

OFFICE OF ADJUDICATION

IN THE MATTER OF SECTION 67 OF THE EMPLOYMENT STANDARDS ACT, R.S.O. 1990, CHAPTER E.14, AS AMENDED, AND IN THE MATTER OF AN APPLICATION FOR REVIEW OF AN OFFICER'S DECISION BY GILLIAN BENTLEY (EPB# 30-008253)

BETWEEN	GILLIAN BENTLEY
AND	MINISTRY OF LABOUR
AND	BBM BUREAU OF MEASUREMENT
ADJUDICATOR	MARY ELLEN CUMMINGS
DATES OF HEARING	SEPTEMBER 18 AND 19, 1996; JANUARY 13, 14 AND 20, 1997
PLACE	TORONTO, ONTARIO
APPEARANCES	JOHN GRAHAM FOR THE CLAIMANT ANITA VEIGA-MINHINNETT FOR THE MINISTRY OF LABOUR DAVID HAGER FOR THE EMPLOYER
DATE OF DECISION	FEBRUARY 3, 1997
DECISION NUMBER	ESC 97-24
FILE NUMBER	ES 67/95-286

DECISION

I

Gillian Bentley, the Claimant, seeks review of an Officer's decision which concluded that her Employer, BBM Bureau of Measurement, did not breach section 43 of the *Act*. Ms. Bentley maintains that she was not fully reinstated to her former position on her return to work after a pregnancy and parental leave. She also alleges that certain actions of the Employer are a breach of section 44 of the *Act*. BBM maintains that Ms. Bentley was fully reinstated after her leave, and that her subsequent termination was for bona fide business reasons, unrelated to her having taken a pregnancy and parental leave. Initially, the Ministry took no position, indicating it would wait until the evidence was adduced. In its final submissions, the Ministry supported the Claimant.

The Employer was made a party.

II

BBM Bureau of Measurement is a non-profit co-operative of organizations interested in receiving accurate measurements of audiences for radio and television programs. The organization's members include radio and televisions stations, advertising agencies and government departments. BBM produces its surveys by asking selected households to monitor their radio and television viewing in diaries provided by BBM. BBM collects the surveys, enters the data into its mainframe computer, and generates survey booklets for its members. I understand from the evidence that there are two periods of surveying each year, which result in peaks of workload for different departments at different times of year.

Much of the evidence is not in dispute, particularly that relating to the background events. Where there are disputes about significant evidence, I will set them out, along

with my conclusions.

Mrs. Bentley was hired in May 1992, into the position of Application/Support Analyst in the Micro Systems section of the Management Information Systems (MIS) Department. Mrs. Bentley's hiring letter described the job as follows:

As Application/Support Analyst you will be responsible for the application, software and communication support and training of new software packages.

Although considerable time was spent in the hearing ascertaining how much time Mrs. Bentley spent on each of these duties, I have not been convinced that it is of much importance. Throughout most of her employment, Mrs. Bentley shared the duties with Shawn Gardener. I have concluded that while both did the same job, Mrs. Bentley was called on to do more of the formal group training and preparation and development of training materials. Mrs. Bentley had more experience in formal training than did Ms. Gardener. Both women provided informal training of users. Although the hiring letter does not mention it, both Ms. Gardener and Ms. Bentley spent some time installing and trouble shooting computer hardware as well.

Mrs. Bentley took pregnancy and parental leave from April 25, 1994 to September 22, 1994. Before she took her leave, Mrs. Bentley requested and was granted permission to take two weeks' vacation at the end of her leave, meaning she planned to return on October 14, 1994. Before the end of her leave, however, Mrs. Bentley informally sought information about the possibility of returning on a part-time basis. In the end, Mrs. Bentley did not pursue it, but asked if she could take her remaining vacation time on Fridays and Mondays. This was declined because it was inconsistent with BBM's policies. Mrs. Bentley then took her vacation before her return from leave. She came back to BBM on November 22, 1994.

Mrs. Bentley's employment was terminated on February 3, 1995. The termination

letter said that her position had become redundant. Mrs. Bentley was provided with termination pay equal to four months salary. In simple terms, Mrs. Bentley's allegation that she was not fully reinstated in her position on her return from leave and vacation centres around what happened between her return to work and her termination. There is also some evidence of events which allegedly occurred while she was on leave.

III

At this point, it would be helpful to set out the statutory provisions that are at issue:

43. (1) The employer of an employee who has taken pregnancy leave or parental leave shall reinstate the employee when the leave ends to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.
- (2) If the employer's operations were suspended or discontinued while the employee was on leave and have not resumed when the leave ends, the employer shall reinstate the employee, when the operations resume, in accordance with the employer's seniority system or practice, if any.
- (3) The employer shall pay a reinstated employee wages that are at least equal to the greater of,
- (a) the wages the employee was most recently paid by the employer; or
 - (b) the wages that the employee would be earning had the employee worked throughout the leave.
44. An employer shall not intimidate, discipline, suspend, lay off, dismiss or impose a penalty on an employee because the employee is or will become eligible to take, intends to take or takes pregnancy leave or parental leave.

Mrs. Bentley's position is that while she returned to BBM with the same job title, and same salary, she did not enjoy the same working location, she was not given any

work to do, and was not given any task or direction from her supervisor. Mrs. Bentley's theory of the case is that BBM decided to use her pregnancy and parental leave as an opportunity to see if the work of Application/Support Analyst could be performed by Shawn Gardener and if the "experiment" was successful, then Mrs. Bentley would be terminated. She alleges that her reinstatement was only a sham. BBM denied the allegations, and argued that the decision to terminate Mrs. Bentley was made only after her return and there was no such experiment during her leave.

IV

I will start with the evidence about the background context in which the decisions about Mrs. Bentley's continued employment were made. I heard from a number of management witnesses, two called by Mrs. Bentley and two called by BBM. There is not a lot of inconsistency in the evidence. BBM's data surveys, its core business, are processed by an old mainframe computer, supported by dumb terminals. In the early 1990's BBM became concerned with continuing to rely on this older technology. It required a programming language called Fortran, which was not used much, making it hard to find programmers; the technology was no longer supported by its manufacturer and was not flexible enough to allow for special data manipulations required by some members. BBM felt that continued reliance on the mainframe and its outdated technology made the company vulnerable.

BBM embarked on the development of a 12 component Syndicated Research Software System (SRSS) to replace the mainframe. Generally speaking, the project called for the greater use of personal computers, which would be networked, and the development of customized software. I heard that BBM anticipated it would write all the software in house and do its own training and development of training materials. Chris Reil, Mrs. Bentley's supervisor, said that the hiring of Mrs. Bentley had been in part, in anticipation of the need to develop training materials and train staff on the new software. In addition, I heard it was expected that the addition of more personal

computers would mean more need to support users, hence the need for the services of an Application/ Support Analyst.

In early 1994, the management of BBM became concerned that the SRSS project was in trouble. Considerable money had been spent (around \$2 million), and none of the components was up and running. In April 1994, the Vice-President of MIS was terminated. Although I heard no details, it was not disputed that the termination related to management's concerns about the SRSS Project. Brian Parish, the Vice-President of Radio Operations, was appointed acting Vice-President of MIS. Mr. Parish candidly admitted that he did not spend a great deal of time in MIS. Mr. Reil said it was not unusual to see him once every three weeks. In my view, Mr. Parish's testimony reflected that he was not intimately involved with the day to day operations of the MIS Department, nor with the Technical Services Unit within MIS (formerly Micro Systems) where Mrs. Bentley worked. Mr. Reil, on the other hand, was quite knowledgeable and a credible witness. Mr. Reil left BBM voluntarily in April 1995.

Glen Shipp, BBM's General Manager and CEO, testified that after the Vice-President of MIS left, the management committee pondered what to do about the SRSS project. On the one hand, it had been expensive, and so far, unproductive. On the other hand, no matter what, BBM had to move away from the mainframe technology. Mr. Shipp testified that the management committee decided to recommend to BBM's Board of Directors that the SRSS Project be cancelled, but that an ongoing program to move BBM away from its reliance on the mainframe continue. The recommendation of the management committee is reflected in the committee minutes of November 10, 1994. At the same time, the committee recommended that the relationship with the outside consulting firm that had been retained to implement the SRSS be terminated. With respect to BBM staff working on the software aspects, the minutes say "Existing staff will be deployed in MIS". Mr. Shipp testified that the recommendations were presented to the Board of Directors on December 13, 1994, and the Minutes of the meeting confirm it. Mr. Shipp said that the Board accepted the recommendation. On

December 15, 1994, the BBM management committee met and the following is recorded in the minutes:

Brian [Parish] will undertake a review of staffing levels/programming requirements in MIS prior to the hiring of a senior manager. He will present his findings to the management committee.

Both Mr. Parish and Mr. Reil testified about a couple of discussions between them about staffing levels in the Technical Services Unit of MIS. Their versions did not differ much, but Mr. Reil had a more detailed recollection. He said that Mr. Parish approached him in December 1994 to discuss whether he felt there was any duplication or overlapping of duties in the Technical Services Unit. Mr. Reil said he told him there were not. Mr. Reil recalled a similar discussion shortly after, where he gave the same answer. Mr. Reil said that there had been similar discussions over the years, with the end result that someone from Technical Services was moved over to the SRSS project. Mr. Reil assumed that this discussion was for the same reasons. Mr. Reil said that in January 1995, Mr. Parish approached him and asked if it was possible for him to get by with a single person doing PC support (the colloquial name for Mrs. Bentley's and Ms. Gardener's position). Mr. Reil answered that he could not, especially if BBM wanted to continue to have training. Mr. Parish asked him to continue thinking about it. Mr. Reil testified that at this time, he was not aware of the imminent decision to cancel the SRSS project.

A further management committee was held on January 19, 1995. The minutes disclose the following decisions were made:

Displaced SRSS employees will be terminated. One position in PC support/training will be eliminated.

Both Mr. Shipp and Mr. Parish testified that Mr. Parish conveyed to the meeting Mr.

Reil's views that the PC support work could not be done by one person. However, the management committee decided for financial reasons not to continue to have two incumbents. Mr. Shipp, who indicated that he supported the elimination of one position, said that the decision not to continue with the SRSS program lessened the need for training and support of PCs, at least in the near future. He said that although BBM was committed to moving forward on the project to end their reliance on the mainframe, how they would do it had not yet been decided. For that reason the decision was made that they could not afford to keep the staff that had been assigned to the SRSS Project. Mr. Shipp pointed out that at that point, there was nothing for them to do. He also said that the SRSS project had been very costly and BBM was looking for ways to reduce expenses. Mr. Shipp said that the management committee decided to leave it to Mr. Reil to decide which of Mrs. Bentley and Ms. Gardener would be terminated, because he was in a better position to decide.

Mr. Reil said that on January 19, 1995, Mr. Parish told him about the cancellation of the SRSS Project and the decision to eliminate one PC Support/Analyst. Mr. Reil said that in deciding which incumbent to eliminate he considered a number of factors. He said that their technical skills were comparable, although with strengths in different areas. He said that he considered that Ms. Gardener had 10 years of service with BBM, while Mrs. Bentley had about two years, and Ms. Gardener earned about \$6,500 less than Mrs. Bentley. On that basis, Mr. Reil decided that Mrs. Bentley would be terminated. Mr. Reil denied that Mrs. Bentley's having taken a leave played any part in the decision. Mr. Parish testified that he accepted Mr. Reil's recommendation. It does not appear from his evidence that Mr. Parish enquired much into Mr. Reil's reasons.

Although Mr. Graham, who represented Mrs. Bentley, cross-examined Mr. Shipp and Mr. Reil in some detail, neither of their stories was shaken in any material way. Mrs. Bentley was terminated the same day as two other employees who had been part of the SRSS project. Two remaining employees in the SRSS group were retained to

continue to implement those parts of the SRSS project that had been successful. Although Mrs. Bentley suggested that she should have been considered for one of those positions, the evidence demonstrated that they were both programmer positions, requiring skills, education and experience that Mrs. Bentley did not have.

V

The bona fides of the management decisions were not successfully challenged. In fact, it was not the central focus of Mrs. Bentley's case. Rather, she alleged that on her return to work in November 1994, she was not fully reinstated, contrary to section 43. Mrs. Bentley suggested that there was a plan to see if the Technical Services Unit could "get by" without her during her leave, and if successful, she would be terminated on her return. The Employer's documents and tale of events do not support such a theory. Up until the decision to cancel the SRSS Project, all agree that there would have been work for both Ms. Gardener and Mrs. Bentley. The management committee and Board of Directors' Minutes reveal no discussion or suggestion of a reduction in positions until December of 1994, after Mrs. Bentley's return.

Mrs. Bentley called Sharon Stanbury as a witness. Ms. Stanbury held a variety of positions in MIS, and was one of those on the SRSS Project who was terminated the same day as Mrs. Bentley. Ms. Stanbury testified about a discussion with Mr. Reil during Mrs. Bentley's leave. Ms. Stanbury said she asked Mr. Reil if he would be hiring a temporary replacement during Mrs. Bentley's leave. According to Ms. Stanbury, Mr. Reil said no, and that during Mrs. Bentley's leave, he would see if Ms. Gardener could do the work, and if she could, one of the two positions would be eliminated. Mr. Reil testified that he may have had a conversation with Ms. Stanbury about whether they would hire a temp, but denied saying that he was trying to see if Ms. Gardener could do the work, with a view to eliminating one of the positions. Mr. Reil was cross-examined at some length about whether he really "needed" Mrs.

Bentley, and whether he had enough work for her to do. Mr. Reil firmly said he did; he said that all training had been curtailed during Mrs. Bentley's leave; projects had been put on hold; Ms. Gardener's workload and his, to some degree, had increased, and they had been unable to provide the same level of service. He said that he expected Mrs. Bentley would be busy with the training and support that would be generated by the implementation of the SRSS Project on her return.

Ms. Gardener's testimony was similar. She said she heard no suggestions that there would be no work on Mrs. Bentley's return, and on occasion recalled Mr. Reil commenting that the workload would improve once Mrs. Bentley came back. Ms. Stanbury's evidence is inconsistent with that of other people who were at BBM during Mrs. Bentley's leave, and it is inconsistent with the documents outlining the steps leading up to the decision to terminate Mrs. Bentley. I conclude that there was no decision or plan to eliminate one of the PC support/analyst positions until December 1994, and no decision to terminate Mrs. Bentley until January 1995.

I will now turn to the evidence which Mrs. Bentley says supports her view that she was not fully reinstated after her leave. First, she indicated that her work station was moved. That is true. Prior to her leave, she was in a cubicle, near a corridor, side by side with Ms. Gardener. On her return, Ms. Gardener was in a shared office with another employee, and Mrs. Bentley was in a different cubicle by a window. Mrs. Bentley testified that the cubicle by the window made her less visible to passers-by, while Ms. Gardener was more accessible. This is true. However, all agree that the BBM office was not large, and that most people looking for help from Ms. Gardener or Mrs. Bentley telephoned or sent an E-mail, so in fact, visibility does not appear to be an issue. Much was made of the fact that Ms. Gardener and Mrs. Bentley no longer worked side-by-side, denying them the opportunity to be an effective team. Mr. Reil said that he gave no consideration to team effectiveness when he put Mrs. Bentley at the window. He said that during her leave, those who had been in SRSS were moved to the MIS area and he had to find room for everyone. Because Mrs. Bentley

had asked for a window at one point, he thought she would like the location. Both he and Mr. Shipp testified that window locations were seen as prestigious, and were reserved for managers and supervisors. Mrs. Bentley admitted that she did not complain about the window seat during her employment. I am not prepared to find that this minor change to an arguably superior location was part of a failure to reinstate.

I also heard evidence that Mrs. Bentley returned to find a different computer on her desk that was not fully operational. That is true. It is also true that Mrs. Bentley was called by Ms. Gardener during her leave to tell her that the computer was being re-allocated, and ask if her files had been backed up. When Mrs. Bentley returned, a new and more powerful computer was on her desk. Ms. Gardener testified that she had hooked it up, and checked it, but Mrs. Bentley said she discovered that her E-mail account had been deleted, meaning that people could not reach her. However, as soon as the problem was discovered, it was corrected. In these circumstances, the change in computer and the apparently accidental deletion of the E-mail account do not add up to a failure to reinstate.

Of more concern is Mrs. Bentley's allegation that she had no work to do. Mrs. Bentley said that she was accustomed to having work assigned on a daily basis by Mr. Reil. On her return, she hardly saw him, and he assigned only two tasks to her. Mr. Reil did not disagree that on Mrs. Bentley's return, he talked to her less than before, but said that Ms. Gardener also received less direction than before. He said that December and January are quieter times, and he was personally busy with the large task of closing BBM's phone room in Vancouver, which required work in Toronto, and a one week trip to Vancouver in December. He also said he took a week's holiday in December. Ms. Gardener agreed that December of 1994 was quieter than usual; she noted that it had been quiet since October. She said that she kept busy with reading and upgrading her skills. Mrs. Bentley, in contrast, said that Ms. Gardener was busy but she was not, and only two tasks were assigned to her; the fixing of a laptop, and the

delivery of a half day training course. Both Mr. Reil and Ms. Gardener said they were unaware Mrs. Bentley had little to do, and Mr. Reil said that if he had known, he would have assigned her some of the work that had been left undone during her absence.

Mr. Reil said he told Mrs. Bentley to ease into things, and go and talk to the people she had serviced before her leave to let them know she had returned. Ms. Gardener said that Mrs. Bentley had told her she wanted to ease into things slowly, and refused Ms. Gardener's suggestion that she send an E-mail announcing her return. Mrs. Bentley denied that either conversation took place.

I do not doubt there was little work in December and January. But I am not prepared to conclude on the basis of the evidence I heard that Mrs. Bentley was singled out and denied tasks and direction.

VI

I sense that Mrs. Bentley was shocked by a termination so close to her return from her parental leave. I understand why. Terminations that follow closely on the return from a leave have to be scrutinized very carefully. In Bhagwatia Singh (George Kent Home Improvements Limited) (January 18, 1996, ESC 96-09), Adjudicator Muir said that "...a termination occurring in close proximity to a leave will be subject to intense scrutiny in order to ensure that the employer has not by some colourable device sought to avoid its obligations under the Act." In this case, I believe that Mrs. Bentley has looked back on events between her return and her termination and re-characterized them in light of her termination. She sincerely believes there was a plan to get rid of her prior to January 1995 that had its genesis in her taking pregnancy and parental leave. But I have looked at those same events, and they do not support such a theory. I am unable to conclude that BBM failed to reinstate Mrs. Bentley in accordance with section 43 of the *Act*.

I have also considered whether her termination is a breach of section 44. In other words, was Mrs. Bentley terminated "because" she took a leave. I have concluded the answer is no. The Employer convinced me that her leave played no role in the decision to terminate Mrs. Bentley. And it has offered legitimate reasons for choosing Ms. Gardener over Mrs. Bentley.

Mr. Graham, on behalf of Mrs. Bentley, suggested that the Employer had breached section 44 in not allowing Mrs. Bentley to "compete" for her position. To accept that argument, I would have to first find that a non-union employer has an obligation to allow its employees to "compete" openly before laying off one. That would be an extraordinary conclusion for me to make. In my view, it is enough for an employer to prove that it did not terminate for reasons prohibited by the *Act*. And often the best way to prove that is to provide bona fide reasons for the choices made. BBM has done that in this case; its choice to retain Ms. Gardener over Mrs. Bentley was reasonable.

VII

I have concluded, after a careful review of all the evidence, that BBM has not violated either section 43 or section 44 of the *Act*. The decision of the Officer is affirmed.

DATED AT TORONTO, ONTARIO, THIS 3RD DAY OF FEBRUARY, 1997.



Mary Ellen Cummings, Adjudicator