

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

John Ladd's Imported Motor Car Company
operating as John Ladd B.M.W.
("John Ladd")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Carol Roberts

FILE NO.: 96/353

DATE OF DECISION: December 9, 1996

DATE OF HEARING: October 15, 1996

DECISION

APPEARANCES

David Wilson	For the Appellant
Gerry Omstead	For the Director of Employment Standards
Neilane M. Thompson, Student at Law	For Lisa Plasier

OVERVIEW

This is an appeal by John Ladd's Imported Motor Car Company operating John Ladd B.M.W. ("John Ladd"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued on May 28, 1996 (Determination No. 002376) wherein the Director found that the employer had contravened Section 54(2) of the *Employment Standards Act* in terminating Lisa Plasier ("Plasier") during her pregnancy leave, and ordered that John Ladd pay \$15,899.10 to the Director of Employment Standards.

ISSUES TO BE DECIDED

The issue on appeal was whether Plasier's employment was terminated as a result of her pregnancy and parental leave, as found by the Director, or as a result of corporate reorganization, as contended by John Ladd.

John Ladd argues that Plasier's position was eliminated as a result of the reorganization, and that Plasier was given holiday and severance pay as required under the *Act*. The company seeks to have the Determination cancelled on these grounds.

A secondary issue was raised at the hearing. That issue, whether the appeal is a hearing "*de novo*", or whether it is a true appeal from the Director's Determination, will be addressed first.

NATURE OF THE APPEAL PROCEEDINGS

The starting point for any inquiry into the nature of the process established by Section 107 is the language of the section itself.

Section 112 provides that a person served with a determination "may appeal the determination to the Tribunal". Section 107 provides that the Tribunal may "conduct an appeal **or other proceeding** in the manner it considers necessary and is not required to hold an oral hearing".

Sections 108 and 109 outline the Tribunal's powers. Included are the powers of a commissioner under Sections 12, 15 and 16 of the *Inquiry Act*, and the power to decide all questions of fact or law arising in the course of an appeal.

Section 107 uses the phrase **appeal or other hearing**. While it does not contemplate that a *trial de novo* be held, the fact that an oral hearing need not be required suggests that something less formal than either an appeal or *trial de novo* may be conducted.

Although there have been no judicial pronouncements on the nature of an appeal under this Act, some guidance may be taken from the decision of the B.C.C.A. in *Dupras v. Mason* (1994) 99 B.C.L.R. (2d) 266, in which the court held that an appeal of a gold commissioner's decision was a true appeal. The court found that as the appeal was not specified as a *trial de novo* in the Legislation, that type of hearing was not permitted.

In arriving at its decision, the Court examined the commissioner's powers and duties, and found that as he was performing the functions of an administrative decision maker, the principles of natural justice had to be adhered to. Consequently, the Court held that the appeal was a true appeal, restricted to the question of whether the commissioner made a reviewable error of fact, of law, or of procedure.

The Court stated that "a true appeal focuses on the original decision and examines it to determine whether it is right or wrong, flawed or unflawed", and that a *trial de novo* "ignores the original decision in all respects, except possibly for the purposes of cross examination" (p. 273).

The Director's function under the *Employment Standards Act* is an investigative, or inquisitorial one. While the Director "must make reasonable efforts to give a person under investigation the opportunity to respond", (Section 77), and has the power and authority of a commissioner to summons witness and compel the production of documents under Sections 12, 15 and 16 of the *Inquiry Act* (Section 84), in most instances, parties do not give evidence under oath, no formal hearings are held, there is no opportunity for cross examination of witnesses, and there is no 'record' other than the Determination itself.

In "Rights and Responsibilities in A Changing Workplace: A Review of Employment Standards", Professor Mark Thompson, the Commissioner of Employment Standards Review, noted that the previous system of appeals, from the Director to the Supreme Court, which heard the matter *de novo*, was unsatisfactory. He recommended (p 134-135) "...that the appeals system be relatively informal with the minimum possible reliance on lawyers...The process should not only be consistent with the principles of natural justice, but be seen to meet those standards." He further noted (at pp. 135-136) "Most cases involve the collection of relatively small amounts of money. The decisions normally rest on reviews of evidence, not complex procedural requirements found in the *Labour Relations Code*."

While not binding on me, this report, which forms the backdrop for the amendments to the *Act* including the creation of the tribunal, suggests that the process should be expedient and informal, and which 'reviews evidence' gathered in accordance with the principles of natural justice.

I note also the Supreme Court of Canada's decision in *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal* (N.S.) [1989] 1 S.C.R. 238, in which the Court found that the objective of providing a speedy and efficient mechanism for investigating and resolving disputes was at least as important as substantive protections.

In light of the object and purposes of the statutory scheme established by the *Act*, I find that while the nature of the hearing is more akin to a true appeal, it nevertheless has the characteristics of a *de novo* hearing. I have had regard to the powers of the Tribunal to receive evidence and decide questions of fact, which are indicators of a *de novo* hearing in arriving at this conclusion.

The *Act* provides that, once a Determination has been appealed, the Tribunal may establish the nature of the hearing. That will be determined by the issue in dispute. Where the appeal involves an analysis of the correctness of the Determination, written submissions may suffice. If the factual underpinnings of the Determination are at issue, an oral hearing may be granted.

The oral hearing may take the form of a hearing *de novo* where facts are disputed, or credibility of witnesses are at issue.

The Determination from which the appeal is taken forms the basis for the hearing, and frames the issues in dispute. The burden of establishing that the Determination is incorrect, or the burden of proof, rests with the Appellant. In these respects, the process is more akin to a true appeal.

Once the hearing has commenced, the Tribunal must give the parties an opportunity to present evidence supporting their grounds of appeal. That includes compelling witnesses to appear to give evidence under oath, and be subjected to cross examination, where facts are disputed. In this respect, the process is not one of reviewing evidence, but hearing it afresh, and making findings of fact, as if the Determination was not made.

In arriving at my decision, I have accepted those unchallenged portions of the Determination as evidence. However, I have given the evidence gathered by the Director's delegate less weight than the oral evidence presented at the appeal hearing, as it was not taken under oath and was not subject to cross examination.

Natural justice and procedural fairness requires that, prior to making any findings, the parties have the right to know the case against them and reply to it. Nevertheless, where requests for information are not responded to, adverse inferences may be drawn.

No evidence was presented as to why Mr. Ladd did not reply to either of the Director's requests for a meeting on February or March 27, 1996. Consequently, the Determination was made without the benefit of any information provided by the supervisor of the complainant.

However, given the nature of the appeal process, any errors made by the Director may be cured during the course of the appeal hearing.

FACTS

Plasier was hired by John Ladd on May 31, 1994, at a monthly salary of \$2,500.00. The advertisement to which she responded indicated that John Ladd was seeking an "enthusiastic, enterprising individual to join their team of professionals in customer relations. Successful candidate will possess extraordinary phone and people skills and personify the professional image that John Ladd BMW has carefully cultivated".

For the first month of Plasier's employment, there were no expenses to John Ladd as she was on a W.C.B. sponsored program. On July 1, after successfully completing the one month trial assessment, Plasier was taken on salary by the company, but her wages were subsidized by W.C.B. on a gradually decreasing basis until September 30, 1994.

In July 1994, a formal job description was prepared, identifying Plasier's job as a Customer Relations Manager. The areas of responsibility were identified as "general office and receptionist duties, including telephone, filing and the filling of work orders; assisting in all organizational and customer related liaison functions; enter warranty claims, act as the BMW contact person and liaise with Trifour System to ensure the proper use of service retention program; assist in the initial contact, meet and greet of showroom customers; assist in counting and recording feedback of all dealership showroom traffic... The long term follow up of various customers will be expected; assisting service department with secretarial requirements as needed; any associated duties requested of you by Mr. John Ladd."

In July 1994, John Ladd employed a consultant to assist in the preparation of job descriptions and establish a salary grid for those positions. Plasier attempted to add more customer service relations functions to her position description in an effort to utilize her management and client services skills. No amendments were made to her written description.

For a six week period in August and September 1994, Plasier assumed additional duties when the position of service manager was vacant, performing tasks such as filling out work orders. She also substituted in the parts department when required, and assisted the new service manager after he was hired.

On January 19, 1995, Plasier notified John Ladd that she was pregnant, and that she would be taking 18 weeks maternity leave followed by 12 weeks parental leave. She indicated that the commencement of her maternity leave would depend on her health situation. Her due date was August 1. On May 15, Plasier advised John Ladd that due to medical complications, she would be unable to work past May 26, and would be commencing her maternity/parental leave that day.

On May 19, John Ladd placed an advertisement for the "Times Colonist" for a receptionist. Kerry Andrest (nee Rozon), "Andrest," was the successful candidate and began work on June 5 with a monthly salary of \$1500.

On August 28, 1995, the parts manager retired. John Ladd used the retirement to reorganize the company. When Plasier commenced employment, there were three managers - a parts department manager, a service department manager, and Plasier, who was described as a customer relations manager. All three positions reported to Mr. Ladd. In September, the parts and service department was consolidated into one department, headed by one individual. He supervises both departments and 6 staff, including Andrest, report to him. John Ladd has reported increased profits since the reorganization.

In early December, Plasier called John Ladd to advise them she would be returning to work on January 8, 1995.

On December 28, John Ladd advised Plasier in writing that due to a company reorganization, her position had been eliminated and her employment was terminated. A severance and holiday pay cheque was enclosed.

The Director found that the position held by Plasier had been taken over by Andrest. The Director further determined that as severance pay had been provided on termination, just cause could not be established, and further, that John Ladd had not provided evidence to support the contention that the reason for the termination was not related to her pregnancy and parental leave.

The Director found a contravention of Section 54 and awarded 5 months lost wages, vacation pay, benefits and 20% of that amount as damages for pain and suffering.

ARGUMENT

Counsel for John Ladd contended that the job held by Andrest was "monumentally different" from the job Plasier held, and that the Director's determination was in error in finding that it was the same or similar. He argued that Plasier's job was a managerial one, while Andrest had no management responsibilities. He contended that Andrest was primarily a receptionist and typist, and that Plasier seldom did any typing because of her injury.

He argued that the customer service functions were transferred to the department heads and the salesmen directly, and that all the clerical functions were assumed by Andrest who does all the typing Plasier did, plus a great deal more. Mr. Wilson also stated that as Andrest performs a job junior to the one Plasier performed, she is paid one half the amount Plasier was paid.

Mr. Wilson also contended that the determination is incorrect as it found that Andrest did additional duties such as warranty and administrative work. He argued that Andrest did not do administrative work, and the warranty work she performs is limited to inputting warranty information into the computer using her computer and clerical skills.

Mr. Wilson further asserted that Plasier assisted in all organizational and customer related liaison functions, and assisted in counting and recording of feedback of all dealership showroom traffic and managed long term follow up with various customers, all of which Andrest does not do.

Ms. Thompson argued that Plasier, despite her title as Customer Relations Manager, was little more than a secretary with occasional duties liaising with customers on behalf of the salespeople. She contended that even though Plasier requested additional managerial responsibilities, those were not forthcoming. She argued that the receptionist role was filled by another employee while Plasier was on leave, that John Ladd did not intend to bring Plasier back as an employee, and that he used the reorganization as a reason to terminate her employment.

The Director contended that Plasier was entitled to resume her old position, and that the termination was not justified, even if there was a corporate reorganization. Although Olmstead conceded that Plasier could have been terminated at any time as a result of the reorganization, Plasier should have been offered the position she formerly occupied, that of receptionist.

ANALYSIS

I heard evidence from John Ladd, Charlie Forrest, Jordie Harris, Kerry Andrest (nee Rozon), Trevor Bast and Lisa Plasier. I have also considered the evidence, to the extent noted above, contained in the Determination.

On the basis of the evidence presented, I set aside the Director's Determination.

Section 54(1) of the *Act* provides that 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 any employee's pregnancy ...,
 - (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.

Although Plasier's job description (as formalized in June 1994) specified that she was a customer relations manager, I find that she performed limited management functions.

A manager is defined in the Employment Standard Regulations as a "person whose primary employment duties consist of supervision and directing other employees."

As Plasier's **primary** employment duties did not consist of supervision or directing other employees, she was not, for the purposes of this *Act*, a manager.

I am unable to find that Plasier was, as her counsel argued, little more than a secretary for the bulk of her employment with John Ladd. Even though Plasier characterized her employment duties as similar to those of a receptionist, and included making coffee, telephone reception, filing, some typing and greeting customers, the evidence is that she performed additional duties, such as fill customer orders and handle warranty work when the sales manager position was vacant for about a six week period, and provide administrative support to the departments.

Although Mr. Ladd's evidence was that Plasier was hired "to assist parts and service in customer relations", I accept that those duties occupied approximately 10% of Plasier's time when there were no vacancies in the managerial positions.

I accept that as a consequence of the reorganization, Plasier's job description and functions changed. I find that her receptionist functions were filled by Andrest, and that her customer relations and management functions were filled by other staff members.

Notwithstanding the apparent similarities between the position Plasier held and the position Andrest presently holds, I find that in fact, their duties are substantially different.

The uncontroverted evidence is that Andrest spends 100% of her time on the computer, and 75% of that time involves inputting warranty claims. The balance of her time is spent on customer service retention (the TriFour system), filing, and typing for the departments as needed. Her evidence is that she does not make coffee, and only occasionally arranges for courier services or greets customers.

I am also unable to conclude that Andrest has the authority or responsibility on the job that Plasier had. There is no evidence that she performs any supervisory or managerial duties.

The issue to be determined is whether John Ladd failed to comply with subsection 54(3)(b) in not offering Plasier a comparable position in the company at the end of her statutory leave period.

While the Director contended that Plasier should have been offered the position of receptionist, I accept that as a result of the reorganization, Plasier's position had been eliminated and that there was no comparable position to offer her. Plasier's evidence is that due to a work related injury, she was unable to spend more than 45 minutes at one time before a computer without taking a break. She did not enter warranty work into a computer at any time during the course of her employment. Andrest spends 75% of her time typing or working on a computer processing a backlog of claims.

Consequently, I am unable to concur with the Director's characterization of Plasier's duties as being similar to those performed by Andrest. I accept that Plasier felt 'underemployed' due to the lack of responsibility she was given. It is clear that she performed more receptionist functions than she would have liked. Nevertheless, she was expected to be responsible for customer relations, and was paid accordingly.

I am unable to conclude that John Ladd was in breach of the *Act*, and allow the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that Determination No. 0002376 be cancelled.

Carol Roberts
Adjudicator
Employment Standards Tribunal