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 -

Ian Robert Johnston
(the " Employee ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/374

DATE OF HEARING: August 21, 2000

DATE OF DECISION: September 25, 2000

DECISION

APPEARANCES

Mr. Ian Robert Johnston	on behalf of himself
Mr. Raymond Van Empel	on behalf of the Employer, Pioneer Garage Limited operating as Pioneer Jeep Chrysler

OVERVIEW

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on May 5, 2000. The Determination concluded that Johnston was not owed compensation for length of service by the Employer.

FACTS AND ANALYSIS

The appellant has the burden to show that the Determination is wrong.

Johnston was employed by the Employer, which operates an automobile dealership in Mission. According to the Determination, he worked for the Employer between February 6, 1996 and February 16, 1999, as an auto body repairman. The dispute centres around Johnston's layoff and recall in April 1999.

Johnston testified that he on Friday February 19, 1999 requested a layoff from the Employer due to lack of work. He did this in order to apply for Employment Insurance. He says he spoke with Dave Stubel, his immediate supervisor, and then went to see Van Empel. The latter was not in and Johnston spoke with the bookkeeper. Apparently she spoke with Van Empel the next day, Saturday, and when Johnston came to work the following Monday, he received the ROE. Shortly thereafter Johnston was advised that the Employer had advertised his position in the Province newspaper. He confronted Stubel, who told him that he had quit when he asked for the ROE. Johnston disagreed and went to Van Empel and explained that he had no intention of quitting. He had two kids at home and needed an income to support them. In any event, he left the dealership with the understanding that he was on layoff. Some time later, Stubel contacted him and asked him to remove his tools from the shop. Johnston removed his tools as requested.

On April 12, between 9:30 and 10:30 a.m. Johnston says he received a call from Stubel to return to work by noon that day. Johnston had found temporary full time work then at another firm, Craftsman Collision, and asked about the amount of work available. Johnston says that he told Stubel that he could report to work in "a day or two". He says that it would be impossible for him to move his tools back to the Employer by the time indicated by Stubel. He also says that Stubel told him that there would be one day's work for him. Johnston then called Van Empel.

According to Johnston Van Empel confirmed Stubel's statements. Johnston says he later found out that there was some 180 hours worth of work that he could have done.

Johnston points in particular to three things in support of his view that the Employer had no intention of recalling him in April. First, the Employer advertised his position immediately after his conversation with the bookkeeper on February 19 and, in fact, hired a replacement employee. Second, the Employer requested that he remove his tools, something, he says, would make it difficult for him to return to work on short notice. He indicated that it would take one or two days to get his tools back to the Employer's shop. Third, the Employer cancelled his employee benefit plan as of March 1, 1999. He says that the Employer did not cancel the benefit plan for other employees on temporary layoff.

Van Empel testified for the Employer. He explains that, indeed, Johnston requested a ROE on February 19. The Employer issued the ROE on the following Monday as testified to by Johnston. Van Empel says that Johnston told the office manager, when he came up to Van Empel's office for the ROE, that he was seeking other employment and that the Employer, therefore, was of the view that Johnston did not wish remain in its employ. As a precaution against being caught shorthanded, the Employer advertised for replacement employees. However, Van Empel says that the Employer had no intention of terminating Johnston. He was given a "standard layoff". Van Empel also testifies that he was of the understanding that Johnston removed his tools because he was concerned about theft. There had been a break-in at the shop during Johnston's employment and the Employer had installed an alarm system. Johnston says, as mentioned above, that he removed his tools because his supervisor (Stubel) told him to do so. Van Empel says that he learned in mid-March that Johnston had found other employment with Craftsman Collision. He called that firm to confirm that Johnston was, indeed, working there. Van Empel confirms that the Employer did, indeed, cancel Johnston's employee benefit package on March 1, 1999. He explains that is standard practice when an employee is on indefinite layoff, as he was from the Employer's understanding of the situation.

Van Empel agrees that he had a conversation with Johnston around April 12. He does not, however, agree with Johnston's version of that conversation. He says that he asked Johnston what his intentions were with respect to returning to work and that the latter responded something to the effect that "I am not coming back." Van Empel denies that he would have had Johnston return to work with just a few hours notice. He agrees with Johnston that it would have been impossible for him to bring his tools back within that time frame. He also agrees that it would not have been proper to call Johnston back for just a day's work. He says that did not happen. Van Empel confirms that there would have been some 180 hours of work or more for Johnston in the months following had he returned to work. Van Empel does not say that there was a guarantee of a certain amount of work at the time of recall. There is no dispute that Johnston was working full time for Craftsman Collision from mid-March and that he went from temporary employment status to permanent there a short time following the telephone conversation between Johnston and Van Empel. On April 20, the Employer hired a replacement for Johnston.

In my view, Johnston did refuse a layoff as found by the delegate. There is no dispute that Johnston was, in fact, recalled. His disagreement with the Determination is that, in his view, the recall was such that he could not reasonably comply with the recall because he only received a

few hours notice of the recall for only one day's work. In the circumstances, I do not need to decide that point. I am prepared to accept the Employer's evidence that it properly intended to recall Johnston when it contacted him on April 12, 1999. The Employer denies that Johnston was recalled in the manner claimed by him. In the circumstances, I accept the Employer's explanation.

In the result, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the Act, I order that Determinations in this matter, dated May 5, 2000 be confirmed.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal