

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 -

Bosun's Locker Ltd

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE NO.:	96/702
DATE OF HEARING:	June 26, 1997
DATE OF DECISION:	June 30, 1997

DECISION

APPEARANCES

Shannon Williams and Stewart Johnston	Counsel for Bosun's Locker Ltd
Dave McCoy	Director, Holly Hill Holdings Ltd
Warren Eggleston	Legal Assistant, The Law Centre, Advocate for Leaoni Webb
Leaoni Webb	
Gerry Ormstead	For the Director

OVERVIEW

This is an appeal by Bosun's Locker Ltd pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination dated October 31, 1996, bearing Determination Number CDET 004326, by the Director of Employment Standards (the "Director").

The Determination found that Bosun's Locker Ltd had contravened Section 54(3) of the *Act* in not placing Ms. Webb in the position she held before she took pregnancy leave or in not placing her in a comparable position. Bosun's Locker Ltd appeals on the grounds that the Director failed to recognise that the Company had been purchased and restructured during the time of Ms. Webb's pregnancy and leave and that her original position had been eliminated either prior to her departure on leave or during the time of her leave. The Company argues that the elimination of the position had nothing to do with the pregnancy and that as the position was eliminated there is no obligation to place Ms. Webb in a non-existent position. The Company further submitted that it offered a comparable position.

The Director awarded, in addition to compensation of an amount equal to 6 months lost wages, compensation for "Emotional Pain and Humiliation".

ISSUES TO BE DECIDED

The issues to be decided in this case are whether the Company was restructured in such a way as to eliminate Ms. Webb's position before or during her pregnancy and pregnancy leave and, if so, whether the Company had any obligation to place Ms. Webb in the position she occupied prior to her leave

when such position no longer existed. Also, even if the restructuring was during Ms. Webb's leave, was she offered a comparable position on her return.

Does the Director have jurisdiction to award compensation for "Emotional Pain and Humiliation" in addition to any amount awarded to compensate for lost wages ?

An evidentiary issue arose during the course of the hearing as to whether the Tribunal should hear and consider allegations of harassment of Ms. Webb by her employer in relation to her pregnancy that occurred prior to her leave.

FACTS

Mr. Wayne Dunsmuir (Dunsmuir) was the owner/operator of a small marine supply and service store in Victoria operating under the name of Bosun's Locker and owned by a company called Bosun's Locker Ltd. Dunsmuir had built the business over a number of years and was very attached to it. However in 1993 his health was beginning to fail him and he was looking for someone who could take over the business and run it successfully for him as a manager and future partner.

Dunsmuir met and hired Leoni Webb in January of 1994 believing that he had found the person he was seeking. Although Ms. Webb did not have a nautical background she had owned and operated her own business before in the auto parts field. Dunsmuir employed her on the basis that she would act as his "administrative manager" and with the plan that she would buy in as a partner and that Dunsmuir would eventually sell the business entirely. It was clear on the evidence that Dunsmuir liked to give "titles" to all his employees and that at all times while he remained an owner of the business Dunsmuir was the Manager, the "Boss", and that sub-management responsibilities were very minor. However, when Dunsmuir was away from the business at trade shows or because of his illness he delegated authority to Ms. Webb and another employee with the title of "operations manager".

Dunsmuir began to initiate Ms. Webb into the nautical world by arranging and paying for her to take the Power Squadron training program and was going to arrange for her to take sailing lessons. Sometime in the Spring of 1994 it appears that his opinion about Ms. Webb being his proper successor seems to have changed. He did not continue with the sailing lessons and she was not further initiated into the nautical community in Victoria. It is clear, however, that she was still considered an excellent employee, especially in the sales side of the business.

Dunsmuir's health continued to decline and he had to be away from the store frequently for health reasons. He became more and more anxious to find the right buyer for the business. Because of all the years he had put into building the business he was still looking for a buyer who really knew the nautical side of the business and who was part of that sailing community.

Dunsmuir was very close to the accountant for Bosun's Locker Ltd, Mr. David McCoy ("McCoy"). Dunsmuir had discussed his situation with McCoy and had asked McCoy to take over the business and

to buy out his shares in the business. Although McCoy was interested in the shares he was not ready to take over and run the business himself. He also had a client, Holly Hill Holdings Ltd ("Holly Hill"), who was interested in buying the business. However McCoy knew that it was most important that a suitable replacement for Dunsmuir be found to manage the business. It had to be someone within the sailing community and with good business acumen.

McCoy started to look for a suitable replacement for Dunsmuir. He talked at length and negotiated, although eventually unsuccessfully, with a Mr. Jeff Penny during the Spring of 1995. It also turned out that the son-in-law of the principal of Holly Hill, a Lieutenant Colonel Paul Crober, an avid yachtsman, was planning to retire from the military. Crober appeared to be the key man and plans were put in place and contracts signed in which McCoy would own 50% of the shares of Bosun's Locker Ltd and Holly Hill would own the other 50%. Crober would take over as the General Manager of the business and Dunsmuir would retire but stay around as a fee for service consultant for a transition period. The new owners, Holly Hill Ltd and McCoy, began to look at the management structure and labour costs if Crober was going to be a full-time on site General Manager. This review of the management structure commenced in February 1995.

In late February 1995 Crober was offered a significant promotion in the military and decided that he would not retire and would not take the position at Bosun's Locker. However as contracts had been signed the sale of shares proceeded and Dunsmuir agreed to stay on as the manager until a replacement could be found. Ms. Webb was not considered for this position by McCoy and Holly Hill. The sale of Dunsmuir's shares to McCoy was completed on May 01, 1995 but the Holly Hill share purchase was not completed until July 01, 1995. For reasons unconnected with this hearing McCoy transferred his shares to Holly Hill in September 1995 so that Holly Hill became the 100% owner of Bosun's Locker Ltd.

Sometime in February or March, 1995 it became known that Ms. Webb was pregnant and John Giesbrecht, an employee of Bosun's Locker, mentioned this fact and a possible temporary replacement position to a friend of his, a Mr. Paul Betts (Betts). Betts was an avid sailor and also had a business background and computer skills. He approached Dunsmuir in March of 1995 and Dunsmuir offered him a part-time probationary position. However, Dunsmuir immediately believed that Betts was potentially the right person to take over the full management of the business. Dunsmuir immediately went to McCoy and told him about Betts. They decided to keep quiet about the possibility of Betts taking over and to watch him for a while to make sure they had the right person.

It is also clear that as Ms. Webb's pregnancy developed in April and onwards Dunsmuir started to treat her differently and in her mind in a demeaning manner. He frequently made unwanted comments about her state of health and expressed unsolicited concerns about her workloads and stress. She, like all the other employees including Betts himself, did not know about Betts being considered as the replacement for Dunsmuir. It was this change in attitude that gave Ms. Webb concerns about her job. She began to realise that Dunsmuir was not going to fulfil the original plan of letting her assume the management and a partnership in the business.

In July of 1995 the new owners of Bosun's Locker Ltd offered the general management position to Betts and he accepted. It was arranged that Dunsmuir would retire and that he would assume a fee for service consulting role. As Betts was going to be a full time on site General Manager it was decided by the new owners to eliminate the positions of Administrative Manager and Operations Manager over a transition period as Betts took over and Dunsmuir became less and less involved. Betts became the Store Manager at the beginning of August 1995.

On August 23, 1995 Ms. Webb sent a letter to the store giving notice that she would be taking her maternity leave in October and would be returning April 23, 1996. She received a reply confirming her leave but also the following:

As you know, the ownership of Bosun's Locker has recently changed and a reorganization of management positions is currently underway. The position of Operations Manager (sic) (which you now currently hold) will no longer exist subsequent to the reorganization. However, as discussed, there will be a full time sales/customer service position with a remuneration consistent with that position available to you upon your return.

Yours truly
Paul Betts
Store Manager

In March 1996, after the birth of her baby, and prior to her leave return date, Ms. Webb agreed to work as relief in the store as a sales clerk and was paid cash for these services. Then in early April she received a letter, dated April 2 1996, from Betts offering her a position on her return as "sale staff- full time", Tuesday through Saturday, at \$10.00 per hour - a monetary reduction from her previous monthly salary. The amount of the monetary difference was somewhat uncertain because of the difficulty of converting a monthly salary to an hourly rate where the actual hours worked was not clear either. However, based on an 8.5 hour day and including allowances for overtime calculations Ms. Webb's hourly rate would have previously been approximately \$11.00 per hour. After some negotiations in which Ms. Webb was most concerned about the schedule of work required and some form of job security and also concerns about the rate of pay, Ms. Webb declined the offered position.

ANALYSIS

The complaint and the Determination in this case are based on Section 54(3) 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.

(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.*

The Director found that Betts had in effect taken over Ms. Webb's position and that Bosun's Locker had failed to place Ms. Webb in the position she held before her leave or to offer her a comparable position. The advocate for Ms. Webb showed in detail that most of the duties done by Ms. Webb were now being done by Betts and argued that Dunsmuir's job was now being done by McCoy and the Board of Directors of Holly Hill and that there had not been any real re-organization of the company. He also submits that the employment offered was far from a comparable position and that therefore the employer was in breach of S. 54(3) and that I should confirm the Director's determination.

On the evidence before me I am satisfied that there was a corporate reorganization taking place throughout 1995. I can not agree that the role played by members of the Board of Directors of Holly Hill has taken over the role of Dunsmuir. Dunsmuir himself in the latter part of his tenure as owner/manager was reporting to a Board of Directors. I am satisfied on the balance of probabilities that Betts has assumed the position occupied previously by Dunsmuir as General Manager of the Company and that because he is a hands-on onsite manager that the sub-management positions of Administrative Manager and Operations Manager have been eliminated. Mr Giesbrecht is no longer with Bosun's Locker and whatever management duties Ms. Webb's position entailed have been subsumed into the General Manager's responsibilities. What was left of her position was sales and customer service.

The part of the reorganization that affected Ms. Webb's position was, in fact, completed prior to her departure on leave. Her job had changed even before her leave commenced even though her title had not officially been removed. She was informed on September 11, 1995 of the changes and her leave commenced on October 16, 1995. I find that these changes to the corporate management structure were unrelated to Ms. Webb's pregnancy except to the extent that she was allowed to maintain her current salary and position until commencement of her leave. Ms. Webb did not challenge these changes to her position with the company when they occurred prior to commencing her leave. The removal of her management responsibilities might have given rise to a constructive dismissal claim in September 1995 but that is not before this Tribunal.

In effect Ms. Webb's position prior to commencement of her leave was that of a customer sales and service staff member. Save and except for the alteration in her monetary status from a monthly salary to an hourly wage and a reduction of approximately one dollar per hour the job she was offered in April 1996 was the same as she was doing in the month prior to her leave.

The *Act* does not require the employer to provide the identical position at the end of a leave but only requires a comparable one and I find that the job offer was comparable to her position just prior to her departure on leave.

It is worth commenting that there is no doubt that Ms. Webb's employment status at Bosun's Locker was significantly diminished, perhaps because of her pregnancy, between January and September, 1995, but I find that the diminishment occurred throughout the months prior to her actual pregnancy

leave. As mentioned earlier there may have been other remedies at the time open to Ms. Webb but the issue before this Tribunal is what happened between October 16, 1995 and April 23, 1996.

An issue arose during the hearing about the harassment of Ms. Webb by her employer, Dunsmuir. I ruled that this evidence was not relevant to the issue before the Tribunal because the incidents occurred about 4 months prior to the leave request and were unrelated to the issue about Ms. Webb being placed in the proper position upon her return from leave almost a year later. There may well be an issue under the Human Rights legislation and, I was informed, that in fact, such a process was still under way. Indeed there may have been grounds for a complaint in 1995 that Dunsmuir, through these actions and the act of bringing in Betts over her head, had changed a condition of Ms. Webb's employment contrary to S.54(2) of the *Act*. However, it is not open to the employee to raise a new ground of complaint at the appeal that has not been the subject of a complaint and a proper investigation by the Director.

I find that the employer did offer a comparable position to Ms. Webb upon her return from pregnancy leave.

In light of the above findings it is not necessary for me to address the issue relating to compensation for "Emotional Pain and Humiliation".

ORDER

I order, under Section 115 of the *Act*, that the Determination is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal