Employment Standards TRIBUNAL

An appeal

- by -

Meredith L. Mitchell

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2005A/54

DATE OF DECISION: May 27, 2005

DECISION

SUBMISSIONS

Meredith Mitchell	on her own behalf
Paul Harvey	on behalf of the Director of Employment Standards
Bradley T. Hara, Hara & Company	on behalf of Curtis Lumber (Sunshine Coast) Ltd.

OVERVIEW

This is an appeal by Meredith Mitchell under Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued March 1, 2005.

Ms. Mitchell worked as a cashier for Curtis Lumber, a hardware and lumber store, from September 10, 2003 until March 20, 2004. Ms. Mitchell alleged that Curtis Lumber had terminated her employment because she was pregnant, and that it had made unauthorized deductions from her pay.

Following an investigation into Ms. Mitchell's complaint, the delegate determined that Curtis Lumber had contravened Section 21 of the *Employment Standards Act* in improperly deducting money from her wages. The delegate concluded that Ms. Mitchell was entitled to wages and interest of $158.90. The delegate also imposed a $500 penalty on Curtis Lumber for a contravention of the Act, pursuant to section 29(1) of the *Employment Standards Regulations.* This aspect of the Determination is not under appeal.

The delegate found that Ms. Mitchell's employment had not been terminated, and that Curtis Lumber had not changed a condition of her employment because she was pregnant. The delegate found no contravention of either section 63 or 54 of the *Act.*

Ms. Mitchell contends that the Director erred in law in concluding that her employment had not been terminated, and that the Director failed to observe the principles of natural justice in making the Determination.

Although Ms. Mitchell was not certain whether an oral hearing was required, I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUE

1. Did the delegate err in law in concluding that Curtis Lumber had not terminated Ms. Mitchell's employment or changed a condition of her employment without her written consent because of her pregnancy?

2. Did the delegate fail to observe the principles of natural justice in making the Determination?

THE FACTS AND ARGUMENT

The facts relevant to the issues under appeal are as follows.

Ms. Mitchell began working for Curtis Lumber in September 2003. She worked five days per week, eight hours per day.

In January 2004, Ms. Mitchell became pregnant. She anticipated going on pregnancy leave on or about October 8, two weeks prior to her due date. In early March, Ms. Mitchell provided Curtis Lumber with a note from her doctor indicating she was experiencing complications with her pregnancy, and advising her to reduce her hours of work. Curtis Lumber reduced Ms. Mitchell's shifts to two (days) per week.

Ms. Mitchell was scheduled to work March 20 and 21, 2004. She left work on the 20th after working for two hours because of illness. Ms. Mitchell asserted that she reported her illness to her supervisor on March 20th, and that he encouraged her to go home after she discussed her situation with her doctor. She also asserted that although she had arranged for a co-worker to cover her March 21st shift, the store manager later cancelled that individual's shift. Curtis Lumber claimed that Ms. Mitchell did not notify the store management that she was unable to work her shift on March 21st.

Ms. Mitchell alleged that, in a telephone conversation on March 22, her boss, David Kyle, told her she could no longer be relied upon, that she would be laid off due to her pregnancy, and that her Record of Employment would be sent to her. She contended that she was never told that she could return to work once her pregnancy-related illness had passed, and that Mr. Kyle did not correct her when she claimed she had been fired unfairly.

On March 24, 2004, Ms. Mitchell telephoned the Curtis Lumber head office to discuss the company's policy on pregnant workers, and that she was asked what Curtis Lumber was to do if she could not work five days per week. Ms. Mitchell further alleged that she advised Curtis Lumber she would be contacting "Human Rights and Employment Standards", and, two hours later, received a telephone call from Mr. Kyle asking her to return to work. After considering the offer, she advised Mr. Kyle that she would not be returning because he had already terminated her position. In her submissions to the delegate, Ms. Mitchell stated "I knew that what had occurred was wrongful dismissal and was concerned that accepting his offer could negate any action on my part if management again acted in this manner."

Ms. Mitchell's Record of Employment (ROE), dated March 29, 2004, indicated the reason for issuing the notice was "K", or "Other". The expected date of recall was "unknown".

In its first submission to the delegate in response to Ms. Mitchell's complaint, dated August 6, 2004, Curtis Lumber contended that it had become apparent Ms. Mitchell was unable to work a reduced work week, and decided to lay Ms. Mitchell off "until such time as her health improved to the point she could at least work her reduced number of shifts". It further indicated that

> Ms. Mitchell did not take kindly to the layoff, and seemed unable to understand our position, or the opportunity and reduced risk to her pregnancy that the layoff afforded her…. We considered the layoff temporary until such time as her health would allow her to work at least the 2 days per week…

In a submission dated October 8, 2004, Curtis Lumber's counsel indicated that the reason Ms. Mitchell was laid off was because of her failure to follow company policy regarding staffing changes.

In a letter which is undated but which accompanied counsel's October 8 submissions, Mr. Kyle wrote, in part, as follows:

> Ms. Mitchell was aware that when leaving a shift due to sickness, she is required to advise the supervisor on the floor….Her failure to follow the company policy was the reason she was laid off, not fired.
>
> I also deny telling Ms. Mitchell that her doctor's note has (sic) anything to do with anything. She was clearly having difficulty accepting her lay-off. I did call her subsequently, and told her that she was a valued employee and that there had not been any complaints regarding behaviour. I offered to let the matter pass and rescind her lay-off notice.

Following a review of the parties' submissions, the delegate found that Ms. Mitchell had presented no evidence in support of her submission that she had been dismissed because of her pregnancy. He relied on the ROE submitted by Curtis Lumber that indicated Ms. Mitchell was on a lay-off status, and concluded that there was no evidence Ms. Mitchell's employment had been terminated. The delegate also found that Ms. Mitchell had been given the opportunity to return to work almost immediately after being laid off once the employer determined that Ms. Mitchell "was not taking this lay off well".

In a submission to the Tribunal on May 19, 2005, after the deadline for submissions had passed, the delegate explained that he interpreted the ROE as indicating a layoff, although there is no code corresponding to that status. However, he also determined that there was no shortage of work.

In his analysis of section 54, the delegate stated that this section did not protect a pregnant employee from all issues that arose out of the employment relationship. He concluded that Ms. Mitchell's employment had not been terminated. Although the decision is somewhat unclear in this respect, it appears the delegate accepted that Ms. Mitchell had been laid off on a temporary basis for breaching a policy regarding a shift change. In his May 19, 2005 submission, the delegate indicated that the Determination failed to indicate that he accepted Ms. Mitchell had her supervisor's permission to leave work early on March 20th , but that she had breached the policy regarding the shift change for the following day.

The delegate also found that Ms. Mitchell's hours of work had been reduced at Ms. Mitchell's request, supported by her doctor's note, concluding that the conditions of Ms. Mitchell's employment had been changed with her consent.

The delegate found that Ms. Mitchell's inability to work due to serious pregnancy-related health issues supported a temporary layoff of her employment:

> To not do so could have caused harm to the unborn child and harm to the mother. While there is some difference in employer statements concerning whether Mitchell was laid off in part or not at all for serious health concerns I view this as being an area of at the very least of some employer concern.

ARGUMENT

Ms. Mitchell contends that the delegate erred in concluding she had breached company policy. She also argues that, even if she did breach a policy, the delegate erred in finding that Curtis Lumber had grounds to lay her off on a temporary basis for such breach. She contends Curtis Lumber had no company policy

manual or, if it did, she was not aware of its contents. She states she was never warned about her conduct, and that Curtis Lumber had no other reason to discipline her.

Further, Ms. Mitchell contends that temporary lay offs arise in situations in which there is insufficient work for an employee, which was not the case with Curtis Lumber. She says that Curtis Lumber had no justification for laying her off.

The delegate argues that, if Ms. Mitchell had not breached company policy, there was no reason she did not return to work from a lay off when the employer asked her to. He argues there was no evidence Ms. Mitchell had been dismissed.

Counsel for Curtis Lumber argues that Ms. Mitchell fails to set out any evidence that the delegate made a palpable and overriding error based on the information before him. He further argues that Ms. Mitchell has failed to provide any evidence the conclusions arrived at by the delegate were unsupported by the evidence before him.

ANALYSIS AND DECISION

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

Natural Justice

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.

Ms. Mitchell does not allege that the delegate failed to ensure her right to be heard. She says that she hopes that "a reappraisal of the facts will provide a fairer determination, one that does not contain as many errors of law and reflects, in a substantial way, natural justice".

Ms. Mitchell made submissions on her complaint, and was given the opportunity to respond to the employer's submissions. I am unable to find that the delegate did not afford her a fair opportunity to be heard. The fact that Ms. Mitchell disagrees with the decision does not equate to a failure of natural justice, and I find no basis for this ground of appeal.

Errors of Law

I find that the delegate made a number of errors of law, and allow the appeal. I have decided that the matter must be referred back to the Director for either a re-investigation or a rehearing.

Section 54(2) of the *Act* provides that an employer must not, because of an employee's pregnancy…

(a) terminate employment, or

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

Section 126(4) provides that the burden is on the employer to prove that

…

(c) …an employee's pregnancy…is not the reason for terminating the employment or for changing a condition of employment without the employee's consent.

Based on the record before me, it is evident that the delegate did not consider the provisions of section 126(4). He concluded that Ms. Mitchell "provided no corroborating or other key evidence in support of her contention she had been dismissed. Her evidence was based almost entirely on allegations." I find that the delegate erred in law in placing an evidentiary burden on Ms. Mitchell to demonstrate that her employment had been terminated because of her pregnancy. The *Act* requires that Curtis Lumber discharge the burden of establishing that she was not. On this basis alone I would allow the appeal. However, I have determined that the delegate made other errors of law which fortify my decision to refer the matter back to the Director for further consideration.

Curtis Lumber advanced two conflicting reasons for "laying off" Ms. Mitchell. The first reason, contained in Curtis Lumber's August 6 letter, was that it was concerned about her health, the second version, contained in Mr. Kyle's October 8 submission, was that she had failed to follow company policy.

The delegate determined that Ms. Mitchell's employment had not been terminated. Based on the delegate's May 19, 2005 submission, it appears that he accepted Curtis Lumber's submission that Ms. Mitchell had been "laid off" because of her "failure to follow company policy" in the matter of her breach of policy regarding a shift change on March 21st. There was no evidence before the delegate that Curtis Lumber had any company policies, much less one on shift changes. The first assertion that Ms. Mitchell had breached a company policy was contained in Curtis Lumber's October submission, and was unaccompanied by any evidence of either the existence of a company policy or Ms. Mitchell's knowledge of it.

Not only did the delegate accept that Curtis Lumber had a company policy on shift changes without any evidentiary foundation, he also concluded, on the basis of conflicting evidence, that Ms. Mitchell had breached that policy.

The delegate further accepted that Curtis Lumber had laid Ms. Mitchell off on a temporary basis for that breach. Although the delegate does not expressly say so, it appears that he accepted that a temporary lay off was an appropriate form of discipline for an otherwise good employee's breach of a company policy, without a prior warning. In my view, this conclusion is legally unsupportable.

Furthermore, even if the delegate did not turn his mind to whether a temporary lay off was an appropriate form of discipline, it does not appear that he considered the propriety of a lay off, which is typically used in seasonal industries or segments of the market in which employment fluctuates, in this instance. The evidence disclosed that the store was at its busiest on weekends, and there was no shortage of work for

Ms. Mitchell. Indeed, the evidence suggested that Curtis Lumber was upset with Ms. Mitchell for becoming ill during a busy period and found itself short of personnel for the weekend shifts. The delegate did not assess the credibility of Curtis Lumber's explanation in light of the facts.

The delegate also accepted Curtis Lumber's conflicting assertion that it temporarily laid off Ms. Mitchell because of her pregnancy-related illness. He found that Curtis Lumber was justified in laying her off temporarily because of the potential "harm to the unborn child and harm to the mother". There is no evidentiary basis, medical or otherwise, for the delegate to make such a finding. Furthermore, there was no medical evidence on which Curtis Lumber could have justified making such a decision. The evidence was that Curtis Lumber had a doctor's opinion that Ms. Mitchell could work two days per week. There was no medical evidence that a temporary lay off would "reduce the risk to her pregnancy", or that Curtis Lumber sought any medical evidence as to whether Ms. Mitchell could continue to do so.

Even if Curtis Lumber believed that it had the ability to unilaterally determine what was in Ms. Mitchell's best interests, the fact that Mr. Kyle offered to "rescind" the layoff notice shortly after it was given raises a serious question of credibility.

It is the employer's burden to establish that Ms. Mitchell was not terminated because of her pregnancy. Given that Curtis Lumber advanced two conflicting reasons for purportedly "laying off" Ms. Mitchell, and that it offered to "rescind" the layoff notice after it became aware Ms. Mitchell was intending to pursue a complaint with either the Human Rights Tribunal and or the Employment Standards Branch, in my view, issues of credibility had to be addressed. The delegate did not attempt to analyze the conflicting reasons Curtis Lumber gave for issuing Ms. Mitchell's "layoff" notice, nor did he make any findings on the credibility of Curtis Lumber's witnesses.

The delegate did however assess Ms. Mitchell's credibility. He considered the words Ms. Mitchell used in referring to her employment status, noting that she indicated initially that she had been "laid off", and later alleged that she had been "let go" or "fired". He concluded that this "discrepancy" "called into question the very foundation of her complaint".

With respect, I find little distinction between being "laid off", "fired", and "let go". In common parlance, all those terms are tantamount to the term "termination" used in the *Act*. Furthermore, I note that, in the details of her initial complaint, Ms. Mitchell wrote that she had been "fired". That is what Ms. Mitchell believed had happened to her, whatever terminology she subsequently used to describe that.

Section 54(2) provides that an employer must not, because of an employee's pregnancy, change a condition of employment without the employee's written consent. The delegate decided that there was no change in Ms. Mitchell's employment because Ms. Mitchell "asked for and was to be afforded reduced work week supported by her doctor's medical note". There was no evidence before the delegate that Curtis Lumber had Ms. Mitchell's written consent to temporarily lay her off, or change a condition of her employment because of her pregnancy related illness.

I conclude that the delegate erred in his analysis of the requirements of section 54, and allow the appeal.

ORDER

I Order, pursuant to section 115 of the Act, that the matter be referred back to the Director for re-investigation or a hearing on the merits.

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Carol L. Roberts
Member
Employment Standards Tribunal