

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 -

Dr. Myron Faryna

("Faryna")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/632

DATE OF DECISION: November 29, 2000

DECISION

This is a decision based on the written submissions of Dr. Myron Faryna, Janine Gardiner on her own behalf, and Rene Peloquin for the Director of Employment Standards.

OVERVIEW

This is an appeal by Dr. Myron Faryna (“Faryna”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued September 7, 2000. The Director’s delegate determined that Faryna contravened Sections 58, 63 and 67 of the *Act* in failing to give Janine Gardiner (“Gardiner”) five weeks notice of the end of her employment. The delegate found that the notice Faryna gave Gardiner was invalid, and awarded Gardiner payment of wages in lieu of notice, or the amount Gardiner would have earned had she been permitted to work out her notice period, and vacation pay on those wages.

ISSUE TO BE DECIDED

Whether the Director erred in determining that Gardiner was entitled to wages in lieu of notice.

FACTS

The relevant facts are not disputed. Faryna employed Gardiner as a dental hygienist from August 1994 to May 18, 2000. On May 18th, which was Gardiner’s last day of work before going on maternity leave, Faryna gave Gardiner written notice of the termination of her employment effective July 1, 2000, because the practice was being sold on or about that day.

The practice did sell on July 1, 2000. The purchaser hired her own dental hygienist and did not offer Gardiner employment.

Gardiner complained that she had not been provided with adequate notice of the termination of her employment, or payment in lieu of notice.

Faryna argues that adequate written notice was given as soon as he confirmed the sale of the business. He alleged that the practice had been up for sale for several years, and that Gardiner was aware that, upon the sale, her employment with him would cease. He states that the notice happened to coincide with Gardiner’s maternity leave, and argues that he should not be held financially responsible for an employee’s personal decision that prevents her an opportunity to work out the notice period. He further argues that maternity leave should be included in notice periods, as it is in all other determinations and calculations.

The Director’s delegate contends that the fact that Gardiner was aware the practice was for sale for two years is irrelevant to the Determination, and that verbal notices were insufficient under the *Act*. The delegate further contends that notices must be in writing, and that employees must be able to serve out the notice period in order to be valid.

ANALYSIS

The burden is on an appellant to demonstrate that a Determination is in error. Having reviewed the submissions of the parties, I find no basis to vary or set the Determination aside.

Section 63 of the *Act* establishes an employer's liability for length of service. It gives employees the right to a period of notice, depending on the length of their employment. As Gardiner had been employed for over 5 years, she was entitled to five weeks notice.

Section 67(1)(a) of the *Act* provides that, a notice under Part Eight (of which section 63 is included) is of no effect if

- (a) *the notice period coincides with a period during which the employee is on ...leave....*

The legislation, although it may appear unfair to Faryna, is unambiguous. If the notice period coincides with statutory leave, as it did in this case, it is of no effect. Pregnancy leave is a statutory leave under section 50 of the *Act*, not a leave relating to a "personal decision" as Faryna argues.

Having no basis to find the delegate erred in applying the legislation to the facts of this complaint, I dismiss the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated September 7, 2000, be confirmed, together with whatever interest may have accrued since the date of the Determination.

C. L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal

CLR/bls