

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 -

Jeanne L. Massei
("Massei")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson
FILE NO.: 1999/46
DATE OF HEARING: July 9, 1999
DATE OF DECISION: August 26, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Jeanne L. Massei (“Massei”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 8, 1999. In the Determination, the delegate found that Massei’s former employer, Club Plaza Enterprises Ltd. (the “Employer”) had terminated Massei properly under Section 63 of the *Act*.

Webb appealed the Determination on the grounds that the Employer had terminated her because she was pregnant, in violation of Section 54 of the *Act*.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the Employer terminated Massei because of her pregnancy.

FACTS

Massei worked for the Employer from November 24, 1997 until April 29, 1998. Massei was hired as a Catering Sales Administrative Assistant. At the end of February 1998, the Employer changed her job title to Sales & Event Co-ordinator, and in April 1998, Massei was promoted to Marketing Manager. The Employer ordered business cards with her new job title about April 15, 1998. According to Massei, she received the title of Sales & Event Co-ordinator after her director, Johnny Cheung, was terminated. In addition to her base salary, she received a commission of 1.5 per cent of food and beverage sales. Sidney Lin (“Lin”), owner and president of the parent company of the Employer, stated that that Annie Lee (“Lee”) and Massei were promoted to Sales Manager and Marketing Manager respectively, but neither received an increase in pay. He changed their job titles because he believed that clients preferred to deal with managers.

Massei stated in her complaint that she had received positive, but informal, feedback about her work. The Employer had expanded her duties. In addition, she had received three promotions in 5 months, and had begun a marketing campaign in April under her own name.

Massei learned that she was pregnant at the end of January 1998, and the expected date of birth of her child was September 8, 1998. She planned to work until the end of August and then begin maternity leave. The only person at her place of work whom Massei informed of her pregnancy was Lee, who was the Catering Sales Co-ordinator at the time. According to Massei, Lee urged her to tell the Employer that she was pregnant. In Massei’s opinion, her pregnancy might have become apparent by the end of April, even

though she continued to wear her regular clothing. Massei stated that she had noticed Lin looking at her abdomen.

Massei made an appointment to see Lin on April 29, 1998 to tell him of her pregnancy. Before Massei could raise the subject of her pregnancy, Lin informed her that she was laid off effective immediately. He provided a letter of termination and cheques for her salary and commissions due at the time, plus compensation for length of service under Section 63 of the *Act*. The letter of termination referred to a "lack of sales" as the reason for ending her employment. In the exchange of correspondence arising from the appeal of the Determination, Lin raised the issue about alleged deficiencies in Massei's performance. She maintained that her performance was good. Since the Employer terminated Massei for economic reasons, not for cause, it is not necessary to examine her performance.

In her original complaint and her appeal to the Tribunal, Massei maintained that Lin had terminated her because of her pregnancy. Massei believed that Lee had informed Lin that she was going to have a baby. The Director's delegate interviewed Lee, who denied telling the Employer of Massei's pregnancy. The delegate found Lee's evidence credible, in part because Lee herself had been terminated in July 1998 and had no interest in the outcome of Massei's case.

In its reply to Massei's appeal, the Employer presented evidence of its financial situation, explaining that it had to reduce costs due to the unacceptably low volume of business. Lin stated that the Employer had to gross \$100,000 per month to be viable. During the first eight months of 1998, the firm achieved that goal in only two months, one of which came prior to Massei's termination. The Employer laid off one employee before Massei's termination and three other individuals after she left the enterprise. Lin vigorously denied looking at Massei's abdomen because of suspicions about her pregnancy. He acknowledged that he had instructed a staff member to prepare a letter of termination and final cheques for Massei about two hours before their meeting.

ANALYSIS

Section 126 (4)(b) of the *Act* places the burden of proof on the employer to demonstrate that pregnancy is not the reason for terminating an employee. On the balance of probabilities, I find that the Employer in this case discharged its obligation. Lin presented evidence of the financial difficulties the enterprise faced, and the steps he had taken to reduce costs, i.e., a reduction in the number of employees. Massei presented no evidence that Lin knew of her pregnancy. She asserted that Lin looked at her abdomen, which Lin denied. Massei suspected that Lee told Lin of her pregnancy. She did not present any evidence in support of her suspicion. On the contrary, the Director's delegate interviewed Lee and found her to be credible when she denied telling Lin of Massei's condition.

Massei placed great emphasis on her promotions, and in particular the Employer's ordering of a supply of new business cards shortly before her termination. Lin stated that

the cost of the business cards was \$50.00. Although giving Massei a promotion, even a modest one, shortly before her termination may point to a change in management strategy, the *Act* does not prohibit such actions, if the employee receives adequate notice. All parties agreed that the Employer had met its statutory obligations with respect to Massei's notice.

Finally, Massei did not introduce any evidence in this proceeding that was not available to the Director's delegate when she issued her Determination. In fact, Massei promised the Director's delegate additional evidence prior to the issuance of the Determination but did not off provide any new evidence. In her appeal, Massei did not demonstrate or even assert that the Determination contained errors of law. The Tribunal is an appellate body. It should not replicate a delegate's investigation.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, I order that the Determination of January 8, 1999 be confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal