

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Jennifer Nice
(" Nice ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 96/216

DATE OF DECISION: May 22, 1996

DECISION

OVERVIEW

This is an appeal by Nice pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 001624 issued by the Director of Employment Standards (“Director”) on March 18, 1996. In this appeal Nice claims that the facts listed in the Determination are incorrect and further that section 50(2) (3) does not apply to her situation.

I have completed my review of the written submissions made by Nice and the information provided by the Director.

FACTS

Nice was employed by Lansdowne Pontiac Buick Cadillac GMC Ltd. (“Lansdowne”) as a service cashier from February 20, 1995 to November 28, 1995.

The employment of Nice was terminated by Lansdowne for excessive absenteeism. Lansdowne paid Nice 1 week’s wages as termination pay at the time of her termination.

Nice filed a complaint with the Employment Standards Branch (“Branch”) on December 11, 1995 alleging that she was owed termination pay.

The Director investigated Nice’s complaint, contacted the employer to inform them that 1 additional week’s termination pay was owing which the employer then paid.

The Director then determined that Nice was not entitled to any other compensation under the provisions of the *Act*, specifically sections 50 (2) (3). The basis of that determination was that while some of the absenteeism was related to Nice’s pregnancy and the subsequent termination of that pregnancy, Nice had not requested any leave pursuant to section 50 of the *Act*.

The Director subsequently issued Determination CDET 001624.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the Director’s Determination was made correctly and is consistent with the *Act* .

ARGUMENTS

Nice argues that:

- she became pregnant in July 1995;
- she underwent a therapeutic abortion on September 5, 1995;

- the days of absence listed are misleading as some are only part days missed and some of the absence was due to scheduled Doctor's appointments;
- Lansdowne was advised by her father on November 23, 1995 that she would be off work under Doctor's care until December 1, 1995;
- she spoke to Lansdowne on November 27, 1995 at approximately 5:30 p.m. and advised that she would be back to work December 1 as previously advised;
- on November 28, Lansdowne called her and advised that Steve Peacock didn't think she would get any better therefore she was going to be dismissed;
- she should be entitled to additional damages for "wrongful dismissal" while under Doctor's / therapist care;
- her situation is one of "wrongful dismissal" and has nothing to do with the pregnancy leave provisions of the *Act* .

The Director contends that:

- Lansdowne has paid the 2 weeks' termination pay as required by the provisions of the *Act*;
- Nice did not either verbally or in writing request pregnancy leave from Lansdowne;
- there has be no contravention of the *Act* .

ANALYSIS

The contention by Nice that her situation is one of "wrongful dismissal" is an issue for the courts to deal with as wrongful dismissal is an issue under common law, not an issue covered by the statutory provisions of the *Act*. The *Act* deals with the termination of employment under the provisions of Part 8. Section 63 states:

Liability resulting from length of service

- 63.** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages compensation for length of service.
- (2) The employer's liability for compensation for length of service increases as follows:
- (a) after 12 consecutive months of employment, to an amount equal to 2 week's wages;
 - (b) after 3 consecutive years of employment, to an amount equal to 3 week's wages plus one additional week's wages for each additional year of employment, to a maximum of 8 week's wages.
- (3) The liability is deemed to be discharged if the employee
- (a) is given written notice of termination as follows:
 - (i) one week's notice after 3 consecutive months of employment;

- (ii) 2 week's notice after 12 consecutive months of employment;
 - (iii) 3 week's notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 week's notice;
 - (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
 - (c) terminates the employment, retires from employment, or is dismissed for just cause.
- (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
- (a) totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
 - (b) dividing the total by 8, and
 - (c) multiplying the result by the number of weeks' wages the employer is liable to pay.
- (5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

The payment by Lansdowne to Nice of a total of 2 week's wages has discharged their liability under section 63 of the *Act*.

With respect to the application of section 50 to this complaint, even though Nice has repeatedly stated that her complaint does not involve the provisions of section 50 - Pregnancy leave, and the fact that she did not request pregnancy leave of her employer, I have considered its application as it formed part of the reasons for the determination.

I must conclude therefore, that in any event, the decision of the Director as set forth in the reason schedule attached to the determination was correct and consistent with the *Act*.

ORDER

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 001624 be confirmed.

Hans Suhr
Adjudicator
Employment Standards Tribunal

May 22, 1996
Date

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