EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

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

- by -

Dan Foss Couriers (Island) Ltd.
("Dan Foss")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO.: 95/036

DATE OF HEARING: March 4, 1996

DATE OF DECISION: March 14, 1996

DECISION

APPEARANCES:

Al Hasham	For the Appellant
Ron Corrigal	For the Director of Employment Standards
Matthew Stark	Representing himself

OVERVIEW

This is an appeal by Dan Foss Couriers (Island) Ltd. ("Dan Foss"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued on November 28, 1995 (Determination #CDET 000235) wherein the Director found that the employer had contravened the *Employment Standards Act* in failing to pay vacation pay and severance pay, and ordered that Dan Foss pay $1,452.97 to the Director of Employment Standards.

FACTS

Mr. Stark, an employee with Dan Foss since May 1991, became injured on or about September 19, 1994. He notified the employer that he was ready and willing to return to work effective November 8, 1994. On that date, he attended at the worksite and was advised that he was being laid off. Although the evidence is conflicting as to who advised him of that, there is no dispute as to the day or the substance of what he was told.

Mr. Stark assumed that he was permanently laid off and filed a complaint with the Employment Standards Branch that day.

ISSUE TO BE DECIDED

There were two issues on appeal:

1. Whether annual vacation pay is owing. Although the Employer does not dispute this finding, they argue that the amount is properly withheld until the employee returns the uniform issued to him.

2. Whether the Director correctly determined that severance pay is owing on the basis that the lay off exceeded 13 weeks of a 20 week period. The Employer contends that the employee was temporarily laid off, and that despite repeated efforts to contact the employee to recall him for work within the 20 weeks provided under the *Act*, they were unable to do so. They argue that the employee should be not be deemed as laid off in those circumstances, and that the determination is wrong and unfair.

ANALYSIS

This hearing took the form of a rehearing. Both Dan Foss and Mr. Stark called witnesses in support of their positions. I heard evidence from Mr. Al Verjee, Mr. Hasham's agent in most of the dealings with Mr. Stark. I also heard evidence from Mr. Maynard Boschma, who testified on behalf of Mr. Stark.

On the basis of the evidence presented, I confirm the decision of the Director.

I shall deal with each issue separately.

Vacation pay

The employer does not dispute the fact that annual vacation pay has not been forwarded to Mr. Stark, but states that it is being properly withheld until Mr. Stark returns the company uniform. Mr. Hasham stated that company policy, which was acknowledged by Mr. Stark, provided that wages would be deducted if the uniform was not returned.

On the basis of the evidence presented, I am satisfied, on a balance of probabilities, that Mr. Stark's uniform was in fact returned to the employer. Mr. Boschma testified that he placed a pair of pants, a shirt and a jacket on the counter of the employer's office, and told the female employee behind the counter that they belonged to Mr. Stark. No contrary evidence was presented.

However, even if I am wrong in determining that the clothing was returned, Section 7 of the *Act* provides that "except as permitted or required by an enactment, an employer shall not, directly or indirectly, withhold...wages by way of a setoff, counterclaim, assignment or for any other purpose." (my emphasis).

Wages include "money required to be paid by an employer to an employee under this *Act*." (Section 1)

Accordingly, even if the clothing was not returned, the Employer has no basis upon which to withhold vacation pay from Mr. Stark. Even though Dan Foss policies state that the company may withhold wages for the employee's failure to return the uniform, this policy is in violation of the *Act*. Section 2 of the *Act* provides that the *Act* prevails, and any agreement to waive the requirements of the *Act* is void. In other words, the employee cannot agree to waive rights contained in the *Act*, including Section 7.

I deny the appeal in this respect.

Severance pay

Mr. Hasham's evidence was that although he told Mr. Stark that he was being laid off, he was told to keep in touch as there might be opportunities to re-hire him later that year. Mr. Hasham stated that he attempted to contact Mr. Stark on numerous occasions in December, January and February, but was unable to do so. Mr. Stark denies that he was contacted, and stated neither he nor his roommate spoke to the Mr. Hasham or anyone else with the company, nor were any messages left on his machine.

Mr. Hasham testified that he told Mr. Stark to "stay in touch", and argued that had Mr. Stark in fact wanted to return to work, he would have made an attempt to contact the office to determine whether there were any employment opportunities.

Mr. Stark acknowledges not calling Dan Foss in order to determine whether there was any employment opportunities because it was so close to Christmas, a traditionally slow time, and because he had already filed his complaint with the EST and was told not to contact the employer further.

Section 44 of the *Act* provides that where an employer temporarily lays off an employee not covered by a collective agreement and the layoff exceeds a temporary layoff, the employee shall be deemed to have been terminated at the commencement of the temporary layoff and the employer shall pay the employee the severance pay under section 42(3).

On the basis of the evidence presented, I am unable to conclude that Dan Foss made sincere efforts to recall Mr. Stark. There was no evidence presented to the Director at the first instance, and although Mr. Hasham provided me with a sheet containing notations regarding his contact with Mr. Stark, it did not indicate that any phone calls were attempted after the month of November. No attempts were made to contact Mr. Stark in writing, by way of registered letter or courier.

The burden of proof in an appeal is on the Appellant. There was no new evidence presented, and I am unable to find that the Director's determination was in error. Mr. Hasham argued that the Employment Standards Bulletin and Guide does not provide assistance on how an employee is to be recalled. He also argued that as Mr. Stark had been off work on a W.C.B. claim previously and re-hired, the employer had a past record of being ready and willing to employ Mr. Stark had he been available. He also argued that it would have been in the employer's best interest to re-hire an experienced employee rather than train a new one, and that it would not make sense not to recall Mr. Stark had they been able to contact him.

I find that had Dan Foss found Mr. Stark to be the desirable employee suggested in the hearing, greater efforts would have been made to contact Mr. Stark to recall him back to work, including writing him in addition to telephone calls. The employer is required to keep records in respect of a number of matters under the *Act*. Although there are no guidelines on how to recall an employee, it is good business sense to document the attempts made to contact Mr. Stark. As a result, I am unable to find that the Appellant has discharged the burden of establishing that the Director's decision was in error, and I deny the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that Determination #CDET 000235 be confirmed.

_____ March 14, 1996

Carol Roberts **Date**
Adjudicator
Employment Standards Tribunal

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