

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-

Commercial Towel and Linen Supply Company Ltd.
(" Commercial Towel ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO.: 97/408

DATE OF HEARING: July 30, 1997

DATE OF DECISION: July 30, 1997

DECISION

APPEARANCES

Don Monsour
Cliff Lowe

For Commercial Towel

A. Yu

On her own behalf

OVERVIEW

This is an appeal by Commercial Towel and Linen Supply Company Ltd. ("Commercial Towel"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards ("the Director") issued May 6, 1997 . The Director found that Commercial Towel contravened Sections 1 and 63 of the *Act* in terminating Alice Yu's ("Yu") employment, and Ordered that Commercial Towel pay \$2863.33 to the Director on behalf of Yu.

Commercial Towel claims that Yu was not terminated but was recalled on two occasions. Alternatively, Commercial Towel argues that Yu abandoned her employment by going on vacation within 13 weeks of her layoff, making her unavailable for recall.

Commercial Towel also argued that the Director's interpretation of the legislation in imposing written notice of recall was in error, and imposed a burden on the employer which was not required by the *Act*.

ISSUE TO BE DECIDED

Whether the Director correctly determined that Yu was terminated on the basis that she had not been recalled within 13 weeks of being placed on temporary lay off.

FACTS

The facts as found by the Director were not disputed, but for his findings on Commercial Towel's attempts to contact Yu.

Yu began working for Commercial Towel on March 1, 1982. She was laid off on October 19, 1996. The Record of Employment (ROE) indicated that she had been laid off due to a shortage of work, and no date of recall was indicated. This was her first layoff.

Shortly after being laid off, Yu filed a complaint with Employment Standards Branch. When asked to respond to this complaint, Commercial Towel stated that Yu had been temporarily laid off, and that her position was still available to her, should she want it. Commercial Towel further indicated that two attempts were made to recall her for work, once in December 1996, the second in January 1997, both of which were unsuccessful. Yu indicated that she had no answering machine, although there were other individuals at her residence to receive messages.

Commercial Towel also presented evidence to the Director in support of its argument that Yu had abandoned her position, being a letter from a co worker and tenant. The letter indicated that Yu had discussed not returning to Commercial Towel, and attending school instead.

The Director questioned the Operations Manager of Commercial Towel about the telephone messages and received conflicting verbal information from that contained in Commercial Towel's earlier written reply to the complaint. The Director determined that there was no explanation for the conflicting evidence provided by the Operations Manager.

Commercial Towel also contended that the fact that Yu never contacted the company to determine whether there was work for her supported its position that she had abandoned her employment.

Yu confirmed that she went on holidays from January 19 to February 18, 1997.

The Director found that the evidence, while conflicting, did not substantiate Commercial Towel's argument that Yu was notified of a recall, nor that Yu quit or abandoned her employment. The Director determined that Yu, being an employee with fourteen years of service to the company, was entitled to written notice of recall after attempts to contact her by telephone had been unsuccessful.

The Director further found that Commercial Towel did not intend to terminate Yu after thirteen weeks, but that the company was merely unaware of the definition of temporary layoff and the restrictions of that status.

At the hearing, settlement discussions were attempted, but were unsuccessful. It is apparent that Commercial Towel seeks to have Yu return to work, but that offer was rejected.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Commercial Towel contended that it attempted to recall Yu on a number of occasions, but that only two had been documented. Mr. Lowe, the Operations Manager, testified he had in fact attempted to contact Yu on a number of occasions, without success.

He also stated he asked Karen Evers, Yu's co worker and tenant, to contact Yu to ask her whether she was returning. Ms. Evers, who lived in Yu's basement suite for approximately 4 months, including the time in question, testified that Lowe did not ask her to make this communication, nor that she did so. She did indicate however that Yu expressed an intention to attend college and not return to work. She further testified that she did not communicate this to Commercial Towel. Ms. Evers' evidence was also that Yu went on holidays from approximately January 20, 1997 to the end of February 1997.

The burden is on the employer to establish that it attempted to recall the employee. There is no obligation on the employee to contact the employer, as Commercial Towel argues in this case.

The Director found, after reviewing all of the evidence, that Commercial Towel had not discharged the burden of establishing that all reasonable efforts had been made to recall Yu.

The evidence regarding Commercial Towel's attempts at contacting Yu was conflicting. I accept that Mr. Lowe attempted to contact Yu by telephone on a number of occasions. However, the fact remains that Yu worked for Commercial Towel for fourteen years, and if Commercial Towel had wanted her to return, it ought to have made reasonable attempts to do so. Lowe was aware that Evers was a tenant of Yu. Evers' evidence what that Lowe did not ask her to communicate the recall request to Yu. No letters were sent. Lowe agreed that he could have dialled incorrect telephone numbers and not known that, as he did not speak Chinese. Nor did he consider using another Chinese speaking employee to make the telephone call. While Yu alleged that Lowe had in fact used her for this purpose in the past, Lowe denied she had. Nevertheless, that is one of the options an employer should consider in making all reasonable efforts to recall an employee. While the legislation does not require that an employer attempt to contact an employee in writing of an intention to recall, an employer must make reasonable efforts to do so.(see *Ocelot Enterprises Ltd. v. British Columbia (Director of Employment Standards)* February 15, 1997, 068/97). I am unable to find that Commercial Towel's attempts were reasonable in the circumstances.

The Director also found no evidence that Yu had abandoned her position by being out of the country when the company attempted to recall her. Although Commercial Towel also contended that Yu should establish that she was not on vacation at the time recall was attempted, the burden of establishing that she was in fact out of the country rests with the employer. Ms. Evers' evidence was that Yu left on vacation on or about January 20, after the 13 week period had passed.

ORDER

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

Carol Roberts
Adjudicator
Employment Standards Tribunal