Henderson v. Marquest Asset Management Inc., 2010 CanLII 34120 (ON LRB)

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3463-09-ES Ms. Michelle Henderson, Applicant v. **Marquest Asset Management Inc.** and Director of Employment Standards, Responding Parties.

Employment Practices Branch File No. **70065871-1**

BEFORE: Patrick Kelly, Vice−Chair.

APPEARANCES: Matthew Fisher for the applicant; Gerry Brockelsby for Marquest Asset Management Inc.; no one appearing for the Director of Employment Standards.

DECISION OF THE BOARD: June 17, 2010

1. This is an employee application under the *Employment Standards Act, 2000,* S.O. 2000, c.41, as amended (the "Act") for review of a refusal to issue an Order to Pay.

Background

2. The Employment Standards Officer ("the Officer") determined that the applicant (or "Ms. Henderson") had been paid all vacation pay owed to her at the time of her termination from employment on or about July 7, 2009. Furthermore the Officer determined that Ms. Henderson's termination was for legitimate business reasons unrelated to her pregnancy leave of one year preceding her dismissal.

3. The applicant takes issue with the Officer's conclusion regarding her termination, but not regarding the vacation pay issue. The responding party employer ("the company" or "Marquest") agrees with the Officer's determination that Ms. Henderson's termination was based solely upon sound business reasons.

The Evidence

4. Ms. Henderson testified on her own behalf. Although provided an opportunity to cross-examine her, the company declined to do so. Gerry Brockelsby, a principal of Marquest,

gave evidence for the company, and he was subjected to a brief cross-examination by counsel for Ms. Henderson.

5. Marquest is an investment management business. At its peak, it employed eighteen individuals. Ms. Henderson was employed in the position of Portfolio Administration Settlements. She was responsible to enter all daily transactions for the purpose of ensuring that all client trades were settled in a timely manner in accordance with industry standards. At the time of her termination, she was earning an annual salary of $47,500. There was a dispute between the parties about the length of her employment, with the applicant claiming seven years and the company claiming 5.5 years. Given the outcome I have reached in this matter, it is unnecessary to resolve this discrepancy.

6. Ms. Henderson began a pregnancy leave in early July 2008. Shortly before the commencement of her pregnancy leave, the company hired another individual to do essentially the same job as Ms. Henderson. Ms. Henderson trained this individual. Mr. Brockelsby explained that in the course of considering Ms. Henderson's replacement, the company gave thought to hiring someone part-time or full-time. The decision was taken to hire a full-time replacement, with the plan to grow the business to the extent that when Ms. Henderson returned a year later, the company would employ two individuals in the Portfolio Administration Settlements position.

7. The company's business did not, however, expand. In fact, its business shrank dramatically in the wake of the world-wide financial crisis that began to affect Marquest soon after Ms. Henderson's departure. The company started terminating employees in September 2008. Ms. Henderson was the seventh employee terminated by the time of her anticipated return to work in early July 2009. The company sent her a letter advising of her dismissal, and offering the equivalent of 21 weeks' pay.[1]

8. Ms. Henderson's replacement was not terminated and remains employed as of the date of the hearing in this matter. The reasons why the replacement was kept on and Ms. Henderson let go are not in dispute. In fact, the company conceded the reasons in a letter dated May 28, 2010 to the Board. First, the company stated that the replacement had broader experience than Ms. Henderson. Secondly, it noted that Ms. Henderson had failed to complete a certification course for which the company paid. Thirdly, the company claimed that Ms. Henderson's attendance record was not very good.

9. In the course of his testimony, Mr. Brockelsby gave no evidence about the replacement's allegedly superior work experience nor about the reasons why Ms. Henderson's failure to complete a course contributed to the decision to terminate her (other than the suggestion that the company lost the course registration fee as a result). Ms. Henderson, on the other hand, said she knew of no requirement that she pass the course in order to keep her position, and that as far as she knew her replacement had not completed the course at the point Ms. Henderson was terminated. She was not contradicted on this or any other portion of her evidence. With respect to her attendance, there was no dispute that some of the absences and lateness relied upon by the company were directly linked to her pregnancy or to doctor's appointments associated with her pregnancy. Mr. Brockelsby claimed that most of the attendance problems manifested themselves before Ms. Henderson became pregnant, but even if that is true, what Mr. Brockelsby failed to establish is that the company ever raised the slightest concern about her attendance prior to her termination. In fact, Mr. Brockelsby said Ms. Henderson was a great employee.

10. Ms. Henderson testified that her termination came as a complete surprise and devastated her. Her husband was laid off from work at the time. She had two children, including her new baby, to care for. She lost a few nights' sleep with the anxiety.

11. Ms. Henderson testified that she looked diligently for work after her termination from the company. She mailed out resumés, searched the Internet, attended a three-day job club, and is now looking into a career program to retrain for a new line of work. She had two job interviews since her termination, but they did not lead to employment. She has not found any work, including less-skilled reception and data entry jobs.

12. Ms. Henderson seeks reinstatement. She enjoyed her work with the company. Mr. Brockelsby gave no evidence concerning, and made no argument against, the remedy of reinstatement. As I have indicated, he said Ms. Henderson was a great employee, and that but for the financial crisis the company found itself in, she would have kept her job.

Analysis and Conclusions

13. The provisions of section 53 relevant to this application are:

> **53.** (1) Upon the conclusion of an employee's leave under this Part, the employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.
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> (2) Subsection (1) does not apply if the employment of the employee is ended solely for reasons unrelated to the leave.
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> (3) The employer shall pay a reinstated employee at a rate that is equal to the greater of,
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> (a) the rate that the employee most recently earned with the employer; and
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> (b) the rate that the employee would be earning had he or she worked throughout the leave.

14. In my view, the evidence clearly discloses that the company failed to abide by its obligation to reinstate Ms. Henderson. It is true that the company faced a severe business crisis, and that as a result of that crisis it was put in the position of having to reduce the number of its employees. However, the company continued to operate and it continued, through the efforts of Ms. Henderson's replacement, to provide the services that Ms. Henderson had provided up until she took her pregnancy leave of absence. The fact of the matter was that the job Ms. Henderson performed just prior to the commencement of her pregnancy leave existed when the leave of absence expired. The company, however, simply preferred that the replacement perform that work rather than Ms. Henderson. That is precisely the mischief that section 53 is meant to remedy. It is meant to protect the job security of employees who take leaves of absence under Part XIV of the Act. The company protested any suggestion that the company decided not to employ Ms. Henderson because she exercised her legal right to take a statutory leave of absence. In a sense, that misses the point. But for the pregnancy leave Ms. Henderson would have kept her position. So, there is, in fact, a direct link between the taking of the pregnancy leave and the termination. In any event, while I accept that the company may not have intended to dismiss Ms. Henderson as a form of reprisal for the exercise of her statutory right, nevertheless it cannot be said that her termination was ended solely for reasons unrelated to the pregnancy leave. Accordingly, the company breached the Act by failing to reinstate the applicant.

Disposition

15. The application is granted.

16. The presumptive remedy is reinstatement. The applicant wants it, and the company

made no argument against it. This, therefore, is a case for immediate reinstatement.

17. I order the company to reinstate the applicant forthwith into her position as Portfolio Administration Settlements, and by no later than June 21, 2010, or such later date agreed by the applicant and the company. She is to be placed at the level of compensation she would otherwise be in if the company had not terminated her employment and she had resumed her job duties following the expiry of her pregnancy leave.

18. The applicant is entitled to compensation for lost wages. She received 21 weeks salary from the company, which the applicant calculated would have covered the period from the return of her pregnancy leave until November 30, 2009. She seeks her wages from December 1, 2009 until the day of the hearing, June 11, 2010, which she calculated to be $24,663. The company took no issue with the argument of the applicant in this regard.

19. Accordingly, I order the company to pay in trust to the Director of Employment Standards for distribution to the applicant the sum of $24,663, on or before June 30, 2010. If the company fails to make timely payment, I further order the company to pay forthwith to the Director of Employment Standards an administrative fee in the amount of $2,466.30.

20. The applicant sought unspecified punitive damages for pain and suffering, as well as $10,000 in legal costs. Pain and suffering are not properly characterized as punitive damages, and in any event, the Board does not award punitive damages. It attempts to provide "make whole" remedies. Pain and suffering is a remedy the Board has been prepared to consider in matters of this kind, but in this case, I am not persuaded, in the absence of any medical evidence and/or a compelling argument, to compensate Ms. Henderson for pain and suffering. To my knowledge, the Board has never ordered legal costs, and in the absence of a compelling argument that the Board has the jurisdiction under the Act to do so, and if it does, that it should do so in this case, I decline the applicant's request for an order in legal costs.

"Patrick Kelly"
_____for the Board

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[1] The offer was contingent on a signed acceptance and release. Ms. Henderson provided neither. Ultimately, the company sent her a cheque in any event, which she cashed.