

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Western Furniture Mfg. Ltd.
("Western")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/263

DATE OF HEARING: September 27, 1996

DATE OF DECISION: September 30, 1996

DECISION

OVERVIEW

The appeal is by Western Furniture Mfg. Ltd. ("Western") pursuant to Section 112 of the *Employment Standards Act* ("the *Act*") against Determination # CDET 001756 of the Director of Employment Standards (the "Director"), a decision dated March 26, 1996. The Determination, issued as a result of a complaint by Muntaz Khan ("Khan"), finds that overtime and compensation for length of service is owed Khan in the amount of \$734.55. Western accepts that overtime is owed Khan in the amount calculated but argues that severance pay is not owed as notice of termination was given.

APPEARANCES

Kulwinder Thiara	For Western
Jamsher Thiara	For Western
Muntaz Khan	On His Own Behalf
Sukuwant Banwait	Interpreter for Khan
Ken White	For the Director
Theresa Robertson	For the Director

FACTS

Muntaz Khan was employed by Western Furniture as an upholsterer. His employment started January 1, 1995 and his last day of work was September 22, 1995.

The employer says that business slowed and that it laid Khan off with a view to having him back when business improved. The employer says at that same time that it gave notice as required by the *Act* when its book-keeper handed Khan, on September 4, 1995, a letter dated that day. The letter states, *"This is to inform you that due to shortage of work you will be relieved from your services to Western Furniture Mfg. Ltd. from September 22, 1995. We appreciate your services and wish you all the best in your future."*

Khan testifies that no one gave him the September 4, 1995 letter. He says that the first he learned of his being 'laid off' was on Sunday, September 24, 1995 when he received a telephone call from Jamsher Thiara and was told that Western had *"no work for him"*. That Khan understood from the telephone call that he was being terminated is clear.

Time card records show that Khan was not at work on September 4, 1995, Labour Day.

ISSUES TO BE DECIDED

There is one issue to decide and that is, Did Western give Khan notice of termination such that it is not now obliged to pay severance moneys?

ANALYSIS

Consideration of the appeal falls under the transitional provisions of the *Act*. Section 128 of the *Act* states:

(3) If, before the repeal of the former Act, no decision was made by the director, an authorised representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.

Section 128 (4) of the *Act* applies to an employee whose employment began before section 63 took effect, on November 1, 1995, and is terminated after that section took effect. Where an employee is terminated before the new *Act* came into force, the old *Employment Standards Act* (SBC Chapter 10) governs (the "old *Act*").

Khan's employment was terminated, that is clear. It was either terminated through the letter of September 4, 1995 or because he was laid off for more than 13 consecutive weeks. Under both the current *Act* and the old *Act*, a layoff of more than 13 weeks in a period of 20 consecutive weeks is to be considered permanent.

And it is the old *Act* that applies. Should a layoff exceed 13 consecutive weeks, as is set out in that legislation, and the current *Act*, the point of termination is the start of the layoff. The first regular work day on which there was no work for Khan was September 25, 1995. The September 4, 1995 letter has his last day of work as September 22, 1995. No matter how Khan's employment came to be terminated, Khan was terminated before the new *Act* came into effect.

Section 42 (1) of the old *Act* calls for two week's written notice of termination where an employee had completed just six months of employment. (For the information of the parties, the new *Act* calls for one week's written notice after 3 months and 2 week's notice after a year.) As Khan was employed by Western for nearly 9 months he was entitled to two week's written notice of termination.

Was the required notice given? Nothing leads me to conclude that it was. The letter of September 4, 1995 is clear enough in terms of its message, it wishing Khan well in his future as it does. Had it been given to Khan before September 11, 1995, Western's obligation to pay severance moneys would have been discharged, the required two week's notice of termination having then been given. But Khan says he never got the letter and it is my conclusion that Khan was never handed the letter, given the facts, the submissions and testimony of the parties, and no hard evidence to the contrary. It is the testimony of Khan, that he was never given the notice. Khan is a credible witness. On the other hand while K. Thiara and J. Thiara say that they believe that their book-

keeper handed Khan the letter on September 4, 1995, they admit that neither actually saw the book-keeper hand him the letter. And while Khan is said to have been given the letter on September 4, 1995, time cards show that he was not at work on that day. Finally, I note that the letter only surfaced with the appeal, despite Western being advised by an Employment Standards Officer that Khan was claiming two weeks pay in lieu of notice of termination, and despite it being issued a DEMAND FOR EMPLOYER RECORDS.

The employer has not shown that two week's notice of termination was actually given Khan. That leads me to confirm the Determination.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 001756 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:jel