

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

1091921 Ontario Ltd.
Operating as Chandler's Restaurant

("Chandler's")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/579

DATE OF HEARING: December 5th, 1996

DATE OF DECISION: December 11th, 1996

DECISION

APPEARANCES

Brian William Karam for 1091921 Ontario Ltd.

Levi Seppi on his own behalf

Ray Stea for the Director of Employment Standards

OVERVIEW

This is an appeal brought by 1091921 Ontario Ltd. operating as Chandler's Restaurant ("Chandler's") pursuant to section 112 of the Employment Standards Act (the "Act") from Determination No. CDET 003898 issued by the Director of Employment Standards (the "Director") on September 12th, 1996.

The Director determined that Chandler's owed its former employee, Levi Seppi ("Seppi"), the sum of \$1,125 representing two weeks' wages as compensation for length of service. Seppi's claims for unpaid overtime and statutory holiday pay were dismissed by the Director on the ground that Seppi was a "manager" as defined in the ESA Regulations and, therefore, not legally entitled to advance those claims [see sections 34(1)(f) and 35 of the ESA Regulations]. Seppi did not appeal this latter finding.

The appeal was heard in Victoria on December 5th, 1996. The employer, who was represented by its managing director Brian William Karam (who is also a member of the Ontario bar), called two witnesses, Ms. Tanya Stanyar and Mr. Robert Pastro, the restaurant's general manager and bookkeeper, respectively. Seppi testified on his own behalf. The Director did not present any evidence.

THE GROUND OF APPEAL

The sole issue in this appeal is whether or not Seppi was given proper notice of termination. Seppi's employment spanned a period of approximately nine months and by virtue of subsections 128(5) and (6) of the Act, he would have been entitled to two weeks' notice or an equivalent amount of severance pay in lieu of notice (see section 42 of the "old" Act). Chandler's maintains that Seppi was given proper

notice whereas the Director has determined that while Seppi was given notice of a “temporary layoff”, he was never given any notice of termination.

FACTS

Chandler’s hired Seppi as a cook and he commenced his employment duties on or about March 6th, 1995. Chandler’s restaurant business is very seasonal with the busy period running from the early spring to the following fall; during the “busy” summer season the restaurant does about six times the volume of business relative to the winter “slow” period.

The evidence of Ms. Stanyar is that she gave Seppi three weeks’ verbal notice of layoff during a meeting in her office on November 25th, 1995. The next day, this notice was reduced to writing and, a few days later, this written notice was given to Seppi’s common law spouse (who also worked at the restaurant). This latter note, Exhibit 2, reads as follows:

November 26/96

Mr. Levi Seppi;

This letter is to confirm in writing the notice of layoff given you November 25th at approximately 3:30 pm. The notice is a three week notification as of November 25/95.

Signed

[Ms. Stanyar’s signature]

Manager

Subsequently, Levi injured himself at work on December 7th and thus did not work throughout the full three week notice period (see Exhibit 3).

A Record of Employment (“ROE”) relating to the termination of Seppi’s employment with Chandler’s was prepared and signed by Mr. Pastro on January 22nd, 1996. On this form there is a space to note the “Reason for issuing this ROE” and a further space for “Comments”. Pastro testified that “he had no reason to believe that Seppi wouldn’t be rehired” when business picked up in the spring. Indeed, Pastro’s evidence was that he “expected” Levi would be rehired.

This latter evidence is corroborated by the ROE itself in several respects:

- Two codes were noted in the space provided on the ROE for describing the reason for issuing the ROE--“A” and “D”, the codes for “shortage of work” and “illness” respectively. Tellingly, the code for “dismissal” (“E”) was not indicated on the form.
- In the “Comments” section Pastro wrote: “Levi hurt his back on Dec 7/95. He was to be on a slow period layoff as of Dec 16/95”.
- In the space where the “Expected date of recall” is to be noted, Pastro did not specify a particular date, nor did he check off the box denoted “Not Returning”; rather, Pastro opted for the third alternative and checked the box marked “Unknown”.

ANALYSIS

Section 1 of the Act defines a “temporary layoff” to include “a layoff of up to 13 weeks in any period of 20 consecutive weeks”. “Termination of employment”, also defined in section 1, “includes a layoff *other than a temporary layoff*” (my emphasis). Under the Act, an employer is *not obliged* to give notice of termination under section 63 if the employee is only being given a “temporary layoff” (although obviously the employer is free to do so). However, once the temporary layoff period is exceeded, the employer is deemed to have terminated the employee [see section 63(5) of the Act].

Accordingly, at the point where the temporary layoff period is exceeded, the employee is deemed to have been terminated and, at that point, the employer must (and can only) comply with section 63 of the Act by paying compensation for length of service. For purposes of calculating the employer’s payment obligation, “length of service” runs from the point of hire to the date when the temporary layoff commenced.

The employer’s own evidence convinces me that in late November 1995 Seppi was not given notice of termination but rather notice of a temporary layoff. I am fortified in this conclusion by the following evidence:

- Exhibit 2 refers to a “layoff” not a “termination” or a “dismissal”;

- the seasonal nature of the business was such that Seppi was being laid off for the “slow” season and could reasonably expect to be rehired when Chandler’s business picked up in the Spring (*i.e.*, within about three months--approximately 13 weeks or less--of the date termination);
- the evidence before me was that one other cook (Mark Fremont), who was also laid off at the end of the “busy season”, was rehired the following Spring;
- Pastro testified that he “expected” Seppi would be rehired; and
- the ROE prepared by Pastro is more consistent with a temporary layoff than a permanent dismissal--the code for dismissal was not indicated on the form; Pastro commented that Seppi was on a “slow period layoff”; rather than indicating that Seppi would not be returning, Pastro merely indicated that the return date was “unknown”.

When Seppi was not rehired (or offered re-employment) in the Spring of 1996, this “temporary layoff” became permanent and, at that point, Chandler’s was obliged to pay two weeks’ severance pay. It is conceded that no such payment was made.

I might also add, merely for the purposes of completeness, that even if it could be said that Seppi *was* terminated (rather than temporarily laid off) in November 1995, I am not satisfied that Chandler’s met its notice obligation under the Act. The Act calls for *written notice* to be given *to the employee*. The only evidence from the employer concerning the notice issue is that Stanyar gave Seppi *verbal* notice on November 25th, 1995 and, subsequently, *written notice* was given to Seppi’s common law spouse, not to Seppi directly. In the absence of any evidence that Seppi authorized his common law spouse to receive notice on his behalf, I do not think it permissible for the employer to unilaterally impose a form of agency on Seppi’s common law spouse. The evidence is that Seppi continued in his employment duties at least until December 7th and I fail to see why he could not have been given written notice as mandated by the Act.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 003898 be confirmed in the amount of \$1,125 together with a further 4% allowance (\$45) for

vacation pay [see section 58(1)(a) and the definition of “wages” in the Act] and interest to be calculated by the Director in accordance with section 88 of the Act.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal