

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-

Tricom Services Inc.
("Tricom")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR PANEL:	Lorna Pawluk Ib S. Petersen Geoffrey Crampton
FILE NO:	97/861
DATES OF HEARING:	March 27, 1998; May 29, 1998 June 19, 1998 written submissions concluding July 10, 1998
DATE OF DECISION:	October 27, 1998

DECISION

APPEARANCES:

Christopher R. Forguson	On behalf of Tricom Services Inc.
Michael J. Hambrook	On behalf of Catherine Pickrell
Adele J. Adamic	On behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Tricom Services Inc. (“Tricom”), under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued on November 4, 1997 by a delegate of the Director of Employment Standards.

The Director’s delegate determined that Catherine Pickrell’s employment was terminated without just cause and for reasons relating to her pregnancy. As a result, the Determination requires Tricom to pay the sum of \$34, 346.60 to Ms. Pickrell on account of: “loss of wages” (\$23,917.80); “loss of employment” (\$5,200.00); “pain/hurt/suffering and humiliation” (\$3,000.00); “out of pocket expenses” (\$1,076.75; and interest (\$1,152.05).

Tricom’s appeal is based on three grounds: (i) Tricom did not terminate Ms. Pickrell’s employment because of her pregnancy; (ii) the Director’s delegate did not conduct a complete investigation and failed to consider certain relevant facts in making the Determination; and (iii) the compensation which Tricom is ordered to pay exceeds the jurisdiction given to the Director (or her delegate).

A hearing was held at the Tribunal’s offices over three days at the conclusion of which submissions were made by the parties.

ISSUES TO BE DECIDED

1. Did the Director’s delegate err in determining that Tricom contravened Section 54(2) of the *Act* by terminating Ms. Pickrell’s employment because of her pregnancy?
2. Did the Director’s delegate fail to conduct a proper investigation and fail to consider relevant facts in rendering the Determination?
3. Did the Director’s delegate exceed her statutory jurisdiction in ordering Tricom to pay compensation totaling \$34,346.60?

FACTS

Tricom operates three divisions, one of which (the Monitoring Division) monitors security alarm systems for retailers of various kinds of alarm and security systems (industrial, commercial, residential, medical emergency and person protection). Eva House is Tricom’s President. Douglas House is the General Manager.

Catherine Pickrell was Station Manager (monitoring Division) prior to her dismissal on September 20, 1995. She had held that position since May, 1994 and had held two previous positions having been first employed as an operator/dispatcher in September, 1991 and as a Station/Shift Supervisor in September, 1992. Her employment with Tricom was interrupted for four months (June to September, 1993). As Station Manager, she was responsible for the day-to-day administration of the monitoring station. Her salary at the time of her dismissal was \$2,600.00 per month, having been increased twice to that amount from \$2,320.00 per month effective June, 1995. Ms. Pickrell gave birth to her first child in early October, 1995.

Tricom moved its monitoring station to new premises on June 4, 1995. Central to the operation of the Monitoring Division is a computer system which provides relevant information to the operators/dispatchers whenever an alarm or signal is received at the monitoring station. Approximately 6,000 signals are received at the station in a 24 hour period. On or about September 18, 1995 Tricom's computer system malfunctioned ("crashed") and, as a result, a substantial amount of data was lost, data files were corrupted and all alarms/signals had to be monitored manually for several days. Although the computer system had malfunctioned in the past, this particular malfunction was considered to be more catastrophic for two reasons – previous malfunctions were intermittent or of short duration and the system's "back-up" files had been available and accessible to the system during the previous "crashes". During the "crash" of September, 1995 it was not possible to "re-boot" the system because the back-up files contained the wrong data. That is, subscriber data had been replaced by activity data. As a result, the monitoring station was in "manual mode" for approximately one week during September, 1995. Responsibility for ensuring that the computer system is "backed-up" properly rests with the Manager, Data Entry, at that time Leanne Farr. According to Mr. House, a computer "crash" per se does not create a catastrophe; but the "crash" in September, 1995 was a catastrophe because there were no data on the system's back-up files.

When the computer system malfunctions, the monitoring station reverts to "manual mode". That is, all signals must be identified by operators by referring to printed master files which are contained in many volumes of loose-leaf binders. Any signals which are identified as alarms by this method are then noted on a Manual Occurrence Report ("MOR"). This is then given to an operator/dispatcher to take the appropriate response action. The staff member would then cross reference the annual occurrence report to information in binders containing hard copies of the material stored in the computer. Where the signal indicated a problem (this was called an "actual") appropriate action was taken by Tricom. From time to time, the incoming signal could not be matched to information in the binder so that Tricom lacked the information necessary to proceed any further. This was referred to as a "log only". As the information would not have been submitted by the alarm company, Tricom policy determined that no further action was necessary.

According to Mr. House, Tricom's certification by the Underwriter's Laboratories of Canada confirms that the monitoring station cannot function effectively in "manual mode". That is, the number of signals received at the monitoring station cannot be verified and appropriate action taken within an acceptable time span. There is no dispute that when the monitoring station is in "manual mode", a sense of chaos prevails and there is little chance of providing an effective monitoring service due to the sheer volume of signals received by Tricom.

The Director's delegate sets out, at page 4 of the Determination, the test she applied in deciding whether or not Tricom had "just cause" to terminate Pickrell's employment:

the employer must provide evidence that reasonable standards of performance have been set and communicated to the employee, that the employee was warned clearly that her continued employment was in jeopardy if such standards were not met, that a reasonable period of time was given to the employee to meet such standards and that the employee did not meet those standards.

In applying that test to the facts which she established during her investigation, the Director's delegate arrived at the following conclusions:

The employer did provide evidence that Pickrell was given adequate assistance to meet the expectations of the employer. Although the employer states that Pickrell attended some training courses throughout 1995, all courses were taken by Pickrell prior to the employer allegedly giving her the written reprimands, and were taken during the time period that Pickrell received a substantial wage increase. Indeed, Pickrell could rightly have had the notion that the employer was well pleased with her performance. Consequently, it appears Pickrell was not on notice at the time of her attendance at the training courses that her performance was less than satisfactory to the employer. Pickrell's attendance at the training courses does not satisfy the concept that the employer must give the employee assistance in meeting their requirements...

...Although the employer alleges that they had Just Cause to terminate Pickrell's employment, the employer was not able to provide evidence that the employee was warned clearly that her continued employment was in jeopardy if the employer's standards were not met. Upon review of all of the evidence provided in this matter, and on a balance of probabilities, I find that the employer did not have Just Cause to terminate Pickrell's employment.

The Director's delegate set out the following analysis, at page 6 of the Determination, as the basis for her conclusion that Ms. Pickrell's employment was terminated "...for reasons relating to her pregnancy":

Pickrell has provided evidence that her employment was terminated for reasons relating to her pregnancy. Pickrell's statements of being excluded from management meetings for approximately 2 months prior to her termination of employment, with the evidence of the employer being very pleased with her performance several months prior to her termination, together with the evidence of Blackett of comments made by House with regard to Pickrell's pregnancy assists in substantiating Pickrell's allegation that her employment was terminated for reasons relating to her pregnancy.

As the employer has not met their burden of proof in accordance with Section 126(4)(b) of the *Act*, I find that Pickrell's employment was terminated for reason relating to her pregnancy, contrary to Section 54(2) of the *Employment Standards Act*.

Mr. House testified that he made a recommendation to Ms. House that Ms. Pickrell's employment be terminated because of her failure to manage the monitoring station effectively during the "crash" of September, 1995. He acknowledged that Ms. Pickrell was obviously pregnant at the time, but he did not know when she was due to give birth. His recollection of the relevant events was that while the monitoring station was in "a state of chaos", Ms. Pickrell was "... in an out-of-the-way location doing manual entry... a very entry-level task." He testified, further, that the staff were "supervising themselves." According to Mr. House, he was misquoted in the statements attributed to him by the HRDC Insurance Officer in the "Supplementary Record of Claim" dated October 13, 1995 in which the following reasons were given for Ms. Pickrell's dismissal:

Ms. Pickrell was terminated for two reasons: the primary one was gross incompetence, namely failing to perform a particular computer function which was part of her responsibility, causing the computer to crash, costing the employer \$100,000 to repair. A secondary reason was that she was ineffective as a manager in not supervising properly. The latter reason, her ineffectiveness was as if she was “digging a hold” towards termination, the former reason was “the last shovel of dirt”.

The “Supplementary Record of Claim” concludes with the following statement:

Had the computer crash not happened, the employer indicated claimant would not have been terminated immediately. She may have, eventually, been terminated due to ineffectiveness as a manager.

The same document records Mr. House’s denial that Ms. Pickrell’s dismissal had anything to do with her pregnancy.

In a sworn affidavit, Mr. House stated that the decision to dismiss Ms. Pickrell was made by him, Ms. House and Denise Wallace, a management consultant who was assisting Tricom at the time. He goes on to state that his support for that decision was based “...solely on her abysmal performance of her duties in the aftermath of the crash.” He also states that “...at no time did I suspect Ms. Pickrell of sabotaging the system or causing the crash in any way.” In particular, the reference to possible sabotage of the computer by a former employee refers to another employee, Leanne Farr, who was Manager, Data Entry at the time of the crash.

In a letter dated June 12, 1996 Ms. House replied to a request for information by the Director’s delegate who was investigating Ms. Pickrell’s complaint at that time. Ms. House stated:

1. Ms. Pickrell was terminated on the grounds of incompetence, and her separation from this company was in no way related to her pregnancy. We have already addressed this issue with the Human Rights Commission, who have found no grounds to proceed. We enclose a copy of our letter to them which will explain our position on the pregnancy issue.

Ms. Pickrell served in a senior management position. During a major computer crash in September 1995, when her skills were sorely needed, she chose to literally hide in a corner, leaving her staff without direction. She failed to meet reasonable deadlines, could not maintain discipline in her department, and was basically ineffectively as a Manager. For these reasons, she was terminated.

2. Although we have not been provided with the date of Ms. Pickrell’s claim, the date of your letter would suggest that she has failed to meet the requirements of Section 74(3) of the *Employment Standards Act* which requires that any complaints must be received by your office within six months of termination. It should be noted that Ms. Pickrell was also late in filing her complaint with Human Rights Commission. As unpleasant as it may sound, we truly believe that this is a frivolous action, wherein Ms. Pickrell knows full well the reason for her termination, but has decided to take these time-consuming actions out of spite and malice.

Denise Wallace testified that one of her tasks as a consultant to Tricom was to assist Catherine Pickrell by developing her management skills. According to Ms. Wallace, the summer of 1995 was a hectic time at Tricom’s monitoring station for several reasons: the move to new premises on June 4th; a large number (up to 20) of new employees were hired and trained; and Tricom had organized an “open house” at its new premises. It was in that context that the “crash” occurred in September, 1995.

Ms. Wallace testified that she knew that Ms. Pickrell “...was due to go on leave around the end of September, 1995.” Ms. Wallace referred to notes made in her Communication Planner in October, 1996

concerning the meeting she attended with Mr. House and Ms. House in August, 1995 to discuss the termination of Ms. Pickrell's employment. These notes record three causes of concern: breach of company policy; lack of management skills; and failure to respond to Manual Occurrence Reports.

Sharon Tidy was employed by Tricom in July, 1995 as Assistant Manager at a salary of \$3,000 per month. She testified that she did not work closely with Ms. Pickrell prior to her dismissal, but "shadowed her for a few days." Her current duties include "...all of Ms. Pickrell's duties plus others." Ms. Tidy testified that during the September, 1995 "crash", she found 10 to 15 "Manual Occurrence Reports" (MORs) which had not been acted on and took them to Ms. House immediately. She also testified that she followed-up on the missed MORs. Toward the end of August, 1995 Ms. Tidy informed Ms. House that she was pregnant. She was granted a maternity leave and returned to work at Tricom when her leave was completed.

Ms. House testified that the decision to dismiss Ms. Pickrell was based on a number of reasons: computer problems ("the number of times we went manual"); lack of organization and direction; and liability for work not being done. Although Ms. House made the decision to dismiss Ms. Pickrell, she did not inform her in person. The job of informing Pickrell went to Mr. House and Ms. Wallace. Under cross examination, Ms. House agreed that "with the luxury of time" she may not have decided to dismiss Ms. Pickrell.

Ms. House testified that she knew Ms. Pickrell was pregnant when she made the decision to dismiss her. However, she did not know Ms. Pickrell's due date and, in any event the decision to dismiss Ms. Pickrell was not influenced by the fact that she was pregnant. Moreover, because most of the Monitoring Division's employees are women, it is common that one or more are pregnant at any given time. She was emphatic in her evidence that Ms. Pickrell's pregnancy was not a factor in her decision to dismiss her.

Ms. House was unable to recall any details about either of the two "Employee Incident Reports" (dated August 21, 1995 and August 29, 1995). According to Ms. House, the MORs at the centre of this case were not introduced into evidence because they were shredded as part of an annual cleaning of files. In cross examination, she could recall that one of the "missed alarms" was a hold-up but, she testified, "Tricom did not get sued directly for any (missed) alarms on that day (September 19, 1995)."

In December, 1994 Ms. House presented Ms. Pickrell and other employees with a plaque. Ms. Pickrell received the "Dedicated Manager Award." Ms. House considered the plaque to be "an encouragement" while Mr. House considered it to be "a joke".

Under cross examination, Ms. House either could not recall or gave unclear testimony on a number of key events/decisions. For example:

- She could not recall any discussion with Ms. Pickrell concerning a change in her method of compensation from a monthly salary to an hourly wage;
- She could not recall if she asked Ms. Pickrell to prepare a record of the number of doctor's visits she made during her pregnancy;
- She could not recall discussing with Ms. Pickrell the possibility of changing from full time to part-time status during her pregnancy;

- With respect to Ms. Pickrell's planned pregnancy leave, Ms. House testified "...nothing was written down. If she told me, I don't remember"; and
- She could not recall if a "pregnancy pool" was organized around Ms. Pickrell's due date.

Ms. House testified that when she hired Sharon Tidy in July, 1995 she did so without knowing when Ms. Pickrell intended to begin her pregnancy leave. Furthermore, Ms. Tidy was employed to assist Ms. Pickrell and not to replace her. Ms. Tidy's starting salary of \$3,000/month was established by Ms. House.

Tricom's Controller, Ron Harding, testified that he was responsible for implementing the phased-in general wage increase for all employees during June and July, 1995. He also testified that the salary increase given to Ms. Pickrell differed from that given to other management personnel because her compensation did not include a company car or automobile allowance. Mr. Harding also testified that he did not order the business cards for Sharon Tidy prior to Ms. Pickrell's employment being terminated by Tricom.

Gail Blackett was employed in the Monitoring Division from July 1994 to July 1995 as a n operator/dispatcher and then as a shift supervisor from August 1995 to November 1995. She described Ms. Pickrell as an excellent manager and as a "team leader" who had earned loyalty and respect of all the employees. Ms. Blackett testified candidly that she thought highly of Ms. House during her first year of employment but her opinion had changed thereafter. She resigned her employment because she was "...uncomfortable with all the hirings and firings and treatment of staff."

Ms. Blackett described the procedures which were adopted during the computer "crash" – senior operators or supervisors "read the receivers" while junior operators looked up information in the mailer-files and took necessary follow-up action. In essence, her testimony confirmed that given by Pickrell and contradicted that given by Mr. House.

Responsibility for dealing with "missed alarms" rests with the most senior person on duty at the time – typically a shift supervisor or the station manager.

According to Ms. Blackett, Catherine Pickrell was not "hiding in a corner" during the September 1995 crash. Rather, she was "reading signals" in the receiver room along with Randy and Val. Also, despite her advanced state of pregnancy and gestational diabetes, she worked many extra hours of work. During July and August, 1995 Ms. Pickrell managed the monitoring station without any supervisors because they were undergoing training at that time.

According to Ms. Blackett, it was "common knowledge" that Ms. Pickrell was suspected by her employer of having been responsible for causing the computer "crash" in September, 1995. She formed that opinion based on a conversation which she had with Ms. House, in which Ms. Pickrell's name was linked with corrupting data files. In the same conversation, she testified, Ms. House spoke of an on-going investigation, a law suit and Catherine Pickrell's responsibility for the "crash".

Ms. Blackett had a clear recollection of comments made by Eva House concerning Pickrell's pregnancy to the effect that she did not think that Pickrell would come back to work after her pregnancy leave and wondered how, as a single parent, she would manage after her baby was born.

Catherine Pickrell testified that she informed Eva House in writing (via Communication Planner) that her “due date” was October 14, 1995 and that she wanted to begin her pregnancy leave on September 29, 1995 – the last day of the payroll period in September. She could recall giving that information to Ms. House after she had completed the first trimester of her pregnancy – the state of pregnancy when complications are most likely to occur. She was certain that she gave this information to Ms. House before Tricom moved to its new premises in early June, 1995. Ms. Pickrell also testified that shortly thereafter, her duties were changed – she was no longer responsible for hiring and training new employees. She was also “excluded” from the daily operations meetings with Ms. House, Mr. House and Ms. Wallace in which she had participated previously. According to Ms. Pickrell’s testimony, she asked Ms. House many times about Tricom’s plans for replacing her while she would be on pregnancy leave and received no answers. When Sharon Tidy was employed, she (Pickrell) was not aware of the fact until Ms. Tidy arrived at the monitoring station on her first day of work.

In late August, 1995 Ms. Pickrell found a box of business cards, with a sample of its contents stapled to the outside, which showed Sharon Tidy with the title of Station Manager.

Prior to receiving the two Employee Incident Reports in August, 1995 Ms. Pickrell testified that she had never been reprimanded previously about her managerial skills.

Ms. Pickrell testified that she spent up to 5 hours a day “reading signals” in the receiver room during the “crash” of September, 1995 and that she worked a total of 12 to 13 hours per day. She worked those hours despite her advanced state of pregnancy and gestational diabetes and often ate snacks without taking a break from working. She felt that was necessary, she testified, because many of the operators had been hired in the preceding two or three months and therefore did not have sufficient experience or skill to be able to “read” signals in the receiver room. She also spent time working with other employees who were assigned to data entry tasks so that when the computer malfunction was repaired, a history of incidents could be reported to clients. This data entry activity was given a high priority and every available employee was assigned to this task because the alarm companies want the information as soon as possible after the system is up. An additional factor to be considered was that operators/dispatchers who were hired after June, 1995 were not trained how to operate the monitoring station in “manual mode”.

Ms. Pickrell was certain that the approximately 20 MORs which remained on her desk on September 19, 1995 were “log only” MORs as distinct from “missed alarms.” The only remaining action required for those MORs, she testified, was entering the data into the computer as she had previously informed Ms. House about the MORs.

Jan French was employed as an operator/dispatcher and relief supervisor between August, 1994 and May, 1997 when she resigned her employment for health reasons. She testified that Sharon Tidy issued a memo to inform staff that Catherine Pickrell would begin her pregnancy leave on September 29, 1995. However, according to Ms. French, “...everyone knew the date anyway.” She also testified that Val Finlay (Data Supervisor) was organizing a “pregnancy pool” and that she (French) suggested putting a chart on the wall in the media room at the monitoring station. Ms. Finlay agreed it was a good idea but, a few days later, informed Ms. French that the pool was cancelled because “...Eva House did not want it to happen.”

Ms. French also testified that she attended a staff meeting at the White Spot Restaurant in May, 1995. She recalled clearly that Catherine Pickrell attended that meeting during which Ms. House advised all staff that a general wage increase was to be implemented in two stages during June and July 1995. There

was also a discussion about the impending relocation to the new monitoring station. She was aware that Ms. Pickrell was pregnant for about 5 or 6 months before she was to begin her pregnancy leave.

Ms. French was on vacation when the September, 1995 “crash” occurred and returned to work before the end of her scheduled vacation leave. Upon her return, she was informed by another employee, Fiona Durham, that Ms. Pickrell had been dismissed and that she (Pickrell) had caused the “crash”. Ms. Durham went on to explain to Ms. French that in announcing Catherine Pickrell’s dismissal, Mr. House had said that he believed she had sabotaged the system.

ANALYSIS

On behalf of Tricom, it is argued that the investigation by the Director was faulty. Key players including Sharon Tidy, Doug House and Denise Wallace were not contacted whereas two former employees were. It was also submitted that the Director failed to pursue its investigation in a timely and prompt manner. The Tribunal was urged to consider the decision in *Cineplex Odeon Corp.* (BCEST #D577/97) as an example of circumstances less extreme than this case where the employer had been denied a fair hearing by the Director. In *Cineplex*, the matter was sent back to the Director for reinvestigation but in this case the prejudice to Tricom cannot be undone. Tricom submits that the merits of its case must be considered in light of the “extreme adverse effects” of the manner in which this investigation was carried out.

Tricom submits that Doug House observed Pickrell sitting at a cubicle performing manual entry tasks and thought this was an inappropriate use of her time. While such a view may have been “unwarranted”, it was nonetheless communicated by Mr. House to Ms. House. Mr. House also admitted that Pickrell may have caused the initial computer problem, but the lack of back up files created the significant problem. Leanne Farr was responsible for back up and thus caused the crash to be as serious as it was. The fact that Pickrell may have caused the initial computer problem was not the reason she was fired.

Tricom also submits that the “missed alarms” amount to a culminating incident but the documentary evidence of these incidents is missing. Sharon Tidy and Eva House testified that there were at least some actual alarms in the MORs in question. Because the Director allowed an entire year to elapse with no contact with Tricom or follow up, the Tribunal can now only go by the memory of the witnesses. It is also argued that “the very fact that the complainant was terminated so late in her pregnancy [means that], Tricom must have had a very good reason to fire her.” It is further argued that:

If the Director had informed Tricom that it was taking this complaint seriously; by contacting Tricom witnesses, by contacting Tricom at all, Tricom probably would have produced the missed alarm reports and said “here, this is why we fired her”. However, since so much time had passed we have the evidence of the complainant to the effect that she did nothing wrong with respect to missed alarms, we have the evidence from Sharon Tidy and Eva House to the effect that the complaint did conceal missed alarms from Tricom, and we have the very suspicious fact that the complainant was fired when she was 8 ½ months pregnant. It is submitted that Tricom would not only have to be evil and callous to fire the complainant when it did, but overwhelmingly stupid – unless Tricom had a legitimate reason to fire her.

It was submitted that the reasons for Pickrell’s termination had nothing to do with her pregnancy and that the overwhelming weight of the evidence shows that Eva House “is and was an employer who goes beyond all statutory requirements to support and accommodate women in her workplace and their choice to have children.”

As for damages, the Determination states that the complainant is entitled to net wage loss from the date of the breach to the date of the decision. It is submitted that this is too long as it effectively makes Tricom a guarantor of the complainant's wages: "Two years is too long"; there must be a "reasonable point" where the employer is no longer liable to make the complainant whole. Tricom also maintains that it was not properly held responsible for Pickrell's retraining expenses. Pickrell sought retraining in another field without taking reasonable steps to determine if this was necessary. Pickrell did not request a letter of reference in spite of being told by Mr. House that a positive reference would be provided. There is also insufficient evidence that Pickrell could not find employment in the security field. The article in "Tidbits" was the only evidence that the industry could have known that Pickrell was suspected of purposefully corrupting the files.

Two months salary for "Loss of Continued Employment" is duplication of compensation as Pickrell was "made whole" by the other heads of compensation. If Pickrell had been terminated without just cause, she would only have been entitled to two weeks wages. Nor is there jurisdiction in the *Act* to award a sum for "Pain/Hurt/Suffering and Humiliation". In support of this argument, Tricom cited *Hytek Air-Conditioning Inc.* (BCEST #D201/98).

On behalf of Pickrell, Mr. Hambrook argued that Tricom lacked just cause to terminate Pickrell's employment and that the reasons for the termination related to her pregnancy. In May, 1995 Pickrell received a card from Eva House expressing appreciation for Pickrell's work. The card described Pickrell as a "team player" and as showing "great potential for growth with the company". In June and July, 1995 Pickrell received substantial wage increases. At that point she had been in the Station Manager position for approximately one year.

At the beginning of June, 1995 Pickrell announced she was pregnant and would be leaving on maternity leave at the end of September. At that point, management's attitude towards her changed: Ms. House wanted to cut back Pickrell's hours to part-time from full-time; suddenly and without explanation, Pickrell was no longer responsible for hiring and training all new operators; and she was excluded from daily meetings about company policies and procedures. Ms. House wanted to change Pickrell's remuneration from salary to wages because of the fear that Pickrell would take off too much time from work for doctor's appointments and pregnancy related matters. (This was not brought up again once time sheets for July and August showed appointments were made to minimize disruptions to work). Ms. House repeatedly failed to respond to Pickrell's questions about her replacement. "With no warning" Sharon Tidy appeared and Pickrell found business cards with Tidy's name and title of "Station Manager". Doug House lost his temper with Pickrell in front of other staff "because he was unable to locate his electric drill." When Pickrell spoke to Wallace about it, Wallace was unsympathetic. During the computer crash, Pickrell, who was 8 ½ months pregnant, worked long hours and took minimal breaks. The day of Pickrell's termination she was escorted out of the building and told to wait "on the side of the road for a ride" even though it was known that she carpooled with two other employees.

Tricom says that Pickrell was fired because of "20 missed alarms" but the actual MORs have gone missing. These MORs were not missed but rather not acted upon as they did not require a response. According to company policy, no action was needed if the information provided by the Alarm company was incomplete. Every time Tricom "went manual" there were alarms that required no action and no was fired for this. These were not missed alarms – they had been acted upon and it was learned that no action was required since there was no information on file. Pickrell had gone through the 20 manual occurrence reports to ensure that all necessary steps had been taken and on September 19, 1995 toward the end of her shift she was going through the reports for a second time. As she had already worked a 12-hour day, she continued to double check the remaining reports the next day.

Mr. Hambrook also argued that the computer crash provided Tricom with a reason to fire Pickrell prior to commencement of her maternity leave. The crash was the reason given to the Insurance Officer of UIC (HRDC) and name in Denise Wallace's notes. The 20 non responded alarms and Pickrell's management skills were not given as the reason for the termination. The 20 missed alarms were not mentioned to UIC. "Tidbits" and "Monitor" stated that an ex-employee had sabotaged the computer; staff was told that legal action was being taken against Pickrell. The 20 missed alarms were not mentioned. Finally, the Tribunal is asked to uphold the damages as calculated in the Determination.

The Director submits that, as the appellant, Tricom has not discharged its burden under section 126(4)(b) to prove that Pickrell's employment was not terminated for reasons relating to her pregnancy or leave. The evidence shows that Tricom's behaviour changed towards Pickrell once Eva House knew of the pregnancy. Tricom has not shown just cause for Pickrell's termination and has failed to produce documentation supporting its actions.

The Director maintains that Ms. House built a successful business and had just moved to a new building when Pickrell announced her pregnancy. This came at a bad time for House who needed a fully functioning Station Manager. After the announcement, there was a change in attitude towards Pickrell. It is also argued that this is not a case about "House's feelings about maternity or working women in general" but rather about the relationship between House and her Station Manager. House depended on Pickrell but her pregnancy and maternity leave made this "dependence difficult to impossible." This dependence culminated in the crash and Houses' inability to cope "culminated in the firing of Pickrell".

With respect to the obligation under Section 77 of the *Act* to give the parties an opportunity to respond, Tricom's evidence does not suggest that the "officer's investigation came to a patently unreasonable result". It was noted that submissions dated December 15, 1997 on behalf of Tricom admitted that the evidence did not establish just cause and there is no significant and serious new evidence that establishes just cause. Tricom's evidence was inconsistent, according to the Director:

One moment Pickrell was "the cause of the crash" [Doug House in his comments to HRDC], the next moment she was an inefficient manager, and finally perhaps she missed/couldn't find, couldn't/didn't act on, 15 to 20 actual/not actual, liability/no liability alarms, which may have been lost/destroyed because they didn't seem important then but seem very important now.

As for quantum of damages, it is submitted that section 79(4) of the *Act* contains the most remedial power under the *Act* and permits the complainant to be "made whole". The section gives the Director the means to put an employee as close as possible to the position she would have been in if the contravention had not taken place.

It is useful, at this juncture, to review the relevant statutory provisions. Section 54(2) of the *Act* outlines an employer's obligations in the case of a pregnant employee:

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

Thus, Section 54(2) prohibits an employer from terminating an employee because of her pregnancy or because of parental, maternity or other leave under the *Act*. This section essentially prohibits an employer from using any grounds for termination which relate to the pregnancy. In other words, if the pregnancy plays any role in the termination, this section is contravened.

Section 126(4)(b) of the *Act* describes an employer's evidentiary obligation and onus where a pregnant employee has been terminated:

126(4) the burden is on the employer to prove ...

- (b) that an employee's pregnancy, a 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.

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. Precisely what this means will vary according to the circumstances, there is no evidentiary burden placed on the employee by this section.

The Director found that Tricom breached sections 54(2) and 126(4)(b) of the *Act* when it terminated Pickrell's employment. Tricom had told the Director's delegate that Pickrell's employment was terminated because she was incompetent. The Director found that Tricom had failed to discharge its onus to establish just cause. The Director also concluded that Pickrell had been fired because of her pregnancy. Pickrell's exclusion from management meetings for approximately 2 months prior to her termination and the fact that Tricom had expressed its satisfaction with her job performance several months earlier, together with the evidence of Gail Blackett about statements made by Eva House, led the Director to conclude that Pickrell's employment had been terminated for reasons related to the pregnancy.

It is then up to Tricom to show that the pregnancy played no role in the decision to terminate Pickrell's employment. Tricom bears a further burden, that of the appellant in these proceedings, to show an error in the Determination. After considering the evidence in this case, it is our conclusion that the appellant, Tricom, has not discharged its onus.

Initially, Tricom management left the impression with Pickrell's co-workers that she had been fired because she had caused the crash. This was clear from the evidence given by Blackett, French and Pickrell, herself. In testimony before the Tribunal, Doug House flatly denied that Tricom thought Pickrell caused the crash. He also denied that the article in "Tidbits" suggested that Pickrell had been the culprit, because backup was Leanne Farr's responsibility. Because the lack of backup data rather than the crash was the major problem, he testified it was really Farr and not Pickrell that was the source of Tricom's difficulties.

We were not convinced by Mr. House's testimony. We found his credibility to be somewhat questionable and found that his version of events incompatible with other reliable evidence. As pointed out by Counsel for Pickrell, Mr. House consistently denied responsibility for decision making at Tricom and insisted that he deferred to Ms. House on essential questions. But, other evidence shows that he had substantial input into decisions to hire, fire and promote; and in matters relating to company policies and procedures. He was frequently a spokesperson for the company in dealings with the media and to Unemployment Insurance, and had the authority to write articles such as "Computer Sabotage?" in "Tidbits" in November of 1995. And as pointed out by Counsel for the Director, Mr. House testified that anyone could, after a couple of hours of training, read alarms coming in when other witnesses on this point said it would be a very long time before someone could deal effectively with the variety of signals coming through on the receivers when the station was in manual mode.

On the question of whether Pickrell was dismissed because of her role in the crash, we were particularly influenced by the testimony of W. Scott. We found her to be a straightforward witness with no

involvement with either party, except through her responsibilities in administering the Employment Insurance Act. She had no reason to not be completely straightforward with the Tribunal. She testified that Doug House told her that Pickrell had caused the crash and thus had to be terminated. While she did not have independent recollection of the conversation, she testified that it was her practice to take notes of all grounds put forth by the employer to justify a termination. Her testimony convinced us that Tricom initially identified Pickrell's role in the crash as the reason for her termination. While, for reasons that we will go into later, we do not think that this was the reason for Pickrell's termination, we are nevertheless prepared to accept Ms Scott's testimony that the crash was the reason initially identified by Tricom, and that missed alarms or management competence were not factors in the decision to terminate Pickrell.

Tricom told the Director's delegate that Pickrell had been terminated because of incompetence. But the delegate concluded, correctly in our view, that this allegation could not be substantiated. Pickrell had every reason to believe that her job performance was satisfactory: she had just received a substantial pay increase and had been told by the company's president that she had a bright future with the company. The two Employee Incident Reports (dated August 21, 1995 and August 29, 1995) are inadequate to show that Pickrell's performance justified termination and Pickrell had never been advised that her employment was in jeopardy if she did not improve her work performance.

Tricom subsequently put forth yet a third new ground for terminating Pickrell's employment. This related to missed alarm signals when the station was in manual mode. We find that this point did not play any role in the decision to fire Pickrell. The evidence presented through Tricom's witnesses failed to convince us that the 20 manual occurrence reports contained any actual missed alarms. On this point we consistently prefer the evidence and testimony of Pickrell, Blackett and French over that of Tricom's witnesses. None of the Tricom witnesses could identify any of the MORs that led to a missed alarm. In particular, the testimony of Eva House did not convince us that Pickrell had been fired for missed alarms as her testimony on this, and other topics, was evasive, unresponsive and rambling. Equally troubling was her insistence that Sharon Tidy was hired to assist Pickrell and not replace her, in light of Tidy's testimony that she spent almost no time with Pickrell and other evidence indicating that Tidy and not Pickrell met with Ms. House and other members of management behind closed doors.

In contrast, Pickrell testified that she had been through those sheets and had not identified any of them as needing further follow up. We accept her testimony that it was Tricom's policy to disregard alarms where the alarm company had failed in its obligation to provide basic information about the particular customer and that she was just following company policy when not taking any further action.

Much was made about the length of time it took the Director's delegate to complete the investigation. Because of the delay, it was argued, Tricom was irreparably prejudiced because it destroyed the documentary evidence necessary to establish the missed alarms. We do not accept this argument. First, as noted above, we are not convinced that these missed reports played any role in Pickrell's termination. We come to this conclusion independently of whether the MORs could have been produced in evidence before us. They were not identified in "Tidbits" nor in the conversation with Ms. Scott from UIC as being a problem. Those events took place very soon after the termination and to that extent were a more accurate reflection of events as they actually took place than later evidence. It is difficult to see how Tricom could later successfully rely on this ground. More significant is the fact that even though Tricom knew Pickrell had filed a complaint and that the matter was being investigated by the Director, key evidence was nonetheless destroyed. While we agree that this investigation took an inordinate period of time, Tricom cannot take advantage of this delay to now say that it would have been able to prove its case if the investigation had proceeded more quickly. Tricom knew that it was under investigation and instead

of assuming that nothing would be done it should have taken the initiative and contacted the Branch before destroying any key evidence.

We conclude that Tricom did not produce any credible evidence as an explanation for the termination of Pickrell's employment. Tricom directed considerable effort at that issue. It is, in our view, clear that Tricom did not have just cause for the termination. In any event, just cause is not the issue under Section 54: the issue is, as we set out above, whether Tricom terminated Pickrell's employment, in whole or in part, for reasons related to pregnancy. Most significant is the fact that management's attitude towards Pickrell changed after she announced her pregnancy. There was an attempt to change her hours and manner of remuneration from salary to wages and she was not involved in the selection or training of the person, Sharon Tidy, being hired to temporarily replace her during her leave. The fact that Tidy's salary was substantially higher than Pickrell's, when combined with the business cards identifying Tidy as the Station Manager, leads us to believe that Tricom had hired Pickrell's permanent replacement. On the question of when Ms. Tidy's business cards were delivered, we prefer Ms. Pickrell's testimony over that of Mr. Harding. Moreover, Tidy was hired after Pickrell had announced her pregnancy. We were also influenced by Blackett's testimony that Eva House had made disparaging comments about Pickrell's ability to cope with work once she had the baby. Finally, we agree with counsel for the Director that this is not a case about House's feelings about maternity or working women in general, but rather about the relationship of the company president to this pregnant station manager.

For all these reasons, we find that Tricom contravened the provisions of Section 54 of the *Act*.

Finally, with respect to the quantum of damages, we note that the provisions of Section 79(4) give the Director various powers where an employer has contravened Part 6 of the *Act*:

- 79(4) In addition, if satisfied that an employer has contravened a requirement of section 8 or Part 6, the director may require the employer to do one or more of the following:
- (a) hire a person and pay the person any wages lost because of the contravention;
 - (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
 - (c) pay a person compensation instead of reinstating the person in employment;
 - (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

In our opinion, Section 79(4) is perhaps the most restorative remedial provision in the *Act*, giving the Director broad jurisdiction to place the terminated employee in the same position he or she would have been in but for the wrongful action of the employer. As a remedial provision, it calls for a liberal and broad interpretation: *Machtiger v. Hoj Industries Ltd. (1992) 91 D.L. R. (4th) 491 (S.C.C.)*.

In our view, the remedies under the *Act* must be fair, compensatory and promote compliance. These principles are reflected in the purposes of the *Act* set out in Section 2 and the *Act* itself. With respect to compensation, the general principle of damages must be to put the individual in the same position the individual would have been in but for the breach of the statutory obligation. Section 79(4) permits a remedy not available at common law. We are not in any way limited to, for example, such damages as might have been awarded in an action for wrongful dismissal. In our view, the statutory remedy should not be narrowly constructed and we have the power to fashion a remedy that is fair, compensatory and promotes compliance with the *Act*. In short, the remedy depends on the extent of the injury suffered because of the breach. Some of the factors we have considered are those relied on by the Tribunal in a

recent decision *Afaga Beauty Service Ltd.* (BCEST #D318/97): Length of employment with the employer; the time needed to find alternative employment; mitigation efforts undertaken; other earnings during the period of unemployment; projected earnings from previous employment; etc. The Tribunal is not limited to considering only those factors as which factors are appropriate will depend on the specific circumstances of each appeal. We do not agree with the Director that Ms. Pickrell's entitlement to compensation extends to the date of the Determination (November 4, 1997). As noted above, there was an inordinate and unexplained delay between the date of Ms. Pickrell's complaint and the date of the Determination. We consider that compensation for "loss of employment" is included in the total amount of compensation to which Ms. Pickrell is entitled when we adopt and apply the various factors enunciated above and in *Afaga Beauty Service Ltd.* (BCEST #D318/97).

For the same reasons given by the Tribunal in *HYTEK Air-Conditioning*, (BCEST #D201/98) we find that the Director lacks the jurisdiction to grant a remedy for the emotions suffered by an individual dismissed contrary to the *Act*. It was reasonable of Pickrell to be greatly distressed at her situation, being about to deliver a child and having no visible means of support. We agree with the view expressed in (*Capable Enterprises Ltd.* (BCEST #D033/98)) there are no provisions in the *Act* which entitle an employee to payment for "pain/hurt/suffering and humiliation". However justified the payment may be, there must be jurisdiction in the *Act* and for the reason outlined in *HYTEK*, we find that there is no such jurisdiction. Thus, this portion of the Determination is cancelled.

With respect to the training expenses, we disagree that this was an unreasonable course of action for Pickrell to take. After Tricom had identified her as having sabotaged their computer, it was reasonable for Pickrell to assume that she would never get work in the security field again. Moreover, the offer of a positive reference must have seemed hollow after the way in which the company had acted in hiring her replacement and in summarily dismissing her for bad management practices only two months after she had been praised as an asset to the company.

In summary, we find that:

- i) the Director did not err in determining that Tricom contravened Section 54(2) of the *Act* by terminating Ms. Pickrell's employment because of her pregnancy; and
- ii) the Director did not fail to conduct a proper investigation and did not fail to consider relevant facts in making the Determination.

However, those findings do not speak to the issue of quantum. Section 79(4) entitles an employee to "compensation instead of reinstating the person in employment" and "compensation for reasonable and actual out of pocket expenses..." In all of the circumstances of this appeal, we would vary the Determination in respect of Ms. Pickrell's entitlement under Section 79 of the *Act*, as follows:

<i>Compensation instead of reinstatement:</i>	\$
In lieu of wages for the period September 21 to 29, 1995:	873.60
In lieu of wages for the period April 1 to September 5, 1996:	13,894.40
Difference in earnings for the period September 6 to September 30, 1996:	663.00
Difference in earning for the period October 1, 1996 to March 31, 1997:	4,071.60
<i>Out of pocket expenses:</i>	<u>1,076.75</u>
Sub-total	\$20,579.35

In addition, Ms. Pickrell is entitled to interest on this amount according to the provisions of Section 88 of the *Act*.

ORDER

We order, under Section 115 of the *Act*, that the Determination be varied as set out above in respect of the amount of compensation to which Ms. Pickrell is entitled under Section 79(4) of the *Act*.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal

Ib S. Petersen
Adjudicator
Employment Standards Tribunal

Geoffrey Crampton, Chair
Employment Standards Tribunal