

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 -

Angela Bottos
("Bottos")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 98/622

DATE OF **D**ECISION: November 17, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Angela Bottos ("Bottos") of a Determination which was issued on September 8, 1998 by a delegate of the Director of Employment Standards (the "Director"). In that Determination the Director addressed a complaint by Bottos that her employer, RPB Holdings Ltd., operating as Best Western Vernon Lodge ("RPB"), had contravened Section 54 of the *Act*, had failed to pay wages for a 15 minute period of each shift she was scheduled to work and had failed to pay minimum daily pay for times Bottos attended at her employer's place of business to request or discuss a return to work following the pregnancy leave. The Director decided RPB had not contravened Section 54 of the *Act* and that Bottos was not entitled to minimum daily pay for attending her employer's place of business for the purpose of requesting or discussing a return to work. The Director found Bottos was entitled to wages for an additional 15 minutes a day on each day she was scheduled to work and secured an amount of \$228.94 on her behalf.

Bottos has appealed only the decision of the Director that RPB had not contravened Section 54.

ISSUE TO BE DECIDED

The issue is whether Bottos has shown the Director erred in concluding RPB did not contravene Section 54 of the *Act*.

FACTS

Bottos commenced her employment with RPB on April 21, 1997 on a temporary basis in the position of Front Desk Clerk. The character of the position is demonstrated by a letter dated April 23, 1997 which was signed by Geanne Boswell ("Boswell"), the Front Office Manager for RPB, and Bottos. The letter said:

Please be advised that you are being hired on a temporary basis only, for the period from mid-April 1997 to mid-October, 1997 (approximately six months). No employment is guaranteed after this time.

Bottos became a permanent employee on September 9, 1997. On October 9, 1997, Bottos commenced pregnancy leave.

There is nothing to support the assertion by Bottos that she was a full-time employee from the date of hire to the date of commencement of pregnancy leave. Bottos refers to a letter dated September 4, 1997, stating:

To Whom it may Concern,

Please be advised that Angela Bottos was offered a permanent, full-time position at the Best Western Vernon Lodge on April 18, 1997, and began working on April 22, 1997.

While this letter appears to be inconsistent with the earlier document signed by Bottos and Boswell, its purpose and content were explained in a submission by RPB to the Tribunal dated October 16, 1998. This submission was sent to Bottos by the Tribunal on October 22, 1998 and any reply was required to be submitted by November 5, 1998. No reply was made and the explanation by RPB is not challenged or

contradicted. The explanation of RPB and the material on file is consistent with the conclusion in the Determination that Bottos was a permanent part-time employee of RPB. The Determination concludes:

When you left on pregnancy leave you were employed as a permanent front desk clerk. All front desk clerk positions are part time positions with varying hours being scheduled subject to the seasonal nature of the motel industry.

I am not prepared to disturb that finding of fact.

Bottos asserts she worked 65 to 80 hours in every pay period during her employment. While that may be correct, it remains that the position in which Bottos was employed was a part-time position with no guarantee of full-time hours.

In late February Bottos notified RPB she wished to return to work and met with Boswell to discuss her return to work. Boswell told Bottos that business was slow and she could schedule her for only two to three shifts weekly until things picked up. Bottos appeared to accept that but when told later she was scheduled for only 17 hours a week on the first work schedule, she told Boswell that was not good enough. In response, Boswell adjusted the schedule, increasing the number of hours a week to approximately 21 hours, but again that was not acceptable to Bottos, who demanded RPB schedule her for the number of hours she worked before her pregnancy leave, essentially full-time hours, and refused to return to work unless she was given those hours.

ANALYSIS

Section 54 of the *Act* states:

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.*

Also relevant is paragraph 126(4)(b) of the *Act*, which places the burden on the employer to establish a change in a condition of employment of an employee entitled to a pregnancy is not for reasons relating to that leave.

Bottos makes two arguments in this appeal. First, she says the Director erred in not finding a contravention of subsection 54(2) by RPB. She says that subsection means RPB was not allowed to change a condition of her employment, specifically, RPB was not allowed to reduce her position from full-time hours to part-time hours.

I do not accept this argument. Even if the reduction in the number of hours of work available to Bottos in a week could be considered a change in a “condition of employment” for the purposes of the *Act*, in order to find a contravention of subsection 54(2), the Director would have been required to conclude the *reason* for the change related, in this case, to Bottos’ pregnancy leave. It is apparent from both the Determination and from the material on file that the reason why Bottos was scheduled for fewer hours on her return from pregnancy leave than what she was receiving before she commenced her pregnancy leave was related to the seasonal nature of the motel industry and not to the leave.

The second argument made by Bottos is that the position she held before taking leave was a permanent full-time position and the *Act* required RPB to return her to that position. In respect of that argument, Bottos challenges a conclusion of fact in the Determination. Bottos bears the burden of showing that conclusion of fact was wrong. She has not met that burden. As indicated above, I accept the conclusion of the Director that the position was a permanent part-time position. It is true that Bottos was fortunate enough to have been employed by RPB during a time of year and in circumstances that allowed her to work close to full-time hours, but that does not change the essential character of the position, as found by the Director, as a part-time position “with varying hours being scheduled subject to the seasonal nature of the motel industry”.

Bottos has not shown the Director made any error in the Determination and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 8, 1998 be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal