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-

Cretan Enterprises Ltd.
operating as "Golphis Steak & Lobster"

("Cretan")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	1999/429
DATE OF HEARING:	October 15th, 1999
DATE OF DECISION:	November 16th, 1999

DECISION

APPEARANCES

Athanashe Karamanoli, Officer & Director & Golphis Caramanoli	for Cretan Enterprises Ltd.
Nicole Panteluk	on her own behalf
Diane H. MacLean, I.R.O.	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Cretan Enterprises Ltd., operating as "Golphis Steak & Lobster" ("Cretan" or the "employer"), pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 16th, 1999 under file number ER 011-277 (the "Determination"). The Director's delegate determined that Cretan owed its former employee, Nicole Panteluk ("Panteluk"), the sum of $8,190.55 on account of unpaid wages, 3 weeks' wages as compensation for length of service (section 63), compensation payable pursuant to section 79(4) by reason of the employer's refusal to grant Panteluk pregnancy leave, concomitant vacation pay (section 58) and interest (section 88).

The employer's appeal was heard at the Tribunal's offices in Vancouver; the employer was represented by its current president/director and by a former shareholder, although neither testified before me. Rather, the employer's relied solely on a written submission prepared by its legal counsel and dated July 8th, 1999. Ms. Panteluk testified and made submissions on her own behalf; the Director's delegate did not present any evidence but did make some brief submissions. The Director's position is more fully set out in a written submission, dated July 26th, 1999 and prepared by her legal counsel.

BACKGROUND FACTS

Cretan operates a restaurant in New Westminster; Panteluk worked as a server at the restaurant from 1993 until her last day of work, December 12th, 1996. According to Panteluk, during the summer of 1996 she became pregnant and shortly thereafter informed her employer; her intention was to work through her pregnancy until February 1997 (at which point she would have been about 7 1/2 months pregnant) and then take pregnancy leave. At no point did she make a formal written request for pregnancy leave in accordance with the provisions of section 54(4) of the *Act*.

In any event, her pregnancy proved to be a difficult one and, thus, she was not able to work through to February 1997 as she had originally planned. In accordance with her physician's advice, her last day of work was December 12th, 1996. She returned to her employer's premises on December 23rd to pick up her "Record of Employment" ("ROE") which she required in order to claim certain federal insurance

benefits. The ROE indicated that Panteluk had "quit" (code "E" on the form) whereas Panteluk maintained that the proper code was "F" (pregnancy). After some discussion, the employer changed the code from "E" to "F". At this point, Panteluk says that she informed Cretan's president, Mr. Karamanoli, that she would, in due course--no specific date was set--be returning to work at which point Mr. Karamanoli stated:

> "...it was his choice whether or not I would be allowed to return. I tried to point out to him that legally he could not terminated my employment simply because I was taking a leave of absence (maternity leave). I told him he had to hold my position or a similar one for when I decided to return. He disagreed and stated I could not return because he didn't want me to whether I like it or not. I decided not to argue with him any further as it was obvious he wasn't willing to rationally come to an agreement. I accepted my ROE papers and left. I have had no further contact with my employer since that time." (Statement of Nicole Panteluk filed with the Employment Standards Branch on May 19th, 1999)

THE DETERMINATION

A number of issues are addressed in the Determination; the principal issues and findings are summarized below.

Timeliness of the complaint

The employer asserted (and apparently still asserts) that Panteluk's complaint was filed outside the statutory time limit--however, that is simply not so. Panteluk's employment ended on, at the earliest, December 12th, 1996 (as will be seen, I fix her termination date as December 23rd, 1996). Her written complaint was filed with the Employment Standards Branch on June 11th, 1997. Thus, even assuming the earlier termination date, her complaint was within, but only just, the 6-month time limit set out in section 74(3) of the *Act*]. Accordingly, there is no basis to set aside the Determination on this ground.

Meal Breaks and Statutory Holiday Pay

The delegate found that during the summer of 1996 Panteluk "was not always paid for her meal breaks, although she was on call". Further, the delegate found that Panteluk was not "properly paid for all of her statutory holidays" (see Determination, page 5). The delegate awarded Panteluk $486.73 on these two accounts. There being *absolutely no contradictory evidence* before me relating to these two matters, this aspect of the Determination must be confirmed.

Compensation for Denial of Pregnancy Leave

The delegate held that:

> "...it is clear that the employer knew that the complainant was taking pregnancy leave and that she wanted to return to work. Therefore, the employer had notice of the

> pregnancy leave. The complainant is entitled to the protection of the Act, although she did not give the employer a written request for leave." (see Determination, page 6)

The delegate, having found that the employer breached one or both of subsections 54(2) and (3) of the *Act*, was of the view that a reinstatement order [see section 79(4)(b)] was not appropriate in all of the circumstances and, accordingly, made a compensation order under section 79(4)(c) in the amount of 20 weeks' wages ($4,130) plus an additional allowance for lost gratuities ($2,000).

Compensation for length of service

In addition to the compensation awarded pursuant to section 79(4)(c) of the *Act*, the delegate also awarded Ms. Panteluk a further 3 weeks' wages as compensation for length of service. The delegate's reasoning on this point is set out below:

> "The complainant, in addition to lost wages, has lost her expectation of continued employment. She is, at the least, entitled to the minimum amount of compensation for length of service available under section 63 of the Act. The complainant worked for the employer from June of 1993; she is entitled to three weeks' wages as compensation for length of service. (Note: Even though the employer refers to himself as the new owner, there was only a change in shareholders and not in the company itself. Therefore her employment was continuous for over three years. Even if there had been a change in ownership, the successorship provisions of the Act would apply.) There is no requirement to mitigate in the case of compensation for length of service."

ISSUES ON APPEAL

Counsel for the employer raised a number of issues in his July 8th, 1999 submission to the Tribunal. In particular, counsel submits that:

i) the original complaint was statute-barred;

ii) the employer did not deny Panteluk pregnancy leave or otherwise terminate her employment;

iii) the award with respect to meal breaks should be set aside;

iv) the Director should not have investigated Panteluk's complaint since she had also filed a complaint under the B.C. *Human Rights Code;* and

v) the delegate was biased.

I have already addressed, and rejected, the first and third grounds of appeal noted above. For the reasons set out in the Determination, I find no merit in the fourth ground. Finally, there is absolutely no evidence before me to raise even a *prima facie* case of bias; thus, the fifth ground is similarly without

merit. Accordingly, I shall now address the second ground, namely, the awards made pursuant to sections 63 and 79(4) of the *Act*.

ANALYSIS

Is Panteluk entitled to Compensation for Denial of Pregnancy Leave?

A pregnant employee may request an unpaid leave pursuant to section 50(4) of the *Act*. A request for pregnancy leave "must be given in writing to the employer...at least 4 weeks before the day the employee proposes to begin leave". It is clear that Panteluk did not give written notice as required by the section. On the other hand, both the B.C. Supreme Court (*Director of Employment Standards v. Stanley Blake,* Vancouver Registry No. F853491, 1987) and the Tribunal (*Capable Enterprises Ltd.*, B.C.E.S.T. Decision No. D336/98) have held that so long as the employer is made aware of the request for leave, the lack of formal written notice may be overlooked.

However, as I conceive this case, the lack of written notice is irrelevant. Section 54(2) states that:

> "*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."
>
> (my *italics*)

Regardless of whether or not pregnancy leave is requested, an employer cannot terminate an employee because of her pregnancy. Further, in the event of termination, by reason of section 126(4) of the *Act*, the employer bears the burden of proving that the pregnancy was not the reason for termination. The employer asserts that it did not terminate Ms. Panteluk. However, the evidence overwhelmingly suggests otherwise.

Ms. Panteluk did not quit her employment on December 12th, 1996; she very clearly indicated to the employer that she was merely taking pregnancy leave. An employee on leave remains an employee (see section 1 definition of "employee") and the employment relationship is not severed. The employer's principal himself recognized that Ms. Panteluk was not "quitting" when he agreed, on December 23rd, to change the ROE code from "E" (quit) to "F" (pregnancy). Subsequent to that action, however (and this evidence is uncontradicted), the employer's principal stated, in no uncertain terms, that he was not prepared to continue Panteluk's employment after her pregnancy leave ended.

In my view, since Panteluk had a statutory right to return to work [see section 54(3)], the employer's refusal to recognize that right amounts, in law, to a termination. Whether one characterizes the employer's action as an express dismissal or a constructive dismissal (see section 66), the fact remains that the employer terminated Ms. Panteluk solely because of her pregnancy--a breach of section 54(2)(a).

Given the employer's breach of section 54(2)(a), a compensation order was properly made under section 79(4). In general, I agree with the approach taken by the delegate and accept that 20 weeks' wages was an appropriate compensatory award.

Compensation for length of service

As noted above, I am of the view that Ms. Panteluk's employment was terminated on or about December 23rd, 1996. Accordingly, given the lack of written notice of termination, she was entitled to 3 weeks' wages as compensation for length of service.

The section 79(4) award was made on the basis that she would have, but for her termination, returned to work in early July 1997 and would have thereafter continued working for a 20 week period after which time, presumably, she would have quit in any event due to her family's relocation. Of course, if Ms. Panteluk had returned from leave only to quit in early December 1997, she would not have been entitled to be paid compensation for length of service. Further, upon her return to work, the employer could have lawfully discharged her by giving proper written notice so long as the discharge did not contravene section 54(3).

In my view, there is something of a logical inconsistency in making an award under section 63--which requires a termination of employment--and an additional award under section 79(4)(c)--which is based on an assumption that the employment would have continued. In *W.G. McMahon Canada Ltd.* (B.C.E.S.T. Decision No. 386/99) I set out what I believed to be the proper approach to a "make whole" remedy under section 79(4):

> "Section 79(4) sets out several alternatives to remedy a breach of section 8 or Part 6 of the *Act*, including, in subsection (b), reinstatement together with payment of lost wages. Thus, by way of the extraordinary remedy of reinstatement with full back pay, an individual is "made whole" (at least in a financial sense)--in other words, the individual is placed in essentially the same economic position that they would have been in had the contravention not occurred...I am of the view that the "make whole" approach is entirely appropriate in this case and when fashioning section 79(4) remedies in general...
>
> In *Afaga Beauty Service Ltd.* (B.C.E.S.T. Decision No. 318/97), a case where the employer wrongfully terminated an employee who was on pregnancy leave, the Tribunal observed:
>
> > 'This section of the Act [section 79(4)] is unique in that it anticipates that a former employee may be reinstated after an unjust dismissal or...can receive compensation instead of reinstatement. In the latter case, appropriate compensation for loss of employment normally is based on the circumstances of the employee, *e.g.*, length of service with the employer, the time needed to find alternative employment, mitigation, other earnings during the period of unemployment, projected earnings from previous employment and the like.'

> In my view, the factors identified above are properly to be taken into account in making a compensatory award under section 79(4)(c) of the *Act* bearing in mind that the purpose of the award is to, as far as is reasonably possible, return the employee--at least in an economic sense--to the position the employee would have been in had the contravention not occurred."

A section 79(4) award, therefore, is predicated on the assumption that the contravention did *not* occur (*i.e.*, in this case, on the assumption that Panteluk was granted pregnancy leave and would have returned to work when her leave ended). The task is then to determine what the employee has lost because, in fact, there *was* a contravention. The assumption of *continued* employment--the basis for fashioning a section 79(4) award--cannot comfortably co-exist with an award based on a *termination* of employment. And yet, an award under section 63 is mandatory in the case of a termination without just cause or proper written notice.

I have found that Ms. Panteluk was terminated because of her pregnancy and thus, in my view, the section 79(4)(c) award ought to reflect the fact that compensation for length of service must be paid, in any event, under section 63. There is, of course, nothing in the *Act*, mandating that compensation for length of service be taken into account in an award under section 79(4). Similarly, there is nothing in the *Act* setting out how compensation under section 79(4) should be determined. However, the fundamental principle underlying section 79(4) is compensation for actual loss.

In my opinion, the proper approach to the matter is to determine, based on the principles set out in *Tricom Services Inc.* (B.C.E.S.T. Decision No. 485/98), *Afaga Beauty Service Ltd., supra.* and *W.G. McMahon Canada Ltd., supra.*, what would be a proper "make whole" award under section 79(4) and then to deduct from that award any amount payable on account of compensation for length of service. In this fashion, the employee is fully compensated for their loss while, at the same time, the statutory entitlement to compensation for length of service is recognized. If both a "make whole" award (without adjustment) *and* compensation for length of service are awarded, the employee actually receives an amount greater than their actual loss. In my view, the *Act* ought not to be interpreted in such a manner.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied so that the award made pursuant to section 79(4) is reduced by an amount equivalent to the award made under section 63. In all other respects, the Determination is confirmed save for the requisite adjustments on account of vacation pay and interest.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal