

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 -

O’Cana Enterprises Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/636

DATE OF HEARING: October 17, 1997

DATE OF DECISION: October 30, 1997

Mr. Lim, Ms. Xie, Mrs. Leeder and Mr. Leeder gave evidence under affirmation.

ISSUES TO BE DECIDED

1. Was Mrs. Leeder's employment terminated by O'Cana?
2. If so, did O'Cana contravene 54(2) of the *Act* by terminating Mrs. Leeder's employment because of her pregnancy?

FACTS

O'Cana operates Alisa Japanese Restaurant in North Vancouver. Michael Lim and Kathy Q. Xie are the principals of the business. O'Cana purchased the restaurant from Maegawa Enterprises Ltd. ("Maegawa") in mid-June, 1995. Mrs. Leeder began her employment with Maegawa on July 12, 1994. O'Cana scheduled interviews to be held with all of Maegawa's employees during the evening of June 16, 1995 but Mrs. Leeder was unable to attend. She was interviewed by telephone on July 2, 1995. Mrs. Leeder's first shift with the new owners occurred on July 6, 1995. Mr. Lim and Ms. Xie were informed by Maegawa that Mrs. Leeder was pregnant.

Mr. Lim's first language is Cantonese but he speaks some Japanese and English. Ms. Xie's first language is Cantonese and she has a good command of Japanese. Mrs. Leeder's native language is Japanese and she understands and speaks English sufficiently well that she did not require an interpreter.

On July 16, 1995 Mrs. Leeder experienced stomach pains after being at work for one hour and was unable to continue working on that day. She returned to work the next day and worked all scheduled hours for the remainder of that week and the next.

On July 28, 1995 Mrs. Leeder requested time off work (on the advice of her doctor) due to complications related to her pregnancy. On or about July 31, 1995 Ms. Xie contacted Mrs. Leeder by telephone to discuss her hours of work for the following week. Mrs. Leeder agreed to work the "dinner shift" on August 2 and 3 as well as the "lunch shift" and "dinner shift" on August 4, 1995 inclusive.

Mrs. Leeder requested and was granted permission to take a week's vacation for the period August 10 to 14, 1995.

While the facts which I have just described are not disputed, the same cannot be said about all of the events of July 28 - August 1, 1995 nor August 21 and August 22, 1995.

O'Cana issued a Record of Employment ("ROE") to Mrs. Leeder on December 5, 1995 and it shows code "E" Z(Quit) as the reason for it being issued.

The Determination

The events of two periods of time (July 28 - August 2, 1995; and August 21-22, 1995) are central to this appeal. The Director's delegate recorded Mrs. Leeder's recollection of those events in the Determination in the following terms:

On July 28, 1995, the complainant told the new owners Kathy and Michael Lim that she was pregnant. The complainant states that the employer told her to stay at home and get "U.I.C.". The complainant told the employer she wanted to continue to work.

On August 1, 1995 the complainant contacted the employer (Kathy Lim) to enquire about her shifts. Lim said that she had hired two new employees to help and the complainant did not have to worry about the job. Later that day the employer called back to the complainant to arrange for her to work the dinner shift Wednesdays, Thursday and Friday and lunch on Fridays.

On August 2, 1995 the complainant went to work and states that two of her co-workers told her that the employer (Kathy Lim) had told them that she did not want the responsibility for the complainant's pregnancy.

On August 21, 1995, during the lunch time shift the complainant asked the employer (Kathy Lim) if she could take the lunch time shifts off to attend pre-natal fitness classes. The employer responded in Japanese "you don't have to work anymore". The complainant interpreted these words to mean "you are fired". The complainant states that she attempted to clarify the situation, in that she was not quitting, rather she was asking for time to attend the classes. The employer then removed the complainant's name from the work schedule.

On August 22, 1995 the complainant went to the restaurant to speak with the employer (Lim). The complainant knew that her name was not on the schedule but hoped to change the employer's mind. However, after discussing her status with the employer, the complainant states that the employer insisted that she had in fact quit.

The Director's delegate recorded Ms. Xie's recollection as follows:

On August 21, 1995 the employer (Kathy Lim) [a.k.a. Kathy Xie] states that the complainant stated that she could not work the lunch shifts anymore. Lim says that the complainant did not inform her that the reason was to attend pre-natal classes.

On August 22, the complainant approached the employer to ask that they confirm that she was fired. The employer refused, as they indicated the complainant had resigned. The employer indicated that the complainant's job was available if she wanted it. The complainant left indicating left indicating that she would seek legal counsel.

Based on those facts, the Director's delegate found that O'Cana terminated Mrs. Leeder's employment and contravened Section 54(2) of the *Act* based on the following analysis:

The statements from each party concerning the conversation that took place at the restaurant on August 21, 1995, are in conflict. It appears that the language used was in Japanese, which may have been a factor in how the statements were interpreted by the complainant or the employer. However the officer is satisfied that the complainant would not have been giving her resignation at this time. It is noted that if the complainant had intended to resign she would not have returned on August 22, to approach the employer concerning her job. Therefore, the onus would rest with the employer to confirm that the complainant had quit. I find that the complainant's employment was terminated by the employer.

Having found that Mrs. Leeder's employment was terminated, the Director's delegate relied on Section 79(4)(c) of the *Act* to require O'Cana to pay Mrs. Leeder compensation in the amount of \$3,482.86 (including interest). The amount of compensation found to be owing was based on a finding that Mrs. Leeder "...would likely have continued to work up to mid-December 1995, and that she therefore, would have lost wages including gratuities during this time." The calculation of the compensation owing was also based on the premise that Mrs. Leeder "...would have been working on dinner shifts only, (i.e. 3 shifts per week)."

July 28 to August 2, 1995

Mrs. Leeder testified that as a result of some complications with her pregnancy she went to her physician who advised her to take some time off work and rest. She also testified that she spoke to her employers on July 28, 1995 to inform them that she was pregnant. Michael Lim congratulated Mrs. Leeder. According to Mrs. Leeder's testimony, Ms. Xie responded by telling her that "...you can get UIC and stay at home" and "...you should stay at home." Mrs. Leeder was granted a leave of absence from July 28th to August 1st inclusive.

On August 1st Ms. Xie called Mrs. Leeder by telephone to inform her that: she had hired two new waitresses; "don't worry about working at Alisa Restaurant"; and she (Mrs. Leeder) could take as much time off as she wanted.

Later that day, Ms. Xie called Mrs. Leeder again and asked her if she would work the “dinner shift” on the following Wednesday and Thursday as well as the “lunch shift” and “dinner shift” on Friday (August 4, 1995).

Ms. Xie testified that her conversation with Mrs. Leeder on July 28th was friendly. She told Mrs. Leeder that she had experienced similar problems when she was pregnant and said “...be careful, take a rest.” While approving Mrs. Leeder’s leave of absence, Ms. Xie testified she told her to “...give me a call when you want to come back.” She also testified that she told Mrs. Leeder that she could “...work until 8 weeks prior to the due date and then apply for (UIC) benefits.”

According to Ms. Xie, Mrs. Leeder called her on August 1st to ask if she could work 2 “lunch shifts” and 2 “dinner shifts” each week. At that time Ms. Xie explained that she had hired two new part-time waitresses and would have to tell one of them “...not to come back again.”

August 21/22, 1995

Mrs. Leeder worked the “lunch shift” on August 21, 1995.

Ms. Xie testified that at approximately 1:30 p.m. she was sitting at the sushi bar in the restaurant when Mrs. Leeder told her “I can’t work lunch shift.” The two women spoke to each other in Japanese. Ms. Xie testified that when she suggested to Mrs. Leeder that she take another leave, Mrs. Leeder became very angry and responded: “You don’t want me to work here because I am pregnant.” As there were customers to be served the conversation did not continue until the end of Mrs. Leeder’s shift approximately one hour later. At that time, Mrs. Leeder had a meal (as was the usual practice of all employees). According to Ms. Xie’s testimony, Mrs. Leeder then told her “I don’t want to work here anymore” and asked for her final pay cheque. When she was told that it was not available at that time, Mrs. Leeder then said that she would ask one of the other employees (Chieko) to collect the cheque for her.

In her evidence, Ms. Xie testified that she discussed the situation with Michael Lim that evening and as they did not know whether Mrs. Leeder would be at work the next day, they decided they would take her name off the schedule when they went to the restaurant the next day (August 22nd.).

The next day (August 22, 1995) Ms. Xie testified that Mrs. Leeder came to the restaurant at approximately 4:30 p.m. and asked her, in English, to tell her that she had been fired so that Chieko could be a witness. According to Ms. Xie, Mrs. Leeder became very angry when she declined to tell her that she had been fired and because her name was no longer on the schedule. Ms. Xie testified that both she and Michael Lim told Mrs. Leeder that “...if you want to come back you are welcome anytime.”

Mrs. Leeder testified that on August 21st she and Chieko were at the cash register when Ms. Xie came over from the sushi bar to talk to them. It was then that she asked Ms. Xie

if “...(she) could have Monday, Wednesday, Friday lunch off to attend pre-natal fitness classes beginning in September.” According to Mrs. Leeder, Ms. Xie’s reply (in Japanese), “ You don’t have to work here anymore”, caused them to argue and Ms. Xie repeated that statement more than once. Mrs. Leeder testified that she had asked for Monday/Wednesday/Friday “lunch shifts” off, if possible and never said that she could not work on those days.

Mrs. Leeder also testified that when she finished serving lunch customers on August 21st., her name had been removed from the schedule and she concluded that she had been “fired”. Therefore, she asked Ms. Xie for her final pay cheque when she had finished eating her meal at approx. 2:30 p.m. When Ms. Xie explained that her cheque would not be available until the end of the month, Mrs. Leeder testified that she asked for it to be given to Kae (another employee) and then left the restaurant.

Mrs. Leeder had been scheduled to work the “dinner shift” on August 22nd. and, according to her testimony, went to the restaurant at approximately 4:30 p.m. She testified that she went because she “...hoped that Michael and Kathy had changed their minds.” When they met at the coffee shop beside Alisa Restaurant, their conversation about the schedule became an argument. According to Mrs. Leeder’s evidence, Ms. Xie told her “You wanted to quit so I crossed your name off the schedule” and she replied: “I didn’t say I wanted to quit.” When their conversation ended, Mrs. Leeder testified that she went next door to the restaurant to say good-bye to Chieko. While she was there Mr. Lim and Ms. Xie came in and they argued again during which time Mrs. Leeder testified she was not given a chance to give her opinion. Mrs. Leeder left the restaurant at approximately 4:45 p.m.

ANALYSIS

The Director’s delegate found that Mrs. Leeder’s employment was terminated by O’Cana and relied on Section 54(2) and Section 79(4) of the *Act* to award compensation to her.

Section 54(2)(a) of the *Act* prohibits an employer from terminating an employee’s employment because she is pregnant.

Section 79(4)(c) of the *Act* gives the Director (or her delegate) the power to require an employer to pay compensation to a person if satisfied that the employer has contravened a requirement of Part 6 of the *Act*. Section 54 lies within Part 6 of the *Act*.

O’Cana submits that the Determination is wrong for three reasons:

1. the Director’s delegate did not consider certain facts which occurred on August 22, 1995;
2. the Director’s delegate erred in placing the onus on O’Cana to show that Mrs. Leeder had “quit”; and
3. Certain other facts, which support O’Cana’s position, were not considered by the Director’s delegate.

O’Cana has the burden of establishing, on the balance of probabilities, that the Determination made by the Director’s delegate was wrong. This is an appeal of that Determination. It is not re-investigation of Mrs. Leeder’s complaint. Section 126(4)(b) of the *Act*, which I will discuss later, places a heavy onus on O’Cana in this appeal.

In *Burnaby Select Taxi Ltd.* (BCEST # D091/96), the Tribunal adopted the following test for determining whether an employee “quit” his or her employment.

The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her further employment.

That test was also adopted in *Wilson Place Management Ltd.* (BCEST # D047/96) and I adopt it again in this appeal.

The findings of fact which I have made are set out above in chronological order. Where a conflict arises on the evidence that is material to the findings which I have made, I have identified that conflict and those facts. Where there are issues of credibility I have determined them on the basis of the test established in *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (BCCA):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...(pp.356-57)

Was Mrs. Leeder's employment terminated by O'Cana?

When I consider all of the evidence, I cannot find "clear and unequivocal" facts which would lead me to find that Mrs. Leeder resigned (i.e. "quit") her employment with O'Cana. I am unable to find any evidence which demonstrates that Mrs. Leeder formed an intent to resign her employment. I note that Mr. Lim & Ms. Xie were informed in mid-June, 1995 that Mrs. Leeder was pregnant. She confirmed that when she requested a short leave of absence on July 28, 1995. It is, therefore, consistent with the "preponderance of the probabilities" that on August 21st she requested a change in her work schedule to enable her to attend pre-natal fitness classes during September, 1995. I accept Mrs. Leeder's evidence that in asking not to be scheduled for the "lunch shifts" on Monday, Wednesday, Friday during September she did not say that she would not work on those days. I also find it significant that Mrs. Leeder returned to the restaurant on August 22nd in the hope that Mr. Lim and Ms. Xie had changed their minds. Her visit to the restaurant on August 22nd. and the heated discussion which ensued are not consistent with the actions of an employee who had decided to resign the previous day and who had asked for her final cheque to be delivered to her by a co-worker.

I am also unable to find any evidence which would support a finding that, objectively, Mrs. Leeder carried out an act inconsistent with her further employment. The preponderance of the evidence points to a contrary finding. Mrs. Leeder was certain, under cross examination, that her name was removed from the schedule before she completed her "lunch shift" on August 21st. I find that to be more probable than Ms. Xie's testimony that Mrs. Leeder's name was removed from the schedule on August 22nd. It was the removal of her name from the schedule coupled with Ms. Xie's statement that "you don't have to work here anymore" which caused Mrs. Leeder to conclude that her employment had been terminated. She then asked for her final pay cheques.

As noted at page 5 above, the Director's delegate was satisfied that Mrs. Leeder did not resign on August 21, 1995 and found that her employment was terminated by O'Cana. I cannot find any ground on which to conclude that that finding was unreasonable. Therefore, I find that O'Cana terminated Mrs. Leeder's employment on August 21, 1995. Having made that finding, I must also decide if the reason for the termination was because of her pregnancy.

Section 126(4)(b) of the *Act* places the burden on the employer to prove that:

"an employee's pregnancy... is not the reason of terminating the employment or for changing a condition of employment without the employee's consent."

There is, therefore, a heavy burden on the employer (O'Cana) to prove that if it terminated Mrs. Leeder's employment, it did not do so because she was pregnant.

I have reviewed and considered the written submissions and arguments made by O’Cana and am unable to conclude that it has met the onus which is placed on it by section 126(4)(b). I do not accept the argument by O’Cana that Mrs. Leeder’s visit to the restaurant on August 22nd. is inconsistent with the finding by the Director’s delegate that her employment had been terminated. Rather, I find that if Mrs. Leeder had intended to resign on August 21st., there would have been no reason for her to return to the restaurant on August 22nd. The fact the ROE was not issued until December 5, 1995 is not persuasive. I note that the ROE was issued some 3 1/2 months after the events of August 21st and, therefore , it is not indicative of Ms. Xie’s intentions or frame of mind on August 21st. Finally, while I acknowledge that O’Cana had granted unpaid sick leaves and/or leaves of absence to Mrs. Leeder during July and August, I do not find that to be inconsistent with a decision to terminate her employment on August 21st. I am reinforced in that opinion by Mrs. Leeder’s uncontroverted evidence that Ms. Xie told her that she should “take off” as long as she wanted (August 1, 1995) and “you don’t have to work anymore” (August 21, 1995). These statements are more supportive of a finding that O’Cana decided to terminate Mrs. Leeder’s employment than a finding that Mrs. Leeder intended to resign from her employment.

When I consider all of the evidence I am unable to conclude that the termination of Mrs. Leeder’s employment was for any reason other than her pregnancy. O’Cana did not attempt to establish that there were any concerns about Mrs. Leeder’s work performance and certainly did not suggest that there was “just cause” to terminate her employment.

O’Cana did not make any submission to challenge the reasonableness of the amount of compensation which the Director’s delegate required it to pay under Section 79 of the *Act*. There are no grounds on which I can conclude that the amount of compensation which the Director’s delegate required O’Cana to pay is contrary to powers given under Section 79 of the *Act*.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/sf