

**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 -

Ocelot Enterprises Ltd. Operating as Subway  
("Ocelot")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Mark Thompson

**FILE NO.:** 96/698

**DATE OF HEARING:** February 10, 1997

**DATE OF DECISION:** February 15, 1997

**DECISION**

**APPEARANCES**

Andrew V. Marchrones	on behalf of Ocelot Enterprises
Annie Laperriere	on her own behalf
Christopher Finding	for the Director of Employment Standards

**OVERVIEW**

This cases arises from an appeal brought by Ocelot pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 004522, issued by the Director of the Employment Standards Branch October 30, 1996.

The Determination affected three persons, but the appeal concerned only one individual, Ms. Annie Laperriere. In particular, the Determination found that the employer had violated Section 63(2) of the *Act* by refusing to pay length of service compensation to Ms. Laperriere. Mr. Marchrones, on behalf of Ocelot, maintained that the employer had attempted to re-employ Ms. Laperriere, but she had been unavailable to return to work.

A hearing was held on February 10, 1997 in Vancouver, B. C. at which time evidence was given by Mr. Marchrones, Mr. Tom Chu and Ms. Laperriere. Mr. Fielding appeared as counsel for the Director of Employment Standards.

**ISSUE TO BE DECIDED**

1. Did Ocelot Enterprises offer re-employment to Ms. Laperriere?
2. Is Ms. Laperriere entitled to length of service compensation?

**FACTS**

Certain facts are not in dispute. Ms. Laperriere was employed as a manager at a Subway restaurant, beginning on August 31, 1994. Mr. Marchrones informed on January 31, 1996, that she was laid off. She was paid both for time worked and vacation pay. According to Mr. Marchrones, he told Ms. Laperriere that the reason for her layoff was that the company was having financial problems. He further stated that he told her that if finances improved in the spring, there might be an opportunity for re-employment. Ms. Laperriere testified that there was no mention of future employment on January 31. Mr. Marchrones could not recall telling her how to keep in touch with the company. He also offered to

assist her in finding work at other Subway restaurants, but she was not interested. Apparently, the meeting did not end on a friendly note.

Mr. Marchrones testified that on March 25, 1996, he attempted to contact Ms. Laperriere to call her back to work as a manager position had become available. He telephoned Ms. Laperriere at her home number, but was told that it was no longer in service. He sought her new number from directory assistance, but was told that there was no listing in her name. He then visited an address on Triumph Street listed on her employment record and did not establish contact. He spoke to one person at that address, who did not know where she could be found.

On March 27, according to Mr. Marchrones, he spoke to Ms. Annie Simard, a close friend of Ms. Lapierrere, asking her where she could be located. At that time Ms. Simard was employed by Ocelot, and had been hired on Ms. Laperriere's recommendation. Ms. Simard stated that she did not know how to find Ms. Laperriere.

After failing to locate Ms. Laperriere, Mr. Marchrones hired Mr. Tom Chu as a manager. Mr. Chu also wanted to find Ms. Laperriere to manage one of the two stores for which he was responsible. He told Ms. Simard that a manager's position had become available and asked if she knew where Ms. Laperriere was, and she replied that she did not. On April 22, another manager's position became available. Mr. Marchrones, assuming that Ms. Laperriere might still be upset with him because of the January 31 meeting, asked Mr. Chu to locate her. Mr. Chu called Ms. Simard, at her new place of employment, but she did not return his call. He drove to the Triumph Street address and asked an individual there for assistance in locating Ms. Laperriere, but he did not know where she could be found. Mr. Chu also tried to locate Ms. Laperriere through directory assistance without success. In the course of preparing for this appeal, Mr. Marchrones sent a double registered letter to Ms. Laperriere at the Triumph Street address, and it was returned as undeliverable.

Ms. Laperriere testified that she had never received any call or other notice from Ocelot to return to work. She was living on 7th Avenue on January 31, 1996 and remained there until April 1. The address on Triumph Street is the residence of her aunt and uncle, and she lived there for six months when she first came to Vancouver. Her aunt and uncle knew how to find her, but had never relayed any message from Ocelot. She moved to a new residence after April 1, and for two months, she did not have a listed telephone number. She has an answering device on her telephone. Ms. Lapierrere stated that she was in Vancouver in March 1996 and saw Annie Simard often. Ms. Simard told her in April that Ocelot was looking for her, but did not say why. Ms. Laperriere expressed the view that any effort by Ocelot to contact her was motivated by a desire to escape its obligations for severance pay. She did not pick up the letter sent to the Triumph Street address because she was working six days a week and could not go to the post office.

**ANALYSIS**

Based on the evidence presented to me, I conclude that Ocelot did make repeated attempts to contact Ms. Laperriere for the purpose of recalling her to work, and that she did not respond to those initiatives. The January 31 meeting apparently was emotional, and Mr. Marchrones could have been explained Ms. Laperriere's prospects for re-employment more clearly. However, Mr. Marchrones used all reasonable means to contact her, without success. Based on the evidence before me, I further conclude that Ms. Laperriere did not cooperate in receiving Mr. Marchrones's requests to return to work.

This conclusion regarding the facts of the case does not determine its outcome.

Section 63 of the *Act* establishes employer's liabilities resulting from length of service. Section 65 of the statute sets out exceptions to the rights conferred by Section 63 as follows in paragraph (4) as follows:

Section 64 does not apply to an employee who

- (c) is laid off and does not return to work within a reasonable time after being requested to do so by the employer.

The Director argued that the employer bears the onus of making an offer of re-employment and to maintain the employment relationship in tact. In this case, the employer paid Ms. Laperriere her vacation pay and did not make it clear that she might be able to return to work. Ms. Simard was not acting as an agent of Ocelot when she contacted her friend.

With respect, I conclude that the Director's argument is overly formal. In this case, the employer telephoned the employee with an offer of employment, but could not reach her. Ms. Laperriere had maintained an unlisted number for some time. Twice agents of the employer visited the last address she had given to the employer and could not locate anyone who knew her. Subsequently, a letter sent to her at that address was returned as undeliverable. Efforts to contact her through a friend were fruitless, and Ms. Laperriere acknowledged that she knew in April that Ocelot was attempting to contact her, but did nothing to respond.

The employer bears the onus to contact an employee to offer renewed employment. However, to eliminate the employee's obligation to respond to an offer would reward an employee who, after receiving a notice of layoff, avoids receiving a legitimate request from an employer to return to work until 13 weeks have past in order to collect length of service compensation. Section 65(4)(c) is designed to prevent such consequences.

**ORDER**

I order pursuant to Section 115 of the *Act* that Determination No. CDET 004522 be varied to delete the requirement to pay Ms. Laperriere length of service compensation.

**Mark Thompson**  
**Adjudicator**  
**Employment Standards Tribunal**