

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 -

Langley Kitchen Gallery Inc.
("LKG")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/405

DATE OF HEARING: August 26, 1999

DATE OF DECISION: September 16, 1999

DECISION

APPEARANCES

Rudolph Huber on behalf of Langley Kitchen Gallery Inc.
Robert W. Stephens on his own behalf

OVERVIEW

This is an appeal by Langley Kitchen Gallery Inc. (“LKG”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 16, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). LKG alleges that the delegate of the Director erred in the Determination by concluding that Robert W. Stephens (“Stephens”) was entitled to compensation for length of service in the total amount of \$6,629.51 (includes interest).

ISSUE

The issue to be decided in this appeal whether LKG owes Stephens compensation for length of service ?

FACTS

Stephens was employed by LKG from December 1985 until March 3, 1998 when Stephens suffered a heart attack. Stephens was a shop supervisor, worked a normal 40 hour work week and was earning \$18.00 per hour at the time.

LKG issued a Record of Employment (“ROE”) indicating that Stephens was unable to work due to his heart attack (illness). During his recovery period, Stephens and LKG kept in contact.

On October 6, 1998 Stephens was advised by his Doctor that he could return to work on “light duties” and a note from the Doctor was provided to LKG. LKG had no “light duties” work available for Stephens at that time.

In December 1998, Stephens was facing increased financial pressures with respect to being off work and, as no work was available with LKG, LKG provided a letter to Stephens dated December 2, 1998 stating:

TO WHOM IT MAY CONCERN:

*This will certify that Robert Stephens SIN***** (deleted) had a heart attack in March 1998 and was given a separation slip.*

Mr. Stephens is now able to return to work, but we do not have any employment for him at this time.

*Yours truly,
LANGLEY KITCHEN GALLERY INC.
(signed)
R. Huber, Director*

Stephens filed a complaint with the Employment Standards Branch (the "Branch") on December 30, 1998 seeking compensation for length of service.

LKG states that they were reluctant to recall Stephens on "light duties" as "*my company was not in a financial position as we received a 60% decline in business and were struggling with a minimal business barely able to keep the remaining staff employed.*"

LKG did recall Stephens to work June 8, 1999 when a telephone call was placed to Stephens' residence to "*request his return to his fulltime position to commence June 15, 1999 at Langley Kitchen Gallery Inc.*". LKG states that they were informed by Mrs. Stephens that Stephens was employed fulltime elsewhere but that the message would be passed on to Stephens. LKG further states that Stephens did not return the call nor has LKG filled Stephens position to this date. LKG finally submits that Stephens' position is still available should he choose to return to work for LKG.

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, LKG.

The obligation of an employer to pay compensation for length of service to an employee is set forth in Section 63 of the *Act* which provides:

Section 63, Liability resulting from length of service

(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

(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.

(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.

The circumstances in which the employer's obligation to pay compensation for length of service is deemed to have been discharged is set forth in Section 63(3) *supra*. There is no evidence before this panel that Stephens either terminated his employment (quit), retired, or was dismissed for just cause.

The evidence is clear, Stephens was available for “light duties” on October 6, 1998 and, according to the letter from LKG, available for regular duties on December 2, 1998. Stephens was available for some work as of October 6, 1998 and at that point in time, he was laid off from work. A layoff from work is defined in the *Act* as:

"temporary layoff" means

(a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and

(b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;

When a layoff exceeds the period defined as a “temporary layoff” the *Act* provides that the employee is considered to have been terminated. The *Act* defines termination of employment as:

"termination of employment" includes a layoff other than a temporary layoff;

The evidence is straightforward, Stephens was laid off October 6, 1998 and was not recalled to work until June 8, 1999, well after the “temporary layoff” became termination.

For all of the above reasons, I conclude that LKG owes compensation for length of service to Stephens. I further conclude that the amount of compensation for length of service as calculated by the delegate of the Director is correct.

The appeal by LKG is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 16, 1999 be confirmed in the amount of **\$6,629.51** together with whatever interest has accrued pursuant to Section 88 of the *Act* since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal