Employment Standards TRIBUNAL

An appeal

- by -

Alwaysun Tanning Studios Inc.

- 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: John M. Orr

FILE No.: 2001/418

DATE OF HEARING: August 28, 2001

DATE OF DECISION: August 30, 2001

DECISION

APPEARANCES:

Leo Vizen	On behalf of Alwaysun Tanning Studios Inc.
John Adams	Counsel for Alwaysun Tanning Studios Inc. (by speaker phone)
Beverly Berger	On her own behalf
Joann Francis	Assistant to Beverly Berger

No one appeared on behalf of the Director

OVERVIEW

This is a continuation of an appeal by Alwaysun Tanning Studios Inc. ("Alwaysun") pursuant to section 112 of the *Employment Standards Act ("*the *Act")* from a determination dated December 12, 2000 by the Director of Employment Standards ("the Director").

The hearing of the appeal commenced on April 19, 2001 at which time Beverly Berger ("Berger") attended by telephone from the United States. At the hearing I heard that Berger was employed by Alwaysun in Victoria from 1994 to the summer of 1999. On August 20, 1999 Berger commenced pregnancy leave during which she traveled to the United States. She returned to Victoria in December 1999 for a brief visit and then returned to the United States. On March 01, 2000 Alwaysun was sold to new owners.

Later in March 2000 Berger contacted the new owners of Alwaysun about returning to work. The new owners claimed to have no knowledge of her previous employment or pregnancy leave. Berger was also advised that the position she previously held was no longer in existence.

The Director found that Berger was on "maternity" (*sic*) leave from August through to May, 2000 when it became apparent that Alwaysun had no intention of recalling her back to her former position. The Director found that Berger was entitled to 5 weeks wages as compensation for length of service that together with vacation pay and interest amounted to $3,255.67.

Alwaysun appealed on a number of grounds that I found unnecessary to enumerate in light of the conclusions that I reached at that time. I found that even a cursory review of the determination revealed that certain essential facts had not been established in order to support the conclusion of the Director's delegate.

I noted that Berger left her employment on August 20, 1999. She said that she left her job to go on pregnancy leave. "Leaves" are covered by the Part 6 of the *Act* and in particular pregnancy leave is dealt with in section 50 (as in force at the material time) as follows:

> **50**. (1) a pregnant employee who requests leave under this section is entitled to up to 18 consecutive weeks of unpaid leave
>
> (4) A request for leave must be given in writing to the employer, if the requests is made during the pregnancy, be given to the employer at least 4 weeks before the day the employee proposes to begin leave,
>
> **54.** (1) An employer must give an employee who requests leave under this Part the leave to which the employee is entitled.
>
> (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,
>
> (a) terminate employment, or
>
> (b) change a condition of employment without the employee's written consent
>
> (3) As soon as the leave ends, the employer must place the employee in the position the employee he held before taking leave under this Part, or
>
> (b) in a comparable position.

The *Act* does not refer to "maternity" leave which was the term used throughout the determination. This seems to have given rise to some confusion over the issues related to Berger's situation.

According to the legislation Berger was entitled to 18 weeks pregnancy leave. In her case this leave would have expired in December 1999. The expiration date of the leave was not addressed anywhere in the determination. I noted that if Berger did not return to work at the end of her statutory leave, or was unavailable for work because she was in the United States, then she might have been deemed to have abandoned her position. However, this was not considered either in the determination.

Berger claimed at the hearing that she believed that she was entitled to pregnancy leave that coincided with her "maternity" benefits under the Employment Insurance scheme. The Director's delegate did not address this issue and I could find no evidence in the materials to support this proposition. It was not clear on what basis the delegate found that the pregnancy leave was extended to May 2000.

The Director's delegate spent some considerable portion of the determination dealing with the sale of the business and of continuity of employment. However, on my reading of the file, the business was consistently owned by Alwaysun Tanning Studios Inc. The delegate appeared to have confused the provisions of section 97 of the *Act* with the provisions of section 56 that indicate that benefits are continuous regardless of the leave.

There were some other issues not addressed in the determination. Alwaysun had indicated that the position vacated by Berger no longer existed. This raised some legal issues not addressed by the delegate in the determination. It was not established during the original investigation whether or not the position still existed and whether or not comparable employment was offered. If the position did not exist the responsibility of the employer was not considered.

It was also not clear in the determination as to the basis for the remedy granted by the Director. The Director's delegate seems to have assumed that Berger's employment was terminated and yet there was no indication that the employment was terminated by the employer. Also, the delegate did not indicate that she was exercising the Director's discretion under section 66 by finding that a condition of employment had been substantially altered. On the other hand, she did not refer to the remedies under section 79(4) that includes the right to require the employer to hire or reinstate the person or to pay compensation instead of reinstating the person and to pay out of pocket expenses.

If the delegate had found as a fact that the employer had terminated the employment then it would be necessary for the delegate to decide whether or not the termination was "because of the employee's pregnancy". This had not been discussed in the determination.

At the original hearing it was clear that the factual basis for the determination had not been properly established. It was clear that once those facts were established a closer analysis of the legislation and legal principles was required. Accordingly I concluded, and the parties concurred, that this matter had to be referred back to the Director for reinvestigation.

My original decision was issued by the Tribunal on May 2, 2001 and on May 14th the director's delegate responded by letter. The delay since that date has been due to sharing that letter with the parties and awaiting their responses.

The May 14th letter from the delegate is confusing and contradictory. Initially it states "it appears from the evidence that the original owner was satisfied with her (*Berger*) returning in May 2000, however under the legislation the leave would have expired in December 1999". One of the fundamental issues in this case was whether or not Berger had been granted an extended pregnancy leave. It appears that the delegate has concluded that she had been granted the extended leave.

However, the delegate then submits that, in March 2000, Berger abandoned her position. The delegate then completely reverses the position taken by the Director in the determination and recommends cancellation of the determination. Ms Berger strongly rejects any suggestion that she abandoned her position in March.

Both parties stated at the continuation of this hearing that the Director's delegate had contacted neither of them since the original hearing. It appears that the Director's delegate in fact conducted no further investigation.

As stated in my previous decision there are fundamental issues that have not been addressed at any time during the course of the handling of this file. I will refer again to some of those issues but these comments are not meant to be exhaustive or in any way to fetter a full, thorough and complete investigation.

1. There was no thorough investigation into the length of pregnancy leave granted to Ms Berger. What leave had she requested? Was the request in writing? Is there a copy? Were there any company records or personal notes that might confirm the leave? When the previous president of the company died did his successor directors and/or officers of the company confirm the leave. Have they any evidence to give as to the length of the leave? Did any other employees have any knowledge about the length of the leave? Who has the onus to establish a leave longer than the statutory minimum?

2. If it is established that the company granted the extended leave then the question arises whether that the employer can rescind leave after the statutory minimum and if it was rescinded was Berger told to report to work? How could she have abandoned her position, during a valid leave, if she was not required to return to work?

3. Did the employer breach Section 54 of the *Act*? Did the employer terminate the employment? If so, was it "because of the employee's pregnancy"? Did the employer change a condition of employment because of the pregnancy? Did the employer fail to offer the employee a comparable position?

4. If the employer was in breach of section 64 did the Director make a determination under section 74(4)?

5. Did the employer simply terminate the employment, giving rise to compensation under section 63? How was this done? Did the employer ever acknowledge that Berger was an employee?

It is most unfortunate that this matter has to be returned once more to the Director for investigation. It is noted that the employer has had the expense of legal counsel on two occasions already and that on this occasion Ms Berger traveled to Victoria from Boston in the United States of America.

It may be that the Director would consider the appointment of a different delegate to investigate this matter *ab initio* for a completely fresh look at the situation, as the present delegate has found herself in a position of having reversed the position of the Director on this file without having heard from the parties or conducted any further investigation. This may well give rise to a perception of bias in any future submissions or negatively affect the credibility of future submissions.

ORDER

Pursuant to section 115 of the *Act* I order that the matter be referred back to the Director.

John M. Orr
Adjudicator
Employment Standards Tribunal