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 -

Ecco Il Pane Bakery Inc.
(the " Appellant ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/413

DATE OF DECISION: September 25, 2000

DECISION

APPEARANCES

Andrew Bose	for the employer
Katherine Wong	for herself
Jim McPherson	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Ecco Il Pane Bakery Inc. (the "employer") from a Determination dated May 19, 2000. That Determination found the employer liable for $897.39 for compensation in lieu of notice to Katherine Wong (the "complainant"). The Director's Delegate determined that the employer had breached Sections 18(1), 63(2), and 63(3) of the *Act*.

ISSUES TO BE DECIDED

A. Should the original complaint be rejected as being made out of the time required by the *Act?*

B. Did the employer have just cause to terminate Katherine Wong?

C. Should the determination be dismissed due to the amount of time required for a decision to be reached?

FACTS

The employer operates two restaurants in the Vancouver area. The complainant started working for this employer in January of 1995. At the time of her termination on January 28, 1997 she held the position of Assistant Retail Manager.

Prior to her termination the complainant had received two warning letters, dated September 5, 1996 and December 10, 1996 respectively. The employer uses a standard form entitled Employee Written Warning. The aforementioned warning letters, under the heading Nature of Problem, indicated "carelessness" for September 5 and "carelessness" plus "work performance" for the December 10 notation. The two warnings relate to the checking of orders given to customers.

There are two dates written on the termination letter which is in the same form as the earlier warning letters. The "date of problem" is given as January 18, and the "date of discussion" about the matter is given as January 28, 1997. The warning letter refers to an attached written

complaint made by a customer about the service received on two days in December of 1996. The letter of complaint states that an order was placed on December 18 for pick up on December 20, at 11:00 am. When the customer arrived to pick up the order she was told that the order was marked for 1:00 pm. When the customer asked that the order be checked she was informed by "the girl" that there was no record of the 11:00 a.m. order. Subsequently, the customer was given the wrong order.

On December 23, 1996 the customer returned to the store to pick up an order that was to be ready at 10:45 am. It is unclear from the complaint letter whether this order was placed on December 20th although from the context of the letter it would appear to have been. The customer was late by 15 minutes, arriving at 11:00 o'clock and was told that the order was marked for 11:30 am. The customer later makes reference to the fact that the "girls were accomadating (sic) and apologetic". It was on the basis of this complaint that the complainant was fired.

ANALYSIS

A. Was The Complaint Made In Time

The employer alleges that the complaint was not made until September of 1999. If this were true the complaint would have been made outside of the 6-month time limit set out in section 74(3) of the *Act*. The complaint form filled out by Ms. Wong was stamped as received by the Burnaby Branch of Employment Standards on February 25, 1997. The form is also stamped as received by the Vancouver branch on February 21,1997. There is a third stamp on the form, which appears to also be from the Burnaby office. There is no explanation as to why the Burnaby branch felt the need to stamp the complaint twice. However Ms. Wong was terminated on January 28, 1997 and filed her complaint on February 21, 1997 which is within the time limit. The employer's timeliness objection is dismissed.

B. Was There Just Cause For Termination

The employer takes no exception to the findings of fact made by the delegate nor does the employer allege that the delegate incorrectly stated the law as it relates to just cause. An examination of the material before me shows no error by the delegate in stating the law as it relates to just cause. Therefore, unless the material before me indicates that the delegate incorrectly applied the law to the facts of this case the decision will be upheld

The employer relied on the events described in the letter by the customer on December 20, 1996 to terminate Ms. Wong. The uncontradicted evidence before me is that Ms. Wong did not work on December 20, 1996. The employer had made no allegations that it was relying on events of December 18 or December 23 in finding just cause for terminating Ms. Wong. There is no evidence before me to indicate that Ms. Wong was, in any way, responsible for the events of December 20 or 23 as described in the letter. The employer has failed to discharge the burden of proving that it had just cause to terminate Ms. Wong.

C. Should The Complaint Be Dismissed For Excessive Delay

The original complaint was filed in February of 1997. The Determination is dated May 19, 2000 made in May. The employer submits that due to the length of time taken to process the complaint it has spent more on time and resources than the amount owed in the Determination. The employer thus argues that it is being unfairly penalized. Furthermore, the employer submits that the age of the case makes it very difficult to prepare further information in defence.

The complainant, through counsel, submits that the employer has not demonstrated any "severe prejudice" to its position nor any substantial stigma due to the delay in the proceedings. Counsel relies on *Blencoe v. British Columbia (Human Rights Commission) (1998),* 49 B.C.L.R. (3d) 216(C.A.). I am not entirely convinced that *Blencoe* applies to a corporate appellant given the importance of the Canadian Charter of Rights and Freedoms to the *Blencoe* case. However it is clear that the Tribunal must comply with the rules of natural justice and undue delay can be a factor in deciding whether natural justice has been breached.

The complainant is correct in asserting that the employer has not shown how the delay has prejudiced its position. As stated earlier the employer takes exception to the conclusions of the delegate not the findings of fact. Indeed the employer's representative confirmed during the investigative stage that the complainant was not at work on December 20, 1996 when it is alleged that the first incident occurred. It cannot now complain that it no longer has access to records that would contradict these findings. Nor does the fact that an employer may have spent more time and resources on a complaint than it is actually worth evidence of prejudice. Absent any evidence that the employer's position has been prejudiced I cannot dismiss the complaint for undue delay.

In summary, the employer has not met the burden of proving that the decision made by the delegate was wrong. The employer has not shown that the delegate erred in fact or law in the conclusion that the employer did not have just cause to terminate the complainant. There is no evidence of any prejudice suffered by the employer due to the amount of time taken to reach a decision. Furthermore, the evidence clearly establishes that the complaint was filed within the statutory time limits.

ORDER

The Determination dated May 19, 2000, is confirmed.

E. Casey McCabe

E. Casey McCabe
Adjudicator
Employment Standards Tribunal