EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

Employment Standards Act, S.B.C. 1995, c. 38

-by-

Ichiban Fine Cleaning Ltd.

("Ichiban")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/208

DATE OF DECISION: November 25th, 1996

DECISION

OVERVIEW

This is an application filed by Ichiban Fine Cleaning Ltd. ("Ichiban") pursuant to section 116 of the Employment Standards Act (the "Act") for reconsideration of an adjudicator's decision to cancel Determination No. CDET 001431 (the "Determination"). The Determination was issued by the Director of Employment Standards on March 1st, 1996.

The Director dismissed Pierina Iurman's ("Iurman")--a former Ichiban employee--claim for statutory holiday pay and termination pay. In essence, the Director found that Iurman had not worked on any statutory holidays and that Iurman, rather than being fired as she had alleged, abandoned or voluntarily quit her employment and, accordingly, was not entitled to any termination pay [see section 63(3)(c) of the Act].

Iurman appealed the Determination (only as to her entitlement to termination pay) to the Tribunal and following an appeal hearing on July 8th, 1996, a Tribunal adjudicator held that Ichiban terminated Iurman, without just cause, on or about November 28th, 1995. As Ichiban failed to pay any termination pay (or to give appropriate notice in lieu thereof) as required by section 63 of the Act, the adjudicator ordered that the matter be remitted to the Director and that a new Determination be issued taking into account Iurman's entitlement to termination pay reflecting her three years of service.

The request for reconsideration is contained in a letter dated October 4th, 1996 to the Tribunal Registrar from Ichiban's accountants, Barnes & Associates. The sole ground advanced in support of the application for reconsideration is that the adjudicator erred in his finding that Ichiban terminated Iurman's employment.

ANALYSIS

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the Act (the "reconsideration" provision). In essence,

the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the Act is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, especially when such findings follow an oral hearing, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

The adjudicator concluded, on the basis of the apparently conflicting evidence before him, that Iurman did not report for work from October 17th to late November 1995 due to a disabling medical condition. During this period, there were occasional conversations between Iurman and Ms. Armenia Boyd (on behalf of Ichiban) in which Iurman repeatedly indicated that she was not quitting and that she intended to return to work when her physical condition allowed.

In a Record of Employment provided by Ichiban as part of Iurman's application for UI sick benefits, the employer stated in the "Comments" section of the form:

> "Says she [Iurman] has a sore neck and does not know when she is returning."

In my view, the only reasonable inference to be drawn from this latter statement is that Iurman, at least as of November 3rd, had neither quit nor been fired--what else can the reference to "returning" mean except "returning to work"?

There is no evidence that Iurman quit or was given notice of termination during a subsequent November 7th telephone conversation. There were no further discussions until November 28th when, again, the Iurman and Boyd spoke by telephone. However, there is no evidence that during the November 28th conversation Iurman either quit or was fired.

In my view, the adjudicator's conclusions that Iurman did not quit her job, and that Ichiban did not have just cause to terminate Iurman, are amply supported by the evidence.

It would appear that when Iurman was fit to return to work on December 8th, the employer refused to allow her to return, in effect terminating the employment relationship. Accordingly, the employer was at that point obliged, by reason of section 63 of the Act, to either pay termination pay or to give an appropriate amount of "working notice"--the employer did neither.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal