

**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 -

Canada Instant Print Ltd.  
("C.I.P." or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton  
**FILE NO.:** 98/164  
**DATE OF HEARING:** May 21, 1998  
**DATE OF DECISION:** June 9, 1998

**DECISION**

**APPEARANCES**

Steven K. Dufour	on behalf of Canada Instant Print Ltd.
Carlo O. Legg	on his own behalf
Ron Corrigan	on behalf of the Director of Employment Standards

**OVERVIEW**

This is an appeal, under Section 112 of the *Employment Standards Act* (the “Act”), by Canada Instant Print Ltd. (“C.I.P.”) against a Determination which was issued on February 18, 1998 by a delegate of the Director of Employment Standards. The Director’s delegate determined that Carlo Legg, a former employee of C.I.P., was entitled to compensation for length of service under Section 63 of the *Act* because he had been laid off for more than a “temporary layoff” (as defined in Section 1 of the *Act*).

A hearing was held Victoria, B.C. on May 21, 1998 at which time evidence was given under oath or affirmation by Steve Dufour, Dianne Philippot, Bill Van Schagen and Carlo Legg.

**ISSUE TO BE DECIDED**

The issue to be decided in this appeal is whether the Director’s delegate erred in determining that Mr. Legg is entitled to compensation for length of service under Section 63 of the *Act*. That is, was Mr. Legg’s layoff a “temporary layoff” or a “termination of employment” as those terms are defined in Section 1 of the *Act*?

**FACTS**

Mr. Legg was first employed by C.I.P. on March 25, 1991 and continued to be employed, without interruption, until March 13, 1997. There is no dispute that Mr. Legg was laid off on March 13, 1997 due to a shortage of work. That is confirmed by the Record of Earnings (“ROE.”) which was issued by C.I.P. at the time showing the expected date of recall as “unknown” (Box 20).

The Director’s delegate determined that Mr. Legg was entitled to compensation for length of service because, following his investigation, he was “... satisfied on the balance of probabilities that the Employer has not met the onus of (proving) that (Mr. Legg) terminated

employment by ignoring a specific recall to work.” His reasons for making that determination hinged on a finding that while the Employer may have left telephone messages for Mr. Legg, “...there is no corroborating evidence confirming that any such messages constituted a recall to work.”

Steven Dufour is C.I.P.’s Secretary and General Manager. He testified that prior to C.I.P. suffering a significant decline (approximate 25% decline) in sales revenue in early 1997, it employed 12 full-time employees. Two of those employees, Mr. Legg and Mr. Kenyon were laidoff on March 13, 1997. Mr. Kenyon was recalled from lay-off on more than one occasion. Mr. Dufour also testified that he left a message on Mr. Legg’s telephone answering machine on three occasions: between May 27th and 29th; on June 4 at 4:00 p.m.; and on June 10 at 4:00 p.m. Mr. Dufour made a note of these calls on his desk calendar, a copy of which was entered into evidence. However, he did not make these notes in his calendar until July 7, 1997 when he received a telephone call from an Employment Standards Branch employee concerning Mr. Legg’s complaint.

When asked about the specific message he left on the answering machine, Mr. Dufour testified that his message was: “Please call me, re: work”.

Dianne Philippet is a majority shareholder and president of C.I.P. She testified that she could recall Mr. Dufour leaving a telephone message for Mr. Legg on two occasions while she was in the office. However, she was unable to recall the contents of either of Mr. Dufour’s telephone conversations. According to Ms. Philippet, Mr. Dufour told her that “...he had got the machine” on both occasions. She was not certain whether they alone were in the office or whether Bill Van Schagen was present on one occasion.

William (Bill) van Schagen is C.I.P.’s production manager. He testified that he could recall being in Mr. Dufour’s office one afternoon when Mr. Dufour telephoned Mr. Legg. He could not recall what Mr. Dufour said and believed, that only Mr. Dufour and he were in the office at the time.

Mr. Legg telephoned Mr. Dufour on June 19, 1997 to inquire about “severance pay” and, Mr. Dufour testified, he told him that he would look into it. It was then that Mr. Dufour testified he asked Mr. Legg why he had not returned his telephone messages. Mr. Legg’s reply, according to Mr. Dufour, was that his youngest daughter must have been playing with the telephone again.

Mr. Dufour conducted an informal survey of C.I.P.’s employees and two of them could recall that Mr. Legg visited the premises once or twice after he was laid off on March 13, 1997.

Mr. Dufour provided a summary of two employees’ payroll information for several payroll periods during May and June, 1997 in support of his submission that C.I.P.’s sales volume had increased and, to avoid incurring overtime costs, wished to recall Mr. Legg.

Mr. Legg testified that he visited C.I.P.'s premises on three occasions (March 14; April 4; May 16) after he was laid off. The purpose of his visit on March 14th was to collect his ROE. On the other two visits, he testified, he spoke to Steven Dufour to inquire about the availability of work. Mr. Legg could recall having spoken to two employees (Margaret Grylls, Craig Edwards) before speaking to Mr. Dufour

Mr. Legg denies having received any telephone messages from Mr. Dufour and testified that he was very interested in resuming full-time employment because he is a single parent. Mr. Legg's recollection of his telephone conversation with Mr. Dufour on June 19, 1997 differs from Mr. Dufour's recollection. Mr. Legg denies that he made any reference to his daughter playing with the answering machine.

### **ANALYSIS**

"Temporary layoff" is defined in Section 1 of the *Act* as "...a layoff of up to 13 weeks in any period of 20 consecutive weeks."

"Termination of employment" is defined, for purposes of the *Act*, as including "...a layoff other than a "temporary layoff".

Section 63(1) of the *Act* creates a liability for employers to pay "compensation for length of service" to any employee who has been employed for 3 consecutive months. That liability can be discharged if, the employee is given written notice of termination, a combination of notice and payment in lieu or is paid wages equivalent to the period of notice to which the employee is entitled under Section 63(3) of the *Act*.

Section 63(5) is of particular relevance to this appeal. It states:

*For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.*

As I noted earlier, the central question to be decided in this appeal is whether Mr. Legg's layoff was a "temporary layoff" or a "termination of employment". If it was a "temporary layoff" then the provisions of Section 63 of the *Act* are not relevant. If, on the other hand, it was a "termination of employment", I must decide how to apply and interpret Section 63 in the facts of this appeal.

C.I.P.'s submission dated March 12, 1998 correctly identifies the factual dispute which lies at the core of this appeal: What specific messages did Mr. Dufour leave for Mr. Legg and did those messages constitute a recall to work?

When I review all of the evidence and submissions in this appeal I find that C.I.P. has not established that Mr. Legg was recalled to work within 13 weeks of being laid off on March 13, 1997. In making that finding I concur with the Director's delegate when he reasoned that even if Mr. Dufour had left messages on Mr. Legg's telephone answering machine, there is no evidence that those messages constituted a recall to work. Neither Ms. Philippot nor Mr. Van Schagen could recall the contents of Mr. Dufour's messages and there was conflicting evidence about who was present in the office at the material times. It is also significant that he did not make the notes in his calendar about the telephone conversations until July 7, 1997 when he was contacted by an employee of the Employment Standards Branch. The evidence also supports a finding that Mr. Legg visited C.I.P.'s premises in early April and mid-May but was not recalled at that time. Further, it seems reasonable to me that if C.I.P. had wished to recall Mr. Legg and was unable to contact him by telephone, a brief written notice of recall could have been sent to him by mail, courier or hand delivery.

I accept Mr. Dufour's testimony that he made several attempts to contact Mr. Legg by telephone. However, the evidence does not allow me to find, on the balance of probabilities, that those efforts constituted a recall of Mr. Legg to work.

The payroll records submitted by C.I.P. do not assist me in making this decision because of the many errors which they contain on their face and, in addition, the fact that sales volumes increased in mid-1997 was not really an issue which was in dispute.

In my view, the statutory definition of "termination of employment" and "temporary layoff" have been interpreted correctly by the Director's delegate in making the Determination and, for all of the reasons given above, I confirm the Determination.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination be confirmed.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**

GC:bls