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-

Five B Produce Inc.

("Five B")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	97/258
DATE OF HEARING:	July 7th, 1997

DATE OF DECISION: August 8th, 1997

DECISION

APPEARANCES

George J. Wool	Counsel for Five B Produce Inc.
Naranjan K. Nijjer	on her own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Five B Produce Inc. ("Five B" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on March 26th, 1997 under file no. ER4-677 (the "Determination"). The Director determined that Five B owed its former employee, Naranjan K. Nijjer ("Nijjer"), the sum of $569.99 representing two weeks' wages as compensation for length of service [see section 63(2)(a) of the *Act*].

In her complaint filed with the Surrey office of the Employment Standards Branch on October 24th, 1996, Nijjer claimed statutory holiday pay and overtime pay in addition to termination pay. The Director concluded that Nijjer was entitled to statutory holiday pay and, accordingly, the employer has now paid that aspect of the claim in full ($508.98).

The Director denied Nijjer's claim for overtime pay because she was a "farm worker" who never worked more than 120 hours in any two-week period (see s. 23, *Employment Standards Regulation*). Nijjer has not appealed this latter finding. Thus, the only issue before me is whether or not Nijjer was entitled to two weeks' wages as compensation for length of service.

The appeal hearing in this matter was held at the Tribunal's offices in Vancouver on July 7th, 1997 at which time I heard evidence from Mrs. Veena Banga, a director and officer of Five B, and from Ms. Nijjer. The Director was not represented at the appeal hearing.

FACTS

Five B operates a 40 acre farm in Surrey, B.C. Five B grows various field crops including vegetables and herbs. According to the Record of Employment ("ROE") issued by the employer on September 3rd, 1996, Nijjer's employment with by Five B commenced on August 22nd, 1995. Nijjer was employed by Five B as a "salad packer"--she prepared "pre-packaged salads" for retail sale.

Mrs. Banga's evidence is that Nijjer claimed to have suffered an on-the-job injury on August 19th, 1996 and was subsequently off work. This claim was in due course investigated by the Workers' Compensation Board ("WCB") and in a written decision dated January 14th, 1997, the WCB denied the claim because the WCB was "unable to conclude that your injuries have occurred as stated by you" (see Exhibit 1). The tenor of the WCB decision letter strongly suggests that Nijjer submitted a fraudulent claim. Although specifically advised by the WCB of her rights of appeal, Nijjer has never appealed the dismissal of her WCB claim. Accordingly, in my view, the question of whether or not Nijjer suffered a workplace injury as she alleged is now *res judicata;* in other words, it has now been established that Nijjer was not away from work due to injuries sustained in a workplace accident.

Mrs. Banga testified that following the alleged workplace accident, Nijjer never returned to work, nor did she call to inquire about the availability of work. After two weeks went by without any word from Nijjer, Mrs. Banga instructed the company accountant to prepare an ROE--the ROE, dated September 3rd, 1996, indicates that it was issued because the "Employee did not return to work; filed a W.C.B. claim".

Nijjer testified that she did, in fact, suffer a work-related back injury on August 19th and was fit to return to work by the end of December 1996 or early January 1997. Nijjer says that she telephoned Mrs. Banga, sometime in late December 1996, and was advised that no work was available even though she also acknowledged having received the ROE in September. She admits that she did not contact the employer during the period following her alleged injury until the December telephone call to Mrs. Banga.

ANALYSIS

I am not satisfied that, on the balance of probabilities, Nijjer sustained, as she alleged, a workplace injury on August 19th--in any event, that matter has now been conclusively resolved against her by reason of the WCB decision letter of January 14th, 1997. An ROE indicating that the employer was of the view that Nijjer had simply "not returned to work" was not challenged by Nijjer when she received the ROE in September 1996. Indeed, it was not until December 1996, by own her admission, that Nijjer contacted the employer about a possible return to work.

In my view, given the circumstances of this case, Nijjer simply abandoned her employment, without lawful justification, on August 19th, 1996 and the employer was within its lawful rights to consider, as at September 3rd, 1996, that the employment relationship had been terminated at the instance of Nijjer. In other words, by reason of section 63(3)(c) of the *Act,* the employer was not obliged to pay any compensation for length of service.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination in this matter, dated March 26th, 1997 and filed under number ER4-677, be cancelled.