

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 -

Sarah Leah Fellman

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE NO.:	97/169
DATE OF HEARING:	June 13, 1997
DATE OF DECISION:	June 16, 1997

DECISION

APPEARANCES:

Sarah Leah Fellman for herself

Garry Patience for K-Mart Canada Limited

OVERVIEW

This is an appeal by Sarah Leah Fellman pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination dated February 26, 1997 by the Director of Employment Standards (the "Director").

The Determination found that K-Mart Canada Limited, ("K-Mart") had not contravened sections 63 of the *Act* in terminating Ms. Fellman without notice or cause and without compensation for length of service. Ms. Fellman appeals on the grounds that the Director wrongly concluded on the evidence that she had frustrated her contract of employment and subsequently quit. She claims that she had an indefinite leave of absence and that she was entitled to her job back when she returned. By failing to re-employ her she claims that K-Mart terminated her employment without cause.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether Ms. Fellman had an indefinite leave of absence which entitled her to return to work at a date of her choosing.

FACTS

Ms. Fellman was employed by K-Mart as a cashier for a period of just over six months until she took a leave of absence on May 22, 1996. In March of 1996 Ms. Fellman spoke to her immediate supervisor and told her that her grandmother was seriously ill in Malaysia and that she wished to take time off to go to visit her grandmother. The supervisor, Elaine Henning, referred the matter to the Store Supervisor, Donna DeWolfe. Ms. DeWolfe granted Ms. Fellman a leave of absence for 6 weeks with a return date of July 3, 1996. The normal store policy only allowed for one month leave without pay but Ms. DeWolfe "bent the rules" for Ms. Fellman because of the unusual circumstances. Ms. Fellman was told that she was needed back for the summer months to cover staff holidays and because it is a busy season.

Ms. Fellman went to Malaysia but shortly before July 3, 1996, her return due date, she decided that she needed to extend her leave. She told her father, who was living in Victoria, that she was going to be staying longer in Malaysia but she did not telephone or write to K-Mart to apply to extend the leave. On July 2nd, only fortuitously, a friend and co-worker called Ms. Fellman's father and found out that Ms. Fellman was not returning. A couple of hours later a supervisor from K-Mart phoned Mr. Fellman to find out what was happening and was told by Mr. Fellman that Ms. Fellman would return in August.

Mr. Fellman wrote to Ms. Fellman in Malaysia and told her that she was on the schedule to work in August. Ms. Fellman did not return in August and she did not telephone or write to K-Mart to extend the leave of absence.

In mid to late August (Ms. Fellman was not clear about the exact date) Ms. Fellman's grandmother died. Ms. Fellman then telephoned her father and asked him to let K-Mart know that she would be returning to Victoria on September 11, 1996. Mr. Fellman phoned the store and spoke to Ms. Henning. Ms. Henning thanked him for letting them know but did not mention any change in Ms. Fellman's employment status. It was felt that it would be inappropriate to discuss this with Mr. Fellman as Ms. Fellman is an adult. Ms. Fellman again did not make any personal contact with K-Mart to apply for an extension of the leave of absence.

Ms. Fellman returned to Victoria on September 11th, 1996 and went to the store to discuss her return to work only to be told that she no longer had a job with the store and that her employment position had been filled. She was given a Record of Employment (ROE) which indicated that she had been fired.

Subsequently Ms. Fellman disputed this ROE and through a lawyer claimed that she had left of her own choice voluntarily. The ROE was reissued at her request to indicate that she had left willingly. At the Hearing she stated that she felt that she had left willingly and she had not been "fired" and that what was most important to her was her reputation. She felt that K-Mart had been giving her bad references and making it difficult for her to get other employment. K-Mart staff at the Hearing assured her that this was not so and that she would be given positive references in relation to the time that she did work at the store.

ANALYSIS

I can find no reason to disagree with the Determination of the Director in this case. It seems abundantly clear from all of the evidence that Ms. Fellman was granted a six week leave of absence with a return date of July 3, 1996. This was a compassionate decision as it was two weeks more than allowed by Company policy. It is clear, even from Ms. Fellman's own evidence, that she was expected back to work on July 3, 1996. Ms. Fellman never applied to anyone in authority at K-Mart, either by phone or by letter, for an extension of this leave. Even her secondhand message through her father was not a request for an extension but rather simply a statement of fact that she was not returning as agreed.

Ms. Fellman certainly had the subjective intent of not returning to work as required and it must be assumed that any reasonable person would have in mind the likely consequences of such an action. Her

hope that the job would still be there whenever she did finally return could not, on the evidence, be considered a reasonable expectation. I find that Ms. Fellman essentially abandoned her position and therefore ended, or terminated, her employment with K-Mart. Therefore no compensation is payable.

ORDER

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

John M. Orr
Adjudicator
Employment Standards Tribunal