

An appeal

- by -

Rebecca Walder
(“Walder”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2010A/116

DATE OF DECISION: October 22, 2010

DECISION

SUBMISSIONS

Rebecca Walder	on her own behalf
T.A. Polderman	on behalf of Caulfeild Veterinary Hospital Ltd.
Andres Barker	on behalf of the Director of Employment Standards

INTRODUCTION

1. On March 12, 2010, Rebecca Walder (“Walder”) filed a complaint against her former employer, Caulfeild Veterinary Hospital Ltd. (“CVH”). In that complaint she alleged that CVH had wrongfully refused to allow her to return to her former position, following her 9-month maternity leave, contrary to section 54 of the *Employment Standards Act* (the “Act”). A complaint hearing was conducted on June 24, 2010, and on July 12, 2010, the delegate hearing the matter issued a Determination (the “Determination”) and accompanying “Reasons for the Determination” (the “delegate’s reasons”). The delegate dismissed Ms. Walder’s complaint finding that there was no contravention of section 54 and that while she had been terminated, CVH had just cause to do so (section 63(3)(c)).
2. Ms. Walder now appeals the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)) although, as will be seen, her appeal documents also raise matters that might more properly fall within subsections 112(1)(a) and (c) – “errors of law” and “new evidence”.
3. I am adjudicating this appeal based on the parties’ written submissions and have before me submissions from Ms. Walder (her initial appeal submission and a reply submission) as well as submissions from the delegate and CVH. I have also reviewed the section 112(5) “record” that was before the delegate when he was making the Determination.

THE PARTIES’ ARGUMENTS

4. As noted above, Ms. Walder specifically raised “natural justice” as her sole ground of appeal, however, her appeal documents also raise matters that more properly fall under the other two statutory appeal grounds, namely, “errors of law” and “new evidence”. Ms. Walder appended a 1 ½ page memorandum to her appeal form in which she identified six separately numbered matters of concern and, in addition, she also raised other concerns about the delegate’s findings.
5. The “natural justice” allegations appear to relate to the following matters: i) CVH’s main witness, Tjeerdo Polderman, the veterinarian who is CVH’s principal, was not initially sworn before he commenced his testimony; ii) the delegate was predisposed in favour of CVH; iii) the delegate was unreasonably influenced by Mr. Polderman’s “professional” status and did not critically examine his evidence and; iv) that the delegate “penalized” her for not having made prior written disclosure of the substance of her evidence (apparently, the parties were to provide written summaries of their evidence, sometimes described as “will say” statements, in advance of the hearing).

6. Ms. Walder also raises matters that could be characterized as alleged “errors of law”: i) that a 2-hour change in her work day (starting and ending 2 hours later) was a “substantial change” that she was not obliged to accept since it amounted to a “demotion”; and ii) the delegate made improper findings of fact.
7. Finally, Ms. Walder wishes to adduce new evidence regarding her medical condition following her termination and alleged instances of sexual harassment (although, apparently, not harassment directed towards her) by CVH’s principal.
8. CVH’s brief submission provides a response to each of the six numbered items Ms. Walder included in her initial submission and, in each case, CVH appears to suggest that there is no reason to disturb the delegate’s findings. The delegate similarly, albeit more fully, responded to each of Ms. Walder’s six points as well as the other matters raised in her submission. The delegate says that Ms. Walder has not raised any valid reasons for setting aside the Determination.

FINDINGS AND ANALYSIS

9. At the outset, I wish to emphasize the limited nature of an appeal to the Tribunal. The Tribunal is not mandated to conduct a new hearing. The Tribunal’s role is much more circumscribed – to review the Determination, and the process followed in making it, to determine if the delegate made any significant legal errors or conducted an unfair hearing. Where new evidence is offered on appeal, the Tribunal must be satisfied that the evidence offered is truly “new” in the sense that the appellant, having exercised all due diligence, could not be fairly expected to have presented this evidence to the delegate. Further, the new evidence must be relevant, credible and have high probative value (see *Davies et al.*, BC EST # D171/03) in light of the *Act* issues in dispute between the parties.
10. One of the central issues in this case concerned the interpretation and application of section 54 of the *Act* the relevant portions of which are reproduced below:

Duties of employer

- 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.
11. It is not clear from the material before me whether Ms. Walder actually requested pregnancy or parental leave in accordance with Part 6 of the *Act*, however, the delegate proceeded on the basis that she did and CVH has not taken issue with that approach. The delegate concluded that CVH did not contravene any of its obligations under section 54. First, the delegate concluded that Ms. Walder’s employment was terminated on March 8, 2010, but that this termination was not “because of [her] pregnancy” and thus section 54(2)(a) was not engaged. The delegate determined that Ms. Walder’s employment was terminated, for cause, based on a series of incidents that perhaps could be collectively described as a breach of her duties of loyalty and faithful service. Second, the delegate concluded that CVH did not contravene section 54(2)(b) since Ms. Walder’s employment did not include a condition that her shift schedule was fixed and immutable and, further, the

proposed change in her working hours was made for *bona fide* business reasons wholly unconnected with her pregnancy leave. Third, the delegate determined that section 54(3) was inapplicable since Ms. Walder's employment was terminated prior to what would otherwise have been the end of her pregnancy leave. The thrust of the delegate's reasons is that Ms. Walder, but for her just cause termination, would have been returned to the same, or at the very least, a comparable position at the conclusion of her pregnancy leave.

12. Having found no section 54 contravention, the delegate then considered whether Ms. Walder was entitled to section 63 compensation for length of service. As noted above, the delegate determined that Ms. Walder was terminated for just cause (subsection 63(3)(c)) and therefore not entitled to receive section 63 compensation for length of service.
13. I now turn to Ms. Walder's specific assertions regarding alleged "natural justice" breaches. Although Mr. Polderman (CVH's principal) was not initially sworn prior to the commencement of his oral testimony, this oversight was corrected in the form of an oath whereby the witness affirmed that his prior testimony had been truthful. This procedure does not contravene any principle of natural justice. Indeed, although I strongly encourage the practice of having witnesses testify under oath, I am not aware of any legal obligation that requires delegates to place witnesses under oath. There is no evidence in the record before me that the delegate was predisposed in favour of any party and an inference in this regard cannot be drawn simply because the proceedings were not resolved in favour of the complainant. Similarly, there is nothing in the record that suggests to me that the delegate was unfairly influenced in his decision-making by the fact that one of CVH's witnesses was a "professional" or because Ms. Walder did not provide a written summary of her evidence in advance of the hearing. Ms. Walder did have copies of CVH's witness statements in advance of the hearing and thus could not have been taken by surprise by their evidence.
14. I am not persuaded that the delegate erred in law in dismissing Ms. Walder's complaint. With respect to section 54, there was conflicting evidence and, obviously, the delegate had to make certain findings in the face of this conflict. While a finding of fact can constitute a legal error, that is only so where there is no evidentiary foundation for the finding of fact in question. The delegate had detailed evidence before him regarding the nature of Ms. Walder's position and the terms and conditions of her employment with CVH. The delegate determined that Ms. Walder did not have an absolute contractual right to work from 8 AM to 4 PM each day. Rather, while she was working this latter shift prior to her taking leave, she had also worked a 10 AM to 6 PM shift earlier in her tenure and was expected to be available to work either shift as the clinic's demands dictated. CVH's position – accepted by the delegate – was that the two shifts were very comparable in terms of the duties involved but that there was a particular business advantage in having a certified "Animal Health Technician" ("AHT") on site when the clinic opened for business each day. Ms. Walder was not a certified AHT and thus the proposal was to return her to the 10 AM to 6 PM shift when she returned from leave since another employee, who was an AHT, was working the 8 AM to 4 PM shift. The evidence before the delegate was that, historically, the clinic endeavoured to have an AHT on shift each morning when the clinic opened for business. Although there appeared to be some confusion in the evidence, CVH's position was that Ms. Walder was, in fact, only being required to work two 10 AM to 6 PM shifts each week and would otherwise work the 8 AM to 4 PM shifts. In any event, before Ms. Walder could return from leave, her employment was terminated.
15. Given the conflicting evidence before the delegate, I am unable to say that his conclusions that the two shifts were essentially similar, and that Ms. Walder was asked to work two of the later shifts each week based on legitimate clinic needs, were unreasonable. Indeed, I agree with the delegate that these conclusions are the most reasonable to be drawn from the conflicting evidence. That being the case, there was no change in Ms. Walder's employment conditions – since she had no absolute contractual right to exclusively work the

earlier shift – and the proposed change in her shift schedule did not stem from Ms. Walder’s pregnancy leave but rather from legitimate business requirements.

16. With respect to the so-called “new evidence” regarding her medical condition, this evidence is not, in my view, relevant and, in any event, could have been presented at the original complaint hearing. I do not doubt that the loss of her employment caused Ms. Walder some measure of psychological distress, however, I do not see how that fact relates to the legal and factual questions that were before the delegate. Vague allegations of sexual harassment against unnamed employees or other persons should not be addressed in this forum. If individual employees wish to pursue these allegations, the proper forum is the Human Rights Tribunal.
17. Finally, I turn to the issue of “just cause”. Employers have the right to summarily terminate employees – even employees on leave – for just cause. The delegate concluded that Ms. Walder’s conduct justified her summary termination. I agree. Without repeating the entire factual record (reported in detail in the delegate’s reasons), it is sufficient to note that Ms. Walder’s behaviour toward her employer and fellow employees was most inappropriate. Among other things, she posted a note on a fellow employee’s “Facebook” page (accessible to people other than just this employee) falsely accusing this employee of “stealing her job” and otherwise being an ingrate; she attempted to bully other employees and was hostile and intimidating in her dealings with them; she attempted to encourage fellow employees to band together in some sort of “class action” suit against her employer’s principal for sexual harassment or discrimination; she threatened to expose a fellow employee’s “affair” to that employee’s boyfriend; and generally “badmouthed” her employer on a website and to other CVH employees. CVH had the contractual right to assign her to work some later shifts and she resolutely refused to acknowledge her employer’s right to do so; in effect, her hostile response to her proposed changed work schedule (and I agree with the delegate that it was not a very significant change) amounted to insubordination. The record includes a reference to Ms. Walder having referred to her employer’s principal, in communications to fellow employees, as a “liar”. Employees are expected to render faithful and loyal service to their employers and the evidentiary record before the delegate was sufficient to allow the delegate to conclude that Ms. Walder fell significantly short of her employment obligations thus justifying her summary dismissal.

ORDER

18. Pursuant to section 115(1) of the *Act*, I order that this appeal be dismissed and that the Determination dated July 12, 2010, be confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal