Employment Standards TRIBUNAL

An appeal

- by -

Michele Gurney
("Gurney")

- 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: W. Grant Sheard

FILE No.: 2002/094

DATE OF DECISION: May 30, 2002

DECISION

APPEARANCES:

Michele Gurney	on her own behalf
Shelley-Mae Mitchell	on behalf of the Respondent Employer
Rod Binchini	on behalf of the Director

OVERVIEW

This is an appeal based on written submissions by Michele Gurney (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on February 4, 2002 wherein the Director's delegate found that the Respondent Employer had not violated Section 54 (2) of the Act holding that the Employee's position was not eliminated due to her pregnancy leave and that the respondent Employer had complied with Section 54 (3) of the *Act* in attempting to place the Appellant Employee in a comparable position upon her return. Accordingly, the Director's delegate ruled that the *Act* had not been contravened and the Appellant was entitled to no compensation under the *Act*.

ISSUE

Was the Director's delegate correct in ruling that the *Act* had not been contravened by holding that the Respondent Employer did attempt to place the Appellant in a comparable position upon her return from maternity leave as required by Section 54 (3) of the *Act*?

ARGUMENT

The Appellant's Position

In an appeal form dated February 22, 2002 and filed with the Tribunal on February 25, 2002 the Appellant requests that this matter be sent back to the Employment Standards Branch for further investigation. In a written submission attached to the appeal form the Appellant says that she has appealed for two reasons. First, "the most recently assigned delegate did not handle the case appropriately" and second, "the most recently assigned delegate would not determine whether the positions were comparable (see page 6 of the Determination)". The Appellant says that she would like the case further investigate to the end that a delegate or adjudicator decides whether the positions were comparable or not.

Regarding the assertion that the case was handled inappropriately, the Appellant says that the first delegate who was assigned to the file informed her that he was going to decide this case in her favour, but he left the branch in July 2001 before having rendered a Determination. The Appellant says that after the delegate who ultimately did render the decision took over the case, he did not discuss the details with her prior to rendering that decision.

Regarding the assertion that the delegate was unable to determine whether the positions were comparable, the Appellant notes that the delegate said at page 6 of his Determination that there was insufficient evidence to determine whether the positions were comparable. The Appellant says "If I had returned to work in the new position, it would still be my word against (the Respondent's) and a comparison based on job descriptions would still be necessary." The Appellant notes that the first delegate assigned to the file had reached a different conclusion and that she, the Appellant, was in the initial position as Land Administrative Assistant in order to further her professional development while attending school for Environmental Engineering. She continues noting that the new position she was offered did not have any environmental aspects as it was strictly an administrative position. The Appellant says "I think the different positions I held at (the Respondent) shows my willingness to try new things, as long as it benefited my professional development.

The Appellant concludes saying "I request that this case be reinvestigated in order to determine whether the positions of Land Administrative Assistant and Assistant to The V P Exploration are comparable or not."

The Respondent's Position

In a written submission dated April 26, 2002 and filed with the Tribunal on April 29, 2002 by Ms. Shelley-Mae Mitchell, solicitor on behalf of the Respondent, the Respondent submits that "the Director's delegate correctly applied the law to the specific facts in this case in the Determination ….. and that there is no basis upon which this matter should be referred back for further investigation". The Respondent further submits that the burden of proof in on the Appellant in an appeal to demonstrate an error in the facts found or law applied and that no such error has been demonstrated. The Respondent says that the Appellant essentially restates the same evidence and arguments which were made in her original complaint.

Replying to the Appellant's submissions, the Respondent says of the conduct of the Director's delegate, "if the first delegate declined to exercise his authority to render a Determination, for whatever reason, his opinions regarding the file become irrelevant. It is only the findings in facts and conclusions drawn by the delegate who rendered the Determination that are subject to review by the Tribunal in this appeal." The Respondent goes on to submit that there is no evidence that the delegate who did render the Determination did not conduct a fair and complete investigation.

With respect to the Appellant's submission that the delegate failed to make a Determination regarding whether the positions were comparable, the Respondent reiterates its position that the new position offered to the Appellant was comparable to the earlier position she held and that the Respondent discharged its obligations under the Act. The Respondent relies on the submissions which were made on this point prior to the original Determination. The Respondent says that, as the Appellant refused the new position which was offered to her prior to the end of her leave, the obligation pursuant to Section 54 (3) to provide a comparable position had not been triggered at the time the Appellant resigned. The Respondent says, therefore, it is not necessary to make a Determination as to whether or not the positions were actually comparable or not.

The Respondent also submits that, any inability to determine the comparability of the positions was properly construed in favour of the Respondent and relies on the case of *Creative Surfaces Inc.* BC EST D195/02. The Respondent further submits that their position that the Respondent did not breach Section 54 (3) as the Employee quit before her return to work and would not, in any event, be entitled to

compensation as she refused comparable employment as supported by the Decision of this Tribunal in RE *Kimberly Flint* BC EST # D477/00. The Respondent says that the Appellant had an obligation both under the *Act* and at common-law to accept the position offered to her and that the position had very similar duties with a more senior reporting relationship, a better pay package, the same benefits, hours of work, location and office.

The Respondent concludes by submitting that the Determination ought to be confirmed.

THE FACTS

The Respondent, Ashton Mining of Canada Inc., is in the business of diamond exploration and operates a head office and laboratory in North Vancouver. The Appellant began working there as a Laboratory Technician on June 20, 1994. She was later promoted to Senior Laboratory Technician and, in August 1998 applied for and received the position of Land Administration Assistant. The Appellant later informed the Respondent of her intention to exercise her right to maternity leave effective March 20, 2000. Prior to commencing her leave she was informed by the Vice President for Exploration for the Respondent that her position as Land Administration Assistant would not likely exist when she was ready to return from her maternity leave.

The Appellant contacted the Respondent on September 11, 2000 by email relating to her anticipated return to work on October 10, 2000. On September 8, 2000 the Appellant again emailed the Respondent requesting an additional two months leave. On September 28, 2000 the Vice President of Exploration for the Respondent telephoned the Appellant about a new position of Assistant to the Vice President of Exploration and emailed to the Appellant a job description for that position. The Appellant met with the Respondent on October 2, 2000 and declined to accept the new position in writing. In response, the Respondent wrote to the Appellant on October 6, 2000 suggesting that she should accept the position and informed her that if she failed to respond it would be the Respondent's position that the Appellant resigned. The Appellant wrote to the Respondent on October 9, 2000 advising that her earlier letter was not a resignation and that she would file an Employment Standards complaint in an attempt to resolve the matter.

The Respondent replied further to the Appellant in a letter dated October 10, 2000 extending the earlier deadline for acceptance of the position to October 16, 2000. The Appellant responded to this correspondence in a letter of her own dated October 13, 2000 advising that she was not resigning and, regardless of the outcome of the Employment Standards investigation, she would not accept the position. The Respondent wrote a final reply to the Appellant dated October 16, 2000 advising that the Respondent viewed the Appellant's rejection of the new position as a resignation.

Although the Appellant disputed the Respondent's assertion during the Delegate's investigation that any changes to her employment were not related to pregnancy leave, there is no dispute on this appeal with the Delegate's finding in this regard. A decrease in land holdings and exploration expenditures caused the Respondent to conclude that their Land Administrator could then largely fulfill their administrative needs without the full time support of an assistant.

The Appellant asserted during the investigation that the new position offered to her was not comparable to her earlier position and felt that, since she was attending school for Environmental Engineering, the loss of technical duties as the Land Administration Assistant would hinder her professional development. In

her appeal submission the Appellant says *"I think the different positions that I held at Ashton shows my willingness to try new things, as long as it benefited my professional development."*

The Appellant wrote to the Respondent on October 2, 2000 saying in part, *"therefore, as I do not consider the position being offered to be comparable to my previous position, it is Ashton's obligation to lay me off. Human Resources Canada requires a letter from my employer that my position as Land Administrator and Technical Assistant was eliminated while I was on maternity leave so that I can collect employment insurance benefits while I am looking for another job."* After the Appellant's initial date for return to work of October 10, 2000 was extended to October 16, 2000, the Appellant wrote to the Respondent in the meantime on October 13, 2000 saying *"I understand that it is not practical for Ashton to leave the position of Assistant to the VP, Exploration unfilled during the time it will take to settle this case. I have not objection to Ashton finding someone else for the position because, even if the case is not settled in my favour, I will not be accepting the position that was offered."*

ANALYSIS

This Tribunal has consistently held in various decisions that the onus is on the Appellant to demonstrate an error in the facts found or law applied by the delegate in rendering a decision.

Regarding the Appellant's assertion that the investigation was handled inappropriately I agree with the Respondent's submission that, even if the original Delegate assigned to the file made comments to the Appellant suggesting that he was going to decide this case in her favour, he did not render a Determination. Whatever opinions he may have had or expressed, therefore, are irrelevant. As the Respondent submits, it is only the findings of facts and conclusions drawn by the Delegate who rendered the Determination that are subject to review by the Tribunal in this appeal. The Appellant's assertion that the Director's Delegate who then assumed conduct of the file and rendered the decision did not discuss the details of the case with her after that does not suggest that he did not have sufficient information to render his decision at that time or that this was unfair to the Appellant. I further agree with the Respondent's submission that there is no evidence that the Delegate who did render the Determination did not conduct a fair and complete investigation.

With respect to the Appellant's assertion that the Delegate was unable to determine whether the positions were comparable, she is correct that, at page 6 of the Determination the Delegate said *"Had Gurney returned to work in the new position, the delegate may have had better evidence to determine the comparability of the positions. The delegate feels there is insufficient evidence to make a Determination on that issue. The fact that a job description show differences between two positions is not a confirmation the positions cannot be comparable. The positions were equivalent in terms of salaries and there is much cross over duties. Gurney by her own admission in evidence refused the new position outright prior to her returning from her leave. Gurney never performed her duties and the delegate cannot say to what extent her new duties would have varied from the old."* However, the Delegate did go on to say "The Delegate is also satisfied that Ashton attempted to place her in a comparable position upon her return as prescribed by Section 54 (3). This did not occur due to Gurney's refusal to accept the position offered."

> Section 54 of the Act provides as follows:
>
> 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 leave allowed by this Part,

(a) Terminate employment,

(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 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.

In the case of (Re) *Creative Surfaces Inc.* BC EST # D195/00 (K. W. ThornIcroft, Adjudicator) the complainant employee had been an outside Sales Representative for a Wholesaler/Retailer of floor tiles. After taking a pregnancy leave, two months prior to her scheduled return to work, the complainant was told that her former position was to be abolished and that she could return, at the same salary, to a new "inside" Sales/Clerical position with no reduction in salary. It was found that the employer made a *bona fide* decision to abolish the complainant's earlier position due to a downturn in business. When it became clear to the complainant that her former position would no longer be available she, in effect, quit. The employer asked her to reconsider and accept the new position but she refused and asked for "severance pay".

At paragraph 13 of the Decision, the adjudicator said, *"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 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 been some significant differences in the duties as between the two positions."*

At paragraphs 16 and 17 of the Decision the Adjudicator found that the employer had not contravened Section 54(3) of the *Act* (failing to provide the same or comparable position on return from maternity leave) because Ms. Flint quit her employment before she was scheduled to return to work. The Adjudicator found that if there was a contravention of the *Act*, it had to have been Section 54(2) (b) for changing a condition of employment without the employee's written consent. However, the employer did not contravene that section because it was not established that a condition of employment was changed because of her pregnancy leave. The Adjudicator was satisfied that the employer had met it's burden of showing that the employee's former position was changed for reasons wholly unconnected with her pregnancy and ensuing leave. Accordingly, her complaint was dismissed.

The case of *Creative Surfaces Inc.* was reconsidered in Re *Kimberley Flint* BC EST #D477/00 (C.L. Roberts, Adjudicator). In that Decision the Tribunal confirmed the earlier Decision of *Creative Surfaces Inc*. At paragraph 21 of that Decision the following was said:

> "In my view, the obligation set out in Section 54 (3) does not take effect until an employee's pregnancy leave has ended. As Flint's leave had not ended at the time CSI offered her an alternative position, there was no duty on CSI to comply with this section. Had Flint returned to work in the new position, the Tribunal may have had better evidence on which to determine whether Flint's previous position was comparable to the one offered. As it turned out, the

> adjudicator found that there was insufficient evidence to make a determination on that issue. Although the adjudicator concluded that there would be significant differences between the positions, that is not a finding that the positions were not comparable, as Flint contends. The positions were clearly equivalent in terms of their salaries, although their duties were different in may respects. Although Flint places significant emphasis on what is characterized as the previous position's "prestige", that is not enough to say the positions were not comparable."

At paragraph 24 of the reconsideration in Re *Kimberley Flint*, the Adjudicator went on to say as follows:

> "It is my view, as it appeared to be the adjudicator's, that it is unreasonable to impose a duty on an employer to place an employee, at the end of several months pregnancy leave, in the same position, or a comparable position, if the business of the employer has undergone significant changes for reasons unrelated to the employee's pregnancy. It would otherwise place an employee who has taken pregnancy or parental leave in a better position than another employee who may have continued to work through that period, and had been offered other work or laid off, because of that significant change."

Following the Decisions in Re *Creative Surfaces Inc.* and Re *Kimberley Flint* I cannot find that the Director's Delegate made any error in the findings of fact or application of law in the present case. Because the Appellant terminated her employment before the end of her pregnancy leave, the Respondent's obligation under Section 54 (3) of the *Act* to place her in the same of a comparable position did not arise. Although it appears that the Employer did change a condition of the Appellant's employment without her written consent, it has been demonstrated that this was not because of the Appellant's pregnancy or leave such that there is no breach by the Respondent of the obligations under Section 54(2) (b) of the *Act*.

As was stated in Re *Kimberley Flint*, had the Appellant returned to work in the new position, the Tribunal may have had better evidence on which to determine whether the previous position was comparable to the one offered. The fact that, in the circumstances, the Delegate had insufficient evidence to make such a finding does not give rise to an error as there was no obligation to provide a comparable position. Just as in Re *Kimberley Flint*, where the new position was not perceived by the Employee to be as prestigious, that was not enough to say the positions were not comparable; in the present case, to say that the new position did not have any environmental aspects and did not benefit the Appellant's professional development is not enough to say the positions were not comparable.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated February 4, 2002 and filed under number ER 103575, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal