

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 -

Hammoud Enterprizes Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Norma Edelman

FILE NO.: 97/234

DATE OF HEARING: June 12, 1997

DATE OF DECISION: July 2, 1997

DECISION

APPEARANCES

Adel Hammoud	on behalf of Hammoud Enterprizes Ltd.
Veena Munsamy	on behalf of Hammoud Enterprizes Ltd.
Yashmin Hanif	on behalf of Hammoud Enterprizes Ltd.
Freba Nasiri	on her own behalf
Masoud Nasiri	on behalf of Freba Nasiri
Hebron Massoud	Interpreter

OVERVIEW

This is an appeal by Hammoud Enterprizes Ltd. pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by the Director of Employment Standards (the “Director”) on March 14, 1997. In this appeal, Hammoud Enterprizes Ltd. claims that Freba Nasiri (“Nasiri”) is not entitled to compensation under Section 79(4) of the *Act* as her employment was not terminated because of her pregnancy.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Nasiri’s employment was terminated because of her pregnancy.

FACTS

Hammoud Enterprizes Ltd. operates a Pita Works Cafe at the Eatons Centre Mall and the Oakridge Mall.

Nasiri was employed as a cashier at the Eatons Centre location from June 15, 1995 to April 30, 1996. Her supervisor was Veena Munsamy (“Munsamy”). One of her co-workers was Yashmin Hanif (“Hanif”).

At the beginning of November 1995, Nasiri advised her employer and co-workers that she was pregnant. She expected to commence maternity leave at the end of June 1996.

On or about March 24, 1996, Nasiri went on vacation. She returned to work on April 8, 1996.

On April 10, 1996 Munsamy advised Nasiri that she was laid off work effective April 30, 1996. A Record of Employment ("ROE") was issued on May 2, 1996 which showed the reason for issuance as A- "Shortage of Work".

On April 15, 1996 Nasiri filed a complaint with the Employment Standards Branch (the "Branch") claiming that she had been dismissed due to her pregnancy. She also filed a Human Rights complaint.

The Director investigated Nasiri's complaint and concluded that Hammoud Enterprizes Ltd. had terminated Nasiri's employment because of her pregnancy. A Determination was issued on May 14, 1997 in which the Director ordered the company to pay Nasiri six (6) months wages as compensation.

Hammoud Enterprizes Ltd. appealed the Determination on April 7, 1997. It claims that Nasiri was laid off work due to performance and attitude/personality problems and not because of her pregnancy.

Adel Hammoud, ("Hammoud"), the President of Hammoud Enterprizes Ltd., stated that when Nasiri went on vacation, Munsamy told him Nasiri was troublesome, incompetent, unpleasant, not a team worker, and couldn't work with other staff and that it would be better if Nasiri no longer worked at the cafe. As a result, Hammoud phoned the Branch and was advised that a layoff with two weeks notice was acceptable in the circumstances, but not a dismissal, as Nasiri had received no written warnings about her performance or attitude/personality. This advice was passed on to Munsamy, and when Nasiri returned from vacation, Munsamy told her she was laid off from work because she needed to hire someone as an Assistant Manager. Hammoud stated that Munsamy did not want to tell Nasiri that she was laid off because she was a poor worker.

Hammoud stated that after Nasiri was told she was laid off, her husband came to speak to him and Munsamy. Nasiri's husband suggested that Nasiri take early maternity leave effective June 1, 1996 and that this reason should be put on the ROE. Hammoud replied that he would call the Branch about the proposal, and when he was told he would have to bring Nasiri back to work if she took early maternity leave, he decided not to accept the proposal as he did not want her back to work.

Hammoud further stated that in the 11 years he has been an employer he has employed 5 women who went on maternity leave and all returned to work. Three still work for him and one is currently on maternity leave from the Oakridge cafe. He said that he has never discriminated against women based on their pregnancy. He said if he was going to get rid of Nasiri because she was pregnant, it would have made more sense for him to do so during her first trimester when she was most sick or during January and February when business was slow, and not during her last trimester when she was no longer sick and business was improving.

Munsamy, the Manager of the cafe at Eatons Centre, testified that she interviewed Nasiri for a cashier/kitchen helper position in the summer of 1995. Based on the interview, a 2 hour try-out and poor reference checks, she advised Nasiri by phone that she was not the right person for the job. Within a few hours, Nasiri showed up at the cafe and pleaded for a chance to work. Munsamy said she finally agreed to hire Nasiri out of sympathy and against her better judgment.

Munsamy stated that Nasiri initially appeared willing to do her job, and at one point during this time she mentioned to Nasiri that she might train her to do some Assistant Manager duties. In November she learned of Nasiri's pregnancy and she told her it was exciting news. She said that Nasiri's first trimester was hard on Nasiri and the staff because it was a busy time during Christmas and Nasiri was nauseous and throwing up much of the time. However, Nasiri managed to come to work each day, and on the whole, everyone was happy. This changed in January 1996 when Nasiri's co-workers started to complain about Nasiri's work habits. In particular they complained that she did not finish her chores on time; she was not a team worker; and they did not want to work with her anymore. Munsamy said she looked into the complaints and found they were true. Nasiri's attitude towards her work and co-workers had changed. She lacked self-motivation, and spent most of her time comparing her hours of work, wages, and job duties to her co-workers. Munsamy said that since she had invested so much time in training Nasiri, she thought that talking to her would solve the problem. She advised Nasiri of her problem areas and ways to solve them, such as being more of a team worker, and having a friendlier and more professional approach towards work. She gave her verbal warnings that she needed to improve. Her approach was to be positive with Nasiri and not negative so as to encourage her to do a better job. She also asked Nasiri if her job was too demanding and she replied that it wasn't and she could handle the job. Nasiri, however, did not improve and she started taking out her anger on her co-workers and once she had a loud verbal argument with a co-worker.

According to Munsamy, she initially refused Nasiri's request for a vacation because she had not worked a full year and spring break was a busy time. After Nasiri persisted, however, she agreed to let her go on vacation. Munsamy stated that while Nasiri was away she noticed that the store was running more smoothly, tasks were completed on time, staff were working as a team, and everyone's stress level was down, even though sales were up. She said she realized it was time to let Nasiri go because it would be in the best interest of the business, herself and her staff. She also decided at this time that she would hire an Assistant Manager and not a cashier to replace Nasiri so she would have someone to relieve her when she took time off.

Munsamy said she contacted Hammoud and told him of the problem and her decision to let Nasiri go. Hammoud replied that he didn't know the correct procedure and he wanted to contact the Branch. After he called the Branch, he informed Munsamy that she could lay off Nasiri with 2 to 3 weeks notice.

Munsamy was off work on April 8 and 9, 1996. On April 10, 1996 she returned to work and gave Nasiri verbal notice to April 30, 1996. She told Nasiri that she was laid off because she

needed an Assistant Manager, and that it was a business decision. Munsamy stated that Nasiri started to cry and called her husband and he came over to the cafe and asked for an explanation and she told him she had explained everything to Nasiri. Munsamy said that Nasiri's husband then replied by stating the layoff was due to his wife's pregnancy and he would go to Labour Relations. Munsamy said she then called Hammoud and asked him to come over to deal with the Nasiris.

Munsamy said that she believes she gave Nasiri more than a fair chance. It was her own actions and attitude that ended her job and her layoff had nothing to do with her being pregnant. She stated that other women have gone on maternity leave and returned to work at the cafe with no problem. She denied that she ever had any discussion with Nasiri about taking early maternity leave.

Munsamy and Hammoud stated that it is standard policy to hire people at the minimum wage and then to give them raises every three months. Nasiri started at the minimum wage and like everyone else got a raise every three months.

Hanif has worked at the Eatons Centre cafe for four years. She stated that Nasiri did an acceptable job in the beginning, and when she got pregnant everyone was happy for her. However, as time progressed, Nasiri became lazy; she would not contribute to her share of the work; she developed an attitude towards staff and customers and once got into a loud argument with a co-worker in front of customers; she refused to be a team worker; and she became argumentative with staff and would complain about the hours of work of other staff. Hanif stated that she stopped enjoying working with Nasiri, and she and the other staff person at the cafe complained to Munsamy about Nasiri and indicated they didn't want to work with her anymore. Hanif stated that when Nasiri went on vacation there was a big difference at the cafe because everything was better, smoother, and less stressful, even though they were very busy. According to Hanif, Nasiri was laid off due to her performance and attitude and not her pregnancy. Hanif stated that she went on maternity leave and returned to work with no problem. She said that she was not forced to testify on Hammoud's behalf and Hammoud treats her fairly and with respect.

Nasiri testified that after initially being rejected for a job, Munsamy decided to hire her and she proved to be a good employee. She said she did a good job while employed at the cafe and Munsamy told her on many occasions that she was doing a good job. She had a good work record and received two raises (one after 3 months and then one after another 3 months) and was promised a third raise. She said she cannot recall Munsamy or any co-worker ever saying anything negative about her work or attitude.

She got along well and was happy and friendly with all staff. She said she never received any warnings about her performance or attitude/personality. Rather she was praised and encouraged and once, before her pregnancy, Munsamy offered to train her to do some Assistant Manager duties. She is of the view that Hammoud has used scare tactics against Munsamy and Hanif and they had no choice but to make false accusations about her attitude and work performance.

Nasiri stated that she asked for permission to take two weeks vacation approximately six weeks prior to the vacation. Munsamy spoke to Hammoud about the matter and then told her she could go on vacation but she had to go on early maternity leave when she came back. Nasiri said she asked Munsamy who would work for her when she went on early maternity leave and Munsamy replied that she would hire a temporary person for 6 to 7 months and that she wanted her to come back to work after the leave. Nasiri said that she told Munsamy that she did not want to go on maternity leave at that time as it was too early and if she had to go on leave then she would not go on the 2 weeks vacation. A few days later, Munsamy said she could go on vacation and did not have to take early maternity leave.

Nasiri said when she was dismissed on April 10, 1996 Munsamy told her that she was sorry but they had to let her go and that it was a business decision. Nasiri said she was upset and asked if anything was wrong with her work and Munsamy replied she was happy with her work, that it was a business decision, and she was an employee just like Nasiri and she had no idea why Hammoud had made the decision. Nasiri said her husband then came by the cafe as usual to pick her up after work and when he saw her crying and upset he asked Munsamy if he could talk to her about the issue. Munsamy reiterated that Nasiri had done a good job, but it was a business decision and Hammoud had made the decision to dismiss Nasiri. Nasiri said that Hammoud then showed up at the cafe. She was too upset to speak and so her husband asked Hammoud why he had dismissed Nasiri and Hammoud just said it was a business decision and they wanted to train someone else. Nasiri's husband, Masoud Nasiri, confirmed that this is what took place after Munsamy advised Nasiri that she was laid off work.

Nasiri claims that her employment was terminated by Hammoud so that he could replace her permanently when he trained her maternity leave replacement. They wanted someone else for the busy summer months because she might get sick or go into labour. She was dismissed on April 10, 1996 due to her pregnancy because when she asked, on or about the middle of February, for two weeks vacation, she was told to go on early maternity leave. She stated that Hammoud waited to get rid of her in April because during her first trimester it was busy with the Christmas rush so she was needed at that time. She is of the view that notwithstanding being told by Munsamy that she wanted her back after her leave, Munsamy thought she would not come back to work after having her baby and she thinks that Hammoud told Munsamy that he did not want her back after her leave. Nasiri stated that nothing was said about maternity leave or pregnancy on April 10, 1996.

At the hearing, Nasiri initially said that the only time the issue of maternity leave or pregnancy was raised was on the occasion when she asked for two weeks vacation. The only other thing which caused her to believe her pregnancy was an issue was that Munsamy appeared shocked and panicked at the news of her pregnancy. However, in a final remark at the hearing she stated the following: “Now, I remember, Adel once said to Veena, never hire a female they always get pregnant. It is better to hire a man and not a woman they don’t get pregnant”. In reply, Hammoud denied making this statement and indicated he found it “amazing” that she only now remembered him making such a statement.

ANALYSIS

Section 54 of the Act prohibits an employer from terminating the employment of an employee because of her pregnancy.

In this case, I am not satisfied that Hammoud Enterprizes Ltd. dismissed Nasiri because of her pregnancy. Rather, I find it is more probable, given all the circumstances, that she was dismissed because of her performance and attitude.

There are five reasons for my conclusion.

First, Hammoud’s two witnesses, Munsamy and Hanif, provided evidence to support his claim that Nasiri was dismissed due to performance and attitude problems and not due to her pregnancy. Although Nasiri claims that these women were scared into testifying for Hammoud, I find nothing which supports that claim. Second, the fact that Nasiri received two raises during her employment does not in itself refute Hammoud’s claim about Nasiri’s performance and attitude. There was uncontradicted evidence that raises were given to employees as a matter of course, and further, the raises were received by Nasiri prior to January, which pre-dates the period when Munsamy said she began to have problems with Nasiri. Third, Hammoud presently employs women who have gone on maternity leave and returned to work. Fourth, I find it unlikely that Hammoud made the statement about women attributed to him by Nasiri. The fact that Nasiri never raised, nor apparently remembered, this alleged statement in the fourteen months between the filing of her complaint, which was done five days after her dismissal, and the date of the hearing, causes me to doubt it was ever made by Hammoud. Fifth, Munsamy denied ever making any statement about early maternity leave and there is no evidence that I found to support Nasiri’s speculation that Hammoud did not want her back after her maternity leave.

Although I cannot conclude that Nasiri was dismissed due to her pregnancy, I do find that there has been a violation of Section 63 of the *Act* and that Nasiri is entitled to compensation for length of service.

The *Act* provides that an employee is entitled to be paid compensation for length of service on termination of employment. An employer's liability for compensation for length of service is deemed discharged if prior written notice of termination is given, or if the employee quits, retires or is dismissed for just cause.

Nasiri did not quit or retire from her job. There is no evidence that she was dismissed for just cause. It is undisputed that she received no written warnings and she denies she received any verbal warnings. Moreover, there is no evidence to show she was ever told her job was in jeopardy if she did not improve her attitude or performance.

Nasiri was dismissed with a little over two weeks verbal notice. She did not receive written notice. The Tribunal has consistently held that the requirement for written notice cannot be satisfied by an equivalent amount of verbal notice. (see e.g. *G.A. Fletcher Music Company Limited*, BC EST #D213/97; *Workgroup Messaging*, BC EST #D205/97; *Dr. Robert S. Wright*, BC EST #D060/96). Consequently, in the absence of written notice Nasiri is entitled to compensation for length of service.

Under Section 128 of the *Act*, the amount of compensation that Nasiri is entitled to is the greater of the number of weeks she would have been entitled to under the former *Act* or the amount she is entitled under Section 63 of the current *Act* which came into force on November 1, 1995. The greater amount in this case is the entitlement under the former *Act*. Accordingly, Nasiri is entitled to two weeks wages as compensation for length of service.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination issued March 14, 1997 be varied to reflect that two weeks compensation for length of service is owed to Nasiri by Hammoud Enterprizes Ltd. Nasiri is also entitled to 4% vacation pay on that amount plus interest as set out in Section 88 of the *Act*.

Norma Edelman
Registrar
Employment Standards Tribunal

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