

An appeal

- by -

Lesley-Anne Sheppard

- 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: Carol L. Roberts

FILE No.: 2002/175

DATE OF DECISION: June 10, 2002

DECISION

This is a decision based on written submissions by Lesley-Anne Sheppard, Lynne Freer, Manager, Programs and Human Resources for Aldergrove Neighbourhood Services Society ("ANS"), and D. Lynne Fanthorpe on behalf of the Director.

OVERVIEW

This is an appeal by Lesley-Anne Sheppard, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued March 13, 2002. Ms. Sheppard alleged that she had been dismissed from her employment because of her pregnancy. The Director's delegate determined that the Act had not been contravened, and closed the file.

ISSUE TO BE DECIDED

Whether the Director erred in determining that Ms. Sheppard's employment had not been terminated due to pregnancy, and dismissing her claim for compensation for length of service.

FACTS

Ms. Sheppard worked for ANS from August 10, 1998 to March 30, 2001 as an infant and toddler Supervisor.

On February 22, 2001, Ms. Sheppard and three other employees were given written notice of lay-off effective June 30, 2001. The layoffs were a result of an anticipated Ministry of Children and Families decision not to renew the childcare portion of its contract with ANS. ANS's childcare services ceased operations at that time. Because Ms. Sheppard was going to be on maternity leave on June 30, ANS asked her to notify it of her last day of work. On March 1, 2001, Ms. Sheppard advised ANS that she would commence maternity leave on April 1, 2001. She also asked to be notified of any job opportunities with ANS.

Ms. Sheppard went on sick leave in March, and on maternity leave April 1, 2001. In late June, she was advised that her benefits would no longer continue to be paid after the end of the month.

During her leave, Ms. Sheppard discovered that ANS was going to open a new day care centre, and offered positions in that centre to two of the four employees who had been laid off. In August, 2001, Ms. Sheppard was scheduled to be interviewed by ANS for a position she had previously held. Shortly before the interview, Ms. Sheppard faxed a letter to ANS indicating that she did not feel ANS needed to interview her, given her prior history in that position.

Although ANS initially offered positions to other employees impacted by the cutback, those offers were rescinded after ANS received legal advice. The positions were subsequently advertised and ANS conducted interviews to fill the available positions. After Ms. Sheppard did not appear for her interview, the only other candidate was hired. The delegate confirmed with one of the other affected employees that she was hired after applying and being interviewed for her position. Ms. Sheppard alleged that two of her co-workers were offered employment, and she was not, based on her pregnancy.

After reviewing the documentation provided by Ms. Sheppard and ANS, the delegate concluded that, because ANS provided Ms. Sheppard with over 4 months written working notice of termination, the termination was not related to her pregnancy, and that the Act had not been contravened.

ARGUMENT

Ms. Sheppard argues that the delegate erred in arriving at the conclusion she did. She contends that, because she had just given birth and was recovering from abdominal surgery, she was incapable of presenting herself properly for the interview. She contends that she was on leave at the time of the interview, and should not have been required to attend at the interview for the position which she had been promoted out of. She contends that two of her non-pregnant colleagues were offered positions with ANS without an interview process.

Ms. Sheppard states that she took annual vacation from March 2 to March 12, and went on medical leave on March 13. Based on the doctor's note submitted with her appeal, Ms. Sheppard was to be off work as of March 13 until the date of her delivery due to problems with her pregnancy.

The delegate says that Ms. Sheppard has provided information, makes several arguments and raises issues that were not raised during the investigation. That new information includes the contention that Ms. Sheppard took annual leave March 2 to 12, a March 14 letter from ANS to the Human Rights Commission, fax documents to "Thea", and a letter dated March 26. The delegate also notes that, in her initial complaint, Ms. Sheppard sets out her sick leave date as March 19, not March 13.

ANS does not dispute the facts, but says that it gave Ms. Sheppard as much notice of layoff as possible, and that her medical circumstances arose after the notice was issued. It states that, commencing March 14, 2001, Ms. Sheppard received full remuneration in the capacity of paid sick leave until the expiration of her sick bank entitlement. It acknowledges that Ms. Sheppard came to work for a short meeting during her maternity leave at its request, and has agreed to compensate her for a four hour minimum period for her attendance.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Ms. Sheppard provides, in support of her appeal, information that was available to her only after the Determination was issued. I have not considered this information as it was not available to be considered by the delegate during the investigation, and constitutes new evidence.

The initial complaint was that Ms. Sheppard's employment was terminated due to her pregnancy. The delegate concluded that it was not. I am unable to find that the delegate erred in dismissing Ms. Sheppard's complaint.

The Tribunal will not accept evidence at a hearing which ought properly to have been put to the Director's delegate at first instance. (see Kaiser Stables BC EST # D058/98, and Tri West Tractor Ltd. BC EST #D268/96).

Section 63 of the Act sets out an employer's liability for compensation for length of service. In Ms. Sheppard's case, ANS was obliged to provide her with two weeks' written notice of termination. Ms. Sheppard advised the delegate in her complaint that she went on medical leave on March 19, and did not advise her she had taken annual leave during that time. On the basis of that evidence, the delegate concluded that ANS had discharged its liability to Ms. Sheppard under s. 63. It appears to me that Ms. Sheppard did not advise the delegate that she had taken annual leave because her real complaint was that she was not hired for a position in August due to her pregnancy. That is a separate matter that I will address below. However, for the purposes of determining ANS's liability to Ms. Sheppard, I accept that Ms. Sheppard did not "hide in the weeds" and fail to disclose information she should have disclosed.

It is difficult to determine why, in her complaint, Ms. Sheppard set out the last date of her work as March 19, rather than March 13, as it appeared to be. However, even on the basis of the new information, I find that ANS gave Ms. Sheppard sufficient opportunity to work during her notice period, and discharged its liability to her.

Section 67(1)(a) provides that the [section 63] notice provisions are of no effect if the notice period coincides with a period during which the employee is on annual vacation, leave... or is unavailable for work due to .. medical reasons.

At the time ANS gave Ms. Sheppard notice, it was aware both that she was taking annual leave, and that her maternity leave was scheduled to commence in April. Ms. Sheppard unexpectedly went on sick leave commencing March 14, and received paid sick leave benefits to the end of March. At the time Ms. Sheppard went on medical leave, she had worked 14 of the minimum 14 day period of notice required to be given (February 23 - 28, March 1-4 and 10 - 13). Furthermore, she received full compensation by way of sick leave benefits to the end of the month. ANS also provided the delegate with a cheque representing payment for the 4 hour minimum hours of work when she was called in for a meeting at the employer's request during her maternity leave. I find no contravention of s. 63.

It appears that Ms. Sheppard's true complaint is that ANS did not hire her in August for a position she is of the view she was well qualified for, because she was on maternity leave. She alleged that, had she not been pregnant, she would have obtained a new position at the new centre. She is of the view that ANS was obliged to offer her a "comparable position" at the end of her leave. The delegate concluded that Ms. Sheppard was not hired for the new position because she did not appear at the interview.

Documents filed with the appeal demonstrate that Ms. Sheppard has filed a complaint with the Human Rights Commission about this issue. In my view, that is the appropriate forum for addressing Ms. Sheppard's concern that she was not hired because she was pregnant. However, that is a separate issue from that of whether the delegate erred in concluding that Ms. Sheppard was not entitled to length of service compensation.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated March 13, 2001 be confirmed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal