Employment Standards TRIBUNAL

An appeal

- by -

Brian Hoare

- 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

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2003A/125

DATE OF DECISION: July 15, 2003

DECISION

OVERVIEW

Brian Hoare ("the Appellant" and "the employee") has appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 4, 2003. The Determination is that Hoare's former employer, Johnson Industries Ltd. ("Johnson" and "the employer"), issued pay stubs which are contrary to section 27 of the *Act* and Mr. Hoare is not entitled to compensation for length of service because he resigned and the employer in any event had just cause.

Mr. Hoare, in filing his appeal, claims a failure to observe principles of natural justice. My reading of Mr. Hoare's appeal is, however, that he is in essence claiming that there are not facts to support main elements of the Determination, an error in law. Mr. Hoare argues that he did not quit and the employer did not have cause to terminate him. He claims that he was unable to work on October 10, 2001 and subsequent days because of a toe injury. Mr. Hoare complains that the Determination is inadequate in that it has been found that the employer's pay stubs provide insufficient information regarding hours worked, yet the employer is merely warned to improve and warned of penalties. He also claims that the Determination reflects an inability to cross-examine witnesses.

I have in this decision decided that the Determination should be confirmed. It is not necessary for the purposes of the *Act* for the Director to provide parties with a chance to cross-examine witnesses: Investigations like that conducted by the delegate are sufficient.

On the matter of pay stubs, Mr. Hoare does nothing but complain. He does not say how the Determination is inadequate, nor does he suggest a remedy.

I am not at all satisfied that this is a case where the employee quit but I am satisfied with the finding of just cause. It can be reasonably concluded on the basis of the evidence that was before the delegate that Mr. Hoare was quite able to work, that he was insubordinate and that he just stopped work in protest of his employer's unwillingness to accept or even act on his claim for compensation. While an employee may refuse to perform work which is contrary to the law, dishonest, dangerous to an employee's health or completely outside of the ambit of the job that the employee was hired to do, he or she may not refuse to work for just any reason, an employer's failure to file paperwork and/or a decision to dispute an application for compensation included.

This case has been decided on the basis of written submissions.

ISSUES

Has there been a failure to observe principles of natural justice? Mr. Hoare throws out the idea that an inability to cross-examine witnesses has impaired his ability to make his case.

Is the Determination wrong to the extent that there is an error in law? According to Mr. Hoare, he did not quit, he stopped work for reason of an injury, and the employer did not have just cause to terminate him. He also argues that the Determination is an inadequate response to finding that the employer's pay stubs provide insufficient information regarding hours worked.

FACTS

The employer designs and manufactures heavy equipment. It has offices in Ontario, England and British Columbia.

Mr. Hoare worked for Johnson as an assembler. He began work on August 4, 1994.

The appeal is to some extent difficult to understand in that it is vague and much of what is advanced by Mr. Hoare is irrelevant in respect to the issue of whether he did or did not quit and the matter of whether the employer did or did not have just cause. For example, facts concerning the issue of telephone use and the matter of whether the employer does or does not have a history of terminating persons who apply for workers' compensation are irrelevant. That said, I find that what is relevant about the appeal is Mr. Hoare's claim that he stopped work on October 10, 2002 and did not report for work on subsequent days because he was unable to work due to a painful toe injury. He claims, moreover, that he was presented with only one written warning for leaving work.

I find that the delegate did not conduct a hearing in this case. He conducted an investigation of the issues and Mr. Hoare was not in fact given an opportunity to cross-examine anyone.

I can find no error in respect to facts which surround the termination.

The evidence before the delegate is that the employment was uneventful until the fall of 2001. At that point, it is clear that the relationship between the employer and the employee deteriorated.

The delegate had at least some reason to believe that, in October of 2001, the employee was warned that it was his responsibility to maintain a "neat, orderly and safe work area". The employer produced a memo to that effect, one dated October 14, 2001.

The delegate had reason to believe that Mr. Hoare left work after his lunch break on October 17, 2001, much to the employer's chagrin. Sean Martens, Hoare's supervisor, outlines in a memo that he told the employee on that day that he should find some work to do. He goes on to say in that memo that Hoare asked him what he should do and that Martens told him that P & H brake parts had been painted and were ready to assemble. Hoare is said to have said that the paint would not be dry until after lunch and suggested that Martens just send him home. Martens indicates in his memo that he did not send the employee home but Mr. Hoare went home anyway.

On November 22, 2001, there was a power outage and shop employees, Hoare included, were told to clean up the shop. Hoare made no move to clean up the shop. Martens, on noticing that, told Hoare to tidy-up his work area. Hoare refused to do so. He said that was not his job to clean the shop. He was then given a choice, either clean up the shop or go home. Hoare went home.

The November 22 incident is outlined in a memo written by Sean Martens. Hoare was, moreover, warned about being disobedient and his attitude (written warning dated November 22, 2001). By that warning, Hoare was told "two more written warnings = dismissal".

On the 30th of January, 2002, Hoare received another written warning, this one from N. A. Johnson, the owner of Johnson Industries. He had on the 29th of January managed to upset Mr. Johnson and that led the owner to write Mr. Hoare a long letter dated January 30, 2002. Mr. Johnson in his letter speaks of

provocative, insulting conduct. He notes that the employee had been warned about his "conduct, behaviour, performance and attitude (by) Gerry Parsons, Sean Martens, Lawrence Johnson and (the owner)". The letter goes on to advise Hoare that, should he again criticise management, waste his time or other people's time, fail to use his own initiative and skills to resolve production problems, fail to follow the instructions of his supervisors, verbally provoke management or fail to follow established company policies, he would be dismissed, immediately.

The employee may have received another written warning, one dated June 7, 2002 which is to do with telephone use and magazine reading. It is unclear whether Mr. Hoare was in fact presented with this particular warning, however. I will assume that he did not receive the warning.

On the 26th of September, 2002, a thruster fell on Mr. Hoare's left foot and he suffered an injury to the fifth toe of the foot. In presenting matters to the delegate (letter dated January 10, 2003), the employee stated that he was injured at work on October 10, 2002 and that he was not paid for work on the 22nd, 23rd, and 24th of October. I am led by the last of Mr. Hoare's submissions to the Tribunal, however, to believe, that the Appellant now realises that he got rather mixed up on his dates (submission dated June 2, 2003). The date of his injury is in fact September 26, 2002: His last day of work was October 10, 2002.

Mr. Hoare was examined by Dr. A.J. McGregor on the 27th of September, 2002. The doctor's report is that Hoare fractured his toe and sustained a widening of the DIP joint.

Doctor McGregor filed out a "Physician's Report" for the Workers' Compensation Board on October 7, 2002. In that report, the doctor, Mr. Hoare's family physician, notes that "10 days from fractured metatarsal – now walking reasonably comfortably". The doctor clearly believed that the employee could return to work on October 8, 2002 if he wore "good supporting steel toed shoes" and that a rehabilitation program was not required.

Mr. Hoare went back to work full-time on October 8, 2002 and he worked the next day. On the 10th he stopped work and left for home. He did not return to work and the employment was severed.

Mr. Hoare claims on appeal that his toe was sore on the 10th, so much so that he had to stop work, and that it prevented his working on subsequent days. The delegate has rejected that claim. The delegate was led to believe that Mr. Hoare quit work for a quite different reason(s). In a letter to Mr. Hoare dated March 6, 2003, the delegate notes that "… on or about October 10, you told other employees that you wanted to be fired by Norm Johnson so that you could cause more trouble and also so that you could sue the company and him personally. The evidence also states that you were reported to have said that if Norm Johnson didn't smarten up that your toe just might get suddenly too sore to stand on and that you would have to go on compo until your holidays started sometime in November."

The delegate knew that Hoare was examined by Dr. McGregor on the 11th of October and his toe was found to be red, swollen and tender. He knew, moreover, that Hoare received compensation from the Workers' Compensation Board (the "WCB") for the period September 27 to October 7, 2002, a half day on October 10, 2002 and thereafter. Yet I find that he had reason to believe that it was not for reason of his toe injury that Hoare ceased work on the 10th, and subsequently did not report for work. Memos, written by three of Hoare's co-workers, months before the investigation, painted a rather different picture than that painted by Hoare. The memos suggest that Hoare left work in protest of his employer's failure to fill out WCB forms and the employer's decision to dispute his compensation claim. TM in one memo states that Hoare said "he was not going to work until he spoke to Norm Johnson and that his foot was

going to suddenly become sore". She also states that the employee said "he would go back on compo until his forms were complete" and that he expressed a desire "to get fired because he wanted to sue Norm Johnson and cause trouble." GS, an engineer, in a second memo states that Hoare came into his office in the morning of the 10th and said "he would really enjoy a long rest before his holidays, … and if Norm Johnson did not smarten up his toe might just suddenly get too sore to stand on, and he would not be able to work." The third memo is from Sean Martens. Martens in his memo wrote that Hoare stopped work at 9:30 in the morning, "was harassing other employees" and "bad mouthing the owner". Martens goes on to state that he told Hoare to go back to work, Hoare refused, and that the employee said that "he suddenly felt the pain returning in his foot and that he was going home until he could be compensated."

I am satisfied that the delegate had reason to believe that it was not for reason of a sore toe that the employee stopped work on the 10th and did not subsequently return to work but that in fact Hoare left work in protest of his employer's unwillingness to accept or even act on his compensation claim.

Johnson, by letter dated October 10, 2002, advised the employee that it considered his behaviour to be unacceptable and his departure "self-termination without cause".

The delegate has decided that Hoare quit. According to the delegate, the employee wanted, "one way or another, to leave the employ of this company and I so find. Witness statements from employees also stipulate that you were ordered to return to work on that day, that you refused and that you were going home until you could be compensated (WCB). You then left the premises, completing the objective element, thus satisfying the legal requirements of a resignation and I so find.

ARGUMENT AND ANALYSIS

It falls to the Appellant to show that the determination should be varied or cancelled, or a matter or matters referred back to the Director, for reason of either an error in law, failure to observe principles of natural justice, or evidence which was not available at the time the determination was made. In this case the Appellant complains of a failure to observe principles of natural justice but the appeal in essence claims an error in law.

Mr. Hoare, in appealing the Determination, throws out the idea that the Determination reflects an inability to cross-examine witnesses and that is all he does. He does not explain how it is necessary that he be provided with an opportunity to cross-examine anyone. In my view, it is not necessary for the purposes of the *Act* for the Director to provide parties with a chance to cross-examine witnesses: Investigations like that conducted by the delegate are sufficient.

The Appellant complains that the Determination is inadequate in that it has been found that the employer's pay stubs provide insufficient information regarding hours worked, yet the employer is merely warned to improve and warned of penalties. In this respect, I find that the Appellant again fails to explain himself. He does not say how the Determination is inadequate, nor does he suggest a remedy. He does nothing but complain.

The Appellant claims that he did not quit and the employer did not have just cause to terminate him and that goes to the matter of whether the employee is or is not entitled to compensation for length of service. Section 63 of the *Act* provides that the liability to pay length of service compensation is discharged where the employee resigns or termination is for cause.

> (3) The liability is deemed to be discharged if the employee
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> (a) is given written notice of termination as follows:
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> (i) one week's notice after 3 consecutive months of employment;
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> (ii) 2 weeks' notice after 12 consecutive months of employment;
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> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
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> (b) is given a combination of written notice under subsection (3)(a) and money equivalent to the amount the employer is liable to pay, or
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> (c) terminates the employment, retires from employment, or is dismissed for just cause.

I am not satisfied that it can be said that the employee resigned. The Tribunal has said in decisions like *Burnaby Select Taxi Ltd. and Zoltan Kiss*, (1996), BCEST No. D091/96, that there must be clear, unequivocal facts to show that the employee voluntarily exercised his or her right to quit. And it has recognized that there is both a subjective and an objective element to quitting. Subjectively, the employee must form the intention to quit. Objectively, he or she must act in a way, or demonstrate conduct, which is inconsistent with continuing the employment. I do not think that it can be implied by the employee's leaving on the 10th or his subsequent failure to report for work that he formed the intention to quit or that it was ever his intention to resign. Had his protest succeeded and the employer accepted his WCB claim and filed his WCB paperwork, it is likely that he would have returned to work.

The more important question is, Did the employer have just cause? A single act of misconduct may be of such a serious nature as to justify an employee's termination. Examples of less serious misconduct, when considered together, may also constitute just cause for dismissal as may the chronic inability of an employee to meet the requirements of a job. In all cases the onus is on the employer to show just cause.

I am satisfied that Johnson did have just cause to terminate Mr. Hoare because the employee withdrew his services as he did. It is an employer's right to determine how business will be conducted. Where an employee disobeys an order to perform work, the employer may terminate the employee for insubordination, so long as the work which the employee is directed to perform is not contrary to the law, dishonest, dangerous to the health of employees and within the ambit of the job for which the employee was hired [*Stein v. British Columbia (Housing Management Commission)*, BCCA (1992), 65 BCLR (2d) 181]. Hoare left in defiance of his employer. I am satisfied that he was insubordinate.

Mr. Hoare failed to report for work and at some point, as that became a matter of days and not hours, his employer was also in a position where it could justifiably terminate him for that reason. Mr. Hoare is mistaken in his belief that an employee in his position may just refuse to perform any more work for just any reason, an employer's failure to file paperwork and/or a decision to dispute an application for compensation included.

Mr. Hoare had a sore toe. I have already found that the delegate had reason to believe that it was not for reason of his sore toe that the employee left work. But even if I am wrong in that, there are four questions to ask in considering whether an employee could rightfully refuse work for reason that his or her health was at risk [*Steel Co. of Canada Ltd.* (1973), 4 L.A.C. (2d) 315 (Johnston)]. They are:

1. Did the employee honestly believe that his health or well being was endangered?

2. Did he communicate this belief to his supervisor in a reasonable and adequate manner?

3. Was his belief reasonable in the circumstances?

4. Was the danger sufficiently serious to justify the particular action he took?

I find that the employee was not in a position where he could rightfully refuse to work. I am not satisfied that the employee believed that his health was in danger. I am satisfied that he failed to communicate, in a reasonable or adequate manner, a belief that he was unable to work. There was no threat to health so as to justify the action that Mr. Hoare took.

I am satisfied that the employer had just cause to terminate Mr. Hoare and that there is no reason to vary the Determination or refer any matter back to the Director in this case.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 4, 2003 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal