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 -

McGregors's Garage & Propane Centre operating as
Northern B.C. Fire Protection Services
("McGregor's")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE No: 1999/602

DATE OF HEARING: December 10, 1999

DATE OF DECISION: December 17, 1999

DECISION

APPEARANCES:

May Popoff	on behalf of McGregor's Garage & Propane Centre Ltd. operating as Northern B.C. Fire Protection Services
Tim Alton	on his own behalf via teleconference

OVERVIEW

This is an appeal by McGregor's Garage & Propane Centre Ltd. operating as Northern B.C. Fire Protection Services ("McGregor's") under Section 112 of the *Employment Standards Act* (the *"Act"*), against a Determination dated September 21, 1999 issued by a delegate of the Director of Employment Standards (the "Director"). McGregor's alleges that the delegate of the Director erred in the Determination by concluding that Tim Alton ("Alton") was entitled to compensation for length of service.

ISSUE

The issue to be decided in this appeal is whether McGregor's is liable, pursuant to Section 63 of the *Act*, to pay compensation for length of service to Alton.

FACTS

The parties agree the following facts are not in dispute:

- Alton commenced employment with McGregor's as a service technician February 1, 1998;
- Alton's rate of pay was $16.15 per hour;
- Alton's last day of work for McGregor's was July 15, 1998;
- Alton was laid off due to a shortage of work;
- McGregor's issued a Record of Employment ("ROE) on July 16, 1998 indicating that the reason for issuing was "A" (shortage of work);
- the payroll records provided by McGregor's accurately reflect the wages earned and paid;
- McGregor's issued a letter dated September 8, 1998 recalling Alton to work effective September 22, 1998;
- McGregor's issued a letter dated September 18, 1998 canceling the recall to work as the work which was expected did not materialize;
- Alton did not return to work for McGregor's.

May Popoff ("Popoff") and Alton testified at the hearing. I will only reproduce the relevant evidence provided at the hearing and through the submissions of the parties.

Popoff testified that:

- Alton was laid off for a shortage of work and there was no intent at that time to terminate his employment;
- McGregor's issued a letter dated September 8, 1998 recalling Alton to work effective September 22, 1998;
- McGregor's issued a letter dated September 18, 1998 to Alton advising that the recall to work was cancelled as the work anticipated did not materialize;
- On many occasions when there was not enough work to do, Alton was allowed to work and do minor jobs instead of being sent home;
- McGregor's did not have enough work to justify recalling Alton;
- after he was laid off, Alton worked for a competitor and as a result, McGregor's lost business;
- Alton advised that he had found a job in Calgary so McGregor's assumed that he had quit;
- well after Alton had left, McGregor's discovered that Alton had not replaced fusible links for customers as he had claimed and billed the customers for;
- McGregor's did not think it was necessary to terminate Alton as he had taken a job in Calgary and had moved;
- the calculation of compensation owing performed by the delegate of the Director is incorrect as Alton was only working 4 days per week at the time of layoff ;
- the witness' statements in regard to the alleged offer to use McGregor's van for the move to Calgary is not true;
- Alton sent a fax dated July 28, 1998 asking for 1 weeks severance pay when he was only on layoff.

Popoff argued on behalf of McGregor's that the actions of Alton in accepting another job with a competitor while on layoff was a "conflict of interest" and was "just cause" for firing Alton. Popoff further argued that the discovery of Alton not having replaced fusible links yet claiming it had been done was also "just cause" for firing him. Popoff finally argued that, based on the circumstances, it just did not make any sense to recall Alton.

Alton testified that:

- he went to work after he was laid off by McGregor's as he needed to be able to provide for his family;
- he was never spoken to about the allegations raised by McGregor's in regard to the fusible links and in any case, those allegations are wrong;
- he did not quit;
- he would have preferred to stay in Prince George if he could have gotten work;
- he did not move his family to Calgary until mid December 1998, well after the 13 weeks had expired;
- he did not receive any notice of termination from McGregor's;
- the job he got in Calgary actually paid less that what he was earning for McGregor's but he needed the work.

Alton argued that the decision of the delegate of the Director was correct and should be upheld.

The delegate of the Director investigated the circumstances in this matter and concluded in the Determination " The ....facts..do indicate that the Employer terminated the employment relationship by default, inaction or by way of not recalling the Complainant back to work within the 13 weeks of layoff. There was no evidence presented to show that the Employer took active steps to end the employment relationship or that the complainant quit or retired. The reasons for the termination of employment that the Employer later brought up appear to be an after thought..."

ANALYSIS

The burden of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, McGregor's.

The obligation of an employer to pay compensation for length of service is set forth in Section 63 of the *Act* which provides:

Section 63, Liability resulting from length of service

(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:
(i) one week's notice after 3 consecutive months of employment;
(ii) 2 weeks' notice after 12 consecutive months of employment;
(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
(c) terminates the employment, retires from employment, or is dismissed for just cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and
(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) 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.

There is no dispute with respect to the basic facts of this matter. Alton was laid off due to a shortage of work. McGregor's recalled Alton to work but cancelled that recall due to the anticipated work not materializing. Alton did not return to work for McGregor's.

There was no evidence presented to substantiate the allegations of McGregor with respect to "conflict of interest" or "poor work performance" on the part of Alton.

The evidence was that Alton was laid off on July 15, 1998. The *Act* defines layoff as follows:

"temporary layoff" means

(a)in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
(b)in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;

Furthermore, should the layoff of an employee exceed the period defined as a *temporary layoff* , the *Act* provides that the employee is deemed to have been terminated. The definition of termination of employment is:

"termination of employment" includes a layoff other than a temporary layoff;

The evidence was that the period of temporary layoff (13 weeks) being experienced by Alton ended on October 14, 1998 when, pursuant to the provisions of the *Act*, the layoff became termination.

In the absence of written notice of termination and with no evidence to support the allegations of just cause, McGregor's liability to pay compensation for length of service has not been discharged.

For all of the above reasons, based on the evidence provided and on the balance of probabilities, I conclude that McGregor's has **not** discharged its liability to pay compensation for length of service to Alton.

With respect to the concerns expressed by McGregor's in regard to the calculation of the compensation for length of service, the *Act* in Section 63 (4) *supra* sets forth the manner in which this calculation is to be performed.

In the calculations performed in the Determination, the delegate of the Director considered only the wages paid in May and June of 1998 and disregarded the wages earned during the period July 1 - 15, 1998. A review of the payroll records provided by McGregor's indicates that when the wages paid for July 1 -15 are divided by the hourly rate the result is that Alton only worked a 4 day work week during this period. The payroll records further indicate that during the months of May and June 1998, Alton worked a 5 day work week.

In my view, considering the fact that Alton only worked 4 days per week instead of the usual 5 days per week (as worked in May and June), it cannot be said that during the period July 1 - 15 Alton *worked normal or average hours of work.* I therefore conclude that the calculations performed by the delegate of the Director with respect to compensation for length of service are correct.

For all of the above reasons, the appeal by McGregor's is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 21, 1999 be confirmed in the amount of **$755.00** together with whatever further interest has accrued pursuant to Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal