

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 116 of the

*Employment Standards Act S.B.C. 1995, C. 38*

-by-

Valley Alarms and Communications Ltd.  
(“Valley”)

-of a Determination issued by-

The Director of Employment Standards  
(the “Director”)

<b>ADJUDICATOR:</b>	E. Casey McCabe
<b>FILE NO.:</b>	96/422
<b>DATE OF HEARING:</b>	February 11, 1997
<b>DATE OF DECISION:</b>	February 19, 1997

## DECISION

### APPEARANCES

John Bulloch	on behalf of Valley Alarms and Communications Ltd.
Kathy Knight	on behalf of Valley Alarms and Communications Ltd.
Connie Madge	on her own behalf
Steve Mattoo	on behalf of the Director of Employment Standards

### OVERVIEW

This is an application for reconsideration by Valley Alarms and Communications Ltd. (“Valley”) pursuant to Section 116 of the *Employment Standards Act* (the “Act”), of Employment Standards Tribunal Decision No. D312/96. Under Determination No. CDET 003181 the Directors delegate determined that Valley contravened Section 63(2) of the *Act* by failing to pay compensation based on length of service to Connie Madge. Tribunal Decision No. D312/96 confirmed that decision.

### ISSUES TO BE DECIDED

Is the employer liable to pay compensation based on length of service or did Connie Madge abandon her employment thereby relieving the employer of its liability under Section 63(2) of the *Act* ?

### FACTS

On July 5, 1996 Determination No. CDET 003181 in the amount of \$937.47 was issued by the Director of Employment Standards. That determination was appealed by the employer and a hearing date was set for October 30, 1996. On that date the Employment Standards Tribunal convened a hearing to adjudicate the appeal. The employer failed to attend the hearing although the complainant, Connie Madge, and a delegate of the Director, Mr. Steve Mattoo, appeared. The Tribunal confirmed Determination No. CDET 003181. (See B.C. EST Decision No. D312/96)

By letter dated November 28, 1996 Kathy Knight, bookkeeper for Valley, requested a reconsideration of the Tribunal’s Decision on the grounds that the employer had not received notice of the hearing. Ms. Knight set out the reasons for the reconsideration in her submission. The Registrar of the Employment Standards Tribunal called for submissions from the

complainant and the delegate of the Director. On January 6, 1997 the Employment Standards Tribunal scheduled a hearing to reconsider Tribunal Decision No. D312/96. A hearing was convened at Surrey, British Columbia on February 11, 1997 at which the employer, the complainant, and a delegate of the Director attended.

The complainant, Ms. Madge, commenced work with the employer on January 15, 1995. She was employed as an alarm monitor. Ms. Madge worked a rotating shift of 4 days on and 4 days off. During the first year of her employment she worked a regular shift but later in her employment she began working an evening shift. Her hours fluctuated between 36-38 hours per week.

On February the 27th, 1996 Ms. Madge was given written lay-off notice which stated:

“Please be advised that you are being given two (2) weeks notice of lay-off effective 27 February, 1996 with your last day of work 11 March, 1996.”

The memorandum was signed by John Bulloch, Monitoring Station Manager. Ms. Madge did not work February 28, 1996. Instead, she had a fellow employee work her shift. This is an acceptable practice in this work place and is called a “mutual”. On February 29, 1996 Ms. Madge reported for duty at 1:00 p.m. and worked a partial shift to 4:30 p.m. At that time the same employee who had relieved her on February 28, 1996 reported to relieve her once again. Ms. Madge did not return to work. On March 11, 1996 she reported to the work place to receive her final pay including vacation pay. On March 18, 1996 she filed a complaint with the Employment Standards Branch alleging that the employer failed to pay termination pay.

Mr. John Bulloch testified for the employer. He briefly explained the employer’s business as being a burglar and fire alarm monitoring service. The employer operates 24 hours per day 365 days per year. Alarm monitors work on their own without direct supervision. He further testified that the employer was in the process of changing its software programs in February, 1996 and that it had determined that Ms. Madge would be surplus to requirements once the change over was complete. He testified that he gave Ms. Madge the lay-off notice dated February 27, 1996. He stated that at the time he gave her the lay-off notice he told her that she would continue on her regular shifts. However, he intended that she would only do filing as he felt that since the employer was entrusted with the security of its customers that the risk was too great to allow someone who is leaving to work unsupervised at the monitoring system. Furthermore, he felt that if Ms. Madge could do the filing for the systems monitors that would allow them to concentrate on learning the new software program.

Mr. Bulloch testified that the employer maintains a schedule in the monitoring station. He stated that the employer left Ms. Madge on the same shift so that she would be with another operator. He stated that she was not taken off the schedule but that she just wasn’t scheduled to act as an operator.

He testified that he didn’t see Ms. Madge on February 29, 1996. He stated that he didn’t know that she had reported for work on that day and was working as an operator. That is because she

did not sign in on the log book when her shift commenced. He stated that he did know that she had called a certain pager number at approximately 4:00 p.m. and that the call was not returned. He stated that as he was not on duty that day he did not have the pager and that whoever held the pager did not return the call. Mr. Bulloch produced the log book which showed that the employee who replaced Ms. Madge that afternoon at 4:30 p.m. had signed in. Mr. Bulloch did state that the log book shows that on March 1, 1996 at 5:19 a.m. Ms. Madge called in sick. Mr. Bulloch stated that he did not receive that call because his usual hours are 8:00 a.m. to 5:00 p.m. daily. He states that no message was left for him to call and that this was the last communication with Ms. Madge. He testified that he surmised that she had abandoned her job despite having received the notice and that she just wasn't coming in again. Mr. Bulloch further stated that Ms. Madge was a good employee and this is borne out by her evaluations. Under cross-examination Mr. Bulloch acknowledged that Ms. Madge was not on the printed schedule and stated that was so because she was to do filing not monitoring. He reiterated that he felt that when he gave her lay-off notice on February 27, 1996 that she understood that she was to remain on her regular shift which would include normal starting times. He acknowledged that her access to the computer had been deleted but that would have been out of a concern for security for the customers. He was questioned why Ms. Madge was not included on a February 29, 1996 memo to other members of the staff when she had been included on a February 20 and January 9, 1996 memos. He responded that once the decision had been made to lay Ms. Madge off that he did not think it was relevant for her to be shown as a recipient of company memos.

Connie Madge testified on her own behalf. She acknowledged that she received the lay-off notice on February 27, 1996. She stated that she wasn't sure if she was scheduled to work on February 28, 1996 but acknowledged that the log book showed that another employee had worked her regularly scheduled shift. She stated that she did report to work on February 29, 1996 and performed the duties of an alarm monitor. She testified that she became quite upset upon reporting for work because it was then that she learned that her name had not been included as a recipient on the February 29, 1996 memo and also that her access code to the computer had been deleted. She also realized that she was not on the schedule which had been posted for all employees for shifts during March, 1996. In order to gain access to the computer she had to call Mr. Kelly Breaks, President of Valley who happened to be in the building at the time, to "put her back into the computer". She testified that she became so upset during the shift that she asked Mr. Breaks if he could ask another employee to complete the shift and when he said ok she contacted that employee. The log book shows that the replacement employee arrived at 4:30 p.m. and worked until 10:00 p.m. that evening which was the completion of the regularly scheduled shift.

Ms. Madge further testified that on February 29, 1996 at approximately 4:00 p.m. she called the designated pager number for the supervisor. There was no answer and she testified that the call was not returned. She further testified that on March 1, 1996 she called in at approximately 5:19 a.m. to state that she would not be in because she was sick. She left this message with the alarm monitor on duty at the time. She testified that later on March 1, 1996 she called again and spoke to another employee to inquire whether she was on the schedule. That employee referred her to Mr. Bulloch. Mr. Bulloch was not in the office at the time and Ms. Madge did not have a pager number or a home number for him. Under cross-examination she testified that because she

wasn't on the schedule and that she was out of the computer that she didn't understand what was happening. She did not understand that she was to come in on a regular shift and that she was to perform other duties. She reiterated that on February 29, 1996 when she reported she was to perform the alarm monitor duties and she was the only person there to perform those duties at the time.

It should be noted at this point that early in February, 1996 Mr. Bulloch received a surprise call from a potential employer seeking a reference for Ms. Madge. Mr. Bulloch acknowledged candidly that he did not give a good reference for Ms. Madge and the reason for this was that he was incensed that she had given his name as a reference without informing him or requesting permission to do so. He stated that he felt this caused some hard feelings with the complainant although he did acknowledge that Ms. Madge was a good employee generally. Ms. Madge responded that she felt she was a good employee and that she was looking for other work even though she was happy at Valley. She did state that she would have been happier though had she been allowed to return to graveyards.

After Ms. Madge had given her evidence, Kathy Knight raised an issue about the record of employment showing that Ms. Madge had been laid off. Ms. Knight was concerned that the tone of the Determination dated July 5, 1996 had indicated that the employer, despite knowing that Ms. Madge had not worked from March 1 to March 11, 1996, still entered laid-off as the reason for termination. She stated that she put "A" in the box under reason for lay-off because initially that was the reason. She stated that she had never heard of the concept of abandonment of a job. She stated that when she completed the record of employment she understood that Ms. Madge had chosen not to complete the two week notice period but that it was the employers position that it was a lay-off. She stated that Ms. Madge was paid to February 29, 1996 because that happened to coincide with cut-off. She further stated that she had overpaid Ms. Madge for the remainder of the February 29, 1996 shift, and for sick days used in 1996. That is, the employer allows 5 sick days per year on a pro rated basis and Ms. Madge had used more than one day in the period of January 1, 1996 to February 29, 1996.

## **ANALYSIS**

The issue to be decided is whether Ms. Madge quit her employment when she left the work place at 4:30 p.m. February 29, 1996. There is both a subjective and objective element in determining whether an employee has quit employment. The subjective development requires an intention by an employee to quit employment. The objective development requires that the employee do some act which confirms that intention to quit. I cannot find that Ms. Madge intended to quit her employment nor that she committed some act which confirmed a quit. It is understandable that she would be upset upon reporting to work on February 29, 1996 to find that she was not "in the computer", on the schedule for March, 1996 and not included as a recipient on the February 29, 1996 memo. When she attempted to call her employer for clarification the calls were not returned either on February 29 or March 1, 1996. I do not accept that it was made clear to Ms. Madge on February 27, 1996 that her duties would change but that her shift schedule would remain the same. In fact when she arrived at work on February 29, 1996 she was the only alarm

monitor in at the time. I find that she made a reasonable effort to clarify the situation with her employer but that the employer failed to respond. Ms. Madge cannot be held responsible for that failure. I am satisfied that Ms. Madge did not quit her employment.

I find that Ms. Madge was available for work but the employer did not provide work. That does not relieve the employer from its obligation to pay compensation pay.

At the end of the hearing the employer argued that it had overpaid Ms. Madge for hours not worked on February 29, 1996 and sick pay. As a result, the employer argues that the amount of the Determination should be reduced accordingly. The employer further argues that the Determination is based on a 40 hour week when the employee worked a flexible schedule of 36-38 hours per week. Ms. Madge agreed that her regular shifts were approximately 38 hours per week. I am not prepared to adjust the amount of the Determination on account of the overpayment of sick days. However, the amount of the Determination should be adjusted to reflect that Ms. Madge received payment for February 29, 1996 and that she would not have been paid for March 1, 1996 due to the fact that she had called in sick and had no sick day credits remaining. The Determination should also reflect a 38 hour work week.

## **ORDER**

I order pursuant to Section 116(1) of the *Act* that Determination No. CDET 003181 be varied.

**E. Casey McCabe**  
**Adjudicator**  
**Employment Standards Tribunal**