

An appeal

- by -

Lisa M. Blackwell

- 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: Carol L. Roberts

FILE No.: 2008A/76

DATE OF DECISION: September 8, 2008

DECISION

SUBMISSIONS

Lisa Blackwell	on her own behalf
Ed Wall	on behalf of the Director of Employment Standards
Dale Donaldson	on behalf of Mallard's Source for Sports

OVERVIEW

1. This is an appeal by Lisa Blackwell, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued May 28, 2008.
2. Ms. Blackwell worked for Mallard's Ski & Sport Ltd. carrying on business as Mallard's Source for Sports ("Mallard's") for 12 years. On June 7, 2007, she complained that Mallard's had contravened section 54 of the Act by altering her terms and conditions of employment because of her pregnancy.
3. The Director's delegate investigated Ms. Blackwell's complaint and determined that section 54 had not been contravened and determined that no further action would be taken.
4. Ms. Blackwell contends that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. She also says that evidence has become available that was not available at the time the Determination was being made.
5. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal's Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination

ISSUE

6. Whether the delegate erred in determining that Mallard's had not altered the terms and conditions of her employment because of her pregnancy and finding no contravention of the Act.

FACTS AND ARGUMENT

7. As found by the delegate, the facts are as follows.
8. Mallard's operates sporting goods stores in Castlegar and Nelson. Ms. Blackwell became the manager of the Castlegar store in 1998. In December 2002, she announced her pregnancy and on May 5, 2003, left on sick leave prior to commencing pregnancy and parental leave. She concluded her parental leave on July 24, 2004. Ms. Blackwell became pregnant again in 2005 and left Mallard's on pregnancy related medical

issues on December 29, 2005, followed by pregnancy and parental leave. She returned to work following her second pregnancy one half day per week in October 2007 and began to discuss her permanent return in January, 2007. She returned to work on April 16, 2007 and quit on June 3, 2007, filing her complaint four days later. She alleged that she was a store manager when she left on her second pregnancy leave and that she was not a manager on her return to work.

9. During Ms. Blackwell's first pregnancy leave, Mallard's hired Nathan Heddle to manage the store. Upon Ms. Blackwell's return, she believed she was a co-manager of the store with Mr. Heddle. Mr. Heddle quit his employment in October, 2005.
10. When Ms. Blackwell began to negotiate her return to work after her second pregnancy, she alleged that the owners, Mr. and Mrs. Donaldson told her she could not return to work full time because, as a mother with two small children, they were concerned she would "burn out". Ms. Blackwell alleged that Mr. Donaldson told her she would only be permitted to work three days per week and that she could not be the manager. She also alleged that, two weeks before she was to return to work, the new manager, Brent Heaven, told her she would be scheduled for 12 hours per week. Ms. Blackwell took a part time job at Safeway in March 2007 because she felt she needed more work than what Mallard's had offered her.
11. Ms. Blackwell returned to work three days per week on April 16, 2007.
12. Ms. Blackwell said that when she returned to work she considered herself an assistant manager and took concerns about Mr. Heaven to Mr. Donaldson. She indicated to him that it was impossible to work under Mr. Heaven any longer. Ms. Blackwell said that by June 1, she had "reached her breaking point" because Mr. Heaven was confrontational with her, Mr. Donaldson had not provided her with a clear understanding of her conditions of employment and because she was feeling betrayed and embarrassed. She resigned June 3. In her letter of resignation, she indicated that when she returned to work it was her understanding that Mallard's had required a full time manager and because she had a young family, she appreciated the benefit of working part time and therefore agreed to work 3 days per week. She further indicated that she understood she was returning as an Assistant Manager. Her letter of resignation read in part, as follows:

Since returning to work, I have frequently requested a letter of employment and have not received on. I requested a raise because I have not had one for 6 years – I was flatly denied. I have requested to be enrolled in the benefits program to help with the costs of supporting my family – denied, even though I had dental paid before I left for maternity leave. ...

I cannot work for an employer that refuses to recognize the increased cost of living for my family and I after so many dedicated years of employment. It is within my legal rights to receive a leave of employment for maternity reasons. My job is required to be left open for my return. You chose to replace me in my position of Manager while I was on maternity leave and never gave me the option of returning to the position I held as Manager. The person you replaced me with is dishonest, deceitful, hypocritical and not worthy of my trust and respect. If you had replaced me with someone who is hardworking, honest and a good manager, then there was a chance that the new arrangement may have worked. Under the current circumstances, my conditions of employment are impossible and I am leaving without notice. I would have preferred to leave under better circumstances but my repeated efforts to discuss different matters with you hoping to improve conditions have all been ignored.

13. Mr. Donaldson denied that Ms. Blackwell was Mallard's manager when she left on her second maternity leave and that he was therefore under no obligation to make her manager upon her return. He contended that it was Ms. Blackwell who stated she could not work full day shifts when she returned from her first

maternity leave and that he advised her that she could not be a manager unless she worked full time core hours at the store. Mr. Donaldson said that, as a result, he began paying her an hourly rate equivalent to her former salary if she worked 37.5 hours per week. Ms. Blackwell alleged that it was she who requested an hourly wage in November 2002 after she felt Mr. Donaldson was criticizing her for taking too many sick days. Payroll records indicated that Ms. Blackwell was paid a monthly salary until April 30, 2003 when she left on her first maternity leave.

14. Mr. Donaldson said that Mr. Heddle became the full time store manager after Ms. Blackwell went on maternity leave until he resigned in October, 2005. Mr. Donaldson said that he gave Mr. Heddle and Ms. Blackwell responsibility for separate sections of the store to assist their working relationship. Mr. Donaldson also said that he himself managed the store after Mr. Heddle left since Ms. Blackwell had already announced her plans to leave on her second maternity leave.
15. Mr. Donaldson said he promoted Mr. Heaven to manager in April, 2006. He alleged that Ms. Blackwell was given all the hours of work she wanted upon her return from her second pregnancy leave on April 16, 2007. He said that she had already taken a job at Safeway and that she was scheduled for the shifts she wanted which would fit her Safeway schedule. He also said she could have worked Sundays but chose not to.
16. Mr. Donaldson said that Ms. Blackwell's schedule was the one she wanted and denied that he told her she would "suffer from burn out" if she worked more hours.
17. Employment records showed that Ms. Blackwell worked an average of 25.8 hours per week prior to leaving on her second pregnancy leave and upon her return to work she worked an average of 20.6 hours per week. Mr. Donaldson said that Ms. Blackwell was unable to work on several Fridays due to daycare issues and that any reduced hours were not due to Mallard's unilateral reduction of Ms. Blackwell's hours.
18. The delegate spoke to several witnesses. Laena Brown's evidence was that she worked at Mallard's from October 2004 to July 2005 and that, during that time, Ms. Blackwell shared management duties with Mr. Heddle. Dave Morrison's evidence was that he worked at Mallard's from May 2005 until November 2007 and that Ms. Blackwell was the manager of a portion of the Mallard's store. Mr. Heaven's evidence was that he was hired jointly by Ms. Blackwell and Mr. Heddle, and saw them as co-managers. He said that managerial duties were split between Mr. Heddle, who did the ordering, Ms. Blackwell, who did the scheduling and Mr. Donaldson, who evaluated his performance. He said that Ms. Blackwell was unable to work full time because of daycare issues.
19. Mr. Heaven's evidence was that Ms. Blackwell asked to be scheduled in for evening shifts that accommodated her husband's shifts and her shifts at Safeway. Mr. Heaven's evidence was that Ms. Blackwell never asked to work 40 hours per week nor did she ask for the same hours she worked before she left on maternity leave.
20. Stacey Tarasoff's evidence was that Ms. Blackwell told her she was returning in April and only wanted to work three days per week, Friday evenings, Saturdays and Mondays because those shifts enabled her and her husband to avoid daycare costs. She said that Ms. Blackwell got all the shifts she asked for.
21. Mrs. Donaldson's evidence was that before Ms. Blackwell returned to work, she inquired about evening and weekend shifts because of her difficulty in finding daycare. Mrs. Donaldson told her that working

only evening and weekend shifts was not possible, so Ms. Blackwell worked Fridays from 1 to 9 pm, and later asked to change her hours from 5 to 9 pm. Mrs. Donaldson also said that prior to returning to work, Ms. Blackwell said that she would be taking a job at Safeway because the hours, wages and future prospects were much better than at Mallard's.

22. The delegate also spoke to the deli manager at Safeway's who advised him that Ms. Blackwell contacted her about work in September or October of 2006. She said that Ms. Blackwell was selective in her shifts and did not want to work full time even though it was available because she could not afford the childcare costs. Ms. Blackwell started work with Safeway on March, 2006 and quit at the end of June, 2007.
23. The delegate found that Ms. Blackwell was not a manager at Mallard's when she left on her second pregnancy leave. He accepted Mr. Donaldson's evidence that a manager was required to work full time core hours, which Ms. Blackwell was unable to do. The delegate had regard to Ms. Blackwell's payroll records which demonstrated that she worked less than 26 hours per week and was paid hourly, rather than on a salary basis. He concluded that the change from a monthly to an hourly wage was related to the fact that she was unable to work full time.
24. Although the witnesses identified Ms. Blackwell as a manager, the delegate found it was not unreasonable for employees to view another longstanding employee as a manager. He also noted that the term referred only to the status at Mallard's and found that Ms. Blackwell's employment duties did not fit the definition of manager as defined in the Act. He noted that she did not exercise the authority, independence and discretion of a manager as defined in the legislation. He found her duties to be more akin to a supervisor.
25. The delegate found that the tasks Ms. Blackwell performed after her return from pregnancy leave were very similar to the duties she performed before she left. He noted that she considered herself the "second-in-command" and the "go-to" person when Mr. Heaven was not available. Given that Ms. Blackwell and Mr. Heaven avoided working together, the delegate found that she was the key employee during her shifts.
26. The delegate also found that Ms. Blackwell's conditions of employment were not significantly different from the conditions she enjoyed prior to the second pregnancy leave. He noted that her wage rate remained the same and she worked hours of her own choosing. He found that Mr. Donaldson accommodated her by giving her shifts that met her child care needs, noting that this information was corroborated by the Safeway deli manager, a disinterested party as well as other employees. The delegate found that Ms. Blackwell worked the hours she did due to her family considerations rather than any requirements by Mallard's.
27. The delegate also noted that in her resignation letter, Ms. Blackwell indicated that she agreed to work three days a week "for the benefit of her family". He found that, had she decided to work more than three days a week she would have mentioned being forced to accept fewer hours of work as one of her reasons for quitting.
28. Finally, the delegate noted that the reasons Ms. Blackwell gave for resigning were unaddressed grievances, including a requested by denied raise, being denied enrolment in a benefit plan and allegations of a dishonest worker. He concluded that Ms. Blackwell's belief that she returned to a job different than the one she left was not her reason for terminating her employment. He determined that her primary reason for quitting was that she was not getting a raise and her secondary reason was her inability to work with Mr. Heaven.

29. The delegate found no contravention of section 54.

ARGUMENT AND ANALYSIS

30. 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

31. The burden of establishing the grounds for an appeal rests with an Appellant. Ms. Blackwell must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. What Ms. Blackwell seeks, in her own words, is a “review” of the Determination for a “fair and reasonable determination”. At the outset, I note that the Tribunal has long held that a disagreement with the result, in and of itself, is not a ground of appeal.

32. I have addressed Ms. Blackwell’s submissions as they were presented and under each statutory ground of appeal.

Error of Law

33. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:

1. A misinterpretation or misapplication of a section of the Act;
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 be reasonably entertained; and
5. Exercising discretion in a fashion that is wrong in principle

34. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

35. The Tribunal must defer to the factual findings of a delegate, including the assessment of the credibility of the parties, unless the appellant can demonstrate that the delegate made a palpable or overriding error. In this appeal, Ms. Blackwell has not discharged the burden of demonstrating any material factual errors. Although Ms. Blackwell takes issue with comments the delegate recited in the Determination, particularly about her daycare situation and her work at Safeway, her appeal is essentially a restatement of the issues she presented to the delegate. An appeal is not an opportunity to re-argue a case presented to the delegate. While I find that the delegate made some minor errors, such as an identification of dates, I am unable to find that those errors are material to the conclusion. Ms. Blackwell also asserts that the delegate was

wrong in believing the evidence of other parties and witnesses over her version of events. In the absence of any compelling evidence that the delegate's assessment of the credibility of the witnesses was in error, I decline to interfere with his conclusions.

36. Ms. Blackwell's appeal document does not identify any errors of law. Nevertheless, I have reviewed the delegate's analysis and am not persuaded that he erred in his legal conclusions.

37. Section 54(2) of the *Act* provides that an employer must not, because of an employee's pregnancy or because of maternity or parental leave...change a condition of employment without the employee's written consent. The burden is on an employer to establish that an employee's pregnancy or leave is not the reason for changing a condition of employment without the employee's consent. (section 126(4))

38. Ms. Blackwell continues to advance the argument that she was a store manager prior to going on her second maternity leave and was not given that status upon her return.

39. The *Employment Standards Regulation* defines a manager as

- a) a person whose principal employment responsibilities consist of supervision or direction, or both supervision and directing, human or other resources, or
- b) a person employed in an executive capacity.

40. In *429485 B.C. Ltd. operating Amelia Street Bistro* (BC EST #170/97), the Tribunal said that a conclusion as to whether a person is a manager:

...depends on a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party.

41. The Tribunal has said that, in order to be employed in an executive capacity, the person must have duties that relate to active participation in control, supervision and management of the business.

42. Although some of the staff at Mallard's, as well as Ms. Blackwell herself, may have called Ms. Blackwell a manager, I find no error in the delegate's conclusion that her job duties did not bring her within the statutory definition of a manager. There is no evidence Ms. Blackwell had either sole or primary responsibility for hiring staff. There is no evidence she had the authority, prior to leaving on her second pregnancy leave, to authorize staff to work overtime or to grant them leaves of absences, develop or deliver programs or services, monitor or evaluate projects, prepare, deliver or evaluate marketing plans, establish prices of product or determine who suppliers would be. There is no evidence she actively participated in the control, supervision and management of the company. That was done exclusively by the store owners, Mr. and Mrs. Donaldson. While some key store employees, including Ms. Blackwell had responsibility for ensuring that the stores operated smoothly and had input into scheduling, hiring and product selection at the Castlegar store, the final decision in these areas was the Donaldsons' alone.

43. Therefore, I find no error in the delegate's conclusion that Ms. Blackwell was not a manager when she left on pregnancy leave or upon her return.
44. However, that does not end the inquiry. Whether or not Ms. Blackwell was a manager, Mallard's had a statutory obligation not to change the conditions of her employment without her written consent because of her pregnancy. The delegate concluded that Ms. Blackwell worked less than 26 hours per week before she left on pregnancy leave. Ms. Blackwell agreed that she had consented to a reduced schedule for a period of time and worked three to four days per week. The records confirm that Ms. Blackwell worked part time between her first and second pregnancy leaves, averaging between 50 and 64 hours each pay period. There is no dispute that she was paid an hourly wage which did not change after her first and second pregnancy leaves. The evidence is also that she did not receive health benefits after her first pregnancy leave as the employer's policy did not allow coverage of part time employees.
45. Although Ms. Blackwell argues that she asked to return to work full time after her second pregnancy leave, there is no evidence supporting that assertion. In fact, the evidence is to the contrary. The most Mallards was obliged to do was return her to a three to four days per week schedule. The evidence is that she was given three days per week, at her own request. It was Mr. Donaldson's evidence, supported by several witnesses, that Ms. Blackwell said she did not want to work as many days per week as her daycare costs were too great and that Mallard's accommodated her wishes. The delegate preferred Mr. Donaldson's evidence, and I find there was evidence supporting his conclusion. Ms. Blackwell's letter of resignation states that she agreed to return to work three days per week.
46. In her resignation letter, Ms. Blackwell states that she agreed to return to the position of "assistant manager". Although this description is a somewhat inaccurate one as noted above, it is clear that Ms. Blackwell agreed to work at a position with less seniority than Mr. Heddle. Although Ms. Blackwell contends that her job "status" changed, there is no evidence that Mallard's changed her job duties, rate of pay, benefits or hours of work without her written consent after her return from her second pregnancy leave. While I appreciate that Ms. Blackwell felt that she ought to have received a pay increase for her years of service to Mallard's, that is not an issue that is the subject of regulation under the *Act*.

Natural Justice

47. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
48. The principles include a requirement that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias). The concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" (*Valente v. The Queen*, [1985] 2 S.C.R. 673 at p. 685)
49. As I understand Ms. Blackwell's submission, she contends the delegate was biased against her because, among other things, 1) he took a significant amount of time to render the Determination and issued it only after she complained about him, 2) he did not conduct the investigation fairly in that he did not speak to some people she felt he ought to have spoken to and spoke to others she felt he ought not to have, 3) he did not have regular contact with her but was in frequent contact with the owner, Mr. Donaldson, and 4) he preferred the evidence of some of the witnesses over hers.

50. Section 77 of the *Act* requires that the Director make reasonable efforts to give a person under investigation the opportunity to respond. There is no evidence Ms. Blackwell was not afforded every opportunity to present her case and respond to the employer's submissions. The delegate has an obligation of making findings of fact and assessments of credibility. The mere fact that the delegate preferred Mr. Donaldson's evidence over Ms. Blackwell is not evidence of bias.
51. Further, once a complaint is made, the delegate must investigate it. He has the discretion to speak to any parties he feels may have evidence relevant to that complaint. A complainant cannot direct that investigation and I find no basis for Ms. Blackwell's submission that his discussions with certain parties constitute bias against her.
52. Although Ms. Blackwell complained about the length of time the delegate took to conclude his investigation, she provided no evidence that there was any administrative unfairness or how she was prejudiced, if at all. The record does not indicate why the investigation took as long as it did, but I do not find the delay to be egregious and Ms. Blackwell provided no evidence that the delay in any way prejudiced her.

New Evidence

53. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - the evidence must have high potential 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 the material issue.
54. Ms. Blackwell includes the following "new" evidence with her appeal: 1) statements made by Mr. Heddle and Greg Peterson about her work during the period between her first and second pregnancy leaves, 2) letters of recommendation from previous employers, 3) statements from two daycare providers and 4) her record of employment (ROE) from Safeway.
55. With respect to the first two items, these were clearly available at the time of the investigation and ought to have been provided to the delegate. Letters of recommendation and statements from daycare providers have no relevancy to the issue of whether Mallard's changed a condition of Ms. Blackwell's employment. Although Ms. Blackwell's ROE demonstrates that the delegate's finding that Ms. Blackwell's last day of employment at Safeway was June, 2007 was in error, I find that little turns on this error. I am not persuaded that this "new evidence" would have led the delegate to a different conclusion on the material issue in dispute.

56. I find no merit to Ms. Blackwell's grounds of appeal.

ORDER

57. I Order, pursuant to Section 115 of the Act, that the Determination, dated May 28, 2008, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal