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 -

Dorothy Ogurek

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April D. Katz

FILE No.: 2000/378

DATE OF HEARING: August 28, 2000

DATE OF DECISION: September 8, 2000

DECISION

APPEARANCES:

For the Employee	Dorothy Ogurek, Stacey Lind
For the Employer	Grace Sun and Willy Sun
Interpreters for Grace Sun and Willy Sun	Peter Lam and Paul Chow
For the Director	No one appeared

OVERVIEW

The Employee, Dorothy Ogurek, ("Ogurek") took 26 weeks maternity leave. When Ogurek approached the Employer, Willy Image Services Ltd. operating as Shelbourne One Hour Photo ("Willy") about commencing work at the end of her leave, the Employer did not offer Ogurek her old position. Willy offered Ogurek her position one month after her maternity leave ended. Ogurek refused the offer because she was concerned she would be laid off quickly without eligibility for compensation for length of service. Ogurek complained to the Director under the *Employment Standards Act* (the "*Act*"). The Director found that Ogurek was offered her old position prior to any termination and stated in Determination ER#: 098781 that there was not a breach of the *Act.*

Ogurek is appealing Determination ER#: 098781.

ISSUE

Was the Determination in error in its findings of fact and in finding that Willy did not breach the *Act*?

Specifically, did Willy offer Ogurek her former employment or a comparable position at the end of her maternity leave in compliance with section 54(3) of the *Act*?

Was Ogurek's employment terminated under section 66 on November 10, 1999?

FACTS

The facts in this appeal are critical in determining the basis for interpreting the *Act*. The Director's delegate found that the parties disagreed about the facts but did not have the benefit of hearing from the witness, Stacey Lind, who Ogurek suggested be consulted about what had happened. Stacey Lind gave evidence at the appeal both orally and in writing.

Ogurek worked in the photo finishing business for 7 years and was the manager of Willy's working 5 days a week when she went on maternity leave on April 23, 1999. In fall 1998, Ogurek had advised the owner of the business in writing that she was pregnant and would be taking 26 weeks maternity leave commencing April 23, 1999. The then

owner sold the business to Willy in December 1998. Willy was not advised and did not ask the duration of Ogurek's maternity leave.

Willy's new owners, Grace and Willy were new to Canada and new to this type of business. English was not their first language. They were dependent on the employees at the commencement of the ownership to learn about the equipment and the business. Ogurek arranged for a qualified replacement for her period of maternity leave. The replacement, Stacey Lind, gave evidence. Stacey always considered her position temporary as a replacement for Ogurek. She considered it Ogurek's position. When she had problems with the work she called Ogurek for advice. When she had problems with the equipment she called Ogurek and Ogurek came in at least 3 times to help fix what was wrong. Ogurek never claimed any hours for her work on these occasions.

Stacey gave evidence that she found that Grace wanted to learn more and more about the operation of the business and took on more and more of the day-to-day manager's duties during Stacey's employment. In August 1999 Stacey accepted a full time position at another photo lab and gave her notice effective September 7, 1999. She continued to work on Saturdays.

When Stacey gave her notice, Grace asked Stacey to find out if Ogurek would return to work. Grace had difficulty understanding English speakers on the telephone and relied on Stacey to do telephone work with suppliers and customers.

Ogurek planned to be on maternity leave until November 1, 1999. Stacey knew Ogurek from working with her in the past and she knew she did not want to end her maternity leave early. Neither Stacey nor Ogurek remembers a conversation in August or September about Ogurek returning to work. Stacey had spoken to Ogurek about the changes in her job and the fact that Grace was acting as the manager on an increasing basis. Stacey did tell Ogurek that Grace told Stacey that there were not enough hours for Ogurek to return to her old job and that Ogurek's hourly rate of $10.75 was too high.

Grace had no idea when Ogurek planned to complete her maternity leave. She did not ask Stacey or Ogurek this question. Grace understood from Stacey that Ogurek would not return in September when she needed her. She remembers Stacey telling her that Ogurek did not know how her baby would adjust to day care. She understood from this that Ogurek was no longer prepared to be the manager working 5 days a week. She did not understand that Ogurek wanted to complete her leave before returning to work.

When Stacey left in September 1999, Grace could process two rolls of film an hour. Stacey and Ogurek could process more than 20 rolls an hour. To keep the business going Grace worked very long hours and subcontracted work to other labs. Grace asked Stacey about possible new people but no one was available full time.

Ogurek wanted to return to her old position on November 1, 1999 but she felt that if she could not get full time work that she could work part time until the business was busier. She had confidence that during the Christmas season she could create more hours for herself. She knew every aspect of the operations side of the business and she knew

business was not as good as when she had been the manager. She went to meet with the owner on October 7, 1999 to discuss her start date and work schedule.

Grace told Ogurek there not enough hours and she would have to see about when Ogurek could be scheduled in November. They discussed working 3 days a week. Ogurek suggested that maybe she could continue for a few weeks on Employment Insurance while she had so few hours of work. Ogurek was prepared to take what she could get and work with the Grace and the business to rebuild her position. Grace thought Ogurek only wanted part time work so she could be at home more with her baby. Willy thought that if Ogurek was not going to resume the responsibilities of the manager's position she should not be paid at the same level she had earned when she was doing that work.

Ogurek waited to hear and heard nothing. On October 26, 1999, the Monday before she planned to return to work, Ogurek returned to the store and spoke to Grace. She found out that the equipment was not working and needed to be replaced. There was new equipment coming in a couple of weeks. Ogurek agreed to wait and start work on November 8, 1999. Grace said she was uncertain what hours she could give Ogurek finally suggested the possibility of working alternate Saturdays. Ogurek went home.

Ogurek contacted Stacey and arranged to start on November 20, 1999. On November 9, 1999 Ogurek went to the store to confirm her start date with Grace. The service man was installing the new equipment. Grace told Ogurek that she could start on Saturdays if she dropped her salary from $10.75 to $9/hour. Ogurek stated that she knew the equipment and the business and had 7 years experience, which made her worth at least $10 per hour. Grace told Ogurek that she would have to consult her husband and let Ogurek know. On November 10, 1999 Grace called Ogurek and told her Willy would not agree to pay Ogurek $10 per hour. Ogurek considered her employment terminated.

On December 3, 1999 Ogurek went to the store to speak to Grace about compensation for length of service. She advised Grace that the *Employment Standards Act* required the employer to compensate her for length of service. She found the Employment Standards Branch office telephone number in the telephone directory for Grace and gave it to her. Grace told Ogurek to leave the store because she was very angry. Ogurek went directly to the Employment Standards Office and picked up a complaint form.

After speaking with the Employment Standards Branch on Friday, December 3, 1999, Grace called Ogurek and offered her a full time manager position at $10.75 per hour. Ogurek advised Grace that she would think about it. Grace and Willy prepared a letter on Saturday, December 4, 1999 with Stacey's help offering Ogurek her old position. Stacey called Ogurek and left a message that the letter was at the store. Ogurek did not go in to the store to get the letter. On Monday, December 6, 1999 Ogurek consulted the Employment Standards Officer who told her if she returned she could be laid off almost immediately without compensation. Ogurek called Grace and advised her she would not be returning to work.

Ogurek filed her complaint on December 8, 1999. She was told to fit the information on to the form. She had difficulty condensing all she had to say and left out some critical

information about her complaint. She failed to state that she wanted to return to her old employment after her maternity leave. She did not disclose the discussions she had had with Stacey in Stacey's capacity as manager of the employer. This evidence came out at the appeal.

ANALYSIS

In an appeal the evidentiary burden in on the appellant to show that the Director's Determination was in error.

The Director's Delegate reviewed the evidence and concluded that Ogurek had quit her employment and that there was no breach of the *Act*. She relied on sections 54, 63, 65 and 66 in her analysis. These sections state the following.

> ***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.*
>
> ***(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 held before taking leave under this Part, or***
>
> ***(b) in a comparable position.***
>
> *(4) If the 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.*
>
> ***Liability resulting from length of service***
>
> *63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
>
> *(2) The employer's liability for compensation for length of service increases as follows:*

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

Exceptions

65 (1) Sections 63 and 64 do not apply to an employee

(a) employed under an arrangement by which

(i) the employer may request the employee to come to work at any time for a temporary period, and

(ii) the employee has the option of accepting or rejecting one or more of the temporary periods,

(b) employed for a definite term,

(c) employed for specific work to be completed in a period of up to 12 months,

(d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act,

(e) employed at a construction site by an employer whose principal business is construction, or

(f) who has been offered and has refused reasonable alternative employment by the employer.

(2) If an employee who is employed for a definite term or specific work continues to be employed for at least 3 months after completing the definite term or specific work, the employment is

(a) deemed not to be for a definite term or specific work, and

(b) deemed to have started at the beginning of the definite term or specific work.

. . . . .

Director may determine employment has been terminated

66 If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

Return From Maternity Leave

The Delegate did not analyze the impact of section 54 on the facts in this complaint. The Delegate quotes section 54 and restates it but did not apply it to the facts. In view of the fact that Ogurek's maternity leave was the reason she left her employment and was returning to it this seems surprising. The requirements of the *Act* for Ogurek's reentry to the labour force seem critical. The *Act* specifically allows an employee to take up to 30 weeks of maternity and parental leave. Ogurek had applied in writing for and been granted 6 months maternity and parental leave.

Under section 54(2) and (3) the employer may not change a condition of employment without the employee's written consent. When the employee's leave ends the employer must be placed in her old position or a comparable position. Ogurek's 30 week leave ended in November 1999. Grace and Willy both gave evidence that they had a full time position for a manager with Willy. Grace stated that having someone in the management role would have been good for her family. They did not hire anyone into this position after Stacey left on September 7, 1999.

When Ogurek arrived on October 26, 1999 she learned that the photo processing machine was broken. She was prepared to wait for it to be fixed before she started work. When Ogurek returned, on November 9, 1999, the machine was in the process of being installed.

On November 9, 1999 Willy was not prepared for Ogurek to return to her old position or one comparable to her old position as required by section 54. The legislation states that the employer must have the position for the employee '**As soon as the leave ends'**. Ogurek may have agreed to delay the end of her leave to help out her employer but she did not agree to change her employment. Willy did not offer a full time position to Ogurek at any time in October or November 1999. I find that the Willy was in breach of section 54(3) of the *Act*.

Change of Working Conditions

Ogurek argued that pursuant to section 66 of the *Act* she was fired on November 10, 1999 when the conditions of the employment offered to her were so '**substantially altered'** from the employment she held prior to her maternity leave. The hours were reduced from 5 days per week to one day a week and the rate of pay was reduced from $10.75 per hour to $9.00 per hour. The conditions were not comparable to her former position. She concluded that her employment was terminated by her employer.

The Delegate did not approach the evidence on the same basis. She relied on Ogurek's complaint form where it stated that she went in on October 7, 1999 to 'discuss coming back to work only 3 days a week, Monday, Thursday and Saturday'. The Delegate concluded that Ogurek was looking for part time work. When Ogurek refused to return to work on December 6, 1999 the Delegate concluded she quit her employment effective December 6, 1999.

I find that the offer of employment on November 9, 1999 which was confirmed on November 10, 1999 had the effect of terminating Ogurek's employment. The reduction of hours, the move of work from weekdays to weekends and the reduction in hourly wage all operated as to end her former employment as a manager of the business effective November 10, 1999.

Impact of Errors of Fact and Law

The Determination found that there was no liability for long service on the basis that Ogurek had quit her employment. The Determination did not address the status of the employment after Willy changed the hours, days and hourly rate.

The Delegate did not meet with Stacey Lind, who knew that Ogurek planned to return to her full time employment as manager. The Delelgate did not have the benefit of Stacey's evidence that she had told Ogurek that Grace had said there was not enough work for Ogurek to work full time. Knowing the situation at the store, Ogurek approached the owners about working fewer hours thinking she could bring the business back to a level to support her full time. She wanted to work with Grace to make it work for both of them.

Ogurek was willing to start with part time if that was all the owners would offer her. She wrote in her complaint form about the 3 days a week that 'At the time this seemed like a possibility and went back to Grace about hours on Oct. 26, 1999."

Grace and Willy did not know what obligations they had to Ogurek until they called the Employment Standards Office on December 3, 1999. The business had declined significantly but they felt there was a full time job to do. The offer was made after the employment relationship had ended.

Based on these findings of fact and law I set aside Determination ER#: 098781.

The provisions of Section 79(4) of the *Act* give the Director various powers where an employer has contravened the *Act*. I refer the matter back to the Director to determine the remedy.

ORDER

I order under Section 115 of the *Act* that the Determination be referred back to the Director in order to determine what remedy should be taken pursuant to Section 79 of the *Act* as a result of Willy's breach of Section 54 (2) and 54(3) of the *Act*.

April D. Katz
Adjudicator
Employment Standards Tribunal