

An appeal

- by -

Northfork Services Ltd.
("Northfork")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2003A/247

DATE OF DECISION: November 12, 2003

DECISION

SUBMISSIONS

Dennis Hartford, President

on behalf of Northfork Services Ltd.

Alan Phillips, I.R.O.

on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal filed by Northfork Services Ltd. (“Northfork”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Northfork appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on August 22nd, 2003 (the “Determination”). The Determination was issued following an oral hearing before the Director’s delegate held on July 16th, 2003.

The Director’s delegate determined, relying on section 66 of the *Act* (which codifies the common law notion of “constructive dismissal”), that Northfork terminated its former employee, Wayne Richardson (“Richardson”), by significantly reducing Richardson’s scheduled hours of work during the latter’s last week of employment (Richardson had earlier given about 1 1/2 weeks’ written notice of his intention to quit). Section 66 of the *Act* states: “If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated”.

By way of the Determination, Northfork was ordered to pay Richardson the sum of \$296.08 (14 hours’ pay plus concomitant vacation pay and section 88 interest) reflecting the difference between Richardson’s actual earnings during his last week of employment (18 hours’ pay) and what he ordinarily would have earned during the same period (32 hours’ pay).

Further, the delegate also levied a \$500 administrative penalty against Northfork pursuant to section 29(1)(a) of the *Employment Standards Regulation*.

In a letter dated October 29th, 2003 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I might add that none of the parties requested an oral hearing and Northfork specifically requested that the Tribunal not hold an oral appeal hearing.

Mr. Richardson has not filed any submission with the Tribunal and the delegate, for his part, merely provided a copy of the record that was before him at the time the Determination was issued [see section 112(5)]--the delegate did not file any submission addressing the merits of Northfork’s appeal.

ISSUES ON APPEAL

Northfork seeks an order cancelling the Determination on one or more of the following grounds:

- the Director's delegate erred in law [section 112(1)(a)];
- the Director's delegate failed to observe the principles of natural justice [section 112(1)(b)]; and
- it has new evidence that was not available at the time the Determination was being made [section 112(1)(c)].

I shall address each ground of appeal in turn, however, I first wish to briefly outline the relevant background facts.

FACTUAL BACKGROUND

Northfork carries on business in Prince George, B.C.; it sells and services forklifts. Mr. Richardson was employed by Northfork as a mechanic from July 1st, 2002 to April 18th, 2003; he was paid \$20 per hour.

On April 8th, 2003, Richardson tendered a written resignation effective as of April 18th, 2003. Northfork apparently requested that Richardson provide a longer notice period--something in the order of one month--but Richardson was not prepared to do so. I interrupt the narrative at this point to observe that, under the *Act*, employees are not obliged to give *any* written notice to their employer although, under the common law, there is a presumption that departing indefinite-term employees will give their employers "reasonable notice". If Northfork believes that it has suffered loss or damage as a result of Richardson having given only about 10 days' notice, that claim must be filed in the civil courts; it is not a matter that can be remedied by the Director, or by this Tribunal, under the *Act*.

In any event, Richardson apparently quit his employment with Northfork in order to establish his own business; a business that would compete with Northfork. There is some dispute between the parties regarding whether Richardson solicited Northfork clients during Richardson's last week of employment. Richardson worked only 18 hours in his last week as compared to a normal 40-hour work schedule; Richardson did not work on the Friday of his last week since it was a statutory holiday. Northfork maintained that the reduction in scheduled hours was attributable to a lack of work whereas Richardson took the view that his hours were reduced in order to deprive him of compensable work during his last week.

ANALYSIS

Error in law

Northfork's grounds of appeal are not clearly articulated in its appeal documents. The basis for Northfork's appeal is set out in a one-page letter, dated August 24th, 2003, appended to its appeal form (and to which a number of other documents are attached) and another one-page letter, dated October 20th, 2003, responding to certain documents contained in the record submitted to the Tribunal by the delegate.

Having reviewed Northfork's submissions, it is not entirely clear to me precisely how the delegate is alleged to have erred in law. It would seem that Northfork now takes the position that it had just cause to

terminate Richardson due to Richardson's misconduct during his last week of employment--including soliciting Northfork clients and not faithfully performing his employment duties.

However, Northfork's principal argument before the delegate was that it did not terminate Richardson; rather, Richardson voluntarily quit. A voluntary quit relieves an employer from having to pay any compensation for length of service [see section 63(3)(c) of the *Act*]. Clearly, Northfork initially took the view that it did not terminate Richardson for cause. It issued not one, but two, separate Records of Employment, dated April 23rd and 30th, 2003, respectively, in which it stated that Richardson "quit" (code "E" on the form).

While it is undoubtedly true that Richardson *did* voluntarily quit; that quit was not to take effect until April 18th, 2003. During the interim period, Richardson was entitled to work out his "notice period" under the prevailing terms and conditions (including those relating to working hours) of his employment contract.

A unilateral and significant reduction in an employee's usual working hours, without lawful cause, can be properly characterized as a "constructive dismissal" under section 66 of the *Act*. Even if Northfork's business was in a downturn during that final week--and the evidence on this latter point was, at best, equivocal--that fact, standing alone, did not give Northfork just cause for dismissal. I might add that Northfork's position on this matter is not consistent--at one point in its submissions Northfork implies that Richardson's hours were reduced due to lack of work but elsewhere in its submissions it says that Richardson could have worked more hours during his last week but voluntarily chose not to do so (an allegation that, similarly, is not credibly supported by the evidentiary record).

"Just cause" implies a fundamental failure on the employee's part to abide by the essential terms and conditions of their employment contract. A conflict of interest might give an employer just cause in some cases but, in this instance, the evidentiary record does not justify a finding of cause based on a conflict of interest.

Natural justice

There is no evidence before me that Northfork was denied a fair hearing or that its submissions were not given reasonable consideration by the delegate. There is no suggestion that the delegate was predisposed in favour of Richardson or that he otherwise had a "closed mind". Northfork's submissions seem to imply that it was denied natural justice simply because the case was adjudicated in Richardson's favour and because the delegate did not view certain evidence as Northfork would have wished. I am not persuaded that the delegate's findings of fact are tainted in any fashion by a breach of the rules of natural justice.

New evidence

So far as I can determine, the "new evidence" amounts to "a graph to show our considerable slow time in April". Northfork's president says that:

- "this was brought to my attention just after the hearing July 16, 2003";
- "I did not feel that producing my Income Statement to a competitor [presumably, this is a reference to Richardson] was a wise business decision at that time"; and
- "this graph will prove that April was a slow month".

This ground of appeal lacks merit for at least three reasons. First, clearly, the evidence was available at the time of the hearing before the delegate; Northfork made a deliberate decision not to place this graph into evidence before the delegate. Second, the *substance* of this evidence (although perhaps not the actual graph itself) *was* in evidence before the delegate; there is nothing *new* about this evidence. Third, the evidence is not particularly relevant in any event since, as noted above, a downturn in business does not give an employer just cause for dismissal.

In light of the foregoing, this appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$796.08** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal