

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 -

Champers Enterprises Ltd. – Champers Hair Design
(“Champers”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE No.: 2000/275

DATE OF HEARING: August 4, 2000

DATE OF DECISION: October 30, 2000

DECISION

APPEARANCES

David Perrin: for Champers
Tracy Scott: for herself

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *Act*) by Champers Enterprises Ltd. – Champers Hair Design (“Champers”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 24, 2000. The Determination found that Tracy A. Scott (“Scott”) had not been placed in a position comparable to the one she held prior to her maternity leave, a violation of Section 54(3) of the *Act*. It ordered Champers to reimburse Scott for lost wages, plus vacation pay and interest, for a total of \$10,887.29.

Champers appealed on the grounds that Scott had asked to return to work on a part-time basis after her maternity leave. Champers maintained that it could not keep one full-time and one part-time esthetician at the location where Scott had worked, so it laid her off.

ISSUE TO BE DECIDED

The principal issue to be decided in this case is whether Champers offered Scott a comparable position after the conclusion of her maternity leave.

FACTS

The parties were notified on June 26, 2000 that the Tribunal hearing would take place on August 4, 2000. On July 20, 2000, Scott submitted a number of documents in support of her case. Champers requested an adjournment of the hearing on July 27. The Tribunal Administrator informed William Hewson, president of Champers, that the adjudicator would hear submissions on the adjournment.

At the hearing, Champers requested an adjournment in order to consider the documents provided by Scott on July 20. Scott argued that the issues raised in her documents were not new. The events leading to the hearing had occurred two years previously, and a number of witnesses had arranged to attend the hearing.

I ruled that the hearing should proceed on the condition that Scott introduce the documents in the July 20 submission individually at the hearing so that Champers could cross examine her or other witnesses on them.

Champers operates four beauty salons, two in Langley and two in Surrey. Scott worked as an esthetician from December 3, 1996 to November 3, 1998 at a salon in Walnut Grove in Langley. Scott began her maternity leave on April 10, 1998, and her baby was born on May 3, 2000. Scott testified that she had medical problems after the birth of her baby, and she was in the hospital for over a week after she initially had returned home.

The basis of Champers's case was that Scott allegedly had requested to return to work after her maternity leave only on a part-time basis. According to Champers, the business could not afford to keep a full-time and a part-time esthetician, so they laid Scott off when she came back from maternity leave.

Scott stated that she was concerned about returning to work because she had been hired to replace an employee on maternity leave and then stayed on to work permanently, and the woman she replaced had not returned to work. Consequently, she spoke to her manager, Roland Penner ("Penner") a number of times about returning to work before her maternity leave even began. After the birth of her baby, she called Penner several times to arrange a meeting to discuss her return to work. The parties agreed that Scott and Penner met on October 15, 1998. After the conversation, Scott made detailed notes of its contents.

Penner testified that Scott's notes were generally accurate. At that meeting, Scott told Penner that she wished to return to work on November 3, 1998. Scott asked if Champers wanted her to return on a full time basis or share a job with her replacement, as she, Penner and Maria Hewson ("Hewson"), secretary of Champers, had discussed. Scott stated that she intended to return on whatever terms that Champers specified. Penner testified that Scott told him that she could not work the same schedule as she had before her maternity leave. Penner believed that Scott would not return to work on a full-time basis. In a letter dated January 9, 1999 addressed "to whom it may concern," Penner stated that Scott asked him if she could return to work three days a week because of her responsibilities for her baby. Penner's testimony did not include any reference to this part of his conversation with Scott. He did state that Scott told him that she could not work the same schedule as she had prior to her maternity leave.

Penner mentioned hearing from a Champers client that Scott's father intended to renovate her garage to enable her to start her own business. Scott denied any such plans, stating that she had a young baby and needed the income from her job, an assertion confirmed by her notes of the conversation. According to Scott, Penner also asked her if she had been serving clients from her home, and Scott told him that she had not done work for any of Champers clients. She invited Penner to check with a sample of her clients on that point. Penner stated that the conversation did not include any discussion of Scott seeing clients at home.

Scott testified that she told Penner that she needed a job, but they did not talk about hours to be worked or part-time versus full time work. Penner stated that he assured Scott that she would be returning to work and that he would contact Hewson on this point. Scott's notes indicated that she believed that she had been accused unjustly and that Penner had tried to dissuade her from return to work.

By all accounts, Scott's next contact with the management of Champers took place on October 30, 1998. According to the Determination, Scott called Hewson to inform him that she

was planning to return to work on November 3. Hewson told her that he did not wish to discuss the matter over the telephone and a decision would be made on November 3. On that day, Scott returned to the Walnut Grove salon, and Penner gave her a termination letter signed by Marcia Waibel ("Waibel"), the general manager of Champers, and two weeks' pay. The letter did not state any reason for the termination. Scott recorded the conversation with Penner, transcribed the recording and produced it as evidence.

Penner told Scott that Champers was laying her off so that she could collect employment insurance. Scott protested that the employer could not replace her with another employee. Penner replied that Waibel made the decision to lay her off, and Scott should speak to her. Penner testified that he believed that Scott would not return to work on a full-time basis and that she had requested a change in her hours of work.

Scott testified that Penner told her that a client had learned from her father that he was building a studio at her home, so Scott would only work for Champers until Christmas. Scott also testified that she asked Penner if job sharing was an option, although the transcript of their conversation did not contain a reference to that subject.

Scott did speak to Waibel later on November 3, 1998, and she again taped the conversation. Scott quoted Section 54 of the *Act* to Waibel and demanded that she be re-hired. Waibel maintained that the business could not afford two estheticians and would not change the decision. Scott pointed out that Waibel never said that she was not being rehired because she wanted to work part-time. Instead Waibel said the decision was for business reasons.

Scott stated emphatically that she asked to return to her previous job, and Waibel never mentioned Scott wanting only part-time work. Scott introduced a transcript of her conversation with Waibel, and the subject of part-time work never arose. The transcript confirmed Scott's testimony that Waibel had told her that the decision to terminate her was for business reasons.

Hewson testified that to her knowledge Scott wanted to return to work on a part-time basis, and no part-time position was available. Hewson stated that Scott was terminated because she told Penner that she wanted to return on a part-time basis. The business did not have enough work to share a single job between two estheticians, although Champers had opened three new salons in the previous two years. Hewson maintained that Scott was offered her position, but it was her choice to ask for a part-time position. Hewson did not contact Scott before November 3, 1998 about her return to work. Under cross-examination, Hewson acknowledged that there was no understanding with Scott that she would return on a part-time basis when she began her maternity leave. In fact, Hewson said that she was surprised that Scott wanted a part-time position. Either Waibel or William Hewson, Hewson's husband and co-owner of Champers, wrote the termination letter. William Hewson was not available to testify.

According to Penner, Scott took her "client cards" home with her when she began her maternity leave. Scott acknowledged that she removed one set of cards with her clients' names and address. She had supplied the cards and kept them up to date. Another set of cards containing clients' medical information remained in the salon. Scott stated that her replacement had lost three cards and Scott did not want to lose more. In addition, she intended to send her clients a birth announcement.

Devon Hunter (“Hunter”), general manager for Champers, testified that he believed that a stylist’s cards are the property of the salon where he or she works, a view that Penner also held. At the time of the hearing, Champers used a computer program to maintain client information. A stylist (and presumably an esthetician) can view the contents, but not print the information, which is protected by a password. In his opinion, client cards would be useful for an employee who wanted to start a salon at home.

Hewson contacted Scott about the client cards. According to Scott, Hewson “screamed” at her to bring the cards back. Hewson testified that she called Scott when she learned that the cards were missing and told her, “Please bring them back or I’ll call the police.” In Hewson’s opinion, the cards were the property of the salon, and she was not aware that Scott had supplied the cards. Scott maintained that they were her property, but she did return them to the salon.

After her termination, Scott looked for a job through the local newspaper, without success. She then applied for Employment Insurance. A counselor there suggested she apply for the “Self Employment Program (SEP).” Under the terms of the SEP, she was required to do market research and prepare a 25-page proposal to start her own business. The proposal had to be accepted before she could be admitted to the program. As part of the market research, she sent out brochures advertising her services in January 1999. Her husband is a graphic artist, and he prepared the brochures. She presented the proposal to a committee in mid-February, and it was accepted a month later. She spent a week in training on running a business and had weekly meetings with SEP staff. The brochure announced that she was available for serving clients from December 1998 to generate a response rate. The rate was sufficient to warrant her entry into the SEP. Her business was still not viable by June 1999, but she received an extension from the SEP on the grounds that her business would be successful. In the meantime, she saw a few clients who contacted her. Scott estimated that she charged about \$100 per month for her services.

At the time of the hearing, Scott was working as an esthetician in a salon in a converted garage at her residence. Donald Peake (“Peake”), Scott’s father, did the work to convert the garage into a salon. He testified that he retired from the Vancouver Fire Department on May 31, 1999. Prior to his retirement, he was not able to work on the garage. He did begin work in the summer of 1999 and finished in June 2000. He did not discuss the construction of a studio in the garage before January 1999. He and his wife paid for the equipment in January 1999. At the time that Penner told Scott that Peake allegedly had told a client that he was building a studio in Scott’s garage, Peake was in Hawaii attending a wedding. He had advised Scott to tape her conversation with Penner on November 3, 1998. Scott kept the tape, and Peake assisted her in preparing the transcript at the request of the Director’s delegate.

Linda Hall (“Hall”), a former employee of Champers and a personal friend of Scott, testified that she was present for conversations between Scott and Hewson prior to Scott’s maternity leave. Hall understood that Scott’s replacement during the leave would remain with Champers as a “floater,” i.e., assigned to work in two salons to facilitate Scott’s return to work. For her part, Scott expected to return to work. Hall visited Scott in her home after the birth of the baby and saw no sign of Scott serving clients from her home. Before Scott came to work for Champers, Hall never saw an esthetician use client cards. Hall acknowledged that Champers had been a good employee, although there was a disagreement with management after Hall gave notice of her resignation.

Irina Martin (“Martin”), a client of Scott, testified that before her maternity leave, Scott told her that she would come back to Champers. Scott never mentioned working out of her home until mid-January 1999, when she told Martin that she would send her a notice. Martin received Scott’s brochure in January 1999 and began using her services at Scott’s home in January or February 1999.

Peter Scott, Scott’s husband, testified that Scott had health problems following the birth of her baby. Her recovery lasted between three and six months. It was not possible for her to work during that time. Peter Scott called William Hewson on October 20, 1998 as a result of his wife’s conversation with Penner. Peter Scott made notes of his conversation with William Hewson. Peter Scott told William Hewson that his wife had not served any clients in their home during her maternity leave. William Hewson then raised the matter of Scott removing the cards and stated that Scott’s replacement had “better numbers” than Scott. Peter Scott also reiterated Scott’s intention to return to work on November 3 and asked William Hewson to confirm that agreement. He did not receive any communication from Hewson or William Hewson before November 3, 1998.

Peter Scott testified that he and his wife had no thought of her working at home in November 1998. After her termination, Scott wanted to find work for another employer in the area. The idea of Scott working at home arose after she met with the SEP staff. He started work on the brochure in December and finished after Christmas. The brochure was published after a suggestion from the SEP counselor. After the brochure was issued, Scott started seeing clients in her home, but only about one person per week, so little income was generated.

In addition to the evidence summarized in this Decision, both parties introduced written statements from third parties. After reviewing these statements, I found that they did not bear directly on the facts of this case.

Champers did not challenge the calculations of the Director’s delegate of wages and vacation pay owed to Scott.

ANALYSIS

The *Act* grants a number of rights to an employee about to give birth and imposes obligations on her employer. The relevant sections for this case are 54(2) and (3), which state:

- (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*

Champers argued that Scott had left them no alternative to laying her off because she insisted that she would only return to work on a part-time basis. However, Champers did not establish the evidentiary basis for this argument. While Champers asserted that Scott was terminated for business reasons, it never introduced any evidence to support this statement. Penner testified that he believed that Scott wanted to return to work only part-time. Under direct examination, he did not say that Scott told him that she would not return to a full-time position. Scott was firm in her evidence that she wanted and needed full-time work. While transcripts of conversations are not a common form of evidence before this Tribunal, Champers did not challenge the accuracy of these documents. In verbal evidence, Scott and Peter Scott confirmed the contents of the transcripts, while Penner and Hewson did not contradict their contents.

Moreover, the *Act* firmly requires an employer to place an employee in her former position or a comparable position after a maternity leave. Champers did not meet this obligation. It did not place or even offer Scott any position, evidently relying on an assumption that she wanted a different work schedule. In these circumstances, an employer should provide a clear statement from an employee that she does not want to return to her former position after a maternity leave would be necessary to demonstrate that the employer has fulfilled its duty to her. Champers did not meet that requirement.

It was clear that at least some persons in Champers management staff believed that Scott had first removed client cards from the salon and then used this information in effect to compete with Champers during her maternity leave. On the balance of probabilities, I concluded that Scott did not compete with Champers in any way prior to her termination. Moreover, Champers did not raise any alleged conflict of interest when Scott was terminated. In any case, it is not open to an employer to add new grounds for termination after the employment relationship has ended.

Clearly, the parties disagreed about the ownership of Scott's client cards. Since Champers did not attempt to discipline Scott in any way for taking the cards, it was not entitled to rely on her conduct regarding the cards after her termination. However, in *Chabra*, BC EST #D585/97, the Tribunal held that client cards were the property of a hair stylist employed in a salon, not her employer.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination dated March 24, 2000 is confirmed. Champers must pay Scott \$10,887.29, plus interest accrued since the date of the Determination under Section 88 of the *Act*.

Mark Thompson

Mark Thompson
Adjudicator
Employment Standards Tribunal