IN THE MATTER OF AN ARBITRATION

BETWEEN:

MARINE WORKERS AND BOILERMAKERS INDUSTRIAL UNION, LOCAL 1
(the "union")

AND:

EARLS INDUSTRIES LTD.
(the "employer")

Re: Termination of Dan Bergen

ARBITRATOR:	Nicholas Glass
COUNSEL:	Robert Rogers for the Employer
	Richard Edgar for the Union
DATE OF HEARING:	January 29, 2014
PLACE OF HEARING:	Vancouver, B.C.
DATE OF AWARD:	March 5, 2014

AWARD

I. Issue

The grievor is alleged by the employer to have quit his employment on the 13th of June, 2013. The grievor and the union on his behalf, allege that he did not intend to quit and did not in fact quit. The grievor and the union allege that the employer terminated him without just cause. The employer denies this and asserts there was a quit. Dismissal for cause is not alleged by the employer as an alternative position.

II. Facts and Background

The employer manufactures and assembles overhead lifting devices. This activity includes making beams for cranes and container spreaders as well as simple beams. It is a family owned and operated company and one of the family members is Steven Coatta who is General and Engineering Manager. The grievor is a 25-year employee who for the last 6 years has been lead hand for the welding division at the company. There are two other divisions, one being machinery, and one being mechanical/hydraulic. Part of the grievor's job as lead hand was to schedule individual welders within a particular job, in accordance with a delivery schedule provided to him by management which lays out the sequence of jobs to be done.

The grievor would have a number of interactions with Steven Coatta in the course of a typical day and they had a well-established working relationship.

Steven Coatta gave evidence at the hearing and described the grievor as a capable employee but one who did not always realize the pressure of trying to get a job out on time. He went on to describe that in early June 2014 there were two urgent jobs in the shop. One was a Port of Portland job and the other was a job for Alcan. There was a problem with the twisting of beams on the Portland job and on the other job there was a large portion of rejected welds which failed to pass the ultrasonic inspection for full penetration welds.

Part of the grievor's responsibilities was to act as supervisor as required by the Canadian Welding Bureau (CWB) and he was responsible for quality control in the welding division.

Mr. Coatta described the procedure for a request for time off. A form would have to be filled out with respect to any request for a full day off. Requests for a half day off were less formal.

Mr. Coatta testified that on Friday 7th of June, 2013, the grievor asked him for a day off on the following Friday, 14th of June. He told the grievor to fill in a form, which he did. On the following Monday, Mr. Coatta advised the grievor that his request was denied. According to his evidence he said "We have too many jobs. You can't have the day off". No more was said at that time as he recalled.

Mr. Coatta then testified that on Thursday, the 13th of June the grievor asked him again if he could take that Friday off. He said to Mr. Coatta "Did you reconsider?" Mr. Coatta's reply was "We are still behind. You can't have the day off." To this the grievor, according to Mr. Coatta's evidence, said "I am going to take it off anyways". Mr. Coatta's reply was "No you are not". The grievor then said "I am taking my tools and leaving". Mr. Coatta's evidence was that he could not clearly recall his response but he basically said "Fine".

According to Mr. Coatta this conversation lasted approximately 15 minutes. He went upstairs and told Cameron and Jason, two other employees, "Dan is leaving". He then went down to the shop and talked to the shop steward, Christian Sylte, and told him that Dan had quit. None of these individuals were called to give evidence.

Mr. Coatta testified that he went to see Christian Sylte as he was the shop steward and he had to be informed because a union member had walked off the job. While he was speaking to Cameron and Jason the grievor was packing up his truck to take his tools out. He gave a little more detail with respect to his conversation with Christian Sylte and stated that "Dan

is packing up his tools. He has quit". To which, according to Mr. Coatta, Mr. Sylte replied "I know ... I don't have any more information. I will get more information".

Mr. Coatta testified that he was not at work on Friday because he himself was taking time off from Friday to Tuesday and was back in the shop on Wednesday. When he came back on Wednesday he was advised that the grievor had not shown up for work on the Friday or the Monday but he did show up on the Tuesday and spoke with some employees in the shop. That same Wednesday, Mr. Coatta testified, Christian Sylte came to his office and spoke to Mr. Coatta and another member of management, Bruce. He asked if he could talk about Dan and whether he could come back to work. Mr. Coatta stated that he or Bruce told Mr. Sylte, "We don't want Dan back".

There were later meetings and discussions with the union which were not productive in the sense that the company did not change its position or reconsider having the grievor back and this led to the current grievance.

In cross examination Mr. Coatta confirmed that no welders worked overtime between June 3 and June 13 and no employee did any overtime on the Port of Portland job in that period. He also confirmed that the grievor had asked for half days off on previous Fridays and depending on the state of the job he had taken those days off or half days off without any adverse consequences.

The grievor also gave evidence. He obtained a Welding "C" Ticket in 1983 and later a CWB ticket followed by a CWB Welding Supervisor ticket. He began with the company in February 1987 working first as a helper and then welding commencing with the burning table. He was acting lead hand from 1999 onwards and became full time lead hand in 2008.

With respect to the critical events of June 13th, he testified that he had put a written chronology together which was produced in evidence and he stated that the chronology was accurate. The chronology or diary goes back to May 13, 2013 and he was asked why he started it. His reply was that he felt things were going sour and management was upset with

him. As this document helps to place the critical exchange in context I will reproduce it here. There is a conflict between the evidence in this document and the evidence of Mr. Coatta with respect to the critical conversation on June 13th but the rest of the document was not challenged:

> Mon, May 13
> Tell Steven I am hoping to leave work at lunch time on Friday to go camping for the long weekend. We agree to talk about it later in the week.
>
> Fri., May 17
> I find out Steven has already started his weekend and will not be there to talk about the afternoon off. I told Cam I would be leaving at lunch time.
>
> Wed., May 22 (Approx)
> Told by Steven that I should not have left early on Friday and just because I had everything ready for my crew it didn't mean my job was done. We had almost nothing for me to do because we were waiting for parts delivery or machining. He also told me to put in a vacation request for May 17.
>
> Thurs., May 23 (Approx)
> Lamination on 2 eyes found and lack of fusion found on 4 other eyes. Found by ultrasonic examination.
>
> Mon., May 27
> Got something in my eye at the very end of the work day. I thought I got it out. When I got home I wasn't sure so I rinsed my eye with the sink sprayer, again I thought I had got it out but maybe scratched my eye a bit.
>
> Tues., May 28
> By early afternoon my eye was getting worse so I had our first aid attendant examine it. He could see the object but could not get it out and advised me to get medical aid. I worked the rest of the day and went to the medical clinic immediately after. The dr. froze my eye and scraped out the object.
>
> Wed., May 29
>
> I could not go to work because I could not open my eyes. I phoned Steven before 7:30 and told him of my problem but that I would be home if they wanted to phone me with any questions. Steven had work started to repair the laminations and lack of fusion on the 2 beams. He had the 4 eyes with the lack of fusion completely removed. This was not how I was going to repair them and had already told Jeremy that we would gouge the weld out to the problem then re-weld. I believe Stevens way approximately tripled the repair time but he is boss and engineer and can decide.
>
> Thurs., May 30
> I am told beam repair cost $10,000 and that I need to take some of the responsibility even though the majority of that $10,000 was towards the lamination that was no one at Earls' fault. I didn't bring up the fact that I thought he tripled the remaining time but did tell him that I did everything I could to ensure a good job so no it was not my fault or responsibility.

Fri., May 31
At 3:55 p.m. Steven asks me to work on Saturday and Sunday. I agree immediately with no whining even though I already had plans for the weekend.

Mon., June 3
Jeremy laid off.

Thurs., June 6
Gave Steven a vacation request for June 14 and the one he requested for May 17.

Mon., June 10
Found vacation request for June 14 back on my bench and denied. At approx. 9 a.m. I talked to Steven and told him I had a problem with being denied especially since I had given up my previous weekend. He told me we were too busy and that he didn't see how he could give me the time off and that I "give very little back". That comment really hurt. My right hand man remained laid off. Steven also said that we would talk later in the week to see about June 14 off.

Thurs., June 13
At approx. 11 a.m. I asked Steven about having the next day off and he repeated that we were too busy and no I couldn't have the day off. For some reason my right hand man was still laid off. I told Steven "I'm sorry you feel that way. I will not be here tomorrow. If you want me to pack my tools that is your decision". He replied "Well maybe you should do that". I told him "I will get my keys". My only conversation with Steven after that was his asking me if I still had their spot welder and I told him no I didn't.

At this point I have had only 2 or 3 of my 25 days of vacation time.

The grievor added in his oral testimony that on Monday the 10th of June when Mr. Coatta told him he could not have the Friday off he said "I am disappointed ... I gave up last weekend to help out. Why not?"

He testified that from his knowledge of the workload of June 10th there would be no problem with him taking off on Friday, June 14th. The main parts were on hold and the twisted beams were going to have to be reconsidered in terms of fixing the problem, but it would not be happening on Friday or over the weekend. Mr. Coatta told him "I will think about it and we will discuss it next week". This was in reference to the week of June 17th.

The grievor then confirmed that the quote of the conversation from his notes was an accurate quote. He confirmed that he never said "I am quitting" and he did not make the

statement "I am packing my tools and leaving". He testified that he expected Mr. Coatta was not going to like his refusal to work on the Friday. He also expected that they would have a talk about it "behind closed doors" regarding expectations.

He added that there was a written policy above the time clock that if there was a no show for work then it would be a deemed "quit". He confirmed in his testimony that he had no intention of quitting when Mr. Coatta said to him "Well maybe you should do that now" in response to the grievor's statement "If you want me to pack my tools that is your decision"]

When asked why he spoke to Mr. Coatta in the way he did he testified "I wanted him to know that I was not quitting but if he didn't want me to show up that would be his decision".

The grievor stated he left at approximately 11:15 a.m. that day and then went to the gas station and straight home. Before leaving he spoke briefly to Christian Sylte. Christian gave him a gesture which signified "What's up?" He then told Mr. Sylte "Steven Coatta fired me".

He testified further that he was home by about 11:45 a.m. that same day and he called the union from his car in the driveway. His evidence was "I couldn't believe what had just happened. I wanted help to get back in to work".

He then went into his house and thought about things and had a coffee. Then he started writing out the narrative which I have quoted verbatim.. He did this at about 12:15 p.m.

On June 14th he went camping and was stopped waiting for a friend beside the highway when George MacPherson, the union president, called him. He told George about the episode and George told him he would speak to the shop steward. George Macpherson testified that he then spoke to the shop steward Sylte who confirmed that he would talk to Steven Coatta and try to smooth it over.

The grievor was cross examined about some of the events leading up to June 13th. He stated that there had been a couple of jobs which didn't go well. Jeremy Thomas, his helper, had a set of issues and had been laid off though he did not know why. He had been out of action for a time because of a foreign body in his eye. Also, one of the jobs had some twisted beams and management was trying to lay responsibility on him for the beams going wrong. He disagreed with them that it was his responsibility and was told that he "gave very little back" and this was a hurtful comment to him. There were more things piling up in the short term and he knew management was not happy. He stated "I see how management deals with things going wrong. I could read the writing on the wall".

Everything subsequently done by the grievor appears to mesh with the mindset that although he did not expect Mr. Coatta to take him up on what was effectively a challenge to fire him, or to treat his absence as a deemed quit, Mr. Coatta did in fact do so.

The grievor clarified that the conversation about refusal of the Friday off and the disputed exchange following that lasted about three minutes, but prior to that Mr. Coatta and he had discussed the status of some ongoing jobs and that part of the conversation took up about ten minutes or so. This reconciles his evidence with that of Mr. Coatta in terms of the length of time they conversed that morning.

In response to questions from me, the grievor stated that when he advised Mr. Coatta that he would not be there on the Friday, he was trying to show him that it was an important matter to him. He knew it was going against his manager's wishes to do this but did not expect it would end up in a termination. He had hoped it would spur a conversation to clear the air and smooth things out. It was a spur of the moment thing to say that "If you want me to pack my tools that's your decision". He had no script at the time.

It is clear that the grievor immediately regretted or at least sought immediately to undo whatever it was that had been done. According to Mr. Coatta he quit but it is apparent, even

if this evidence is accepted over the grievor's version of events that it amounted to a quit born of frustration. According to the grievor's version there was an act of insubordination and an invitation or challenge to the employer to terminate him as a way of bringing things to a head.

I accept his evidence that he was in shock; that he did that same afternoon write down a narrative of events leading up to and including the critical exchange, and that he called the union that same afternoon to try and help him undo what had been done.

Some facts are not in dispute. There was a standoff, during which the grievor insisted that he was going to take Friday off and Mr. Coatta was telling him that this was not acceptable. Shortly afterwards the grievor backed up his truck, took his tools and left the building.

In terms of reaching a conclusion regarding the issue of whether there was an effective quit it does not make a significant difference as to whether the grievor's version or the Coatta version of the exchange is accurate.

This is because it is apparent from the surrounding circumstances, and from the actions of the grievor shortly after he left, that whatever was said or done was a spur of the moment thing. "I am packing up my tools or leaving", or "If you want me to pack my tools that is your decision", was either a confrontation amounting to a quit, or an invitation or challenge to Mr. Coatta to fire him. It was not a considered action which was born of a true intent to sever the employment relationship, but a case of things coming to a head and a level of frustration being reached at what the grievor perceived as an unfair position on the part of management.

The grievor was, as he stated, clearly frustrated by what he saw as unfair treatment. There had been a past history of allowing him to take Fridays off or half Fridays off depending on the work load and as lead hand he had a good working knowledge of what the work load was at any given time with respect to the welders who he supervised.

By defying his manager's instructions to work the Friday he was certainly being insubordinate. On the other hand, he stated that he was aware of the company policy posted above the time clock which informed employees that if they failed to show for work they would be deemed to have quit. This is of course is not something that is in accordance with the collective agreement and is not automatically enforceable. The grievor did not demonstrate any strong knowledge of the collective agreement. His testimony indicated that he was familiar with the company policy and he said nothing to suggest that he knew it to be potentially unenforceable. On this occasion he felt so strongly about taking the Friday off it appears that he was going to deliberately fail to show for work on Friday and take the consequences, which he apparently knew or understood could include his actions being interpreted by the employer as a deemed quit or could include being let go on the spot.

III. Discussion

After careful consideration of the somewhat conflicting evidence I find the grievor's version of what happened to be more consistent with the surrounding circumstances. See *Faryna v. Chorney* [1952] 2 DLR 354 B.C.C.A. The fact that there was a posted policy by the time clock, with which all employees including the grievor were familiar, is an important aspect of the matter which as the grievor stated in his testimony was a factor affecting his attitude and utterances. The policy, although I do not have the exact wording, advises employees that if they fail to show for work (presumably without authorization or lawful excuse such as sickness) they will be deemed to have quit employment with the company.

It makes sense that when the grievor insisted to Mr. Coatta that he would be taking the Friday off in the face of instruction from management to attend that day that this would or could be treated by the company as a deemed quit. It follows logically from this situation and from these circumstances that the grievor would then go on to say, as he testified that he did: "If you want me to pack my tools that is your decision". He testified that by saying this he was trying to make it clear to Mr. Coatta that there was no quitting involved in the voluntary sense. If management wished to invoke the deemed quit policy it was to be "their decision". The common ground between them is that the grievor did say, in defiance of his

supervisor's instructions "I will not be here tomorrow". It is also common ground that the grievor said something about packing his tools and he did indeed go and fetch his truck, collected his tools and drove away during his shift. However, this objective conduct is, while certainly consistent with a possible quit, equally and in my view more compellingly consistent with his understanding that management was letting him go, and in response to his invitation for them to decide he was terminated, they were doing just that.

After reviewing the circumstances in which the exchange between the grievor and Mr. Coatta occurred, I find that there was at no time a resolve on the part of the grievor to sever the employment relationship. He believed that by defying his supervisor and refusing to come to work on Friday the 14th of June, he was laying himself open to the possibility of his employment being terminated by the operation of the deemed quit policy or otherwise. That is why, as he said in his evidence, he spoke to Mr. Coatta in the way that he did and said "I will not be here tomorrow. If you want me to pack my tools that is your decision".

It should be said at this point that a deemed quit policy of the type described in evidence is not consistent with the job security protections contained in the collective agreement and would not bind an arbitrator under the Labour Code of BC if it was invoked as the sole basis for termination, in any circumstances. The grievor, of course, is not a lawyer and the context in which he spoke was one in which he clearly believed the deemed quit policy was effective and meaningful.

I accept his testimony as to what he said to Mr. Coatta. Mr. Coatta's evidence was not a word for word recollection of what was said. I accept that he formed the view that the exchange resulted in the grievor quitting. However, I did not hear clear and cogent testimony from him that the grievor uttered the words "I quit" or that the grievor did any more than say "I will not be here tomorrow" as well as something about "packing my tools and leaving". This is not persuasive evidence that the grievor expressed a resolve to sever his employment voluntarily. There is a heavy onus on an employer to establish an actual resignation or quit has taken place. See for example *Re U.A.W. and Chrysler Corp. of Canada Ltd. (Windsor)* (1952), 4 L.A.C. 1291, I find this onus has not been met.

I am reinforced in this view by the unchallenged evidence of the grievor as to what he did when he went home that afternoon. He immediately telephoned the union and asked for help to reinstate him in his job. This is not the action of an employee who has resolved to sever his employment with the company and then proceeded to leave permanently.

Even if I am wrong about the actual words he used during the exchange with Mr. Coatta, and they could be construed as the grievor's announcement of quitting, I would find that such utterances on his part were born of temporary frustration at what he perceived to be the unfairness of refusing him the Friday off, given the work load as he knew it to be and given his efforts the previous weekend to help the company out with its scheduling issues. There was never a truly subjective intent on his part established in the evidence to sever his employment. The objective conduct of backing up his truck and taking his tools and leaving the workplace during his shift might be adequate to fulfill the second objective element of a resignation or quit, because such action is arguably inconsistent with the continuance of the employment. But it is more probable in my view that he backed up his truck and took his tools because he thought his employment had been terminated by Mr. Coatta. However, the central point is that the subjective evidence of the formation and expression of a resolve to resign or sever the employment relationship is lacking for the reasons I have described above.

It is plain that the grievor's action in refusing his supervisor's instruction to attend work on that following Friday, the 14th, was an act of insubordination and the company would have been entitled to take some form of disciplinary action against him but it was not entitled to treat his employment as at an end.

IV Review of Authorities

The issue of voluntary severance or quit versus dismissal without just cause has frequently been the subject of arbitral awards. These cases are of course fact driven but certain

principles have emerged which assist arbitrators with finding the correct dividing line between these two forms of termination of employment.

One of the earlier cases which contains a helpful analysis is *Re: Sun Oil Employees Association and Sun Oil Co. Ltd.*, 19 L.A.C. pg. 365, where Board Chairman Paul Weiler had to deal with a grievor who became angry and said "I quit" and got up to leave. While he was on his way out the door his supervisor replied, "I agree. You have shown us no reason for keeping you". There were other facts also bearing in the case, which I do not need to review. At page 367 Chairman Weiler reviews the appropriate authorities:

> There are two basic categories of cases in which the issue of voluntary termination arises. In the first, although the employee has not expressed an intention to quit, the company treats his conduct as manifesting such an intention. In particular, where the employee is absent from, or leaves his work without justification, the company deems him to have voluntarily terminated his employment. In *Re U.E.W., Local 512, and Anchor Cap & Closure Corp. of Canada Ltd.* (1949), 1 L.A.C. 222, the employee was absent due to illness from May 8th to July 20, 1948. In holding this was not sufficient to show voluntary termination, Professor Finkelman stated at p. 223:
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> > "The act of quitting a job has in it a subjective as well as an objective element. An employee who wishes to leave the employ of the Company must first resolve to do so and he must then do something to carry his resolution into effect. That something may consist of notice, as specifically provided for in the Collective Agreement or it may consist of conduct, such as taking another job, inconsistent with his remaining in the employ of the Company."
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> In *Re U.A.W. and Chrysler Corp. of Canada Ltd. (Windsor)* (supra) the company gave the employee the alternative of returning to work or quitting. In refusing to uphold this ultimatum the arbitrator stated at pp. 1293-94:
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> > "At the time of the ultimatum of returning to work or quitting was issued, the Company of course had the right to discharge [the grievor], who had been pronounced medically fit, in the event that he did not report to work when ordered to do so. This however, was not done, but he was told to return to work or quit. In my opinion the proper procedure would have been for the Company to have advised him that if he did not return to work he would be discharged. I say this for the reason that while the Company has the right to discharge, the right to quit belongs to the employee, together with the privilege of exercising such right when and as he sees fit. The Company cannot purport to exercise such right to quit for him.

> "[The grievor] denied that he had quit and there is no evidence from the Company that he ever expressed himself as intending to quit. A heavy onus rested on the Company to show that the fact of his quitting should be implied from his course of conduct. In my opinion the evidence does not support such an implication ..."

In a more recent case, *Re U.A.Q. and Leepo Machine Products Ltd.,* (1966), 17 L.A.C. 33, the grievor was assigned a new job which she found painful and tiring, and which chafed her hands. She asked for other work and was told to "do the work or go home and stay there". The grievor went home intending to grieve about the work assignment. The arbitrator rejected the company theory that this amounted to voluntary termination. This case, along with the other two, seems to establish the principle that only if the employee's acts reflect an *actual* intention to quit can the employer interpret them as voluntary severance. If the company deems certain acts to be quitting where this is not a *reasonable* interpretation of their conduct, this constitutes a discharge.

In the light of this principle, the decision in *Re Int'l Union of Woodworkers of America, Local 1-71, and Canadian Forest Products Ltd.* (1954), 5 L.A.C. 1755, is somewhat dubious. There the grievor was told to work the night shift several times but refused to do so. The board upheld the company action in treating the employment relation as voluntarily severed. Surely it is not reasonable on these facts to infer that the employee no longer wanted to remain with the company. Of course the company was under no duty to accept the terms on which he wished to work, and could have discharged him for failing to report. The significance of this distinction for our case will become apparent when we consider the effect of Farrow's conversation with Stewart.

The second major theme in the cases is more relevant to our problem, particularly to the first interview where Farrow explicitly indicated his intention to quit. The problem posed in these cases is whether there is sufficient objective conduct of the grievor to confirm his subjective intention, within the meaning of the principle laid down by Professor Finkelman (above). In *Re: U.A.W., Local 303, and Frigidaire Products of Canada Ltd. (Leaside)* (1953), 5 L.A.C. 1601, the grievor was criticized by his foreman concerning the way he was doing his work and was asked what he would do about it (much as in the situation here). The grievor then indicated he was going to quit and confirmed this to the general foreman at the company office, though refusing to sign a voluntary quit slip. He then left the plant but changed his mind over the weekend. The board decided this was a voluntary severance, not a discharge, and refused reinstatement. Although similar in many respects to our own fact-situation, the case is distinguishable in that the grievor first confirmed his original statement about quitting to another person and then he left the plant without retracting.

The next relevant decision, *Re U.A.W., Local 1256, and Long Mfg. Co. Ltd.* (1963), 13 L.A.C. 415, involved an employee who, on a Thursday, complained of not feeling well, and about the work assigned to her. At the pay break, at 3:30 p.m., she told Supt. Lychy to "Tell my foreman that as of 3:30 p.m. I am quitting", clocked out, and went home. She remained home the next day, Friday, and, that evening, was asked by Lychy to get her

> unemployment insurance book and release slip. After saying she would, she began to think things over, and eventually decided to return to work the next morning. She was refused employment by the company which alleged that she had quit her employ. The board accepted the company position, finding she intended to quit, she went home early, stayed home a day, confirmed her intention again, and allowed the company to remove her time card. Obviously there are many distinguishing factors in that case in comparison with this one.
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> The final, and most exhaustive, analysis of the problem occurred in the aforementioned case of *S.C.M. (Canada) Ltd.* (1964), 15 L.A.C. 332. Here the evidence, while conflicting, showed that the grievor complained of the timing of her job to Mr. Duncan, the plant manager. After the latter refused to accede to her request for a change, she said, in effect, "I'm going to quit". He replied that she must see her foreman about that. After leaving the interview with a union official, she changed her mind and decided not to see the foreman, although not telling Duncan. At a later interview with her foreman LeGrand, she denied or retracted any intention to quit but was told by LeGrand that she had already done so and "was finished". The board also found that LeGrand, before his interview with the grievor, knew of her changed intention, although he did not tell Duncan of this during a later conversation with him.
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> The board found that, while there was an expressed intention of quitting, "one of the essential elements to constitute a 'quit', defined in the reported cases, was completely absent, namely, any conduct on the part of this grievor designed or directed to carry out her prior expressed intention to quit". Hence, it found no effective "quit", and, instead, a discharge, which it also found was LeGrand's intention in the circumstances. The case differs from ours in several respects. First, the grievor retracted her intention to quit only after leaving the first conversation and telling Duncan. Second, however, the grievor in the earlier case seemed to express (or at least was so understood by Duncan) a future intention to quit, one which could only be carried out by seeing the foreman. There is no doubt in our case that Farrow was expressing an intention to quit immediately, that Boynton had authority to accept his voluntary termination, and that he did so. Hence this case, too, is not on all fours with our own.

It is interesting that the arbitration board in *S.C.M. (Canada) Ltd.* (supra) recognized that the grievor's statement of intent to quit in the future was inadequate to establish that there was a true quit or resignation, in the absence of any conduct carrying that intention into effect. The board in *S.C.M.* (supra) as pointed out by Chairman Weiler in *Sun Oil* (supra) stated:

> One of the essential elements to constitute a quit, defined in the reported cases was completely absent, namely any conduct on the part of this grievor designed or directed to carry out her *prior express intention to quit.*
>
> [emphasis added]

When reviewing the distinguishing features of *S.C.M.* (supra) as compared with *Sun Oil* (supra), Chairman Weiler particularly noted this factual distinction between a declaration of intent to quit in the future and conduct carrying out that intent, and clearly recognized it as significant because at page 370, as earlier quoted, he noted the following as a distinguishing feature of the case:

> Second, however, the grievor in the earlier case seemed to express (or at least was so understood by Duncan) a future intention to quit, one which could only be carried out by seeing the foreman.

In any event, Chairman Weiler in *Sun Oil,* (supra) goes on as follows:

> In evaluating our own facts, we accept certain established principles in the cases. First, while an employee may voluntarily quit his employment (which appears to be almost an "at-will", contractual relationship), he must form the subjective intent to do so. While the company many infer that he has quit from his conduct, they cannot "deem" that he has quit, over his objections. Hence, in the second interview with Stewart, where Farrow accepted the alternative of two weeks' notice, there was no "intention" to quit in so doing. Farrow was accepting the lesser of two evils posed to him by Stewart, leaving work now or in two weeks, while protesting that he was not quitting. Only if the employment relationship was already severed by the earlier interview can the company position at this time be upheld. Hence, the events at this interview cannot constitute the objective element confirming the subjective intention to quit, which is spoken of in the cases and below. There must be some fusion of these two aspects of voluntary severance, in the sense that the objective conduct must be the result of a *continuing* subjective purpose of quitting. This was not the case here, as we have seen.
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> By the same token, while there was a subjective intention expressed at the earlier interview, there was no confirming objective conduct. Moreover, the subjective intention was retracted (and this retraction was maintained) immediately after the statement. Yet, in a sense, Farrow made an "offer" to terminate contractual relations with his employer. Boynton exercised his authority to accept it, all before the offer was revoked. Why should there be an established arbitration doctrine that this mutually agreed-to intention to sever employment relations must be followed by some confirmatory objective conduct, carry it out? The answer appears to be that, in the informal world of the employment contract, statements may be about legal relationships without due attention to their significance.....

Chairman Weiler then went on to decide that there was an absence in that case of any confirming conduct carrying the grievor's prior stated intent into effect.

Counsel for the union included an award of Arbitrator Dorsey in his brief of authorities, *Richmond Firefighters Association (International Association of Firefighters Local 1286) v. Richmond*

(City) (Clou Grievance), 2011 B.C.C.A.A.A. No. 122 (Dorsey) which contains a supportive review of a handful of awards which have developed an apparent exception to the time honoured *Anchor Cap* approach to quit cases. . None of them, including arbitrator Dorsey's award, mention or acknowledge that it is an exception. It is not the issue here but as an award of mine, *Eurocan Pulp and Paper Co and CEPU Locals 298 and 1127* [2010] B.C.C.A.A.A. (Glass). (referred to as *Eurocan 1*), was described by arbitrator Dorsey as a revolutionary departure from the approach taken in these awards I cannot resist making a brief comment which may be of assistance to counsel grappling with the issue in future. Fuller discussion will have to wait for another forum. I emphasize the following comments are *obiter*.

Briefly, the proposition in these awards is that if a grievor communicates an intent to resign or retire at some time in the future, then changes his/her mind, that communication if it is clear and forceful enough is to be characterized as a final and irrevocable decision to sever employment on a fixed (or presumably open ended) date in the future, so that the employer can ignore any later decision, before the date arrives, to not resign and remain in employment. The grievor has in effect self –terminated in advance. He/she remains an employee with the full protection of the collective agreement until the fateful day when they must depart. They cannot then invoke the just cause provisions in the agreement because they decided at some earlier date that they would leave and this decision governs their employment rights.

The awards that more or less follow this are fully canvassed in *Richmond Firefighters* (supra) They include *Ontario Federation of Labour and Canadian OPEU Local 343* (2007) 168 LAC (4th) 432 (Grey).) This approach has recently been endorsed by arbitrator Ish in *Eurocan Pulp and Paper and Unifor, Local 298 and 127* (Ish, January 27,2014).

These awards by-pass the fact that the enquiry in *Anchor Cap* is concerned with establishing whether or not what has taken place is "the act of quitting a job". These are the opening words of the oft quoted passage in that case. It is the template for all quit case enquiries. The enquiry is not limited to, and does not stop with identifying expressions of intent to quit a job in the future, (whether oral or written does not change their character, *pace* Arbitrator Hanrahan in *Northern Electric Co Ltd and UAW Local 1535* (1969), 21 LAC 53 at p. 56), as these only establish *the act of quitting a job* if there is a matching of that intent (which must be continuing) with outward and visible signs of actual severance of employment pursuant to

that intent. Without that *Anchor Cap* says there is no quit, however clear and forceful the expression of intent to quit in the future may be, absent agreement or estoppel.

In the fact patterns in these awards there is at least on the surface a classic Anchor Cap deficiency in the case for establishing an enforceable quit. There is communication of intent to retire, but no evidence of carrying that intent into effect. There is no completed "act of quitting a job". So why should the basic principle not be followed? Perhaps it shouldn't, but at the very least the development of this exception should be founded on a reasoned discussion and analysis of the *Anchor Cap* principle, and the specific reasons why it is not to be followed in certain fact situations, yet remarkably these awards including the recent ones of arbitrators Ish and Dorsey are all silent on this subject.

I addressed the application of *Anchor Cap* to a similar fact situation at pp.27, 28 of my award in *Eurocan 1*, and come down on the side of applying it, rather than treating this as an appropriate case for an exception. At p.30, I commented that the only two appropriate exceptions would be an agreement or an estoppel against the grievor neither of which applied on the facts. Neither of the two tribunals which adversely reviewed this award in the appeal process (two tribunals upheld it) mentioned these central findings, and neither recognized, let alone commented on my application of the *Anchor Cap* principle to the facts. The history of the arbitral and judicial reviews is set out at page 2 of the Ish award in *Eurocan 2* at page 2.

A case more closely aligned with the present facts is *Re: International Woodworkers of America and Canadian Gypsum Co. Ltd.*, 19 L.A.C. p. 341. The grievor had an altercation with his foreman involving a number of alleged failures on the grievor's part. Eventually he was told that he was using his machine incorrectly, at which the grievor then shut it off and told the foreman to stop bothering him. The foreman said, "I can run it if you can't, and if you don't like it, you know what you can do". At page 342 Chairman Weiler commented on these facts as follows:

> Although there were some differences in the evidence about precisely what was said, the sequence of facts relevant to the issue of a "quit" can be easily summarized. After an altercation with his foreman, the grievor walked off

> his job saying he would not work under Basili. He tried at various levels of management to get shifted to another foreman's section. Apparently Hartviksen asked him to return to work under Basili while offering him the possibility of a shift in the next week. This was in accordance with company practice when difficulties arise between foreman and employee. Moreover, Wybenga's assignment to Basili was of a temporary nature. This offer was refused by the grievor. The first management judgment that Wybenga was still discussing his problem with Hartviksen. Nelson stuck to this position throughout. Finally Wybenga left the plant at management's direction when his request for a transfer was refused, and was clocked out by the mine engineer.
>
> It is obvious that at no time did Wybenga have the subjective intention of severing his employment relation with the company. Quite to the contrary, his efforts were continually directed to getting assigned to another section in the mine. Nor could any of the management officials to whom he spoke have reasonably believed that he wished to voluntarily quit his job. Instead, Mr. Nelson, in particular, seemed to believe that the type of conduct of which Wybenga was guilty could be *deemed* to be a "quit". The conduct in question was a refusal to work under a particular foreman, a form of refusal of a general work assignment. Now obviously such an action can warrant some kind of discipline, perhaps even a discharge. We feel that the company was wrong in believing it automatically constituted a voluntary quit.

Chairman Weiler then went on to revisit *Sun Oil Co.* (supra) and discuss the principles and authorities contained therein. Applying those principles the arbitration board decided that there was no voluntary severance of employment by the grievor. The board went on to deal with an alternative argument about a late allegation of discharge for cause which is not relevant to these proceedings.

There are many other arbitral responses to inadequate evidence of subjective intent to resign. Some of them are usefully categorized and summarized in *Richmond Firefighters* (supra) where at paragraph 46 Arbitrator Dorsey says:

> When an employee states an intention to resign the employee will not be held to have the resolve to resign if the statement was made in anger, frustration, on the spur of the moment, under duress or undue pressure or in some other circumstance that does not evidence that clear subjective intention. (e.g. *Save On Foods,* 1999 A.G.A.A. No. 34 (Sims); *Goodyear Canada Inc.*, 2002, O.L.A.A. No. 407 (Goodfellow); *Northwestel Inc.*, 2003, C.L.A.D. No. 648 (Dorsey).

The governing principle found in the cases reviewed and discussed above is that to establish an enforceable quit there must be clear evidence of a genuine and settled resolve on the part

of the grievor to sever the employment relationship, matched with evidence of this resolve or intent being carried into effect. Spur of the moment declarations and statements made in anger or under stress will usually be regarded as inadequate evidence of resolve to sever the employment relationship.

V. Conclusion

Based on my review of the evidence above I find that the grievor intended to take Friday off contrary to the wishes of his supervisor, and indicated his willingness to accept the consequences which might include termination of his employment, at which Mr. Coatta signified that his employment was indeed at an end by agreeing that he should pack his tools and leave. There was no subjective intent on the part of the grievor to sever his employment, and his actual conduct in leaving during his shift on Thursday 13th June without returning is explained by his belief that his employment had been terminated by the employer. It is not evidence of conduct carrying out a resolve to quit his employment.

Accordingly, I find that the grievor did not quit his employment on June 13, 2013.
The grievance is upheld and I order that the grievor be reinstated and made whole.

IT IS SO AWARDED.

Nicholas Glass

Nicholas Glass, Arbitrator. March 5, 2014