Employment Standards TRIBUNAL

An appeal

- by -

Orr Hotel limited and Golden Tree Lumber Inc, Associated Companies pursuant to Section 95 of the Employment Standards Act, operating as Dominion Hotel and Lamplighter Pub

("Orr Hotel")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/400

DATE OF HEARING: January 26, 2001

DATE OF DECISION: February 26, 2001

DECISION

OVERVIEW

The appeal is by Orr Hotel Limited and Golden Tree Lumber Inc. operating as the Dominion Hotel and the Lamplighter Pub and pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Appealed is a May 17, 2000 Determination by a delegate of the Director of Employment Standards ("the Director").

In the Determination, it is decided that Orr Hotel Limited and Golden Tree Lumber Inc. are associated companies and they are treated as one person and the employer pursuant to Section 95 of the *Act*. The Determination orders the companies (which I will refer to as simply "Orr Hotel" and "the employer") to pay Gary Carlson, Lenna Reid, Rodney Sitosky, Dawn Stott and Shauna Walter a total of $9,466.68 in wages including interest.

The appeal, as originally filed, claimed that Orr Hotel Ltd. and Golden Tree Lumber Inc. may not be associated and treated as one person pursuant to section 95 of the *Act* and, also, that none of the above named employees are owed moneys under the *Act*. At the outset of my hearing, I was advised that the employer had decided against arguing the matter of whether the two incorporations may be treated as one person and the employer pursuant to section 95, and also that matters concerning Carlson, Reid, Sitosky and Stott had been settled. As such, only the order to pay Walter remained at issue.

The Determination orders the employer to pay Shauna Walter a total of $5,333.55 in wages, interest included. That amount represents overtime wages, statutory holiday pay and 12 weeks' of compensation which is awarded pursuant to section 79 (4)(c) of the *Act*. In respect to the latter, the delegate has concluded that conditions of employment were altered by the employer because the employee was pregnant and that the employer failed to allow the employee to take pregnancy leave.

The order to pay statutory holiday pay is not appealed. The appeal is that Walter did not work overtime and the decision to award 12 weeks' wages pursuant to section 79 (4)(c) is punitive in that it is so inappropriate.

APPEARANCES:

Yeong K. Kang	For the Orr Hotel
Shauna Walter	On her own behalf
Gary Carlson	Witness
Colleen Diamond	Witness

ISSUES TO BE DECIDED

At issue is the conclusion that the employee did in fact work overtime.

At issue is the amount of compensation which has been awarded for violation of the pregnancy leave provisions of the *Act*. The amount is said to be punitive in that it is plainly unreasonable.

What I must ultimately decide is whether the appellant has or has not shown that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS

Shauna Walter worked as a waitress in the Lamplighter pub. The Lamplighter pub is an adjunct of the Dominion Hotel. The Dominion Hotel is owned by Orr Hotel Limited. According to the Determination, the employment ran from July of 1997 to December 18, 1998.

The pub is an A licence establishment. It serves liquor until 1:30 a.m. and it closes at 2 a.m..

On filing her Complaint, Walter claimed that she worked past 2 a.m. but was not paid for that overtime work. The Determination awards 2 hours' overtime wages for each week of the employment (1/2 hour x 4).

The employer, on appeal, claims that Walter's work day ended at 2 a.m., closing time. According to Yeong K. Kang, the owner of Orr Hotel Limited, there is no work for a waitress to perform once the bar is closed because there are no customers to serve. He claims that cleaning was done by "Joe".

The employee tells me that it was not Joe's responsibility to clean the bar and tables (neither of the parties is able to recall Joe's last name): It was the job of the waitresses and bartenders. She claims that the Determination is about right, that she worked 4 to 5 shifts a week on average and that she worked at least ½ hour of overtime on each shift as she went about cleaning the bar.

I find that there is not in fact evidence to establish that the employee did not work overtime as set out in the Determination. Indeed, like the delegate, I am led to the conclusion that the employee did not finish her shift at 2 a.m. but regularly worked past that point. Joe is not produced. I am given no reason to believe that Kang would know what were the employee's true hours of work. He has himself said, in written submissions, that he rarely was at the pub. Walter's version of events is, on the other hand, supported by testimony from two of the bar's former employees. Gary Carlson, head bartender during Walter's employment, and a person that worked the same shift as Walter, states that Walter did help with the bar's cleanup and he estimates that about half an hour was spent on that chore. Colleen Diamond, who was manager from 1996 to June of 1998, also tells me that Walter assisted in the bar's cleanup once the bar had closed. She estimates and recalls that Walter spent somewhere between half and hour and an hour cleaning the bar.

The employer has been found by the delegate to have violated section 54 of the *Act*. Section 54 is in Part 6 of the *Act* and it is as follows:

> **54** (1) An employer must give an employee who requests leave under this Part the leave to which the employee is entitled.
>
> (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,
> (a) terminate employment, or
> (b) change a condition of employment without the employee's written consent.
>
> (3) As soon as the leave ends, the employer must place the employee
> (a) in the position the employee held before taking leave under this Part, or
> (b) in a comparable position.
>
> (4) If the employer's operations are suspended or discontinued when the leave ends the employer must, subject to the seniority provisions in a collective agreement comply with subsection (3) as soon as operations are resumed.

It is the conclusion of the delegate that the employer violated section 54 in two respects. First, he concludes that the employer changed the conditions of Walter's employment because she was pregnant. Second, the delegate has found that the employer failed to grant Walter pregnancy leave and then return her to her former position, or a comparable position, once her child was born and she was ready to return to work.

According to the delegate and the employee, the employer cut back her shifts in June and from that point on she received only 2 to 3 shifts a week, not her normal 4 or 5. There is evidence of that. It is not shown that the employee worked the same number of shifts after announcing her pregnancy as before.

The employer, on appeal, claims that the employee did not in fact request pregnancy leave. According to the employee, her request for maternity leave was written and given to Zenon Goldstein, the new manager. I reach no conclusion on that, nor need I. It is sufficient for the purpose of this appeal that I decide only whether the employer did or did know that Walter was pregnant and that she was planning to take pregnancy leave. And on that I find that it is perfectly clear that the employer did know that. The employer issued a Record of Employment ("R.O.E."). It is dated January 7, 1999 and signed by Goldstein. The employer on that ROE indicates that it is issued for reason of pregnancy or parental leave (Code "F").

The employer, on appeal, shows that the employee was allowed to work right up to the date when her leave was to begin. The employee's leave was to begin on 21st of December, 1998 and, while her last day of work was December 19, 1998, I am shown that the 20th was a Sunday and not a regular day of work for Walter.

ANALYSIS

It is not shown that Walter did not work overtime as set out in the Determination. I am given no reason to believe that the Determination is wrong. The order to pay overtime wages is confirmed.

> **40** (1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38
> (a) 1 1/2 times the employee's regular wage for the time over 8 hours, and
> (b) double the employee's regular wage for any time over 11 hours.
>
> (2) An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38
> (a) 1 1/2 times the employee's regular wage for the time over 40 hours, and
> (b) double the employee's regular wage for any time over 48 hours.
>
> (3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.
>
> (4) If a week contains a statutory holiday that is given to an employee in accordance with Part 5,
> (a) the references to hours in subsection (2) (a) and (b) are reduced by 8 hours for each statutory holiday in the week, and
> (b) the hours the employee works on the statutory holiday are not counted when calculating the employee's overtime for that week.

Violation of the Pregnancy Leave Provisions of the *Act*

The burden of proof is on the appellant.

> **126** (4) The burden is on the employer to prove
> …
> (b) that an employee's pregnancy, a leave allowance by this Act or court attendance as a juror is not the reason for terminating the employment or for changing a condition of employment without the employee's consent.

The Determination is that the employer violated section 54 of the *Act* in that it changed the conditions of Walter's employment and it failed to allow the employee to take pregnancy leave. Hours of work is identified as the condition of employment which changed.

As the employer presents matters to me, it fails to provide reason to believe that the Determination is in error in respect to the conclusion that the employer changed a condition of employment contrary to section 54 (2)(b) of the *Act*. I have already found, in setting out the facts

of this case, that the employer has not produced evidence which shows that the employee's condition of employment remained the same. Beyond that I find that the employer is not suggesting that that the employee's hours of work were reduced for a reason which has nothing to do with her pregnancy.

The employer claims that the employee did not make a written request for pregnancy leave. I find that it is unimportant to section 54 (2), both subsection (a) and (b). Written request for pregnancy leave or not, an employer "*must not, because of an employee's pregnancy … (a) terminate employment or (b) change a condition of employment without the employee's written consent"*.

The employer, on appeal, shows me that the employee was allowed to work, albeit with reduced hours, right up to the announced date of her leave. The employer considers that to be significant and reason to reduce the amount of compensation awarded Walter by a considerable margin. I do not, not by any amount.

It is not enough that the employer allowed the employee to begin her pregnancy leave. The employee, written request or not, must be allowed to return to her former position once a leave allowed by Part 6 ends, or given a comparable position (*Capable Enterprises Ltd*., BCEST No. D033/98). (See also decision by Judge Leggatt, *Director of Employment Standards v. Stanley Blake*, (1987), unreported, Vancouver Registry No. F853491).

It is the delegate's conclusion that Walter was not returned to her former position at the pub but terminated. The employer has not shown me that that particular conclusion is in error.

Where, as here, a delegate has found that a leave provision of Part 6 of the *Act* has been violated, he or she may award compensation pursuant to section 79 (4)(c) of the *Act*.

> **79** (4) In addition, if satisfied that an employer has contravened a requirement of section 8 or Part 6, the director may require the employer to do one or more of the following:
>
> (a) hire a person and pay the person any wages lost because of the contravention;
>
> (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
>
> (c) pay a person compensation instead of reinstating the person in employment;
>
> (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.
>
> (my emphasis)

The delegate could have forced the employer to reinstate Walter and ordered the employer to pay any wages lost because the contravention, but the delegate did not do that. Instead, the delegate

has ordered that the employer pay, pursuant to section 79 (4)(c), what is estimated to be the cash equivalent of reinstatement and the payment of lost wages, namely, 12 weeks' wages.

The employer argues that that amount of wages is punitive in that it is clearly unreasonable. I disagree. My reading of section 79 (4) (b) and (c) is that it provides the Director with a restorative power to make things whole, at least, so far as that is possible. The amount which has been awarded is well within the bounds of what appear to me to be the amount of wages lost for reason of the cut in the employee's hours of work and the failure to provide the employee with pregnancy leave and return her to a comparable position if not her former position.

The Determination is for the above reasons confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the employer pay Shauna Walter a total of $5,333.55 plus whatever further interest has accrued pursuant to section 88 of the *Act*.

LORNE D. COLLINGWOOD

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal