Employment Standards TRIBUNAL

An appeal

- by -

Kim Murphy

- 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.: 2005A/85

DATE OF DECISION: July 6, 2005

DECISION

SUBMISSIONS

Kim Murphy	on her own behalf
Gillian MacGregor	on behalf of the Director of Employment Standards
Kevin McKenzie	on behalf of McKenzie & Company

OVERVIEW

1. This is an appeal by Kim Murphy under Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued April 8, 2005.

2. Ms. Murphy worked as a legal secretary for McKenzie and Company ("McKenzie") for approximately 12 years. Ms. Murphy alleged that McKenzie terminated her employment because she was pregnant, and claimed compensation for length of service. McKenzie contended that Ms. Murphy resigned and that she was not entitled to compensation.

3. The delegate held a hearing into Ms. Murphy's complaint on July 20, 2004. Both parties were represented by counsel. The delegate concluded that the Act had not been contravened, and took no further action.

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

5. Ms. Murphy did not seek an oral hearing, and, based on the written submissions of the parties, I am satisfied that an oral hearing is not required.

ISSUE

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

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

THE FACTS AND ARGUMENT

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

9. Ms. Murphy began working for McKenzie in 1991 as a receptionist. She eventually became a legal secretary to Kevin McKenzie, and was working in that capacity when she took her first maternity leave in 1999. She returned to work in January, 2000. Ms. Murphy and McKenzie agreed Ms. Murphy would work three days per week, and another legal secretary would be hired to also work three days per week. After approximately one year, Ms. Murphy agreed to work five days per week; one day from home, four

days in the office. McKenzie installed a work station at Ms. Murphy's home so that she could perform her work there. Ms. Murphy's salary was $3,800 per month.

10. In May 2002, Ms. Murphy went on her second maternity leave, indicating her intent to return on or about January 10, 2003. In September, 2002, Mr. McKenzie asked Ms. Murphy to come into work to cover an absence. Mr. McKenzie and Ms. Murphy later had a dispute about the amount of money she was to be paid for this work and she did not provide the coverage. In October 2002, Ms. Murphy met with Mr. McKenzie to discuss her return to work. Ms. Murphy did not return to work following that discussion, and in December, 2002, McKenzie hired a legal secretary, Jackie Corrie, to work four days per week.

11. The delegate heard conflicting testimony from the parties about the discussion that took place between Mr. McKenzie and Ms. Murphy.

12. According to Mr. McKenzie, Ms. Murphy told him that she would work a maximum of three days per week for $3,100 per month, and if this was unacceptable to Mr. McKenzie, she would not return. Mr. McKenzie's evidence was that he told Ms. Murphy he required her to be in the office four days per week, but would continue to accommodate her working from home one day per week. According to Mr. McKenzie, this arrangement was not acceptable to Ms. Murphy. Shortly after this discussion, Mr. McKenzie asked Ms. Murphy's replacement if she would like to work four days a week. She said she would. Ms. Murphy subsequently telephoned Mr. McKenzie and said that she had understood he had hired her replacement. Mr. McKenzie's evidence was that he told Ms. Murphy that he would hire a replacement if she would not agree to work more than three days a week. Mr. McKenzie's evidence was that he never said words to Ms. Murphy that would give her any reason to believe she could not return to work. He agreed that Ms. Murphy never told him that she quit.

13. Ms. Murphy's evidence was that Mr. McKenzie told her he no longer wanted her working at home because he thought her two children would interfere with her work. Ms. Murphy testified that Mr. McKenzie suggested that she work two days a week, and that she told him she could not afford to work less than three days per week. Ms. Murphy testified that in November, the bookkeeper, Lynda Williams, told her that her replacement had been offered a permanent, four day a week position, and suggested that Ms. Murphy look for another job. Ms. Murphy said that she understood from that discussion that her employment had been or was going to be terminated. Ms. Murphy then telephoned Ian McKenzie, Kevin McKenzie's father, also a partner in the firm, to tell him she had been fired, and wanted compensation for length of service. Later, she telephoned Mr. McKenzie and told him that she had not quit. He told her that he would be issuing her Record of Employment indicating that she had quit. Ms. Murphy testified that she never had a discussion with Mr. McKenzie about a three day work week, and that Mr. McKenzie never presented that to her as an option. She testified that she was willing to return to work four days in the office and one day at home, but was told that option was not available to her. Although Ms. Murphy said that she and Mr. McKenzie discussed her returning to work two days a week, that option was not financially acceptable to her.

14. The delegate also heard evidence from Ms. Williams, who is Ms. Murphy's second cousin, and was instrumental in getting Ms. Murphy her job. Ms. Williams' evidence was that Ms. Murphy told her repeatedly that she only wanted to return to work three days per week, and that she was under the impression that Ms. Murphy had no intention of returning to work. She testified that Mr. McKenzie told her that he was having difficulty in getting a response from Ms. Murphy as to whether she would be returning to work.

15. The delegate also heard evidence from Jackie Corrie, who testified that Ms. Murphy told her she was going to propose a three day work week to Mr. McKenzie, and asked Ms. Corrie if she would be interested in working three days per week.

16. The delegate noted that there were no witnesses present at the meeting between Ms. Murphy and Mr. McKenzie. The delegate applied the test for assessing the credibility of the parties set out in *Faryna v. Chorney* ([1952] 2 D.L.R. 354 (B.C.C.A.) in assessing their evidence about what occurred.

17. The delegate weighed the evidence, including two letters McKenzie sent to Ms. Murphy on November 29, 2002, and found that it most likely that Ms. Murphy raised the issue of a three day work week with Mr. McKenzie. She found it most probable that Mr. McKenzie offered her work on the same conditions she had before, which was four days at work and one at home, since Ms. Corrie was offered and accepted a four day week. The delegate concluded that Ms. Murphy was offered the same employment terms and conditions as she had prior to going on maternity leave.

18. The delegate reviewed all of the evidence, and found the evidence given by Mr. McKenzie to be the more probable version of events.

19. The delegate applied the test outlined in *Zoltan Kiss* (BC EST #D091/96) to assess whether Ms. Murphy quit or was fired, noting that it was the employer's burden to discharge the onus of proving that the employee had quit. The delegate concluded that Ms. Murphy formed an intention to quit when she was told she could not return on a part time (three days per week) basis, and carried out those intentions in failing to return to work on January 10, 2003.

20. The delegate determined that Ms. Murphy had terminated her employment by repudiation, and was not entitled to compensation for length of service.

ARGUMENT

21. Ms. Murphy says that the delegate erred in law in deciding the case as if it were a "simple severance pay case" rather than a "maternity leave issue".

22. She also submits that the evidence does not support a finding that she quit her employment.

23. Ms. Murphy says that she was denied natural justice as a result of the hearing being 11.5 hours long with unacceptable breaks throughout the day, that there was no time given to her to present a "rebuttal" witness to the employer's "surprise" witness. She further alleges a denial of natural justice as a result of the length of time elapsing between the date of the hearing and the date of the decision.

24. Ms. Murphy's letter of appeal refers to additional matters which do not form grounds for an appeal, including the "aggressive manner" of the employer and the length of submissions. I have not addressed those issues in this decision.

25. The delegate says that there is no difference between a "maternity leave" case and a "severance pay" case apart from a remedy. She submits that there must be evidence of a termination or constructive dismissal before any remedy can be considered. She says that Ms. Murphy attempted to amend her complaint just prior to the hearing, and this was objected to by counsel for the employer. She says that she asked counsel to address that matter by way of written submission. She says that the Director was not limited in providing an appropriate remedy had she found Ms. Murphy's employment been terminated.

26. She submits that all of the issues raised about Ms. Murphy's return to work schedule were addressed in the Determination, that the issue of whether Ms. Murphy quit or fired was considered and decided.

27. The delegate says that the hearing was in fact 8.5 hours, and all the breaks were for appropriate reasons.

28. The delegate says that Ms. Murphy does not identify who the "surprise" witness is, and that her counsel did not object to any witnesses, or ask for a recess.

29. The delegate submits that Ms. Murphy simply disagrees with the result of the decision, and seeks a re-hearing of the evidence. She contends that Ms. Murphy has not demonstrated an error of law or a denial of natural justice, and seeks confirmation of the Determination.

30. McKenzie argues that the delegate's findings that Ms. Murphy quit her employment were findings of fact that are amply supported by the evidence, and do not constitute errors of law which may be appealed to the Tribunal. McKenzie contends that Ms. Murphy is seeking to re-argue the facts, a remedy which is not available to her under section 112(1).

31. McKenzie further submits that the delegate did not attempt to treat the case as a severance pay case rather than a maternity leave issue. Rather, it says that the delegate concluded that Ms. Murphy quit when McKenzie did not agree to change the terms of Ms. Murphy's employment.

32. McKenzie says that Ms. Murphy was represented by counsel who he did not object to the length of the hearing or any witnesses. McKenzie submits that, when it was apparent the evidence would not be concluded by 5:00 p.m., all parties agreed that the hearing would resume after a dinner break. McKenzie further says that Ms. Murphy's counsel did not object to any evidence called by the employer, nor did he seek to call rebuttal evidence.

33. Ms. Murphy's reply essentially repeats her arguments in support of her appeal.

ANALYSIS AND DECISION

34. The burden is on Ms. Murphy, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. The Tribunal has consistently said that an appeal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the hearing.

35. 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

36. The analysis will address the two grounds of appeal separately, dealing first with the issue of whether question of whether the Director failed to observe the principles of natural justice, and secondly, whether the Director made any reviewable error in concluding that Ms. Murphy quit her employment.

Natural Justice

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

38. Ms. Murphy was represented by counsel. There is no evidence there was a "surprise" witness, or that she was denied a full opportunity to ask questions of any witness or respond to any evidence presented by that witness. Ms. Murphy was represented by counsel, and there is nothing in the record that suggests any objections were taken to any evidence, nor any requests for an adjournment.

39. There is no evidence the length of the hearing constitutes a denial of natural justice. Indeed, it appears that the manner in which the hearing took place was done with the consent of all parties and to accommodate their interests.

40. The evidence is that final submissions were submitted to the delegate on August 13, 2004. Although a delay of almost eight months between the date of the hearing and the date of the decision is disconcerting, the delegate is under no statutory duty to issue a decision within a specific time frame. There is no evidence that the delay in any way prejudiced Ms. Murphy, or otherwise affected her ability to have a fair hearing.

41. I find no merit to this ground of appeal.

Errors of Law

42. In *Waldrif* (BC EST #D 330/03) the Tribunal said as follows:

> The Act does not allow an appeal to be based on an error on the facts alone. The Tribunal has recognized, however, that that in some circumstances errors of fact can be considered an error of law where there is no evidence to support the findings of fact made or a view of the facts has been taken that cannot reasonably be entertained based on the evidence that was before the Director (see *Gemex Developments Corp. -and- Assessor of Area #12 - Coquitlam*, [1998] B.C.J. No. 2275 (BCCA).
>
> The Tribunal has recently addressed the scope of review in the context of appeals based on error of mixed law and fact (see *Britco Structures Ltd*., BC EST #D260/03). In that decision, the Tribunal concluded that errors of mixed law and facts which do not contain extricable errors of law are not reviewable under Section 112 of the Act.
>
> In *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc*., [1997] 1 S.C.R. 748, it was said that questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

43. There are two sections of the *Act* at issue. The first, section 63, establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee has quit or retired.

44. The second section is 54(2), which 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.

45. 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.

46. The primary issue before the delegate was whether Ms. Murphy quit her job, or whether McKenzie terminated her employment, either for reasons of her pregnancy or other reasons. That issue was relevant for making determinations under each of these sections.

47. The delegate heard the oral evidence of the parties and witnesses for the employer. She appropriately placed the burden of establishing that Ms. Murphy quit her job on McKenzie.

48. In my view, there is nothing in the submissions that justifies a conclusion that the Director erred in law on the issue of whether Ms. Murphy quit. As indicated above, the Tribunal has said that the *Act* does not allow an appeal based on facts alone. In any event, there is nothing before me to support an argument that the findings of fact made by the delegate could not be reasonably made on the evidence before her.

49. Given that the delegate concluded that Ms. Murphy quit her job, it matters not whether the delegate approached this as a "maternity case" or a "severance pay" case. The employer is not liable to pay compensation when an employee quits.

50. There was no evidence before the delegate that McKenzie attempted to change a condition of Ms. Murphy's employment without her written consent. The delegate concluded, on the evidence before her, that it was Ms. Murphy who sought to change the conditions of her employment. Thus, it would follow that the delegate found no breach of section 54(2).

51. It is evident that Ms. Murphy disagrees with the delegate's conclusion. However, I am unable to find that the delegate erred in law, and dismiss the appeal on this ground.

ORDER

52. I Order, pursuant to section 115 of the *Act*, that the Determination, dated April 8, 2005, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal