Employment Standards TRIBUNAL

An appeal

\- by -

Quigg Development Corporation
("Quigg")

\- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2007A/144

DATE OF DECISION: February 4, 2008

DECISION

SUBMISSIONS

Paul M. Pulver, Esq. — on behalf of Quigg Development Corporation

Connie Jansen — on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Quigg Development Corporation ("Quigg") of a Determination that was issued on October 11, 2007 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Quigg had contravened Part 6, Section 54 of the *Act* in respect of the employment of Rebecca Young ("Young") and ordered Quigg to pay Young an amount of $14.001.56, an amount which included wages and interest.

2. The Director also imposed an administrative penalty on Quigg under Section 29(1) of the E*mployment Standards Regulation* (the *"Regulation"*) in the amount of $500.00.

3. The total amount of the Determination is $14,501.56.

4. In this appeal, Quigg says the Director erred in law in finding Young was terminated because of her pregnancy. In the alternative, Quigg says the amount they were ordered to pay was excessive in the circumstances.

5. Quigg does not seek an oral hearing, nor is the Tribunal required to hold an oral hearing. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act*, SBC 2004, ch. 45, including section 36 which states, in part: ". . . the tribunal may hold any combination of written, electronic and oral hearings". The Tribunal has reviewed the material and the parties' submissions and in its discretion has concluded this appeal can be decided on the written material in the appeal file.

ISSUE

6. The issue in this appeal is whether the Director applied the wrong legal test in finding Quigg had contravened Section 54 of the *Act*.

THE FACTS

7. The evidence received by the Director during the complaint process and the findings of fact are set out in the Determination. I will provide a brief summary for the purpose of this decision.

8. Young was employed by Quigg as a Project Coordinator from November 6, 2006 to January 25, 2007. On November 22, 2006, Young notified Quigg she was pregnant.

9. On March 1, 2007, the Director notified Quigg of the complaint by Young, invited Quigg to respond to the complaint, providing their reasons for terminating Young, and issued a Demand for Employer Records to Quigg.

10. Quigg said Young was terminated because she was unsuitable for the job. During the complaint process, Quigg elaborated on their reasons for terminating Young, both in direct response to inquiries from the Director and through legal counsel.

11. On March 8, 2007, Chris Dragan, Director of Finance for Quigg, replied to the Director's correspondence. Mr. Dragan outlined Young's employment history and listed several reasons for terminating Young and provided examples supporting the decision. Quigg denied that Young's pregnancy was a factor in her termination.

12. On April 4, 2007, the Director provided Quigg with Young's response to the reasons given in the March 8 letter. The Director invited Quigg to attend a fact finding meeting. That meeting was held on April 23, 2007. Mr. Dragan and Mr. Allen Askew, Young's supervisor attended the meeting.

13. Following that meeting, and a subsequent conversation with Mr. Dragan, the result of the complaint investigation was summarized by the Director in a June 6, 2007 letter. The letter provided Quigg with the Director's preliminary findings relating to the complaint. On June 20, 2007, counsel for Quigg responded to the letter on their behalf. In a letter dated July 6, 2007, the Director responded to some of the points raised in the June 20 letter, but did not alter the preliminary findings. The letter invited the possibility of settlement and invited Quigg to provide any additional evidence before a Determination was made.

14. In the Determination, the Director set out the applicable provisions of the *Act*, noting that Section 126 imposes a burden on an employer to prove that an employee's pregnancy is not the reason for terminating the employment or changing a condition of employment of the employee without consent. The Director analyzed the facts and the respective positions of the parties.

15. The Director concluded Quigg had not met its burden, finding, on balance, that Young's pregnancy played some role in her termination.

16. The Director ordered Young be "made whole" for the period from January 26, 2007 to June 1, 2007. The reasons for that order are set out in the Determination.

ARGUMENT

17. Quigg argues the Director erred by linking the purported failure to show there was "just cause" to terminate Young with the failure to prove Young was not terminated by reason of her pregnancy. Quigg says that because Young was a probationary employee, they are not legally required to prove "just cause", only to show unsuitability.

18. Quigg reasserts its position that Young's pregnancy played no role in their decision to terminate her and argues there was no evidence that it did and ample evidence that it didn't.

19. Quigg says all that needed to be shown by them to meet the burden described in Section 126 was that Young was not suitable or compatible for the position she had.

20. In the alternative, Quigg argues that the Director erred by finding Young was entitled to be compensated to June 1, 2007 when the facts indicated she did not work after April 12, 2007. Quigg says Young had a duty to mitigate and there was no evidence she had done so.

21. In reply, the Director says some of Quigg's statements regarding the facts are distorted and incorrect and restates some of the points of evidence in the Determination and the findings made from them. The Director says that the correct legal test was applied. The Director says Quigg was not required to prove it had "just cause"; the findings and the Determination were based on Sections 54 and 126 of the *Act*.

22. In their reply to the Director's submission, Quigg says the Director has not included the notes of any conversations with the parties in the Section 112 record, in particular the notes of the fact finding meeting, and has failed to remain neutral in the appeal. Quigg also says the Section 112 record does not include any documents concerning Young's search for alternate employment.

23. Quigg joins issue on whether the Director required them to prove "just cause".

24. The Tribunal agrees with Quigg on the deficiency in the Section 112 record. On January 15, 2008, the Tribunal required the Director to add those notes to the Section 112 record. Two pages of typed notes, taken during the fact finding meeting on April 23, 2007, were provided to the Tribunal by the Director on January 17, 2008 and Quigg was given an opportunity to comment on them. The Director also provided a letter, dated June 6, 2007, which is said to be a response to Quigg's letter of March 6, 2007 and the April 23 fact finding meeting. The letters were already in the Section 112 record.

25. On January 28, 2008, Quigg filed a submission on the notes which had been provided. Quigg says the response of the Director to the direction from the Tribunal is inadequate for a number of reasons:

(i) There were no documents or notes relating to Young's efforts to find alternate employment;

(ii) The document is undated and does not appear to be a contemporaneous document, but a reconstruction;

(iii) There are numerous material omissions from the notes, including the following :

- They do not record the examples provided by Mr. Dragan at the fact finding meeting of Young's lack of proactivity and its consequences;
- They do not fully record the "problem with Jeff at Home Warranty";
- They fail to note Mr. Dragan's comment that Young's failure to "get the job done" was jeopardizing Quigg's reputation with a client; and
- They fail to record Mr. Dragan's explanations as to why Young's termination was unrelated to her pregnancy, including Quigg's continued employment of another person on pregnancy leave and the timing of Young's pregnancy leave coinciding with the anticipated completion of a major project.

(iv) The notes fail to address inconsistencies in the parties' recollection of events.

26. Quigg says the notes show the Director was biased in favour of Young and reasserts the position that the Director's submission on the appeal should not be considered.

ANALYSIS

27. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

28. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

29. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). In this respect, a key aspect of this appeal is that the Director erred in finding, on the available facts, that Young's termination was related, in whole or in part, to her pregnancy.

30. I will first address the preliminary matters raised by Quigg – that the Director has failed to provide the Section 112 record and has failed to remain neutral in the appeal – and the allegation of bias which was made in the final submission received by Quigg.

31. As indicated above, the Tribunal accepted the submission made by Quigg thatt the Director should have included the notes of conversations and statements made by the parties or by witnesses where the Determination indicates that such conversations and statements were before the Director when making the Determination: see *Super Save Disposal and Accton Transport Ltd.*, BC EST #D100/04. A demand was made by the Tribunal, and a two page document, indicated to be a copy of the notes taken by the Director during the fact finding meeting on April 23, 2007, was provided. No document or notes were provided relating to Young's efforts to find alternate employment. I must conclude that is because there is none.

32. Quigg says the two page document is inadequate for several reasons, only one of which addresses the statutory requirement on the Director to provide the record. Quigg says the document does not contain the contemporaneous notes made at the April 23 meeting, but seems to be a reconstruction of the meeting after the fact. The Director says the two pages are the notes taken during that meeting and I have no reason to believe otherwise.

33. The other objections to the notes relate to whether they properly reflect all of the comments made at the April 23 meeting. These objections go to the findings of fact made by the Director in the Determination. The notes, however, are not the Determination. The notes themselves do not reflect any inconsistencies between the statements recorded in those notes and the findings made in the Determination. The notes

were not the only source of information acquired during the complaint process. In the end, it is the findings made in the Determination with which the Tribunal is concerned. For example, Quigg's assertion that the notes fail to record the comments relating to the continued employment of another person on pregnancy leave and the timing of Young's pregnancy leave ignores that the Determination does record those comments, attributing their source to the letter from counsel for Quigg, not the April 23 meeting.

34. Accordingly, this appeal will be based on the findings made in the Determination, the Section 112 record, any additional material provided and allowed into the process by the Tribunal and the arguments of the parties.

35. Quigg says the submission of the Director should be ignored, because it exceeds the bounds of neutrality. Quigg says their position is supported by an analysis of the Director's submission which "clearly advocates on behalf of Young" and makes factual assertions that are not supported by the record. There are five examples provided of the Director making "factual assertions not supported by the record". In my assessment, the comments made by the Director in response to the appeal do not go beyond correcting what the Director says were "distorted and incorrect" assertions of fact made in Quigg's appeal submission and providing clarification for those assertions which were clearly deviating from the findings of fact made in the Determination. Further, some of the assertions made in the January 2 submission are themselves misstatements:

(i) The Determination, and the notes of the April 23 meeting, indicate that Mr. Askew's only comments to Young about the filing were sarcastic: "Young said Askew did not speak to her about the filing except for a few sarcastic remarks". This statement was provided to Quigg in a June 6, 2007 letter to Mr. Dragan and was never commented on or challenged.

(ii) Contrary to the submission of Quigg, the Determination does state at page 7 that the codes were discussed as part of weekly meetings between Young and Mr. Askew.

(iii) The Determination does not suggest Young was not offered an administrative position "solely" because of the budget coding. The record clearly indicates that the employer's position was that Young was not offered the administrative position because she was making too many mistakes; the budget coding was given by the employer as an example of those mistakes.

36. It is not advocating on behalf of a party to make submissions correcting misstatements or misrepresentations of the findings of fact made in the Determination.

37. I do not view the submission in the Director's reply, that the appeal should be dismissed, as anything other than a reflection of the Tribunal's often stated principle that the failure of a party to participate in the complaint process can adversely impact their ability to advance an appeal, although I do not accept that principle applies to the circumstances of this case.

38. I find nothing in the submissions of the Director that is inconsistent with the description in *British Columbia Securities Commission*, BC EST #RD121/07 of the proper role for the Director in an appeal of a Determination.

39. Quigg alleges bias. First, I note this allegation comes in the third and second last paragraphs of the final submission made in this appeal on behalf of Quigg. There was no suggestion of any such concern raised in either the complaint process or in the appeal. Second, the allegation of bias is based on the assertion by Quigg that the delegate "consistently" accepted Young's version of events without explanation and that the two page document, the notes of the April 23 meeting, do not "comply with the Tribunal's request" – which is a purely subjective perception – or "add anything of substance to the Record".

40. It is trite that a party alleging bias against the Director, or in this case one of his delegates, has the burden of providing clear and cogent evidence that will allow the Tribunal to make objective findings of fact demonstrating actual bias or a reasonable apprehension of bias: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99. Further, a consideration of a bias allegation against the Director, or one of his delegates, which is predominantly fact driven, must address and reflect the purposes of the legislation and the practical reality of the function of the Director and his delegates under the *Act*: see *Director of Employment Standards (Re Milan Holdings Inc.)*, BC EST #D313/98.

41. The Courts have rarely explored the definition of bias, usually preferring to say what it is not, rather than what it is. The Supreme Court of Canada has offered these comments on the meaning of bias in *R. v. R.D.S.*, [1997] S.C.J. No. 84 at para. 105:

> Bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. A helpful explanation of this concept was provided by Scalia, J. in *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), at p. 1155:
>
> > The words [bias or prejudice] connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts).
>
> Scalia, J. was careful to stress that not every favourable or unfavourable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable - in other words, it is not "wrongful or inappropriate": *Liteky*, supra, at p. 1155.

42. Quigg has not provided any evidence that would demonstrate to an objective observer that the delegate in this case was biased in the above sense against Quigg. Under the *Act*, if an investigation is conducted, findings of fact must be made and, as a practical reality, those findings will be adverse to the interests of one of the parties. That reality does not make the delegate involved in the complaint process bias against the party against whom the findings are made.

43. The assertion that that the delegate "consistently" accepted Young's version of events without explanation is simply without merit. The Determination provides the reasons for the findings of fact made and it is evident from any reasonably objective analysis that those findings were made on an assessment of the evidence as a whole, not simply on a blind acceptance of a version provided by Young. It is unclear to me how the alleged failure of the Director to comply with the Tribunal's request for notes of the April 23 meeting or that those notes don't add to the Record proves bias. There is nothing in Quigg's submission that assists me in that regard.

44. In sum, I reject the allegation of bias as being without foundation.

45. Quigg has failed to alter the findings of fact made in the Determination. Accordingly, this appeal will be considered on those findings applied to the operative provisions of the *Act*, Sections 54(2) and 126(4)(c), which state:

> *54 (2) An employer must not, because of an employee's pregnancy or a leave allowed under this part*
>
> *(a) terminate employment, or*
>
> *(b) change a condition of employment without the employee's written consent.*
>
> . . .
>
> *126 (4) The burden is on the employer to prove that,*
>
> *(c) in the case of an alleged contravention of Part 6, an employee's pregnancy, a leave allowed by this Act or court attendance as a juror is not the reason for terminating the employment or for changing a condition of employment without the employee's consent.*

46. The reverse onus imposed on the employer in the above provision is a statutory recognition of the difficulty for a terminated pregnant employee in trying to establish the employer's motive in evidence. The legislature has decided that in such circumstances, the employer must bring forward evidence which, on balance, shows that the action taken was free of any prohibited reason. In *Rose Miller*, BC EST # D062/07, the Tribunal said the following:

> As mentioned by the Delegate, Section 126(4)(c) of the *Act* imposed a legal burden on Ms. Miller to prove that the pregnancy was not the reason for the termination of Ms. McClure's employment. In general, the imposition of a legal burden of proof means that a party has an obligation to prove or disprove a particular fact or issue. A failure to convince the trier of fact to the correct legal standard means that the party will lose on that issue (see Sopinka et al, *The Law of Evidence in Canada*, 1992 Butterworths at 57). In the context of section 126(4)(c), *Tricom Services Inc.* BC EST #D485/98 is authority that an employer must prove, on a balance of probabilities, that a termination was not caused by a pregnancy "in whole or in part". The section places no evidentiary burden on the employee.

47. I agree with and accept the above statement.

48. Quigg says the Director erred by requiring Quigg to establish just cause for terminating Young, who was at the time a probationary employee. Quigg seems to have misunderstood what the Director decided, which was that the reasons relied on by Quigg as the sole reasons for terminating Young's employment – her constant mistakes and substandard performance – were not borne out by the evidence. In this regard, the Director found no indication in the evidence that Quigg had communicated its alleged dissatisfaction with her performance in any meaningful way; no evidence that Young was ever made aware that her behavior was as serious as alleged or that her performance was as inadequate; no evidence that she was ever made aware that her performance needed to improve significantly or she would not be kept; and that her termination on January 25, 2007 was sudden and unpredicted. In the absence of evidence supporting the reasons given for her termination, the Delegate was, in my view entitled to infer that Young's pregnancy played at least some role in the termination.

49. The finding that the employer has either met or not met the burden imposed is in large part a finding of fact. I say "in large part" because it always remains open to the employee or the employer to show an error of law in the findings of fact made in the Determination. In this case, I am of the view that there was evidence on the basis of which the Director could have made this finding and cannot find that those findings were irrational, perverse, inexplicable, or unreasonable in the sense contemplated by the relevant legal authorities. Accordingly, no error of law arises.

50. This aspect of the appeal is dismissed.

51. Finally, Quigg argues the wage recovery portion of the remedy provided in the Determination must be limited to the period ending April 12, 2007 rather than June 1, 2007. Quigg says Young had a duty to mitigate her damages and there is no evidence she could not have continued working up to June 1, 2007. The Director provided the following reasons for finding that Young should be made whole for a period up to June 1, 2007:

> When Young assessed her options she faced the prospect of having to find work while being five months pregnant. I find it reasonable that prospective employers would be seeking to hire coordinators who would be available from the beginning of a construction project through to its completion. I accept that finding a job as a project coordinator created a challenge for Young because of the nature of the work and the project implications. Young was to take pregnancy leave in June 2007. This would require her to find comparable employment within a short period of time and she faced the prospect of telling prospective employers she would be going on pregnancy leave within months of being hired. In order to mitigate her losses, Young would have to find a job in her area of expertise, with a comparable wage. In spite of her efforts, Young managed to find a temporary assignment in a lower level position.

52. I find nothing unreasonable in the above statement. The facts show that Young did find alternate temporary work at a lower rate of pay that lasted from February 12, 2007 to April 12, 2007. The logical inference is that she did not sit idly by after she was terminated, but made efforts to obtain alternate employment which were moderately successful. Quigg says there is no evidence that Young could not have continued working in her new employment up to June 1, 2007, but has submitted no evidence on the mitigation issue. As indicated by the Supreme Court of Canada in *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324, at page 331, the burden is on Quigg to show Young could have avoided some of the loss she incurred:

> In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. *If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue*, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.
>
> (emphasis added)

53. The burden on Quigg is not met by a bald assertion suggesting Young could have continued working from April 12 to June 1, 2007. The burden imposed on them has not been met. This argument is dismissed.

54. In result, the appeal is dismissed.

ORDER

55. Pursuant to Section 115 of the *Act*, I order the Determination dated October 30, 2007 be confirmed in the amount of $14,501.56 together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal