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-

Patricia Ann Wong
("Wong")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	98/655
DATE OF HEARING:	February 5th, 1999
DATE OF DECISION:	February 18th, 1999

DECISION

APPEARANCES

Lee Cowley	Counsel for Patricia Ann Wong
Greg Harney	Counsel for Habitat Contemporary Furniture Ltd.
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Patricia Ann Wong ("Wong") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 2nd, 1998 under file number 087-490 (the "Determination").

Wong filed a complaint under the *Act* against her former employer, Habitat Contemporary Furniture Limited ("Habitat" or the "employer"), claiming 8 weeks' wages as compensation for length of service (see section 63) and additional vacation pay (see section 58). Counsel have agreed that if Wong is entitled to additional vacation pay, the amount due is $235.50.

The Director's delegate dismissed Wong's claim for additional vacation pay, finding that her length of service at the point of termination was less than 5 years and thus she was only entitled to the 4% vacation pay that was, in fact, paid to her. With respect to Wong's claim for compensation for length of service, the delegate rejected Wong's position that her employment was terminated on or about November 12th, 1997; rather, the delegate concluded that Wong was temporarily laid-off on that date and was recalled for work within 13 weeks of that temporary layoff. Because Wong declined the employer's recall offer, the delegate held that she, in effect, quit her employment and thus was not entitled to any compensation for length of service [see section 63(3)(c)].

The appeal hearing was held at the Tribunal's offices in Vancouver on February 5th, 1999 at which time I heard *viva voce* evidence from Ms. Wong, on her own behalf, and from Mr. Derek Hickton ("Hickton")--a Habitat shareholder, officer and director--on behalf of Habitat. In addition to the two witnesses' testimony, I have also considered the various documents and written submissions submitted by the parties to the Tribunal.

ISSUES TO BE DECIDED

This appeal raises two broad issues. The first issue concerns Wong's length of service. Depending upon Wong's years of service, she is entitled to either 4% or 6% vacation pay; further, her actual tenure will determine her entitlement to compensation for length of service (assuming that her employment with Habitat was, in fact, terminated by the employer).

The second issue concerns the termination of her employment: simply put, was Wong terminated without cause or notice or did she, in effect, quit?

I shall deal with each issue in turn.

FACTS AND ANALYSIS

Length of Service

Habitat is a furniture retailer located in Richmond, B.C. Wong commenced her employment as a Habitat sales representative in August 1987 and her employment continued until mid-September 1988 when she was off work for 18 weeks on maternity leave. Wong returned to work at Habitat in mid-February 1989 and continued her employment until June 14th, 1992.

Wong's evidence is that she never quit her employment with Habitat in June 1992; rather, she was off work on maternity leave (18 weeks) followed by parental leave (12 weeks) and then a further 2 weeks using accrued vacation time. She returned to work in early March 1993. Wong maintains that she was continuously in Habitat's employ--albeit on leave for two separate periods of 18 and 38 weeks, respectively--from August 1987 until November 1997.

The Director's delegate found that Wong quit her employment in June 1992 and was rehired in March 1993. Accordingly, her length of service, for purposes of calculating vacation pay and compensation for length of service, commenced in March 1993 rather than in August 1987.

Hickton testified that Wong, either prior to or during her second maternity leave commencing in June 1992, indicated that she did not wish to return to work due to the demands of looking after her two young children. However, shortly before she returned to Habitat in March 1993, Wong did inquire about the availability of part-time work and Hickton was agreeable to Wong returning on a part-time basis (Friday evenings and Sundays).

Very obviously, there is a conflict in the evidence. What then, on the balance of probabilities, is the more likely scenario? The documentary evidence is of some assistance. On June 14th, 1992, Habitat issued Wong a Record of Employment ("ROE") as it was obliged to do. The ROE indicated that Wong's last day of work was June 14th, 1992; the stated reason for issuing the ROE was "pregnancy/adoption" (code "F"); the expected date of recall was shown as "unknown" and all accrued vacation pay was accounted for.

If Wong was simply taking a leave from her employment, rather than quitting, why would the employer have paid out her vacation pay? Further, if the expectation was that Wong would be returning to work why would the ROE not record "leave of absence" (code "N") rather than pregnancy (code "F")? Finally, if Wong was only taking a maternity leave, why wouldn't her expected return date be known with some reasonable certainty?

Under the provisions of the *Employment Standards Act* then in force, an employee was entitled to 18 weeks maternity leave but only after having requested such leave in writing (supported by a certificate by a medical practitioner certifying the pregnancy and indicating the probable birth date). Under the former Act, an employee could also apply (again, in writing and supported by a medical certificate), for additional parental leave but the combined maternity and parental leave could not exceed 32 weeks (former Act, section 51.2).

There is no reliable evidence before me that Wong ever provided the requisite written notice and medical certificates to the employer as required by sections 51 and 51.1 of the former Act. Wong says that she did give such notice; the employer says otherwise, however, Wong has not tendered any corroborating documentary evidence. Wong's evidence is that 1 week before her maternity/parental leave expired, she contacted Hickton about returning to work only to be told that "business was slow" and that he (Hickton) "would get back to her". As noted above, Wong did return to work, after a 38 week hiatus, in early March, 1993.

Under section 54 of the former Act, Wong was entitled to be reinstated to her former position at the conclusion of her combined maternity and parental leave and, on her evidence, was not allowed to return. Despite the employer's apparent refusal to reinstate her at the conclusion of her maternity/parental leave, she never filed a complaint under section 56 of the former Act.

Finally, Wong says that after taking 30 weeks maternity/parental leave she then took an additional 2 weeks as vacation time. However, there is no evidence before me that Wong had any further entitlement to vacation leave after June 14th, 1992 (Wong had already been paid her accrued vacation pay for the current year--see the ROE issued on June 14th, 1992).

In light of all the foregoing, I cannot conclude that the delegate erred in determining that Wong's employment terminated in June, 1992 and that she was rehired in March, 1993. Section 53 of the former Act deemed employment to be continuous only where the employee was absent from work in accordance with the leave provisions set out in Part 7 (*i.e.*, the Maternity and Parental leave provisions). On the basis of the evidence before me, I am of the view that during the period June 1992 to March 1993 Wong was not on maternity and parental leave as defined by Part 7 of the former Act.

I find that Wong's employment ended in June 1992 and commenced anew in March 1993 and, accordingly, she is not entitled to any additional vacation pay because she did not, as of November 12th, 1997 (or by January 1998), have the requisite "5 consecutive years of employment" mandated by section 58(1)(b) of the *Act*. I cannot accede to the argument made by counsel for Wong that, despite the 38 week "break" in her service, she can nevertheless be treated as a "10-year" employee for purposes of the *Act*.

While at common law Wong's entire tenure with Habitat could be taken into account for purposes of determining her entitlement to "reasonable notice" of termination (see *McIlvaney v. Estee Lauder Cosmetics Ltd.* [1991] B.C.J. No. 3408 and the cases cited therein), my jurisdiction is limited by the specific requirements of the *Act.* Under the *Act,* both vacation pay and compensation for length of service are determined solely on the basis of an employee's "*consecutive* years of employment" rather than *total* years of employment. It should also be noted that under the common law, service is but one (albeit an important) factor to be taken into account in determining reasonable notice; depending on other factors--such as age, position, prevailing labour market conditions--employees of equal service could be entitled to markedly different "reasonable notice" periods. In my view, a general common law principle cannot be imported into the *Act* when the effect would be to override specific statutory language.

In sum, I find that Wong was entitled to vacation pay at a rate of 4% rather than 6% of earnings. It is conceded that she was paid at the 4% rate. This aspect of Wong's appeal is therefore dismissed.

Compensation for length of service

Given my finding with respect to Wong's length of service, if she is entitled to any termination pay, her entitlement is 4 weeks' wages [see section 63(3)(a)(iii) of the *Act*]. While Habitat concedes that it did not pay Wong any termination pay, it says that it was not obliged to do so because Wong was not terminated; rather, she quit [see section 63(3)(c)].

There is no dispute that Wong was laid off on November 12th, 1997. A few days later, on November 18th, Habitat issued Wong an ROE which indicated that her employment was terminated due to a "shortage of work" (code "A"). Wong maintains that she was "permanently terminated" on November 12th; the employer maintains that Wong was only given a "temporary layoff" at that time with the expectation that she would be recalled when business improved.

The Employer's Position

Habitat's 1997 Fall sales were substantially less than the Summer's sales. Indeed, sales in November were only about 45% of July's sales. In an effort to reduce costs, a decision was made to layoff two employees, one of whom was Wong. Hickton says that his expectation all along was that he would recall Wong when business improved and thus he considered her layoff to be temporary rather than permanent. Hickton says he spoke with Wong by telephone and confirmed with her that she was laid off with the expectation of recall. This was also confirmed to her by the employer's letter dated November 20th, 1997 which states, in part, "as I told you verbally, the fact that business is very slow, we have had to put you on temporary layoff" and that "as soon as business picks up, we would like to call you back to work". The employer's November 20th letter also referred to the 13-week "temporary layoff" period provided for in the *Act.*

Sales in December, 1997 and January, 1998 showed marked improvement. Hickton testified in that January 1998, with business seemingly improving, he made several unsuccessful attempts to contact Wong--he believes she was at that point avoiding his calls so as to crystallize a claim for

termination pay. He spoke with Wong on or about January 9th at which time she asked for a "written guarantee of employment", something he was not prepared to provide although he was prepared to recall Wong to work on the same terms and conditions under which she had formerly been employed.

Hickton wrote to Wong on January 26th, 1998 recalling her as of January 30th, 1998 to work the identical schedule of hours she had worked prior to her layoff; Wong was requested to confirm her intention to return to work by no later than Noon January 29th, 1998. In the absence of any reply from Wong, Habitat took the position that Wong had quit and thus Hickton forwarded to Wong her vacation pay and an earned bonus along with a letter dated February 18th, 1998. The February 18th letter read, in part, "since you have not responded to my letter of January 26th, 1998, you obviously do not wish to continue employemnt (sic) with us".

Wong's Position

Wong testified that on November 12th, 1997 her employment was terminated by Hickton; he made no mention of a possible recall and suggested that she look for work elsewhere. Indeed, Wong's evidence is that a few days later, Hickton suggested that she apply for work at another furniture retailer--Georgia Interiors--that was, apparently, advertising for staff. Wong never applied for this job perhaps because, as suggested by Hickton, Georgia Interiors was only advertising for short-term help as it was liquidating its inventory. Wong did, however, seek out new employment and her search bore fruit when, on November 19th, she was offered a job with ScanDesigns Ltd.; she commenced her employment with that firm on November 28th, 1997.

Wong testified that she never received the employer's letter of November 20th, 1997 (which confirmed a temporary layoff rather than a permanent dismissal); indeed, she says that the first time she saw this letter is after her appeal was filed and it was provided to her by the Tribunal. I find this latter statement to be disingenuous; I cannot accept Wong's submission that the November 20th letter was an *ex post facto* fabrication by the employer. It should be noted that this letter was provided to the delegate during his investigation and was specifically mentioned in the Determination. The employer's November 20th letter was provided to Wong's solicitor by the delegate on August 31st, 1998--tellingly, in my view, the solicitor never challenged the veracity of the employer's November 20th letter in his September 14th, 1998 written submission to the delegate. So far as I can gather, Wong's present assertion that she never received the November 20th letter (and that it was a fabrication) was advanced for the very first time in her appeal documents; this assertion was never advanced during the course of the delegate's investigation.

Wong says that she spoke with Hickton by telephone on January 9th, having returned his earlier call of the 7th, and while he suggested that business was improving he did not ask her to return. He apparently inquired about Wong's employment with ScanDesigns--Wong rebuffed his request--and she asked Hickton if she "had a job or not". Since Hickton would not confirm a fixed return date, Wong sent the following brief letter to Hickton on January 9th:

> "I am confirming my telephone conversation with you on January 9, 1998. In our conversation when queried concerning my employment status, you could not offer in writing a guarantee of a full time position or a return date to resume employment.

> Accordingly, I will consider myself dismissed from employment from your firm as per the letter dated November 13, 1997."

Wong received the employer's January 26th recall letter but never responded either verbally or in writing. Wong's testimony on this latter point was "I did not respond because I already had a job and so I ignored the letter".

Findings

As noted above, I reject the notion that the employer fabricated the November 20th letter--a letter that specifically stated that Wong was being placed on "temporary layoff" with the expectation of recall. By definition (see section 1) a *temporary layoff* is "a layoff of up to 13 weeks in any period of 20 consecutive weeks"; again, by definition, there is no *termination of employment* if the employee is only placed on temporary layoff. Section 63(5) provides that an employee is deemed to be terminated as of the commencement date of a temporary layoff but only if the temporary layoff exceeds the 13-week threshold.

In my view, the delegate correctly determined that Wong was not entitled to any compensation for length of service because she was given a temporary layoff and subsequently quit her employment during the 13-week temporary layoff period. Further, and in any event, Wong was recalled within the 13-week period but chose to refuse the recall (see *Slumber Lodge Motel Corp.*, B.C.E.S.T. Decision No. 171/97).

I cannot accept that Wong was dismissed rather than laid off on November 12th, 1997. The November 18th ROE is entirely consistent with the employer's position--the ROE was issued for shortage of work (code "A") rather than on the basis that Wong had been dismissed (code "M"). The "expected date of recall" box on the ROE was marked "unknown" rather that the alternative choice, "not returning". The employer's position is also consistent with the reference letter that it provided to Wong at her request--the letter says that her employment was discontinued "due solely to the economy and level of business we are experiencing at this time" and that the employer "would be pleased to hire her in the future".

Further support for the employer's position can be found in the fact that Wong admitted during her cross-examination that Hickton made "repeated calls" to her residence in early January, 1998--why would the employer be attempting to contact Wong if, as she alleges, she had already been "permanently laid off" (*i.e.*, dismissed)?

Wong's own letter of January 9th, 1998 offers, at best, equivocal support for her position. This letter refers to the employer's failure to "guarantee in writing" a full-time position (something the employer was *not* obliged to do); the letter also states *"accordingly, I will consider myself dismissed from employment"*--such language is puzzling if, as Wong submits, she had already been dismissed some two months earlier.

In my view, the more likely scenario is that Wong, having already secured alternative employment with ScanDesigns, was unwilling to return to Habitat unless she had a written guarantee of full-

time employment (it should be noted she was *not* a full-time employee prior to her layoff). Since Habitat was unwilling to offer employment on those terms, she quit. However, and this is the key point, Wong *quit while she was on temporary layoff* and thus the employer was not obliged to pay her any compensation for length of service. Even if one does not characterize Wong's January 9th letter as a quit, the uncontroverted evidence is that she was recalled to work--on January 26th, 1998--but refused to report. Wong's refusal to return to work upon recall can be characterized as a "constructive resignation" (see *e.g., Axelrod v. Beth Jacob of Kitchener et al.*, [1944] 1 D.L.R. 255, Ont.C.A.) and because this resignation occurred within the 13-week temporary layoff period the employer, once again, was not obliged to pay her any compensation for length of service.

In view of my findings, Wong's appeal must be dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal