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 -

Omega Gymnastic Academy Society
("Omega")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Lorne D. Collingwood
FILE NO.:	97/6
DATE OF HEARING:	July 10, 1997
DATE OF DECISION:	July 24, 1997

DECISION

OVERVIEW

The appeal is by Omega Gymnastic Academy Society ("Omega") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against Determination No. CDET 004947 of the Director of Employment Standards (the "Director"), a decision dated December 11, 1997. In the Determination, Omega is found to owe Yong Mei Li compensation for length of service.

APPEARANCES

Keith Chong	President of Omega
Pat Allan	Vice President of Omega
Neal Dockendorf	Witness
David Kenwright	Witness
Kyna Fletcher	Witness
Katherine Phillips	Witness
Yong Mei Li	On Her Own Behalf
Wilson Heung	Assisting Li
Diana Liu-Heung	Assisting Li
Linda Yu	Interpreter

ISSUE TO BE DECIDED

The issue is whether or not Omega is required to pay Li compensation for length of service. Omega argues that it does not because it gave Li notice of termination as required by the *Act*, because Li quit, and because Li gave Omega just cause to terminate her employment when she began to recruit its athletes for another gymnastics club.

At issue as well are the calculations of the Director's delegate.

FACTS

The Omega Gymnastics Academy is a parent run, non-profit operation which provides training for young gymnasts. Yong Mei Li was employed as a technical coach. She began work for Omega on September 1, 1990. Her last day at work was July 2, 1996.

In April, Omega served notice to its coaches that it had to cut costs because of declining enrolments and that there would be pay cuts. Li was presented with the details of what Omega was proposing on June 13, 1996. Omega said that it could provide her with only 16 to 20 hours of work a week in the coming year, and pay of between $18,000 and $23,000 a year. Li had been earning $32,500 a year, for 26 training hours per week and time spent at competitions and various other functions.

Li had still not accepted Omega's new terms and conditions by July 1, 1996. On July 2nd Omega unilaterally reduced her work week to 4 five-hour days and her pay to $21 per hour.

In the evening of the 2nd, Li telephoned Keith Chong, President of Omega. The two give rather different accounts of what was said. Little turns on it but I conclude that Li asked if she could take 2 weeks' vacation beginning the next day, was refused, and that she then told Chong that she would not be in for work the next day. The latter is clear to me on the basis of what Omega says happened, namely, that Li hung up on Chong and that he then called her back, got her answering machine, and left a message that "she must be at work at 10:00 a.m. the next morning if she wished to continue working". The fact that left such a message indicates to me that Li must have told him that she would not be working the next day.

Li was not at work on the 3rd. She visited her physician, a Dr. Peter Shih. He told her to rest and gave her a note stating, "Mrs. Li is currently under my care. She will be able to return to work in the next 4 weeks." Five days later, Dr. Shih issued her a second note, one dated July 8th, 1996. It states, "Mrs. Li is currently under my care for depression and stress reaction. She will be unable to work for the next 4 - 6 weeks or perhaps longer."

Li telephoned Neal Dockendorf on the 3rd and asked to meet him that evening. Dockendorf is a director of Omega and its past president, led past rounds of negotiations with Li, and is a person Li trusts and considers a friend. Dockendorf was unable to meet Li on the 3rd but met her at her home on the 4th. A couple associated with Flicka Gymnastics was there. Omega presents that as part of an attempt to recruit gymnasts for another club but there is no evidence of that. Indeed, there is no hard evidence that Li recruited any athletes for any other gymnastics club. As matters are presented to me, Li invited Dockendorf to her home for the purpose of explaining the state of her health and for the purpose of securing better terms from Omega.

Li showed Dockendorf and, through him, Omega, the first of her doctor's notes on meeting him on the 4th. By then, however, Omega had sent her notice that she was being terminated. Omega's letter to Li dated July 4, 1996 states, "this letter serves as notice that, effective August 16, 1996, your services as coach for our club will no longer be required". The letter goes on to state, "Failure to come to work during this period will also indicate your intention to resign, and as advised by Employment Standards, we will immediately

complete a separation certificate and issue a cheque for 1 day of work on July 2, 1996 and the remaining holiday pay as required by law".

In the days that followed there were more telephone calls and letters were exchanged. Chong was telephoned by one of Li's daughters on the 5th and advised of Li's condition. The daughter called Pat Allan, then Omega's Treasurer, on the 6th. Allan told Li's daughter that "if she was sick, it was not a problem" and that Li "should contact David to let him know her return date so that her replacement could be notified of her return". Li sent Omega a letter dated July 8, 1996 in which she accepts Omega's new conditions of employment and states that she "will resume (her) employment as soon as possible". A second letter dated July 10, 1996 again conveys her intention to resume her employment. In reply Omega sent her a letter dated July 15, 1996 which states, "we wish to remind you that effective August 16, 1996, your services as a coach for our club will no longer be required".

ANALYSIS

On hearing from the parties, it became clear to me that Omega views Li as a very good coach and that it wanted to retain her. Equally clear is how much Li misses her work and the young athletes which were under her guidance. The interests of both Omega and Li would appear to be better served if the parties could agree to resolve their differences and if requested to do so, I would make myself available to the parties for the purpose of exploring just such an agreement. As matters now stand, however, my role is to apply the law to issues raised by Omega's appeal.

In the Determination of the Director it is found that Li did not resign her employment. Omega argues that conclusion is in error, pointing to the fact that Li failed to report for work on the 3rd and 4th even though she was scheduled to work those days. Did she quit at that time? It is clear to me that she did not. I find no intent to quit. Li did not report for work on both the 3rd and the 4th, and days immediately following, but it is clear to me that the reason that she did not report for work is that she was ill, seriously ill. That she was unable to work for medical reasons is confirmed by her physician and not contradicted by any hard evidence to the contrary.

Omega argues that it gave Li notice of termination as required by the *Act.* Clearly, Omega gave Li notice of a sort through its letter of July 4, 1996 but that notice had no legal effect for reasons of the period of notice and s. 67 (1) of the *Act*. That section is as follows:

> 67. (1) *A notice given to an employee under this Part has no effect if*
>
> *(a)* ***the notice period coincides with a period during which the employee*** *is on annual vacation, leave, strike or lockout or* ***is unavailable for work due to*** *a strike or lockout or* ***medical reasons****, or*
>
> *(b) the employment continues after the notice period ends.* (my emphasis)

Omega served Li with written notice of termination but the period of its notice coincides with the period in which Li was unable to work for medical reasons. As such, Omega's notice could have no effect under the law.

Omega's liability for compensation for length of service is five weeks' wages given that Li's employment was for a period of five years and 10 months. I have found no evidence to support the allegation of just cause, I have found that Li did not quit, and I have found that Omega failed to give Li notice as required by the *Act.* I therefore find that Li is owed 5 weeks' compensation for length of service.

The calculation of compensation for length of service is prescribed by section 63 (4) of the *Act.* That section is as follows:

> (4) *The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by*
>
> *(a) totalling all the employee's weekly wages, at the regular wage,* ***during the last 8 weeks in which the employee worked normal or average hours*** *of work,*
>
> *(b) dividing the total by 8, and*
>
> *(c) multiplying the result by the number of weeks' wages the employer is liable to pay.* (my emphasis)

The Director's delegate is correct in using, as a basis for her calculations, Li's salary for the eight weeks ending June 30, 1996. Omega is wrong in suggesting that calculations should be based solely on the rate in effect at the time of termination. That is not what the *Act* calls for. I confirm that Li is owed $3,339.02 as calculated by the delegate.

ORDER

I order, pursuant to section 115 of the *Act*, that Determination No. CDET 004947 be confirmed.

_____

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc