Employment Standards TRIBUNAL

An appeal

- by -

Rose Miller, Notary Public

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert Groves

FILE No.: 2007A/43

DATE OF DECISION: July 31, 2007

DECISION

OVERVIEW

1. The appellant, Rose Miller ("Ms. Miller"), challenges a determination (the "Determination") dated April 10, 2007 issued by a delegate of the Director of Employment Standards (the "Delegate") following a hearing conducted by the Delegate on October 5, 2006 in respect of a complaint filed by one Toni McClure ("Ms. McClure") pursuant to section 74 of the *Employment Standards Act* (the "*Act*").

2. Having decided that Ms. Miller had contravened section 54 of the *Act*, the Delegate ordered Ms. Miller to pay the following sums:

Wages	$13,644.80
Vacation Pay	$ 524.80
Interest	$ 825.97
TOTAL	$14,470.77

3. In addition, the Delegate imposed a $500.00 administrative penalty pursuant to section 29 of the *Employment Standards Regulation*. The total found to be owed by Ms. Miller was therefore $14,970.77.

4. I have before me the Determination, the Reasons for the Determination, Ms. Miller's Appeal Form and attached material, the record supplied by the Delegate in response to the requirement imposed by section 112(5) of the *Act*, a submission from the Delegate, a submission from Ms. McClure, and a rebuttal submission from Ms. Miller.

5. The Tribunal has determined that I will decide this appeal on the basis of the written materials submitted by the parties, pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act* and Rule 16 of the Tribunal's Rules of Practice and Procedure.

FACTS

6. Ms. Miller is a notary public. She employed Ms. McClure as a conveyancer and assistant commencing July 1, 2005.

7. Before the Delegate, Ms. Miller submitted that throughout her employment Ms. McClure made too many mistakes on her files and displayed poor attitude. She stated that she was obliged to spend long hours vetting Ms. McClure's work to ensure that it was free of errors, and that she and other staff members made regular corrections to it. Other evidence tendered by Ms. Miller at the hearing was to the effect that Ms. McClure tended to react poorly when confronted with her mistakes, but on one occasion, Ms. Miller asserted, Ms. McClure acknowledged a major error, and said to Ms. Miller "I can't believe you are not firing me for this." Ms. Miller also said that Ms. McClure kept irregular hours, coming and going as she pleased, and frequently requested days off and permission to leave early, all of which undermined the morale of the other staff working in the office. Cumulatively, these behaviours caused Ms. Miller to conclude that Ms. McClure was unsuitable, which resulted in Ms. Miller's terminating Ms. McClure's employment on March 31, 2006. At the time Ms. Miller terminated Ms. McClure's employment she provided Ms. McClure with a cheque representing the equivalent of two weeks' pay "in lieu of notice."

8. Ms. McClure asserted that Ms. Miller's complaints were overblown, that most of her work was good, and that the problems associated with some of her files were due to difficulties obtaining information from third parties in a timely way. Ms. McClure submitted that the issues which arose with her work were typical of a busy conveyancing practice, and not specific to her alone. She denied she had a bad attitude, and emphasized that she was never formally disciplined by Ms. Miller and never specifically told that her job was in jeopardy if her performance did not improve.

9. At the time of her discharge Ms. McClure was several months into a pregnancy, a fact that had been made known to Ms. Miller late in 2005. When Ms. McClure filed her complaint with the Employment Standards Branch pursuant to section 74 of the *Act* she alleged that her job had been terminated for this reason. Ms. Miller vehemently denied that the pregnancy played any part in her decision to terminate Ms. McClure's employment.

10. In his Reasons for the Determination the Delegate observed that since Ms. McClure had alleged that Ms. Miller had discharged her due to her pregnancy, it was incumbent on him to consider the application of sections 54(2) and 126(4) of the *Act* to the circumstances of the case. The relevant portions of those sections read as follows:

> 54(2) An employer must not, because of an employee's pregnancy...,
> (a) terminate employment, or
> (b) change a condition of employment without the employee's written consent.
>
> 126(4) The burden is on the employer to prove that,
> ...
> (c) in the case of an alleged contravention of Part 6, an employee's pregnancy...is not the reason for terminating the employment or for changing a condition of employment without the employee's consent.

11. Section 54 falls within Part 6 of the *Act*.

12. In considering whether Ms. Miller had met this burden the Delegate found that other employees made mistakes of the sort relied on by Ms. Miller to discharge Ms. McClure, the mistakes Ms. McClure and the other employees made were often the result of faulty information obtained from third parties, and the work in the office was often performed at a hectic pace. All of this led the Delegate to conclude that there was some measure of tolerance in the office concerning mistakes, especially those that emanated from information obtained from other sources.

13. More importantly, the Delegate decided that not only did Ms. Miller fail to establish that the sort of errors made by Ms. McClure and her demeanour at work were serious enough to warrant discharge, she also had not shown that she had provided Ms. McClure with a reasonable opportunity to improve her performance and attitude after having given her a clear warning that her continued employment depended upon it. The dearth of compelling evidence supporting Ms. Miller's position on these points, and the fact that Ms. Miller discharged Ms. McClure shortly after returning from a lengthy absence from the office convinced the Delegate that Ms. Miller's decision to discharge Ms. McClure was taken more on the sudden. This in turn led the Delegate to doubt that Ms. McClure's performance and attitude were the sole reasons for the termination.

14. In the result, the Delegate determined that Ms. McClure's pregnancy played at least some part in Ms. Miller's deciding to discharge her. The corollary to this finding was the Delegate's conclusion that Ms.

Miller had failed to meet the burden imposed on her by section 126(4) of the *Act* to show that Ms. McClure's pregnancy played no part in that decision.

15. Having decided that Ms. McClure's complaint had been made out, the Delegate then considered the remedies he might impose pursuant to section 79(2) of the *Act*, the critical portions of which read:

> 79(2) ...if satisfied that an employer has contravened...Part 6, the director may require the employer to do one or more of the following:
>
> ...
>
> (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.

16. The Delegate decided that the remedy of reinstatement offered in section 79(2)(b) was not viable as the employment relationship involving the parties had broken down, and section 79(2)(d) need not be considered since Ms. McClure had not submitted a claim for expenses.

17. Concerning the compensation remedy referred to in section 79(2)(c), the Delegate determined that the $1,700.00 paid to Ms. McClure by Ms. Miller at the time of the discharge was sufficient to satisfy Ms. McClure's claim for loss of employment as it represented more than the compensation for length of service Ms. McClure would have been entitled to pursuant to section 63 of the *Act*. In order to make Ms. McClure whole, however, the Delegate also ordered that Ms. Miller pay Ms. McClure the equivalent of four months' wages representing the period from the date of the discharge to July 31, 2006, when Ms. McClure had expected to begin her pregnancy leave. In the circumstances, the Delegate decided that, apart from the $1,700.00 previously mentioned, no deductions should be made from the four months' wages awarded, particularly in respect of any failure to mitigate that was alleged by Ms. Miller on the basis that the services of conveyancing assistants were in high demand and Ms. McClure could have found similar employment before the commencement of her planned leave if she had but looked. On this point the Delegate concluded that Ms. McClure was unable to work following the discharge because she was shocked and traumatized by it, which made her ill, a finding supported by the fact that she applied for, and was successful in obtaining, sickness benefits under the *Employment Insurance Act*. Finally, the Delegate declined to reduce the payment of wages ordered by the amount of sick benefits obtained by Ms. McClure. In reaching this conclusion the Delegate determined that a contravention of section 54 should not be mitigated by the receipt of such benefits, for if it were it would mean that Ms. Miller's liability would be subsidized by another agency.

18. Ms. Miller's submission attached to her Appeal Form gives the impression that she believes the cards were stacked against her from the beginning in the proceedings conducted by the Delegate. She challenges the Delegate's declining to accept her statement that Ms. McClure's pregnancy played no part in the termination. She suggests that the reverse onus imposed by section 126(4)(c) of the *Act* placed her in a "no-win" situation, that it violates the *Canadian Charter of Rights and Freedoms*, and, on a practical level, that there was little or no other evidence she could have presented which would have enabled her to meet it. She also raises the spectre of the Delegate's being biased against her personally, having regard to the length of time taken by him in making his Determination, and the timing of his issuing of it on April 10, 2007, during the busy spring tax season.

19. Ms. Miller notes that Ms. McClure herself acknowledged that her performance was below standard, and warranted discharge, when she stated to Ms. Miller after a particularly serious error that she could not believe she had not been fired for committing it. Ms. Miller also reiterates that Ms. McClure was abusive, manipulated the work environment so Ms. Miller would fire her, and then employed the Employment Standards Branch to extract a monetary penalty. She contends that the Delegate ignored evidence relating to Ms. McClure's alleged "blackmailing" of a previous employer, and untruthfulness in a court proceeding involving a boyfriend. She submits that the Delegate should have taken into account on any issues relating to credibility the fact that this was the first occasion in respect of which the Employment Standards Branch had received a complaint involving her as an employer.

20. Ms. Miller further contends that it makes no sense for her to have discharged Ms. McClure because she was pregnant, not only because there was no evidence that the pregnancy prevented Ms. McClure from doing a proper job as a conveyancer, but also, and more importantly, because conveyancing services were at a premium. The latter factor was proven by means of the evidence Ms. Miller led at the hearing before the Delegate to the effect that she could not replace Ms. McClure after her departure, despite efforts to do so, due to the demands of the market for such services.

21. Ms. Miller admits that she did not warn Ms. McClure that her employment was at risk, but explains that she decided not to make this clear because Ms. McClure would have reacted poorly and Ms. Miller wanted to disrupt the office as little as possible. These were also the reasons why Ms. Miller made a "quick decision" to let Ms. McClure go "immediately" upon Ms. Miller's returning from her absence of some weeks in March 2006. In further support, she attaches statements from other employees praising Ms. Miller as an employer, attesting to Ms. McClure's having a disagreeable personality, and impugning Ms. McClure's motives.

22. As for the remedy itself, Ms. Miller asserts that the target date for Ms. McClure to take pregnancy leave was mid-July in 2006, not the end of the month. Moreover, she refers to Ms. McClure's admitting to having health problems prior to the discharge as evidence which supports an argument that Ms. McClure would probably have taken leave much earlier than her target date in July.

23. In a submission filed with the Tribunal during the course of these appeal proceedings, Ms. McClure challenges in detail what she perceives to be the many attacks on her character and credibility which appear in the materials filed by Ms. Miller. She attaches letters of reference complimentary of her work as a legal assistant.

24. The Delegate has also filed a submission in this appeal. He states that the parties conducted a mediation which was unsuccessful. There followed a hearing, in preparation for which the Delegate informed the parties as to the process to be followed and their obligation to marshal the documents and witnesses necessary to present each party's case. The parties had full opportunity at the hearing to tender evidence and to challenge the evidence presented by the party opposite. The Delegate also gives assurance that all the evidence presented was considered. He asserts, however, that a calendar tendered by Ms. Miller with her appeal materials confirming dates on which Ms. McClure indicated she intended to start her pregnancy leave should not be considered, as it has not been shown that it was unavailable to Ms. Miller at the hearing he conducted. As for Ms. Miller's suggestion that Ms. McClure's dealings with a previous employer should be considered in deciding whether Ms. McClure conspired to have Ms. Miller fire her, the Delegate submits it was irrelevant to a consideration of the principal issue before him: whether Ms. McClure's pregnancy played any role in Ms. Miller's decision to terminate her employment.

25. In a rebuttal submission, Ms. Miller says that the calendar should be considered because she had no knowledge at the hearing that the remedy fashioned by the Delegate would include an assessment of wages for a period of time after Ms. McClure was discharged. She also challenges the Delegate's decision in the Determination not to deduct from the monetary award an amount equal to the sickness benefits she received under the *Employment Insurance Act* during the relevant period following her discharge. Finally, she encloses searches suggesting there were several conveyancing assistant positions advertised in the Lower Mainland during the months April-July 2006.

ISSUES

26. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

27. Ms. Miller has appealed the Determination on the three grounds set out in section 112(1) of the *Act*, which reads:

> 112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
> (a) the director erred in law;
> (b) the director failed to observe the principles of natural justice in making the determination;
> (c) evidence has become available that was not available at the time the determination was being made.

28. Section 115(1) of the *Act* should also be noted. It says this:

> 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
> (a) confirm, vary or cancel the determination under appeal, or
> (b) refer the matter back to the director.

29. Ms. Miller has requested that the Determination be cancelled on each of the grounds set out in section 112. I propose to deal with those grounds in reverse order.

Has evidence become available that was not available at the time the Determination was being made?

30. In order to support her arguments tendered on this appeal Ms. Miller has filed extensive material including, *inter alia*, a statutory declaration and a letter from other employees, an excerpt from her calendar which Ms. Miller avers sheds light on Ms. McClure's proposed date of departure on pregnancy leave, several employment advertisements designed to show that Ms. McClure should have been able to obtain other employment as a conveyancing assistant after her discharge, and written submissions in which Ms. Miller makes statements in the nature of testimonial evidence implying that Ms. McClure is a person of bad character and unworthy of belief.

31. Previous decisions of the Tribunal have held that section 112(1)(c) is not intended to permit a party who is unhappy with the result in a determination to seek out new evidence to bolster a case that has failed to persuade at first instance. The Tribunal has also stated that an appeal does not amount to a re-hearing, or a re-investigation of a complaint. It is an error correction process, with the burden of showing error on

the appellant (see *MSI Delivery Services Ltd.* BC EST D051/06, *Re Bruce Davies et al.* BC EST #D171/03, *J.P. Metal Masters 2000 Inc.* BC EST #D057/05). This approach is consistent with a principle underlying the *Act* expressed in section 2(d), which is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the legislation. A party is therefore expected to take the complaint process seriously, to co-operate with the Director, and to present all arguments which the party may reasonably expect should be presented before a determination is made. If it is clear that evidence should have been led at the time of the initial hearing, it will not normally be admitted on appeal (see *D.J.M. Holdings Ltd.* BC EST #D461/97).

32. Having said that, the Tribunal retains a discretion to allow an appeal based on fresh evidence, but it must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask itself whether the evidence could not, with the exercise of due diligence, have been discovered and presented to the delegate during the investigation or adjudication of the complaint and prior to the determination being made. In other words, was the evidence really unavailable to the party seeking to tender it? At the same time, even if the evidence was not unavailable in this sense, the Tribunal may nevertheless consider it if the appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars* BC EST #D570/98).

33. In this case, Ms. Miller does not argue that the evidence she now seeks to put forward was unavailable at the time the Determination was being made. Rather, she appears to be presenting much of it to bolster arguments and evidence of a similar type that were tendered at the hearing, but which failed to persuade the Delegate that Ms. McClure's complaint should be dismissed. As such, it constitutes an attempt by Ms. Miller to shore up a case which failed at first instance, and re-argue it before the Tribunal. This is not the basis for considering such evidence which is contemplated by the legislation, and for that reason I must decline to consider the evidence of this sort which Ms. Miller has produced. It is simply not evidence that was "not available" as that phrase has been interpreted when considering the requirements of section 112(1)(c).

34. With respect to the calendar, however, Ms. Miller's argument is somewhat different. She submits that she should be entitled to refer to it for the first time now because she was unaware in the proceedings before the Delegate that she might be liable to pay a sum to Ms. McClure for any part of the period of time following the discharge. In my opinion, such an argument provides insufficient justification for the admission of the new evidence tendered in the circumstances of this case. While there have been decisions of the Tribunal in which new evidence has been considered where a failure to tender it at first instance has resulted from a misunderstanding between an appellant and a delegate (see *Trattoria Pasta Shoppe Ltd.* BC EST #D048/04), there is no suggestion here that the Delegate misled Ms. Miller as to the type of evidence she might tender at the hearing, or the nature of the remedy pursuant to section 79 of the *Act* which the Delegate might impose if he determined that Ms. McClure's complaint had merit. Ms. McClure alleged quite succinctly in her Complaint and Information Form that her job had been terminated due to pregnancy. Even a cursory review of the *Act* would have revealed the importance of the various sections which the Delegate, in the event, relied on when making his Determination having regard to the issues at play. Previous decisions of the Tribunal providing guidance as to how Ms. McClure might be made whole under the *Act* are generally available to the public. While it was open to the Delegate to invite submissions on the potential remedies which might be imposed, which might have alerted Ms. Miller to the type of remedy the Delegate was considering under section 79, the Delegate was

not obligated to do so. Employers are expected to be familiar with the provisions of the *Act*, and to know how they may be affected if they contravene them.

35. Furthermore, Ms. McClure's departure date was a matter of fact on which evidence was tendered at the hearing. The Reasons for Determination specifically refer to Ms. McClure's testifying that there was no reason she would not have worked until the end of July 2006, and Ms. Miller appears to have argued strenuously at the hearing that Ms. McClure would not have been able to work that long due to a health condition. The time at which Ms. McClure would have ceased to work after her discharge was, therefore, a live issue at the hearing. If Ms. Miller had felt that the calendar might clarify when Ms. McClure would have ceased work she should have tendered it at the hearing, or at least asked the Delegate for an adjournment so she could consider its importance further. She did neither of those things.

36. I am not persuaded that Ms. Miller has made out grounds for appeal on the basis that evidence has become available that was not available at the time the Determination was being made.

Did the Delegate fail to observe the principles of natural justice in making the Determination?

37. Ms. Miller's Appeal Form identifies as a ground of appeal that the Delegate failed to observe the principles of natural justice in making the Determination. Such a challenge gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in Ms. Miller's either not having an opportunity to know the case she was required to meet, or an opportunity to be heard in her own defence. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.

38. I have reviewed the record and the submissions of the parties. I see nothing which suggests to me that Ms. Miller was unaware that Ms. McClure was alleging that Ms. Miller had contravened the *Act* by terminating her employment because she was pregnant. The parties participated in a mediation, which was followed by an oral hearing conducted by the Delegate. Ms. Miller appears to have had ample opportunity to cross-examine Ms. McClure and to offer such evidence and arguments as she believed necessary in order to defend herself against the complaint. It is not obvious to me that the proceedings were in any way conducted unfairly.

39. What Ms. Miller asserts in addition, however, is that the Delegate must have been biased against her because he did not accept her protestations that she did not discharge Ms. McClure because she was pregnant, and he delayed in issuing the Determination until April 2007, Ms. Miller's busy time of year.

40. An allegation of bias in a public official acting in a quasi-judicial capacity, as a delegate does, is a serious matter. Such an allegation must never be made lightly. If a person alleges bias, she must present cogent evidence in support. An assertion based on impressions, or mere suspicion, is entirely inadequate. A real likelihood, or probability, of bias must be shown (see *Re Gallagher (cob Mid Mountain Contracting)* BC EST #D124/03).

41. Ms. Miller appears to suggest that bias should be inferred merely because the Delegate declined to accept the substance of her case put forward by way of defence to Ms. McClure's complaint. If that were the test for bias there would scarcely be a decision-maker who would be free from the taint. As for the fact that the Determination was issued in April 2007 it is in my view much more likely that the Delegate took his

time because he wished to be certain that he had reached the correct result. As stated by the Tribunal in *Kim Murphy* BC EST #D093/05, a delay in the issuing of a decision may be disconcerting, but delegates are under no statutory duty to issue a decision within a specific time frame. The fact that the Determination was issued during Ms. Miller's busy season is, to me, entirely coincidental. Ms. Miller offers no evidence in support of a contrary conclusion.

42. In my opinion, Ms. Miller's allegations of bias are entirely speculative, and I reject them.

43. No violation of the principles of natural justice has been established in this case.

Has the Delegate committed errors of law?

44. The basis on which the Delegate decided that Ms. McClure's pregnancy must have played some role in Ms. Miller's decision to discharge her is revealed in the following passage from the Reasons for the Determination:

> Considering the testimony I have heard and analysed I cannot come to the conclusion Miller terminated McClure for the reasons she states. There is nothing supporting McClure knew the mistakes and bad attitude relied upon by Miller would jeopardize her employment. Had McClure engaged in conduct so extreme as to warrant immediate dismissal I could understand the termination but this is not what Miller advanced as a reason for termination. Miller claims McClure became unfit for the position and given the evidence showing McClure was never formally told of the problems I prefer McClure's statements that the termination of March 31, 2005 (sic.) was sudden and unpredictable. This leads me to the conclusion the pregnancy played at least some role in the termination.
>
> I find Miller has failed to produce sufficient credible evidence that McClure's termination was not caused, in whole or in part, by the pregnancy. I find section 54 has been contravened.

45. In her initial submission filed in support of her appeal, Ms. Miller says this:

> My reaction after reading the decision was that my truths had not been heard and Toni's lies prevailed. It was stated that I did not give enough evidence to prove my innocence. My evidence had been overlooked and not believed and was left with a feeling that there wasn't anything that I could have presented that would have been accepted or good enough. When you are faced with the reality that you are guilty until you prove your innocence and the accuser is able to accuse with no penalty for a false accusation, you're like a sitting duck in a "no-win" situation.

46. In my opinion, Ms. Miller's comments misconceive what the Delegate did in this case. The Delegate did not decide that Ms. Miller was being untruthful when she said she had concluded that Ms. McClure made too many mistakes and had a bad attitude. What the Delegate determined was that since Ms. McClure was never made aware that her errors and attitude might lead to her losing her employment, with the result that the termination came as a surprise, and on the sudden, the Delegate was led to the conclusion that Ms. McClure's pregnancy played at least some role in the termination. Having made this finding, the Delegate concluded that Ms. Miller had not met the burden imposed by section 126(4)(c) of the *Act* to prove that Ms. McClure's pregnancy formed no part of the decision to discharge her.

47. It is trite to say that the appellate jurisdiction the Tribunal now possesses under section 112 in no way contemplates the Tribunal's determining appeals involving alleged errors of fact *simpliciter*. The Tribunal

may only vary or cancel a Determination, or refer the matter back for consideration afresh, if the error alleged is an error of law. Therefore, errors of fact can only come within the scope of the Tribunal's purview when they amount to errors of law. The occasions on which an alleged error of fact amounts to an error of law are few.

48. In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST #D028/06).

49. In my opinion, the Delegate's finding that the pregnancy played a role in the termination is a finding of fact. I am further of the view that there was evidence on the basis of which the Delegate could have made this finding. Ms. Miller knew that Ms. McClure was pregnant. Ms. Miller never made Ms. McClure aware that the mistakes, and her attitude, meant that her employment was in jeopardy. Other evidence tendered at the hearing confirmed that other employees also made mistakes, which was often due to incorrect information having been received by third parties. The discharge occurred precipitously, after Ms. Miller returned from a leave. Taken together, these circumstances convinced the Delegate that the support for Ms. Miller's assertion that Ms. McClure's performance and attitude were the sole reasons for discharge was so weak that he was entitled to infer that the pregnancy must have constituted a factor. While I may not have come to this conclusion, I cannot say that the Delegate acted in a manner that was irrational, perverse, inexplicable, or unreasonable in the sense contemplated by the relevant legal authorities.

50. As mentioned by the Delegate, section 126(4)(c) of the *Act* imposed a legal burden on Ms. Miller to prove that the pregnancy was not the reason for the termination of Ms. McClure's employment. In general, the imposition of a legal burden of proof means that a party has an obligation to prove or disprove a particular fact or issue. A failure to convince the trier of fact to the correct legal standard means that the party will lose on that issue (see Sopinka et al, *The Law of Evidence in Canada*, 1992 Butterworths at 57). In the context of section 126(4)(c), *Tricom Services Inc.* BC EST #D485/898 is authority that an employer must prove, on a balance of probabilities, that a termination was not caused by a pregnancy "in whole or in part". Further, the section places no evidentiary burden on the employee.

51. Once the Delegate drew his conclusion of fact that the pregnancy had played a part in Ms. McClure's discharge, it followed that Ms. Miller had not discharged the legal burden of proof imposed by section 126(4)(c). It was entirely correct for the Delegate to then decide that Ms. Miller had contravened section 54(2)(a). I see no error of law on the part of the Delegate in proceeding in this fashion in the sense of a misinterpretation or misapplication of a provision of the *Act* or the general law.

52. As for the remedy the Delegate imposed pursuant to section 79(2)(c), I refer to, and adopt, what was said in *Britco Structures Ltd.* BC EST #D260/03:

> The Tribunal has held that the predecessor to s.79(2) [formerly s.79(4)] allows for a complainant to be "made whole" at least in a financial sense, so as to place the complainant in essentially the same economic position they would have been in had the contravention not occurred. It has held that a "make whole" approach ought to be taken when fashioning remedies of a purely compensatory nature under this section (see *MacKenzie* BC EST #D033/00, *Afaga Beauty Service Ltd.* BC EST #D318/97, *W.G. McMahon* BC EST #D386/99). In *Afaga Beauty Service Ltd.* the Tribunal wrote:
>
> > This section of the *Act* [s.94(2)] is unique in that it anticipates that a former employee may be reinstated after an unjust dismissal or...can receive compensation instead of reinstatement. In the latter case, appropriate compensation for loss of employment normally is based on the circumstances of the employee, e.g., length of service with the employer, the time needed to find alternative employment, mitigation, other earnings during the period of unemployment, projected earnings from previous employment and the like.

53. The Delegate was alive to these principles in fashioning his remedy for Ms. McClure. There was evidence before the Delegate on the strength of which he was entitled to conclude that if the discharge had not occurred Ms. McClure would have continued to work until July 31, 2006. It is true that there was evidence the Delegate accepted demonstrating that conveyancers were in demand elsewhere in the period following Ms. McClure's discharge. However, the Delegate concluded that Ms. McClure did not act unreasonably when she did not obtain work of this type during this period because the stress resulting from the discharge debilitated her, to the point where she applied for, and obtained, sickness benefits under the *Employment Insurance Act*. At the same time, the Delegate decided that Ms. Miller's "insinuation" that a pre-existing condition would have forced Ms. McClure to cease work in any event long before July 31, 2006 was not compelling. These were all findings it was the Delegate's function to make. The fact that Ms. Miller disagrees with them is of no assistance in resolving the issues presented on this appeal. I am not persuaded that Ms. Miller has presented material adequate to show that in making these findings the Delegate committed errors of law.

54. Was the Delegate right when he declined to deduct the sickness benefits Ms. McClure received from his "make whole" award? I believe he was. In the context of a wrongful dismissal action for damages, the law in British Columbia appears to be settled that no such deduction should be made (see *Zelisko v. "99" Truck Parts & Equipment Ltd.* [1985] BCJ No.179, *French v. Victoria Aerie No.12 Fraternal Order of Eagles et al* [1987] BCJ No.510). In my view, this approach operates *a fortiori* in the circumstances of a proceeding under the *Act*. This is so because the payment of compensation for loss flowing from a contravention of the *Act* is a statutory consequence of the failure to comply with a requirement of the *Act*. It does not represent a form of damages for breach of contract, to which the strict rules relating to mitigation and duplication of compensation are applicable. Instead, it is a form of remedy for having one's statutory rights violated or ignored (see *660 Management Services Ltd. et al* BC EST #D147/05). If there is an issue relating to the payment of sickness benefits, it is an issue involving Ms. McClure and the Canada Employment Insurance Commission, not Ms. Miller.

55. Ms. Miller's assertion that the Determination violates her rights under the *Charter* raises questions which I do not have the jurisdiction to answer. Section 103 of the *Act* provides, *inter alia*, that section 45 of the

Administrative Tribunals Act applies to the Tribunal. Section 45 of that statute states that the Tribunal does not have jurisdiction over constitutional questions relating to the *Charter*.

56. In my opinion, evidence relating to dealings Ms. McClure may have had with a previous employer, or to other court proceedings involving a boyfriend, are not probative of the matters with which the Delegate needed to be concerned when making his Determination. It was no error of law, therefore, for the Delegate to have given this evidence little or no weight. The same may be said for the fact that Ms. Miller may not have been implicated in any prior complaints filed pursuant to the *Act*.

ORDER

57. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated April 10, 2007 be confirmed.

Robert Groves
Member
Employment Standards Tribunal