

**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 -

VCS Hytek Air-Conditioning Inc.  
("Hytek")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorna Pawluk

**FILE NO.:** 98/161

**DATE OF HEARING:** May 22, 1998

**DATE OF DECISION:** June 9, 1998

**DECISION**

**APPEARANCES**

Vic Seder  
Nancy Chin

for Hytek  
on her own behalf

**OVERVIEW**

This is an appeal by VCS Hytek Air-Conditioning Inc. ("Hytek" or the "employer") under Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated February 25, 1998 by the Director of Employment Standards ("the Director").

**ISSUES TO BE DECIDED**

The issues are whether Hytek dismissed Nancy Chin ("Chin" or the "employee") contrary to section 54(2) and whether Chin is owed damages under section 79 of the *Act*.

**FACTS**

On February 3, 1997, Vic Seder ("Seder"), owner and manager of Hytek, told Chin that her services were no longer required. Chin had been employed by Hytek as a secretary/bookkeeper since May 6, 1995 and on July 15, 1996 had gone on pregnancy leave. Chin and Seder had discussed the return to work date on several occasions and agreed that she would return on February 3. On February 3, Seder called and asked to meet her in a restaurant. There he told her that her position was no longer available and offered her compensation for length of service.

Chin refused Hytek's offer and filed a complaint with the Employment Standards Branch claiming she had been terminated due to her pregnancy leave. Following an investigation by the Branch, a Determination was issued finding Hytek in breach of the *Act* and ordering Hytek to pay Chin \$5,183.69 for: lost wages from date of expected return from pregnancy leave to commencement of new employment; compensation for length of service; lost wages during the 3 month probationary period at new employment at a lesser wage (a difference of \$200 per month for 3 months); annual vacation on lost wages; day care expenses paid for and not refunded; emotional pain and suffering; and interest.

The Delegate concluded that Hytek breached sections 54(2) and (3) which gave Chin "an absolute right of reinstatement" to the same position she held before leave, or a comparable one. The Delegate reasoned that since Chin's position had been "merged" into the new position of Office Manager, it was the only comparable position that could have been offered to her. The Delegate found a breach of section 126(4)(b) which required the employer to show that termination is not influenced "in any way" by the pregnancy leave: "it is apparent that the employer hired a replacement worker [Stacey Buss] while the

complainant was on leave and decided to keep this worker on, albeit in an expanded role, rather than reinstate the complainant." The Delegate also noted that even though Chin's Record of Employment indicated that "serious financial problems at Hytek have resulted in the elimination of a support position", the evidence showed that no support position was eliminated "as such". Rather the position was given a new title of "Office Manager" and was awarded to Buss. The Delegate acknowledged that the new position of Office Manager was created "at least partially" to allow Seder more time to solicit business for the company and that the Office Manager performed some of the duties formerly performed by Seder personally.

Hytek appeals, arguing that it did not contravene sections 54(2) or (3) of the *Act* and that Chin is owed only compensation for length of service.

At the oral hearing, Seder testified that various arrangements were made for Chin's work to be done in her absence. Initially, a temporary employee was hired through a personnel agency. As of September 6, once the children went back to school, Seder's wife Leslie assumed some of the clerical duties on a part time basis. In September he hired a former Hytek employee, Stacey Buss ("Buss"), on a part-time basis to perform some of Chin's accounting duties as Leslie was not qualified for this aspect of Chin's work. Initially, Buss worked three days a week but once the company moved to new premises in Delta, on November 1, 1996, she moved to full-time work. (Her initial wage rate was three-fifths of \$30,000 and was subsequently increased to \$35,000.) Seder testified that in the spring of 1996, he had bought-out his former partner. Seder estimates that the partner took about \$100,000 worth of work from two large customers with him. It thus became necessary for Seder to solicit more business to stave off bankruptcy. He hired Buss to assume some of his former managerial duties and concentrated on customer development.

Seder said that he did not appreciate the company's dire financial circumstances until after Christmas when the year end report had been prepared by the accountant; only then did he realize the company could not support both Buss and Chin. Since only Buss had some of the skills necessary to assume some of Seder's duties, he decided that Buss would be kept on, rather than Chin. His wife continues to work without receiving a salary; he says that their combined income from the company is the same as it was when he, alone, was reporting for work each day. Seder maintains that he was under no obligation to consult with Chin about the creation of the new position and that it was only because of the company's financial position that she was let go.

Seder also complained about the treatment he received by three Industrial Relations Officers ("IROs") who handled this case. He maintains that they pre-judged the situation, without listening to his side of the story or hearing the evidence in support of the company's case. He said that at least one of the IROs urged him to settle with Chin, emphasizing her right to go to the Human Rights Commission. He also claims that they failed to present him with adequate evidence of various aspects of Chin's claim for damages. In particular, he was upset with that evidence presented to substantiate the new rate of pay received by Chin at the replacement employment which she secured as of February 24, 1997. He said he repeatedly asked for information about when an employee could be dismissed following return from pregnancy leave and was repeatedly rebuffed. He says that the Branch's

actions belies its existence as a neutral arbiter which impartially determines the rights and obligations of employers and employees. He also complains that Chin failed to live up to her obligation to make a written request for leave under sections 50 and 51, but the employer is, nonetheless, required to live up to its obligations.

Chin testified that she did not know until February 3, 1996 that her employment would be terminated; all previous indications were that she would be welcomed back to her old job.

For example, she attended the Christmas party in early December and had other telephone discussions with Seder about her return to work. She was under the impression that she and Buss would be kept on by Hytek, and had made her daycare arrangements accordingly.

She was very upset once she found out that her old job was not waiting for her and was able to secure alternate employment at Nu\_Way Forming as an Office Manager effective as of February 23. Her initial salary was \$200.00 less per month than her former salary, and this sum was paid to her until she had passed the probationary period. At that point, her duties changed and she received a \$500.00 per month raise which brought her \$300.00 more than she was making at Hytek.

Chin arranged for daycare in Burnaby, forty minutes from her North Vancouver home, on her route to work in Delta. It cost \$840.00 per month, payable on the first of the month; the monthly fee was nonrefundable. The Daycare also required a week of orientation prior to full time attendance; this cost \$165.00. She continued with this daycare arrangement for another 5 or 6 months. Chin seeks reimbursement for this expense as she could not afford to pay for daycare at a time when she was not employed. She noted that since the daycare was over 40 minutes, one way, from her home, it was not convenient to use the daycare, although she did leave her daughter there periodically. But she used this daycare arrangement once she obtained employment with New Way Forming on February 23.

Chin testified that she and Seder got on well and there were no issues regarding her ability to perform her duties. Chin testified that she is owed vacation pay for the two months prior to maternity leave.

Chin argues that the Office Manager position now held by Buss was created in September of 1996, but Seder did not advise Chin that another position had been created. Further, he did not mention this position in his letter of March 16, 1997 to the Branch. The first time the position was described as "office manager" was in January of 1998. She also complained that Seder called her current employer, without identifying himself, to verify her wages and the daycare to verify daycare expenses. She argues that 25 of the 37 duties of the new manager are her former duties and that the new position was created only to bolster the employer's claim that it did not breach section 54. As for her failure to seek leave in writing, she indicated that Seder never asked for this. She believes that even though Buss does several new duties, her purpose in returning to Hytek was to take over Chin's job. Chin believes that but for the fact she was away on pregnancy leave, Buss would never have been brought back into the organization and would not have filled the Office Manager position. Chin also said she was never told about the new position.

## **ANALYSIS**

Section 50 of the *Act* entitles a pregnant employee up to 18 consecutive weeks of unpaid pregnancy leave; section 51 entitles an employee to up to 12 consecutive weeks of parental leave. Section 54 outlines an employer's duty to employees on leave:

- 54(1) An employer must give an employee who request leave under thisPart the leave to which the employee is entitled.
- (2) An employer must not, because of an employee's pregnancy or leave allowed by this Part,
  - (a) terminate employment, or
  - (b) change a condition or 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.

Section 126(4)(c) places the burden of proof on the employer to show that a leave granted under the *Act* is not the basis of dismissal or alteration of the terms of employment:

- 126(4)(c) that an employee's pregnancy, a leave allowance by this Act or court attendance as a juror is not the reason for terminating the employment or for changing a condition of employment without the employee's consent.

The Determination does not suggest that Chin's pregnancy was the reason for termination of her employment. Seder testified that he was supportive of Chin's needs during the pregnancy and Chin did not contest this. Rather, the Determination finds that the Employer breached Part 6 of the *Act* by failing to reinstate Chin following the expiry of her pregnancy leave.

The Director's Delegate concluded that section 54(2) confers an "absolute right of reinstatement" and because Chin was not reinstated into the only comparable position, Hytek had breached the *Act*. The Delegate also found that because the employer hired a new worker while the complainant was on leave and retained the new worker, even in an expanded role, the onus in section 126(4)(b) had not been discharged.

I agree with the Determination that section 54(2) confers on the employee a right to reinstatement unless the employer discharges its onus under section 126(4)(b) to show that the authorized leave was not the reason for the termination. The mere fact that the duties were merged did not establish the fact that the Office Manager was a comparable position;

but in this case, the new position, though not identical, was primarily a reorganization of the former position held by Chin. Nothing in the evidence convinced me that the Determination was wrong on this point. The employer offered very little evidence, other than Seder's opinion, to show that Chin could not have performed the duties of Office Manager, and in order to discharge its onus, such evidence was necessary. Particularly important is the fact that subsequent to her employment with Hytek, Chin secured work as an Office Manager. Moreover, twenty five of thirty seven duties assigned to the Office Manager had previously been performed by Chin. Also of import is the fact that Seder did not advise Chin about the availability of the new position and instead presented her with a *fait accompli* at the February 3<sup>rd</sup> meeting. Under such circumstances, the Determination correctly found that Hytek did not discharge its onus under section 126(4)(b).

Seder repeatedly asked how much time must pass after reinstatement before an employer can exercise its right to dismiss free from the constraints placed by section 54(2) and (3). The answer depends on the circumstances and in this case, the timing of the dismissal played only a marginal role in my conclusion that the *Act* had been breached. The key point is that the termination was motivated in part by a consideration prohibited by the *Act*.

He also now complains that Chin did not give him notice in writing as required by the *Act* of her wish to take pregnancy leave. Chin says that Seder never asked her for written notice and seemed satisfied with her verbal communication with him. The *Act* does not outline a penalty for a failure to comply with the written notice requirement and there is nothing to suggest that Chin's failure prior to taking pregnancy leave invalidates her rights to now complain of termination. For that reason, it is unnecessary for me to comment further.

The Determination ordered Hytek to pay Chin \$5,183.90. Section 79 outlines the powers used by the Director's Delegate to determine the damages owed in this case:

- (3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may do one or more of the following:
  - (a) require the person to comply with the requirement
  - (b) require the person to remedy or cease doing an act;
  - (c) impose a penalty on the person under section 98.
  
- (4) In addition, if satisfied that an employer has contravened a requirement of section 8 or Part 6, the director may require the employer to do one or more of the following:
  - (a) hire a person and pay the person any wages lost because of the contravention;
  - (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
  - (c) pay a person compensation instead of reinstating the person in employment;
  - (d) pay a employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

The Delegate concluded that reinstatement was inappropriate after the worker had rejected the employer's offer of compensation in lieu of notice. The award of compensation included damages for lost wages from the date of expected return to work until February 24, 1997 when Chin assumed her new job and compensation for length of service. Both of these heads of damage fall squarely under subsection 4(c) as "compensation instead of reinstating the person in employment" and were properly included in the Determination. Similarly, Hytek should pay Chin the discrepancy in wages for the first three months of her new employment. This, too, constitutes "compensation".

Day care expenses paid but not refunded and emotional pain and suffering were awarded under subsection 4(d): "reasonable and actual out of pocket expenses incurred due to the contravention". To be payable under that provision, the payment must have the following features: it must be an out of pocket expense; it must be "reasonable" and "actual"; and it must be incurred due to the contravention.. Out of pocket expenses have been defined as a "direct expense which requires the immediate outlay of cash in contrast to an accrued expense." (*Blacks Law Dictionary*) Thus, money must have been expended in connection with the termination.

Payment for "emotional pain and suffering" is awarded to compensate an aggrieved party for the emotional impact of the offending act; in this case, it was in effect a monetary quantification of the psychological costs or effects suffered by the employee because of the wrongful termination. The Director's delegate concluded that \$1,500.00 was a fair reflection of Chin's emotional distress following the termination, although the sum was not connected to an outlay of cash in order to pay a direct expense. Rather it was a sum that intended to address, in a general way, the psychological damage that can occur in such circumstances. (Chin testified that she was upset by the termination but did not have to seek medical attention or any other type of psychological help that required her to incur expense.) However, in order to fall within the ambit of section 79(4)(d), the expense must entail the outlay of cash and that did not occur here. Thus, that portion of the Determination orders compensation for emotional pain and suffering cannot stand.

As for daycare costs, Chin spent \$840.00 for the month of February, plus \$165.00 for orientation. The orientation fee was a one time charge to cover the care given her child during a transition week prior to full time care. If Chin had not secured new work, she would not have been able to use the daycare as it was 40 minutes from her home, too far to be used daily or for short periods of time. Given the distance from her home, it was impractical for Chin to use the daycare daily unless she was travelling to work. However Chin secured new employment very quickly, and started prior to the end of the month. While the expense had been initially incurred because of her return to Hytek, she subsequently required the daycare for her new job. Nevertheless, the daycare was a direct expense incurred only because of the breach; the fact that Chin mitigated her losses (as she is required to do) does not change the initial nature of the payment.

To be covered by section 79(4)(d), the expense must be "actual out of pocket" and this is not true of the expense incurred here. Part of the award reimburses Chin for lost salary and to that extent has placed her in exactly the same position as she would have been if Hytek had honored its obligation to reinstate her. If she had returned to work, she would have had to pay her daycare expense from her salary. To now require payment of the monthly

daycare fee in addition to salary replacement in effect double compensate her by giving replacement salary and the cost of expenses that would ordinarily be paid out of her salary.

In other words she is not out of pocket for the daycare expenses and thus the monthly daycare fees cannot be reimbursed. However, the initiation fees are to be reimbursed since Chin was subsequently forced to find new daycare more compatible with the new location of her work and to incur the expenses attendant with that move.

Seder repeatedly expressed dissatisfaction with the "proof" provided by Chin of her salary and daycare expenses. I did not share his concern and find that the proof provided by Chin was reliable and trustworthy.

Finally, Chin believes that she has not been properly paid for vacation pay earned in her last two months with Hytek, before she went on leave. She asks to now be compensated for it; but this was not included in the original complaint or covered by the Determination and I thus I am without jurisdiction to deal with it. Seder took issue with the calculation of vacation pay in the original Determination, but I find no problem with that aspect of the Determination.

**ORDER**

Pursuant to section 115 of the *Act*, I vary the Determination dated February 25, 1997 as indicated above.

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**Lorna Pawluk**  
**Adjudicator**  
**Employment Standards Tribunal**