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 -

Alpine Sausage Co. Ltd.
("Alpine")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	98/701
DATE OF HEARING:	January 11, 1999
DATE OF DECISION:	January 26, 1999

DECISION

APPEARANCES

for Alpine Sausage Co. Ltd.	Josef Heinrich
for the individual	Denise Southern
	Michael Southern

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by the Alpine Sausage Co. Ltd. ("Alpine") of a Determination which was issued on October 27, 1998 by a delegate of the Director of Employment Standards (the "Director"). In that Determination the Director concluded Alpine had contravened Sections 58(1)(b), 58(3) and 63(2)(b) of the *Act* in respect of the employment of Michael Southern ("Southern") and ordered Alpine to pay an amount of $8075.57.

Alpine says the Director was wrong to conclude Southern was entitled to length of service compensation, arguing Southern lost that entitlement when he refused to return to work after being requested to do so during his temporary layoff. Alpine also contends the Director was wrong to ignore a $1400.00 debt that was owed by Southern to Alpine when the amount of vacation pay owing to Southern was calculated.

ISSUE TO BE DECIDED

The issue raised by the appeal is whether Alpine has met the burden of persuading the Tribunal that the Determination ought to be varied or cancelled because the Director erred in fact or in law in reaching the conclusions upon which the Determination is based.

FACTS

Southern had been employed by Wim's Freezer Meats Ltd. from June 13, 1988. That company was purchased on February 5, 1996 by Josef Heinrich ("Heinrich") and Southern's employment continued following the disposition. Between the date of disposition and January 15, 1998, the name of the employer changed to Alpine. There is no dispute that Southern's employment was continuous and uninterrupted from June, 1988 to January 15, 1998.

On January 15, 1998, Southern was laid off. The Record of Employment indicates the lay off was temporary and the expected date of recall was shown on that document as May 4, 1998.

Southern continued to be on temporary lay off to at least March 25, 1998. Up to that date, there were two or three discussions between Alpine and Southern about when he might return to work, but Alpine could only say that he would be recalled when things got busier. Alpine alleges that Southern was called back to work on March 25 and refused. Southern says he was not called back to work.

On March 23, Southern received a telephone call from Heinrich to come to the Bredin Road plant. Southern went in the next day. According to Southern, Heinrich wanted him to drive the company truck to Vancouver the following day, pick up some orders and return. Southern says there was some discussion about if and when he would be called back to work and that Heinrich continued to be equivocal, saying that business was slow and no work was available for Southern. After some further discussion, Heinrich said he would get someone else to drive the truck to Vancouver.

According to Heinrich, he told Southern on March 24 to could return to work but Southern declined, saying it would interfere with an educational/training program which was being funded through Employment and Immigration. Heinrich said he did not press Southern to return to work and let the matter go at that.

On May 2, 1998 there was a chance meeting between Southern and Heinrich during which another conversation took place about Southern's continued employment with Alpine. Heinrich says he asked Southern to come in the following Monday to talk about his job. Southern says Heinrich was quite clear during the conversation that he was not going to be called back to work in the foreseeable future and there was no invitation to meet with Heinrich on the following Monday to discuss his job.

ANALYSIS

The *Act* defines ***"temporary layoff"*** as meaning:

> *(a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and*
>
> *(b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks.*

Subsection 63(5) says an employee who is laid off for more than a temporary layoff is deemed to be terminated as of the beginning of the period of layoff. Unless Southern quit his employment on March 25, 1998, by April 17, 1998 he was deemed terminated. Length of service compensation becomes payable on termination of employment. The principle of mitigation is not incorporated into Section 63 of the *Act*. Consequently, whether Southern refused an offer to return to employment after April 17, 1998 is not relevant to whether he was entitled to length of service compensation on April 17. If the post-April 17 events are relevant at all, it would only be for the purpose assisting in determining the reliability of the respective versions of events that occurred up to April 17.

Under Section 63 of the *Act*, an employer becomes liable to pay length of service compensation to each eligible employee. This liability may be discharged in only three circumstances: where the employer gives written notice of termination to the employee as required by paragraph 63(3)(a); where the employer gives the employee a combination of notice and compensation in an amount equivalent to the amount the employer is liable to pay; and where the employee terminates employment, retires from employment or is dismissed for just cause. In this case, Alpine seeks to be discharged from its statutory obligation to pay Southern length of service compensation on the ground that Southern terminated, or quit, his employment.

The Tribunal has been consistent in its approach to allegations that an employee has terminated, or quit, the employment. The following statement is found in the Tribunal's decision *Burnaby Select Taxi Ltd. -and-Zoltan Kiss***,** BC EST #91/96:

> The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment.

The sole basis for the argument that Alpine should be discharged from the liability to pay length of service compensation is that Southern terminated his employment when he was called back to work on March 24 and refused to return to work. The burden on Alpine in this case is to prove that Southern was called back to work and that he refused to return. Alpine has not established that Southern was called back to work or that Southern refused to return to work.

While there was some conflict in the evidence about all that was said in the conversation that took place on March 24, there is complete agreement that Heinrich did not demand, pressure or even request Southern to return to work on March 25. In his testimony, Heinrich said he talked with Southern about returning to work for Easter, that Southern said it would interfere with his UI education and, according to Heinrich,: *"I said OK, I didn't press it"*. His testimony confirmed what he said he had recalled of the conversation in a letter to Southern, dated June 25, 1998, in which he stated:

> I also very clearly recall a conversation with you and our Production Manager Les Walraven a few weeks before Easter, when I asked you if you were interested to resume your employment with us earlier, because Easter is a fairly busy time in our industry. At this point you said *that if I insist on you returning to work you would do it*, but you would prefer to stay with your EI program.
> (emphasis added)

The above evidence was confirmed in the testimony of Southern and all of the above is consistent with his reply submission on the appeal, part of which states his recollection of the conversation:

> He asked me if I was still on Employment Insurance and I said that I was attending some courses to try to start my own business. He told me he didn't want to mess that up. He told me not to worry about coming back.

The evidence shows that Southern was not being placed in a position where he was asked to make a choice about whether to return to work or quit his employment. In fact, the June 25, 1998 letter of Heinrich indicates Southern stated that if he was pressed, he would have returned to work.

Accordingly, I conclude that Alpine has not shown the Director was wrong in fact or in law in concluding Southern was entitled to length of service compensation.

Alpine also raised an issue in its appeal about whether a debt of $1400.00, which was acknowledged by Southern during the investigation and again in his evidence, but had not been acknowledged in writing nor made the object of an assignment of wages, could be deducted from any wages found to be owed as a result of the appeal. The question is whether I can give effect to the debt in the context of this appeal. Section 21 of the *Act* reads:

21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly,

> *withhold, deduct or require payment of all or part of an employee's wages for any purpose.*
>
> *(2) An employer must not require an employee to pay any part of the employer's business costs except as permitted by the regulations.*
>
> *(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.*

The debt is not a matter which is either permitted or required to be deducted by the *Act* or by any other enactment and therefore falls within the general prohibition in subsection 21(1). The *Act* is clear in that regard and I have no authority to ignore or override it. At best, I can only conclude there is some other provision of the *Act* that allows it to be set off.

Section 22 does allow limited exceptions to the general prohibition in Section 21 and, in particular, subsection 22(4) allows an employer to honour an employee's written assignment of wages to meet a credit obligation. However, the debt owed by Southern to Alpine is neither in writing nor is it the object of an assignment. Accordingly, that provision would not allow me to give effect to the debt in the context of this appeal. There is no other provision of the *Act* that addresses this issue or allows the Tribunal the authority to make the adjustment sought by Alpine.

There is no ground for this aspect of the appeal. The Director does, however, have a continuing involvement in this file, including authority under Section 78 of the *Act* to assist in settling the complaint and I can only ask the Director to consider whether it would be constructive to exercise that authority in the circumstances.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 27, 1998 be confirmed in the amount of $8075.57, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal