BC EST #D303/98
Reonsideration of BC EST #D052/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996 C. 113

by

Claude Guindon
("Guindon")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Alfred C. Kempf

FILE NO.: 97/831

DATE OF DECISION: July 8, 1998

DECISION

OVERVIEW

Pursuant to Section 116 of the Employment Standards Act (the "Act"), Claude Guindon ("Guindon") seeks reconsideration of a decision of the Employment Standards Tribunal ("the Tribunal), BC EST #D052/98 dated February 3, 1998 (the "Original Decision"). That decision involved an appeal by Guindon of a Determination issued by a delegate of the Director dated October 23, 1997 which concluded that Guindon had voluntarily quit his employment (as opposed to having been dismissed) with the Respondent in this reconsideration application, Triangle Towing Ltd ("Triangle") and was therefore not entitled to severance pay under the Act.

ISSUES TO BE DECIDED

There are two issues:

whether the circumstances of this case fall into one or more of the grounds upon which the Tribunal will reconsider a decision or order; and
if this an appropriate case for reconsideration, whether the Tribunal erred in concluding that Guindon quit his employment voluntarily;

FACTS

The Original Decision resulted from an oral hearing in which several witnesses were called, including the appellant, Guindon, Christina Johnson ("Johnson") and John Walsh ("Walsh"). Witnesses for the employer, Triangle Towing Ltd. ("Triangle") were Greg Prinz ("Prinz"), Alan Moore ("Moore") and Pam Findlay ("Findlay"). The Adjudicator also examined the documentation on the file. The issue in the case was whether or not Guindon had resigned his employment and, if not, whether he had been terminated without just cause. The Adjudicator, after considering the evidence before him, determined that Guindon had resigned.

The Tribunal, in making the Original Decision, confirmed the Determination on the part of the Director that Guindon had voluntarily quit or resigned his employment. In other words, Guindon had not succeeded in persuading the Tribunal that it was more likely than not that he had been terminated. In light of the finding on the part of the Tribunal that Guindon had resigned, it was not necessary to explore whether or not there was cause for termination.

The Tribunal in the circumstances of the case had to make findings of credibility. In doing so the Tribunal stated as follows:

In this case there were two different stories. Mr. Guindon says it was Mr. Prinz that was doing the yelling and that was fired over the incident relating to the curling club and RCMP call out. His common-law wife, Christina Johnson testified confirming his story. I do not accept their evidence, as it was neither trustworthy nor credible. Mr. Guindon gave his evidence throughout the hearing in a most unfair, ranting, and at times theatrical manner. Mr. Guindon spent most of his testimony attempting to attack in a general way the credibility of Mr. Prinz, starting with an allegation that Mr. Prinz had interfered with a witness he intended to call, suggesting that Mr. Prinz had forged or altered records filed with the Tribunal. His common law wife appeared nervous when I asked her some questions concerning the "termination meeting".

APPELLANT'S SUBMISSIONS

Guindon submits that the Adjudicator erred in law and on his finding of facts concerning whether or not Guindon had quit his employment and that the cessation of the employment was caused by a termination for which there was insufficient cause. The thrust of the submission is that the Tribunal ought to have believed Guindon and come to a different conclusion concerning the facts surrounding the resignation. The appeal submissions go on to deal with the law concerning when a resignation is really a resignation and several cases are cited in support of the proposition that a resignation uttered in emotional or highly charged circumstances may not in fact constitute an intention to resign.

The submissions go on to deal with the issue of whether, in the circumstances, Triangle had just cause for the dismissal of Guindon.

By way of submission Guindon refers to other terminations and to proceedings before the Employment Insurance Commission to allege that Triangle has treated other employees in a similar fashion.

ANALYSIS

Section 116 of the Act gives the Tribunal broad powers of reconsideration. In a series of decisions the Tribunal has firmly established that it will not interpret Section 116 allow a dissatisfied party an automatic right of reconsideration. As is stated in BC EST #D479/97:

…the Tribunal has stated the reconsideration provision will be used sparingly and has identified a number of grounds upon which it may choose to reconsider an order or decision. These grounds may be summarized as cases demonstrating: a breach of the rules of natural justice; a significant error of fact that is either clear on the face of the record or that arises from the introduction of new evidence that is both relevant to the order or decision and was not reasonably available at the time of the original hearing to the party seeking to introduce it; a fundamental error of law; or an inconsistency with other decisions of the Tribunal which are not distinguishable on their facts.(emphasis added)

In this case an error of fact is alleged although it is referred to in the submissions as an error of fact and law. No new evidence has been adduced on the issue of what was said and done on the day of the dismissal.

The Tribunal, as is the case with many other appellant tribunals, will not lightly disturb a finding of fact based on a weighing of credibility of witnesses to a hearing. It is not at all clear on the face of the record that there has been any error of fact. Based on the findings of fact I am also satisfied that there was no error of law. I am unable to disturb the finding on the part of the Tribunal that on the morning in question Guindon attended at Triangle's offices to attend a scheduled meeting and during that meeting tendered his resignation (which was accepted by Triangle).

I do not know whether an argument was made at the hearing about whether the resignation was meant to be resignation since there is no discussion of this issue in the Original Decision. If the argument was not made I would not consider it on this reconsideration application since no reason has been forward as to why it could not have been made at the hearing. The issue is however intertwined with the issue of whether there was a resignation or a dismissal. I have therefore considered this submission. The case law cited by Guindon is really concerned with the question of whether conduct or words amount to a "voluntary" resignation. All of the cases are very much dependent upon their facts and, generally speaking, there are a variety of factors that can be considered.

One of the important factors is the conduct of the employee after the "resignation". In the Fitzsimmons v. School District #26, (1996) 23 C.C.E.L. (2d) 130 the employee returned to her desk to do more duties and left for home extremely upset without taking any of her personal possessions. The next morning she phoned in sick. When she was advised of the termination she protested the employer's interpretation of her conduct vehemently.

In Cox v. Victoria Plywood Co-operative Association (1993) 2 C.C.E.L. (2d) 78, the employee in question was the Operations Manager of a plywood mill who had worked for the Defendant employer for 36 years. As a result of a heated argument with one of the Defendant's directors, he said that he "quit". The employer purported to accept that resignation without conferring further with the employee. It was determined in that particular case it was not reasonable on the part of the Board of Directors that a 36 year Operations Manager would intend to quit his employment over a dispute with one of the directors.

In Widmeyer v. Municipal Enterprises Limited (1991) 36 C.C.E.L. 237 another long-term management employee quarrelled with the President of the company and in the course of a meeting may have uttered the words "I quit". He then continued to work for approximately 20 days before the employer advised the employee that he was accepting his resignation based upon what had occurred in the meeting and the fact that the employee had told the employer that he was preparing a resume and was looking for other employment.

The difficulty with the submission is that there is no evidence that Guindon attempted to retract his resignation or that he attempted or continued to work after the resignation. It is likely that such evidence was not given at the hearing in light of Guindon's insistence that he was fired. In any event there is no basis on which I can conclude that the resignation, which the Tribunal has found to occur, was involuntary.

Given my finding that the Tribunal's Original Decision on the issue of the resignation is correct, it is not necessary to comment further on the issue of cause for dismissal.

ORDER

Pursuant to section 116 of the Act, I order that the Original Decision be confirmed.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

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