Employment Standards TRIBUNAL

An appeal

- by -

IND Diagnostic Inc.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2003A/29

DATE OF HEARING: April 22, 2003

DATE OF DECISION: May 6, 2003

DECISION

APPEARANCES:

James Yang, Human Resources Manager for IND Diagnostic Inc.

INTRODUCTION

IND Diagnostic Inc. (the "Employer") appeals, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on December 31st, 2002 (the "Determination") pursuant to which it was ordered to pay its former employee, Ms. Yong Mei Wang ("Wang"), the sum of $1,042.24 on account of 2 weeks' wages as compensation for length of service, concomitant vacation pay and section 88 interest.

This appeal was heard at the Tribunal's offices in Vancouver on April 22nd, 2003 at which time I heard the testimony (under oath) of Mr. James Yang, on behalf of the Employer. Ms. Wang did not appear at the appeal hearing nor did anyone appear on behalf of the Director.

REASONS FOR APPEAL

The Employer appeals the Determination awarding Ms. Wang compensation for length of service on the ground that the Director's delegate failed to observe the principles of natural justice [section 112(1)(b) of the *Act*]. There is absolutely nothing in the material before me to support this ground--the Employer was given a full and fair opportunity to present its case to the Director's delegate. The Employer simply disagrees with the delegate's conclusions.

As Mr. Yang developed the Employer's argument both in written submissions and at the appeal hearing, it is clear that the Employer's challenge to the Determination more properly falls under section 112(1)(a)--the Director erred in law. More specifically, the Employer says that Ms. Wang was not entitled to any compensation for length of service since she received approximately one month's written notice of termination pursuant to section 63(3)(a) of the *Act*.

FINDINGS AND ANALYSIS

As noted above, the Employer asserts that it provided Ms. Wang approximately one month's written notice of termination and, accordingly, is not obligated to pay her any compensation for length of service.

Mr. Yang, on behalf of the Employer, submitted a letter, dated March 6th, 2001 under the signature of Mr. Hui Yuan (identified as the Employer's "General Manager"), which the Employer says fully satisfied its statutory obligation under section 63(3)(a) of the *Act*. In addition, I also have before me a one-page "without prejudice" agreement dated as of March 6th, 2001 which purportedly is signed by Ms. Wang even though the other party identified in the agreement is another employee, Ms. Yao Wei Wang. In its appeal documents, the Employer says that this document concerns Ms. Wang but that "we mistakenly wrote another employee name" in the agreement. This latter agreement is submitted as further corroboration of Ms. Wang's termination as of March 6th, 2001.

It is, of course, the Employer's burden to prove--on the balance of probabilities--that the Determination is incorrect since, in this case, it was based on an error of law. The Employer alleges, in effect, that the delegate erred by making a finding totally against the weight of the evidence.

Very often, when a respondent fails to attend the appeal hearing, there is little reason to reject any evidence tendered by the appellant since it is uncontradicted. There are, however, several evidentiary problems with the Employer's evidence in this case. Indeed, the evidentiary failings are so significant that I find myself unable to accede to the Employer's submission. I find that the delegate properly considered the available evidence and that there is no sound reason for setting aside the delegate's conclusions both as to matters of fact and law.

The principal evidentiary failing in this case concerns the form of the "written notice of termination" purportedly issued by the Employer to Ms. Wang. The Employer's March 6th letter is not, as I conceive the document, written notice of *termination.* Rather, it is a notice of *temporary layoff.*

The *Act* allows an employer to "temporarily layoff" an employee for a period of up to 13 weeks (in any period of 20 consecutive weeks) without incurring any liability for compensation for length of service or any concomitant alternative obligation to give proper advance written notice of termination in lieu of paying compensation (see the section 1 definition of "temporary layoff"). If a "temporary layoff" exceeds the 13-week threshold it is deemed to constitute a termination effective as of the date of the initial temporary layoff--see section 63(5).

However, an employer cannot have it two ways--a cessation in employment is either a termination (in which case compensation for length of service must be paid or, alternatively, proper written notice must be given in lieu of paying compensation) *or* the cessation in employment is only intended to be temporary in which case the employer has no immediate financial obligation to pay compensation for length of service nor need it give any prior written notice.

It must be remembered that this "election" is entirely unilateral on the employer's part. However, surely, at the time the employer elects, the employee must be given some reasonable indication regarding what election the employer has made. If the cessation is intended to be permanent, then the employee will undoubtedly look for new work; if the cessation is only intended to be temporary, the employee's response will likely be more nuanced. The employee may or may not seek out new permanent employment depending on a number of factors including the employee's subjective assessment about whether or not they will be recalled (and, when recall might occur).

The first (and most critical with respect to this issue) paragraph of the Employer's March 6th letter to Ms. Wang reads as follows:

> This is a notice that [sic] informing you will be *temporary laid-off* by IND Diagnostic Inc. due to the shortage work. (my *italics*)

The notion that Ms. Wang was only being temporarily laid off (or, at least, would consider herself to be so positioned) is further evidenced by the third article of the previously mentioned "agreement" which states that the Employer "will notify the Employee to return to work if any appropriate open position is available...". While there is language in both the March 6th letter and in the agreement that might suggest a more permanent cessation of employment, I find, on balance, that the most reasonable interpretation of the document *on its face* is that it represents a notice of temporary layoff.

Finally, even if I were to conclude that the Employer's March 6th, 2001 letter was a termination letter, I do not have any evidence before me that this document was actually given to Ms. Wang since Mr. Yang--the only witness to testify on behalf of the Employer--was not able to provide anything other than hearsay evidence on that point. In her submissions to the delegate, Ms. Wang claimed she had never been given the March 6th letter as alleged by the Employer. The one Employer witness who could give proper evidence about the circumstances relating to the March 6th letter did not testify before me; I draw an adverse inference as a result of this omission in the Employer's evidence.

The Employer's appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$1,042.24** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal