BC EST #D131/00). It is apparent that not all of the elements exist in this case.

It is trite that central to the concept of "wilful disobedience" is an act of disobedience. The Director seems to have presumed an act of disobedience that does not exist on the record.

While Millick's announcement on November 12 that he would not be available for a fifth week on the afternoon shift and the ensuing discussion was a direct challenge to the authority of Mr. Williams to assign him to work on that shift, I am troubled by the fact that at the time of his termination, Millick had not committed any act of wilful disobedience. He had made a statement that he would not be coming in for the afternoon shift the following week. In that respect he conducted himself in a way that was both insolent and provocative, but that conduct was not, on the evidence, of such a nature as to be incompatible with the continuation of employment. As Mr. Williams said in his evidence, Millick was not told on November 12 (or any other time) that he would be fired if he failed to show up for afternoon shift the next week as he wasn't going to fire him.

In order to justify the dismissal on the ground of wilful disobedience, the evidence must at least show there were acts carried out by Millick in defiance of clear and unequivocal instructions with the knowledge, actual or understood, that his employment would be terminated by defying those instructions. There is no such evidence in this case. Particularly, there is no evidence showing the Director's comment in the Determination that "it was made clear to Mr. Millick that his employment with J.A.W. Fabricators would cease if he refused to report for work as scheduled" has any basis in fact.

In the absence of those elements of wilful disobedience which justify summary dismissal, I find the Director erred in law in finding just cause for dismissal. The Determination is cancelled.

While there is no appeal by J.A.W. Fabricators on the Director's finding that Millick did not resign, or quit, his employment, I will note there is no basis in fact or law to question that finding. As a result, I find Millick is entitled to be paid compensation for length of service. The matter is referred back to the Director to calculate the amount of compensation.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated September 24, 2004 is cancelled and the matter of calculating Millick's compensation for length of service is referred back to the Director.

David B. Stevenson
Member
Employment Standards Tribunal