BC EST # D305/96

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-

Evergreen Exhibitions Limited
("Evergreen")

and
Margo King
("King")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Carol L. Roberts
FILE NO:	96/334
DATE OF HEARING:	September 23, 1996
DATE OF DECISION:	September 23, 1996

DECISION

APPEARANCES

Albert Chartrand	For the Appellant
Margo King	For the Respondent
Gerry Olmstead	For the Director of Employment Standards

OVERVIEW

This is an appeal, pursuant to Section 112 of the *Employment Standards Act ("*the *Act*"), against Determination #CDET 002211 which was issued May 9, 1996. The Director found that although Evergreen was not in violation of Sections 17(1) or 58(1) of the *Act*, it had contravened Section 63(1) in failing to pay King compensation for length of service upon termination of employment.

FACTS

King commenced employment with Evergreen on November 1, 1994. She was laid off temporarily on August 17, 1995, and expected to be called back on October 2, 1995. Evergreen contends that a telephone call to King to resume work was not returned. King states that she received neither a telephone call or any other indication that she was expected to return to work.

In the absence of evidence supporting Evergreen's claim that an attempt to recall King was unsuccessful, the Director found a violation of the Act, and ordered payment of wages in lieu.

ISSUES TO BE DECIDED

Although Mr. Chartrand based his appeal in part on the amount of wages owing, he indicated this was no longer an issue after being advised of the basis for the calculation. It was Mr. Chartrand's understanding that his liability was limited to one week's wages. As this complaint was made when the former Act was still in effect, the transition provisions of this Act apply under Section 128. Pursuant to Section 128(5), an employer is liable to pay an employee an amount equivalent to the number of weeks' wages the employee would have been entitled to under Section 42(3) of the former Act as compensation for length of service.

Under the previous Act, an employer was liable to pay two weeks' wages upon termination. Although the present *Act* reduces that liability to one week, this case falls within the transition provisions and, accordingly, wages are calculated as if the liability arose under the previous Act.

The remaining issue on appeal was the correctness of the Director's determination of liability. Mr. Chartrand contended that King failed to reply to the telephone message, did not call to determine whether a job was available, and had resigned rather than being terminated.

ANALYSIS

The burden of establishing that the decision of the Director is in error rests with the Appellant. On the basis of the evidence before me, I am unable to conclude that the determination is incorrect.

Section 63 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 63(3).

In those circumstances where an employee does not have a right of recall, a temporary layoff is up to 13 weeks in any period of 20 consecutive weeks.

On the evidence, I am unable to conclude that Evergreen made sincere efforts to recall King. The information provided to the Director at the first instance was that Mr. Chartrand made one telephone call to King and left a message with her daughter. His evidence, which was unchanged on appeal, was that the call was not returned. Mr. Chartrand acknowledged that he made no attempt to contact King in writing. Although Mr. Chartrand contended that previous telephone messages had always been returned, he conceded, in cross examination, that no further calls were made when the only call was not returned.

I agree with the submissions of the Director that in many ways the circumstances of this appeal are unfortunate. Mr. Chartrand did not document his sole attempt to contact King, who denies receiving any message. No further attempts were made even though there was no evidence that King was not a good employee. While King also admitted not making any attempts to call Mr. Chartrand after receiving her separation slip which indicated "temporary layoff, expected return week of October 2, 1995", there is no onus on an employee to contact the employer regarding a recall.

Although Mr. Chartrand also contended that King resigned, I am unable to find this argument tenable. King did not provide Evergreen with a letter of resignation, and I am unable to find, on the basis of the facts, that Evergreen may reasonably infer that she did resign in any event.

Consequently, I deny the appeal.

ORDER

I order, pursuant to Section 115 of the Act, Determination No. CDET 002211 be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal