

**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 -

(“Kant Holdings Ltd.”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** James E. Wolfgang

**FILE NO.:** 97/342

**DATE OF HEARING:** August 15, 1997

**DATE OF DECISION:** September 2, 1997

**DECISION**

**APPEARANCES**

Tino Mattiuzzi	Kant Holdings Ltd.
Tracy Morris (nee Clifford)	On her own behalf
Peter F. Glemnitz	On behalf of the Director of Employment Standards

**OVERVIEW**

This is an appeal by Kant Holdings Ltd. (“Kant”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination issued by a delegate of the Director of Employment Standards on April 18, 1997.

The Determination found that Kant had contravened Section 63 of the *Act* and ordered it to pay compensation in the amount of \$443.65.

Kant filed an appeal of the Director’s Determination on May 3, 1997.

A hearing was held on August 15, 1997 at which time I took evidence from all parties.

**ISSUE TO BE DECIDED**

Is Tracy Morris (“Clifford”) entitled to compensation for length of service?

**FACTS**

Clifford was employed by Robin’s Donuts at two different locations from 1991 or 1992 until December 20, 1996.

Clifford had worked a regular shift, seven hours per day, Monday to Friday from 16:30 to 23:30. Her hours were later reduced to six per day as a result of the store closing one hour earlier.

The Terminal store closed on or about November 21, 1996 and the employees, including Clifford, were transferred to the Harewood location.

On November 25, 1996 Kant purchased the Harewood store and within one week, based on sales at that location, determined it was “too labour intensive”. Shortly thereafter Kant advised the Harewood manager they would need to layoff some employees.

On or about December 10, 1996 Clifford states she showed both the owner and the manager a note from her doctor indicating, due to some difficulty with her pregnancy she may require light duty or need to stop working by the end of December. Clifford claims this was for information only and was not a request for leave. She further stated to the manager that she would give him a couple of weeks notice if she had to stop work. She claims because of her condition she took extra time without pay to complete her cleaning duties or she would get her husband to do the heavy cleaning.

Clifford stated she finished work on December 20, 1996, closed the store and went home. On December 21, 1996, her day off, the manager telephoned her at home to advise that she was laid off. He said they had too many staff and, being pregnant, she was the logical one to go.

Her Record of Employment was originally issued as “F” (Maternity leave). The reason for leaving was later changed to “A” (Shortage of work) by letter from Kant to Human Resources and Development Canada dated January 21, 1997.

On March 18, 1997 Clifford met the manager at the Harewood location and asked what they were going to do about severance pay as the 13 weeks of temporary layoff had nearly expired. The manager advised he would contact Kant for instructions.

In Kant’s letter to the Tribunal dated May 3, 1997 they claimed they called Clifford on the 20, 21, 22, 23 of March leaving messages on her answering machine. They also claim Clifford was scheduled to work that weekend.

In Kant’s letter to Clifford dated March 26, 1997 they state:

“I phoned you on the 20th of March leaving a message stating to present yourself on the 22nd and 23rd of March for work. I called again on the 21st of March, your husband returned my calls on the 22nd telling me you were not able to work because you were in Victoria. You were scheduled to work 8:00 a.m. to 2:00 p.m. (22nd and 23rd). I informed you two days prior to the expiration of 13 weeks or 91 days.”...

Clifford claims the date Kant left the message on her answering machine was March 21, 1997, in the evening and she did not receive the message until the afternoon of March 22, 1997.

A copy of a work schedule was submitted at the hearing for the period March 10 to March 23, 1997. Clifford had been pencilled in at the bottom of the schedule showing she was to work Friday March 21, Saturday March 22, and Sunday March 23, 1997, 10:00 a.m. to 5:00 p.m. each day.

A signed note from one of the employees stated that Clifford's name was not on the schedule posted at the store for that period.

Kant agrees the relationship between Clifford and Kant is "at odds" but claim there is a job for her following her maternity leave.

### **ANALYSIS**

Three questions are raised by this application:

1. Did the 13 weeks of temporary layoff expire before Clifford was recalled to work?
2. Is a message left on an answering machine proper notice for a return to work?
3. Is a one or at most a two day notification reasonable notice for a return to work after an extended layoff?

In a letter dated March 26, 1997 Clifford was told she had been scheduled for work on March 22 and March 23, not for March 21 as was shown on the schedule. Further, in the letter of March 26 Clifford was advised she had been scheduled for a 8:00 to 14:00 shift for each day however on the schedule submitted at the hearing she is shown working a 10:00 to 17:00 shift.

Clifford worked a Monday to Friday shift and was laid off at the end of work Friday, December 20, 1996. If the employee does not return to work by the end of the working hours on the Friday of the 13th week, then the temporary layoff is exceeded.

March 22 is the first day of the 14th week and Clifford is owed compensation for length of service whether she had gone to work or not on March 22 & March 23.

If Clifford had not visited the store on March 18, 1997 and spoken to the manager about her severance pay, would she have been put on the schedule or notified to return to work? It is my feeling she would not. I find it difficult to believe Kant intended to rehire Clifford in March until she raised the question of severance pay. That triggered a response by which Kant hoped to avoid their obligation under Section 63 of the *Act*. This could explain the short notice and the urgency in trying to contact her before the expiration of the 13 weeks.

Kant admits they at no time made their intention of rehiring Clifford known in writing, at least until March 26, 1997 which was after the fact. Kant relied on a message left on Clifford's answering machine as notice to return to work. As there is no assurance if and when the person receives a message left on an answering machine it is at best an unreliable method of notification. As time appears to have been so important to Kant I feel a greater effort should have been made to notify Clifford, if it was their intention to rehire her.

A person is entitled to a reasonable notice for a return to work after an extended layoff. A one day, or at most a two day notice would appear to fall far short of meeting that obligation.

There is a conflict with Kant's evidence pertaining to Cliffords hours and days of work. The March 26 letter stated Clifford was to report for work on March 22 and 23, and work a 8:00 to 14:00 shift. In an undated fax received by the Tribunal on May 5, 1997 Kant indicated they would forward the shift schedule for the period "ASAP". That schedule shows Clifford was to work March 21, 22 and 23, from 10:00 to 17:00 each day. In view of this conflict, in my opinion, the letter of March 26 is more representative of the circumstances.

The schedule for the week before Clifford was advised to return to work shows the operation is being covered by one person per shift except for a 1/2 hour overlap on Saturday and Sunday between 15:30 and 16:00. In the period Clifford was added to the schedule there would be either 2 or 3 persons per shift for most of the day until 17:00. From 17:00 till closing only one person was scheduled. We heard no evidence of an increase in sales or other reason that would explain an increase in staffing or change the position taken by Kant in December to reduce staff.

For the above reasons I am not persuaded to change the Determination as issued.

## **ORDER**

I order, under Section 115 of the *Act* the Determination dated April 18, 1997 against Kant be confirmed.

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**James E. Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**