EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

\- by -

Capable Enterprises Ltd.
operating as Christopher Robin School
("Capable")

\- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: David Stevenson

FILE NO.: 98/331

DATE OF DECISION: August 12, 1998

DECISION

OVERVIEW

This is an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* (the *"Act"*) by Capable Enterprises Ltd. operating as Christopher Robin School ("Capable") of a decision of the Employment Standards Tribunal (the "Tribunal") dated January 19, 1998 (the "original decision"). The original decision substantially confirmed a Determination of the Director of Employment Standards (the "Director") dated December 11, 1995 which concluded Capable had contravened Sections 50, 51 and 54 of the *Act* by dismissing Safia Barr ("Barr") or, alternatively, by not continuing her employment on the same terms and conditions as existed prior to her maternity leave.

ISSUE TO BE DECIDED

The appeal of the Determination raised several issues. In this reconsideration application of the original decision, Capable has abandoned all but one of the grounds upon which it challenged the Determination. In its application submission Counsel for Capable states:

> The sole ground of this application is that the Adjudicator erred when he decided that Barr's failure to give written notice of her leave was not proper grounds for her complaint to be dismissed and the decision of the Director to be reversed.

FACTS

It is unnecessary to recite the totality of the facts considered in the original decision. For the purpose of this reconsideration, we need only adopt the following facts and statements of fact from the original decision:

> During the Summer of 1994 Barr had discussions with Liou's daughter . . . and told her she was pregnant. . . . In early autumn Barr orally advised Liou she was taking maternity leave and that it would begin at the end of January.
> (page 4)

> In April of 1995 Barr contacted Liou by phone and had discussions about returning for the 1995-96 teaching year.
> (page 5)

> It is clearly established in Section 50(4) of the *Act* that a request for pregnancy leave must *"(a) be given in writing to the employer, . . ."* It is clear that Barr did not give such notice.
> (page 5)
>
> . . . I find that Liou had ample notice of Barr's intentions to take pregnancy leave and at this late date can not now claim she was prejudiced by this lack of written notice. Her daughter informed her of Barr's impending pregnancy leave, Barr informed her of the impending leave and Liou took steps to cover for Barr by hiring Balsells to replace Barr during the leave.
> (page 6)

The complaint was filed in May, 1995.

ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

116. (1) On application under subsection (2) or on its own motion, the tribunal may

(a) reconsider any order or decision of the tribunal, and

(b) cancel or vary the order or decision or refer the matter back to the original panel.

(2) The director or a person named in a decision or order of the tribunal may make an application under this section.

(3) An application may be made only once with respect to the same order or decision.

The circumstances in which an application for reconsideration will be successful are limited. Those circumstances have been identified in several decisions of the Tribunal, commencing with *Zoltan Kiss*, BC EST #D122/96, and include:

> failure to comply with the principles of natural justice;
> mistake of law or fact;
> significant new evidence that was not reasonably available to the original panel;

> inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
> misunderstanding or failure to deal with a serious issue; and
> clerical error.

Reconsideration is not used simply to provide another opportunity to seek review of the evidence or to reargue a disagreement with the Determination before another panel of the Tribunal.

Counsel for Capable argues this reconsideration is based on an error in law:

> . . . the Adjudicator erred in applying the law when he decided that the failure to give written notice was a mere technical irregularity or alternatively that the failure to give written notice was curable by way of finding that Capable received constructive notice.

In the original decision, that issue of law was addressed in the following way:

> . . . there is a long line of cases (under the old *Act*) but dealing with similar situations clearly recognizing that "maternity leave is a fundamental right of every female employee in this province . . ." (*Director of Employment Standards v. Stanley Blake*, 1987, unreported, Vancouver Registry No. F853491). Mr. Justice Leggatt [sic] went on to say, "it would be unjust in the extreme if I were to deny the benefits . . . to someone because they failed in a technical way to complete a full and formal application."
> (page 6)

The Adjudicator concluded that the failure to submit a request for pregnancy leave in writing to the employer was a technical requirement and did not nullify Barr's right to the benefit. The Adjudicator also referred to Section 2 of the *Act* and found support in that section for rejecting the argument of Capable that Barr was not entitled to the benefit because she had not requested pregnancy leave in writing.

Counsel for Capable has raised a number of arguments in support of the issue raised. First, he says the requirement to give written notice is not a technical requirement but a substantive one and, based upon its placement in the relevant section of the *Act*, is the "fulcrum" upon which the respective rights and obligations of the employee and employer are crystallized. Second, he argues the Adjudicator failed to balance the "justice" factors that impacted the employer against the "great injustice" to Barr of disentitling her to the pregnancy benefit. Third, he disagrees that the absence of written notice was not a detriment to Capable. He says the conclusion in the original decision adversely affects the certainty achieved in the written notice about when the employee will be absent for

pregnancy leave and whether the employee intends to return. He submits this certainty is important for reasons relating to an employer's ability to plan their business for the absence, and the return, of the employee. Finally, he says the Adjudicator ignored the wording of Section 50 of the *Act* and the significant differences between the requirements of the old *Act* for written notice and those in subsection 50(4).

It may be helpful to set out the requirements of the old *Act* that were the subject of the comments of Judge Leggatt in *Director of Employment Standards v. Stanley Blake*, *supra.*:

> *51 (1) An employee, on her written request supported by a certificate of a medical practitioner stating that the employee is pregnant and estimating the probable date of birth of the child is entitled to leave of absence from work without pay for a period of 18 consecutive weeks or a shorter period the employee requests commencing 11 weeks immediately before the estimated date of birth or a later time the employee requests.*

I do not find the above provision to be significantly different in content from what is found in subsections 50(1) and 50(4) of the *Act*. Both provisions link a written request to a leave of fixed duration, commencing either as described in the statute or as requested by the employee.

Judge Leggatt was also impressed by the provisions in the old *Act* that are now found in Section 54, in respect of which he said:

> . . . the legislature has expressed itself in a way which can only lead to the conclusion that these [pregnancy benefits] are rights, rights that the court should endeavour to enforce.
> (pages 6 - 7)

My initial comment is that there is something inherently objectionable in the position of the applicant in this case. Capable had close to four months notice from Barr that she was pregnant and would take leave, accepted the notice given by Barr of her intention to take pregnancy leave at the end of January, 1995, then allowed Barr to go on leave and intended, at the time she took leave, to allow Barr to return to her employment. All this occurred without an objection from Capable that Barr had not given a request for leave to them in writing. The conduct of Capable has all the indicia necessary to give rise to an estoppel against their raising the issue at all. This point was raised by the Director in argument before the Adjudicator in the original decision, but was not commented upon. I do not rely on that doctrine in reaching my conclusions in this application, I only note that

had Capable indicated to Barr that written notice was required by them, Barr had ample time to place her verbal notice to Capable in writing.

I decide this application on the basis that Capable has not demonstrated that the circumstances of this case justify a reconsideration of the original decision. I agree completely with the Adjudicator in the original decision that the *Act* cannot be interpreted in a way that would disentitle a pregnant employee to leave under Section 50 by reason only that the employee did not request the leave in writing to the employer. There is nothing in Section 50, Part 6 or in any other provision of the *Act* that suggests that result. Pregnancy leave is an important minimum employment benefit that should not be lost by inference. Before an employee is found to be disentitled to such an important benefit there must be language in the *Act* expressing a clear indication that result is intended.

I agree with Counsel for Capable on one point of argument. The requirement for written notice is present in Section 50 of the *Act* for the purpose of achieving a degree of certainty about the timing and length of an employee's pregnancy leave. The *Act* allows for a number of possibilities about when leave may be commenced, when it may be ended and in what circumstances it may be shortened (or lengthened, as in the case of a request for parental leave). If a request for leave is given in writing to the employer, it is the employee who sets the timetable for the leave and, under subsection 54(1), the employer is statutorily obligated to comply with that timetable. I disagree, however, that this process is indicative of an intention by the legislature to recognize and establish trade offs for competing substantive rights and obligations between the pregnant employee and the employer. In my opinion, written notice does nothing more than establish a procedure which is intended to minimize the potential for dispute and disagreement between a pregnant employee and her employer about when the employee intends to commence leave and whether she intends to seek to return from leave earlier than mandated by the *Act*. The scheme of the *Act* relating to pregnancy benefits is simple. A pregnant employee takes leave no earlier than 11 weeks before her expected date of birth and returns to work no earlier than 6 weeks following the actual date of birth, unless she requests an earlier return, and the total leave allowed is up to 18 weeks. The business adjustments an employer must make to accommodate the pregnant employee arise primarily from the benefit given, not from whether the employee makes a written request as opposed to a verbal request. In all probability, the only consequence for the employee of not giving written notice to the employer is that she loses the right to set the timetable for the leave or to seek to adjust the period of leave.

Finally, even if I am wrong about whether Barr was not entitled to leave under the *Act*, it would not change the outcome of the case. Barr was given pregnancy leave by Capable and had her employment terminated or had her conditions of employment changed when she sought to return from her leave. The focal point of the conclusion that Capable had contravened the *Act* was subsection 54(2), which states:

54. (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.

A contravention of subsection 54(2) can be founded on the employer's response to either the pregnancy or the leave allowed under Part 6. In this case, the original decision is based on a finding that Capable had terminated Barr's employment or had changed a condition of employment because of *both* the pregnancy and the leave:

> . . . the simple fact is, that had not Barr become pregnant, Capable would not have been able to take the opportunity to recruit, hire and evaluate a replacement, Balsells. She [Liou] violated the spirit and the intent of the *Act* by taking advantage of Barr's pregnancy and leave to terminate her employment or to change Barr's working conditions. . . .
>
> Capable came nowhere near meeting the onus that the *Act* places upon the employer in proving that the termination or change in working conditions was not because of the pregnancy or pregnancy leave.
> (page 8)

Even if I were to agree with Counsel for Capable that Barr was not entitled to leave, that would have no impact on the conclusion in the original decision that she was terminated or had a condition of her employment changed because of her pregnancy. On that basis alone, the compensation awarded in the original decision is justified.

ORDER

Pursuant to section 116 of the *Act*, I order that the application for reconsideration be denied and the original decision confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal