

File Name: A complaint of discrimination by Coralyn Fleck against ASHTON'S SALON & DAY SPA INC.

Date of Decision: July 13, 2006

Area(s): Employment

Characteristic(s): Sex (Pregnancy)

Complaint: Coralyn Fleck worked as an aesthetician for Pamela Dean at Ashton's Salon & Day Spa Inc. Ms. Fleck alleged Ms. Dean terminated her employment with Ashton's Salon & Day Spa Inc. because of her pregnancy.

Decision: Ms. Fleck lost her job because of discrimination.

Complaint of Discrimination because of Pregnancy

An employee must show that she was (or was perceived to be) pregnant, that the employer created a burden or disadvantage for the employee, and that the pregnancy was at least one factor in that bad treatment.

Ms. Dean said she fired Ms. Fleck for various reasons related to her work performance and claimed that she was unaware of Ms. Fleck's pregnancy. The Board did not accept this reason, noting that there were many examples when the possibility of a pregnancy was brought to her attention. The Board further found that the performance concerns were unsupported (there were no warnings, there were no attempts to address the alleged issues). The Board found that Ms. Dean knew about Ms. Fleck's pregnancy, and the pregnancy was the main factor in terminating Ms. Fleck's employment.

Remedy: The Board awarded the following remedies:

Individual Remedies

- General damages: \$8,000

IN THE MATTER OF:

**THE HUMAN RIGHTS ACT, R.S.N.S., 1989,
as amended by 1991, c.12**

&

IN THE MATTER OF:

**A complaint of discrimination by CORALYN
FLECK (Complainant) against ASHTON'S
SALON & DAY SPA INC. (Respondent)**

BEFORE:

**BOARD OF INQUIRY
CHAIR – DAVID J. MacDONALD**

DECISION

APPEARING:

**ANN E. SMITH
Counsel for the Human Rights Commission**

CORALYN FLECK – Complainant

PAMELA DEAN on behalf of Respondent

HEARD:

MAY 24TH, MAY 25TH, JUNE 13TH, 2006

DATE OF DECISION:

JULY 13, 2006

[1] This Board of Inquiry was appointed by the Nova Scotia Human Rights Commission pursuant to Section 32 A(1) of the Nova Scotia Human Rights Act, R.S.N.S., 1989, c.214 as amended to inquire into the formal complaint of Coralyn Fleck dated December 10, 2004, against Ashton's Salon & Day Spa Inc.

[2] The parties to the proceedings were the Nova Scotia Human Rights Commission represented by Ann E. Smith; Coralyn Fleck; and Ashton's Salon & Day Spa Inc. represented by Pamela Dean.

[3] The Board held hearings into the matter on May 24th, 25th, and June 13th, 2006. All parties were present and represented throughout each day of the hearings. A total of seven (7) witnesses were called to give sworn testimony before this Board. They included Coralyn Fleck (Complainant); Twyla Dean, Lindsey Verboom, Elaine Jack, Kelly Cormier and Shana Langley – all employees of the Respondent at relevant times hereto; and Pamela Dean, majority owner of the Respondent company.

[4] Coralyn Fleck graduated from the Academy of Cosmetology and Esthetics in March of 1998 as an esthetician. In September of that year she began working at Serenity Esthetics in Elmsdale. After a while she left this operation and began working at the Hair Company, also in Elmsdale. She worked there for about a year and one-half. Sometime in 2002, she responded to an advertisement for a position at Ashton's Salon & Day Spa Inc. (Ashton's or the Salon) which is located in Truro, Nova Scotia. She was interviewed by the owner, Pamela Dean, and hired as an esthetician. Ms. Fleck started working at Ashton's in June of 2002.

[5] Things went very well for Ms. Fleck at Ashton's. Although she started slow, over time she built up a cliental and became busier, earning more money as a result thereof. A

second esthetician – Amber Langille – was added to the staff and there appeared to be plenty of work for both of them.

[6] However, in February 2004, Amber Langille was let go, which left Ms. Fleck the lone remaining esthetician. Sometime thereafter, she began experiencing problems with her thumb. She went to her doctor who recommended that she reduce her workload from seven (7) to six (6) hours per day. On March 23, 2004, she advised Lindsey Verboom, Salon Co-ordinator and Ms. Fleck's 'go to' person, that she would need to work a reduced schedule as per her doctor's directions.

[7] Due to scheduled appointments they were unable to accommodate her requested reduction in hours until April 15th, at which time her modified schedule began.

[8] In late April Ms. Fleck became aware that she was pregnant. It is her evidence that she informed co-workers Stacey Wurtz and Twyla Dean of this on May 19th. She states that word then spread throughout the Salon.

[9] On May 27th, Ms. Fleck performed a full body massage on one client followed immediately by a back and shoulder massage on a second client without time for a proper break in between. Upon completion she started to feel dizzy and her heart felt like it was racing. As Lindsey Verboom was off on pregnancy leave, she informed her replacement, Elaine Jack, that not enough time had been allowed for her to have a proper break and, because of the dizziness and heart racing, she did not feel it appropriate to do any further waxings until she had checked with her doctor. Upon being informed that there were two (2) massages already booked for her, she agreed to do them and thereby avoid the inconvenience and displeasure of any re-scheduling or cancellation. She advised Ms.

Jack that she had an appointment with her doctor for June 7th at which time she would seek advice on the matter.

[10] Ms. Fleck received notice via the mail that her doctor had scheduled a pulmonary functions test for her at the QEII Health Science Centre in Halifax for Wednesday June 9th, 2005. Apparently her doctor wanted her breathing and lungs checked to determine if she was asthmatic. Ms. Fleck states that upon receiving notice of the appointment she telephoned Ashton's to check her schedule and inquire if her bookings for that Wednesday could be covered by someone else.

[11] On Monday, June 7th, Ms. Fleck attended at her doctor's office for a scheduled appointment. Although Monday was her scheduled day off she went by the Salon after the appointment to check her schedule for Tuesday. While there she spoke to Pamela Dean and Elaine Jack and showed them the notice regarding the pulmonary functions test. It was her understanding that getting Wednesday off to attend for the tests would not be a problem, and that Shana Langley, another esthetician who filled in on occasion, was available to cover for her. While there Ms. Fleck informed them that she had just come from her doctor's appointment and recalls that the comment was made "It's just the first of many."

[12] Around suppertime of that Monday, Ms. Fleck began experiencing some bleeding, which intensified into the evening. Her mother advised her to go to the hospital, which she did. Upon examination the medical personnel expressed their concern that she might miscarry and decided to hospitalize her overnight. (Unfortunately Ms. Fleck did suffer a miscarriage before the week was over).

[13] Later that night she asked her boyfriend to contact Lindsey Verboom, explain what was going on, and advise her that she would not be able to come in to work the next morning. This he did.

[14] Ms. Fleck was released from hospital Tuesday afternoon with instructions to get bed rest for a week. When she got home she asked her boyfriend to phone Ashton's and update them on her situation. This he did, speaking to Elaine Jack at the Salon who asked that he convey to Ms. Fleck not to be concerned. Ms. Fleck then went right to bed.

[15] On Wednesday morning, at approximately 9:00-9:30 a.m., a Purolator courier arrived at Ms. Fleck's home with a package for her. Upon opening the package she found a letter dated June 7th from Elaine Jack, Salon Coordinator, advising that her employment was terminated. The letter reads as follows:

It is with regret that we must inform you that as of this date, your employment with Ashton's Salon & Day Spa has been terminated.

At this time, you have expressed the unwillingness & inability to perform services that are imperative to the business – i.e., certain waxings and all massages. Also, with limited hours available and time off required for other commitments, it has become increasingly difficult to fulfill booking requests. These limitations and restrictions which you have imposed upon your job, regardless of their origins, have provided no other alternative if Ashton's is to grow and move forward in Esthetics.

Enclosed is severance pay in lieu of notice. We wish you all the best in your future endeavors.

THE ISSUE:

[16] Ms. Fleck states that she has been discriminated against in the matter of her employment because of her pregnancy. The relevant prohibition against this type of discrimination is stated in the Human Rights Act as follows:

- 5. (1) No person shall in respect of**
- (d) employment discriminate against an individual or class of individuals on account of**
- (a) sex**
- (1) “sex” includes pregnancy, possibility of pregnancy and pregnancy related illness**

Discrimination is defined at section 4 of the Act as follows:

For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

STANDARD OF PROOF:

[17] The burden of proof that must be met by a complainant in matters of this nature was summed up by Board Chair David Bright in *McLellan v. Mentor Investments Ltd.* (1991), 15 C.H.R.R. D/134 para. [15] (N.S. Bd. Inq.):

...

The civil burden or “preponderance of evidence”, or proof of a fact on a balance of probabilities has been described as, It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If this evidence is such that the tribunal can say, “we think it more probable than not,” the burden is discharged, but, if the probabilities are equal, it is not.”

[18] The standard of assessing the evidence before a Board of Inquiry is on the civil balance of probabilities. If the board is satisfied on balance that the complainant has proved the discrimination alleged and there is no justification or defense available to the respondent, then the board may uphold the complaint and fashion a remedy. If the board is not so satisfied then it may dismiss the complaint.

[19] It is the complainant who bears the initial onus of establishing a *prima facie* case. A *prima facie* case has been described by the Supreme Court of Canada in *O’Malley v. Simpson-Sears Ltd.* (1985) 7 C.H.R.R. D/3102 at D/3108:

A prima facie case of discrimination ... is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the respondent employer.

[20] In this case the onus is on Ms. Fleck to show that she was pregnant, was treated adversely by her Employer, and evidence from which to infer that the pregnancy was a factor in that adverse treatment. It is not necessary that pregnancy be the only factor in the adverse treatment. See *Sidhu v. Broadway Gallery* (2002), 42 C.H.R.R. D/215

(B.C.H.R.T.) at para 58; and *Vestad v. Seashell Ventures Inc.* (2001), 41 C.R.R.R. D 43 (B.C.H.R.T.) at para 39. It is only necessary that it be a factor to constitute discrimination.

[21] An inquiry into a complaint of this type of discrimination requires recognition of the role of circumstantial evidence as rarely does one find an overt admission of discrimination. It is well stated in the following passage from *Beatrice Vizkelety, Proving Discrimination in Canada* (Toronto, Carswell, 1987) at p. 142:

The appropriate test in matters involving circumstantial evidence ... may therefore be formulated in this matter: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.

[22] Ms. Fleck has established a *prima facie* case for discrimination. She was a full time esthetician who, within three (3) weeks of announcing her pregnancy, was terminated from her employment without any prior indicators. It now becomes necessary to examine and consider the evidence and circumstances surrounding the entire situation to determine whether the respondent has a valid defense or whether the reasons given were merely a pretext.

[23] The respondent's reasons for the dismissal are set forth in the second paragraph of the termination letter:

...

“At this time, you have expressed the unwillingness and inability to perform services that are imperative to the

business – i.e. certain waxings and all massages. Also, with limited hours available and time off required for other commitments it has become increasingly difficult to fulfill booking requests. These limitations and restrictions which you have imposed upon your job, regardless of their origins have provided no other alternative if Ashton’s is to grow and move forward in Esthetics.”

...

[24] Although not presented as such, it would not be unreasonable to presume that the underlying cause for what is expressed in that paragraph is Ms. Fleck’s pregnancy. However, the Respondent states such was simply not the case, and there was a good deal of time spent at these hearings delving into what they purport to be the underlying cause of Ms. Fleck’s dismissal.

[25] It is to be noted that in examining the reasons for the dismissal, this board is not concerned with establishing just cause in the industrial relations sense of that phrase but rather whether the reasons given are validly supported by the circumstances upon which the Respondent claims they are based. If they are not, then they must be viewed as being a pretext.

Do the circumstances support the reasons contained in the termination letter?

[26] In late March Ms. Fleck began to experience problems with her thumb. Upon seeing her doctor she was advised to reduce her work day from seven hours to six hours and to make sure she took adequate breaks. She provided the Respondent with a doctor’s note to this effect. In fact it was several weeks before this adjustment could be made in her schedule. In the meantime she continued to provide services for the bookings that

had already been made. The breaks, however, were another issue and continued to be an irritant throughout the remainder of her employment.

[27] On May 27th Ms. Fleck, upon completion of two lengthy back-to-back massages began to experience some heart fluttering. She reported this to the Salon co-coordinator, who at that time was Elaine Jack, and further stated that she would not do further massages for awhile. When informed that there were two massages already booked she offered to do them and as far as we know she, in fact, did. Ms. Jack informed her that she would not book her for any further massages until after she had seen her doctor. Ms. Fleck had an appointment for June 7th – a week from the following Monday.

[28] It is true that Ms. Fleck would not do certain waxings, those known as Brazilian's or Full Montys. But this was something she and Ms. Dean had dealt with at her initial interview before she was hired and Ms. Dean expressed that it was not a problem, nor had it been in the two years she worked there. Ms. Fleck had stopped doing massages on males. This was the result of an incident which occurred at work when she was 'hit on' by a couple of male clients and did not feel comfortable, nor safe because of the particular location of her room in relation to the rest of the Salon. As her clientele was 98% female and 2% male this was hardly a big deal nor was there any indication of such by the Respondent prior to the dismissal. In fact Ms. Verboom's response to Ms. Jack when she inquired about this was *'That's fine. That's her prerogative!'*

[29] The reference in the termination letter to an increasing difficulty to fulfill booking requests because of Ms. Fleck's limited hours and time off for other commitments is completely unsupported by the facts. I will address this in more detail further on but at this point, suffice it to say that both Ms. Dean and Ms. Jack, albeit reluctantly, have

conceded in their testimony that the difficulty with bookings, and in particular the pre-sold certificates, had little, if anything, to do with Ms. Fleck's availability.

[30] According to Ms. Jack the time off for other commitments is in regard to two Saturdays wherein Ms. Fleck 'requested' time off to work at her father's auction. This too was something that Ms. Fleck had arranged with Ms. Dean in the initial interview. It was not a problem if there was appropriate notice. The evidence is that Ms. Fleck did give reasonable notice although one Saturday had her heavily booked for services and required either someone to fill her spot or a re-scheduling.

[31] While Ms. Jack and Ms. Dean attempted to attribute the most negative of implications to Ms. Fleck's situation, the factual circumstances simply do not support what is claimed in the termination letter.

Do the circumstances support the alternate version of the reasons for termination?

[32] At the inquiry into this matter Ms. Dean offered an alternate version of the reasons for Ms. Fleck's dismissal. This second version took the form of a two-pronged attack on Ms. Fleck. The first part, similar to the termination letter, had to do with Ms. Fleck's refusal to do any massages whatsoever. This, coupled with her reduced work schedule, was making it difficult to book customers and honour pre-sold certificates, thereby costing the salon existing business and the ability to move forward.

[33] The second part was in regard to Ms. Fleck's attitude. While acknowledging that she was a very good esthetician, it is asserted that she was confrontational, abusive to fellow employees, acted inappropriately in front of customers, and her demeanor was such that even Ms. Dean felt uncomfortable in her own building.

[34] Ms. Dean states there were four specific incidents or factors that led to her decision to dismiss Coralyn Fleck and they were as follows:

The first incident occurred in late March of 2004. Ms. Dean states she was in the Salon having her hair done when Coralyn marched in and stated she would not be working the following Saturday nor a second Saturday later on as she had to work at her father's auction. She states that Coralyn's demeanor meant the issue was not open to question. Despite Lindsay's efforts to explain that she was fully booked that Saturday, Coralyn made it known that her auction job took priority.

The second factor: Ms. Dean started to get indications that Coralyn was bullying Kelly Cormier who was a part-time receptionist. This was reported to her by Elaine Jack. Apparently Coralyn had yelled at Kelly. Twyla Dean reported that this had happened when she had a customer in the chair and expressed the view that something had to be done. Ms. Dean states that things escalated in late April and into May. She was hearing that Kelly was constantly being confronted by Coralyn.

The third incident occurred one day when Ms. Dean was in the Salon, possibly a Saturday. A man and woman had been booked in for a massage and a facial. While there she witnessed Coralyn confront

Kelly about the way the couple were booked. Coralyn felt that she should have been booked for the higher priced facial as she was the regular esthetician. It was resolved by Shana Langley offering to switch the facial customer for the massage customer.

The fourth incident occurred in late May when she received a call from Elaine Jack and was told that Coralyn would no longer do any massages as it made her heart flutter. Ms. Dean states this created a big problem for the Salon as they had between \$16,000 and \$17,000 worth of gift certificates out and were losing customers because they could not get them booked. According to Ms. Dean this was the day she knew something had to be done about Coralyn. She states that she did not know anything about Coralyn's pregnancy at the time.

[35] Ms. Dean states that she was in the Salon the morning of June 3, a Thursday. As she expressed it, 'she was on pins and needles' waiting for Coralyn to arrive. When she did, her demeanor made Ms. Dean uncomfortable. At that exact moment Ms. Dean made the decision to terminate Coralyn Fleck's employment.

[36] It is to be noted that Ms. Dean, and to a certain extent Ms. Jack, attempted to portray the implications of these incidents in their most damaging light - causing lose of business and inability to accommodate certificate holders; and her demeanor and confrontational attitude being the cause of an intolerable level of discomfort amongst the rest of the staff, including Ms. Dean herself. However, the evidence reveals an

entirely different scenario: that Ms. Fleck was causing scheduling problems and costing the Salon business is completely erroneous, and the allegations in regard to her confrontational department are, at best, exaggerated.

[37] Prior to February of 2004 the Salon employed two full-time estheticians – one of whom was Ms. Fleck. The other esthetician was let go in February for reasons that were unrelated to the availability of work. Apparently at that time there was plenty of business for both estheticians. As a result, Ms. Fleck was left with the entire workload. This she did to the point where her thumb began to breakdown. Despite her doctor advising what must be considered but a slight reduction in her hours coupled with proper breaks, it was several weeks before that schedule could be accommodated by the Salon. In the meantime Ms. Fleck continued to provide services to the committed bookings.

[38] In fact, even after the reduced schedule, Ms. Fleck regularly agreed to work on her off days, plus time over and beyond her scheduled hours, to accommodate customers who required her services. Furthermore it was Ms. Verboom's opinion that she accommodated a request to work late or come in on a day off about 90% of the time. Aside from one male who gave her bad vibes, Kelly Cormier cannot remember Coralyn Fleck ever refusing to take a customer even if scheduled for her day off. Both Elaine Jack and Kelly Cormier readily acknowledged that when she returned a customer to the front desk she would always offer to take a rebooking outside her scheduled hours if necessary to accommodate that person.

[39] A second full-time esthetician was not hired until the week prior to Ms. Fleck's dismissal, although Shana Langley did covers and fill-ins on occasion. Ms. Dean

acknowledges that she pushed Coralyn at times but excused it by stating that this was the way things were done in this type of business. When pressed, Ms. Dean could not say how much, if any, business was actually lost because of the scheduling difficulties. Aside from an incident with Coralyn's brother after she was dismissed, Ms. Dean does not recall having to refund any monies of the \$16,000 to \$17,000 worth of certificate business she says was outstanding. She acknowledges that her scheduling concerns could have been addressed by hiring a second esthetician.

[40] As stated earlier the matter of breaks continued to be a source of irritation to Ms. Fleck. She did not feel she was getting the 'breaks' her doctor had advised. Meal and bathroom breaks would have been even more of a concern to her after she learned she was pregnant. Nonetheless she was only scheduled for breaks on the 'long days'. Other days she was expected to take them whenever she could. Again according to Ms. Dean this is what was expected of everybody in this customer-based business. Ms. Fleck would, on occasion, take the matter up with whoever was on the front desk, Elaine Jack or Kelly Cormier. They were in charge of bookings, and in Elaine's case, scheduling. Kelly Cormier had nothing to do with scheduling and this was a source of frustration between her and Ms. Fleck. The issue was never resolved to Ms. Fleck's satisfaction. Instead her efforts in that regard were subsequently categorized as confrontational.

[41] Aside from the 'breaks' issue there was only one instance where Ms. Fleck and Ms. Cormier did in fact have a confrontation. In late May of 2004 Kelly Cormier booked a couple, one for a massage and one for a facial. She booked Ms. Fleck to do the massage and Shana Langley to do the facial. Ms. Fleck's boyfriend overheard the

booking and when she got off work he told her about it. Ms. Fleck came back to the Salon and began yelling at Kelly Cormier for booking her for a male massage.

[42] Pam Dean claims there were two incidents like this. Kelly Cormier remembers only one. It's possible that the second incident recalled by Ms. Dean was actually the day the couple came in for the services and that's when the issue of who did what surfaced.

[43] In any case Kelly Cormier states that she had no problems with Coralyn Fleck aside from that one time. She considers Coralyn Fleck basically a nice person with a bit of an 'attitude thing'. Shana Langley states that she got along with Coralyn Fleck and there were no problems, nor was she aware that anyone else was having problems with her. According to Twyla Dean Ms. Fleck was a really good esthetician who she herself would use. This was also the opinion of her own clients. She was a bit cranky at times and Twyla Dean may have mentioned to Pamela Dean that she was getting hard to work with. Elaine Jack states that she and Coralyn Fleck had no struggles.

[44] In regard to the time off to work at her father's auctions, again this was something that had been addressed at the initial interview. There is some variance as to how much notice was given for the first date, Saturday May 1 (the second was June 12th). Since Lindsey Verboom left in early April and it was she who Coralyn Fleck approached about it, there would appear to have been plenty of notice.

[45] But notice was not the problem for Pam Dean. It was Lindsey's trying to explain to Coralyn Fleck that she was fully booked that first Saturday. While she refers to it post-dismissal as a factor, it had occurred some two months prior thereto and it does not appear to have been significant enough for Ms. Dean to have addressed at the time.

Furthermore, Ms. Dean's shocked reaction at Ms. Fleck's indication that the auction took priority must be viewed with skepticism given that this was the same position that Ms. Fleck had taken at her pre-hiring interview.

[46] This brings me to the issue of Coralyn Fleck's refusal on May 27th to do any more massages, period. Upon being told this by Ms. Jack, Ms. Dean claims that her only focus was on the business, '*What will we do now?*'. This meant they could not do bookings and certificate holders could not be accommodated. The Salon's ability to go forward without Coralyn to do massages was going to be very very difficult. Ms. Dean states she decided to replace her.

[47] What's puzzling about Ms. Dean's position on this point is that she has either completely missed or chosen to ignore the salient feature of what had occurred. Ms. Fleck had not simply refused to ever do massages again; she had reported some heart flutters to the Salon co-coordinator after performing two long massages without a break, and they had reached an accommodation wherein Ms. Jack would not book any more massages until Ms. Fleck had checked with her doctor about the occurrence; an appointment that was about a week and one-half away. In the meantime Ms. Fleck had offered to do the only two remaining massages that were booked in order to accommodate both the clients and the Salon.

[48] The fact is that the refusal which Ms. Dean asserts as the final straw in her tolerance of Ms. Fleck, did not exist in the form she now claims was the impetus for her actions.

Findings and conclusion:

[49] Upon consideration of the evidence it is my conclusion that there is little, if any factual support for the reasons Ms. Dean asserts were behind the dismissal. While Ms. Fleck's moodiness did at times cause a certain uneasiness among her fellow employees, the only person who had any real difficulty with her was Lindsey Verboom who considered her to be intimidating and confrontational. But Lindsey Verboom had been on maternity leave for almost two months prior to Ms. Fleck's termination, and would not be returning for quite some time (October 2005). As to the second issue, Ms. Dean conceded in response to questions from the Board that the reference to losing business and not getting people booked was not Coralyn Fleck's fault period. The evidence fully supports such a conclusion.

[50] It is to be noted that there were a number of inconsistencies in Ms. Dean's testimony. While affecting an air of sincerity she was at times rambling, creative and evasive. Nowhere was this more evident than her responses in regard to Ms. Fleck's pregnancy.

[51] According to Ms. Dean, not only was the issue of Ms. Fleck's pregnancy a non-issue in her decision to terminate but she was unaware that Ms. Fleck was pregnant. She does acknowledge that at some point she knew that Coralyn 'thought' she was pregnant but that may only have occurred after the decision to terminate.

[52] Her credibility in regard to knowledge on this issue is severely strained when one considers the events of Monday evening, June 4th. Ms. Fleck is in the emergency ward of the local hospital with reason to believe she might miscarry. Her male friend telephones Lindsay Verboom to report what's happening, express his concern, and

advise that Coralyn Fleck would not be in to work the next day. Ms. Verboom then telephoned Ms. Dean to pass on this information. Despite being told that Coralyn Fleck is in the emergency ward at the hospital and is bleeding or spotting, Ms. Dean claims that she never asked any questions nor sought any explanation of why Coralyn Fleck was in hospital. She states that she did not know Coralyn Fleck was pregnant nor did it occur to her that this had anything to do with why she was in hospital. If that were in fact the case, it is only reasonable to expect that she would have asked what had happened that brought Coralyn Fleck to the emergency ward of the hospital that evening. But she maintains she did not.

[53] Later that evening Elaine Jack phoned Ms. Dean with the same report. Apparently despite still not being aware of what was going on she again failed to ask! Both Ms. Verboom and Ms. Jack knew exactly what was happening to Ms. Fleck and were concerned about the possible adverse effects on her pregnancy. Somehow the entire scenario escaped Ms. Dean's grasp.

[54] To validate the Respondent's defense to the *prima facie* case of discrimination would require acceptance of the following circumstances (in no particular order):

- **Pamela Dean did not have any knowledge of Coralyn Fleck's pregnancy prior to June 4, or June 7 and 8, despite it having been announced to other employees in the Salon on May 19:**
- **In all her discussions with Lindsey Verboom and Elaine Jack between June 4 and 8, it did not come up:**

- **Despite being told on Monday night, June 4, that Coralyn Fleck was in the emergency ward at the local hospital, she did not ask the obvious ‘why, what happened?’:**
- **Upon being told by Elaine Jack on or about May 27 that Coralyn Fleck would no longer do massages, she did not make any further inquiries: nor did she deem it appropriate to ask Coralyn Fleck what was behind – as she understood it – her flat out refusal to do any more massages:**
- **That she knew nothing about Coralyn Fleck’s pending doctor’s appointment during which she intended to have the issue addressed:**
- **Despite what she now asserts were intolerable problems with Coralyn Fleck, she never once spoke to her about – efficient use of time, attitude problems, poor mood; nor indicate in any way prior to the termination letter that she had any concerns in regard thereto:**
- **That Pamela Dean and her daughter Lindsey Verboom never discussed Coralyn Fleck’s pregnancy due to something else that was preoccupying the family at the time:**
- **That the availability of Amber Langille as a replacement for Coralyn Fleck only became known inadvertently as a result of Pamela Dean’s phoning Ms. Langille’s mother on or about June 5th in regard to an unrelated personal matter:**
- **That even though there was no culminating incident that week to trigger the suddenness of Pamela Dean’s decision to terminate, neither had it anything to do with Coralyn Fleck’s pregnancy:**

- **Despite her claim of being very upset by what she witnessed between Coralyn Fleck and Lindsey Verboom in regard to the two Saturday's off, and Coralyn Fleck and Kelly Cormier in regard to the two massage/facial clients, Ms. Dean never spoke to her about it nor got involved:**
- **That there is no causal relationship between the pregnancy and issues which suddenly became severe enough to factor into reasons for dismissal even though, prior thereto, they were too insignificant to warrant discussion or addressing in any way:**

[55] It is telling that Ms. Dean's assertion as to why Coralyn Fleck was terminated are unsupported by any warnings, complaints or any attempt whatever to constructively address the alleged issues. Lindsey Verboom had felt for sometime that they should let Coralyn Fleck go but states that Pamela Dean had always stressed that she was a good esthetician and urged her to try and get along. This same response was given to Ms. Jack after she arrived. Then suddenly, and for no reason that was ever given any supporting background, Pamela Dean decided Coralyn Fleck had to go. Ms. Verboom, thought something had happened that week which was severe enough to change Ms. Dean's mind on the subject. But Pamela Dean states that there was no such incident – nothing happened.

[56] The only circumstance that had in fact changed was that Coralyn Fleck had become pregnant. I am left with no other reasonable conclusion but that it was Ms. Fleck's pregnancy that irrevocably altered the employment relationship. Pregnancy

among the Salon's staff was not something with which they were unfamiliar. Lindsey Verboom had recently completed her pregnancy and given birth on May 20th; Kelly Cormier was pregnant and due in August; Twyla Dean had just returned in March from maternity leave. Pamela Dean and Elaine Jack were well aware of what was in store for them in regard to Coralyn Fleck's pregnancy – frequent visits to the doctor and time off on occasion. For whatever is the true reason, they decided not to accommodate her. I say 'they' because despite Ms. Jack's assertion that she was merely following instructions, the evidence indicates that she was influential in the decision to terminate. The extent of that influence is something only Pamela Dean can assess.

[57] Neither is there support for the Respondent's stated reasons for the dismissal, nor any indication that those in existence prior to Ms. Fleck's pregnancy were of any serious concern to Ms. Dean. Accordingly it is the conclusion of this Board that the Respondent's defense to the complaint is not credible. This Board is convinced on balance that the pregnancy of Ms. Fleck was indeed a factor, and perhaps the only one of significance, in the decision to terminate Ms. Fleck.

REMEDY:

[58] In the matter of remedy, the Commission has asked me to consider general damages, special damages, and any public interest remedy that may be deemed appropriate.

[59] I make no award in regard to special damages, the object of which is to place the Complainant, as near as possible, to the position she would have been in financially had the discrimination not occurred. According to Ms. Fleck she was unable to even look for

other employment until the following September and was not actually re-employed until December. How much of this was due to the mental anguish of the discriminatory dismissal as opposed to the emotional distress of the miscarriage, or whether the combined effect, is, in the absence of appropriate medical input, impossible to determine. Because I can not say with certainty if, or how much time off Ms. Fleck would have required solely as a result of the discrimination, I feel it inappropriate to make any assessment in regard to loss of wages.

[60] In regard to general damages it is my impression that the circumstances herein are of the nature contemplated by the Board of Inquiry in *Hill v. Misener (No.2)*, (1997), C.R.R.R. doc. 97-215 when it made the following observation:

In a physical injury, damages in the range of \$2,000 to (sic) represent an extremely minor physical problem which resolves quickly. People who sustain minor physical injuries do not question who they are, they do not question their self-worth, they do not question their value as human beings. An injury to one's self-respect, dignity and self-worth is an injury that is far more destructive and painful and takes a longer time to heal than a minor physical injury.

...

[61] It is just this type of injury that has been inflicted on Ms. Fleck. She was given absolutely no warning of the Respondent's intentions to terminate her employment. On the contrary she was led to believe that everything was fine even after the termination letter had been handed to the courier and was in the process of being delivered to her. It is extremely unfortunate that this occurred while Ms. Fleck was going through a miscarriage. Instead of getting an expression of concern from her employer, she was handed a letter of termination. This can only be viewed as a harsh blow which compounded an already highly emotional circumstance. As Ms. Fleck describes it, she felt as if the rug had been pulled from under her. It is understandable that she would have questioned her self-worth and her value as a human being, as a result of the treatment she received.

[62] The range of general damages for contraventions of the Human Rights Act is currently between \$1,000.00 and \$10,000.00. As a consequence of this discrimination Ms. Fleck suffered injury to her dignity and self respect under circumstances which I assess as requiring an award in the higher end of that scale. Therefore, I assess general damages to Ms. Fleck in the amount of \$8,000.00

[63] The Respondent, Ashton's Salon & Day Spa Inc. is hereby ordered to pay that amount to the Complainant on or before August 31, 2006.

July 13, 2006

David J. MacDonald, Chair
Human Rights Board of Inquiry