

**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 -

Capable Enterprises Ltd.  
operating as Christopher Robin School  
("Capable")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Jerry Brown

**FILE NO.:** 95/046

**DATE OF DECISION:** January 19, 1998

**DECISION**

**APPEARANCES**

Michael J. Ritzker Judy Chu Tai Liou	Counsel for Capable Enterprises Ltd. Owner/Operator/Director, Capable Enterprises Ltd.
Safia Barr	on her own behalf
Thomas F. Beasley Kevin Blakely	Counsel for the Director Delegate of the Director

**OVERVIEW**

This is an appeal by Capable Enterprises Ltd. operating Christopher Robin School (“Capable”), under Section 112 of the *Employment Standards Act* (the “Act”), from Determination Number CDET 000395 which was issued by the Director of Employment Standards (the “Director”) on December 11, 1995.

The Determination found that Capable Enterprises Ltd. (“Capable”) had contravened Sections 50, 51 and 54 of the *Act* by dismissing Safia Barr (“Barr”) or alternatively by not continuing her employment on the same terms and conditions prior to her pregnancy leave.

The Director determined that Capable had failed to provide sufficient information to satisfy the onus set out in Section 126 of the *Act* which requires an employer to prove that an employee’s pregnancy or leave allowance provided for by the *Act* were not the reason for terminating employment or changing a condition of employment.

The Director ordered that for violating the *Act* and pursuant to Section 79(4)(d) Capable should pay Barr \$6455.82 as compensation for expenses that Barr incurred in securing reasonable alternative employment by establishing her own child-care business.

Capable appealed the Determination on the grounds that there had been no violation of the *Act* and that the Director had erred in law. It argued that Barr was a fixed-term employee and that her employment with Capable simply expired, therefore putting Barr within the exceptions contained in Section 65 of the *Act*. As well, Capable argued Barr’s contract was not renewed because of a management decision and not because of her pregnancy or leave. Additionally, Capable argued that there was misconduct by Barr that was cause for non-renewal of her contract. Counsel for Capable also raised

the issue of whether Barr had given her employer proper notice, pursuant to the *Act*, of her upcoming leaves.

Capable's appeal was heard over several days. This decision has been delayed due to my medical condition. I have appreciated the parties patience and I apologize for any inconvenience.

### **ISSUES TO BE DECIDED**

- 1) Did Barr give notice to her employer pursuant to the *Act*;
- 2) Was Barr a fixed-term contract employee or an employee working on a contract of indefinite term;
- 3) For the purposes of Section 54 of the *Act* does it matter whether an employee is on a fixed-term contract or on a contract of indefinite term;
- 4) Has Section 54 of the *Act* been breached by Capable or has it met the onus of proving the termination or change in conditions was not because of the employee's pregnancy; and
- 5) If there has been a violation of the *Act*, what compensation should Barr receive?

### **FACTS**

Judy Liou ("Liou") has been the owner of Capable Enterprises Ltd. ("Capable") since 1986. Capable operates Christopher Robin School for young children.

Liou has been trained in business, receiving a business diploma. She has passed her real estate licensing examination in British Columbia, buys and sells properties in the Vancouver marketplace as personal investments and owns and administers two four-plexes. Liou deals in English and English-language contracts in the course of her various business enterprises.

When she first became owner of Capable, Liou relied on her staff to help her administer the operation. As time passed she has become more active in the school's affairs as its director and currently performs most of the administrative and management duties or oversees these duties after delegating them to staff.

When Liou took over the operation and ownership of the school there were concerns about enrollment declining. This concern never materialized and under her able direction the school weathered the changing market conditions. At all times Capable

operated four classrooms at Christopher Robin School. There are a programs for three-year olds, four-year olds, kindergarten-age and pre-school children.

In September of 1989, Barr was interviewed and hired by Liou and Pauline Abrahams to work for Capable. Barr was hired to teach the four-year old program at the school for the salary of \$1600 per month. Barr's salary was increased incrementally to \$2,050 by the time she left on pregnancy leave.

Barr's credentials included certification from the Canadian Mothercraft Society as having successfully completed the program for and becoming qualified as an Early Childhood Educator. Barr also obtained provincial certification as an infant/toddler preschool supervisor and preschool supervisor. Barr had previously worked at Merry Moppets Nursery School and when she left their employ to seek higher salary she received excellent references.

Barr's duties at Christopher Robin included teaching two classes of fifteen four-year olds, one class in the morning and one in the afternoon. The workday started at 8 a.m. with preparation work and ended at 3:30 p.m., when Barr left school.

According to uncontested testimony, Barr was responsible for initiating new programs at the school including French and music instruction, twice weekly, theme programs and a monthly calendar for the benefit of the parents. Barr also introduced a more structured classroom by introducing and utilizing daily class schedules.

All the teachers' working relationship with the school was purportedly governed by a "Staff Requirements" document. Not all the teachers completed one yearly and not all the documents were completed fully or in the same manner. This document included teacher duties and salaries and listed some benefits. Many of the documents were incomplete with blank spaces where additional information was required left incomplete. The documents were signed only by the teacher, not by a school representative.

Barr had signed these documents while employed by Capable, the last one being for the school year 1993-94. Despite repeated requests for a document for the 1994-95 school year one was not offered to nor signed by Barr.

During the Summer of 1994 Barr had discussions with Liou's daughter, who was assisting Barr in running the summer program, and told her she was pregnant. Liou acknowledges hearing this information from her daughter. In early autumn Barr orally advised Liou she was taking maternity leave and that it would begin at the end of January.

Liou advertised for a replacement and hired Eva Balsells ("Balsells") to replace Barr, beginning in late January, 1995. Balsells was also well-qualified but was paid \$1,500 per month, significantly less than the \$2,050 Barr was receiving to teach the same class.

Barr began her maternity leave and Balsells replaced her in the classroom for the remainder of the 1994-95 school year.

Capable issued a Record of Employment form, dated January 31, 1995 indicating that Barr was going on pregnancy leave and that her date of return was unknown. This form was signed by Liou, as the issuer. An undated letter of reference on Christopher Robin School stationery was issued by Terry Straumford, principal teacher, indicating that Barr had been employed at the school for six and a half years as a full-time teacher of the four-year-old class and had left in January 1995 “due to Maternity leave.”

In April of 1995 Barr contacted Liou by phone and had discussions about returning for the 1995-96 teaching year. During the conversation Liou offered her a job teaching a different age group at a salary of \$1,500 per month, less than the \$2,050 per month she was making when she began her pregnancy leave. Liou informed her that Balsells was working for less money and that this was the offer. Barr refused the offer telling Liou it was less than her first-year salary in 1989.

Barr filed a complaint with the director in early May of 1995.

In June, Barr attended an end of year party at the school and had talks with parents about her future plans.

## ANALYSIS

### *Did Barr give proper notice to her employer pursuant to the Act?*

It is clearly established in Section 50(4) of the *Act* that a request for pregnancy leave must “(a) be given in writing to the employer,.....” It is clear that Barr did not give such notice.

At first blush it would appear that Barr’s complaint should be dismissed and the decision of the Director should be reversed. If I were to follow this course of reasoning I think I would be doing a great injustice to Barr and also to the spirit of the *Act*.

Firstly, there is a long line of cases (under the old *Act*) but dealing with similar situations clearly recognizing that “maternity leave is a fundamental right of every female employee in this province...” (*Director of Employment Standards v. Stanley Blake*, 1987, unreported, Vancouver Registry No. F853491). Mr. Justice Leggatt went on to say, “It would be unjust in the extreme if we were to deny the benefits .... to someone because they had failed in a technical way to complete a full and formal application.”

Not only do I concur with this approach, but support for this is found in Section 123 which says that a technical irregularity does not invalidate a proceeding under this *Act*.

Also, it is evident that the Legislature was clear in its intent when it included in Section 2, the purposes section of the *Act*, that the *Act* was “intended to contribute in assisting employees to meet work and **family** responsibilities”. (my highlight)

Even if I am incorrect with respect to the above I find that Liou in fact had ample notice of Barr’s intentions to take pregnancy leave and at this late date can not now claim she was prejudiced by this lack of written notice. Her daughter informed her of Barr’s impending pregnancy leave, Barr informed her of the impending leave and Liou took steps to cover for Barr by hiring Balsells to replace Barr during the leave. There was no detrimental effect on Liou’s operation.

Lion’s action indicate that at the least she had constructive notice of Barr’s intent to take pregnancy leave.

***Was Barr a fixed term employee or an employee working on a contract of indefinite hire?***

Counsel for Capable argued that the Staff Requirements document, signed by some teachers some of the years was a fixed-term employment contract. He goes on to argue that, this being the case, Barr is outside the purview of the *Act* because she is a definite term employee and her contract expired and Capable was not required to the renew her contract.

Part 8 of the *Act* deals with terminations and Section 65 deals with exceptions to the termination sections. While these sections do not specifically apply to pregnancy leave provisions of the *Act* they do acknowledge that the *Act* recognizes cases where an employee is “employed for a definite term.”

It is, therefore, necessary to address this issue. While the evidence at the hearing indicated there may have, at some time, been an understanding that the Staff Requirements document may have been a contract for a fixed term I do not find this to be the case. Liou may have intended this to be the case but the vagueness of the document in the key area of term, and the blank spaces on the documents presented as evidence allow me to find that the documents, at best detailed part of the contract of employment between the parties.

Additionally, in keeping with the legal concept of, *contra preferendum* I find that the Staff Requirement documents (which were Capable’s documents) did not, on their own, represent the total arrangement between the parties. Had they been clear, concise and drafted so that the parties could clearly understand the arrangement they were entering into I might have been able to conclude they were a contract for a definite term.

In dealing with Barr's case, even if I am wrong in my finding that the Staff Requirement documents do not represent the total arrangement of the parties or incorrect in holding against Capable for the their vagueness, the slipshod manner in which they were administered, gives me pause. By not having a signed document in place for Barr's last half year Capable has lost any chance to argue that Barr was a fixed term employee, either as a result of practice or because an oral contract allegedly sprang from Liou's failure to have a written document signed for that period. Because of this omission, I find that Barr, at the very least, became an employee of indefinite term. Had Capable wanted to keep Barr on what they alleged was a fixed term contract of employment they would have most assuredly taken greater efforts to have her sign the Staff Requirements document.

***For the purposes of Section 54 of the Act does it matter whether Barr is on a fixed term contract or on a contract of indefinite hire?***

I am addressing this issue in the event that my finding that Barr was an indefinite term employee is not correct. Even if she was a fixed term employee I believe it is clear that this does not take her outside the benefits and protection of the *Act*. Section 4 clearly states that the requirements of this *Act* are minimum requirements and cannot be waived by the parties, subject to a few exceptions. I do not believe that a fixed term contract is one of the included exceptions.

Additionally, Section (54)(2) of the *Act* is clear that an employer must not , because of an employee's pregnancy or leave allowed by this part , terminate employment, or change conditions of employment. There is no exception for fixed term employees. Even if this is not the case, it should be noted that Capable acknowledged that Barr was on pregnancy leave.

I find that Section 54 applies to all employees, whether they are fixed term employees or on a contract of indefinite term.

In support of this I refer back to the purposes of the *Act* discussed above.

***Has Section 54 been breached by Capable or has the employer met the onus of proving the termination or change in working conditions was not because of the Barr's pregnancy or leave?***

Section (54) of the *Act* places clear cut duties upon the employer, in this case Capable. In the instant case the evidence from the employer clearly supports their breach of the *Act*.

Liou acknowledges that she offered to allow Barr to return from her pregnancy leave at a lower salary and with less responsibility in a different classroom. Liou alleges this had nothing to do with Barr's pregnancy nor with her pregnancy leave. Even if I accepted this on its face, the simple fact is, that had not Barr become pregnant, Capable

would not have been able to take the opportunity to recruit, hire and evaluate a replacement, Balsells. She violated the spirit and the intent of the *Act* by taking advantage of Barr's pregnancy and leave to terminate her employment or to change Barr's working conditions. At the very least, by offering Barr a salary that was reduced so significantly and by taking away her four-year-old class, there was effectively a constructive dismissal which terminated Barr's employment. From the other side, even if the employment was not terminated the working conditions were changed without the Barr's written consent, thereby violating the *Act*.

Capable came no where near meeting the onus that the *Act* places upon the employer in proving that the termination or change in working conditions was not because of the pregnancy or pregnancy leave.

***Compensation owed to Barr.***

Having established that there has been a violation of the *Act*, I will deal now with the compensation owed to Barr.

Section 79 (4)(a) through (d) of the *Act* reads as follows:

- (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.



*i) Reinstatement*

While the *Act* clearly allows for this option, and while I find that it was never an issue that Barr performed poorly, it was placed before me that this was not a viable option because of the apparent breakdown in the employment relationship. I concur.

*ii) Emotional pain and suffering*

Written and oral submissions from both counsel were helpful and illuminating throughout this entire case. While the Director's counsel raised some interesting points about the law, I find that there are no provisions for such a remedy in the *Act*. It is clear that such a remedy is available in other places, such as the *Human Rights Code*.

If I am incorrect in this finding, I find the fact that Ms. Barr's baby was colicky, that she had to move residence and that her husband was stressed by these circumstances was no more than the vagaries of normal every-day life and does not give rise to compensation for pain and suffering.

*iii) Out-of-pocket expenses*

While the *Act* allows for the payment of reasonable and actual out-of-pocket expenses, the materials put before me in support of these expenses were not helpful.

The Director's counsel argued that the Director's delegate erred in ordering out-of-pocket expenses. I find that out-of-pocket expenses are permissible under the *Act* on a case-by-case basis. They were not incorrect in this case as partial compensation for the breach, but not in the amount as set out. The Director's delegate may not have noticed some issues during his review that raised questions in my mind as to the timing of the work and purchases. It appeared to me that some of the enterprise occurred in anticipation of the problems between the parties as evidenced by the grammatical tense of some of the documents and materials before me.

Based on this finding I order out-of-pocket expenses are due to Barr in the amount of \$4,500.00. I also provide a cautionary note that for someone to order compensation for out of pocket expenses in the future, and for them to be held acceptable, they should be well scrutinized and supported by the Director's delegate.

*iv) Compensation for Loss of Wages*

I find that compensation for loss of wages is an appropriate remedy in this case. There was able argument, as discussed above, about the nature of Barr's employment (fixed or indefinite) and there is no need to re-canvass it. When I consider counsels' argument on the question of mitigation, I find that Barr is entitled to loss of wages for the period from September 1, 1995 to December 31, 1995.

Given the length of Barr's employment and the arguments advanced by Capable's counsel, I find the Director's position was generous in these circumstances.

I find for Barr in the amount of \$2,050.00 per month for a total of \$8,200.00.

*v) Compensation for Loss of Continued Employment*

I agree with the Director's counsel that compensation for loss of continued employment may be an acceptable remedy in cases such as this one. However, I find that this not an appropriate case in which to award this form of compensation. Had the documents which were put before me been more complete I may have decided otherwise.

**ORDER**

I order, under Section 115 of the *Act*, that Determination Number CDET 000395 issued by the Director of Employment Standards on December 11, 1995 be varied to show that Capable owes Barr compensation and wages in the amount of \$12,700.00.

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**Jerry Brown**  
**Adjudicator**  
**Employment Standards Tribunal**