

An appeal

- by -

Skyline Estates Ltd. doing business as "Traveller's Inn"
("Skyline")

- 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: Carol L. Roberts

FILE No.: 2003A/110

DATE OF DECISION: July 3, 2003

DECISION

OVERVIEW

This is an appeal by Skyline Estates Ltd. doing business as Traveller's Inn ("Skyline"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued March 5, 2003.

Jadwnder Chauhan-Sidhu filed a complaint with the Director alleging that her employment had been terminated because of her pregnancy. Following an investigation, the Director found that Skyline contravened Section 54(2) of the *Act* in terminating Ms. Chuahan-Sidhu's employment because of her pregnancy, and Ordered that it pay her compensation in the amount of \$2662.40, representing lost wages for two months.

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. This decision is based on written submissions by Teresa McLeod, Skyline's Human Resources Manager, and Gerry Omstead on behalf of the Director of Employment Standards.

Using an old Form 1 (Appeal) document, Skyline has indicated the grounds of appeal to be that there was an error in the facts, that there was a different explanation of the facts, and that there were other facts that weren't considered during the investigation. Skyline seeks to have the matter sent back for further investigation.

In 2002, the *Act* was amended, eliminating the grounds of appeal identified by Skyline. However, given that two of the issues identified are similar to grounds under the current *Act*, and given that Skyline is a lay appellant, I have nevertheless considered the appeal under the new provisions. I will infer that one of the grounds is that evidence has become available that was not available during the investigation (or, other facts not considered during the investigation). I will also address the allegation that there is an error in the facts, since an error in the facts may, in some circumstances, amount to an error of law.

ISSUE TO BE DECIDED

1. Whether the Director erred in law; and
2. Whether new evidence has become available that was not available at the time the Determination was being made that would have led the delegate to arrive at a different conclusion.

FACTS

Ms. Chauhan -Sidhu began working as a housekeeper for Skyline in September 1998. The delegate found that she worked full-time, seven hours per day, five days per week. She last worked for Skyline on July 3, 1999. On July 4, 1999, Ms. Chauhan-Sidhu went on pregnancy leave. This date was earlier than anticipated, based on her doctor's recommendation. Ms. Chauhan-Sidhu did not request her leave in writing. The only documentation about her leave was the note from her doctor.

Ms. Chauhan-Sidhu took a total of 19 consecutive weeks of unpaid leave, giving birth to her baby on November 14, 1999. On January 21, 2000, Ms. Chauhan-Sidhu advised Skyline that she would be ready to return to work on February 13, 2000. Skyline advised Ms. Chauhan-Sidhu that business was slow, and that it would contact her when it got busier. Ms. Chauhan-Sidhu contacted Skyline in person on February 7, and was again told that she would be contacted soon, once business picked up.

Ms. Chauhan-Sidhu alleged that Skyline contacted her on March 13, 2000 and told her to contact Skyline's motel. She did so, but was advised there was no work available. Ms. Chauhan-Sidhu subsequently learned that, while she was attempting to return to work, Skyline had hired three new housekeepers. On March 22, Skyline advised Ms. Chauhan-Sidhu that there was no work for her.

Ms. Chauhan-Sidhu filed her complaint in April, 2000.

The delegate asked Skyline why it had not rehired Ms. Chauhan-Sidhu when it hired three people to do the same work she had been doing before she left on pregnancy leave. Skyline did not respond to the delegate's inquiry.

Skyline submitted that Ms. Chauhan-Sidhu had not contacted the company before February 7th. Ms. Chauhan-Sidhu contended that she had made telephone contact with Skyline on January 21. The delegate attempted to speak with the Skyline employee who had contact with Ms. Chauhan-Sidhu regarding her role in the pregnancy leave and attempted return, but that employee did not contact the delegate.

The delegate concluded that, whether she accepted the employee or the employer's evidence, the evidence established that Ms. Chauhan-Sidhu contacted Skyline within the 32 weeks provided for under s. 51(4) of the *Act*.

The delegate concluded that Skyline contravened s. 54(2) of the *Act*. She concluded that reinstatement of the employee was not appropriate, and concluded that two month's salary was reasonable in light of the type of work Ms. Chauhan-Sidhu performed and the time of year the return to work was sought.

ARGUMENT

Skyline submitted that critical information was not provided to the delegate at the time the investigation was conducted. Skyline's representative indicated that she had assumed the position in March, 2003.

Skyline submitted that its payroll records demonstrated that Ms. Chauhan-Sidhu was not averaging 70 hours every two weeks. It submitted that Ms. Chauhan-Sidhu was not a full time employee, but worked 28 hours per week in the low season.

Further, Skyline submits that Ms. Chauhan-Sidhu presented a doctor's note dated July 12, that indicated she would be off work "for one more week". It submits that Ms. Chauhan-Sidhu did not present any doctor's note that indicated she was to take early maternity leave due to medical complications. However, Skyline also submitted an email from the manager of one of Skyline's motels that indicated that Ms. Chauhan-Sidhu had provided a doctor's note that she would be taking early maternity leave due to complications.

Further, Skyline submits that, on August 16, 2000, its general manager offered Ms. Chauhan-Sidhu a position as housekeeper at one of its hotels. It says that Ms. Chauhan-Sidhu did not respond to the letter.

The delegate contended that while Ms. Chauhan-Sidhu may have only worked part time, the amount of the compensation order does not reflect her earnings, but is a compensatory award for failing to comply with the Act.

The delegate also submits that the evidence demonstrated that Skyline hired three housekeepers at the time they told Ms. Chauhan-Sidhu it had no work for her. It contends that Skyline only offered Ms. Chauhan-Sidhu employment after she had filed her complaints with the Employment Standards Branch and the Human Rights Commission.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

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

As noted above, Skyline's grounds of appeal do not fall within this section. However, in light of the length of time this matter was before the Director for a determination, I have decided that, rather than have Skyline submit a new form of appeal, I have addressed the substance of its submission under the current grounds.

Having done so however, I am unable to find that Skyline has established that the delegate erred.

Skyline says that Ms. Chauhan-Sidhu was only a part time, not a full time worker. While that may be a factual error, in my view, nothing in the Determination turns on that. Section 79(4) provides that, if the director is satisfied that an employer has contravened a requirement of Part 6 (that part relating to pregnancy and parental leave), the director may require an employer to do a number of things, including paying a person compensation instead of reinstating the person in employment. The complaint was filed in April 2000. The decision was issued on March 5, 2003, almost three years later. At that time, the delegate concluded that it was not appropriate to require Skyline to rehire Ms. Chauhan-Sidhu. Consequently, a compensatory award was made. The purpose behind a compensatory award is to, as far as possible, place the employee in the position they would have been in had the contravention not occurred. I am unable to find that the amount of the compensatory award should be referred back, even though it may have been based on two months full time wages. I note that Skyline hired three people to do the kind of housekeeping work that Ms. Chauhan-Sidhu performed while she was attempting to return to work. I infer that Ms. Chauhan-Sidhu could have worked full time at that time of year had she wanted to do so, and there is no evidence she did not wish to return full time.

The new evidence, or facts not considered during the investigation, include the payroll summary, a note from Ms. Chauhan-Sidhu's doctor, email correspondence and Skyline's offer of employment to Ms. Chauhan-Sidhu, made August 16, 2000.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

Skyline has not met any of these conditions. All of the information was available at the time the delegate was conducting her investigation, and should have been put to her at first instance. However, I am of the view that even had the delegate had this information earlier, no error has been demonstrated. The note and email correspondence merely confirm the information considered by the delegate. The offer of employment was made well after Ms. Chuhan-Sidhu filed her complaint, and outside the unpaid leave provisions set out in Part 6 of the Act. That new evidence would not have changed the outcome of the appeal.

I deny the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination dated March 5, 2003 be confirmed in the amount of \$2,662.40, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal