EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for a reconsideration pursuant to Section 116 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Kimberly Flint
("Flint")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/623

DATE OF DECISION: November 1, 2000

DECISION

This is a decision based on written submissions by Kimberly Flint ("Flint").

OVERVIEW

This is an application by Kimberly Flint, under Section 116(2) of the *Employment Standards Act* ("the *Act*"), for a reconsideration of Decision BC EST #D195/00 (the "Original Decision") which was issued by the Tribunal on May 12, 2000.

The Original Decision varied a Determination made by a delegate of the Director on January 26, 2000. The delegate concluded that Flint was not offered a comparable position upon her return from pregnancy and parental leave in violation of section 54(3) of the *Act*, and ordered Creative Surfaces Inc. ("CSI") to pay Flint $10, 090.00 under section 79(4) of the *Act*.

The Tribunal cancelled the Determination by finding that CSI had "met the burden of showing that the terms of Flint's former position were changed for reasons wholly unconnected to her pregnancy and ensuing leave." The Tribunal also found that, if CSI had contravened any section of the *Act*, it was s. 54(2)(b), finding that Flint quit her employment before she was scheduled to return to work.

ISSUE TO BE DECIDED

Whether the Tribunal erred in law in finding that CSI had not significantly changed Flint's position title and duties. Flint contends that the position of architectural/designer representative and administrative clerk are not comparable. Flint also argues that the Tribunal erred in basing its decision on Section 54(2) of the *Act*, rather than 54(3).

FACTS

The pertinent facts are set out in some length in the Tribunal's decision. (BC EST D#195/00) Those will be briefly summarized for the purposes of this reconsideration.

Flint was asked to work as an outside sales representative for CSI by two of its principals at the time it was formed. Flint told them she intended to marry and start a family. Flint was told that would not be a problem, and she commenced work on November 1, 1996. Flint became pregnant in March 1997 and the principals approved her pregnancy leave from November 1997 to June 1998. About two months before she was due to return to work, Flint met with one of the principals. She was told that her former position had been abolished but that she could return, at the same salary, to a new sales/clerical position. Flint considered this position to be less attractive and prestigious, and when it became clear that her old position was no longer available, she quit.

CSI had reduced its staff from 15 to 12 or 13 during a downturn in the construction industry in late 1997, and it decided, during Flint's leave, that it did not wish to fill the outside sales position. CSI contended that the new position was comparable to the old position, but that the work would be

performed primarily in the office, rather than on the road. The Tribunal had no basis on which to assess this submission. Flint had rejected CSI's offer and did not perform any of her new duties, and there was no other independent evidence to support this contention. The Tribunal stated:

> A problem I have in this case is that since Flint rejected the employer's position outright, and never actually performed any of her new proposed duties, I cannot say to what extent the new duties varied from the old. It is simply not possible to gauge, due to a lack of evidence, whether her new duties would have been dramatically different (Flint's position) or not so very different (the employers' position) from those undertaken by Ms. Flint before she went on leave. However, it does appear that while there may have been some overlap there would have also been some significant differences in the duties as between the two positions.

The parties did not dispute that CSI was losing core business. CSI asserted that it made a bona fide decision to abolish Flint's former position on the basis that it could not sustain an outside work force, and that Flint was offered a new position with no reduction in salary in an effort to preserve her employment.

The Tribunal stated:

> It appears to me that the essence of Ms. Flint's assertion is that her employer, while she was on leave, changed a condition of her employment (namely, the fundamental nature of her duties) without her written consent and thereby contravened section 54(2)(b) of the *Act*. It may well be that while Ms. Flint was on pregnancy/maternity leave, Creative Surfaces changed a condition of her employment without her consent. Nevertheless, Creative Surfaces contravened section 54(2)(b) *only if* a condition of Ms. Flint's employment was changed *because of her pregnancy/maternity leave.* (emphasis in original)

The Tribunal concluded that CSI reduced its workforce while Flint was on leave, and that there was no evidence that CSI hired another individual to replace her while she was on leave, or after she quit. Flint stated that she intended to quit rather than accept the new position, and agreed that one of CSI's principals asked her to reconsider that decision, which the Tribunal found to be consistent with an employer who wanted Flint to continue working. The Tribunal concluded

> I am satisfied that the employer has met its burden (see *Tricom Services Inc.*, BC EST #D458/98) of showing that the terms of Ms. Flint's former position were changed for reasons wholly unconnected with her pregnancy and ensuing leave.

ARGUMENT

Flint contends that the adjudicator erred in law in finding that CSI contravened section 54(3) of the *Act*. She argues that she was not placed in comparable decision, and that the Tribunal found in fact that there were significant differences in the duties between the two positions.

Flint also contends that section 54 does not provide for an adjudicator to consider whether an employer had *bona fide* reasons to make a decision.

Flint further argues that the adjudicator erred in concluding that, if there was a contravention, it was of section 54(2)(b) since she quit her employment before she was scheduled to return to work. She contends that she never had the chance to reach the scheduled date because she was presented with the changes 7 weeks prior to her date of return and was asked to agree to them within a week. She argues that CSI breached the *Act* when they presented her with the letter outlining the change in duties that were to take effect on her return to work.

ANALYSIS

The Tribunal has established a two stage analysis for an exercise of the reconsideration power (see *Milan Holdings Ltd*. (BCEST #D313/98). At the first stage, the panel decides whether the matters raised in the application in fact warrant reconsideration.

> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. (*Milan Holdings*, p. 7)

The Tribunal has held that a reconsideration will only be granted in circumstances demonstrate that there has been a breach of the rules of natural justice, where there is compelling new evidence that was not available at the new hearing, or where the adjudicator made a fundamental error of law. (*Bicchieri Enterprises Ltd*. (BC EST #D335/96)

The scope of review on reconsideration is a narrow one (see *Kiss* BC EST#D122/96):

1. failure by the adjudicator to comply with the principles of natural justice,

2. mistake in stating the facts,

3. failure to be consistent with other decisions which are not distinguishable on the facts,

4. significant and serious new evidence that would have led the adjudicator to a different decision,

5. misunderstanding or a failure to deal with a significant issue in appeal, and

6. a clerical error in the decision.

In my view, this is not an appropriate case for exercising the reconsideration power. There was no breach of the rules of natural justice or compelling new evidence alleged or established. As I understand Flint's argument, she contends that the Tribunal erred in law.

Flint's argument focuses entirely on section 54 of the *Act* which provides as follows:

> *Duties of an Employer*
>
> *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.*

Section 54(3) imposes a duty on an employer, as soon as the employee's pregnancy or parental leave ends, to place that employee who has taken pregnancy leave either in the position they held before taking leave or in a comparable position. Flint's position was eliminated while she was on leave. CSI could not place her in her old position upon her return. Before her leave ended, CSI offered Flint what it contended was a comparable position.

In my view, the obligation set out in section 54(3) does not take effect until an employee's pregnancy leave has ended. As Flint's leave had not ended at the time CSI offered her an alternative position, there was no duty on CSI to comply with this section. Had Flint returned to work in the new position, the Tribunal may have had better evidence on which to determine whether Flint's previous position was comparable to the one offered. As it turned out, the adjudicator found that there was insufficient evidence to make a determination on that issue. Although the adjudicator concluded that there would be significant differences between the positions, that is not a finding that the positions were not comparable, as Flint contends. The positions were clearly equivalent in terms of their salaries, although their duties were different in many respects. Although Flint places significant emphasis on what is characterized as the previous position's "prestige", that is not enough to say the positions were not comparable. In any event, Flint made this argument before the adjudicator, and her application is an attempt to have the Tribunal "re-weigh" the evidence. This is not an appropriate basis to exercise the reconsideration power.

The adjudicator also considered another argument that Flint apparently advanced in the hearing, which was whether there was also a contravention of subsection 54(2). Flint argues that this subsection of the *Act* did not form the basis of the original Determination. While that may be so, subsections 54(2) and (3) cannot be considered in isolation of one another.

The adjudicator found that, although CSI may well have changed a condition of Flint's employment, it did so for bona fide business reasons. Although Flint correctly notes that the words "bona fide" do not appear within section 54, what is at issue is whether the employer changed a condition of her employment because of her pregnancy. The adjudicator concluded that CSI had met the burden of showing that the terms of the former position were changed for reasons wholly unconnected with her pregnancy leave. That is a finding of fact that is not a basis for the exercise of the reconsideration power.

It is my view, as it appeared to be the adjudicator's, that it is unreasonable to impose a duty on an employer to place an employee, at the end of several months pregnancy leave, in the same position, or a comparable position, if the business of the employer has undergone significant changes for reasons unrelated to the employee's pregnancy. It would otherwise place an employee who has taken pregnancy or parental leave in a better position than another employee who may have continued to work through that period, and had been offered other work, or laid off, because of that significant change.

ORDER

The Determination is confirmed.

C. L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal