

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S .B .C . 1995, C . 3 8

ARFI Holdings Ltd.
("the Employer ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NO.: 96/693

DATE OF DECISION: January 24, 1997

DECISION

OVERVIEW

This is an appeal by ARFI Holdings (the "Employer") of Determination No. CDET 004552 issued by the Director of Employment Standards (the "Director") on October 31, 1996 pursuant to Section 112 of the *Employment Standards Act*, (the "*Act*"). The Director determined that the Employer should pay a total of \$3717.87 to two former employees, Jessie J. Donaldson and Margaret J. Stokes for length of service compensation, vacation pay and interest.

ISSUES TO BE DECIDED

The Employer had several bases for its appeal. It operated a hotel in Victoria in rented premises. In June 1996, a new owner purchased the building in which the hotel was located and increased the rent substantially. The Employer closed the business on July 5, 1996, paid its employees their wages through that date and issued Records of Employment indicating that the business had been sold. The Employer acknowledges that employees were terminated without written notice. However, it disputes the Director's Determination regarding length of service compensation on the grounds that Section 65(1)(d) of the *Act* should apply. In addition, the Employer asserts that Ms. Donaldson had resigned in 1981 and in 1988 and subsequently had been rehired. Finally, each employee received a "bonus" of \$400, which the Employer states was a severance allowance and thus should be applied to the amounts contained in the Determination.

FACTS

The Employer had operated the Ritz Hotel for a number of years at 710 Fort Street in Victoria. In September 1992, it signed a five-year lease agreement with a property management firm, providing for an escalating scale of monthly rentals. The final contract, signed in November 1992, provided for a "Minimum Rent" of a specified sum per month for the calendar year of 1996. In June 1996, a new owner informed Mr. Finn Hemmingsen, a partner in the Employer, that his firm had purchased the building in which the Ritz Hotel was located but not the hotel business. Mr. Hemmingsen discussed the sale of the Hotel with the new owner, who informed him that the monthly rent commencing June 1, 1996 would be slightly more than double the previous amount. The Employer's cheque for the June 1996 rent did not clear the bank. At that point, the new owner of the building gave notice that it was canceling the lease agreement.

Negotiations between the Employer and the new owner of the building resulted in an agreement covering the financial arrangements for the transfer of the business, effective July 4, 1996.

The day after the agreement, the Employer gave notice of termination to all employees.

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ANALYSIS

The Employer's position is that the closure of the business was caused by the steep increase in the rent imposed by the new owner of the 710 Fort Street building. Although its cheque for the June 1996 rent was not honored by its bank, Mr. Hemmingsen maintained that the failure was due to his efforts to continue under the old lease.

Section 65 of the *Act* provides for several exemptions from Section 63, which in turn provides for length of service compensation. The relevant paragraphs of Section 65 are the following:

(1) Sections 63 and 64 do not apply to an employee

(d) employed under an employment that is impossible to perform due to an unforeseeable event or circumstances other than receivership

After reviewing the evidence before me, I conclude that Section 65(1)(d) was not intended to apply to the circumstances of this case. While the Employer was evidently caught off guard by the dramatic increase in its rent, this event was not unforeseeable. The lease agreement referred to a "minimum rent," so there was no guarantee that the rent would not be raised, even by the previous owner of the building. In addition, it appears that the Employer was in some difficulty independent of the rent increase, since it did not pay the June 1996 rent at the previous rate. The word "unforeseeable" should be interpreted cautiously. It would seriously undermine the minimum protections given employees by the *Employment Standards Act* to deny them length of service compensation when their employer encounters a difficulty in the marketplace, be it a product market or a real estate market.

The Employer asserts that Ms. Donaldson previously resigned and thus interrupted her continuous service. A Record of Employment presented by the Employer indicated that she had resigned in June 1988 and returned to work on September 2, 1988. It appears that this information was not available at the time the Determination was made. The impact on the amount of the Determination will be slight.

The Employer also argues that a bonus of \$400 paid to Ms. Stokes and Ms. Donaldson should be deducted from any length of service compensation. The payments were termed a "bonus" on the employees' Record of Employment and pay stubs. A bonus is a voluntary payment by an employer to an employee. It is not open to this Employer to alter the nature of the payment retroactively when faced with a complaint by a former employee.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET No. 004552 be confirmed in respect to Margaret Stokes and varied in respect of Jessie Donaldson, to reflect a starting date for her employment of September 2, 1988.

Mark Thompson
Adjudicator
Employment Standards Tribunal