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 -

Ron Mah
operating
Kingsland Restaurant

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No.: 2000/065

DATE OF DECISION: April 20, 2000

DECISION

OVERVIEW

This is an appeal by Ron Mah operating as Kingsland Restaurant ("Mah") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination dated January 14, 2000 (ER# 22524) by the Director of Employment Standards (the "Director").
The Director determined that an employee, Jocelyne Flanders ("Flanders") was terminated without cause and without compensation due to an extended lay-off. The Director determined that Flanders was entitled to compensation for length of service in the sum of $276.35 (including vacation pay and interest to that date).

Mah has appealed on the basis that he never "fired" Flanders. He submits that the restaurant was closed for the summer and that he would have re-hired Flanders after the lay-off but she did not give him the chance to do so.

ISSUE TO BE DECIDED

The issue to be decided is whether Flanders' employment was effectively terminated and whether she is entitled to compensation for length of service.

FACTS AND ANALYSIS

Mah is the owner and operator of a restaurant, the Kingsland Restaurant, in Rossland, B.C. Flanders was employed by Mah to work in the restaurant. There is no dispute that if her employment was terminated, without notice or cause, she was entitled to two weeks wages as compensation for length of service in accordance with section 63 of the *Act*.

Mah decided to close the restaurant for about two months in the summer of 1999. He did not fire Ms Flanders and he did not give her notice. She was effectively laid-off. Mah says that he intended to recall Flanders to work once he re-opened the restaurant. The restaurant was closed on July 3, 1999 and re-opened on September 6, 1999 - a period of 9 weeks. Mah did not re-call Flanders to work although it is clear, even on his own submissions, that he was aware that she was still available for work.

The *Act* defines temporary layoff, in part, as follows:

> *"temporary layoff" means*
>
> *(b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks*

The *Act* then provides in section 63 that an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

As the beginning of the layoff for Flanders was July 3, 1999, unless she returned to work by October 3, 1999 she would be deemed to be terminated as of July 3, 1999.

Ms Flanders was not recalled to work and filed her complaint on November 3, 1999.

Although the employer never actually "fired" Ms Flanders (and he says he would never have done that) the effect of the legislation is that the simple passage of time means that her employment was effectively terminated as of July 3, 1999. Even if Mah intended to bring Flanders back to work at some point she was deemed to have been terminated in July and was therefore entitled to compensation for the length of her service to that date.

The obligation to pay compensation can be removed if the employer gives the appropriate notice, if the employee quits or retires, or if the employee is terminated for just cause. None of these reasons apply in this case. Mah says that he did not dismiss Flanders. He did not give her any notice and there is no suggestion that she quit or retired.

I am satisfied that the Director's delegate properly investigated this matter, applied the proper law, and came to the correct conclusion. The employer has not met the onus of persuading me that the Determination is wrong. Therefore the Determination will be confirmed.

ORDER

I order, under section 115 of the *Act*, that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal