

**Ontario Supreme Court**  
**Youkhanna v. Spina's Steel Workers Co.**  
**Date: 2001-11-06**

Isaac Youkhanna, Plaintiff

and

Spina's Steel Workers Co. Ltd., Defendant

Ontario Superior Court of Justice MacFarland J.

Heard: October 25-29, 2001

Judgment: November 6, 2001

Docket: 00-CV-18456SR

*Bram A. Lecker, for Plaintiff*

*Paulette S. Haynes, for Defendant*

***MacFarland J.:***

1 Isaac Youkhanna was 49 years of age on October 25, 1999 when he was "laid off", to use his employer's phrase, from his job as a welder at Spina's Steel Workers Co. Ltd. (hereafter Spina's Steel).

2 Mr. Youkhanna's qualification as a welder was disputed on the evidence. He is not now and was not then a journeyman welder. He holds no license for welding from any issuing authority. He took some welding courses during his training as a machinist at a technical high school equivalent in his native Iraq. He also gained some work experience in welding in Iraq before immigrating to Canada in 1976. His sole experience in welding in this country was that gained during his employment at Spina's Steel where he began in August, 1997. His own evidence, which I accept, is that after about one year working as a labourer for Spina's Steel, he was promoted to "welder". He did specific types of welding that he had been taught to do by his employer and for which no licence was required.

3 Although the defendant's witnesses, Mr. Spina and Mr. Simone, claim the plaintiff was no more than a labourer, the Record of Employment (Tab 1 of Exhibit 1) prepared by the employer describes his occupation as "welder". By contrast, the Employer's Report of

Injury/Disease Form 7 (Tab 2 of Exhibit 2) describes Mr. Youkhanna's occupation at the time of injury as a "labourer".

4 Mr. Youkhanna had no managerial nor administrative responsibilities. He took direction from Rudy Simone and did as he was directed to do by Simone.

5 I find that while Mr. Youkhanna did some welding as part of his duties, he was neither a particularly experienced or qualified welder. He certainly had nowhere near the training and experience of the plaintiff in *Reid v. Browning—Ferris Industries Ltd.* (1997), 30 C.C.E.L. (2d) 1 (Ont. Gen. Div.). Yet he was more than the mere labourer the defendant would have me believe.

6 The incident which precipitated his "lay-off" occurred on October 19, 1997. He'd begun work as usual that day and during the morning was assisting his supervisor, Mr. Simone, to lift some angle bolts when he felt sudden severe pain in his low back. He was unable to continue and Mr. Simone suggested he go to the lunchroom and rest. A bit later when the pain did not seem to be letting up, Mr. Simone suggested he go home. Mr. Youkhanna asked Simone if he would pay him for the rest of the day if he left and when Simone said he would, he left. While he was in the lunchroom, Mr. Youkhanna says that Rudy Simone asked that he (Youkhanna) not claim compensation because it would be bad for the company's record. The plaintiff responded that he had no intention of claiming compensation and that he fully expected he would return to work the following day. Although Mr. Simone denies this conversation took place, I don't accept his evidence. I prefer that of Mr. Youkhanna for reasons that will become apparent.

7 Unfortunately for Mr. Youkhanna, he was still in pain the following day to such a degree that he was unable to work. He telephoned Mr. Simone and told him he couldn't work and asked to be paid for a couple of days. Mr. Simone responded that he could not make that decision, only Mr. Spina could and he then put Mr. Youkhanna through to John Spina. Mr. Spina agreed to pay the plaintiff provided it was only for a couple of days. Mr. Spina claims to have told Mr. Youkhanna that if he was away from work any longer than two days, he (the plaintiff) would have to claim compensation. Mr. Youkhanna denies there was any discussion about compensation on this occasion. The only time, he says, compensation was discussed was on October 19<sup>th</sup> during his discussion in the lunchroom with Mr. Simone. Where Mr. Youkhanna's

evidence conflicts with that of either John Spina or Rudy Simone, I have no hesitation accepting his over theirs.

8 John Spina testified that Mr. Youkhanna was not fired but only temporarily laid off indefinitely for economic reasons. He said the company's work was for the construction industry and was seasonal. Traditionally, some of his labour force was laid off in the fall when the volume of work fell off and were rehired in the spring when it picked up again. He also said others were "laid off" the same time as Mr. Youkhanna.

9 Mr. Youkhanna denied that the company's work was falling or/and that workers were customarily laid off in the fall and that anyone else was laid off when he was.

10 Mr. Spina said it was the ordinary labourers who were the ones laid off. Yet no corroborating evidence was called to support Mr. Spina's evidence. He produced no corporate records of any kind to either demonstrate that business was falling off—although he claimed to have such records—or to demonstrate either seasonal lay-offs generally or the fact that others were laid off at the same time as Mr. Youkhanna. When cross-examined and asked for the names of these employees, he couldn't even remember their names although when pressed, said one was "John somebody" and another, "a Portuguese guy Joe". I would have thought with this lawsuit facing him with the allegation being made that this plaintiff was singled out because he was away after being injured on the job and was going to make a claim for compensation that some corroborating evidence would have been led. Mr. Spina is the chief executive officer and president of the corporate defendant and the one with access to the company records, yet none were produced.

11 When asked when the decision was made to "lay-off" Mr. Youkhanna, Mr. Spina gave several different answers. When examined in-chief, he said the decision was made at a management meeting a couple of days before the plaintiff was laid off.

12 During cross-examination when counsel suggested the decision then would have been made while Mr. Youkhanna was off as the result of his October 19<sup>th</sup> injury, Mr. Spina backtracked. He then said he wasn't aware of the exact date the decision had been made, but that when it was made "I wasn't aware he was going to be hurt", and then suggested the decision had been made a couple of weeks before the "lay-off". Later in his evidence, he suggested the decision was made four to five weeks before October 25<sup>th</sup>. He reiterated that

the decision was that of a “management committee” of which Mr. Simone was a part. Mr. Simone’s evidence—after some equivocation—was that it was on the very day of October 25<sup>th</sup> that he suggested to Mr. Spina that it would be necessary to lay the plaintiff off because of work shortage. He said two people had already been laid off the previous week, but he could remember neither their names nor the length of time they had worked for the defendant. Mr. Simone denied that he knew anything about the decision to lay Mr. Youkhanna off any earlier and denied being a part of any management committee.

13 I would have grave difficulty accepting the evidence of either Mr. Spina or Mr. Simone. It was clear that Mr. Spina has very definite views about workers who claim compensation. To this day he believes Mr. Youkhanna faked his injury to claim compensation. He says he never gives any warning to employees who are about to be laid off or they will sustain an injury before the lay-off date in order to claim compensation while off work.

14 The evidence discloses that Mr. Spina interfered with Mr. Youkhanna’s efforts to claim compensation. He told the Workplace Safety and Insurance Board that Mr. Youkhanna’s injury occurred on October 19<sup>th</sup> but that Mr. Youkhanna was not employed on that date because he had been part of a company lay-off, which occurred on October 16, 1999. (See Exhibit 12). This was simply untrue.

15 Further, he informed the Board that Mr. Youkhanna had quit in July 1999 and had been rehired one week later so that his new hiring date was July 1999, as opposed to August 1997.

16 While there was an incident in July 1999, it is apparent even from Mr. Spina’s evidence at trial that that incident was resolved and Mr. Youkhanna’s employment continued as though there had been no break and the Record of Employment prepared by the company confirms this by listing his start date as August 25, 1997.

17 I find that the plaintiff was terminated by Mr. Spina on October 25, 1999, because Mr. Spina did not believe plaintiff had been injured but that he was feigning injury in order to collect compensation while off work. There is simply no evidence to support Mr. Spina’s opinion in this respect, only his own fertile imagination.

18 I do not accept that there was any economic reason for Mr. Youkhanna’s termination. He worked overtime hours right up until he was injured. If the work was truly falling off, there would not have been any need for overtime hours. There was no legitimate basis to terminate

Mr. Youkhanna and his dismissal was wrongful, and he is entitled to reasonable notice. At the time of termination, he had worked for the defendant for a little over two years. He was 49 years of age. He had no specialized training as a welder, only some high school course and some on-the-job training in Iraq that was not detailed in any way. For the first year of his employment at Spina's he was a labourer, and it was after that first year he was "promoted"—his words—to welder.

19 In his resume, which is Tab 3 of Exhibit 1, he details his work experience. This was the document he provided to new prospective employers when he was job searching after his termination from Spina's. His welding experience is not documented in any way—only a brief reference to his former employer, wherein he describes his occupation as welder—without elaboration. His immediate pre-Spina's employment was in the management of convenience stores for some 13 years.

20 Mr. Lecker suggests the appropriate starting point for calculation of the appropriate notice period is two months, based on two years of employment.

21 I am of the view that Mr. Youkhanna is very close to the employee to whom the *Employment Standards Act* was meant to apply—all things being equal. Section 57 of the *Employment Standards Act* suggests two weeks is the appropriate notice period for one in Mr. Youkhanna's circumstances. His first year of two years of employment on his own evidence was as a labourer. In his second year as a welder, he performed welding operations, which were learned on the job at Spina's peculiar to their particular type of work and of a nature that did not require he be licensed. His skills were of a limited nature. However, I have been referred to the decision of my brother Cavarzan J. in *West v. Eaton Yale Ltd.*, [(October 15, 1999), Doc. 12396/96 (Ont. S.C.J.)] where the plaintiff had some nine-and-a-half years of employment. He had Grade 12 education when he began his employment which required no special skills. He learned his various jobs by doing them. The Court found the appropriate notice to be six months.

22 Mr. Youkhanna was 49 years of age when he was terminated. Through diligence and effort, he was able to find alternative employment by June of 2000. There is no serious suggestion that he failed to mitigate.

23 Until his injury in October, 1999, it cannot on this record be seriously disputed that the plaintiff was a good worker. The proof is in the pudding for when he returned to work after the July 1999 “incident”, he received an increase in salary.

24 I find Mr. Youkhanna was terminated simply because he claimed to have been injured at work and John Spina was of the view that the injury was feigned to enable the plaintiff to collect Workers’ Compensation benefits.

25 Evidence of the employer’s bad faith is clearly demonstrated by the efforts made to interfere with and impair Mr. Youkhanna’s ability to claim compensation benefits. In ordinary circumstances, I would find an appropriate notice period to be two months. In the particular circumstances of the demonstrated bad faith here, I would increase that to three months.

26 Claims for punitive and aggravated damages were specifically withdrawn by the plaintiff to keep this case within the provisions of Rule 76.

27 Mr. Youkhanna earned \$14.50 per hour when fired. In the three preceding months before he was let go, the plaintiff consistently worked 44 hours each week for an average weekly wage of \$667.00 or \$2,668.00 per month. Three months’ notice amounts to \$8,004.00

28 While I appreciate there were some weeks when the plaintiff worked more than his 44 hours, there were weeks when he worked less. He is entitled to 40 hours at \$14.50 per hour and 4 hours at \$14.50 x 1.5 or \$21.75 per hour.

29 The plaintiff is entitled to judgment against the defendant in the sum of \$8,004.00, plus prejudgment interest on that sum.

30 At the conclusion of argument, I told counsel that the issue of costs would be addressed following release of my reasons for decision. Counsel may file with my secretary, Ms. Sonia Lim, at (416) 327-5139, any additional materials they wish to review before the question of costs is addressed by teleconference. Such materials should be received within ten (10) days of the release of these reasons.

*Action allowed.*