Employment Standards TRIBUNAL

An appeal

- by -

Alwaysun Tanning Studios Inc.

- 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

ADJUDICATOR: John M. Orr

FILE No.: 2001/40

DATE OF HEARING: April 19, 2001

DATE OF DECISION: May 2, 2001

DECISION

APPEARANCES:

John Adams.	Counsel for Alwaysun Tanning Studios Inc.
Beverly Berger	On her own behalf (by telephone speaker phone)
Joann Francis	In person on behalf of Beverly Berger

No one appeared on behalf of the Director

OVERVIEW

This is an appeal by Alwaysun Tanning Studios Inc. ("Alwaysun") pursuant to section 112 of the *Employment Standards Act (*"the *Act")* from a determination dated December 12, 2000 (#ER 100264) by the Director of Employment Standards ("the Director").

Beverly Berger ("Berger") was employed by Alwaysun in Victoria from 1994 to the summer of 1999. On August 20, 1999 Berger commenced pregnancy leave during which she traveled to the United States. She returned to Victoria in December 1999 for a brief visit and then returned to the United States. On March 01, 2000 Alwaysun was sold to new owners.

Later in March 2000 Berger contacted the new owners of Alwaysun about returning to work. The new owners claimed to have no knowledge of her previous employment or pregnancy leave. Berger was also advised that the position she previously held was no longer in existence.

The Director found that Berger was on "maternity" leave from August through to May, 2000 when it became apparent that Alwaysun had no intention of recalling her back to her former position. The Director found that Berger was entitled to 5 weeks wages as compensation for length of service that together with vacation pay and interest amounted to $3,255.67.

Alwaysun appeals on a number of grounds that I find unnecessary to enumerate in light of my conclusions that follow.

ANALYSIS

Even a cursory review of the determination reveals that certain essential facts had not been established in order to support the conclusion of the Director's delegate.

Berger left her employment on August 20, 1999. She was issued a Record of Employment showing her last day of work being August 19, 1999. She says that she left her job to go on

pregnancy leave. "Leaves" are covered by the Part 6 of the *Act* and in particular pregnancy leave is dealt with in section 50 (as in force at the material time) as follows:

> **50**. (1) a pregnant employee who requests leave under this section is entitled to up to 18 consecutive weeks of unpaid leave
>
> (4) A request for leave must
>
> (a) be given in writing to the employer,
>
> (b) if the request is made during the pregnancy, be given to the employer at least 4 weeks before the day the employee proposes to begin leave,
>
> **54.** (1) An employer must give an employee who requests leave under this Part the leave to which the employee is entitled.
>
> (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,
>
> (a) terminate employment, or
>
> (b) change a condition of employment without the employee's written consent
>
> (3) As soon as the leave ends, the employer must place the employee in the position the employee he held before taking leave under this Part, or
>
> (b) in a comparable position.

The *Act* does not refer to "maternity" leave which is the term used throughout the determination. This seems to have given rise to some confusion over the issues related to Berger's situation.

According to the legislation Berger is entitled to 18 weeks pregnancy leave. In her case this leave would have expired in December 1999. The expiration date of the leave is not addressed anywhere in the determination. If Berger did not return to work at the end of her leave, or was unavailable for work because she was in the United States, then she may have been considered to have abandoned her position. However, this is not considered either in the determination.

Berger claimed at the hearing that she believed that she was entitled to pregnancy leave that coincided with her "maternity" benefits under the Employment Insurance scheme. The Director's delegate did not address this issue and I could find no evidence in the materials to support this proposition.

The Director's delegate spent some considerable portion of the determination dealing with the sale of the business and of continuity of employment. However, on my reading of the file, the business was consistently owned by Alwaysun Tanning Studios Inc. The delegate appeared to have confused the provisions of section 97 of the *Act* with the provisions of section 56 that indicate that benefits are continuous regardless of the leave.

There are some other issues not addressed in the determination. Alwaysun had indicated that the position vacated by Berger no longer existed. This raises some legal issues not addressed by the delegate in the determination. It was not established during the investigation whether or not the position still existed and whether or not alternative employment was offered. If the position did not exist the responsibility of the employer was not considered.

It was also not clear in the determination as to the basis for the remedy granted by the Director. The Director's delegate seems to have assumed that Berger's employment was terminated and yet there is no indication that the employment was terminated by the employer. The delegate does not indicate that she is exercising the Director's discretion under section 66 by finding that a condition of employment has been substantially altered. On the other hand, she does not refer to the remedies under section 79(4) that includes the right to require the employer to hire or reinstate the person or to pay compensation instead of reinstating the person.

If the delegate found as a fact that the employment had been terminated by the employer then it would be necessary for the delegate to decide whether or not the termination was "because of the employee's pregnancy".

In reviewing all of these issues with the parties it was clear that the factual basis for the determination had not been properly established and that once those facts are established a closer analysis of the legislation and legal principles is required. Accordingly I concluded, and the parties concurred, that this matter must be referred back to the Director for reinvestigation.

ORDER:

Pursuant to section 115 of the Act I order that the matter be referred back to the Director.

JOHN M. ORR

John M. Orr
Adjudicator
Employment Standards Tribunal