Employment Standards TRIBUNAL

An appeal

- by -

583667 operating as Only Women's Fitness
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Ib S. Petersen

FILE No.: 2001/222

DATE OF HEARING: June 28, 2001

DATE OF DECISION: August 23, 2001

DECISION

APPEARANCES:

Ms. Cindy Verheul	on behalf of the Employer
Ms. Dana Coupal	on behalf of herself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on February 20, 2001. The Determination against the Employer concluded that the Employer terminated Coupal (the "Employee") without just cause because it failed to place her in the position she held before going on maternity leave, or a comparable position, and that she, in the result, was owed $2,404.63 on account of compensation for length of service.

ISSUES

The issues before me boils down to these: (1) Did the Employer recall Coupal to employment after her maternity leave? (2) If so, what were the terms of the recall and did these terms contravene Section 54 (return to work after maternity leave)? (3) Did the Employer and Coupal agree that she be laid-off in November 1999 to be recalled in January 2000 and was there an agreement that she agreed to be recalled in April 2000?

FACTS

The background facts may be gleaned from the Determination and the evidence presented at the hearing:

1. Coupal worked for the Employer, a fitness centre/gym, as manager/head of sales from October 1995 to May 1, 1999. She was paid $15.75 per hour.

2. On May 1, 1999, Coupal went on maternity leave.

3. On August 1, 1999, the ownership of the Employer changed hands by way of an asset sale. 583667 BC Ltd. was the new owner. Verheul was the principal of that company.

4. The evidence was that all employees were terminated prior to the sale and re-hired "at status quo." Coupal's employment was continued with the new Employer.

Verheul testified for the Employer. On August 24, there was a staff meeting, attended by Coupal. There is no agreement with the respect to what happened at this meeting. Verheul's

evidence was that all staff were told that she (Verheul) was going to be the manager and that Coupal was going to be head of sales, with the same pay and hours. Jilline Cleverly also testified for the Employer. She said that she had a conversation with Coupal in October 1999 during which Coupal told her that Verheul had asked her to come back. She also testified to the staff meeting in August 1999. Questions were raised as to Coupal's return date, and staff were told that the Employer "by law" was required to have her back "at the same wages" and that she would be "head of sales."

Coupal agreed, in her testimony, that she attended the August 24 staff meeting. However, she stated that she was not told in the meeting that she would not be manager. Rather, she had a conversation with Joanne Baker, who testified for the Employer, and who worked as a manager during part of Coupal's (and the previous owner's) maternity leave, in the parking lot and that was when she was told that she would no longer be the manager.

The Employer had a big promotion campaign in September and Verheul asked Coupal to come back to work for that. According to Verheul, Coupal thought it was too soon and did not return at that time. Coupal said she offered to Verheul to "come in." In cross examination, Coupal was asked if Verheul had asked her to come to work September and she responded that she "did not recall that." She also stated that her understanding of the EI guidelines for maternity leave was that she was entitled to be on leave until early November.

In October, Verheul said, she spoke with Coupal about her return to work. At that time, Coupal only wanted to come back 2-3 hours, 2-3 days a week. Verheul explained that she offered to do that and hired another person to take Coupal's hours. It appears that the Employer was not certain as to the hours worked by Coupal prior to going on maternity leave. In cross examination, Coupal was asked if Verheul had asked her to come to work in October and she responded that "you did not ask me back" and that she "offered to come in."

Coupal returned as a "contractor" and worked a number of hours in October, November and December. Coupal confirmed that she did come to work. In cross examination, Coupal was first asked who put the hours on the schedule and the response was that she was "not sure." She was then asked if she set her own hours when she returned to work during those months and she responded that Verheul "asked [her] because she came in on her own time." The Employer put the proposition to her that she always set her own hours. She was then asked if she "worked the hours [Verheul] wanted or [she] wanted and the response was that she "worked the hours on the schedule." Finally, when the proposition was put to her that she worked the hours she requested, she answered that she "did not remember that."

The Delegate found that there was no evidence of a lay-off in November 1999. In my view, there was ample evidence to support that. Verheul testified that Coupal was asked back in November. At Coupal's own request, she was laid off on or about November 6, 1999. Coupal does not dispute the lay-off. Coupal's testimony was that Verheul complained to her that the business was not doing as well as she had expected. Coupal explained that November-December were traditionally slow months, while January was busy. According to Coupal, Verheul asked her how she would feel about staying home until January. Coupal testified that she agreed with

that proposal. This would allow her to remain on employment insurance. However, as Coupal was unsure if she had "enough hours to qualify for EI," she was scheduled to work a few hours.

Verheul explained that, in January, 2000, Coupal called Verheul and told her that she wanted to stay at home as her husband did not want her to work. According to the Employer, Coupal agreed that she would remain on EI until her claim ran out in April 2000.

Coupal stated that she went to the Employer in January and that she brought a schedule showing 35 hours per week. According to her, Verheul thought that Coupal's hours were only 20 per week. Verheul agreed that she initially thought Coupal worked 20 hours per week, later she realized the correct number was 30.

A key aspect of the dispute between the parties is the number of hours Coupal worked before she went on maternity leave. Coupal did not "have a problem with not being manager." However, she explained that she worked 30-35 hours per week the last two months before going on maternity leave. In cross examination, when Coupal was asked why the Record of Employment showed 25-30 hours per week, she stated that "she knew the hours worked." Coupal also agreed, in cross examination, that Verheul always told her that her hours were "guaranteed."

Coupal's husband took a document (dated January 8, 2000) to Verheul for her signature--apparently for use in connection with a loan the couple were seeking from a financial institution--which indicated that Coupal's hours of work were 30 and her hourly rate was $15.75. Apparently, Verheul was unwilling to commit to this. Based on payroll documents submitted, the estimate of 30 hours per week was not unreasonable.

Coupal also explained that her husband had worked as a (part-time)janitor for the Employer until he was terminated for financial reasons in February 2000. He was given notice.

Verheul explained that Coupal told other staff members, as well, that she did not want to come back until April. Coupal explained that she did not hear from Verheul until the end of March. In March, Verheul called Coupal three times--March 15, 17 and 20--and left messages for her to call. Coupal returned the calls on March 20 and Verheul told her that her hours were "guaranteed." She confirmed this in a letter to Coupal dated March 27, 2000. The letter stated:

> "Further to our conversation on Monday, please advise me as to what hours I can put you on the schedule for. You last told me that you would be available for work in April. As you have been assured time and again, your job is guaranteed when you come back.
>
> To clarify a couple of matters you brought up in our phone conversation. You reminded me that I layed you off in November. This was at your request and after I allowed you to work extra hours to make sure you had enough hours for another EI claim. You stated that Labour Relations has told you that if I hadn't called you back within 12 weeks of this lay-off, that you were technically terminated and owed severance pay. I might remind you that you were working and being paid,

> in December, 1999. You were also called back in January. At that time you offered to stay on employment insurance until April as you wanted to stay home with your baby and it would help me financially.
>
> I have consistently told you that your job is guaranteed when you return. Please be kind enough to let me know when and/or if you are coming back. I need to post the schedule for April. The other staff members are trying to plan their jobs, knowing that they may have their hours cut when you return. You have told me that you are working elsewhere, so please let me know definitely by the end of this week, if or when you are returning. Thank you."

Coupal replied in writing on March 29. In the letter, she explained that it was her understanding that she would be returning in January. She also stated:

> "... My main concern now was my hours. I told you that I was guaranteed 30 hours when I returned to work, and you told me you had spoke [sic] to Sheena (former owner) who told you she couldn't remember, but it would be a minimum of 20 hours anyway. You then told me still, that at that time also, you couldn't financially afford to give me 30 hours or even 20 hours. ... I then told you that this wasn't fair, I make more money on UI then [sic] I would coming back to work. You then said maybe it would be in my best interest to stay on my UI claim until it runs out in April, and then you would see what you can do for me. And yes...I have to agree! It had nothing to do with me wanting to stay at home with my baby, it was because you still couldn't afford to give me the hours I should have had. I know you have told me that my job is guaranteed when I returned, but that's been proven wrong already. ..."

The letter then indicated that Coupal was not going to return to the Employer and demanded her severance pay. In a letter to the Delegate, also dated March 29, 2000, Coupal confirmed that Verheul had offered her the job back and that she had refused the offer. At that time, it is clear that the employment relationship was at an end. As indicated in Verheul's letter to Coupal, she took the position that as she had not been recalled after 13 weeks, after November 1999, she was entitled to compensation for length of service under the *Act*. Coupal had found employment with the Canadian Superstore at the end of February 2000, working minimum 17 hours per week. She did not inform the Employer of this.

Joanne Baker, explained that there was a staff meeting in March 2000 where Verheul dealt with staff concerns regarding Coupal's return--apparently they did not want her back. Verheul apparently told the staff that she had to hire Coupal back "because of the law." She also explained that Coupal had told her that her husband wanted her to stay at home. Coupal's husband, Wayne Coupal, also testified at the hearing. He confirmed that he preferred her to stay at home because they had three children. It was suggested to him, in cross examination, that he told Verheul that he wanted Coupal to stay at home and he was unsure if he had said that.

Coupal filed a complaint with Employment Standards on January 25, 2000. Coupal believed she should have been returned to work in January and that she was not offered a comparable job at that time. The then decision to file a complaint with the Employment Standards Branch and, it appears, that the delegate became involved in the matter.

Verheul was critical of the Delegate's investigation and explained that the Delegate asked her for her side of the story in the form of a memo (which she provided). The Delegate attended the Employer's operation in October 2000 and dropped off his card. The Delegate "came by" again in February 2001, apparently to ascertain if the Employer was prepared to settle the matter. Verheul stated that the Delegate did not speak with employees who might testify on her behalf.

In the circumstances, both parties treated the employment relationship as at an end after March 2000.

ANALYSIS

In this case, the burden is on the Employer, as the appellant, to persuade me that the Determination should be set aside. In the circumstances, I am persuaded to allow the appeal for the reasons set out below.

This has been a difficult case to decide. Most of the material facts have been in dispute between the parties. There are several factual and legal errors in the Determination that were not fully explored. For example, the Delegate finds that there is no evidence that Coupal was laid off in November only to set out, a few sentences later, that she was laid off in November because "business was slow." As well, the parties appeared without representation and were not in a position to fully address the legal issues raised by this appeal. The combined effects of Section 97 (sale of business), Section 67 (notice while on a statutory leave), and Section 54(4) (discontinuation of the employer's business during maternity leave) were not argued before me, and I do not propose to deal with those issues, because, in any event, it was not in dispute that Coupal was "re-hired" at "status quo."

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" or if the employee resigns. Just cause is not an issue here. The onus is on the employee to establish that he or she was dismissed from his or her employment (*Walker v. International Tele-Film Enterprises Ltd.*, [1994] B.C.J. No. 362 (February 18, 1994) (BCSC)). However, on balance, I find the facts show that the Employee, Coupal, was, in fact, not dismissed from her employment.

Both the Employer and the Employee did not organize their affairs well. The *formalia* required in connection with maternity leave, such as a written request, appears largely to have been ignored. It was unclear, at least to me, and, perhaps, to the parties as well, when Coupal was supposed to return from maternity leave, in other words, what the arrangement between the parties was. Her statutory 18 weeks would run out September 1, 1999, thought the *Act* provides

for additional leave (Section 51, parental leave). In any event, it was clear to me on the evidence that Coupal did not want to return to work in September, she thought it was too early. It appears that Verheul agreed with that.

While the Employer's position was that Coupal was to be recalled "by law" with "the same wages," there was considerable confusion on the Employer's part at the time as to what that meant--i.e., was it 20 or 30 hours. Had Coupal returned to work in September, she may well have found that the employer was not in a position to return her to "a comparable position" in terms of wages. The evidence was that Verheul was managing the Employer's business and I find it unlikely that Coupal did not know that, at least in August when she attended a staff meeting. She worked at the gym in October, November and December. Her assertion, in submissions to the Tribunal and to the Delegate, that she did not know that the manager's position was *not* open to her until January 2000 is, in the circumstances, not credible. In any event, I am of the view that she did not wish to return in September 1999. Coupal was, I find, of the view that she could draw EI and did not have to return to work until November. If she had returned to work, her entitlement to be placed in a comparable position may well have crystalized.

In part, the reason for the confusion probably lies in the fact that the business was sold while Coupal was away from work on maternity leave and that the (former) Employer purported to terminate her employment while she was off on leave. The Record of Employment filed with Human Resource and Development Canada in April 1999 states her return date as "unknown."

The Employer's evidence was that Coupal was offered a return to work in October and November 1999. Coupal's testimony was that she offered to come in and that the Employer did not "ask [her] back." I accept the employer's evidence that Coupal only wished to return to work on a limited basis in the fall of 1999. In other words, her return to work was on terms acceptable to her at the time. Verheul hired another person to take Coupal's hours (such as she believed them to be), namely Joanne Baker. Coupal could have worked those hours. Regardless of who made the offer, Verheul or Coupal, it is clear that Coupal did, in fact, work limited hours in October, November and December. Based on the cross examination of Coupal, I accept that she set the hours she wanted to work in those months. In other words, there was an agreement--or consent on Coupal's part--that she only work limited hours. While such consent falls short of the requirement in Section 54(2)(b) that consent to changes in conditions of employment be in writing, in the circumstances, I accept that the consent was voluntarily given and for the benefit of both Coupal(who could work fewer hours and spend time with her children) and the Employer (which would not have to find hours for her during the slow season). In my opinion, the entitlement to be placed in a comparable position did not crystalize in October or November of 1999. It follows that I do not agree with the Delegate's conclusions that the Employer contravened Section 54 of the Act by failing to return Coupal to a "comparable position."

That does not end the matter. In early November, there was an agreement that Coupal be "laid-off." Coupal's evidence was that was the time her maternity claim with EI ran out. It would

appear that she, in fact, worked for the Employer while receiving EI. In Coupal's submission to the Tribunal, dated March 31, 2001, she explained:

> " ... She claims she spoke with Sheena [the former owner] about how many hours to give me back, and Sheena told her around 20. ... Cindy then asked how I would feel about her laying me off until January, when sales would pick up dramatically. I told her my maternity claim had run out and I wasn't sure if I had enough hours for a new claim. She told me she would give me whatever hours I needed for a new claim, because this would help her out, and she could not give me any hours anyways [sic]. *I then said that would be fine*. What can I say? If the hours aren't there for me, what choice do I have? So this is what Cindy did, she wrote a letter to UI stating that at this time there were no hours for Dana Coupal to return to, and she would be temporarily be laying me off...." (emphasis added)

The real disagreement between Coupal and Verheul was whether the recall was supposed to be in January or April 2000. If there was an agreement that Coupal would return to work in January (as is Coupal's position) or April (as is the Employer's position), and the Employer failed to return her to work under that agreement, Coupal, arguably a claim to compensation for length of service would arise, either as of the date agreed or 13 weeks after the failure to recall (Section 63(5)). However, on the facts of this case, there was no "lay-off," *i.e.*, at the will of the Employer, rather there was a mutual agreement that Coupal did not have to come to work until January.

The Employer did not terminate Coupal in January 2000. On balance, on all of the evidence, I am of the view, that there was a further agreement in January between Verheul and Coupal that Coupal be "laid-off" until April 2000. This was not a "lay-off" in the typical sense. This is confirmed by Coupal's letter to the Employer, dated March 29, 2000, referring to the conversation between her and Verheul in January 2000:

> "....With how I felt after that conversation, I took it upon myself to look for another job, just incase I didn't have a job to return to in April. I wasn't willing to take that chance.....
>
> ...[Verheul] then said maybe it would be in my best interest to stay on my UI claim until it runs out in April, and then you would see what you can do for me. And yes...I have to agree! It had nothing to do with me wanting to stay at home with my baby, it was because you still couldn't afford to give me the hours I should have had...."

Coupal's letter was a response to a letter and a telephone call from Verheul in late March 2000. While both letters probably contain of elements of "post facto" rationalization of the parties positions, it seems to me that Coupal's disagreement with Verheul's letter was not so much the fact that there was an agreement that she stay at home until April, but rather with the reasons for staying at home--*i.e.*, looking after her newborn.

As well, in her submission to the Tribunal, March 31, 2001, Coupal explained with respect to the January conversations:

> "Cindy then explained that the wage she had to pay me, $15.75/hour, she could have two girls working because they only got $8.00/hour. She said she still could not afford to give me back the hours, and it would be in my best interest to stay on my UI claim until it ran out in April, and then she would see what she could do for me at that time...."

Coupal filed a complaint with the Branch in late January and sought other employment. In late February 2000, she found employment with the Real Canadian Superstore. On March 29, 2000--the same day she responded to the Employer--she wrote to the Delegate about her conversations and correspondence with Verheul:

> "... She claims she just assumed that I would stay on UI until April, then come back. I told her I wasn't about to sit around and wait and take the chance of not having the hours or my job in April, seeing how I didn't have the hours in November or January. She then says, "well..I have to take you back," that's the rules of Labour Relations. I then said to her, knowing that was the only reason she would be taking me back wasn't a very good feeling....I then told her I was happy where I was right now, and that all I wanted was my severance pay ...."

The Employer relied on the agreement and did not contact Coupal until March. The Employer argues that when it contacted Coupal for a return to work in April, Coupal in no uncertain terms told Verheul that she did not want to return to the workplace and, in effect, therefore, resigned her employment and is not entitled to compensation for length of service. I agree with the Employer's argument.

In the result, I am persuaded to cancel the Determination.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated February 20, 2001, be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal