**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 -

Chrisine Hintz
("Hintz" or the "Employee")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

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| **ADJUDICATOR:** | Ib S. Petersen |
| **FILE NO.:** | 98/421 |
| **DATE OF HEARING:** | August 19, 1998 |
| **DATE OF DECISION:** | September 10, 1998 |

# DECISION

## APPEARANCES

Ms. Chrisine Hintz — on behalf of herself

Ms. Shurly Mandeep Chochan — on behalf of Anke Kruse Organics Inc. (the "Employer")

## OVERVIEW

This is an appeal by the complainant pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on June 2, 1998. In the Determination, the Director's delegate found that Hintz resigned from her employment and that this resignation was not caused by the Employer making changes to her position during her maternity leave. In the result, therefore, he found that Hintz was not entitled to a remedy for termination of employment due to her leave (Section 54). Hintz maintains that she resigned because the Employer had hired another employee to work in her position on a permanent basis and, therefore, there was no position for her to return to. She says that she was forced to resign. On that basis, she says, she is entitled to one year's salary: from the time she went off Employment Insurance maternity benefits to the present time. The delegate also found that Hintz was not entitled to minimum daily pay for work on a number of days (Section 34), but that she was entitled to overtime payments in the amount of $61.92. As agreed between the parties, overtime is not an issue in this hearing. Hintz maintains that she is entitled to minimum daily pay because she was called in to work although on many of the days she claims for, she left work early because she elected to do so and not because the Employer asked her to leave. Hintz also argues that I should impose a penalty on the Employer. There is no penalty mentioned in the Determination.

## ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether:

1) the Employer contravened Section 54 of the *Act* such that Hintz is entitled to a remedy?
2) the Employer contravened Section 34 of the Act such that Hintz is entitled to minimum daily pay? and, finally,

3) in the circumstances, the Tribunal should impose a monetary penalty on the Employer.

## FACTS

The Employer is a distributor of organic foods and other products. Its main office is in Ontario. The president is Anke Kruse ("Kruse") and Chohan is the vice-president.

Hintz commenced employment with the Employer in September 1995 as a receptionist/office assistant. She worked approximately 30 hours per week, full time Monday through Thursday and sometimes four hours on Fridays. Chohan testified that Hintz was a valued employee.

Hintz explained that she had worked less than four hours on a number of days and had only been paid for the hours actually worked. On September 29, 1995, her first day of employment she had worked two hours and been paid for two hours. Chohan explained that this was a "trial period" to see how the employment relationship would work out. With respect to the other occasions, mostly on Fridays where she was required to come in to work because she was responsible for the release of a palate which was prepared on Thursdays and shipped on Fridays to the Ontario location, Hintz stated that she was required to come to work. She agreed with the Employer that she was the only person present on those Fridays. Hintz then stated that she if there was no work to be done she asked to go home or was sent home. How she could either be sent home or ask to go home early when she was the only person there remains unexplained. The Employer explained that Hintz simply elected to go home when, in her mind, there was no more work to be done. The Employer agrees that on one occasion, Hintz came to work after a medical appointment and was quite distressed that she sent allowed her to go. Hintz brought one hour's worth of work with her home. She was paid for this hour. However, the Employer did not ask her to do this.

In her evidence, Hintz explained that the president of the Employer, Kruse, in January 1997, asked her to become a tele-marketer which she did not want. Hintz stated that she did not discuss her plans with Chohan. However, in cross-examination she did agree that she had told Kruse and Chohan in January 1997 that she did not know if she was returning to work after her maternity leave. Chohan also testified that Hintz never said that she wanted to come back. She stated that she did not think she would be coming back full-time, but might consider part-time, as she wanted to spend time with her new baby.

Earlier in her employment with the Employer, between the end of February and mid August 1996, she had been exposed to tele-marketing for a period and did not feel comfortable with that kind of work. She found it stressful. Her hourly rate had been reduced. In any event, in August 1996, the Employer returned her to her previous position and restored her hourly wage rate as a receptionist/office assistant, $9.25. Hintz explained that this was because the Employer needed someone to deal with the desk as both Kruse and Chohan were out of the office frequently.

On January 14, 1997, the Employer placed a job posting with Human Resource Canada for an office assistant, the position held by Hintz. The position included reception duties and clerical duties. This posting appeared to be on a permanent basis. Hintz stated that she never talked to Chohan about this. However, on the copy of the posting--an exhibit in these proceedings--Hintz is the contact person for the Employer for prospective applicants. The Employer hired Peena Nutt for the position. Hintz agrees that she trained Nutt for the position. Nutt, who gave evidence on behalf of Hintz, was not sure whether the training lasted one or two weeks. While she stated that she did not know at the time of hiring that would replace Hintz on a temporary basis or that she was hired as maternity relief, she knew, as well, that Hintz was pregnant.

At the end of January 1997, Hintz went on sick leave, due to complications related to the pregnancy. As well, around that time the Employer moved its operations to another location. Hintz' baby was due in March.

In February 1997, Hintz testified, the Employer invited her back for a "baby shower". At that time, Hintz states she was first told that Nutt would take her position and that she could return as a tele-marketer with Employer on a part-time basis. Other employees were present at this event, including Aaron Ellesworth and Janice Nelson. The Employer stated that it would prefer to have her back as soon as possible and even indicated that there was a space for her baby. Hintz stated that she did not tell the Employer at that time that she was not satisfied with being returned after her maternity leave as a tele-marketer. The reason for this, she explained was, her medical condition.

Hintz went on maternity leave. She complains that she received harassing and annoying telephone calls from Chohan until June, leaving the impression that she was constantly receiving harassing and annoying telephone calls from the Employer. In cross-examination, however, she admitted that the number of calls was limited to three. One of these telephone calls had to do with another employee of the Employer, Nelson, who had not come in to work. Chohan asked if Hintz knew why. In another call, Chohan had asked about her vehicle, which had been damaged while parked in front of the other employee's home. The third call related to how Hintz was doing. Hintz insisted that these telephone calls were an annoyance. In my view, there was nothing "harassing" about these call. In my view, Hintz exaggerated the nature and extent of these calls.

On June 11, 1997, Chohan visited Hintz. At that time, Hintz says she confronted her with her dissatisfaction with being offered a position as tele-marketer. As well, she questioned the Employer's business ethics on a number of issues and stated her dissatisfaction with the employee-employer relations at the work place. Hintz said she did not disclose anything at the time about working part- or full-time. Chohan says that she and the Employer never had a request from Hintz to return to work.

In June Nutt left the Employer's employ and on June 14, the position as office assistant was posted again. This time Kari Rose responded and was hired. Again the posting indicated that the position was a permanent one. The Employer indicated that it did not know that Hintz wanted to return to her previous position and, if she had, Chohan would have accommodated her. The Employer agrees that while it posted the position on a permanent basis, constant re-organization would have allowed it to accommodate Hintz.

On July 28, 1997, Hintz resigned from her position with the Employer. When she resigned she explained to Chohan that she did not want to return because the Employer had moved and because she needed to work evenings because of her husband's hours of work as she was looking after the baby.

In February, Hintz applied for and received maternity benefits. When these benefits came to an end in early September 1997, she applied for regular employment insurance benefits. In her application, dated September 9, she stated that she had not decided to return to work. As a reason for not returning to her former Employer, she stated that she was looking after her child and could not afford daycare. Moreover, she explained on this form that she was only seeking part-time work and that she would not be able to work between 6:00 a.m. and 5:00 p.m., her husbands working hours. Human Resource and Development Canada ("HRDC") denied her application for regular benefits. On October 14, 1997, HRDC determined that she had quit her position with the Employer without just cause and, in the result, she was not entitled to regular benefits. She appealed to the Board of Referees and eventually to the Umpire. As I understand it, the Umpire referred her claim back to the Board of Referees (where a hearing or a decision is pending). In her appeal, dated October 14, 1997, she stated that she "used the reason that I had inadequate child care arrangements and could not return to work, when in actuality I did not want to go back because my employers were unethical."

On December 1, 1997, Hintz filed a complaint with the Employment Standards Branch.

On the balance of probabilities, and considering all the evidence, I am of the view that Hintz did not want to return to work on a full-time basis with the Employer when she went on maternity leave. Where there is a conflict between the evidence of Hintz and Chohan, I prefer the evidence of the latter. There were conversations with the Employer in early January 1997 where the Employer inquired as to her plans. Hintz agrees that there were discussions with respect to a position as tele-marketer. Chohan states that Hintz said that she did not think that she wanted to return to work after the birth of the baby. These discussions took place in the first or second week of January 1997. It is consistent with the Employer's version of the facts that the Employer, therefore, posted the position with HRDC as a permanent position. Hintz never told the Employer that she wished to return to the her previous position. I accept the Employer's evidence that Hintz, in fact, told it that she did not think she wanted to return. This is, as well, consistent with the statements made on her application for employment insurance in September, namely that she was not interested in full-time work due to her care giver responsibilities for the new baby. Moreover, she was listed as the contact person for potential employees on the job posting (with HRDC). She trained Nutt, who took over her position. She knew that the position was posted on a permanent basis. Yet she never sought any clarification from the Employer. From my observations of her during the hearing, she did not appear to be afraid of speaking her mind. Hintz did not file a complaint with the Branch until after she had been turned down for regular Employment Insurance benefits.

**ANALYSIS**

Section 54 of the *Act* provides (in part):

> (2). An employer must not, because of an employee's pregnancy or leave allowed by this Part,
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> (a) terminate employment, or

> (b) change a condition of employment without the employee's written consent.
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> (3) As soon as the leave ends, the employer must place the employee
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> (a) in the position the employee held before taking leave under this Part, or
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> (b) in a comparable position.

"Conditions of employment" are broadly defined in Section 1 of the Act to mean "all matters and circumstances that in any way affect the employment relationship of employers and employees."

In the case at hand, the Employer posted Hintz' position with HRDC on a permanent basis in January 1997. However, the Employer argues that Hintz said that she did not think she would return. As mentioned above, I am prepared to accept that. It was not in dispute at the hearing that Hintz had never requested her job back. Her argument, as I see it, boils down to the proposition that because the Employer had filled the position on a "permanent" basis when she went on maternity leave in January with her knowledge, she was forced to quit in July. I do not agree with Hintz.

First, as indicated above, I do not believe that she intended to return to work.

Second, and in any event, Section 54 is not triggered in the circumstances of this case. When Hintz went on maternity leave--and the issue of whether the leave was properly requested and granted was not argued at the hearing--her position was unchanged: she was the receptionist/office assistant. While the Employer hired another person--with Hintz knowledge--to perform her duties on a "permanent" basis, that person's employment terminated in June (while Hintz was still on maternity leave) and the Employer hired yet another person apparently on the same basis. If any changes were made to Hintz' position, they are not clear to me. The only possible change discussed between Hintz and the Employer--and that was Hintz' evidence--was an offer of tele-marketing work on a part time basis when she returned after having had the baby. There were no actual changes made to her position. Once her leave was over, she could have requested to be placed in previous her position or a comparable position. She did not do that. Rather she quit at the end of July--under circumstances that indicates that she, in fact, never wanted to return to the Employer. If she had returned at the end of her leave, she might have triggered Section 54(3) because that Section, in my view, is predicated upon the leave coming to and end. In other words, it is not until the leave ends that the Employer is obligated to return her to her previous position or a comparable position.

In the result, I dismiss the appeal with respect to Section 54.

Section 34 of the *Act* provides (in part):

> (1) If an employee reports for work on any day as required by an employer, the employer must pay the employee for
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> > (a) at least the minimum hours for which the employee is entitled to be paid under this section, or
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> > (b) if longer, the entire period the employee is required to be at the work place.
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> (2) an employee is entitled to be paid for a minimum of
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> > (a) 4 hours at the regular rate, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or ...

In this case, there was evidence of Hintz being paid less than she was entitled to, at least in two instances. On September 29, 1995 when she had just started working for the Employer. The Employer admitted that she worked two hours and was paid for two hours. Whether this was just a "trial period", as the Employer argues, is irrelevant. On November 1, 1996, Hintz says she was sent home when she came to work following a medical appointment. She claims the Employer requested that she brought work home. The Employer making a request but agrees that Hintz took one hour's worth of work home and was paid one hour's pay for doing the work. In other words, it is not in dispute that Hintz actually performed work for the Employer on that date. On other occasions claimed for, Hintz herself would appear to have made the decision to leave work and go home. The explanation was that there was no more work to be done. The Employer did not dispute this.

Hintz argues that simply because she was requested to come to work on Fridays, she is entitled to be paid the four minimum daily pay. If the employee "reports for work on any day as required" by the employer, the minimum daily pay provisions apply. If the employee "starts work", the employee is entitled to fours pay at the regular rate unless work is suspended for a reason completely beyond the employer's control. The Employer has the burden to show that work is suspended for reasons completely beyond its control (see, for example, *D.E. Installations Ltd.*, BCEST #D397/97 and *Johnny's Other Kitchen Ltd.*, BCEST #D279/97). In *Nechako Enterprises Ltd.*, BCEST #078/98, the Tribunal held that an alleged agreement to have an employee, who regularly worked less than four hours, "voluntarily" sign out before the four hours, did not constitute a circumstance beyond the employer's control. In the circumstances, I am satisfied that Hintz worked less than four hours on a number of days and was paid only for the hours worked. It appears that she left because she finished the work. In my view, this does not constitute a circumstance beyond the Employer's control. The Employer required Hintz to be at work. If the Employer did not arrange its affairs such that there was sufficient work for her to do on those days, the Employer must either pay the minimum daily pay or not require her to report for work.

In the result, I find that the delegate erred when he determined that "it was her choice to go home or work as she felt like" and Hintz is entitled to minimum daily pay under Section 34.

Hintz requested that I issue a penalty against the Employer. Even if this was within my jurisdiction, and the parties did not canvass the law on this point, I decline to issue a penalty in the circumstances of this case.

## ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated June 2, 1998 be confirmed, except with respect to Hintz' entitlement under Section 34 (minimum daily pay) which is hereby referred back to the Director.

**Ib Skov Petersen**
**Adjudicator**
**Employment Standards Tribunal**