

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Robert J. Wayte

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton
FILE NO.: 97/941
DATE OF HEARING: April 21, 1998
DATE OF DECISION: May 21, 1998

DECISION

APPEARANCES

Robert J. Wayte on his own behalf

Linda C. Leiding on behalf of Nedco Electric (a division of Westburne)

OVERVIEW

This is an appeal by Robert J. Wayte, under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued by a delegate of the Director of Employment Standards on December 5, 1997. The delegate concluded that Mr. Wayte’s claim that he was “constructively dismissed” from his employment with Nedco Electric (a division of Westburne) was without merit.

Mr. Wayte gives several reasons for his appeal: the Director’s delegate omitted or described certain facts incorrectly; has drawn unreasonable conclusions from the facts; and, has misapplied the law.

A hearing was held on April 21, 1998 at the Tribunal’s offices in Vancouver at which time evidence was given under oath or affirmation.

ISSUE TO BE DECIDED

Did the Director’s delegate err in determining that Mr. Wayte was not entitled to compensation for length of service under Section 63(3)(c) of the *Act* because he resigned from his employment ?

FACTS

Mr. Wayte was employed by Nedco from October 21, 1994 to February 8, 1996. He injured his foot while at work on January 19, 1996 and, as a result, was unable to return to work until January 29, 1996. He worked from January 29, 1996 to February 1, 1996 (inclusive) although he had not yet recovered fully from the injury which he had sustained on January 19th. Upon his return to work, Wayte testified, he was not happy about several matters in the warehouse where he worked: wire and other items of inventory were not stored properly; the horn on the forklift truck had not been repaired; and the piece of equipment (reel stand) on which he had injured his foot had not been repaired. As a result, he spoke to Gary Sabiston (Divisional Manager) and told him that he was upset about those particular matters and workplace safety issues in general. According to Wayte’s testimony, Gary Sabiston undertook to speak to Gerald Krahn (Operations Manager) and

Dean Kilback (Warehouse Manager) about his concerns. He also testified that Kilback was very upset that he (Wayte) had raised his concerns directly with Sabiston.

Mr. Wayte had an appointment to see his physician on Monday, February 5, 1996, and undertook to inform his supervisor, Dean Kilback, about his ability to return to work following his medical examination. He left a voice mail message for Dean Kilback in the early morning of February 6, 1996 to advise him that his doctor's advise was that he should remain off work until February 12th. Kilback contacted Wayte by telephone later that morning to confirm his return-to-work date and to remind him of the importance of keeping his employer informed about his medical status.

Mr. Wayte returned to work on February 7, 1996 despite his doctor's advice and despite the fact that he continued to experience pain in his injured foot. Kilback spoke to Wayte in his office and expressed his dissatisfaction with Wayte's failure to communicate effectively with him. Kilback gave Wayte a written warning which Wayte acknowledged as "fair comment" and undertook to communicate with Kilback more effectively in the future. Kilback also gave Wayte, in writing, a list of 3 specific tasks which were to be completed on February 7,8, and 9, 1996 respectively. The first task on the list was not completed on February 7th and Wayte undertook to complete it on February 8th.

Wayte reported to work on February 8th and had an uneventful morning. Due to his injury, he required assistance to move some of the larger/heavier wire reels in the warehouse. That assistance could have been provided either by a co-worker (Johnny) or by Dean Kilback. In the early afternoon, Wayte required assistance and went to Kilback's office to seek his assistance but Kilback could not assist as he was engaged in a telephone conversation. Wayte proceeded with his tasks, with some assistance from his co-worker. Between 4:00 p.m. and 4:30 p.m., Wayte was attempting to move some wire with the forklift truck and damaged another piece of equipment with the forklift. After paging Kilback and receiving no response, Wayte went to Kilback's office to discuss the damage to the equipment. It was approximately 4:30 p.m., the end of Wayte's regular working day.

The Director's delegate made the following findings of fact in his Determination:

On February 8th, 1996, you and your supervisor had a confrontation which centered on your failure to complete these assigned tasks, as well as some of your safety concerns. This confrontation culminated in your leaving the supervisor's office, cleaning out your locker, and telling two of your co-workers you were quitting.. It is unclear if you told your supervisor that you were quitting at this time.

You did not report for work the following day, February 9th, 1996, and you left a voice mail on your supervisor's machine, confirming your resignation.

Both you and your ex-employer agree you resigned your position. However, there is a disagreement concerning the reason for your resignation. A summary of the employer's view is that you resigned your

position in a fit of pique prompted by supervisor criticism and a degree of frustration concerning your ability to effectively do your job while hampered by an injury. A summary of your view is that you resigned your position due to concerns for the work-place safety of your co-workers and yourself, coupled with frustrations arising from your work-place safety concerns not being addressed by management.

Finally, it is your contention that your quitting your position due to these unanswered safety concerns constitutes “constructive dismissal”.

In his written reasons for appeal, Wayte states that when he spoke with Kilback at the end of his work day on February 8th, he told Kilback that he “...had had enough”, and complained about on-going safety concerns as well as his inability to complete the three tasks within the assigned time-frame (February 9, 1996). At the hearing, Wayte testified that when he told Kilback “I’ve had enough” he intended to discuss the situation with Gerald Krahn to find an acceptable resolution . He also testified that he was thinking about taking more time off work as his foot was still quite painful. He testified, further, that he “believed Nedco would write me off and keep Dean Kilback.” Wayte also testified that he “...wanted Nedco to see its responsibilities to employees and to deal with (safety issues) effectively.” However, he also testified that he had concluded that Nedco was not a safe workplace and was not “an acceptable workplace” at that time. In his opinion, he had become the “Safety Monitor” at Nedco. Wayte also testified that his “...biggest concern was that Dean Kilback was not performing.” When he left the workplace on February 8th, Wayte testified, he said good-bye to two co-workers (Jeff Gunter, Phil Stack) but did not ask them to tell Dean Kilback that he was quitting Nedco. He testified that he said: “It was nice knowing you” to Gunter and Stack as he left the workplace.

There is no dispute that the conversation between Kilback and Wayte at approximately 4:30 p.m. on February 8th ended abruptly when Kilback told Wayte to “...shut up, go home and have a nice night.” Kilback acknowledges that a more experienced manager would have handled the situation differently, but he had become frustrated with Wayte’s criticism of the workplace and his failure to complete the tasks assigned to him on February 7th. He was also concerned that if the conversation continued it would become more heated. There is also no dispute that Wayte took his heavy rain coat and work boots from his locker prior to leaving his workplace on February 8th.

Wayte did not report for work on February 9, 1996. At approximately 9:30 a.m., Dean Kilback ‘phoned Wayte and left a message on his answering machine to ask him if he would be coming to work and to return the call. Wayte returned Kilback’s call and dictated the following voice mail message on Kilback’s telephone from a written statement:

I do not believe Nedco offers me a safe and harassment free environment. I find its demands on me excessive. My physical and mental health concerns have been all but ignored. I don’t believe Nedco is willing or able to offer me any assurances that my concerns will ever be addressed.

It would only be appropriate that these matters be pursued through Human Resources, for only they can mediate and resolve the outstanding issues.

My return to work would only be concurrent with the assurance that these matters be addressed.

In his Reasons for Appeal, Wayte describes this communication as a “conditional resignation” which he intended to mean: “...if you do not give me assurance that you will clear up the safety issues I will quit.” He also describes his communication as “...an ultimatum accompanied by a request for a meeting to discuss the situation.”

On February 12th, Wayte left a voice mail message for Gerald Krahn (Operations Manager) which Krahn returned at approximately 9:30 a.m. Krahn’s notes of his telephone conversation with Wayte were entered into evidence and are reproduced below:

- What did you call about?
- Quit Thursday (Says he informed Dean) (Confirmed)
- Dean said have a good sleep etc.
- Dean phoned Friday to find out if Bob was coming in
- Led Bob to believe Dean didn’t accept his resignation
- Then Bob left the “message”
- Wants to request meeting
- I told Bob that Personnel would look into the problem
- Friend 2 years ago said: It’s really bogus the way big companies handle complaints
- Bob says we can only pursue the conclusion (one way or the other) after we have a meeting.
- I pointedly and specifically asked him if he verbally told Dean he was quitting and he said “YES”
- He also said he took all his personal stuff at that time
- I asked him if he was aware he should quit in writing. “He said Yes”

Karen Koronko, Nedco’s Manager of Human Resources wrote to Mr. Wayte on February 13, 1996 to confirm that his resignation had been accepted. She also wrote: “...I have received word that you want a meeting with Human Resources, should this still be important to you, please contact me...” Wayte replied in writing on February 16, 1996 and enclosing several pages of notes:

“Further to your letter I assume it is a little too late for a meeting.

The attached notes may help you with your investigations.
Sincerely”

ANALYSIS

The starting point of my analysis is Section 63 of the *Act* which places a liability on employers to pay compensation for length of service to all employees after 3 consecutive months of employment. That liability is deemed to be discharged if the employee is given written notice, resigns, retires or is dismissed for just cause. I note that the full text of Section 63 was reproduced at page 2 of the Determination.

The Director's Delegate concluded after setting out several pages of reasons, that "...the employer's liability incurred as a result of your length of service has been discharged by your resignation." I agree with that conclusion and I offer the following additional reasons for reaching the same conclusions based on the evidence put before me at the hearing and my review of the documents submitted to the Tribunal.

Several earlier decisions of the Tribunal have adopted the following test for determining whether an employee has resigned from his or her employment:

The act of resigning, or "quitting", employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment.

[See, for example, *Wilson Place Management Ltd.* BC EST #D047/96) and *Burnaby Select Taxi Ltd.* (BC EST #D091/96)]

My review of the evidence leads me to conclude that Wayte did form an intention to resign his employment. Krahn's uncontested evidence is that when he asked Wayte "pointedly and specifically" if he had told Dean Kilback that he was quitting, Wayte confirmed that he had done so. Wayte's own testimony that he told Gunter and Stack, "it was nice knowing you", as he left the workplace on February 8th also indicates his intention not to continue working at Nedco. Similarly, Wayte's testimony that he had concluded that Nedco was not "an acceptable workplace" supports a finding that he had formed an intention to resign. This finding is supported further by his removing his personal belongings from his locker prior to leaving the workplace. Wayte's voice-mail message of February 9th (in which he offers his "conditional resignation" and "ultimatum") lends further support to my finding that Wayte resigned his employment.

It is also significant that there is no evidence to suggest that Wayte made a complaint concerning workplace safety to the Workers' Compensation Board, prior to February 8, 1996. I am also mindful of the fact that Wayte's intention or state of mind on this matter did not change and, therefore, I am satisfied there are no grounds for me to conclude that his actions result from a temporary emotional upset such as shock, fear, anger or anxiety. I also note that Wayte's response to Karen Koronko's letter of February 13th was not to deny that he had resigned, nor to request a meeting (as she had suggested).

For all of these reasons, I find that the Determination should be confirmed.

ORDER

I order, under Section 115 of the *Act*, that the Determination dated December 5, 1997 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal