An appeal

\- by -

Beamriders Sound & Video

\- 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: John Savage

FILE No.: 2005A/218

DATE OF DECISION: March 7, 2006

DECISION

SUBMISSIONS

Jim Kalsi, for the Employer

Waylon Kosinski, for the Employee

Gagan Dhaliwal, for the Director of Employment Standards

OVERVIEW

1. Waylon Kosinski ("Kosinski") filed a complaint under section 74 of the Employment Standards *Act* (the "*Act*") alleging that Beamrider Sound & Video Ltd. ("Beamrider") contravened section 54 of the *Act* by not returning him to the position he held before his parental leave. Following receipt of the Complaint the Delegate commenced an investigation.

2. Kosinski commenced employment with Beamrider on June 1, 2000 as a retail store installer and continued in his employment advancing to Head Installer until September 30, 2004 at which time he went on parental leave.

3. Kosinski gave Beamrider written notice stating that he would be commencing parental leave on October 1, 2004. On September 29, 2004 Beamrider issue a Record of Employment ("ROE") indicating Kosinski quit his employment and was not returning. Kosinksi went back to Beamrider's office the next day and had the ROE amended to indicate that Kosinski was on parental leave and the return date was unknown.

4. Kosinski was in communication with Beamrider in June, 2005 regarding his return to work. During his absence Kosinski had applied for work with other employers and had taken courses. Beamrider did not have a position for Kosinski and so advised Kosinski.

5. Kosinski alleges that Beamrider contravened Section 54 of the *Act* by not returning him to the position he held, or to employment at all, before his leave. Beamrider contends that Kosinski quit.

6. The Delegate conducted an investigation and issued his Determination November 23, 2005.

7. The Delegate of the Director concluded that Kosinski did not quit his employment and awarded Kosinski $8,482.01 including wages lost during the period of his unemployment, the difference between wages for the first 6 months of new employment, compensation for length of service and vacation pay on these sums. An administrative penalty was imposed under section 29(1) of the *Employment Standards Regulation*, B.C. Reg 396/95 as amended in the amount of $500.

8. Beamrider appeals the Determination of the Delegate alleging that the Delegate erred in law, breached the rules of natural justice, and submits new evidence that it says has become available that was not available at the time the Determination was made.

9. On reviewing the submissions of Beamrider it is apparent that the issues argued concern alleged errors of law in the Determination and not breaches of natural justice.

ISSUES

10. Is there new evidence that has become available that was not available at the time the determination was being made?

11. Did the Director err in law in placing the burden of proof that the complainant quit on Beamrider?

12. Did the Director err in law in finding the complainant did not quit his employment?

LEGISLATION

13. An appeal to the Employment Standards Tribunal is a limited appeal. Section 112(1) of the *Employment Standards Act* restricts the grounds of appeal as follows:

> 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:
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> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

14. In a number of decisions of the Employment Standards Tribunal, panels have adopted the definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). That definition can be paraphrased as finding an error of law where there is:

1. a misinterpretation or misapplication of a section of a statute;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a methodology that is wrong in principle.

15. It is not open to an appellant to appeal factual findings, findings of mixed fact and law (except in circumstances listed above), or to introduce new evidence on appeal that was available at the time the determination was made.

16. The Determination under appeal also concerns the interpretation and application of section 51 and 54 of the *Employment Standards Act*. A birth father, birth mother or adoptive parent is entitled to up to 37 consecutive weeks of unpaid parental leave. Following such leave the employer must place the employee in their previous position or a comparable position.

17. Section 51(1) reads as follows:

> 51 (1) An employee who requests parental leave under this section is entitled to,
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> (a) for a birth mother who takes leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 35 consecutive

weeks of unpaid leave beginning immediately after the end of the leave taken under section 50 unless the employer and employee agree otherwise,

(b) for a birth mother who does not take leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event,

(c) **for a birth father, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event**, and

(d) for an adopting parent, up to 37 consecutive weeks of unpaid leave beginning within 52 weeks after the child is placed with the parent.

18. Section 54 reads as follows:

54 (1) An employer must give an employee who requests leave under this Part the leave to which the employee is entitled.

(2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,

(a) terminate employment, or

(b) change a condition of employment without the employee's written consent.

(3) As soon as the leave ends, the employer must place the employee

(a) in the position the employee held before taking leave under this Part, or

(b) in a comparable position.

(4) If the employer's operations are suspended or discontinued when the leave ends, the employer must, subject to the seniority provisions in a collective agreement, comply with subsection (3) as soon as operations are resumed.

1995, c. 38, s. 54.

19. If an Employer contravenes its obligations under Section 54 then Section 79(1)-(4) authorizes a “make whole” remedy: *Re W.G. McMahon Canada Ltd.*, BC EST # D386/99. Section 79(1)-(4) provides as follows:

79 (1) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may require the person to do one or more of the following:

(a) comply with the requirement;

(b) remedy or cease doing an act;

(c) post notice, in a form and location specified by the director, respecting

(i) a determination, or

(ii) a requirement of, or information about, this Act or the regulations;

(d) pay all wages to an employee by deposit to the credit of the employee's account in a savings institution;

(e) employ, at the employer's expense, a payroll service for the payment of wages to an employee;

(f) pay any costs incurred by the director in connection with inspections under section 85 related to investigation of the contravention.

> **(2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:**
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> **(a) hire a person and pay the person any wages lost because of the contravention;**
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> (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
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> (c) pay a person compensation instead of reinstating the person in employment;
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> (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.
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> (3) In addition to subsection (1), if satisfied that an employer has contravened section 39, the director may require the employer to limit hours of work of employees to the hours or schedule specified by the director.
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> (4) The director may make a requirement under subsection (1), (2) or (3) subject to any terms and conditions that the director considers appropriate.

NEW EVIDENCE

20. The submission of Beamrider includes extracts from a website from a company advertising training services, the "Automotive Training Centre". Kosinski took a course of training at this company during his absence from the company while, he says, he was on parental leave. Beamrider also says that Kosinski applied for other positions while absent.

21. Section 112(1)(c) of the *Act* provides a right of appeal where a party has "evidence has become available that was not available at the time the determination was being made". In deciding whether the Tribunal should receive new evidence on appeal the Tribunal noted in *Re Merilus Technologies Inc.*, [2003] BC EST #D171/03 that it has been guided by the test applied in civil courts for admitting fresh evidence on appeal.

22. The test for admitting fresh evidence on appeal involves the consideration of the following factors: (1) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing, (2) the evidence must be relevant to a material issue in the appeal, (3) the evidence must be credible in the sense that it is reasonably capable of belief, and (4) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on a material issue.

23. The evidence sought to be led could be described as, to some degree, confirmatory of the evidence provided during the investigation. Such evidence in general is not to be admitted if it was available to be presented earlier during the investigation: *Re Big Olive Taverna*, BC EST # D440/00.

24. With respect to taking a course at the Automotive Training Centre, this information was before the Delegate and is referred to in his reasons. The Delegate notes "Mr. Kosinski took a course at the Automotive Training Centre in Richmond". With regard to searching for other employment, Beamrider produced some information regarding this at the hearing. The Delegate discusses the issue as follows:

> "Mr. Kalsi states that sometime during his leave, Mr. Kosinski informed him that he was going to school and would be looking for work elsewhere. However, he has not provided any evidence to support this assertion. Further, even if I accepted that this conversation took place, there are no

> provisions in the Act that would prohibit an employee from conducting a job search or attending school during a parental leave".

25. Thus, the new evidence sought to be introduced is actually just confirmatory of the evidence that was already before the Delegate. This evidence should not be admitted as it is not new evidence that wasunavailable at the time of the investigation.

26. With regard to the job search, if the Delegate was correct in his treatment of this evidence – that an employee is not prevented from conducting a job search during parental leave – then the "new evidence" was not germane to his decision in any event.

27. In my opinion this ground of appeal is without merit.

DID THE EMPLOYEE QUIT?

28. The main issue in the complaint was whether Kosinski quit his employment. The Delegate accepted that Kosinski requested parental leave and went on parental leave commencing October 1, 2004. At that time an ROE was issued indicating that Kosinski quit and was not returning. Kosinski returned and asked that the ROE be amended to show that he was on parental leave with an unknown date of return.

29. The ROE was in evidence before the Delegate. Under the heading "Expected Date of Recall" the box "not returning" was checked but then crossed out and box "unknown" is checked and the change initialed. Under the heading "Reason for Issuing this ROE" the code originally entered has been crossed out and the code "F" entered and the change initialed. Beamrider's witness, Jim Kalsi ("Kalsi"), acknowledged that this took place.

30. According to both parties during the course of his leave Kosinski contacted Kalsi requesting another ROE which would have entitled him to Employment Insurance benefits. Kalsi says that Kosinski informed them that he was not returning to work as he was going to school and would be looking for work elsewhere. Kosiniski denies that he said he would not be returning to work. Kalsi says that Beamrider did not issue Kosinski a new ROE since Kosinski was not being laid off.

31. During the course of his parental leave Kosinski took the Fixed Operations Specialist program at the Automotive Training Centre in Richmond. This was a four month course. Kalsi also asserted that Kosinski had told him he was seeking employment elsewhere but Kosinski denied this.

32. In June Kosinski contacted Kalsi in order to arrange for a return to work. Kalsi said there were no openings at that time. Another employee of Beamrider, Mr. Murakami later offered Kosinski a position in another store but that offer was rescinded after Murakami learned that the position had been staffed with a new hire.

33. After summarizing this evidence the Delegate concluded that Kosinski's actions did not demonstrate an intent to quit nor did he perform any act inconsistent with his further employment with Beamrider. In the context of the issue of whether Kosinski's actions constitute quitting employment, the Delegate clearly found that they did not amount to quitting his employment with Beamriders.

34. It is apparent that in reviewing this series of events that the Delegate preferred the evidence of Kosinski over that provided by Beamrider on several crucial points. The Delegate preferred Kosinski's evidence

over that of Kalsi regarding the meeting where Kosinski asked that the ROE be amended. The Delegate preferred the evidence of Kosinski regarding the course.

35. Beamrider argues that in looking for work elsewhere Kosinski's actions were inconsistent with his continued employment. An employer may, understandably, react unfavourably to an employee seeking alternative employment. To constitute a repudiation of the contract of employment, however, the actions of the employee must be incompatible with the continued employment relationship: *Zaraweh v. Hermon, Bunbury &Oke*, [2001] B.C.J. No. 1896, 204 D.L.R. (4th) 677 (C.A.).

36. This issue has arisen before. It has been held that looking for work elsewhere during employment is not grounds for discharge, i.e., it is not inconsistent with the employment relation and is not a repudiation of the employment relation: *Richards v. Trail District Chamber of Commerce* [1987] B.C.J. No. 1316; *Mosher v. Twin Cities Co-operative Dairy Ltd.* (1984), 63 N.S.R. (2d) 252.

37. In my opinion the Delegate considered the evidence and came to the conclusion that Kosinski did not quit. Other conclusions may have been available based on the evidence but that does not constitute an error of law.

38. The weight of evidence is a matter for the Delegate and is a question of fact, not law: *Ahmed v. Assessor of Vancouver* (1992) BCSC 325; *Provincial Assessors of Comox, Cowichan and Nanaimo v. Crown Zellerbach Canada Ltd.* (1963) 42 WWR 449 at page 471. It is only where a conclusion reached is one that could not reasonably be entertained that an error of law is shown: *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).

39. In considering this issue on appeal it is not necessary that the Tribunal necessarily agree with the conclusion of the Delegate. It is only if no reasonable person, acting judicially and properly instructed as to the law, could have come to the determination: *Delsom Estates Ltd. v. Assessor of Area 11 – Richmond / Delta* (2000), SC 431 (B.C.S.C.).

40. The Delegate did not err in law.

BURDEN OF PROOF

41. The term "burden of proof" is ambiguous, on occasion it is used to mean that there is some evidence of a fact, and in another context it is used to mean that a fact has been proven in evidence.

42. The term "evidential burden" refers to the responsibility a party has to ensure that there is sufficient evidence of a fact or an issue on the record to pass the threshold test for that fact or issue. As noted by Chief Justice Dickson in *R. v. Schwartz*, [1988] 2 S.C.R. 443 at p.467 "The party with an evidential burden is not required to convince the trier of fact of anything, only to point out evidence which suggests that certain facts existed". The incidence of the evidential burden obliges a party to adduce evidence or point to evidence on the record that raises an issue.

43. The term "legal burden of proof" refers to the party that has an obligation to prove or disprove a fact or issue to the appropriate standard. Failure to convince the trier of fact to the appropriate standard means that the party will lose on that issue: *R. v. Laba*, [1994] 3 S.C.R. 965. The incidence of the legal burden obliges a party to prove a fact.

44. Beamrider argues that the Director erred in placing the burden of proof on Beamrider to prove that the complainant quit. Beamrider quotes from the Delegate's reasons that "the burden is on the employer to prove that an employee was not terminated or a condition of employment was not changed without the employee's consent because the employee was on a leave provided for under the *Act*".

45. In the course of its argument Beamrider references two decisions of this Tribunal, *Zoltan Kiss*, BC EST #D091/96 and *Maple Ridge Travel Agency Ltd.*, BC EST #D273/99.

46. In its argument it is clear that Beamrider's position is that the Delegate erred in placing the legal burden of proof on Beamrider to prove that Kosinski quit. In support of this position it references this passage in *Maple Ridge*:

> However, in my view, the onus is on the employee to establish that she was dismissed from her employment. The Tribunal's decision in *W.M. Schultz Trucking Ltd.*, BCEST #D127/97 may be read to support the proposition that there is an onus on the Employer to prove "the clear and unequivocal facts necessary to support a conclusion that the employee quit his employment". Insofar as there is any dispute with respect to the ultimate burden of proof, I prefer the approach of Mr. Justice Errico of the British Columbia Supreme Court in *Walker v. International Tele-Film Enterprises Ltd.*, <1994> B.C.J. No. 362 (February 18, 1994), at page 17-18:
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>> "The onus of proof is on Mr. Walker to prove that he was wrongfully dismissed. This is not a case where the defendant employer is raising justification. The issue is whether Mr. Walker left the company on his own volition or whether he was dismissed. Counsel for Mr. Walker cited a decision of the Nova Scotia Court of Appeal in *McInnes v. Ferguson*, (1900), N.S.R. p. 517. This decision holds that the onus lay on the employer where the issue was whether or not the employee left voluntarily, but there is no judicial discussion about it. I have considerable difficulty with this proposition which shifts the onus of proof to the defendant. This is a concern I share with Prowse J., as she then was, who in *Osachoff v. Interpac Packaging Systems Inc*., unreported, Vancouver Registry, April 21st 1992 C910344, discussed this decision and declined to follow it, as I do. In that case, as in this, the onus is on the plaintiff to establish on the balance that he was dismissed."
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> In England, Christie et al., *Employment Law in Canada* (Butterworth, 3rd ed.), the learned authors comment as follows, at page 13.7:
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>> "... Since, in a wrongful dismissal action, the burden of proving that he or she was dismissed is on the employee, the employee must prove that he or she has not resigned if the employer succeeds in raising a *prima facie* case of a quit."

47. I agree with that passage and the reasoning behind it, however, the Delegate in his Determination relied on Section 126(4) of the *Employment Standards Act* only to determine whether there was a contravention of Part 6 of the *Act*. Section 126(4) provides that:

> **(4) The burden is on the employer to prove that,**
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> (a) in the case of an alleged contravention of section 9 (1), an employee is 15 years of age or older,
>
> (b) in the case of an alleged contravention of section 9 (2), an employee is 12 years of age or older, or
>
> (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.
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> 1995, c. 38, s. 126; 2003, c. 65, s. 13.

48. The Delegate did not rely on Section 126 in the context of determining whether Kosinski quit. The Delegate relied on Section 126 in the context of determining whether Beamrider had contravened Section 54 of the *Act*. The Delegate had already concluded that Kosinski had not quit based on his analysis of the evidence. The passage quoted by Beamrider as constituting an error is part of the analysis of whether there has been a breach of Section 54. The following sentence in the analysis, not quoted, makes this clear: "This onus is clearly stipulated under Section 126 of the *Act*".

49. In my opinion the Delegate did not err in relying on Section 126 in the context of determining whether there was a breach of section 54.

SUMMARY

50. The new evidence sought to be introduced is not evidence that was unavailable at the time of the hearing. The Delegate did not err in law in determining that the employee did not quit. The Delegate did not err in law in relying on Section 126 in the context of determining whether there was a breach of Section 54 of the *Act*.

ORDER

51. The appeal is dismissed and pursuant to section 115 of the *Act*, the Determination of the Delegate is confirmed.

John Savage
Member
Employment Standards Tribunal