Employment Standards TRIBUNAL

An appeal

- by -

Canadian Lawn Care Services Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: John M. Orr

FILE No.: 2002/101

DATE OF DECISION: April 29, 2002

DECISION

OVERVIEW

This is an appeal by Canadian Lawn Care Services Ltd. ("the employer") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination dated February 1, 2002 by the Director of Employment Standards (the "Director").

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

The Director determined that Richard Fuoco ("Fuoco") was entitled to one-week of pay as compensation for length of service. The employer had asserted that Fuoco was given working notice of layoff and that this discharged the employer's liability for compensation. The Director determined that the employer had not established that the notice was actually delivered to Fuoco in a timely manner.

The employer appeals reasserting that notice was given with Fuoco's paycheque in the customary fashion and that receipt of the paycheque should have been sufficient evidence of receipt of the notice.

ISSUES

The issue in this case is whether the employer has provided sufficient evidence to establish that notice was given and received.

ANALYSIS

The Director's delegate correctly identified that the onus is on the employer to show that there was notice of termination. The onus is also on the employer in this appeal to persuade the Tribunal that the Determination was wrongly decided.

The employer has provided a copy of a written notice of layoff dated May 4th, 2001 - one-week prior to Fuoco's last day of work. The employer says that the notice was included in an envelope with Fuoco's paycheque. If this is the case the notice would not have been delivered until the last day of employment and would not constituted sufficient notice to discharge the liability for compensation.

However, the employer states that the letter was delivered with the previous paycheque on April 27th. As pointed out by the Director, this proposal is somewhat lacking in credibility as no explanation is given why the employer would postdate the notice to May 4th if it were being delivered on April 27th. The employer submits that some witnesses could have provided evidence that Fuoco talked about his layoff with other employees and thereby confirming that the notice had been delivered. Unfortunately, the employer has provided no statements from these witnesses. Mr Fuoco maintains that he never received any written notice in advance of his layoff.

I am not satisfied that the employer has met the onus of persuading me that the Determination was wrongly decided and therefore the Determination will be confirmed.

As an aside, I was initially concerned that this matter had been wrongly classified as a termination and not analysed as a "layoff". If Fuoco was laid off no notice would be required. However if he was not recalled to work and the layoff lasted longer than a "temporary layoff" he would then be entitled to his compensation. Although the case was not analysed in this manner it does appear from the Determination and the submissions that Fuoco was never recalled to work and therefore was still entitled to his compensation. The claim may have been premature if it was made before the temporary layoff period expired but I am prepared to confirm the Determination, as Fuoco was not in fact recalled to work.

ORDER

I order, under section 115 of the *Act,* that the Determination dated February 1, 2002 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal