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 -

Real Emond and Erika Kirrmaier operating as
BJ's Restaurant & Rentals
(" BJ's ")

\- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B Stevenson

FILE No.: 2000/049

DATE OF HEARING: April 25, 2000

DATE OF DECISION: May 4, 2000

DECISION

APPEARANCES

for the appellant:	Real Emond
	Erika Kirrmaier
for the individual	in person
for the Director	Joe LeBlanc

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Real Emond and Erika Kirrmaier operating as BJ's Restaurant & Rentals ("BJ's") of a Determination that was issued on January 12, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that BJ's had contravened Section 63 of the *Act* in respect of the employment of Rita Sivorot ("Sivorot") and ordered BJ's to pay an amount of $1120.57.

The key factual issue that arose in the Determination was whether Sivorot quit or was terminated without notice. The Director concluded, after reviewing the circumstances, that Sivorot had not quit, but had been terminated. BJ's takes issue with that conclusion.

ISSUES TO BE DECIDED

The issue in this case is whether BJ's has shown that the conclusion of the Director that Sivorot did not quit her employment, but was terminated, was wrong.

FACTS

BJ's is a restaurant in Kimberly owned and operated by Real Emond and Erika Kirrmaier. Sivorot worked as the cook at the restaurant from October 1, 1995.

On December 6, 1998, Sivorot was injured in an automobile accident. She notified the owners of BJ's of the incident. She was off work for approximately 14 days, returning on or about December 21, 1998. She worked with pain until December 28 and was scheduled be off until January 1, 1999. During her time off she consulted with her doctor, who told her to take some additional time off work to recover from the accident. She called the owners at home on New Years Eve and talked to Erika Kirrmaier. She told her she needed more time off. Ms. Kirrmaier told her to call when she was ready to return.

Sivorot was in the restaurant about two weeks after this call, but no meaningful conversation occurred between her and either of the owners. There was no further communication between

Sivorot and the owners of BJ's until Sivorot's father relayed a message that Mr. Emond wanted to talk with her. None of the witnesses were able to accurately place this event, but it was shortly after Sivorot had gone to BJ's accountant for her Record of Employment for her insurer, ICBC, probably late February or early March. Sivorot called Mr. Emond as a result of this message. There was a discussion, which was ended by Mr. Emond because he had to attend to a customer. Sivorot told him if he wanted to meet with her that he should call her back. Mr. Emond did not call her.

In June, 1999, ICBC retained Leanne Vaughan, an Occupational Therapist, to assess Sivorot and set up a therapy program for her. As a result of her assessment, Mrs. Vaughan believed that part of Sivorot's therapy program could involve a graduated return to work. On July 6, 1999, Mrs. Vaughan called BJ's. The purpose of her call was to inquire whether BJ's would participate in a graduated return to work for Sivorot. She was referred to Mr. Emond. She asked Mr. Emond of there was a job available for Sivorot. As both Mr. Emond and Mrs. Vaughan recall the call, there was no discussion about what kind of job was being contemplated by Mrs. Vaughan. Mr. Emond told her that Sivorot had not contacted BJ's since she went off, that they had filled her position and they would prefer it if Sivorot "moved on".

ANALYSIS

Section 63 of the *Act* contains provisions relating to an employer's liability to pay an employee length of service compensation on termination of employment. For the purposes of this appeal, the relevant parts of that statutory provision are subsection 63(1) and paragraph 63(3)(c) of the *Act*, which state:

> *63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one weeks' wages as compensation for length of service.*
>
> . . .
>
> *(3) The liability is deemed to be discharged if the employee*
>
> *(c) terminates the employment, retires from employment, or is dismissed for just cause.*

Length of service compensation is, from the employee's perspective, a statutory benefit earned with continuous employment. It is a minimum statutory benefit. From the employer's perspective, it is a statutory liability that accrues to each employee with more than 3 consecutive months of employment. While length of service compensation is often referred to as "termination" or "severance" pay, it is related to termination only to the extent that a termination of employment, actual or deemed, triggers the benefit or liability, depending on the perspective. Subsection 63(3) identifies three circumstances where the statutory liability of the employer to pay length of service compensation is deemed to be discharged: first, if the employee is given written notice of termination equivalent to the employer's statutory liability to the employee; second, if the employee is given a combination of notice and compensation equivalent to the employer's statutory liability to the employee; and third, if the employee terminates the employment, retires from employment or is dismissed for just cause. It should be pointed out

that while the *Act* uses the phrase *"terminates the employment"* in paragraph 63(3)(c), that phrase captures circumstances that are more commonly described as quitting or abandoning employment.

In its appeal, BJ's makes the following point:

> 4. Because there was no contact also proves that there is no way that we could have terminated her, and because she never contacted us also confirms that there is no way she could have asked for her job back either. Also because we never issued her an ROE stating she was terminated shows we had no intention of terminating her.

In respect of this point, the *Act* takes a broad view about what might constitute a termination. In Section 1 of the *Act*, termination is simply described as follows:

> *"**termination of employment**" includes a layoff other than a temporary layoff.*

In its ordinary sense, a "termination" is a bringing to an end. Under the *Act*, as the above definition suggests, employment can be brought to an end without any direct communicating of that fact to an employee. Under Section 63, for example, an employee who is laid off for more than a temporary layoff is deemed to be terminated; under Section 66, the Director may deem an employee terminated if a condition of that employee's employment has been substantially altered.

In this case, the Director concluded that Sivorot's employment was terminated, for the purposes of administering the complaint, on July 6, 1999, when Mr. Emond told Mrs. Vaughan that there was no job available and he would prefer it if Sivorot "moved on". That was a reasonable conclusion, even though there was no direct communicating of the "termination" to Sivorot. Certainly if the Director was mistaken in that conclusion, Mr. Emond or Ms. Kirrmaier had ample opportunity to correct that misconception. The Director notes in the reply submission to the appeal that from the time the Branch first contacted BJ's, in August, 1999, the owners took the position that Sivorot had quit and there was no indication that they were prepared to continue her employment.

As I indicated above, based on the statements and the position taken by BJ's, it was reasonable for the Director to conclude that a termination of Sivorot's employment had occurred and nothing in this appeal has shown that conclusion was wrong. Accordingly, unless the statutory liability of BJ's to pay length of service compensation was discharged because one of the three circumstances described in paragraph 63(3)(c) was applicable, the appeal must be dismissed. In this case, BJ's has taken the position that because Sivorot did not contact them to update her condition, they were justified in concluding she had quit or abandoned her employment. Initially, I felt there might be a question about whether Sivorot was dismissed for just cause, but no issue of just cause arose on the facts. This case turns exclusively on whether Sivorot quit or abandoned her employment. In its appeal, BJ's made the following submission:

> 5. We don't agree that it is our responsibility to make updates on <u>her</u> condition. As mentioned earlier, Rita told us that she wanted out of this line of work, and when she showed no interest in maintaining this job, we thought she

> had moved on. Then suddenly, five months after last hearing from her, we get a call through Leanne.

In respect of that submission, I agree that it was not BJ's responsibility to seek updates on Sivorot's condition. In my opinion, Sivorot had some responsibility to keep her employer apprised of her medical status. In some circumstances, a failure to meet that responsibility would be a strong indication of an employee's intention to quit their employment. The real question is whether in the circumstances of this case Sivorot's failure to meet that responsibility ought to be interpreted as a quit or an abandonment of her employment. On that question, I agree with the following statement from the Determination:

> The employer did not give the claimant any instruction nor did they enquire themselves as to her expected date of return. . . . It was the employer's responsibility to make the requirement of regular or occasional updates on her condition to the claimant. Then if the claimant did not comply they would have a stronger case for their contention of job abandonment. The employer made no such requirement on the claimant therefore they cannot now assert that the claimant resigned her job.

On New Year's Eve, when Sivorot talked to Ms. Kirrmaier, she was told only to call when she was ready to return. In light of that instruction, the failure of Sivorot to keep BJ's updated about her condition is a relatively neutral fact and could not, on its own, be viewed as indicating she had quit or abandonment her employment. Some additional facts pointing to such a conclusion were required. The Determination correctly notes that in order to quit, Sivorot would have to initiate and carry out some action that was consistent with a voluntary resignation from employment.

The Tribunal has consistently noted that the act of quitting is a right that is personal to the employee. There must be clear and unequivocal evidence that this right has been voluntarily exercised by the employee. There is an objective and a subjective element involved in the act of quitting: objectively, the employee must carry out an act that is inconsistent with further employment; subjectively, the facts must point to an intention on the part of the employee to terminate the employment. On the facts, there is not a sufficient evidentiary basis for concluding Sivorot quit her employment.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determinations dated January 12, 2000 be confirmed in the amount of $1120.57, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal