Employment Standards TRIBUNAL

An appeal

- by -

Dr. J. Andrew Macdonnell Inc.
("Macdonnell")

- 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: David B. Stevenson

FILE No.: 2001/279

DATE OF HEARING: July 20, 2001

DATE OF DECISION: August 2, 2001

DECISION

APPEARANCES:

on behalf of Dr. J. Andrew Macdonnell Inc.	J. Grant Hardwick, Esq
on behalf of the individual	Alanna Hamanishi
on behalf of the Director	Mr. Rob Turner

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Dr. J. Andrew Macdonnell Inc. ("Macdonnell") of a Determination that was issued on March 16, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Macdonnell had contravened Part 6, Section 54(2) of the *Act* in respect of the employment of Alanna Hamanishi ("Hamanishi") and ordered Macdonnell to cease contravening and to comply with the *Act* and to pay an amount of $5,026.83.

The appeal stated:

> The Delegate wrongly held that the maternity leave negated the effect of any misconduct that preceded the leave. The Delegate further wrongly concluded the employer must prove that the leave was not the cause for dismissal when the evidence was that the employee was allowed to return to the position held prior to the leave and dismissal [sic] for inadequate performance.

ISSUE

The issue in this case is whether Macdonnell has shown the decision of the Director that Hamanishi was terminated because of her pregnancy and/or pregnancy leave and/or maternity leave was wrong.

THE FACTS

No evidence was called by any party at the hearing of this appeal.

Macdonnell is the professional corporation of the dental practice of Dr. J. Andrew Macdonnell. Hamanishi worked for Macdonnell as a Certified Dental Assistant from September 3, 1997 to February 25, 2000 at a rate of $13.00 an hour. Her termination occurred less than four weeks after she returned to work following maternity and parental leaves taken under Part 6 of the *Act*.

The Record of Employment issued by Macdonnell in respect of the termination of employment, dated March 27, 2000, included the following comment relating to her dismissal:

> While the employee was on mat. leave the position she had changed to involve front desk work as well as dental assisting.

The Determination noted:

> It is not disputed that Hamanishi was returned, nominally at least, to the position she had previously held. The content and focus of the position had changed significantly during her absence or was in the process of changing, and the person who had been hired to replace Hamanishi was doing the job to Macdonnell's satisfaction.

Macdonnell took the position in response to the complaint that Hamanishi had been terminated because she was not performing satisfactorily. The Director accepted that Macdonnell had developed concerns over Hamanishi's performance, some of which had been noted before she disclosed the fact of her pregnancy, which was November, 1998. Macdonnell had recorded a number of the more serious concerns:

> September 25, 1997 - patient not frozen
> February 24, 1998 - touching needle caps with bare fingers
> January 20, 1999 - room not set up on time; patients brought back late
> March 25, 1999 - sent a fellow employee to get her lunch; patients kept waiting
> April 14, 1999 - general problems with work ethic
> April 21, 1999 - failed to have patients sign the necessary forms

Hamanishi gave Macdonnell written notice on May 14, 1999. On May 18, 1999, Macdonnell recorded another matter of complaint with Hamanishi's performance:

> May 18, 1999 - fellow employees were complaining she was not doing her job

The first two of the above notations occurred over a 16 month period. The next five were made in a four month period following Hamanishi giving notice of her pregnancy.

Macdonnell considered terminating Hamanishi, but decided he should not dismiss her before she commenced and finished her leaves. Hamanishi commenced her leaves on July 1, 1999. While Hamanishi was on leave, Macdonnell hired a replacement who was more suited to front end work. A new computer system was introduced, for which Hamanishi was not trained when she returned from leave. All employees were expected to be proficient on the computer.

During the period following her return from leaves to her termination, Macdonnell recorded several more complaints about Hamanishi's job performance:

> February 1, 2000 - making personal calls
> February 2, 2000 - making personal calls
> February 15, 2000 - not attaching suction properly, not paying attention
> February 16, 2000 - an attendance problem

The Director considered whether Macdonnell had established just cause for termination and found that he had not. The Director found no evidence that any of the concerns Macdonnell had with Hamanishi's performance were brought home to her in a way that constituted discipline. The Determination noted that job performance was not given as the reason for terminating Hamanishi on the Record of Employment. The Determination noted the following:

> . . . It [Hamanishi's firing] was because things had changed in the office, and Hamanishi was less suitable relative to another, newer employee who had replaced her.
>
> Her training on the front-end work had just commenced when she left on pregnancy/paternal leave, and [Macdonnell] did not give her a reasonable chance to get up to speed when she came back to work. She did not receive and was not offered or scheduled for any computer training. There were several notations about her in his staff book, but there were no warnings, intermediate or final, and there was no just cause.

The Determination said there was no evidence that Macdonnell considered whether Hamanishi's perceived shortcomings in qualifications for the new office organization after her return to work on February 1, 2000 may have been related to her seven month absence for pregnancy/maternal leaves. The letter of reference given to Hamanishi by Macdonnell included glowing references to her ability to learn new office procedures very quickly, to her excellent patient rapport, personality, sense of humour and cheerful disposition. Macdonnell said during the investigation that the letter was not sincere. The Determination noted that and added:

> Nevertheless, the words chosen contradict not only his uncommunicated performance concerns, but also the up-front concerns he had about her being unable to fit into and be qualified in the new office organization.

Macdonnell did not testify at the appeal hearing.

There were additional facts considered in the Determination, which have not been placed into this decision. The Determination devoted five full pages to the analysis. The Director concluded that Macdonnell had not satisfied the burden found in Section 126(4)(b) of the *Act*. None of the findings of fact were disputed, although there was some disagreement about what conclusions should be drawn from those facts.

ARGUMENT AND ANALYSIS

Mr. Hardwick, appearing on behalf of Macdonnell, argued that the Director was deflected from the issue on the complaint by a consideration of whether Macdonnell had just cause to terminate Hamanishi. He submitted that the question of just cause was irrelevant to the issue to be decided, which was whether Macdonnell had terminated Hamanishi because of her pregnancy or leave allowed under Part 6 of the *Act*. I disagree with Mr. Hardwick on that point. The absence of just cause may suggest the existence of some other cause. The weight put on the absence of just cause will depend on the surrounding facts.

Mr. Hardwick argued that even where the Director identified the correct issue and stated the considerations related to that issue in the Determination, a discussion of just cause factors coloured the overall analysis of that issue. He said, in addition, there was a general "helping" of the evidence not justified on the facts, such as where the Director stated that Hamanishi's lapses in performance "may have been a direct or indirect result of being pregnant", with the consequence that the concerns being raised by Macdonnell about those lapses were perceived as being related to her pregnancy. He also argued that too much emphasis was placed on the letter of recommendation.

Mr. Turner, appearing for the Director submitted that the issue raised by the circumstances of the complaint required a comprehensive assessment of whether Macdonnell had just cause to terminate Hamanishi. The complaint did not involve a situation where an employee was terminated during her pregnancy or while on leave allowed by the *Act*. The termination in this case occurred nearly four weeks after the employee had returned from a leave allowed by the *Act* and the position of Macdonnell was that Hamanishi was an unsatisfactory employee with a bad performance record. He stated his belief that in such circumstances, the presence of just cause for termination was relevant to whether Macdonnell had met the statutory burden. He argued that the absence of just cause, however, considered with other evidence, indicated that Hamanishi's dismissal was related to her pregnancy and/or leaves allowed under the *Act* and Macdonnell had not met the statutory burden to show it was not.

There was a comment made in the Determination that it was not reasonable that Macdonnell had not granted Hamanishi a "fresh start" with a "clean slate" when she returned from her leaves. I did not put any great significance on this comment. It is clear from the context that the Director was indicating that the notations made during February seemed harsh, *ie*, two notations for "making personal calls", considering Hamanishi had just returned to work following a seven month pregnancy/paternal leave. There was no issue raised that the Director did not consider all of the noted concerns, before and after Hamanishi's leaves, when just cause was considered and rejected.

The relevant statutory provision reads:

> *54. (2) An employer must not, because of an employee's pregnancy or leave allowed by this Part,*
>
> *(a) terminate employment, or*
>
> *(b) change a condition of employment without the employee's written consent.*

Paragraph 126(4)(b) allocates the burden in this case:

> *126. (4) The burden is on the employer to prove*
>
> . . .
>
> *(b) that an employee's pregnancy, leave allowed by this Act or court attendance as a juror is not the reason for terminating the employment or for changing a condition of employment without the employee's consent.*

In *Re Tricom Services Inc.*, BC EST #D485/98, the Tribunal stated the nature of the burden on an employer who files an appeal from a Determination issued under the above provisions:

> The combined effect of these two sections is that an employer must prove, on the balance of probabilities, that the termination of an employee was not caused, in whole or in part, by the employee's pregnancy. . . .
>
> . . .
>
> . . . Tricom bears a further burden, that of the appellant in these proceedings, to show an error in the Determination.

I am not satisfied that Macdonnell has met either of these burdens.

The Determination noted that Hamanishi was not given a reasonable opportunity to learn the new office procedures. She did not receive, nor was she scheduled for, training on the computer system that had been introduced during her absence, as other employees, including her replacement, were. The person hired to replace her was kept after Hamanishi returned. Hamanishi was terminated because office procedures had changed, the skills required for her position had changed and it was perceived that she was not capable of adapting, yet no opportunity was given her to learn the new procedures, to acquire the necessary computer skills or to adapt to the changed position.

I agree, taking into account all those facts and factors, with the conclusion in the Determination that the opportunities missed or denied set her up for failure and were clearly and directly related to her taking the leaves allowed under the *Act*. Nothing in this appeal has shown that conclusion to be wrong.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determinations dated March 16, 2001 be confirmed in the amount of $5,026.83, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal