Employment Standards TRIBUNAL

An appeal

- by -

Sheila Justol
("Justol")

- 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: Robert Groves

FILE No.: 2009A/020

DATE OF DECISION: June 3, 2009

DECISION

OVERVIEW

1. This is an appeal by Sheila Justol ("Justol") challenging a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards dated January 26, 2009. Ms. Justol had filed a complaint under section 74 of the *Employment Standards Act* (the "*Act*") alleging that her former employer, IBB International (Canada) Ltd. ("IBB") had contravened the *Act*, *inter alia*, by failing to reinstate her in her position of employment following the conclusion of a maternity leave.

2. IBB argued that Ms. Justol's claim was unfounded. It said the facts, properly interpreted, led to the conclusion that Ms. Justol had abandoned her employment.

3. Following a hearing, the Delegate determined that in the circumstances there was no contravention of the *Act*, and so no wages were owing to Ms. Justol.

4. I have before me Ms. Justol's Appeal Form and submission dated March 2, 2009, the Determination and the Delegate's Reasons for the Determination, a submission from the Delegate in the form of a letter dated March 18, 2009, the record the Director says was before the Delegate at the time the Determination was made, a submission from IBB dated March 30, 2009, and a final submission from Ms. Justol dated April 19, 2009.

5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the *Tribunal's Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. I have concluded that this appeal shall be decided having regard to the written materials I have received, without an oral hearing.

FACTS

6. Ms. Justol was a long term employee of IBB, having commenced to work for the firm in 1996. In February 2007 she commenced a leave, due to a pregnancy. IBB acknowledged that Ms. Justol's period of leave was to be longer than the usual 52 weeks, principally because Ms. Justol had health issues prior to the birth of her child which required her to depart from work earlier than would otherwise have been the case. In the end, she was scheduled to return to work in May 2008.

7. In February 2008 a representative of IBB contacted Ms. Justol to confirm the date of her return to work. At that time, it was agreed that she would return on June 2, 2008.

8. During the course of her investigation, and at the hearing, the Delegate heard from a Tony Malik ("Malik"), an IBB Manager. He said that on April 23, 2008 he telephoned Ms. Justol concerning her return to work on June 2, 2008. Ms. Justol told him she needed to extend her leave to August 5, 2008, for personal reasons. Mr. Malik said he told her that IBB needed Ms. Justol on June 2, 2008 because the person filling her position had left. He also stated he told her that IBB could not hold her position for her until August 5, 2008. At no time during the conversation did he tell her that he would extend her leave.

9. Ms. Justol's interpretation of this conversation appears to have been somewhat different. She understood Mr. Malik to be saying that she would be permitted to return from leave after June 2, 2005, but that if she returned on August 5, 2008 he could not say what position would then be available for her. Later, in cross

examination, it appears that she stated Mr. Malik offered her a new position if she returned to work on August 5, but that he could not say what the new position would be.

10. On April 24, 2008 at 4:11pm Mr. Malik forwarded an email to Ms. Justol which said, in part:

> As per our conversation on April 23, it is my understanding that the arrangement for you to return from your maternity leave was June 2, 2008.
>
> For personal reasons you have asked us if you can return on August 5 2008. While we cannot hold your position open till that time, we value your past dedication to the company Furthermore, are willing to offer you a new position, starting August 5, 2008.

11. Following what appears to have been her receipt of this email, Ms. Justol emailed Tina Martin ("Martin"), her supervisor at IBB, on April 24, 2008 at 4:49pm, advising that she could not return to work on June 2, 2008, as originally planned, because her childcare provider was leaving the country and would not return for a period of months. She then said:

> I had a conversation with Tony Malik he said that he cannot hold my position till that time. He offer me a new position on Aug. 5, 2008. I phoned him back to know what will be my new position and he cannot say it to me at the moment. Tina, if you know something would you be able to let me know because I don't wanna think for 3 months knowing that I don't really have an open job. I don't wanna come back left hanging...

12. Ms. Justol told the Delegate that a little over a month later, on May 31, 2008, she emailed Ms. Martin advising that she could work two days a week from June 2, 2008 until August 5, 2008. Nothing appears to have come of this suggestion.

13. Ms. Justol did not report for work at IBB on June 2, 2008, or at any time thereafter. Mr. Malik confirmed to the Delegate that if she had returned on June 2, 2008 she would have resumed her work in her previous job.

14. Sometime late in July or early in August 2008 Mr. Malik contacted Ms. Justol to discuss whether she would be taking the new position with IBB previously referenced. By that time, it appears IBB had gone through a re-organization which resulted in Ms. Justol's old position being re-classified at a lower grade of pay. It also appears that the postition was no longer available to her. Mr. Malik subsequently met with Ms. Justol, at which time he informed her that the new position he was offering her would involve similar duties and authority, but that the salary was lower, and the benefits less generous. He also told her that her leave had finished on June 2, 2008 and that she would be rehired as a new employee.

15. At that time, too, Mr. Malik provided to Ms. Justol a copy of a letter that another employee, Sheila Bowman ("Bowman"), had prepared for Service Canada after Ms. Justol did not return from her leave on June 2, 2008. That letter, dated July 31, 2008, stated that on April 23, 2008 IBB had informed Ms. Justol verbally, and in a follow-up email, that her position:

> ...was terminated with immediate effect. Please be advised that our payroll records indicate that the employee was terminated as at April 23rd, 2008...
>
> Given the employee's past service to the company, the Warehouse Manager further advised Ms. Jostol that the Company would be willing to offer her a position as a new employee starting in August 2008 should she choose to accept it...

16. Ms. Justol stated that prior to her receiving the July 31, 2008 IBB letter to Service Canada she was unaware that her employment had been terminated. Once she received this information, and upon hearing that the position being offered to her paid less, and carried fewer benefits, she declined to accept the offer.

17. Later in August 2008 it appears that senior management at IBB contacted Ms. Justol and informed her that the company did not want to lose her as an employee over a differential in pay. She was again offered a new position, but this time at the same rate of pay that she was earning in the position she had occupied prior to her leave. Ms. Justol declined to accept that offer of employment as well.

18. Before the Delegate, Ms. Bowman explained that the statements in the July 31, 2008 letter to Service Canada to the effect that Ms. Justol had been terminated on April 23, 2008 were made in error, and that no specific steps were taken by IBB to record any termination of her employment until early August 2008, at which time Ms. Justol's employment was recorded as having come to an end when she did not report for work on June 2, 2008. Ms. Bowman attributed her errors in the July 31, 2008 letter to her recently having undertaken the human resources function at IBB, her lack of familiarity with the precise meaning of words employed on the job, and her not being informed about what was going on.

19. Mr. Malik said he delivered the July 31, 2008 letter to Ms. Justol to make her aware of IBB's position regarding the August 2008 return date, that he did not understand the contents of the letter relating to termination at the time, and that the statements to the effect that a termination had occurred on April 23, 2008 were incorrect. He also testified that he never told Ms. Justol she had been terminated.

20. While Ms. Justol disputed that the July 31, 2008 letter to Service Canada was prepared in error, she did not challenge Mr. Malik's evidence that he never communicated to her that she had been terminated.

21. IBB's argument to the Delegate was that it had discharged its statutory obligation to permit 52 weeks of leave for Ms. Justol, that it had not agreed to an extension of leave beyond June 2, 2008 for legitimate operational reasons, and that when Ms. Justol did not appear for work on that date she must be deemed to have abandoned her employment. As Ms. Justol was a valued employee, IBB was prepared to re-hire her in a new position commencing August 5, 2008, when Ms. Justol had indicated she might be available, but in the end, Ms. Justol was not prepared to accept that new position.

22. Ms. Justol submitted that IBB terminated her employment on April 23, 2008. She said that termination was inappropriate, as it occurred while she was on leave due to her giving birth to her child.

23. The Delegate determined that Ms. Justol did not return to work at the end of her statutory leave, and that because she was unavailable for work at that time, she had abandoned her position. In the result, the Delegate concluded that there was no contravention of the *Act*, and Ms. Justol was not entitled to compensation.

ISSUE

24. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

25. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *Act*, which reads:

> 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 being made.

26. Subsection 115(1) of the *Act* should also be noted. It says:

> 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

27. Ms. Justol alleges that the Director failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made. I will deal with these grounds in order.

Natural Justice

28. A challenge to a determination under subsection 112(1)(b), which alleges that there has been a failure to observe the principles of natural justice, raises a concern that the procedure followed by the Director and his delegates was unfair. The principles of natural justice mandate that a party must have an opportunity to know the case she is required to meet, and an opportunity to be heard in reply. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.

29. My review of the record and the other material submitted on this appeal has revealed nothing that would support a claim that the Director failed to observe the principles of natural justice. The Delegate conducted a hearing. There is no evidence that Ms. Justol was unaware of the case that IBB would make, or that she was deprived of an opportunity to cross examine IBB's witnesses, to lead evidence of her own, or to make submissions relating to the substance of her complaint.

30. Ms. Justol's appeal under subsection 112(1)(b) of the *Act* has no merit.

New Evidence

31. The Tribunal's right to allow an appeal based on new evidence under subsection 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence could not, with the exercise of due diligence, have been discovered and presented to the delegate during the investigation or adjudication of the complaint and prior to the determination being made. In other words, was the evidence really unavailable to the party seeking to tender it? At the same time, even if the evidence was not unavailable in this sense, the Tribunal may nevertheless consider it if the appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars* BC EST #D570/98).

32. The new evidence Ms. Justol seeks to adduce consists of correspondence which tends to show that the IBB group benefits insurance provider was instructed in early August 2008, it is thought by Ms. Bowman, to terminate Ms. Justol's coverage effective April 23, 2008. Ms. Justol argues that this further supports her assertion that there was no error made in the July 31, 2008 letter to Service Canada, and that it was IBB's intention to dismiss her on April 23, 2008, while she was still on leave.

33. There is nothing about the new evidence which suggests it could not have been made available to Ms. Justol, and therefore to the Delegate, long before the Determination was issued in January 2009. In her submissions, Ms. Justol provides no reasons why she could not have procured the evidence in a more timely way.

34. It is trite to state that an appeal to the Tribunal under the *Act* is not a proceeding *de novo*. Nor was the ground of appeal set out in subsection 112(1)(c) enacted for the purpose of inviting a party dissatisfied with a determination to seek out new evidence that could have been obtained earlier in order to bolster a case that has failed at first instance (see *MSI Delivery Services Ltd.* BC EST #D051/06).

35. I am also of the opinion that the new evidence is not decisive in the sense that, if considered on the merits, it would show that the Delegate came to an erroneous conclusion in determining that IBB did not contravene the *Act* in its dealings with Ms. Justol relating to her return from leave.

36. The Delegate accepted the evidence of Ms. Bowman, and others who testified on behalf of IBB at the hearing, that the July 31, 2008 letter to Service Canada advising that Ms. Justol's employment had been terminated as of April 23, 2008 was prepared in error. That was a finding of fact the Delegate was entitled to make, especially as the Delegate conducted a hearing at which she obtained the benefit of hearing the principal participants examined and cross examined.

37. Ms. Justol challenges this conclusion, but it is important to recall that the appellate jurisdiction the Tribunal now possesses under section 112 does not permit the Tribunal to decide appeals involving alleged errors of fact *simpliciter*. The Tribunal may only vary or cancel a determination, or refer the matter back for consideration afresh, if the error alleged is an error of law. Therefore, errors of fact can only come within the scope of the Tribunal's purview when they amount to errors of law. The occasions on which an alleged error of fact amounts to an error of law are few.

38. In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly

unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST #D028/06).

39. Here, the errors in the July 31, 2008 letter to Service Canada were explained by Ms. Bowman. She was new to the human resources position, and misinterpreted the substance of what had transpired on April 23, 2008. The Delegate accepted that explanation. I cannot say that such a conclusion was irrational, perverse or inexplicable. There was certainly some evidence to support it, especially as all the witnesses for IBB testified that Ms. Justol's employment could not be said to have been terminated until June 2, 2008, when she did not return from leave as scheduled.

40. In my view, the evidence that Ms. Bowman appears to have notified the IBB benefits carrier that Ms. Justol's employment was terminated on April 23, 2008 does not diminish the force of the Delegate's finding. It appears that the communication to the insurance provider occurred at or near the same time that Ms. Bowman wrote the July 31, 2008 letter to Service Canada. As she thought at the time, incorrectly, that Ms. Justol's employment had been terminated on April 23, 2008, it is not surprising that she may have so advised the insurance provider of this fact at the same time as she wrote her letter to Service Canada. The notification to the insurance provider was, therefore, part and parcel of the same error already evidenced in the letter to Service Canada. It does not, in my opinion, detract from the Delegate's conclusion that Ms. Bowman was in error in forming this conclusion, either significantly, or at all.

41. Ms. Justol's appeal under subsection 112(1)(c) cannot succeed.

Error of Law

42. This leaves the question whether it can be said the Delegate made an error of law, so as to ground an appeal by Ms. Justol under subsection 112(1)(a).

43. It is true that Ms. Justol has not specifically raised the question of an error of law under that section in her Appeal Form, or in the submissions she has delivered. Notwithstanding this, however, in order to do justice to the parties to an appeal, most of whom will be unrepresented by legal counsel, it is the practice of the Tribunal to seek to discern the true basis for a challenge to a determination, regardless of the particular box an appellant has checked off on an Appeal Form (see *Triple S Transmission Inc.* BC EST #D141/03).

44. The question of law the Delegate addressed in the Determination was whether IBB complied with its statutory obligations in the context of Ms. Justol's return from maternity leave.

45. The principal obligations of IBB in this regard appear in section 54 of the *Act*, the relevant portions of which read:

> 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.

46. What was the leave to which Ms. Justol was entitled? Subsection 51(4) of the *Act* states that an employee's combined entitlement to leave for pregnancy under section 50, and parental leave under subsection 51, is limited to 52 weeks.

47. There are two exceptions to this stipulation which may, in appropriate circumstances, lengthen the period of leave beyond 52 weeks. First, with respect to the period of pregnancy leave identified in section 50, subsection 50(3) provides that an employee is entitled to up to 6 additional consecutive weeks of unpaid leave if, for reasons related to the birth or the termination of the pregnancy, she is unable to return to work when her pregnancy leave under section 50 ends. Second, regarding parental leave under section 51, subsection 51(2) states that if the child has a physical, psychological or emotional condition requiring an additional period of parental care, the employee is entitled to up to an additional 5 consecutive weeks of unpaid leave, beginning immediately after the end of the parental period of leave provided for in subsection 51(1).

48. Assuming, without deciding, that either subsection 50(3) or subsection 51(2) would otherwise have been applicable in Ms. Justol's case, it is clear that if Ms. Justol can be said to have been requesting an extension of her leave pursuant to either of those provisions from June 2, 2008 to August 5, 2008, the period requested was significantly longer than the 6 or 5 consecutive week extension periods identified in those subsections. That being so, I cannot conclude that either subsection was engaged in the circumstances.

49. Since the Delegate concluded that IBB did not terminate Ms. Justol's employment on April 23, 2008, a finding of fact with which I do not find I can interfere, the question is whether IBB complied with its statutory obligation under subsection 54(3). In the circumstance, the evidence of Mr. Malik, which was not contradicted by Ms. Justol, was that IBB would have placed Ms. Justol in her former position had she returned to work as scheduled on June 2, 2008. She did not do that. In these circumstances, it cannot be said that IBB terminated Ms. Justol's employment because of a pregnancy or a leave, or that it declined to place her in her former position at the end of her leave.

50. The conclusion the Delegate appears to have drawn from Mr. Malik's email to Ms. Justol of April 24, 2008 was that if she did not return to work on June 2, 2008 her old position would no longer be available for her. That meant that if Ms. Justol proposed to return on August 5, 2008, it would not be in the context of a return from leave, but in response to an offer of a new position of employment. Ms. Justol refused to accept the new position of employment that was offered to her in August 2008.

51. Ms. Justol appears to have characterized the communications with Mr. Malik in April 2008 to mean that IBB was agreeing to extend her leave until August 2005. No one who testified on behalf of IBB said that the company was prepared to extend Ms. Justol's leave beyond June 2, 2008. There is no written communication to Ms. Justol which expressly states that was what was happening. The Delegate appears to have concluded that the substance of the communications made to Ms. Justol conveyed the message that if she did not return

to work on June 2, 2008 as scheduled, her old position of employment would come to an end. I am not persuaded that the Delegate in any way erred in law in reaching this conclusion.

ORDER

52. Pursuant to section 115 of the *Act*, I order that the Determination dated January 26, 2009 be confirmed.

Robert Groves
Member
Employment Standards Tribunal