# 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 -

Angie MacKenzie (formerly Fielding)
(" MacKenzie ")

\- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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| **ADJUDICATOR:** | Kenneth Wm. Thornicroft |
| **FILE No:** | 1999/647 |
| **DATE OF HEARING:** | January 17, 2000 |
| **DATE OF DECISION:** | February 4, 2000 |

## DECISION

**APPEARANCES:**

| | |
|---|---|
| Angie MacKenzie | on her own behalf |
| R. Lee Buckler | Legal Counsel for Zep Manufacturing Company of Canada |
| No appearance | for the Director of Employment Standards |

## OVERVIEW

This is an appeal brought by Angie MacKenzie ("MacKenzie")--formerly Angie Fielding--pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 21st, 1999 under file number ER 082-557 (the "Determination").

The Director's delegate determined that Ms. MacKenzie's former employer, Zep Manufacturing Company of Canada ("Zep" or the "employer"), did not have just cause to terminate MacKenzie's employment but, having paid 1 week's wages as compensation for length of service (see section 63), nevertheless fully discharged its pecuniary obligation to Ms. MacKenzie under the *Act*. The delegate rejected Ms. MacKenzie's assertion that her employment was terminated by reason of her pregnancy [see section 54(2)(a) of the *Act*].

This appeal was heard at the Tribunal's offices in Vancouver on January 17th, 2000; Ms. MacKenzie testified on her own behalf and Zep's general manager, Mr. Gary Dionne ("Dionne"), appeared as the sole witness on that firm's behalf. The Director did not appear at the appeal hearing.

## ISSUE TO BE DECIDED

Ms. MacKenzie says that the delegate erred and that, indeed, her employment with Zep was terminated because of her pregnancy.

## RELEVANT LEGISLATION

Pursuant to Part 6 of the *Act*, employees are entitled to certain unpaid leaves including pregnancy leave. Further, an employer is not permitted to terminate an employee because of her pregnancy:

> **Duties of the Employer**
>
> 54 (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,
>
> > (a) terminate employment...

If a pregnant employee is terminated, it is the employer's burden to show that the pregnancy was not the reason for discharge:

> **Evidence and Burden of Proof**
>
> 126 (4) The burden is on the employer to prove...
>
> > (b) that an employee's pregnancy, a leave allowance by this *Act* or court attendance as a juror is not the reason for terminating the employment or for changing a condition of employment without the employee's consent.

Where an employer is unable to discharge its burden of proving that an employee's pregnancy was not the reason for her termination, various remedial options are open to the Director:

> **Determination**
>
> 79 (4) In addition, if satisfied that an employer has contravened a requirement of section 8 or Part 6, the director may require the employer to do one or more of the following:
>
> > (a) hire a person and pay the person any wages lost because of the contravention;
> >
> > (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
> >
> > (c) pay a person compensation instead of reinstating the person in employment;
> >
> > (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

In this case Ms. MacKenzie does not seek reinstatement but rather compensation in lieu of reinstatement.

## THE DETERMINATION

During the course of the delegate's investigation, Zep maintained that MacKenzie was terminated for cause, primarily, poor work performance. The Determination reads, in part, as follows (at pp. 3-4):

> "...the employer states that Angie Fielding was not terminated due to her pregnancy, rather, she was terminated for just cause [namely] not completing the work assigned to her and using foul language in the work place, issues she had received previous warnings about...
>
> In reviewing all the evidence before me, I can not [sic] find that the complainant was fired due to her pregnancy.

> However, I also do not find that the employer had ‘just cause’ to fire the employee. In reviewing all the documentation supplied, no where does it indicate that if the complainant’s performance did not improve that she would be terminated. Nor does the documentation indicate that if the complainant used foul language in the work place, she would be terminated. All the documentation states is that the complainant would be held fully accountable for meeting project guidelines established when she first began working there...The employer did pay the complainant $507.20 one-week’s compensation for length of service pay upon termination. Accordingly, the employer does not owe any additional wages to the employee.”

## EVIDENCE AND ANALYSIS

Zep manufactures and distributes specialty chemicals including cleaning supplies used by hotels and other commercial enterprises. During the relevant period, there were a dozen or so sales representatives, 2 or 3 warehousemen and 2 office clerks (one of whom being Ms. MacKenzie) employed at Zep’s local Delta office/warehouse.

*MacKenzie’s Evidence*

Ms. MacKenzie testified that she was originally hired, in early November 1998, after being interviewed by Mr. Dionne and the office manger (and her direct supervisor), Ms. Veronica Harkema (“Harkema”), and worked as an accounts receivable/payable clerk from November 9th, 1998 until her termination on March 10th, 1999. Her monthly salary was $2,200.

In early December 1998, MacKenzie learned that she was pregnant and so advised Harkema. At about the same time, the only other clerk in the office also advised the employer that she was pregnant and intended to take maternity leave. MacKenzie’s employment continued without incident until mid-January 1999 at which time, her concern piqued by an employment advertisement placed by the employer in a local newspaper, she spoke with Harkema who advised that since the only two clerical staff in the office both planned to take maternity leave, one would have to be let go. MacKenzie indicated to Harkema that the employer could not terminate her because she was pregnant but Harkema apparently stated that the employer “did not need a reason” for termination inasmuch as MacKenzie was a probationary employee (MacKenzie concedes that she was hired on the basis of an initial 3-month probationary period). Dionne also apparently told MacKenzie that she could be terminated because she was still on probation. MacKenzie denies having ever received the verbal or written warnings particularized in the Determination (at p. 2). MacKenzie’s last working day was March 3rd; she was away from work for one week to get married and upon her return on March 10th was terminated by Harkema.

It had been MacKenzie’s intention to work throughout her pregnancy until shortly before her due date; her baby was born on July 30th, 1999 (but was due a week later) and thus MacKenzie seeks 4 1/2 months’ lost wages based on her monthly salary of $2,200.

*Dionne's Evidence*

Dionne testified that he made the decision to hire MacKenzie on the strength of her interview and "great résumé"; according to Dionne "she seemed pleasant and I thought she could do the job". However, over the course of time, Dionne says he discovered that MacKenzie would not accept "constructive criticism" and that "she did not get along with people at work". Dionne testified that "generally, the salesmen did not like her attitude"; "customers complained"; MacKenzie was "rude" when following up on unpaid accounts. Dionne says that MacKenzie received verbal warnings on January 13th, 25th and 27th, 1999--warnings that are particularized in a "Performance Correction Notice" presented to MacKenzie on February 12th, 1999. Appended to this latter "Notice" is a letter to MacKenzie which purports to extend MacKenzie's probation period by one month. According to Dionne, MacKenzie refused to sign the Notice (the space for her signature is left blank) and in an "aggressive" tone refused to even look at the Notice, or the attached letter, and maintained her position that she could not be terminated "because she was pregnant".

Dionne was on holidays when Harkema fired MacKenzie but Dionne says that he nonetheless authorized the termination. Dionne testified: "We could have fired her after her probation was up but carried it on; I was willing to pay severance and we did". Dionne testified that Zep's original intention was to have both clerks take maternity leave and then return to work; to that end, advertisements were placed to obtain temporary replacement employees. Dionne adamantly maintained that MacKenzie was terminated, not because of her pregnancy but, rather, due to her "poor attitude", her conflictual interactions with staff and clients and because "there was no future for her with the company".

*Findings*

I start from the proposition that it is the employer's burden of proving that MacKenzie's pregnancy was not the reason for her termination [see section 126(4)(b)]. It is not MacKenzie's burden to show that she was terminated by reason of her pregnancy (Tricom Services Inc., B.C.E.S.T. Decision No. 485/98). The delegate determined that the employer did not have just cause for termination. Zep has not appealed this latter finding and I see no reason to disturb it. However, the delegate also found that the employer had discharged its evidentiary burden of proving that MacKenzie's termination was not due to her pregnancy.

In my view, when an employer has not shown that it had just cause to terminate a pregnant employee, the reasons advanced for the termination must be carefully scrutinized. Rarely, I expect, will an employer specifically advise an employee that she is being terminated because of her pregnancy--in most instances, some other reason will be advanced. The question that must be addressed, then, is whether or not the proffered reason for termination is merely a pretext. In the instant case, the employer states that it verbally warned MacKenzie on three occasions in January 1999 regarding poor work performance. These warnings are particularized in the "Performance Correction Notice" dated February 12th, 1999. MacKenzie denies having been so warned and, indeed, denies having been given the latter Notice.

I find Dionne's evidence regarding the "Notice" to be improbable. If, as Dionne suggested, MacKenzie absolutely refused to discuss her poor work performance and refused to sign an acknowledgement regarding having been so informed, I would have expected some immediate disciplinary action (for insubordination) to have been taken--none was. Zep says that MacKenzie did not get along with her co-workers, used foul language in the workplace and was rude to customers but these assertions are not corroborated in any fashion. MacKenzie's direct supervisor, Ms. Harkema, likely would have been in a position to corroborate Dionne's assertions but she was not called as a witness. Since Harkema was MacKenzie's direct supervisor, the person who allegedly issued two of the three verbal warnings referred to in the Notice, and the person who actually carried out the termination, Harkema's failure to testify before me is all the more troublesome. I think it appropriate to draw an inference adverse to the employer for its failure to call Ms. Harkema as a witness.

Zep says its original intention was not to terminate MacKenzie but simply to replace her on a temporary basis while she was on pregnancy leave. However, the advertisement that Zep placed in a local newspaper in mid-January 1999 (which clearly describes MacKenzie's position) did not advertise a temporary position; Zep sought a "team player to join our growing company". It should also be noted that the advertisement ran six months before MacKenzie's anticipated leave was begin in late July. The evidence suggests to me that Zep was looking to replace MacKenzie at least as early as mid-January 1999, well before any firm decision had been taken to discharge MacKenzie for "cause" in early March 1999.

There is some evidence in the employer's own documents which suggests that MacKenzie's termination was related to her pregnancy. At page 4 of Ms. Harkema's March 4th, 1999 memorandum to Dionne--which apparently sets out the reasons for MacKenzie's termination--there is a reference to MacKenzie leaving work early, and calling in sick on other days, due to her pregnancy. In very next paragraph, Harkema justifies MacKenzie's termination on the basis that she is not a "team player" and "does not carry her own weight".

The delegate appears to have been influenced by the fact that the other pregnant employee took leave and subsequently returned to work but, in fact, Zep now concedes that the other employee did not return to work although Zep maintains that was her own personal choice.

I am of the view that Zep has simply failed to discharge its evidentiary burden of proving that MacKenzie was not terminated because of her pregnancy. Section 79(4) sets out several alternatives to remedy a breach of section 8 or Part 6 of the *Act*, including, in subsection (b), reinstatement together with payment of lost wages. Thus, by way of the extraordinary remedy of reinstatement with full back pay, an individual is "made whole" (at least in a financial sense)--in other words, the individual is placed in essentially the same economic position that they would have been in had the contravention not occurred. The Tribunal has held in several previous decisions that a "make whole" approach ought to be taken when fashioning section 79(4) remedies of a purely compensatory nature [see e.g., Afaga Beauty Service Ltd., B.C.E.S.T. Decision No. 318/97; W.G. McMahon, B.C.E.S.T. Decision No. 386/99].

MacKenzie was terminated in mid-March 1999 and, but for her termination, I find would have worked up until at least mid-July 1999. Given that MacKenzie was a newly-married mother-to-

be whose husband was a full-time student, I am satisfied that MacKenzie had every intention of working until at least mid-July 1999. There is no evidence before me of any failure, on MacKenzie's part, to mitigate her loss of wages nor do I have any evidence of any earnings by her during the period mid-March to July 1999. Thus, MacKenzie's pecuniary loss amounts to some four months' wages. MacKenzie did not return to work following the birth of her child until January 2000 and thus I do not think it appropriate to award compensation for the period after the birth since, in all likelihood, MacKenzie would not have returned to work at Zep upon the conclusion of her unpaid statutory leave. In any event, MacKenzie does not seek compensation for any postnatal wage loss.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be varied to indicate Zep's liability to MacKenzie, pursuant to section 79(4)(c) of the *Act*, in the amount of $8,800. In addition, MacKenzie is entitled to interest to be calculated by the Director in accordance with section 88 of the *Act*.

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**Kenneth Wm. Thornicroft**
**Adjudicator**
**Employment Standards Tribunal**