ONTARIO LABOUR RELATIONS BOARD

0475-13-ES Sandra Gonzalez, Applicant v. **IBM Canada Limited** and Director of Employment Standards, Responding Parties.

Employment Practices Branch File No. **70111802-3**

BEFORE: Mary Anne McKellar, Vice-Chair.

APPEARANCES: Ted Charney and Sandra Gonzalez appearing for the applicant; Kim Pepper, Irene Christie, Linda Hagans and Linda Diliso appearing for the responding party employer; Kikee Malik appearing for the Director of Employment Standards.

DECISION OF THE BOARD: March 18, 2014

Introduction

1. This is an application under section 116 of the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended (the "Act"). The applicant, Sandra Gonzalez, alleges that the responding party ("IBM"), contravened sections 53 (the obligation to reinstate after a period of leave) and 74 (the prohibition on reprisal for taking or being eligible to take a period of leave). The underlying claim was filed on August 14, 2012.

2. I heard this matter on October 28, 2013 and January 10, 2014. Ms. Gonzalez testified on her own behalf. Linda Hagans, Manager of HR Business Development Canada and Latin America, testified for IBM.

The Facts

3. Ms. Gonzalez commenced employment with a company called Algorithmics in 2001. By the fall of 2011, when the events pertinent to this application occurred, she was one of three individuals who provided support to the activities of Algorithmics executives (most if not all of whom held the title of Vice-President), including support for the activities of teams of employees reporting to those executives.

4. All of Ms. Gonzalez' duties involved the provision of administrative support to the executives.

5. In September 2011, IBM entered into a purchase agreement to acquire Algorithmics. The purchase closed in the following month. At the time, Algorithmics had approximately 350 employees.

6. Ms. Hagans testified that IBM, led by an HR Integration Manager who reported to her, had approximately four weeks in which to decide which Algorithmics employees would be offered permanent employment with IBM and which ones would not. That decision is made on the basis of whether or not the employee performs functions that can be absorbed by IBM's existing organization. In that respect, Ms. Hagans, who had overseen at least six similar IBM acquisitions, testified that employees who perform administrative support functions only are not offered permanent employment because those functions are performed in IBM by individuals who work out of centralized administrative hubs not necessarily geographically co-located (or even proximate) to the parts of the organization and the individuals to whom they provide support. There is one such hub in Texas, and individuals who work there support some activities and employees located in Canada. There is another hub in Markham, Ontario. It is staffed, not by individuals that IBM employs directly, but by individuals provided to IBM through an employment agency.

7. IBM prepared a preliminary list of approximately 300 individuals to whom permanent offers of employment would be made, with employment commencing January 1, 2012. It prepared another preliminary list of approximately 50 individuals who would not be offered permanent employment. This latter group was offered employment with IBM for a fixed term commencing January 1, 2012, with a lump sum payment payable at the end of that term. The length of the term of employment (and the amount of the lump sum payment) varied somewhat by individual, and it was intended by IBM to do two things: (1) allow for the seamless absorption of that individual's functions into the structures IBM already had in place; and (2) to cover off any period of notice of termination to which the individual might be entitled, and any entitlement to severance pay.

8. Because of the short turnaround time that IBM had in which to assess the Algorithmics workforce and decide who should receive which offer, IBM started by looking at the job titles of individuals and the department in which they worked. This approach was typical when IBM purchased other businesses. Subsequently, IBM might talk to the HR department of the vendor employer, but did not make it a practice to interview incumbents, nor did it do so in the case of its acquisition of Algorithmics. Initially all three individuals who provided support to the Algorithmics VPs were placed on the list of those to receive fixed-term contract offers. Through discussions with the head of HR for Algorithmics, however, IBM was advised that the other two individuals, DP and JR, did not perform purely administrative support functions, but had some specific operational responsibilities of their own. As a result, IBM ended up offering them permanent positions.

9. Ms. Gonzalez had a number of complaints about the conduct of DP, all of which occurred while both of them were employed by Algorithmics. Ms. Gonzalez said that DP told her she should stay home after her pregnancy leave because she did not need to work. Ms. Gonzalez also suspected that DP had managed to save her own

employment and that of JR by convincing management (specifically Algorithmics' head of HR for whom DP provided support) to change their job titles and possibly by enhancing their job descriptions just prior to IBM's conclusion of the Agreement of Purchase and Sale with Algorithmics. There was no direct evidence of these allegations, and IBM certainly did not accept that there was sufficient foundation for my finding any of them to be true. In my view there is no need to determine these matters in any event. Even if I assume the truth of what Ms. Gonzalez said, any machinations DP engaged in, with or without the assistance of Algorithmics' head of HR are irrelevant to the question of the obligations of IBM under this Act.

10. By letter dated October 28, 2011, Ms. Gonzalez received notice from IBM that she would be made a formal offer of employment for a fixed term, commencing January 1, 2012 and ending November 30, 2012, with a lump sum of $15,900.00 to be paid to her at the end of the contract. The formal offer made to Ms. Gonzalez was provided to her by letter dated November 2, 2011, and she received it on that date when she attended a meeting of Algorithmics employees and IBM representatives. Both letters were signed by TM, and Ms. Gonzalez spoke to her personally at the meeting. Ms. Gonzalez testified that TM appeared "shocked" to discover that Ms. Gonzalez was pregnant. In fact, Ms. Gonzalez had advised Algorithmics that she would be commencing a pregnancy leave on November 8, 2011, and had scheduled a week of vacation preceding the commencement of that leave. Her baby was due on November 16, 2011. Algorithmics has hired a replacement ("DS") for Ms. Gonzalez. Ms. Hagans testified that the list of employees IBM receives when it purchases another employer is supposed to indicate which employees are on leave, but that that information was not provided for Ms. Gonzalez, and that IBM first learned of her pregnancy at the November 2, 2011 meeting.

11. TM informed Ms. Gonzalez that she should return the offer letter and that a different offer would be made. By letter dated November 15, 2011, Ms. Gonzalez was offered employment with IBM for the same fixed term as before, but with specific language acknowledging that she was on a maternity leave of absence until November 1, 2012. The lump sum offered to Ms. Gonzalez at the conclusion of her fixed term contract in this second letter was increased to $23,900.00, and Ms. Hagans testified that this was in recognition that she would not really benefit otherwise from the working notice that the fixed term offer was meant to encompass because she would not be working during the majority of it. Ms. Gonzalez was asked to return the offer by December 12, 2011, indicating in writing whether she was prepared to accept or decline it.

12. Ms. Gonzalez was not happy with the offer. She wanted permanent employment with IBM and was upset that her colleagues DP and JR had been offered permanent employment. She testified that she had a number of conversations with TM about this, and had understood that the latter might "do something" for her. Ms. Gonzalez did not respond formally to the IBM offer, but testified that she did not accept the offer.

13. By letter dated December 30, 2011, IBM advised Ms. Gonzalez as follows:

> Dear Sandra,
> Since you have not accepted our offer of employment with IBM Canada Ltd. ("IBM"), on a gratuitous basis IBM will place you on a leave of absence effective January 1, 2012, in order for you to be eligible for benefits based on our standard package as outlined below. At the completion of your Maternity Leave of Absence on November 1, 2012, IBM will process your separation.
>
> **Benefits Coverage:**
> - Supplemental Health – You Only coverage Option 2
> - Dental – You Only coverage Option 2
> - Employee life insurance – Option 4

14. Ms. Gonzalez was placed on the IBM payroll for the purpose of giving effect to what is outlined in the letter. Ms. Hagans explained that this had to occur as Algorithmics ceased to exist as of December 31, 2011, and its benefit plan was wound up.

15. Consistent with terms set out in the December 30, 2011 letter from IBM, by letter dated November 1, 2012, Ms. Gonzalez was advised that she was being separated from her employment, and that she would be paid 18.5 days of vacation pay, which had apparently accrued over her employment with Algorithmics. She was paid that amount, and IBM subsequently issued a T4 to her in respect of it.

16. Algorithmics had hired DS to replace Ms. Gonzalez during her pregnancy leave. DS accepted an offer of employment from IBM that provided for the same termination date (November 16, 2012) as that specified in her contract with Algorithmics. In fact, her employment with IBM terminated on November 30, 2012. IBM had previously determined (as reflected in its job offer to Ms. Gonzalez) that the position would be eliminated as of that date.

17. Ms. Gonzalez did not receive termination or severance pay. The Employment Standards Officer's Narrative Report indicates that she withdrew her claim for termination and severance pay, and she does not seek to recover such amounts in this proceeding.

18. Ms. Gonzalez testified that she thought it was pointless to accept IBM's employment offer, because it would only involve a short period of active employment. I note that the offer letters do indicate the possibility that the employment of an employee to whom a fixed-term contract was offered could be extended beyond the end of that date, or that the employee might within that time find another job within the organization. Having noted that, however, and having regard to the fact that Ms. Gonzalez said that the

job she wanted was providing support to a high ranking executive, and that her skills and experience with Algorithmics were all in the area of providing administrative support, it seems unlikely her employment with IBM would have continued beyond November 30, 2012. Ms. Hagans testified that the last time IBM hired anyone in Canada to perform administrative support functions was sometime in 2010.

19. Ms. Gonzalez said she started looking for work after the date her leave ended, and that she looked online on Workopolis every day from then until the first date of this hearing. The only jobs she considered were ones that paid at least $65,000.00 per year and that seemed to her to involve the provision of assistance to high-ranking executives. She testified that there were six or seven postings that fell within that category, but only two or three that really "piqued her interest". She did not apply for any of them, however, and there appeared to be a number of intersecting reasons why she did not, although her testimony on this point was not entirely clear. As I have indicated, she testified in her examination-in-chief that she was looking for a salary in the range of $65,000.00, although she told counsel in cross-examination that she would have considered a job that paid $55,000.00 (essentially her salary level at the time her leave commenced), but not one that paid $50,000.00. Geography also appeared to be a factor. In examination-in-chief she indicated that one reason she did not apply for jobs was that they were in Brampton or Mississauga. In cross-examination, she initially said that she did not decline to consider certain jobs because of geography, but later said that she did take that into account, because she had to rely on public transportation. Finally, she indicated that she did not apply for any jobs because she was depressed, and continues to be depressed. She advised that she consulted a counsellor who confirmed to her that her depression stems from loss of her job and is not post-partum depression as Ms. Gonzalez had originally thought. Ms. Gonzalez does not seek to work for IBM now, but intends to take training to become a yoga instructor and to open a children's yoga studio.

Analysis

20. The Act imposes obligations on employers. IBM's primary position is that it never became Ms. Gonzalez' employer. I agree, and consequently I do not need to address any of the alternative arguments made. IBM had no obligations under this Act with respect to Ms. Gonzalez. The latter's real complaint appears to relate to the quality of the offer of employment IBM made to her as compared to DP and JR. With respect to whether or not it would have been successful, I make no comment, but that is a matter that might potentially have been pursued under the *Human Rights Code*, but which cannot ground a claim under this Act.

21. IBM purchased Algorithmics. There is no dispute that the effect of this transaction at common law would have been to terminate the employment contract of all the Algorithmics employees on the effective date of the transaction. The authorities supporting this proposition are discussed in a decision relied on by Ms. Gonzalez' counsel: *Dabet Holdings (Guelph) Inc. (Re)* [1989] ESC 2548, at pp. 11ff.

22. The Act does not deem the employment contracts between a vendor employer and its employees to continue and to bind the purchaser employer. It contains no provisions similar to the "sale of business" provisions found in section 69 of the *Labour Relations Act, 1995*, which expressly provide that the purchaser of a business becomes a "successor employer" and is bound to any collective agreement between a trade union and the vendor employer in respect of the employees of the business acquired. Section 9 of the Act does not go that far: it recognizes that a purchaser may choose to employ some or all of the employees of the vendor, and where it does so, deems the period of employment with both to have been continuous.

> **9.**(1) If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment.

23. Not only does no provision of the Act require a purchaser to offer an employee of the vendor continued employment on the same terms and conditions, there is explicit recognition that the terms of offer may differ. For example, O.Reg-287/01 clearly contemplates that the terms and conditions of employment offered by a building service provider to an employee of the predecessor contractor may differ from the terms and conditions in place prior to the sale. The Court of Appeal decision in *Abbott v. Bombardier Inc.*, 2007 ONCA 233 (CanLII) also contemplates terms and conditions of employment may differ before and after a sale.

24. An employer-employee relationship is a species of contract. No contract can be created unless both parties agree to enter into an employment relationship. IBM offered Ms. Gonzalez employment, but she did not accept that offer, and indeed confirmed in her testimony that she did not agree to become IBM's employee. All of the case law is clear that a purchaser may choose to extend an offer of employment to one or more employees of the vendor, and those employees may choose to accept the offer or not. See *Dabet Holdings (Guelph) Inc. (Re), supra.*

25. At the time Algorithmics ceased to exist, it owed Ms. Gonzalez vacation pay. Further, Ms. Gonzalez was on a pregnancy leave from Algorithmics and it was statutorily obliged by the Act to continue her benefits during the period of that leave. IBM paid the vacation pay owing and it continued the benefits after Algorithmics ceased to exist. That action alone, or the issuing of a T4 in respect of the amount paid, does not in my view make IBM Ms. Gonzalez' employer.

26. IBM was not obliged by the Act to offer Ms. Gonzalez any employment. And it was not obliged by the Act to make sure that any offer of employment it did make was on terms and conditions as favourable as those she had enjoyed with Algorithmics. At the time that IBM offered Ms. Gonzalez a fixed-term (as opposed to a permanent) contract of employment on November 2, 2011, no one in the employ of IBM had any idea that she was pregnant and about to commence a pregnancy leave. There is simply no basis for any finding that IBM engaged in a reprisal contrary to section 74 of the Act. First of all, section 74 constrains "employers": of necessity, IBM was not her employer when it made her an offer of employment. Secondly, IBM cannot be said to have made her a lesser offer than it made to DP and JR "because" she was about to take a pregnancy leave, when it was unaware of that fact.

27. Ms. Gonzalez was an employee of Algorithmics when she commenced her pregnancy leave. Algorithmics therefore had certain obligations to her pursuant to section 53 of the Act:

> **53.**(1) Upon the conclusion of an employee's leave under this Part, the employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.
>
> (1.1) Despite subsection (1), the employer of an employee who has been on leave under section 50.2 may postpone the employee's reinstatement until,
>
> (a) a prescribed day; or
>
> (b) if no day is prescribed, the later of,
>
> (i) the day that is two weeks after the day on which the leave ends, and
>
> (ii) the first pay day that falls after the day on which the leave ends.
>
> (1.2) During the period of postponement, the employee is deemed to continue to be on leave under section 50.2 for the purposes of sections 51.1 and 52.
>
> (2) Subsection (1) does not apply if the employment of the employee is ended solely for reasons unrelated to the leave.
>
> (3) The employer shall pay a reinstated employee at a rate that is equal to the greater of,

> (a) the rate that the employee most recently earned with the employer; and
>
> (b) the rate that the employee would be earning had he or she worked throughout the leave.

28. Algorithmics ceased to employ Ms. Gonzalez on December 31, 2011, prior to her seeking any return to work. I do not need to address the question of what the extent, if any, of IBM's obligations under section 53 of the Act would have been had she accepted its offer of employment. Quite simply, IBM was not obliged to "reinstate" Ms. Gonzales to employment after her pregnancy leave ended, because she never enjoyed an employment relationship with it. This is in contrast to the specific findings in the cases filed before me that dealt with reinstatement obligations under the Act where a sale of business had occurred. In both decisions, the obligation under section 53 applied to the purchaser *because it was specifically found to be in an employment relationship with the employee seeking reinstatement*. See *Pape Rehabilitation and Wellness Centre*, [2004] O.E.S.A.D. No. 193 (ON LRB). While the analysis by which the Board concluded that the individual became an employee of the successor is not one I agree with, I do agree that the existence of an employment relationship is essential. See also *Medical Arts Dispensary of Ottawa (1990) Ltd. (Re)*, [1992] O.E.S.A.D. No. 130 and *Formes Bis Maternity Inc.*, [2003] O.E.S.A.D. No. 309.

29. Even if IBM had been obliged to comply with section 53 of the Act *vis-à-vis* Ms. Gonzalez, I would have found that it did so. Before anyone at IBM knew Ms. Gonzalez was pregnant, it had determined that her position would cease to exist as of November 30, 2012. The elimination of the position was unrelated to the fact of her pregnancy. Once IBM learned that Ms. Gonzalez was on pregnancy leave it indicated she would be reinstated to her position following the end of that leave until November 30, 2012, if she accepted the offer of employment. There were no other comparable positions available. Therefore, even if IBM had become Ms. Gonzalez' employer, section 53 would not be contravened on these facts. Ms. Gonzalez' pregnancy cannot put her in a better position *vis-à-vis* her employment status than she would have been in, had she not been pregnant. See *Just Energy Corp*., [2011] OLRB Rep. May/June 358, at ¶17.

Disposition

30. For all of the above reasons, this application is dismissed.

"Mary Anne McKellar"
for the Board