

An appeal

- by -

Security Mailing Inc. operating as Global Direct Inc.
("Global")

- 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

ADJUDICATOR: Mark Thompson

FILE No.: 2003A/32

DATE OF HEARING: April 17, 2003

DATE OF DECISION: May 6, 2003

DECISION

APPEARANCES:

Joan MacKenzie, For Globel

Janean Bennett, For herself

OVERVIEW

This is an appeal by Security Mailing Inc., Operating as Globel Direct Inc. (“Globel”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards on December 20, 2002. The Determination found that Globel owed Janean Bennett (“Bennett”) a total of \$6,103.86 for compensation for length of service and vacation pay, plus interest. The Determination found that Bennett was terminated because her conditions of employment were altered substantially when she returned from maternity leave. Globel argued that Bennett was not available to perform her former position when she returned from maternity leave, and that it offered Bennett a choice of two new positions when she effectively quit her previous job.

ISSUES TO BE DECIDED

The issue to be decided in this case is whether Globel terminated Bennett by substantially altering a condition of her employment.

FACTS

The basic facts of the case were not in dispute. Bennett worked for Globel as a sales person from November 11, 1998 until she started maternity leave on June 17, 2001. She expected to return to the same job after her maternity leave was completed. On March 6, 2001, Globel started to reduce costs, including a 10 per cent wage cut and reductions in fringe benefits. The cost reduction process continued while Bennett was on leave and would have occurred had she remained at work. During Bennett’s maternity leave she moved her residence from Langley to Sechelt. Globel’s offices are in Richmond.

Prior to her leave, Bennett’s base salary was \$30,000 per year, with an assigned revenue stream of \$1.2 million. In addition to her base salary, she received a commission of 5 per cent of revenues over \$25,000 per month and 20 per cent of the margin on third party purchases. According to Bennett, her duties were to serve existing clients and locate new customers for the company. She was not in the office full time and had access to clients through Globel’s message system.

While she was on maternity leave, Bennett spoke with Karly Black (“Black”), then the vice president of client relations for Globel. Bennett testified that she spoke to Black at a Christmas party in 2001 and told her that she was moving to Sechelt. In the spring of 2002, Bennett called Black to discuss the date of her return to work. According to Bennett, at this point, she believed that she would return to her former position. Bennett has planned to return to work on June 17, 2002. Prior to that time, Black relocated to Calgary and Joan MacKenzie, managing director for Vancouver, assumed her responsibilities.

Bennett contacted Black about her return to work in May. Black first referred her to a vice president. This individual asked Bennett for her resume, which Bennett found odd. She called Black again, and Black then referred her to MacKenzie. Bennett stated that Black had promised her that she would return to her old job. MacKenzie testified that Black denied making such a promise, although she recalled speaking to Bennett at a social function about her move to Sechelt.

MacKenzie commenced preparations for Bennett's return to work. Globel had planned that Bennett would return to work on July 1, 2002. Bennett apparently asked to return on August 15, and MacKenzie proposed that Bennett return on July 15. MacKenzie stated that Bennett told her that, because she had moved to Sechelt, she would not be available for work 5 days per week in the Richmond office, but would work from home. According to MacKenzie, Bennett said that she could be available in the office between two and three days per week. Bennett testified that MacKenzie told her in their first conversation that her old job was no longer viable. Bennett further testified that she told MacKenzie that she wanted her old job, or "the way her old job was," by which she meant that she would not necessarily be in the office every day. MacKenzie told her that she wanted her sales staff available in the office 5 days per week. She also told Bennett that the firm's circumstances had deteriorated, and a wage cut of 10 per cent had been imposed during her leave. Bennett stated firmly that she never asked Globel for adjustments to her work schedule so she could be at home with her baby. She had arranged for day care for 5 days a week and could have resumed her previous duties.

MacKenzie then offered Bennett her choice of two positions. One entailed a base salary of \$27,000, with a revenue base of \$1 million, plus commission income of 4.5 per cent of revenues over \$56,000 per month, 18 per cent of the margin on third party purchases, plus 10 per cent commission on business generated from new clients. The second position involved commission income only, 10 per cent of all revenue Bennett generated for Globel.

Bennett did not accept either offer and requested compensation for length of service. She regarded the first offer as a substantial reduction in her income potential. She did not dispute the reduction in the base salary offered, but the combination of a decrease in her commission rate and an increase in the revenue benchmark of over 100 per cent (from \$25,000 per month to \$56,000 per month) was substantial. The second position offered was quite different from her previous job.

ANALYSIS

The Determination did not rely upon Part 6 of the *Act*, so no issue arose from Bennett's maternity leave.

In its appeal, Globel argued that Bennett had effectively quit her position by refusing to be available every working day of the week. The offers MacKenzie presented to her were an effort to retain the services of a valuable employee who had resigned her previous job. The Determination described Globel's position as having offered Bennett comparable employment after her return from leave.

Bennett stated that she was willing and able to return to her previous position, and she never said that she would not be available 5 days a week.

The relevant provision of the *Act* was Section 66, which states:

If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

Section 1 of the *Act* defines “conditions of employment” as:

All matters and circumstances that in any way will affect the employment relationship of employers and employees.

Section raises two issues of interpretation: was a condition of Bennett’s employment “substantially altered” and what, if any, deference should be accorded to the director’s judgment on this point.

In *Re Jager*, BC EST #D244/99, the Tribunal suggested a three step process for interpreting Section 66. First the Director should consider if there was an alteration in any matter or circumstance affecting the employment relationship. Secondly, the Director should consider if the alteration was substantial. If the alteration is substantial, the Director may exercise her discretion to conclude that the employment relationship has been terminated.

In this case, the parties agreed that Bennett’s conditions of employment had been altered.

The *Act* gives no guidance about the meaning of “substantial.” Previous decisions of the Tribunal have found that reductions in the wage rate (*Re Flamenco Holdings (1996) Ltd.* BC EST, #D422/98) and hours of work (*Re JB’s Bagatelle Ltd.*, BC EST #D02799) to be substantial. In the Determination, the delegate concluded that the positions offered to Bennett were a substantial alteration in her conditions of employment. While the reduction in her base salary and commission rate were consistent with the reduction in pay other employees experienced, the increase of her commission base from \$25,000 to \$56,000 effectively doubled the sales she would have to produce to maintain the same income.

Thus, the Director found that the alteration was substantial and exercised her discretion to conclude that Globel had terminated Bennett’s employment.

The Tribunal has established a set of principles to guide it in decisions to interfere with the Director’s discretion. These are summarized in *Jager, supra*. In brief, the Tribunal will defer to the Director’s discretion unless there was an error in the exercise of her authority, a procedural irregularity occurred or the decision was unreasonable. In *Re Takarabe*, BC EST #D160/98, the Tribunal stated that

“the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decisions on irrelevant factors.

The facts of this case do not support the Tribunal overruling the Director’s discretion. No errors of law or procedural irregularity occurred, and the decision was not unreasonable or arbitrary. The delegate carefully weighed the value of the better of the new offers against Bennett’s previous position and concluded that a substantial alteration had occurred. The evidence that Bennett had effectively resigned her position was ambiguous at most. On the balance of probabilities, I conclude that Bennett did not intend to resign her position, although MacKenzie may have honestly believed otherwise.

ORDER

For these reasons, the Determination of December 20, 2002 is confirmed, pursuant to Section 115 of the *Act*. Bennett is to receive \$6,103.86, plus interest accruing under Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal