

An appeal

- by -

Robert D. Clark
(“Clark”)

- 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.: 2001/110

DATE OF HEARING: May 11, 2001

DATE OF DECISION: June 11, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (“the Act”) and by Robert D. Clark (who I will also refer to as “the appellant”). Clark appeals a Determination by a delegate of the Director of Employment Standards (“the Director”) which is dated January 16, 2001. The Determination is that Optimil Machinery Inc. (“Optimal”), Clark’s former employer, did not contravene section 8 of the Act because it did not misrepresent the availability of a job or the terms and conditions of the job which it offered to Clark.

Clark on appeal claims that the delegate is wrong in her conclusions. He also claims that she failed to deal with part of his claim, a claim that he was constructively dismissed by his employer.

APPEARANCES:

Robert D. Clark	On his own behalf
Robert Chapman	the President of Optimal

THE ISSUES

The appellant filed several written submissions prior to the appeal hearing and in those submissions he expresses concern with the type of hearing that the Tribunal was going to conduct and also a refusal by the Tribunal to order the production of several documents which pertain to Clark’s employment and that of a number of other persons who are employed by Optimal. The appellant’s first concern only arose because the delegate, in responding to an invitation to make submissions on the appeal, took it upon herself to say that “an appeal of a Determination ... does not proceed as a trial *de novo*”. The appellant, a person than is quite unfamiliar with the ways of courts and tribunals, appears to have taken that to mean that the Tribunal would not consider evidence which the delegate failed to consider, at least in his view, and further, that he was going to be prevented from appealing the delegate’s conclusions in other respects. That lead him to search Tribunal decisions and, on doing so, he realized that the delegate was demanding a hearing which was contrary to what the Tribunal has said it will conduct in *World Project Management Inc.*, BCEST No. D134/97.

At the outset of the appeal hearing, I took time to explain the nature of the appeal process and I outlined the powers of an Adjudicator, my role as an Adjudicator and how I intended to proceed. That appeared to satisfy Clark as there were no further objections to the hearing process.

In hearing the appeal, I found, moreover, that Clark did not seek to have me order the production of any additional documents. And I have not ordered that any be produced. I am satisfied that this appeal can be decided on the basis of what is before me.

The above said, I find that the appeal raises the following issues:

- The facts which surround Clark's employment and the termination, the latter because Clark claims that he was forced to resign by the employer;
- the matter of whether Optimil did or did not violate section 8 of the *Act*;
- should it be found that Optimil did violate section 8 of the *Act*, there is then a need to decide on the appropriate remedy;
- Clark claims that the delegate failed to consider a claim he was forced to quit;
- what I must ultimately decide is whether it is or is not shown that the Determination should be varied or cancelled, or a matter or matters referred back to the Director for reason of an error or errors in fact or in law.

ARGUMENT

Clark argues that the employer misrepresented the availability of the position of fabricator, thereby contravening section 8 of the *Act*, in that the employer advertised for fabricators and did not hire any fabricators.

Clark, more importantly, claims that he was offered a certain job at certain terms and conditions and that, on starting work, he found that his new job was not at all like that offered and at lesser terms and conditions. In that regard, he claims that he was first promised one rate of pay, then a somewhat lower rate of pay and that, on starting work, he found that he was to receive even less than that. In a round about way, Clark claims that he did not receive a supervisor's job as promised in that he states that "my position was then and is now that because of my high qualifications that if I was to accept what the employer deemed a lesser job that I would be in charge of those who did it, not starting at the bottom". He also claims that the type of work and the conditions of his employment were not as he was led to expect through a tour of buildings 1 and 2, namely, a top notch high tech facility. It is said that he was sent to work in conditions which are deplorable and in a building where standards are low.

Clark, in filing his complaint, indicated that the foreman and others were trying to get rid of him. He tells me that he was forced to quit by threats and intimidation and his employer's failure to act on his complaints. It is also said that he raised this with the delegate.

The employer claims that Clark was offered work as a welder and that he was paid the same rate as all of its other welders. The employer claims that it did not mislead Clark in any way, nor did it terminate Clark. It is said that Clark had difficulty getting along with his fellow workers.

FACTS

Optimil is a medium sized manufacturer of sawmill machinery. It employs approximately 120 people, almost all of which are journeymen machinists and journeymen steel fabricators.

Clark worked for Optimil from June 12, 2000 to November 9, 2000.

I find that the employer has only four rates of pay for non-office staff, a journeyman rate, a premium rate which is higher than the journeyman rate, an “A rate” and a “B rate”. At the point of Clark’s employment, Optimal had just implemented a pay increase. Under the new scheme, journeymen were to receive \$25 an hour. Welders were to be paid the A rate, \$22.29 an hour. Truck drivers, labourers and helpers are paid the B rate, the lowest of the four rates.

In May and June of 2000, Optimil advertised in daily papers on three different days for “fabricators”. Clark answered the ad and he asked what the job paid. He was told that Optimal paid its fabricators \$25 an hour.

Clark was granted an interview. It was Robert (Bob) Chapman, the President of Optimil, that interviewed Clark and, on the basis of that interview, Clark was offered employment.

According to Clark, Chapman during the course of the interview offered him a job at \$24.75 an hour. I find that it was not in fact until after the interview that Clark was offered a job by Optimal. Clark, himself, states that he, after the interview, sent Chapman a fax in which he thanked him for the interview and reiterated his skills as a welder, and that “he called me later in the day to say he was interested in hiring (me)” [page 7, written submission dated March 23, 2001].

I find that if there was talk of the wage, \$24.75 an hour, in the interview that it was in the context of explaining what journeyman steel fabricators earned. Optimal used to pay its journeyman \$24.75 an hour. In order to be a journeyman steel fabricator, one needs to serve an apprenticeship. Clark has not served an apprenticeship. His training qualified him for work as a welder.

It is clear that at some point Clark was offered work as a production welder. On being offered that job, Chapman was asked what that job paid. According to Clark, Chapman told him that the job paid \$22.75 an hour. Chapman’s recollection of matters is, however, that he said only that the job paid “about two dollars less than the journeymen rate”. That Chapman was less than clear on what it was that Clark was to be paid is obvious but, as the job offered was that of production welder, I am inclined to believe that Clark was told to expect that his pay would be that paid to production welders.

The appellant, I realize, is claiming that Chapman mislead him in regard to the specific amount of pay that he was to receive. But I find that there is not clear proof of that. There are not witnesses to the discussion of pay, nor documents to confirm what rate of pay was offered Clark.

Clark's employment record shows a wage rate of \$22.29 and it appears that the \$22.29 is written over another figure. It is not clear that the underlying figure is \$22.75, however, and it is not clear that the form provides any indication of what it was that Clark was offered. It is not dated. And it is not until after Clark started work that he was asked to sign the record. Clark himself tells me that it was not until three months after he started work that he was presented with the form and asked to sign it. I find that the employment record establishes nothing of importance.

While I do not know whether Clark was told to expect \$22.75 an hour, or whether he just misunderstood the employer, it is clear that Clark thought that he was going to be paid that rate. That there was confusion over the rate of pay was discovered by Clark's foreman, Brian, on the first day of work and that led him to contact Gertie in payroll. On doing that, he passed Clark on to Gertie and she told Clark that as a welder his pay was the "non-journeyman rate", \$22.29 an hour.

Clark claims that Chapman offered him the job of supervisor but I find that there is not evidence to show that. I find also that it is unlikely that the employer would have offered him such a job in that he was just out of school, he had not yet demonstrated that he could weld, at least, productively, and he has relatively little experience.

Before accepting the offer of employment, Clark asked for a tour of Optimal's facilities and Chapman gave him a tour of buildings 1 and 2. I find, however, that Chapman, in the course of the tour, told Clark that he would not be working in either of those buildings but another building. I find that Clark did not ask to see that building, nor did he ask anything about the building or the people that worked there. I also find that Optimal has six buildings and that buildings 3, 4, 5 and 6 are pretty much the same in that they are all reconfigured EXPO 86 buildings.

Clark was assigned to work in building 6. Clark speaks of the deplorable conditions in which he had to work. The delegate toured building 6 and she describes it as "a very modern facility, not at all like Clark had described in his complaint". I assume that it is as the delegate describes. Clark does not present evidence which is clearly to the contrary. And, as matters are presented to me, he complains only of what are relatively minor annoyances which are common to many a shop-floor, things like smoking and paint fumes.

I find that Clark's complaint is not really with building 6 but with the people that worked in building 6. He describes them as being fundamentally different from the workers in buildings 1 and 2. He says that they are unqualified, possess poor work habits, smoke on the job, and that he was bullied. He also claims that one of the workers is (was) an alcoholic. He describes his place of work as a building of outcasts. I find, however, that while it is journeymen fabricators and journeyman machinists that work in buildings 1 and 2 and welders in the main who work in building 6, I am given no reason to believe that there is a significant difference between the two groups of workers. And, more importantly, I find that there is not evidence which shows that the employer promised Clark that he would only be asked to perform certain work and/or work only

with workers who possessed a certain level of qualifications, certain work habits, no health problems and a certain temperament (which is not to say or imply that any of the workers are unqualified, bad tempered, have poor work habits, or that any have any sort of health problem). From what I can see, none of that was discussed.

Soon after starting work, Clark complained to Chapman about what he was being paid. Clark said that a qualified welder like himself should receive the journeyman rate. He at the same time indicated that he was having trouble getting along with Brian because the foreman was insisting that he work nights. Chapman indicated that he needed a welder of Clark's calibre and he said that would both raise the matter of paying welders the journeyman rate at an upcoming meeting and consider moving Clark to another building. I find that the employment continued without any change being made to Clark's pay, nor was he moved to another building.

I find that, during the course of the employment, Clark was assigned work which welders are commonly asked to do.

I find that as the weeks wore on, Clark had more and more trouble getting along with his fellow workers. There were instances of minor pushing and shoving. I find that Clark complained of that and a number of other things and that the employer did nothing about his complaints. It is as though they fell on deaf ears.

Eventually, Clark became rather disenchanted with his work and he expressed to Gertie that he was thinking about going back to school. Gertie said that, if he wanted to take further training and still remain an employee of Optimal, he would have to apply for a leave of absence. On his last day of actual work, Clark suffered an injury which required that he go on Workers Compensation. While he was receiving Workers' Compensation, Clark decided that he would not return to Optimal but that he would take further training. He went back to school without ever applying for a leave of absence.

ANALYSIS

Parts of the appeal are rather convoluted. It is as if the employee does not understand that it is the right of the employer to decide who will be employed and how its business will be conducted. An employer may direct how work will be done so long as that is neither contrary to the law, dishonest nor dangerous, and it is within the scope of the job for which the employee was hired. It is simply not for the employee to consider the wisdom of how the company is run [*Stein V. British Columbia (Housing Management Commission)* (1992) B.C. Court of Appeal, 65 B.C.L.R. (2d) 181].

It is alleged that Optimal misrepresented the availability of the position of fabricator. If so that would be contrary to section 8 of the *Act*. That section is as follows:

- 8 An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
- (a) the availability of a position;
 - (b) the type of work;
 - (c) the wages;
 - (d) the conditions of employment.

This is not a case in which someone was induced or persuaded to make himself or herself available for work. In this case, Clark was persuaded to become an employee. The question is, was that because the employer misrepresented the availability of a position, the type of work, the wages or a condition of employment. The Determination is that there is no evidence of that.

In this case the employer placed an ad in daily newspapers and, by that, advertised for fabricators, not journeymen fabricators, just “fabricators”, plain and simple. That ad does not require that the employer hire anyone, however. The ad is not an offer of employment: It is merely an invitation to apply for a job. It was the employer’s prerogative to hire no one.

In this case, Optimal did hire a fabricator, it hired Clark. The *Act* entitles Clark to pay, work, and conditions as promised and agreed. Did Optimal, having offered Clark the job of production welder, then revoke a term or condition of the employment as it was offered or promise a certain kind of work and go back on its promise? I find that there are not facts to support a conclusion that the employer did so.

Clark was offered the job of production welder and I am satisfied that it is the work of a production welder that Clark was asked to perform. As noted above, the employer may direct how work is to be done, just so long as it is within the scope of the job for which the employee was hired. Clark speaks of having to perform general labouring but that lies within the scope of the job of welder. He also claims that he was forced to do work which fabricators do. That too is within the confines of the job for which he was hired. A welder is a fabricator. The common, every day meaning of “fabricate” is to make or create something, to construct by combining or assembling diverse, typically standardized parts [*Canadian Dictionary of the English Language*, ITP Nelson, 1997 edition]. Welding components of machinery and equipment, the work done by Clark, falls easily within that definition.

There is not evidence to show that Clark was offered a supervisor’s job, indeed, I very much doubt, as it is so unlikely given his qualifications, that Optimal did offer Clark such a job.

The appellant, as noted above, does not produce evidence to show that Optimal promised him \$22.75 an hour.

It is not shown that being assigned to work in building 6 represents a change in working conditions. Clark was told that he would not be working in either building 1 or 2 but another building. It is not shown that there is an important difference between the buildings. And the

employer did not lead Clark to expect that building 6 contained a certain kind of worker, nor I am I shown that there is an important difference between the workers who work in buildings 1 and 2 versus those who work in building 6. I am in fact unable to see how there was a revoking of any condition at all.

I agree with the delegate: There is no evidence to support a conclusion that Clark was induced, influenced or persuaded to become an employee of Optimal on the promise of a certain wage, condition or type of work which was later revoked with the result that the employee received less than what was promised.

The matter of Clark's termination

Clark did not claim length of service compensation in filing his Complaint. All that he has had to say in filling out his Complaint is that the foreman was looking for an excuse to get rid of him.

On appeal, Clark suddenly begins to speak of constructive dismissal. I find that what is arguing is that he was in effect forced to quit by the employer because Optimal allowed the circumstances and conditions of his employment to deteriorate to the point where they were intolerable.

I have considered whether I should refer the matter of whether Clark may be entitled to the length of service compensation back to the Director and decided against doing so. He has not given me any reason to believe that Optimal was in any way responsible for that which led him to tender his resignation. As matters have been presented to me, I am led to believe that Clark quit because he could not get along with his fellow workers and he decided that he did not really want to be a production welder at Optimal but would return to school. The clear and unequivocal facts of this case are that he quit of his own free will.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated January 16, 2001 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal