

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 -

Sabrina Campbell

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton
FILE NO.: 98/065
DATE OF HEARING: April 24, 1998
DATE OF DECISION: June 3, 1998

DECISION

APPEARANCES

Sabrina Campbell on her own behalf

Chuck Urano on behalf of Urano Enterprises Ltd.
Deborah Urano

OVERVIEW

This is an appeal by Sabrina Campbell, under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued on January 14, 1998 by a delegate of the Director of Employment Standards. Following an investigation of Mrs. Campbell’s complaint, the Director’s delegate concluded that her employment with her former employer, Urano Enterprises Ltd., had not been terminated because of her pregnancy.

One of the reasons given by Mrs. Campbell for her appeal is her dissatisfaction with the process by which her complaint was investigated by the Director’s delegate. She submits that she was not given an adequate opportunity to present relevant facts and submissions to the Director’s delegate prior to the Determination being issued. She also submits that, in her view, her complaint was “disregarded from the outset.”

ISSUE TO BE DECIDED

The only issue to be decided in this appeal is whether Urano Enterprises Ltd. contravened Section 54 of the *Act* by terminating Sabrina Campbell’s employment because of her pregnancy.

FACTS

The context of this appeal can be described briefly, as follows:

- Urano Enterprises Ltd. (“Urano”) operates a fast food restaurant in Abbotsford, B.C.
- Mrs. Campbell’s most recent period of employment with Urano began in March, 1997 (she had resigned previously in September, 1996). She was a part-time supervisor whose hours of work varied, to a maximum of 24 hours per week.
- Mrs. Campbell received wage-loss benefits under the *Worker’s Compensation Act* from September 22, 1997 to October 26, 1997.

- Mrs. Campbell informed Chuck Urano in early October, 1997 that she would be unable for work for approximately another two weeks. On October 21, 1997 she received permission from her physiotherapist to return to work on October 27, 1997.
- Following two telephone conversations on October 22, 1997 (the first between Mrs. Campbell and Chuck Urano; the second between Mrs. Campbell and Chuck Urano) Mrs. Campbell was given written notice that her employment would be terminated on November 9, 1997. She worked three part-time shifts after receiving notice of termination.
- Chuck Urano and several employees stated that Mrs. Campbell informed them, before she became entitled to wages loss benefits, that she intended to “quit” and would not return to work after mid October, 1997.
- Mrs. Campbell delivered her child on January 19, 1998.
- The Director’s delegate determined that Mrs. Campbell’s complaint should be dismissed because:“ ... (her) dismissal arose from an argument between the employer and (her) husband about the scheduling of her shifts. Section 54 of the Act refers to a dismissal ‘because of the employee’s pregnancy’. This was not the factor in the employer’s decision to dismiss the complainant. He fired her because Marvin aggravated him.” (emphasis in original)

Against that factual backdrop I will now set out a summary of the evidence which I heard.

Scott Smith

Scott Smith (“Smith”) testified that he was visiting Campbell’s home on the morning of October 22, 1997. During his visit, Mrs. Campbell had a telephone conversation with Chuck Urano to inform him she was able return to work. Their conversation caused her to be very upset. As a result, Smith testified, Marvin Campbell (Sabrina’s husband) telephoned Chuck Urano approximately 10 minutes later “ ... to work things out”. According to Smith, Marvin Campbell hung up during his conversation because Chuck was yelling at him. Smith acknowledged that he could not hear what Chuck Urano said. He could only hear and observe what Marvin Campbell.

Marvin Campbell

Mr. Campbell testified that his wife was upset by her telephone conversation with Chuck because, in her words, she had been told not to return to work, her replacement had been hired and there was no point in returning to work as she was about to go on maternity leave. As a result, Mr. Campbell testified, he telephoned Chuck Urano “ ... to work the situation out.” Mr. Campbell is Mr. Urano’s brother-in-law.

He also testified that he could recall the following exchange of words:

Marvin: Why is Sabrina not returning to work ?

Chuck: She is leaving in mid-October.

Marvin: Is her maternity leave application in writing ?

Chuck: I can bring her in for two weeks and fire her for any reason.

Marvin: That's discrimination : a clear case!

It was at that point that Mr. Campbell "hung up" the telephone.

Sabrina Campbell

Mrs. Campbell testified that when she telephoned Mr. Urano on October 22, 1997 she informed him of her ability to return to work on October 27th. He replied, she testified, that he had already replaced her and she would begin her maternity leave in the near future. Her recollection of his words was that "... Chuck told me there was no point for me to return to work because I would be taking my maternity leave within the next two months." After she confirmed her wish to return to work, she testified, Mr. Urano re-stated that his position and the conversation ended.

Chuck Urano

Mr. Urano testified that Mrs. Campbell told him in mid-September, 1997 that she would not be at work after mid-October, 1997. This conversation took place, he testified, before Mrs. Campbell's injury which entitled her to wage-loss benefits. He could recall thanking her for giving him one month's notice of her plans. He also testified that he challenged Mrs. Campbell's claim for wage-loss benefits because she did not report an injury to him at the time it occurred. This, he acknowledged, probably upset Mrs. Campbell.

Mr. Urano's recollection of his telephone conversation with Mrs. Campbell on October 22nd was that when she told him she was able to return to work as of October 27th., and that her doctor would allow her to work two 4 hour shifts per week, he told her that there were no hours available for the week of October 26-31 because the schedule was already posted. He then offered, he testified, to place her on call for that week and to put her on the next week's schedule.

At that point, he testified, Mrs. Campbell told him what hours Mr. Campbell was scheduled to work with his employer and he noted that in his calendar so as to avoid any scheduling conflicts for the Campbell's. In his opinion, their conversation ended amicably and he "... thought everything was fine." A copy of Mr. Urano's desk calendar on which he noted Mrs. Campbell's hours of work for October 27-November 9, 1997 was entered into evidence.

Shortly thereafter, Mr. Urano testified, he had a telephone conversation which included a loud, heated exchange which he recalled as follows:

Marvin: Hi Chuck. What is this ? You will put Sabrina on call. She is entitled to those hours.

Chuck: I told her I don't have hours for her on the next schedule because it is already made and that I would put her on call next week and put her on the next schedule.

Marvin: She is entitled to the hours she had before she went on WCB.

Chuck: Marvin, she is entitled to part-time hours she wasn't on full time.

Marvin: That's discrimination!

Chuck: What are you talking about?

Marvin: She is entitled to those hours of 2 four hour shifts per week.

Chuck: She is entitled to part-time hours and I don't have any problem with that but she also gave me notice before she went on her WCB that she wasn't coming back as of the middle of October.

Marvin: Do you have that in writing ?

Chuck: No I didn't think I needed it from family.

Marvin: Ya - just like you complained about the WCB claim. This is discrimination !

Chuck: Ya - whatever Marvin. I didn't think she hurt herself here so I sent in the complaint. Maybe I should have talked to you guys before I did it but I did what I felt was right.

Marvin: This is total discrimination she is entitled to those hours.

Chuck: She is entitled to part-time hours which is 4 to 30 hours per week as per the labor code book classifies part-time and will do that.

Marvin: This is discrimination !

Chuck: You know Marvin I don't have to deal with this (Marvin) and I could just give Sabrina her two weeks notice.

Marvin: For what reason are you firing her ?

Chuck: I don't even have to have one if I just give her proper notice which is two weeks notice.

Marvin: What is the reason ?

Chuck: I am just going to give her two weeks notice so I don't have to deal with you !

Marvin: This is discrimination and I am going to take you to the Labour Relations Board and the Human Rights Commission.

Chuck: Go ahead Marv because I haven't done anything wrong.

Marvin: I want the notice in writing.

Chuck: I will have it ready for when she starts work next week.

Marvin: So when is she working next week ?

Chuck: I don't know off hand.

Marvin: I want to come pick up the notice.

Chuck: Well, I won't have it ready right away. Just call back to find out when she works and to see if you it ready to pick up. See you later, bye.

Mr. Urano confirmed, in cross-examination, that he decided to terminate Mrs. Campbell's employment because of his telephone conversation with Mr. Campbell: "Marvin was giving me a hard time and I didn't want to have to deal with him." He also testified that he did not expect Mrs. Campbell would return to work after her WCB-related absence because of her verbal notice to "... quit by mid-October."

Deborah Urano

Mrs. Urano testified that there were two reasons why she was surprised that Mrs. Campbell called to say she wanted to return to work on October 27th. First, early in the year she had loaned Mrs. Campbell her maternity uniform (pants and tops) and they were returned to the restaurant while Mrs. Campbell was on leave as a result of her injury. Second, Mrs. Campbell had told many of her co-workers that she would not be coming to work after mid-October.

Mrs. Urano also testified that after the telephone conversation between Mr. Campbell and Mr. Urano, her husband told her that he was upset because ‘ ... Marvin was telling him what he had to do.’ He also told her she testified, the “ ... he gave Sabrina two weeks notice so he wouldn’t have to deal with Marvin.” That decision, Mrs. Urano testified, was consistent with her husband’s normal practice to deal directly with employees rather than dealing with their family members.

On one of the days that Mrs. Campbell was at work in early-November. Mrs. Urano testified, Mr. Urano told Mrs. Campbell that if he “ ... could get an apology” or “work it out” with Mr. Campbell, he would allow her to continue working. Mrs. Campbell replied by telling Mr. Urano: “I’ve been advised not to talk to you about the situation.”

Under cross examination, Mrs. Urano testified that she could recall two female employees whose employment had not been affected adversely by their pregnancies: Deidre Ward (Mrs. Urano’s sister) and Alisha Campbell (Mrs. Campbell’s sister).

Lindsey Stewart

Ms. Stewart testified that Mr. Urano told her during the Summer that, on her doctor’s advice, Mrs. Campbell was to avoid lifting heavy items because she was pregnant. She also testified that during a conversation about hours of work in early September, Mrs. Campbell said that she “ .. was going to be quitting.” A few weeks later, Ms. Stewart testified, Mrs. Campbell was not at work and she assumed she had quit. It was only at a later dated that she became aware of “the WCB issue.” She also testified, under cross examination, that Mrs. Campbell “ ... never said anything to her about going on maternity leave.”

Lenna Cook

Ms. Cook testified that Mrs. Campbell told her in early-September that “ ... she didn’t want to come back after October 15th.” Ms. Cook was not aware if that dated was significant but, she testified, “ .. that was the date she said.”

When asked in cross examination if Mrs. Campbell had said she was “quitting” or “going to leave”, Ms. Cook testified: “you just said you didn’t wan to come back after October 15th.” However, in a written statement dated April 9, 1998 Ms. Cook wrote:

“ ... in September, Sabrina Campbell had told me that she did not want to work here as of mid-October. She had been saying this for a few weeks and she said it was because of her pregnancy ...”

Cheryl Hughes

Ms. Hughes began working at the restaurant in September, 1997 and, she testified, shortly thereafter she had a lengthy conversation with Mrs. Campbell about babies, pregnancy, adoptions and the like. During that conversation, she testified, Mrs. Campbell told her that she was quitting in mid-October and offered several reasons: Marvin did not want her working anymore; she had miscarried previously; she needed to take it easier; and she had fallen in the recent past.

In cross examination, Ms. Hughes offered two possible explanations for having that kind of personal conversation with a person whom she did not know well: she is an older woman and she is a member of the same church as Mrs. Campbell.

ANALYSIS

Section 54(2)(a) of the *Act* prohibits an employer from terminating an employee's employment because of her pregnancy. There is no dispute about the fact that Mr. Urano terminated Mrs. Campbell's employment. The question which I must decide is whether her employment was terminated because of her pregnancy.

The Director's delegate determined that Mrs. Campbell's dismissal “ ... arose from an argument between the employer and (Mrs. Campbell's) husband about the scheduling of her shifts.” As a result, the delegate concluded that Mrs. Campbell's pregnancy was not a factor in Urano's decision to terminate her employment.

As the appellant, Mrs. Campbell bears the burden of establishing, on the balance of probabilities, that the Determination should be cancelled or varied.

I must also bear in mind that Section 126(4) of the *Act* places the burden on an employer to prove that an employee's pregnancy is not the reason for terminating her employment.

I have set out the evidence and testimony in chronological order. Where there is a conflict in evidence and the credibility of witnesses is an issue I must resolve such issues by adopting the test which the BC Court of Appeal set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the

real test of the truth of the story of a witness in such a case must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...(pp.356-57)

Was Mrs. Campbell's employment terminated because of her pregnancy ?

Mrs. Campbell submits that her employment was terminated during her telephone conversation with Mr. Urano on October 22, 1997 and, as a result, the Director's delegate erred in determining that her employment was terminated because of her husband's telephone conversation with Mr. Urano. When I review all of the evidence and submissions on this particular point I find that Mr. Urano did not terminate Mrs. Campbell's employment during their telephone conversation. Rather, he expressed initial surprise at her interest in returning to work at that time but then agreed to place her on the schedule for the week of November 1 - 7, 1997 while placing her "on call" for the week of October 26 - 31, 1997.

Mr. Urano's initial surprise resulted from his belief that Mrs. Campbell did not intend to be at work after mid-October, 1997. This view was shared by several of Mrs. Campbell's co-workers whose testimony, I find, compels me to conclude that she planned not to be at work after mid-October. I find Ms. Hughes' testimony on this point to be particularly compelling. There is no evidence that Mrs. Campbell put this in writing or that she had made a written request for maternity leave. However, the evidence is clear and convinces me that she had made her intentions known orally both to her employer and to her co-workers.

Mrs. Campbell submits that she had "... full intentions of returning to work after my WCB claim and my maternity leave." I accept that as an accurate statement of her intentions. However, that statement is not inconsistent with the view held by Mr. Urano (and some of her co-workers) that she did not intend to return to work immediately upon the expiry of her entitlement to WCB wage loss benefits. Rather, he held the view, quite reasonably in my opinion, that Mrs. Campbell did not intend to return to work prior to the birth of her child in early 1998 and possibly not at all.

I find that I am persuaded by Mr. Urano's testimony that he decided, during his telephone conversation with Mr. Campbell, to terminate Mrs. Campbell's employment. He did so because he was annoyed with Mr. Campbell and "... didn't want to have to deal with him." Mr. Urano's approach to this particular situation was no different than similar situations in which he prefers to deal directly with employees rather than one of their family members.

Thus, I agree with the delegate's finding that Mr. Urano decided to terminate Mrs. Campbell's employment because her husband aggravated him and that her pregnancy was not the reason for her dismissal.

Was Mrs. Campbell given proper notice?

Mr. Urano gave two weeks' notice in writing to Mrs. Campbell on October 22, 1997 that her employment would be terminated on November 9, 1997.

I note that Mrs. Campbell was in receipt of wage-loss benefits from the Workers' Compensation Board until October 26, 1997.

Section 67(1) of the *Act* states that notice of termination which is given to an employee who is unavailable for work due to medical reasons, amongst other things, is of no effect. And, under Section 67(2) of the *Act*, once notice is given to the employee, the employee's wage rate and other conditions of employment must not be altered without the employee's written consent. Thus, in my opinion, the written notice given to Mrs. Campbell on October 22, 1997 could not take effect until October 27, 1997 when her medical condition no longer made her "unavailable for work." But that is not the end of the matter. Section 63 of the *Act* places a liability on employers to pay compensation for length of service unless appropriate written notice is given [see Section 63(3)(a)]. That provision entitled Mrs. Campbell to receive at least one week's notice because she had more than 3 months but less than 12 months of consecutive employment (March, 1997 - October, 1997). The period of time from October 27 to November 9 is greater than one week and, therefore, Mrs. Campbell received written notice which was greater than the minimum requirements of the *Act*. Upon receiving that notice she was scheduled for and did work 3 shifts, consistent with her part-time status.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sr