EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Creative Surfaces Inc.
("Creative Surfaces" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/094

DATE OF HEARING: April 25th, 2000

DATE OF DECISION: May 12, 2000

DECISION

APPEARANCES

Aldo Napoleone, Vice-President	for Creative Surfaces Inc.
Kimberly Flint	on her own behalf
Lesley A. Christensen, I.R.O.	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Creative Surfaces Inc. ("Creative Surfaces" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 26th, 2000 under file number 090-238 (the "Determination").

The Director's delegate determined that Creative Surfaces owed its former employee, Kimberly Flint ("Flint"), the sum of $10,090.15 (including interest) as compensation payable pursuant to section 79(4)(c) for the employer's contravention of section 54(3) of the *Act.*

The employer's appeal was heard at the Tribunal's offices in Vancouver on April 25th, 2000 at which time I heard the testimony of Aldo Napoleone, on behalf of the employer, and Ms. Flint, on her own behalf. The Director's delegate did not testify but did make submissions in support of the Determination.

ISSUE TO BE DECIDED

This appeal concerns the interpretation of section 54 of the *Act* which provides as follows:

> **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.

(4) If the employer's operations are suspended or discontinued when the leave ends, the employer must, subject to the seniority provisions in a collective agreement, comply with subsection (3) as soon as operations are resumed.

The Director's delegate determined that while Flint was away from work on pregnancy/paternity leave (see sections 50 and 51) Creative Surfaces abolished her former position (as an outside sales representative) and offered her a position that was not "comparable" to her former position contrary to section 54(3)(b) of the *Act.*

THE DETERMINATION

The delegate noted, at page 3 of the Determination, that:

> "An employer does not comply with the ***Act*** by merely offering an employee a job upon her return from pregnancy and parental leave, nor is it enough to offer a job with the same wages and benefits as were previously enjoyed. The employee is expressly entitled to return to her prior position or to a comparable position."

The delegate held that, in fact, Creative Surfaces did not intend to offer Flint a comparable position upon her return to work. Accordingly, the delegate held that Creative Surfaces was obliged to pay Flint compensation in the nature of a "make whole" remedy.

It should be noted that the delegate determined that the employer did not intend to return Flint to a "comparable position" at the conclusion of her pregnancy/paternity leave; the delegate did not make any finding regarding whether the employer had a *bona fide* reason for its decision to abolish Ms. Flint's former position. However, it should also be noted that the employer's principal position before the delegate was that it offered Ms. Flint a "comparable position". Finally, although this Tribunal has consistently ruled that a "make whole" remedy is an appropriate approach to compensation payable under section 79(4)(c) of the *Act*, an employee's failure to mitigate ought to be considered when fashioning a "make whole" remedy (see *Afaga Service Ltd.*, BC EST #D318/97; *W.G. McMahon Canada Ltd.*, BC EST #D386/99). Even though the delegate held that the position offered to Ms. Flint (which paid the same salary) was not comparable, there is no discussion in the Determination regarding whether Ms. Flint ought to have nonetheless accepted the position offered to her in an effort to mitigate her losses. Even if it could be said that the employer changed Ms. Flint's conditions of employment because of her pregnancy/paternity leave (an assertion, it will be seen, that I do not accept), any determination in her favour ought to have addressed whether Ms. Flint made all reasonable efforts to mitigate her losses.

FACTS AND ANALYSIS

Creative Surfaces, established in 1996, sells and supplies floor tiles, mainly to residential contractors although there is a small retail component to the business. Mr. Napoleone and another Creative Surfaces principal, Ms. Theresa Paterson (the employer's "Sales Manager"), formerly worked with Ms. Flint at another company. When Napoleone and Paterson formed Creative Surfaces, they approached Flint and asked her to join them--as an outside sales representative--in their new endeavour; Flint agreed. At that time, Flint indicated that she was planning to be married and that she and her prospective husband intended to have a family

relatively soon after their marriage. According to Ms. Flint, Napoleone assured her that a pregnancy leave would not pose any problem. Flint accepted the position (her duties were much the same as with her former employer) and commenced her new employment on November 1st, 1996.

In March 1997, Flint became pregnant and in April subsequently advised both Napoleone and Paterson about her pregnancy. She arranged for her pregnancy/paternity leave to begin in November 1997 and expected to return to work in early June 1998. Her leave request was approved. According to Flint, about 2 months before her scheduled return to work, she was invited to a luncheon meeting with Ms. Paterson at which time she was told that her former position had been abolished but that she could return, at the same salary, to a new "inside" sales/clerical position--this offer was set out in a letter handed to Ms. Flint signed by Ms. Paterson and dated April 8th, 1998. This new position, in Flint's view, was markedly less attractive and prestigious than her old position and she expressed a clear reluctance to accept the new position.

Flint met with Napoleone on April 15th, reiterated her dissatisfaction with the employer's proposal and when it became clear that her former position was simply no longer available, she, in effect, quit. When asked by Napoleone to "reconsider" and accept the new position, Flint refused and asked for "severance pay". Napoleone requested a letter of resignation from Flint, which she never provided, although Flint did request that Creative Surfaces prepare and issue her a record of employment (which was issued on the basis that Flint had "quit" her employment).

Napoleone testified that in 1997 Creative Surfaces employed 15 people at its Burnaby location but that with the downturn in the local construction industry in late 1997 (which continued throughout 1998), the staff complement was reduced to 12 or 13 people. Given the contraction experienced in the construction industry (which Flint herself acknowledged), Creative Surfaces decided--this all occurred during Flint's leave--that it no longer wished to have someone fill the outside sales duties that had formerly been undertaken by Flint. One full-time sales representative (not Flint) was laid off; henceforth the outside sales function would be undertaken solely by a remaining commissioned sales representative and Ms. Paterson.

Although Napoleone maintains that the position offered to Ms. Flint was, in fact, comparable to her former position, he also acknowledged that she would be required to spend 100% of her time in the Burnaby office (whereas formerly she had spent a good deal of her time "on the road") and would lose the benefit of a company car. Napoleone also maintained, however, that the new position simply represented an "expansion" of some of Flint's former duties. A problem I have in this case is that since Flint rejected the employer's new position outright, and never actually performed any of her new proposed duties, I cannot say to what extent the new duties varied from the old. It is simply not possible to gauge, due to a lack of evidence, whether her new duties would have been dramatically different (Flint's position) or not so very different (the employer's position) from those undertaken by Ms. Flint before she went on leave. However, it does appear that while there may have been some overlap there would have also been some significant differences in the duties as between the two positions.

What does not appear to be in dispute is the fact that Creative Surface's core business was being substantially eroded during the period from late 1997 through to mid-1998 as a result of any number of factors including the Barrett "leaky condos" inquiry and the economic troubles in Asia

(which in turn affected the B.C. economy). Creative Surfaces maintains that it made a *bona fide* decision to abolish Flint's former outside sales position because it simply could no longer sustain its existing outside sales force. Flint was offered a new position with no reduction in salary--although admittedly it was a position that was likely to be less attractive to her--in an effort to preserve her employment.

Unpaid pregnancy and parental leaves are statutory entitlements. These types of leaves are entirely consistent with section 2(f) which states that one purpose of the *Act* is to assist employees with their family obligations and responsibilities. Thus, upon request, an employer "*must* give an employee who requests leave...the leave to which the employee is entitled" [section 54(1)] and while the employee is on leave the employer "must not, *because of an employee's pregnancy or a leave allowed by* [Part 6], (a) terminate employment, or (b) change a condition of employment without the employee's written consent" [section 54(2)]. Once an employee's leave has ended, the employer *must* place the employee in the same or a comparable position to that held by the employee prior to taking leave [section 54(3)]. In the event of a *prima facie* contravention of section 54(2) of the *Act*, section 126(4)(b) states that it is the employer's burden "to prove that an employee's pregnancy, [or] a leave allowance by this *Act*...is not the reason for terminating the employment or for changing a condition of employment without the employee's consent".

The delegate determined that Creative Surfaces contravened section 54(3) of the *Act*, however, in my view, if there is any contravention of section 54, it is of section 54(2)(b) since Ms. Flint quit her employment before she was scheduled to return to work. Ms. Flint quit her employment about 6 weeks prior to the end of her maternity/paternity leave; her employment was not expressly terminated by her employer--the most that could be said is that Creative Surfaces "constructively" terminated her employment (note that an employee "on leave" continues to be an "employee" for purposes of the *Act*) by "substantially altering" a condition of her employment (see section 66). However, I am not satisfied that section 66 applies in this case and, in any event, Ms. Flint was offered "reasonable alternative employment" within section 65(1)(f) of the *Act.* Thus, in my view, quite apart from her rights under section 54, Ms. Flint is not entitled to any compensation for length of service under section 63.

It appears to me that the essence of Ms. Flint's assertion is that her employer, while she was on leave, changed a condition of her employment (namely, the fundamental nature of her duties) without her written consent and thereby contravened section 54(2)(b) of the *Act.* It may well be that while Ms. Flint was on pregnancy/paternity leave, Creative Surfaces changed a condition of her employment without her consent. Nevertheless, Creative Surfaces contravened section 54(2)(b) *only if* a condition of Ms. Flint's employment was changed *because of her pregnancy/paternity leave* [see *e.g., Koren v. White Spot Ltd.* (1988), 29 B.C.L.R. (2d) 121 (B.C.S.C.); J*ohn Ladd's Imported Motor Car Co.*, BC EST #D313/96; *Bosun's Locker Ltd.*, BC EST #D292/97; *Capable Enterprises Ltd.*, BC EST #D033/98; *Bottos*, BC EST #D517/98].

I am satisfied that the employer has met its burden (see *Tricom Services Inc.*, BC EST #D485/98) of showing that the terms of Ms. Flint's former position were changed for reasons wholly unconnected with her pregnancy and ensuing leave. In particular, I note that when she was first hired away from her former employer, Ms. Flint clearly stated that she intended to marry and start a family relatively soon. If Creative Surfaces was unwilling to grant her a leave, why would it have continued to endeavour to hire her? When she requested her leave from Creative

Surfaces, it was given without question even though she did not formally apply for the leave in writing as directed by section 50. Her employer never demanded that she supply a doctor's certificate although it could have done so if it wished. In short, the leave sought was given without formal request and without any particular demand for formal proof as to entitlement. I infer from the foregoing facts that Creative Surfaces, as it has consistently maintained, did not object to Ms. Flint taking a leave and fully intended to have her return to its workforce upon the conclusion of her leave.

The evidence before me shows that during the period spanned by her leave Creative Surfaces actually reduced its workforce. In early 1998 the only "outside" sales representative (other than the sales manager, Ms. Paterson) was paid on a straight commission basis; this individual was already on staff when Ms. Flint went on pregnancy leave. There is no evidence before me that Creative Surfaces hired some other individual to replace Ms. Flint after she quit, or indeed, to temporarily replace her while she was on leave. It is conceded by Ms. Flint that the residential construction industry was experiencing a downturn even before she went on pregnancy leave. There is nothing in the evidence before me which would call into question the employer's assertion that this downturn continued (and, indeed, worsened) during the early part of 1998. When Ms. Flint stated that she intended to quit rather than accept the new position, she agrees that Mr. Napoleone asked her to "reconsider"; hardly the words of an employer fixed and determined to oust her from the workforce. Finally, if it was the employer's intention to shed Ms. Flint from its workforce why would it guarantee her the same salary for a job that she considered to be a lower-level position?

The employer's appeal is allowed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal