Employment Standards TRIBUNAL

An appeal

- by -

Hee Mee Dim Sum Co. Ltd.
("Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2002/296

DATE OF DECISION: July 22, 2002

DECISION

OVERVIEW

This is an appeal filed in the name of King Chiu Leung, however, it would appear that Mr. Leung is actually appealing on behalf of Hee Mee Dim Sum Co. Ltd. (the "Employer"), a company of which he is a principal.

This appeal, filed pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), concerns a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on May 13th, 2002 (the "Determination") pursuant to which the Employer was ordered to pay the sum of $642.95 to its former employee, Shiu Ying Yip ("Yip"), on account of two weeks' wages (including vacation pay and section 88 interest) as compensation for length of service (see section 63).

By way of a letter dated July 5th, 2002 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

THE DETERMINATION

During the course of the investigation, the Employer did not fully cooperate with the delegate and never advanced a substantive defence to Yip's claim. The reasons advanced in support of this appeal were not provided to the delegate even though the Employer was given ample opportunity to present its case to the delegate. I propose to address the Employer's arguments but in so doing I do not necessarily accept that the Employer's grounds of appeal are properly before the Tribunal.

The delegate determined that Yip, who was employed for some 18 months as a "dim sum maker", was temporarily (this is not clear) laid off on November 18th, 2001. On November 27th, Yip was told to come into the restaurant to pick up her last paycheque. Over the next ensuing 13 weeks, Yip was not called back to work and, thus, the temporary layoff (if that was the Employer's intention) became a dismissal for purposes of the *Act* [see subsection 63(5)].

Prior to being laid off, Yip did not receive any written notice of termination and thus was entitled to compensation for length of service. Ms. Yip's entitlement (two weeks' wages) was calculated based on the Employer's payroll records.

REASONS FOR APPEAL AND FINDINGS

The Employer appended a number of documents to its appeal form setting out various assertions that might be taken as a defence to Yip's claim. I shall address these assertions in turn.

Notice of termination

The Employer asserts that on October 31st, the employees were given notice of the Employer's intention to close the restaurant as of November 15th, 2001. Thus, it says that Yip was given proper prior notice of

termination. However, there is nothing in the material before me to indicate that written notice was delivered in accordance with the dictates of the Act.

Temporary layoff

The Employer says that Yip was only given notice of a temporary layoff and that after nine weeks, Yip was requested to return to work but she "did not answer".

The Employer says that it told the Director's delegate on January 29th, 2002 that it wanted Yip to return to work on a full-time basis. The Employer says that 2 days later, the delegate stated that Yip did not wish to return to work.

The Employer says that on February 7th, 2002 it forwarded, by registered mail, a written request to Yip asking her to return to work.

Finally, on February 16th, 2002, it reiterated the request that Yip return to work through the Canada Manpower Centre on Fraser Street in Vancouver.

The first and third requests do not comply with the Act since they were not directed to Yip or to her authorized agent nor is there any credible evidence before me to show that these requests, if made (and this is some controversy on this score), were actually communicated to Yip.

As for the February 7th request, I do have before me a registered mail receipt, dated February 7th, 2002, showing that a package was sent to Ms. Yip. I have nothing before me to prove that this document was ever received by Ms. Yip. I also have a document, in chinese characters as well as a purported english translation, stating that Yip is requested to return to work commencing February 18th, 2002 based on a 8-hour per day/4-day per week schedule.

Ms. Yip, in her submission dated June 15th, 2002, states that she did not receive any verbal layoff notice on October 31st. I need not resolve this factual dispute since, as I noted earlier, the requisite notice must be delivered in writing if the Employer wishes to avoid its monetary liability under section 63.

Ms. Yip says that, in fact, the business never closed and that she was terminated (not laid off) so that the Employer might hire new employees at a lower wage rate (particularly, the then recently introduced $6 per hour "training wage"). Ms. Yip denies receiving "officially or unofficially" a notice of recall on or about January 29th. Ms. Yip does not specifically deny receiving the February 7th recall notice but does note that it only calls for a return to work on a four day per week, rather than a five day per week, basis. Ms. Yip has provided her record of employment which indicates that she was dismissed due to a "shortage of work" and that her expected date of recall is "unknown" rather than (the only other choice on the form) "not returning". The record of employment is not inconsistent with the Employer's position that Yip was temporarily laid off. The record of employment shows her last day worked as being November 16th, 2001 a date that is not inconsistent with Yip's assertion that she was terminated on November 18th.

However, even if one accepts that Yip was laid off, on a temporary basis, on November 18th, 2001, after 13 consecutive weeks of layoff (i.e., as of February 17th, 2001), Ms. Yip was deemed to have been terminated [see section 63(5)]. Since, based on the Employer's own documents, Ms. Yip would have been laid off for 13 consecutive weeks prior to the expected date of recommencing work (November

18th), she was dismissed as of November 18th, 2001 and thus entitled to compensation for length of service.

I note, as does the delegate in his submission, that the Employer's position is somewhat inconsistent in that, in the first place, it says that Ms. Yip was terminated with proper notice and, in the second place, says only that Ms. Yip was temporarily laid off and then recalled. Further, as previously noted, neither argument was properly advanced during the delegate's investigation.

I might further add that the Employer's recall was not based on a 5-day/40 hour week (i.e., Ms. Yip's schedule prior to being laid off/terminated) but on a 4-day/30-hour (taking into account section 32) or 32-hour week. Even if Ms. Yip had returned to work on this reduced schedule, this unilateral reduction in Ms. Yip's working hours might have been characterized as a constructive dismissal by the Employer thus triggering Ms. Yip's entitlement to compensation for length of service.

This appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of $642.95 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal