

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* S.B.C. 1996, C. 113

- by -

Afaga Beauty Service Ltd.  
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Mark Thompson

**FILE NO.:** 97/281

**DATE OF DECISION:** July 22, 1997

**DECISION**

**APPEARANCES**

Franco Gismondi	for the Employer
Penny M. Killy	for herself
Bernie T. Gifford	for the Director

**OVERVIEW**

The Employer appealed a Determination dated April 2, 1997 pursuant to Section 112 of the *Employment Standards Act*. The Determination found that the Employer had terminated Ms. Penny M. Killy's ("Killy") employment during her pregnancy leave. The Determination further ordered the Employer to pay Ms. Killy \$6,665.89 in compensation for the violation of the *Act*. The Employer argued that it had offered Killy her previous position after the completion of her pregnancy leave, but she had abandoned her employment. At the time of the hearing, Killy was residing in Ontario. She participated in the hearing by telephone.

**ISSUES TO BE DECIDED**

The issues to be decided are whether the Employer terminated Killy's employment during her pregnancy leave, and if so, what compensation is due to her.

**FACTS**

Killy was employed as a hair stylist and nail technician at a salon operated by the Employer. She commenced employment in March 1993. Some time in 1995, Killy informed Mr. Franco Gismondi ("Gismondi"), one of the owners of Afaga Beauty Service, that she wished to begin her pregnancy leave on December 23, 1995. Subsequently, Killy decided to delay her pregnancy leave, and she continued to work until February 3, 1996. Gismondi testified that he permitted her to work although she had informed her customers that she would not be working after December at Gismondi's request, Killy left a note on February 3, 1996, stating "Back at the end of August, 20th or 27th?" Gismondi asked Killy to remove her personal equipment (scissors, combs, dryers and the like) from the work area when she began her leave. Gismondi stated that prior to beginning her leave, Killy asked him to pay her in cash for her work and to schedule her on a part-time basis, but he refused. Killy denied making such a request. She stated that she wanted and needed full time employment.

She did acknowledge that she asked Gismondi for part-time work while she was on pregnancy leave, but learned that she could not work during the leave.

During her pregnancy leave, Killy brought her baby to the salon from time to time. In addition, she worked on her mother's hair approximately every five weeks. The Employer charged only for supplies used in the work. She and Gismondi agreed that they never spoke directly about her return to work.

According to Killy, she made "numerous attempts" to contact Gismondi about coming back to work. In particular, she stated that she visited the salon on August 6, but Gismondi was too busy to talk. On August 8, she called the salon. A stylist "Elizabeth" took a message because Gismondi was too busy to speak to her. Killy further stated that she telephoned and left a message for Gismondi on August 13. In all cases Gismondi did not reply. Killy presented copies of notes from her boyfriend and a former neighbour, both stating that they were present on two occasions when she called the Employer in August about coming back to work.

Gismondi testified that he did not receive any messages from Killy prior to September 3. Normal practice in the salon is that the stylist who is least occupied answers the telephone and records messages. Gismondi did not receive any messages from Killy. Further, he had booked appointments for her in August, but had to cancel them when Killy did not return to work in August. Gismondi presented letters from four stylists employed at Afaga stating that they had never received any telephone calls from Killy or taken her messages for Gismondi. One of the stylists is Elizabeth. In addition, another stylist, Ms. Rosa England, testified that there was a note in the salon appointment book that Killy would be back on August 27. On August 19, Killy called and asked Ms. England to cut her hair. England replied that she was too busy then. She did not receive any other calls from Killy. According to Gismondi, his first conversation with Killy concerning her return to work was on the afternoon of September 3, 1996.

Killy and Gismondi agreed that she asked to resume her employment when they spoke on September 3, and Gismondi refused. According to Gismondi, he told her that he could not take Killy back on the terms she requested and she had abandoned her job. The following day, Killy called Gismondi and asked if she was fired or laid off. She mentioned that if she were laid off she could collect Unemployment Insurance. Gismondi stated that he told Killy to speak to the unemployment insurance authorities, but he did not receive any communication from Killy or the federal authorities. Killy stated firmly that she wanted her job back on a full time basis. Furthermore, the stress caused by her loss of employment affected her health. For his part, Gismondi insisted that Killy's job was available for her had she chosen to return to work.

In his Determination, the Director's Delegate stated that Killy was entitled to "the equivalent of six months' wages based on her previous year's earnings." He went on to calculate the amount owing Killy based on one half of her 1995 earnings, less Unemployment Insurance

received, plus vacation pay and interest. When asked for the basis of the six months' wages for a complainant, the Delegate replied that the amount had been policy in the Employment Standards Branch for many years. Ms. England testified that in her experience, a stylist's earnings were reduced for several months after pregnancy leave.

Some of the stylist's clients make other arrangements while she is away from work. Since the stylist's compensation is based on commission, it is necessary for her to rebuild a client list to attain her former earnings level.

## **ANALYSIS**

Section 54, paragraphs 1-3 of the *Act* impose duties on an employer with respect to pregnancy leave as follows:

(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 a leave allowed by this Part,

(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 before taking leave under this Part, or

(b) in a comparable position.

A careful reading of the *Act* clearly indicates that the employer must take the initiative in placing an employee in a former position at the conclusion of pregnancy leave. In this case, Gismondi and Killy each seemed to be waiting for the other to take the initiative in arranging for Killy's return to work. There was no evidence of bad faith on Gismondi's part, but it was his obligation to offer Killy a position on the same terms as she had prior to February 3, 1996. He seemed to think that Killy was obligated to arrange for the resumption of her work, which is contrary to the requirements of the law.

The statutory authority for the part of the Determination that stated the basis of the amount owed to Killy was six months' wages is Section 79 of the *Act*. Paragraph (4) of the Section covers this situation as follows:

(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 an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

In this case subparagraph (c) presumably applies. There was no evidence about Killy's desire for reinstatement at the time of the hearing, but she had moved out of the province after the end of her pregnancy leave. This Section of the *Act* is unique in that it anticipates that a former employee may be reinstated after an unjust dismissal or that a person improperly dismissed can receive compensation instead of reinstatement. In the latter case, appropriate compensation for loss of employment normally is based on the circumstances of the employee, e.g., length of service with the employer, the time needed to find alternative employment, mitigation, other earnings during the period of unemployment, projected earnings from previous employment and the like. Based on the language of the Determination and the Delegate's statement, I conclude that none of these factors were considered in the calculation of the economic loss Killy suffered because of the Employer's failure to place her in her former position. In terms of procedures, this Tribunal should not base a decision on a body evidence not considered in the course of the Determination.

## **ORDER**

For these reasons, I order that the Determination dated April 2, 1997 be confirmed in its conclusion that the Employer violated Section 54 of the *Act*. I further order that the Determination be referred back to the Director under Section 115(1)(b) of the *Act* to consider the appropriate amount of compensation due to Killy.

**Mark Thompson**  
**Adjudicator**  
**Employment Standards Tribunal**