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 -

Axiom Services Ltd.
(" Axiom " or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/393

DATE OF HEARING: August 30, 2000

DATE OF DECISION: September 25, 2000

DECISION

APPEARANCES

Mr. George McCaulley	on behalf of the Employer
Ms. Shirin Ashrafahmadi	on behalf of herself

FACTS AND ANALYSIS

This is an appeal by the Employer 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 25, 2000. The Determination against the Employer concluded that Ashrafahmadi did not quit her employment with the Employer and, in the result, was owed $7,133.33 on account of compensation for length of service.

The Determination noted, and this was not in dispute at the hearing, that Ashrafahmadi worked for the Employer as an esthetician from August 1993 to November 27, 1999. The dispute centres on what happened on that and the following day. The Employer says that she resigned; Ashrafahmadi says that she went on sick leave and had no intention of resigning. In the appeal the Employer raised a number of other issues, principally just cause based on Ashrafahmadi's conduct. At the hearing the Employer elected not to pursue those issues.

Shortly after McCaulley and his partner had taken over the business of Axiom, he was presented with a doctor's note by Ashrafahmadi. This note stated, among other things, that she was "under medical care" and "unable to work". The note also indicated that she would be off work for approximately 3-6 months. McCaulley explained at the hearing that Ashrafahmadi told him that she would be off work for an undetermined period of time. She testified that she told him that she did not know when she would return. The Employer's case turns on a statement made by Ashrafahmadi to Linda DiStefano, a manager with the Employer either immediately following the meeting between Ashrafahmadi and McCaulley or the following day when Ashrafahmadi came back to pick up her pay cheque and ROE. In any event, not much turns on that. DiStefano testified that Ashrafahmadi in a brief conversation told her that "she would not be returning to Axiom as she was very unhappy working there." Apparently, she could not work with McCaulley's partner. Ashrafahmadi denied that she told DiStefano that she would not return to Axiom.

On November 28, 1999, Ashrafahmadi received her Record of Employment. The ROE indicated "illness" and stated that the return date was "unknown." I note that the other box under expected recall to work "not returning" was not marked. Shortly thereafter Ashrafahmadi sought to be covered by the Employer's benefit plan. That claim was denied because her medical condition, in the insurer's view, was such that it should improve sufficiently to allow her to return to work before the end of the qualifying period in March 2000.

In the mean time, the Employer was becoming concerned about the "messy" situation with Ashrafahmadi's employment status. He says that he contacted an officer of the Employment Standards Branch for advice. In a nutshell, he says that the advice was that he notify Ashrafahmadi that she no longer worked there. He understood this to mean that he could terminate Ashrafahmadi. In the result, on February 9, 2000, the Employer wrote to her as follows:

> "Your last day of work at Axiom was November 27/1999. At this point, an application for Long Term Disability Benefits was submitted to Manulife Financial on your behalf.
>
> We were advised by Manulife Financial (letter December 23/1999) that your application for Long term Disability was declined. Furthermore, you declined to continue payment of Group Health Insurance Benefits, which were subsequently terminated as of January 1/2000.
>
> It has also become known that you are working elsewhere.
>
> Given the above stated circumstances, we see no other options than to terminate your employment effective immediately. An amended Record of Employment is enclosed."

The amended ROE indicated "dismissal"–not "quit"–and that Ashrafahmadi would not be returning.

I agree with the delegate's conclusions. Ashrafahmadi did not resign in November 1999. Rather she went on an approved sick leave. The ROE confirms that she would return though the return date was unknown. Moreover, she presented a note from her doctor which indicated that she would be returning in 3-6 months. The employer had this note. The Employer was aware that Ashrafahmadi had sought coverage under the employee benefit plan and had been turned down. In the circumstances, I do not place much weight on the statement by DiStefano that she was told that Ashrafahmadi would not be returning. The statement is contradicted by Ashrafahmadi. Given the burden of proof on the appellant, even if I accept that Ashrafahmadi made the statement attributed to her, I am not convinced that the delegate erred in his conclusions. In fact, considering all of the circumstances of the instant case, including, the letter from the Employer in early February which did not confirm Ashrafahmadi's advice to the Employer that she did not wish to return. Quite the opposite, the letter terminated her. This, in my view, is inconsistent with a claim that she had resigned in November. As mentioned above, the information on the ROE supports this conclusion.

One troubling aspect of this case is the advice attributed by the Employer to an officer of the Employment Standards Branch that the Employer should clean up the "untidy" situation and "notify Ashrafahmadi that she was no longer working there". The officer was not the delegate who investigated or made a Determination in the instant case. The officer in question did not testify at the hearing. Nevertheless, it is clear from the delegate's submission to the Tribunal that she does not dispute the fact that she had a conversation with McCalley about Ashrafahmadi. She agrees that she did discuss various options open to the Employer in the context of conducting

an investigation into another operation run by the Employer. In any event, even if I accept the Employer's version of this advice, and I am somewhat reluctant to do that given the equivocal nature of the statement of the advice at the hearing, the officer's interpretation of the *Act* is not binding upon the Tribunal or on the third party to this advice, Ashrafahmadi. In short, insofar as the Employer's defence is reliance on the advice of an officer of the Branch, I reject it.

In the result, I uphold the Determination against the Employer.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated May 25, 2000, be confirmed.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal