An Application for Reconsideration

- by -

J.A.W. Fabricators Co. Ltd.
(the “Employer”)

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113, as amended

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2005A/138

DATE OF DECISION: August 29, 2005

DECISION

SUMBISSIONS

1. John McKay for J.A.W. Fabricators Co. Ltd.

OVERVIEW

2. This is an application filed by J.A.W. Fabricators Co. Ltd. (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a Tribunal Member's decision. This application is being adjudicated based on the parties' written submissions (see the Vice-Chair's letter to the parties dated August 25th, 2005).

3. The Employer submits that the Director and the Tribunal both erred in finding that Mr. Peter A. Millick ("Millick") did not quit his employment.

4. In my view, although this application is timely and does raise an important legal question, it is nonetheless an application without merit and, accordingly, must be dismissed.

PREVIOUS PROCEEDINGS

The Determination

5. On September 27th, 2004 a delegate of the Director of Employment Standards issued a Determination (the "Determination") and accompanying "Reasons for the Determination" ("Delegate's Reasons") dismissing Millick's complaint against the Employer. The Determination was issued following an oral evidentiary hearing held on May 7th, 2004. The issue before the delegate was whether Mr. Millick voluntarily quit his employment or was terminated. The Employer argued that if there was a termination, it had just cause to terminate Mr. Millick.

6. The Employer normally only operates a "day shift" (7:40 AM to 4:00 PM), however, it occasionally adds an evening shift (4:00 PM to 12:30 AM) in order to accommodate special projects. In October 2003 the Employer took on a new project that required an evening shift—the project was to be completed within two weeks. Mr. Millick either volunteered or was assigned (the delegate made no finding in this regard) to the evening shift and worked without incident for two weeks. However, the project was not completed within two weeks and Mr. Millick asked to be returned to the day shift. The Employer refused; Mr. Millick stated that he would continue for two more weeks on the evening shift but not any longer.

7. By mid-November 2003, the project was still not completed; contrary to the information set out in the Delegate's Reasons, the project was eventually completed on November 20th, 2003 (the delegate had indicated the project was eventually abandoned).

8. In any event, on November 12th, 2003 Mr. Millick told the Employer that he would no longer accept evening shifts. At that point the Employer provided a letter to Mr. Millick stating that his employment was being terminated since he indicated he would not report for his scheduled evening shifts. The relevant

portion of the Employer's November 13th letter (which was hand delivered to Mr. Millick that same day) is set out below:

> This letter is to confirm your notice to quit from our company as of November 15, 2003 12:30 am because you do not want to work next week's shift. We will therefore be terminating your employment today, due to your refusal to work your scheduled shift.

9. The delegate concluded that although Mr. Millick did not quit his employment, he "was terminated for willful disobedience" and that his termination was undertaken with legally just and sufficient cause. Thus, Mr. Millick's claim for compensation for length of service (see section 63 of the *Act*) was dismissed.

The Appeal Proceedings

10. Mr. Millick appealed the Determination on the ground that the Director's delegate erred in law and, in particular, he alleged the delegate failed to consider whether there had been a "constructive dismissal" (see section 66 of the *Act*). Alternatively, Mr. Millick asserted that the delegate did not properly apply the principles governing just cause where the alleged cause is "willful disobedience" of an employer's order.

11. On March 29th, 2005 the appeal was heard by way of an oral evidentiary hearing before Tribunal Member David Stevenson. Member Stevenson subsequently issued written reasons for decision on April 7th, 2005 (BC EST Decision No. D046/04) allowing the appeal. Member Stevenson's April 7th reasons for decision contain certain findings of fact (especially at pages 4-5) that are arguably at odds with those found by the delegate; at the very least, these latter findings certainly add to the evidentiary record:

> Millick started working the afternoon shift on Monday, October 20, 2003. He was asked by Mr. Williams [described in the record as the Employer's "Manager"] to work that shift. While Millick may have felt the request from Mr. Williams was an order, he raised no objection or argument at the time and gave every indication to Mr. Williams he was voluntarily accepting the afternoon shift assignment. Near the end of the first two weeks, Millick called Mr. Williams and asked to be rotated back to day shift. Millick said it was unfair to him and hard on his family. Mr. Williams explained to him why he would have to stay on nights. Millick agreed to work another two weeks on the afternoon shift but told Mr. Williams he wouldn't be available to work the afternoon shift after that.
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> …On November 12, a discussion between Millick and Mr. Williams took place…On balance, I find that Millick told Mr. Williams he was not available to do a fifth week on the afternoon shift and that he wanted to be placed back on day shift. Mr. Williams told Millick he had to stay on the afternoon shift as there was no spot for him on day shift. Millick replied, "Then I guess I won't be coming in".
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> Millick was never informed by Mr. Williams, or any other representative of [the Employer], that he would be fired if he refused of [sic, or] failed to work or continue to work the afternoon shift. At the hearing, in response to the question of whether he had told Millick on November 12 that he would be fired if he didn't show up for the afternoon shift the following week, Mr. Williams said, "I wasn't going to fire him."
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> Millick had asked for a day off on November 13 and that had been arranged. He was scheduled to work the afternoon shift on November 14 and had given no indication he would not work that shift.

12. Member Stevenson did not find it necessary to rule on the question of whether Mr. Millick had been "constructively dismissed" as defined by section 66 of the Act. Rather, he based his decision on the narrower issue of whether the delegate erred in finding that Millick had been "willfully disobedient". Member Stevenson concluded that the delegate "seems to have presumed an act of disobedience that does not exist on the record" and, accordingly, he cancelled the Determination and referred the matter of Mr. Millick's entitlement to compensation for length of service back to the Director to be calculated.

13. With respect to the matter of whether Mr. Millick quit his employment [recall that the delegate had previously determined that Millick had *not* quit], Member Stevenson held (at page 8 of his reasons):

> While there is no appeal by [the Employer] on the Director's finding that Millick did not resign, or quit, his employment, I will note that there is no basis in fact or law to question that finding. As a result, I find that Millick is entitled to be paid compensation for length of service.

The Delegate's Referral Back Report

14. As directed by Member Stevenson, a Director's delegate (not the same delegate who issued the Determination) prepared a report, dated May 17th, 2005, in which he calculated Mr. Millick's entitlement at $8,310.40 (including 6% vacation pay) based on a service period of more than five years, a normal 40-hour work week, and an hourly wage of $24.50. The delegate's May 17th report was forwarded to the parties for their comment. Mr. Millick's legal counsel advised (May 30th, 2005 letter) that she accepted the delegate's calculations; the Employer did not file any submission with respect to the delegate's calculations.

15. Accordingly, in a brief decision issued on July 27th, 2005 (BC EST Decision No. D111/05), Member Stevenson varied to the Determination and ordered the Employer to pay Mr. Millick the sum of $8,310.40 on account of 5 weeks' wages as compensation for length of service.

THE APPLICATION FOR RECONSIDERATION

16. The Employer's Application for Reconsideration is contained in a 2-page letter dated June 7th, 2005 and signed by Mr. John McKay, the Employer's "President". In his June 7th letter Mr. McKay does not contest Member Stevenson's finding that there was no just cause for dismissal; rather, *the reconsideration application is predicated solely on the assertion that Mr. Millick quit his employment*:

> The company maintains that if an employee approaches an employer and informs the employer that he will not be returning to work, the employee has quit. Millick left his employment, the company did not terminate him.

17. As I see it, there are two fundamental problems with this application.

18. First, as noted by Member Stevenson (see above), the Employer never appealed the delegate's conclusion that Mr. Millick did *not* quit his employment. Further, I have reviewed the record that was before Member Stevenson and I note that the Employer did not file any submission with the Tribunal in which it asserted that Mr. Millick was not entitled to any compensation for length of service since he had quit. In other words, it appears that the Employer did not argue the "quit" issue before Member Stevenson and has now raised this issue, for the very first time before the Tribunal, by way of the present application for reconsideration. I am not satisfied that this issue is properly before me. In light of the fact that the quit

issue was not formally in dispute before Member Stevenson, it would appear that there is no Tribunal decision on this point that is capable of being "reconsidered".

19. Second, even if the "quit" issue were properly before me, I am unable to conclude that the evidentiary record supports the Employer's position. The Delegate's Reasons (at page 2) correctly identified the governing legal principles in a "quit" situation:

> I find Mr. Millick did not resign. The right to quit is personal to the employee and there must be clear and unequivocal fact[s] to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to a quit; subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her employment.

20. In this case, as Member Stevenson noted (at page 7 of his April 7th Reasons): "As Mr. Williams said in his evidence, Millick was not told on November 12 (or any other time) that he would be fired if he failed to show up for [the] afternoon shift the next week as he wasn't going to fire him". This is not a case where the employee persisted in stating he would not report for work in the face of a threat that such behaviour would put his job at risk. In my view, it cannot be inferred from the available evidence that Mr. Millick had formed an intention to quit as of November 12th or 13th, 2003. Mr. Millick's statements are, in my opinion, equally consistent with the notion that he simply no longer wished to work evening shifts but was quite prepared to work (as historically had always been the case) the day shift. Mr. Millick was not threatening to *quit*; he was threatening to refuse to work any more evening shifts.

21. If Mr. Millick had he been told that he would be dismissed if he refused to continue working evening shifts and in the face of that knowledge affirmatively indicated he was no longer prepared to continue his employment, that *might* have been taken as a quit. I say "might" because such a situation could perhaps be equally characterized as a "constructive dismissal" under section 66 of the *Act*—note that Member Stevenson did not find it necessary to address this latter issue. However, that latter scenario is not what transpired.

22. Further, there is no objective evidence of a quit since Mr. Millick never failed to report for work on the evening shift. Indeed, despite some grumbling on his part (perhaps quite justified), *Mr. Millick never failed to report for an evening shift.* If Mr. Millick had actually failed to report for work, as scheduled, that might (again, subject to section 66) have amounted to objective evidence of an intention to quit.

ORDER

23. The application to reconsider the decision of Member Stevenson in this matter is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal