Employment Standards TRIBUNAL

An appeal

- by -

Polycryl Manufacturing (1998) Inc.
("Polycryl" or the "Employer")

- 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.: 2001/199

DATES OF HEARING: June 18 & 22, 2001

DATE OF DECISION: July 5, 2001

DECISION

APPEARANCES:

Nazeer T. Mitha, Barrister & Solicitor	for Polycryl Manufacturing (1988) Inc.
Virgie DeClaro, Agent	for Eduardo DeClaro
Danilo Fabros	on his own behalf
Eriberto Fabros	no appearance
Alfredo Lazarro	on his own behalf
Heidi Hughes, Barrister & Solicitor & Jim Ross, E.S.O.	for the Director of Employment Standards
Nap G. Espiritu	Interpreter

OVERVIEW

This is an appeal filed by Polycryl Manufacturing (1988) Inc. ("Polycryl" or the "Employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Polycryl appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on February 26th, 2001 (the "Determination"). By way of the Determination, Polycryl was ordered to pay the total sum of $4,088.53 to four former employees reflecting recovery of unauthorized wage deductions (section 21), compensation for length of service (section 63), concomitant vacation pay (section 58) and section 88 interest. Further, by way of the Determination, the Director also assessed a $0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

The particulars of the four employees' unpaid wage claims are set out below:

Employee	Deduction	C.L.S.	Vac. Pay	Interest	Total
Eduardo DeClaro	$ 92.73	$800.00	$32.00	$45.95	$ 970.68
Danilo Fabros	$677.68	$880.00	$35.20	$79.14	$1,672.02
Eriberto Fabros	$ 44.41	$400.00	$16.00	$22.88	$ 483.29
Alfredo Lazarro	$ 84.98	$800.00	$32.00	$45.56	$ 962.54

I heard all of the *viva voce* evidence relating to Polycryl's appeal on June 18th, 2001. The parties' final submissions were made on June 22nd, 2001. Although all of the employees were

notified that final submissions would be made on June 22nd, and they were invited to attend on that day, only counsel for the Employer and the Director appeared before me on the 22nd.

On June 18th, I heard the following evidence. Mr. Iqubal Bhimji, Polycryl's president, was the Employer's principal witness although Ms. Helen Embury, the company's controller, also briefly testified as a rebuttal witness. Danilo Fabros and Alfredo Lazarro each testified on his own behalf. Ms. Delia Fabros testified on behalf of her husband, Danilo Fabros, as did Ms. Virgie DeClaro on behalf of her husband, Eduardo DeClaro. Neither Mr. DeClaro nor Eriberto Fabros appeared in person at the appeal hearing (unlike Mr. DeClaro, Eriberto Fabros did not even have an agent to speak on his behalf). The Director was represented by legal counsel who cross-examined witnesses and made submissions, however, the Director did not call any *viva voce* evidence.

BACKGROUND FACTS

Polycryl is a comparatively small manufacturing firm. It manufactures acrylic sinks and vanity tops, mainly for the local market. The employees formerly worked on the production line in Polycryl's plant situated in Mission. All four employees (along with their supervisor) were involved in a motor vehicle accident that occurred on June 28th, 2000. The employees were returning home after work in a van owned by the Employer and driven by Eriberto Fabros; the other three employees, as well as their shift supervisor, Mr. Fidel Tan, were passengers in the vehicle.

Immediately following the accident, all five individuals were transported to Vancouver General Hospital where all were examined and released. Polycryl's president, Mr. Iqubal Bhimji, learned about the accident by way of a telephone call from Mr. Tan's wife. Mr. Bhimji personally attended at the hospital that same evening but when he arrived all employees, except Mr. Tan, had already been discharged. None of the four respondent employees ever returned to work.

The relevant facts regarding the employees' lack of effort to keep the Employer apprised with respect to their medical condition and consequent availability for work are not seriously contested. However, the legal inferences that can properly be drawn from their behaviour is very much in issue I shall address this matter more fully at a later point in these reasons.

The Employer issued letters to each of the employees that were delivered by courier on either July 24th or 25th, 2000 in which the Employer took the position, in each case, that the employees had "quit". In each of the four letters, the Employer states that: "...we must assume that you are not interested in working here and have quit". Records of Employment were issued (and enclosed with the "confirmation of quit" letters) to each employee; these Records all indicate that the employee had "quit" (code "E" on the form). Three of the four employees applied for, but were ultimately denied, employment insurance benefits. These latter three decisions of the Employment Insurance Board of Referees underlie, in part, the Employer's appeal.

ISSUES ON APPEAL

Counsel for Polycryl advised me at the outset of the appeal hearing that the matter of the wage deductions was not in issue. Further, there is no dispute with respect to the delegate's calculations, assuming that the employees are entitled to compensation for length of service. Broadly speaking, there are two issues before me.

First, Polycryl says that the delegate ought to have dismissed three of the four claims (Eriberto Fabros is the excluded claim) by reason of the doctrine of issue estoppel. Second, and in any event, Polycryl says that none of the four respondent employees was entitled to compensation for length of service since each of them abandoned his employment. In the alternative, Polycryl says that if it is determined that, as a matter of law, it discharged the employees (see section 66 of the *Act*), it had just cause to do so based on their failure to keep the Employer apprised of their availability for work and/or their failure to report (or to medically justify a failure to report) for work.

I propose to address each of these issues in turn.

ANALYSIS AND FINDINGS: ISSUE ESTOPPEL

The Board of Referees' Decisions

As previously noted, three of the four employees--namely, Eduardo DeClaro, Danilo Fabros, and Alfredo Lazarro--were denied employment insurance benefits as a result of separate decisions of the Employment Insurance Board of Referees. In each case the Employer's appeal was allowed by a unanimous decision of a 3-person Board. All three Board decisions turned on an interpretation of section 30(1) of the federal *Employment Insurance Act* (*"EIA"*) which states:

> 30. (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left employment without just cause, unless
>
> (a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or
>
> (b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

Section 29(b.1) of the *EIA*, in turn, defines "voluntarily leaving an employment" as including, *inter alia:* "(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed". Section 29(c) of the *EIA* states that an employee has "just cause for voluntarily leaving an employment" if, for example, the employee has been subjected to harassment, discrimination, dangerous working conditions, significant changes in terms and conditions of employment etc.

In all three instances, the Employer appealed decisions of the Employment Insurance Commission granting the three employees benefits under the *EIA*. The appeals relating to Danilo Fabros and Alfredo Lazarro were heard on December 7th, 2000 and separate decisions allowing the Employer's appeal were issued on December 8th, 2000. The Employer's appeal regarding Eduardo DeClaro was heard on February 12th, 2001 and the Board's decision allowing the appeal was issued on February 15th, 2001.

The relevant portions of the Board's decisions relating to each of the three employees are set out below:

> Danilo Fabros:
>
> ...the Board believes that an employee who values his job would keep his employer notified of his condition and potential return date...
>
> In the case at hand, the claimant willfully made no attempt to keep his employer informed and the employer could draw no other conclusion than that the claimant abandoned his job.
>
> Alfredo Lazarro:
>
> If one were truly interested in preserving his job, a reasonable person would have informed the employer of his status and expected date of return. In the case at hand, there was no communication with the employer who was willing and able to modify job duties to accommodate the claimant.
>
> While the claimant may have qualified for medical benefits, it is clear from the employer's testimony that claimant had no interest in returning to his job and by deduction the employer is quite within his rights to conclude that claimant abandoned his job. Whether voluntary leaving or misconduct the claimant does not have just cause to leave his job.
>
> Eduardo DeClaro:
>
> The first question is whether the claimant quit his job voluntarily. On the surface it appears that he did not, as he did sustain injuries. However, the evidence is that the claimant did not communicate with his employer about the issue. A July 5, 2000 medical certificate was not submitted until July 20, 2000. No other substantial communication occurred on the part of the claimant.
>
> Based on this evidence the Board finds that the claimant by his lack of action, did voluntarily abandon or quit his job. To say he wanted to keep it and then not do anything to keep it, is illogical.
>
> ...the Board considers the claimant to have quit his job without showing just cause, and showed no personal initiative to preserve his job.

The Doctrine of Issue Estoppel

Issue estoppel may be characterized as a discrete component of the broader doctrine of res judicata. The latter doctrine operates so as to prevent the rehearing of a cause of action that has previously been determined in another forum. Application of res judicata serves the twin purposes of ensuring judicial finality with respect to a particular dispute and avoiding the possibility of different decision-makers reaching different conclusions with respect to the same dispute. Issue estoppel, on the other hand, applies in circumstances where a particular issue between the parties (as distinct from a cause of action or dispute) has previously been finally determined. In other words, "issue estoppel prevents the relitigation of an issue that a court or tribunal has decided in a previous proceeding" and "prevents a party from relitigating an issue already decided in an earlier proceeding, even if the causes of action in the two proceedings differ" [see Minott v. O'Shanter Development Company Ltd. (1999), 42 O.R. (3d) 321 at 329].

In Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853 at p. 935, the English House of Lords set out three requirements that must be satisfied before issue estoppel applies, namely:

> 1. the same question was previously decided;
>
> 2. the previous decision was a final judicial decision; and
>
> 3. the parties to the previous decision, or their privies, were the same persons as the parties to the proceedings in which the estoppel is asserted.

The above three requirements were adopted by the Supreme Court of Canada in *Angle v. M.N.R.* [1975] 2 S.C.R. 248. Even though the three preconditions may apply in a particular case, there remains a residual discretion to refuse to apply the doctrine. As Lord Upjohn noted in *Carl Zeiss Stiftung* (at p. 947):

> All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

Thus, issue estoppel will not be applied when it would be unfair or unjust to do so. Although the burden of proving the three preconditions rests with the party asserting issue estoppel, once the preconditions have been satisfied, the burden shifts to the other party to show that application of the doctrine would be unfair or unjust [see *Minott, supra.* and *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (O.C.A.)]. Before exercising the discretion to refuse to apply issue estoppel, it must be clear that the party faces *actual* unfairness or a *real* injustice; "the discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court" (*Schweneke, supra.*).

As the law now stands, "issue estoppel has pervasive application and extends not just to decisions made by courts but...also to decisions made by administrative tribunals"; furthermore, "whether the previous proceeding was before a court or an administrative tribunal, the requirements for the application of issue estoppel are the same" (*Minott, supra.*).

Issue estoppel and investigations under the Act

The Determination was issued on February 26th, 2001, a point in time after the issuance of all three Board of Referees' decisions. However, the delegate was only made aware of the two December 8th, 2000 decisions prior to the issuance of the Determination (see Determination, page 5). Further, although Employer's counsel's submission to the delegate dated December 21st, 2000 (Attachment 1 to the Determination) refers to the two December 8th Board of Referees' decisions, I do not read counsel's submission as specifically raising an issue estoppel argument. Nevertheless, I am relying on counsel's (uncontradicted) assertion that he did, in fact, argue issue estoppel before the delegate. This latter assertion was advanced during final argument and, in addition, is set out at paragraphs 56 and 57 of counsel's March 6th, 2001 submission appended to the Employer's appeal form.

Counsel for the Director submits that issue estoppel ought not to be applied to any proceeding under the *Act*. I cannot accede to this submission. Indeed, the *Act* itself contemplates the application of *res judicata* and issue estoppel (see *e.g., Caverly,* B.C.E.S.T. Decision No. D002/99). Section 76(2)(f) of the *Act* states that an investigation need not be conducted "if a court, tribunal or arbitrator has made a decision or award relating to the subject matter of the complaint". The *Act* goes even further since a delegate can refuse to investigate not only where there has been a prior *decision,* but also where there is merely an *outstanding proceeding* relating to the subject matter of the complaint [section 76(2)(e)].

Two of the stated purposes of the *Act* are "to promote the fair treatment of employees and employers" and "to provide fair and efficient procedures for resolving disputes" arising under the *Act* [see sections 2(b) and (d)]. In my view, the application of the principles of *res judicata* and issue estoppel is entirely consistent with those stated purposes, particularly when one considers that these doctrines are founded on the notion that "there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause" (see Lord Upjohn's speech in *Carl Zeiss Stiftung* quoted with approval in *Angle v. M.N.R., supra.*).

As the Director's counsel properly notes, section 76 creates a statutory discretion, however, that discretion, in my view, ought to be exercised--in the case of an assertion of *res judicata* or issue estoppel--in accordance with the established legal criteria governing the application of those doctrines. In the instant case, it appears that the delegate did not address whether or not the two December 8th Board of Referees' decisions gave rise to an estoppel with respect to the complaints of Danilo Fabros and Alfredo Lazarro. I am of the opinion that the delegate erred in failing to address the issue estoppel argument. This is not a case where the delegate reviewed the governing principles and concluded that issue estoppel did not apply; rather, the delegate simply refused to embark upon any analysis of the issue.

In light of the foregoing comments, it might be appropriate simply to refer the matter back to the Director so that the issue estoppel argument might be considered. Neither counsel invited me to so order and, in the circumstances of this case, I do not believe such an order to be appropriate. Counsel for the Director's submission before me is that issue estoppel should not apply to investigations under the *Act* and, in any event, issue estoppel cannot be applied in this case. If the matter was referred back, it might well return to the Tribunal for adjudication at some future point. Thus, in the interests of adjudicative efficiency, I propose to address whether an issue estoppel arises in the circumstances of this case.

I now turn to the three legal criteria that must be satisfied before an issue estoppel arises.

Was the same question previously decided?

At the outset, I think it important to recall Madam Justice Abella's admonishment in *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683 (O.C.A.) [leave to appeal to Supreme Court of Canada refused: 19 O.R. (3d) xvi] that although there may be differences in statutory language, or differences between a statutory and common law formulation of a particular concept, "a different characterization and process does not...mean a different question". The issue before the Board of Referees was "voluntary leaving an employment"; in this appeal, the central issue is whether or not the employees "terminated" their own employment as a result of having quit or abandoned their jobs. In my view, these two different statutory formulations, at their core, raise essentially the same issue.

Regardless of how the two tribunals may have framed the issue before them, "the question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceedings" (*Angle, supra.*). As noted above, the Board of Referees had to determine whether the three employees should be refused employment insurance benefits because they "voluntarily left" their employment. In essence, and in each case, the Board held that the employees had "abandoned" their employment by reason of their failure to keep the Employer apprised of their medical condition and expected return to work date. The Tribunal has variously referred to such action (or inaction) on an employee's part as a "quit", an "abandonment" or a "constructive resignation", to be contrasted with the situation where an employee explicitly informs the employer that they are resigning their employment. In *GC Auto Supplies Ltd.* (B.C.E.S.T. Decision No. D160/00), the Tribunal noted that an employee's absence from work without leave after having been pronounced medically fit to return to work may be characterized as a resignation. In *Prosser* (B.C.E.S.T. Decision No. D078/96), the Tribunal confirmed the delegate's determination that an employee abandoned her employment when she failed to return to work, or notify her employer, for some 10 days after her expected return to work from medical leave.

Under the *Act*, an Employer need not pay compensation for length of service if the employee "terminates" their employment [section 63(3)(c)]. In this case, the Employer argues that the employees, by reasons of their failure to keep the Employer apprised of their medical condition and expected return to work dates, in effect, quit. In the Determination itself (page 2), the delegate characterizes the first issue to be addressed as follows: "Did the complainants quit or

were they fired?" In his submission to the delegate, appended as Attachment 1 to the Determination, counsel for the Employer asserted that "the employees in question either retired from employment voluntarily or were dismissed for just cause".

In my view, the issue before the Board of Referees--whether the employees "voluntarily left" their employment--cannot be meaningfully distinguished from the principal issue before the delegate--whether the employees' "abandoned" or "voluntarily resigned" their employment.

This case is, in my view, distinguishable from *Alderman v. North Shore Studio Management Ltd.* (1997), 32 B.C.L.R. 136 (B.C.S.C.), a case where issue estoppel was not applied. In *Alderman*, the Board of Referees had to determine whether or not the employee lost his job due to "misconduct"--a concept quite separate from the common law notion of "just cause". An employer may have just cause for termination in the absence of any employee misconduct; for example, in particular circumstances an employee may be lawfully dismissed for poor performance, nonculpable absenteeism, refusal to accept a geographic transfer and in numerous other circumstances where there is an absence of culpable conduct (such as theft, dishonesty, insubordination etc.) on the part of the employee. "A finding of misconduct under the [*EIA*] does not necessarily mean that an employer has just cause for dismissal [and] conversely, an employer may have just cause for dismissal even though no misconduct is found": *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (O.C.A.).

The present case, in some sense, mirrors *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (Ont. Gen. Div.) where an employer was estopped from defending a civil action for damages for wrongful dismissal on the basis that the plaintiff had quit. The court ruled that since this latter argument had been argued before, and rejected by, the Board of Referees, issue estoppel applied.

In my view, the Board of Referees "made findings of fact on the very issue that is raised by these parties" (see *Schweneke, supra.*), namely, whether these employees, *by their own conduct* (regardless of how such conduct might be characterized--"voluntarily leaving", "constructive resignation", "quit" or "abandonment"), terminated their employment. Thus, I am satisfied that the first criterion has been satisfied.

Was there a prior final judicial decision?

Although the three employees could have appealed the Board of Referees' decisions to an Umpire (typically, a judge of the Federal Court of Canada), no such appeals were ever filed. "A judicial decision, otherwise final, is not the less so because it is appealable" (Spencer-Bower, Turner and Handley, *The Doctrine of Res Judicata*, 3rd ed., 1996, at. p. 76). "The decision of an administrative tribunal may be a judicial decision for the purpose of issue estoppel though the tribunal's procedures do not conform to the procedures of a civil trial" (*Minott, supra.*).

I am further satisfied that the Board decisions, although clearly not rendered by a superior court, were nevertheless "judicial" decisions. As Abella, J.A. observed in *Rasanen, supra.:*

> [Administrative Tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly...
>
> As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action...
>
> ...it is difficult to see why the decisions of an administrative tribunal having jurisdiction to decide the issue, would not qualify as decisions of a court of competent jurisdiction so as to preclude the redetermination of the same issues.

It clearly the law in British Columbia that issue estoppel may arise from decisions rendered by administrative tribunals: *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622 (B.C.C.A.).

I should note, at this point, that in this case, unlike the rather perfunctory hearing that was apparently conducted in *Alderman, supra.,* the three employees were given prior notice of the hearing and the issues to be addressed at the hearing, there was an oral hearing (tape-recorded) before the 3-member Board at which the employees attended either in person (Fabros, Lazarro) or by agent (DeClaro), both *viva voce* and documentary evidence was tendered and submissions received. Following the hearings, the Board issued written reasons for decision setting out the evidence considered as well as the Board's findings of fact and legal conclusions. In many respects, the hearing before the Board was not markedly different from an ordinary civil trial. Indeed, if these three cases are a reliable guide, hearings before the local Board or Referees are seemingly conducted in a more procedurally formal fashion than are proceedings before the delegate where formal oral hearings are rarely, if ever, conducted and where the parties are not generally given the right to confront each other in a face-to-face forum prior to the issuance of a Determination.

I am satisfied, as was the Ontario Court of Appeal in *Minott,* that the Board of Referees' decisions are final judicial decisions for purposes of the doctrine of issue estoppel.

Are the parties the same?

As noted, the Employer was the appellant in each of the three proceedings before the Board of Referees. In their respective cases, Danilo Fabros and Alfredo Lazarro both appeared and

testified on their own behalf before the Board. Although Mr. DeClaro did not appear in person before the Board of Referees, he was represented (as he was before me) by his wife who appeared as his agent and who also testified on his behalf. In all three cases, the employees (as claimants) and the Employer (as appellant) were identified as "parties" to the appeal and as such had full rights to participate (and did so) in the appeal hearing before the Board.

In *Alderman, supra.,* the court held that since the employer "is not called upon to make payment in any way" in the event of a decision in favour of the employee, the employer cannot be characterized as either a party or a privy. In my view, that position takes an unduly narrow view of who is a party. One need not have a financial stake in the result in order to be a party or privy: *Genesee Enterprises Ltd. v. Rached*, 2001 BCSC 59. Certainly, the Employer had a "parallel" interest (see *Genesee*) in the outcome of the Board of Referees' proceedings as both *Randhawa, supra.* (where, in the subsequent civil trial, the employer was estopped from arguing that the employee had quit) and the present appeal clearly demonstrate.

I might add, in any event, that the assumption in *Alderman* that employers have no pecuniary interest in the outcome of an employment insurance proceeding appears to be incorrect. In *Minott, supra.,* the Ontario Court of Appeal observed:

> Ordinarily, employers do not appear on applications for unemployment insurance benefits or even on appeals because the stakes are small and they do not have a direct financial interest in the outcome, *although they may be liable under s. 46(1) of the Act to repay any benefits received by an employee who subsequently succeeds in a wrongful dismissal action.* (my *italics*)

In light of the foregoing, I am satisfied that the third requirement for the application of issue estoppel has also been established in this case.

Conclusion: Application of issue estoppel

In my view, the three preconditions to the application of issue estoppel have been satisfied with respect to three of the four employees' claims for compensation for length of service. An issue estoppel argument was apparently specifically advanced with respect to the claims of Danilo Fabros and Alfredo Lazarro, however, the delegate did not address the matter in any fashion. I do not agree with counsel for the Director that because delegates, for the most part, lack legal training, they need not address an issue estoppel argument. When investigating and adjudicating complaints, Director's delegates are carrying out a quasi-judicial function and, in carrying out that function, must consider all relevant legal principles.

Nor do I agree that delegates have, in essence, unfettered discretion to refuse to consider issue estoppel. While delegates do have a discretion under sections 76(2)(e) and (f), that discretion must be exercised judicially. In other words, in this case, the delegate was obliged to determine whether, at the very least, Danilo Fabros' and Alfredo Lazarro's claims for compensation for length of service should have been dismissed on the ground of issue estoppel. As noted, the delegate simply failed to address his mind, in any fashion, to that question.

In the circumstances of this case, I am not satisfied that it would be unfair or unjust to apply the doctrine of issue estoppel, at least with respect to Danilo Fabros and Alfredo Lazarro. I have considered the five "factors", addressed in *Schweneke, supra.,* that might militate against the application of issue estoppel. None, in my view, is apposite. As previously noted, they both were given notice of, and attended, an oral hearing before a 3-person Board of Referees. They both had prior notice of the Employer's position and argument. The hearing was at least as procedurally fair, if not more so, than an investigation conducted by a delegate. There is nothing in the material before me to indicate that these two employees were, due to some financial or other urgency, unable to properly present their respective cases to the Board. The monetary "stakes" at issue in each proceeding were not significantly different (if anything, the "stakes" were higher before the Board of Referees). I cannot conclude that the Board was in any better or worse position to make the requisite findings of fact than would be a delegate, or indeed, this Tribunal. Nor can I conclude, based on the material before me, that the Board had any greater or lesser expertise with respect to the matter of voluntary quits than would a delegate or this Tribunal.

In my view, the delegate erred in failing to consider whether the doctrine of issue estoppel barred Danilo Fabros' and Alfredo Lazarro's claims for compensation for length of service. Had the delegate turned his mind to that issue, I am of the view that he would have been bound to determine that the two claims were barred.

ANALYSIS AND FINDINGS:

COMPENSATION FOR LENGTH OF SERVICE

I have concluded that the delegate ought to have dismissed the complaints of Danilo Fabros and Alfredo Lazarro (only with respect to the matter of compensation length of service) pursuant to section 76(2)(f) of the *Act* and the doctrine of issue estoppel. It may well also be the case that Mr. DeClaro's complaint might have been similarly dismissed had the same argument been advanced with respect to his claim. However, since issue estoppel was not argued before the delegate with respect to Mr. DeClaro's claim (and I note that he did not personally appear before the Board of Referees), I am not prepared, on appeal, to dismiss Mr. DeClaro's award for compensation for length of service on the basis of issue estoppel.

It is also clear, in any event, that issue estoppel cannot apply to the complaint filed by Eriberto Fabros and thus his complaint must be adjudicated on its merits. In the event that I have erred regarding the application of issue estoppel, I think it also appropriate to address all the employees' claims on the merits.

The Determination

The delegate held, in the case of each employee, that there was no evidence that the employee "clearly and unequivocally quit or resigned" (Determination, pages 6-7). The delegate further concluded that the employees (other than Eriberto Fabros) "may not have met reasonable

[performance] standards" and "arguably did not provide doctor's letters that were clear or timely" (Determination, page 9). However, the delegate also held that since the employer did not properly apply the principles of "corrective discipline", the Employer's actions in issuing "confirmation of quit" letters amounted to a dismissal without just cause.

The delegate concluded that "Eriberto Fabros did not meet reasonable [performance] standards" but also concluded that despite this failure, the employer did not have just cause for termination since "the employer has not shown that there has been a proper application or any application of corrective discipline procedures" (Determination, page 10).

In my view, and based on the evidence before me, none of the employees was entitled to compensation for length of service because each abandoned his employment. An employer does not have "just cause" to terminate an employee simply because the employee is unable to work due to illness or injury [although, in some circumstances, the employment contract could be "frustrated"--a common law concept that is codified in section 65(1)(d) of the *Act*]. Indeed, under the *Act*, an employer cannot lawfully terminate an employee by giving what would otherwise be proper written notice if the employee is away from work due to "medical reasons" [section 67(1)(a)].

On the other hand, as cases such as *GC Auto Supplies Ltd.* and *Prosser* (both *supra.*) indicate, an employee has an affirmative obligation to keep their employer informed about their present medical condition and expected return to work date. This is not an onerous requirement since: i) the employee's employment is protected while they are off work due to illness or injury; ii) the employee alone (after appropriate medical consultation) knows when they will be able to return; and iii) the employer has an interest in being kept informed in order to maintain normal workflow during the employee's absence. If an employee fails to keep their employer reasonably informed, or fails to return to work when medically fit to do so, that failure can be taken as evidence that the employee does not wish to return to work (*i.e.*, that they have quit or abandoned their job).

In *GC Auto, supra*. the Tribunal observed:

> In many cases where an employee is absent from work for a longer period than is covered by the Employer's grant of permission, and where the employee neglects to maintain contact with her office or to return when she had previously advised, this will present a strong *prima facie* case for a finding of resignation.

In this case, the Employer was well aware that all four employees were involved in a motor vehicle accident. The Employer also knew, however, that the employees' injuries were not so serious as to justify an extended hospital stay--recall that all were examined and released on the same night as the accident even before Mr. Bhimji arrived to visit them. None of the employees received much, in anything, in the way of medical "treatment" except for Danilo Fabros who received some stitches. They were assessed and released with not much more than advice to take nonprescription pain medication.

I shall address each employee's particular situation in turn.

Eriberto Fabros

Eriberto Fabros telephoned the Employer the next day to inquire about the whereabouts of the van so that he could recover some personal belongings. He did not report for work. He never sought, nor obtained, his Employer's permission to be absent from work. Following the accident, Eriberto Fabros *never returned to work nor did he ever provide any medical explanation or report* justifying his absence. The Employer requested "a letter from your Doctor explaining why you are not fit for work" (see "confirmation of quit" letter sent out on July 24th, 2000) but, again, *no response of any kind* was forthcoming. This is not a situation like that in *Fitzgibbons v. Westpres Publications Ltd.* (1983), 3 D.L.R. (4th) 366 (B.C.S.C.), where the employer was aware that the employee was not medically fit to return to work. I might add that Eriberto Fabros did not attend the appeal hearing and thus the Employer's evidence is wholly uncontradicted.

For a period of nearly one month, Eriberto Fabros said or did nothing to indicate he still considered himself to be employed by Polycryl. There is a strong presumptive case of resignation and Eriberto Fabros has wholly failed to present *any* evidence (neither to this Tribunal nor to the delegate) to undermine that presumption.

Danilo Fabros

Danilo Fabros did not return to work following the accident. He testified that he could not contact his Employer in the days following the accident, even by telephone, "because of the the pain in my head". I find that explanation to be totally unbelievable especially when he also testified that he was able to call his family doctor the next morning and, in fact, saw another doctor that same day when his regular family doctor was "too busy" to see him. The Employer contacted his wife about one week after the accident and requested a medical report. That report was not immediately provided. The Employer contacted Mr. Fabros again on July 19th and *he was specifically told to report to work the next day or provide a proper medical report justifying his continued absence.*

Mr. Fabros did not report for work the next day nor did he provide a medical report justifying his absence as of July 20th. On July 20th, Mr. Fabros did fax a one-line note on a doctor's prescription pad (this document, even charitably, cannot be properly characterized as a medical report) dated July 1st which stated that he would be unable to work for the next "two weeks". In other words, by July 20th, based on this cursory report, Fabros should have been fit to return to work, however, he failed to either report for work or provide, *as he was specifically directed to do,* a proper medical report justifying his continued absence. In light of that failing, on July 24th the Employer took the position that Fabros had quit. In my view, one could equally say that the Employer had just cause for termination, based on Fabros' refusal to provide a medical justification for his continued absence from work after July 19th despite being specifically directed in that regard.

Alfredo Lazarro

Mr. Lazarro saw his family doctor the day after the accident and again on July 4th, 2000. Lazarro did not contact his Employer in any fashion immediately after the accident (or, indeed, at any time--all telephone calls were initiated by the Employer) because he was in "too much pain" even though he was able, the next morning, to walk to his family doctor's office and then back home. About one week after the accident, the Employer contacted Lazarro to inquire about his health and expected return to work. Lazarro told his Employer that he was unable to return to work and, accordingly, the Employer requested medical confirmation of his condition. This medical confirmation was not forwarded to the Employer. Lazarro testified that he "presumed" the Employer "knew that I could not report for work".

Although, at the appeal hearing, Lazarro tendered a photocopy of a one-sentence handwritten note, dated July 4th, on a prescription pad that states he will be off work until July 21st, I am satisfied that this note (assuming it is a *bona fide* note, a matter about which I have some doubts) was never forwarded to the Employer. The Employer has no record of this note, nor does the delegate. Lazarro says that the note was faxed from a store or some other location but cannot say from where, or when, the note was faxed. He has no record of the note having been faxed (say, a receipt for payment of fax charges) and was unable to produce the original document. Originally, he stated that he faxed this note the day after the accident (*i.e.,* June 29th), however, the note is dated July 4th. He acknowledges that, at best, he only told a store clerk to fax the note; he, himself, did not fax the note.

In any event, since Lazarro had not provided any medical information as requested by his Employer, Mr. Bhimji called Lazarro on or about July 18th (earlier that same day, the Employer's controller, Ms. Embury, spoke with Lazarro's wife and conveyed the message that the Employer required proper medical corroboration of Lazarro's inability to work). Mr. Lazarro acknowledged that on July 18th Mr. Bhimji told him that he should return to work and that he would only have to do "light duties" that would not involve any heavy lifting. Lazarro also testified that Mr. Bhimji told him that if he did not report as directed, the Employer would take the position that he had quit. Lazarro did not report for work as directed because, in his words, "I didn't think I could do a lighter job because of pain on my right side". Instead, he filed a claim for employment insurance benefits. Lazarro did not subsequently report for work, nor did he call in, but he did fax a medical report to the Employer on July 19th that indicated, but only as of July 4th since that was the last time the doctor saw Lazarro, that Lazarro should not do any heavy lifting. Of course, the Employer had already told Lazarro, consistent with the Employer's duty to accommodate, that Lazarro would not have to do any heavy lifting at work. Lazarro never provided any medical report to the Employer indicating he was unable to do light-duty work as of July 19th. Lazarro had no explanation for his failure to contact the employer on or after July 19th.

I consider that by failing to report for work after July 19th as directed (coupled with his failure to provide any medical information indicating that he was disabled from undertaking even light duties), Lazarro abandoned his employment. Alternatively, based his failure to report (or to

provide medical information justifying his continued absence), the Employer had just cause for termination.

Eduardo DeClaro

Mr. DeClaro did not appear at the appeal hearing. His wife appeared and testified on his behalf but since Mrs. DeClaro's evidence was confused, internally inconsistent and, in some respects, simply improbable, I find her evidence of limited assistance.

Mr. DeClaro made no effort at all to contact the Employer in the days following the accident. About one week after the accident, the Employer telephoned the DeClaro residence and spoke with Mrs. DeClaro who advised that her husband was seeing a doctor and receiving physiotherapy. The Employer asked for a medical report. This report was not provided and so, on July 19th, the Employer once again telephoned Mr. DeClaro and again asked him for medical confirmation of his inability to work. The next day, Mrs. DeClaro telephoned the Employer and provided the name and telephone number of Mr. DeClaro's doctor; Mrs. DeClaro told the Employer to contact the doctor directly. The Employer telephoned the doctor's office but only received an answering machine message indicating the doctor was away on vacation. Finally, on July 20th, the Employer received, by fax, a brief note--again, written on a prescription pad--dated July 5th which states only: "Still in pain, not yet ready for work for next 10 days". Thus, and taking the note at face value, DeClaro should have returned to work on July 15th. The Employer requested medical confirmation of DeClaro's inability to work after July 15th but such confirmation was never provided. Indeed, DeClaro had no personal contact whatsoever with the Employer after July 19th.

After the Employer forwarded the "confirmation of quit" letter, DeClaro obtained another "prescription pad" note from his doctor. This note, dated July 25th states: "The above patient was involved in MVA June 28/00 and didn't work since". It is hardly a medical justification for DeClaro's absence after July 15th and, in any event, was never forwarded to the Employer--it was obtained, apparently, in support of DeClaro's claim for employment insurance benefits.

In light of the above circumstances, I consider that DeClaro abandoned his job; alternatively, if one characterizes this situation as a dismissal, I am of the view that the Employer had just cause for termination.

By way of final comment, I cannot help but wonder why the employees took such a determinedly cavalier attitude toward their Employer and their employment following the June 28th motor vehicle accident. The Employer has a small operation with only seven "plant" employees (leaving aside the few "office" employees); as a result of this accident, five of the seven were away from work for several weeks. Despite the obvious hardship to the Employer's operations, none of these employees saw fit to even call the Employer to keep it apprised of their condition so that the Employer might make some informed decisions in order to maintain a semblance of normal operations.

The Employer's position before the delegate was that these employees were intent on securing "easy money" via employment insurance and through settlement of their claims for personal injury. Certainly, to the extent that they returned to work promptly, their claims in either respect would have been negatively affected. I am not prepared to make a finding that these employees were deliberately refusing to report to work for fear of compromising their other claims, but, by the same token, that sort of thinking does go a long way to explain what is otherwise inexplicable behaviour.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied by cancelling the awards made in favour of Eduardo DeClaro, Danilo Fabros, Eriberto Fabros and Alfredo Lazarro on account of compensation for length of service (the awards for concomitant vacation pay on such compensation is similarly cancelled).

The Determination is confirmed as to the awards made under section 21 of the *Act;* the delegate is directed to recalculate the employees' respective entitlements to section 88 interest as and from June 29th, 2000.

Inasmuch as the Employer did contravene section 21 of the *Act*, the $0 penalty is also confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal