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-

The Little Printer Ltd.
(the "Employer")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE NO.: 97/114

DATE OF HEARING: May 29, 1997

DATE OF DECISION: May 30, 1997

DECISION

APPEARANCES

Bruce C.E. Russell	for the employer
Lesley A. Christensen	for the Director of Employment Standards
Sandi K. Rossiter	for herself

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination dated January 31, 1997 which found that the employer had breached Section 63(2)(b) of the *Act* by failing to pay compensation for length of service to Ms. Rossiter.

ISSUE TO BE DECIDED

Is Ms. Rossiter entitled to compensation for length of service or was she dismissed for just cause?

FACTS

The Little Printer Ltd. is a small business which is privately owned. It caters to the printing requirements of small to medium size businesses. Ms. Rossiter was employed as a graphic artist. Her employment commenced on June 1, 1991 and was terminated on June 8, 1995. The Director's Delegate determined that she was entitled to four weeks' compensation for length of service and made a calculation based on the average earnings of the last eight weeks of employment plus interest.

On November 19, 1996 the Director's Delegate sent the employer a Demand for Employer Records. The employer provided records with respect to length of employment and pay scale but did not provide reasons for terminating Ms. Rossiter. Based on the information available the Director's Delegate issued the Determination dated January 31, 1997 against the employer.

On February 21, 1997 the employer, through its legal counsel, appealed the Director's decision. In its submission the employer raised a defense of just cause with supporting reasons. The employer stated that it had new evidence and would rely on evidence from out of province witnesses which was not considered at the time the Determination was made. The employer asked for a full hearing on the merits. On April 28, 1997 the Registrar of the Employment Standards Tribunal sent a Notice of Hearing to the parties setting May 29, 1997 as the date for a hearing of the appeal.

On May 27, 1997 Mr. Russell faxed a letter to the tribunal. It reads:

> "I have just been informed it is impossible to obtain the attendance of two witnesses, Dale Warcup and Monte Stanton at the hearing scheduled for May 29, 1997. Both have left the employ of the Appellant and are somewhat uncooperative. Accordingly, we seek an adjournment respecting the above or directions. In any event my client cannot proceed with the appeal and will not attend on May 29, 1997 due to the above and the great distance involved. Yours truly,"

On May 28, 1997 the Registrar responded to that submission by stating that she was not prepared to deal with the application on a summary basis, the hearing would commence on May 29, 1997 as scheduled and that the adjudicator would hear submissions from counsel regarding the application for an adjournment. The letter also stated that if the application was not granted that counsel should be prepared to proceed with the merits of the appeal. If the application were granted counsel should be available to proceed at an early date.

At approximately 7:55 a.m. on May 29, 1997 Mr. Russell faxed to the Tribunal a reply submission. That submission stated:

> "Further to your fax of May 28, 1997 I am unable to provide any further information than previously provided respecting the unavailability of Dale Warcup and Monte Stanton due in part, to their leaving the employer and the distance problems respecting principals of the employer. I am instructed my clients have a valid and meritorious defense to the claim and meritorious appeal. Accordingly, I am instructed not to attend the May 29, 1997 hearing. I can add nothing further. Yours truly,"

I add that I did not receive the May 29, 1997 reply submission until after I had telephoned counsel for the employer when, at 9:15 a.m. he had not appeared at the hearing. I presented a copy of the May 29, 1997 submission to the Director's Delegate and Ms. Rossiter who were in attendance. I heard submissions from each regarding the application for an adjournment. I then telephoned Mr. Russell to inform him that I was prepared to grant a one hour adjournment for him to attend if he wished to make any further submissions on the adjournment or the merits of the case. Mr. Russell reiterated his instructions that he was not to attend the May 29, 1997 appeal.

ANALYSIS

I am not prepared to grant an adjournment of this matter. I am not satisfied that the employer has provided sufficient reasons to grant an adjournment on the basis of the unavailability of witnesses. In its letter of May 27, 1997 the employer states that two of its witnesses had left its employ and were uncooperative. Further, the owner of the business is out of the country at the moment and did not give any indication when he would be available. This is the employer's appeal and notice of the hearing was issued on April 28, 1997. The employer had ample time to ensure the availability of its witnesses or to apply at an earlier date for an adjournment. Both the Director's Delegate and Ms. Rossiter attended and were prepared to proceed. It has been nearly two years since Ms.

Rossiter was terminated. The employer had not provided sufficient reasons to convince me to delay justice any longer.

It should be noted that the employer's appeal rests on its desire to adduce evidence to support reasons for just cause that were not given to Ms. Rossiter at the time of her termination nor provided to the Director's Delegate during the investigation. The employer's submission of February 21, 1997 sets out reasons justifying the cause for dismissal but the submission lacks particulars. I am satisfied in reviewing the file material that the employer has not discharged its onus as appellant in this matter.

Further it is Tribunal policy that evidence which was available but not produced prior to the issuance of a Determination letter will not be considered at the appeal stage. (see *Tri-West Tractor Ltd. (1996)* BC EST No. D268/96)

In conclusion I find that the onus in this matter is on the employer as appellant. The employer has failed to discharge that onus by refusing to attend the hearing and by not presenting sufficient reasons to convince me that the Determination dated January 31, 1997 should be set aside.

ORDER

I order under Section 115 of the *Act*, that the Determination dated January 31, 1997 be confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal