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 -

Jacqueline Macfarlane

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No.: 2000/050

DATE OF HEARING: May 23, 2000

DATE OF DECISION: May 30, 2000

DECISION

APPEARANCES

Jacqueline Macfarlane	On her own behalf
Linda Dares and Randy Hooper	On behalf of Costerton Farms Ltd doing business as Dares to be Different
Ray Stea and Betty Down	Delegates for the Director

OVERVIEW

This is an appeal by Jacqueline Macfarlane ("Macfarlane") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination dated January 06, 2000 by the Director of Employment Standards (the "Director").

Jacqueline Macfarlane was employed by Costerton Farms Ltd doing business as Dares to be Different ("the restaurant"), a health food restaurant, as a dishwasher and prep assistant for 9 days in August/September 1999. Her employment was terminated by the restaurant at the end of work on the ninth day. Ms. Macfarlane was approximately 5 months pregnant when she started her employment. Macfarlane complained that her employment was terminated because she was pregnant contrary to section 54 of the *Act.*

Macfarlane made a complaint to the *Employment Standard Branch* and also to the *Human Rights Commission*. In accordance with a protocol between the two organizations an investigator (Ms. Down) from the *Commission* conducted the investigation both for the *Commission* and as a delegate of the Director.

As a delegate of the Director Ms. Down determined that Macfarlane had been dismissed for cause unconnected with her pregnancy. It is from this decision that Macfarlane has appealed.

FACTS AND ANALYSIS

Ms. Macfarlane was interviewed and hired as a dishwasher at the restaurant by a senior member of the restaurant staff. She started work on Wednesday August 25, 1999 and received three days training. She started full time on Monday, August 30, 1999 and worked through that Friday with her last day being the following Monday, September 6, 1999. As noted above, Ms. Macfarlane was approximately 5 months pregnant when she was hired for the job. She did not disclose her pregnancy to the interviewer.

Macfarlane says that her training days went well but is significant to note that she records a couple of situations with her trainer where there was some discord because Macfarlane wished to do things her own way. She says that on her second training day Linda Dares ("Dares") approached her and asked her if she was pregnant. She disclosed that she was pregnant and she says that Dares was not upset and shared some stories about the difficulties of being a single parent.

It is clear from all of the submissions and from the evidence heard at this hearing that there was some considerable difficulty between Macfarlane and Dares during the next week when Macfarlane started work full-time.

Dares described the restaurant as a busy place with rather cramped and difficult work spaces. She said that it was essential that everyone work as a team and that there was an informal system to the way things worked that created a certain "flow". When Macfarlane started work she wanted to introduce some new ideas into the way things functioned in the kitchen. It seems that these ideas may even have been good ideas but when Macfarlane was told to simply do things the way there were currently being done she became argumentative.

It is clear that there was a significant personality clash between Dares and Macfarlane. Dares wanted Macfarlane to simply do as she was instructed while Macfarlane wanted to try to persuade Dares that improvements could be made. Macfarlane made changes unilaterally that upset Dares and other staff. The changes may well have been sensible but they slowed down "the flow" which was essential to good customer service. Dares described Macfarlane as argumentative when she was told to just get on with the work as it had been done normally.

I accept that Macfarlane truly believed that the reasons for the problems between herself and Dares stemmed from the fact that she was pregnant. She believed that Dares was upset that the pregnancy had not been disclosed and that Dares did not want her to continue to work at the restaurant because of her pregnancy. Macfarlane also felt some guilt for not disclosing her pregnancy and wrote a letter of apology.

On the other hand I also accept that Dares did not relate the problems to the pregnancy itself. She was distressed by Macfarlane's assertive or argumentative attitude toward her job. She did not appreciate Macfarlane's attempt to re-organise the kitchen and her apparent inability to accept simple and straightforward instructions. She conceded that Macfarlane's lack of honesty in failing to disclose her pregnancy was an added indication of Macfarlane's attitude. She testified that it was not the pregnancy that was the problem it was job performance.

Dares also led evidence that the restaurant had always been a family-friendly work place and had always accommodated pregnancy, childbirth, and childcare for its employees. Such evidence, while not conclusive that in this case they were willing to accommodate, is indicative that pregnancy alone would be an unlikely cause for dismissal.

Ms. Macfarlane has submitted extensive and detailed material which supports her belief that she was dismissed because of her pregnancy. This material and her submissions were all available to, and considered by, the Director's delegate.

The fact that the employee honestly believes that the pregnancy was the reason for her dismissal is not sufficient to establish that the employer actually dismissed her for that reason. I have reviewed the Determination and all of the submitted material and I am not satisfied that the appellant has met the onus of persuading me that the Determination was wrong. However I should comment that I was somewhat concerned as to whether the delegate had applied section 126(4)(b) of the *Act*.

Section 126(4)(b) provides that the burden is on the employer to prove that the employee's pregnancy was not the reason for termination. The delegate does not specifically refer to this section or to the burden of proof. Nevertheless, I conclude that the delegate had carefully considered the evidence and that there was sufficient evidence to satisfy the onus on the employer.

While the onus is now on the appellant at this stage I am satisfied that, even if I applied section 126(4)(b), as if this was a hearing *de novo*, the employer has met the burden of proving that the dismissal was not "because of the pregnancy".

In summary, I conclude that the delegate came to the correct conclusion in the Determination and that, even if the burden of proof was not referred to in the Determination, there is not sufficient evidence to persuade me that the determination was wrong.

ORDER

I order, under section 115 of the *Act*, that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal