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 -

Benito Palmeri operating The Hair Place
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/287

DATE OF DECISION: July 7, 1999

DECISION

APPEARANCES

Mr. M Ehlers	on behalf of the Employer
Ms. Selina Yong	on behalf of herself
Ms. Leslie Christensen	on behalf of the Director

FACTS AND ANALYSIS

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on April 20, 1999. In the Determination, the Director's Delegate found that Ms. Selina Yong ("Yong" or the "Employee") was entitled to compensation pay for length of service, in the amount of $1,346.22.

From the determination, I understand the following: Yong was employed as a hair stylist at the hair salon operated by the employer between December 12, 1994 to February 27, 1998. She was paid by way of commissions, 45% of her sales and worked 7 and 1/2 hours per day, 5 days per week. It is not in dispute that she was laid off.

The Employer argues that the Determination is wrong. The Employer says, among others, in its appeal:

> "1. The Determination is wrong in our opinion because Selina Yong was planning to leave the salon at least three weeks before she was laid off. ...
> 2. ... Selina Yong ...was simply waiting for us to lay her off.
> 3. ... she had no intention of coming back ... "

For the present purposes it is sufficient to refer to Section 63 of the *Act*, under which an employer may become liable for compensation for length of service which is discharged, among others, if the employee terminates the employment.

The Employee does not deny that she was seeking other employment, or that she was employed during the layoff which, in any event, is irrelevant for the purposes of Section 63 of the *Act*.

There is no issue between the parties that the Employer laid off Yong as set out in the Determination. There is no issue that she was not recalled to work during the period of temporary

layoff. Unless there are recall rights, "temporary layoff" is defined in the *Act* to mean "a layoff of up to 13 weeks in any period of 20 consecutive weeks" (section 1). Section 63(5) provides:

> (5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

In short, therefore, the Employer terminated the employment when failed to recall her to work before the expiry of her temporary layoff. Had the Employer recalled her during that period, and had she refused the recall, the Employer's liability would have been discharged. That was not the case here. The Determination notes that the Employer offered to re-employ Yong some nine months after the layoff. There is no suggestion, in the appeal, that this is incorrect. I agree with the delegate that the recall offer came to late. In my view, there is no merit to the appeal.

In the result, the appeal fails.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated April 20, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal