Employment Standards TRIBUNAL

An appeal

- by -

Derek Blyth
(the "Appellant")

- 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: Wayne R. Carkner

FILE No.: 2001/748

DATE OF HEARING: March 22, 2002

DATE OF DECISION: March 28, 2002

DECISION

This decision is based on written submissions and oral evidence and argument provided at a hearing in Prince George BC on March 18, 2002.

APPEARANCES

For the Appellants	Ralph Sather – representing himself and Waterbed Warehouse Ltd. formerly operating Central Plaza Town Pantry (the "Employer")
	Roderick Herd – representing himself "Herd"
For the Respondent	No Appearance by Dianna Higginson ("Higginson")
For the Director	No Appearance

OVERVIEW

These appeals are by Ralph Sather, a Director/Officer of Waterbed Warehouse Ltd., Waterbed Warehouse Ltd. formerly operating Central Plaza Town Pantry and Roderick Herd pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) of two Determinations (one being a Corporate Determination) issued by the Director of Employment Standards (the "Director") on October 3, 2001.

The first determination concluded that the Employer had contravened the *Act* by terminating Higginson without cause and that she was entitled to a remedy of $317.19 for compensation for length of service (CLOS), vacation pay and interest pursuant to Section 88 of the *Act.* This Determination further concluded that the Employer had substantially changed the conditions of employment of Herd to the extent that the change constituted a termination under the *Act* and that Herd was entitled to a remedy of $3015.86 for CLOS, vacation pay and interest.

The 2nd Determination concluded that Ralph Sather was a Director/Officer of Waterbed Warehouse Ltd. Sather had filed an appeal of the this determination but acceded at the commencement of the hearing that he was not disputing the fact that he was a Director/ Officer of Waterbed Warehouse Ltd.

ISSUES

1. Did the Director err in finding that Higginson was terminated without just cause?
2. Did the Director err in finding that the Employer had made substantive

3. changes to Herd's conditions of employment to the extent that the changes constituted a termination of employment?
4. Did the Director err in finding that Herd had not quit his employment?
5. Did the Director err in finding that Herd was entitled to 6 ½ weeks of CLOS instead of 8 weeks of CLOS?
6. Interest Accrual Pursuant to Section 88 of the *Act.*
7. Delay in process.

BACKGROUND

The Employer operated the Central Plaza Town Pantry, a gas station/convenience store, under an Agency Agreement with Chevron Canada Limited at the time the complaints were filed in the summer of 1998.

A Determination dated December 15, 1999 was issued against the Employer with the same remedies as the ones under appeal (excluding the interest accrual) in this decision. A Director's determination was also issued on this date. These Determinations were appealed and a hearing was held on March 14, 2000 resulting in a decision issued on March 23, 2000 (*BC EST #D129/00*).

This Decision found that the Employers (Ralph Sather) Agency Agreement had lapsed 41/2 months prior to the Determination being issued. The Adjudicator also noted that no corporate search had been included in the Director's documentation to ensure that the proper party was named in the Determination.

The Adjudicator directed that the matter be referred back to the Director for further investigation and that this investigation should occur as expeditiously as possible. No conclusion was reached on the merits of the appeal.

On September 26, 2000 (6 months later) a Corporate Determination was issued against Desert City Holdings Ltd. operating as Central Plaza Town Pantry (Desert City). This Determination concluded that Desert City was liable for the remedies assessed in the December 15, 1999 Determination in favour of Herd and Higginson.

Desert City appealed the September 26, 2000 Determination on the basis that the Director had improperly applied Section 97 of the *Act.* A hearing was held on February 9, 2001 and a Decision was issued on March 5, 2001 (*BC EST #D110/01).* The Adjudicator found that the Director had applied Section 97 improperly and canceled the Determination issued against Desert City. The Adjudicator further suggested that if the original 2 Determinations issued on December 15,1999 had not been canceled that the Director should revisit this issue. The 2 Determinations under appeal here (issued 7 months after the 2nd Decision regarding this matter) are a reissuing of the December 15, 1999 Determinations.

It is unfortunate that the extended time delays have occurred as both Appellants identified that they had great difficulty recalling the specifics that related to the issues before me.

FACTS AND ANALYSIS

1st Issue – Was Higginson Terminated For Just Cause?

The Determination outlined that Higginson worked for the Employer from August 21, 1997 to August 3, 1998 as a gas station attendant. The Determination further outlined the Employers position for termination was for being late for work.

The Employer's position was that Higginson had been late for work previously and was given a letter on April 7, 1998 indicating that she would be terminated if she was again late for work.

Higginson's position to the Director was that she had never been given a warning letter for being late.

The Employer provided a copy of the letter to the Director, which outlined the Employer's concerns regarding Higginson's work habits when her friends were "hanging around the place of business. The Director concluded that the Employer did not show just cause for the termination.

The Employer did not add anything to what was outlined in the Determination nor did the Employer call any witnesses to support the assertions in his written submissions. The Employer asserted that he had cause to terminate Higginson's employment based on the warning letter.

The Director interviewed the parties and preferred Higginson's statements to the Employer's. The letter produced by the Employer did not deal with the issue of lateness and the Employer did not produce any further documentation to support that the Respondent was repeatedly late for work.

As the burden of proof rests with the Appellant to show an error in fact or conclusion in the Determination and as the Appellant has failed to meet this onus I must conclude that the appeal on this issue fails.

2nd Issue – Did The Changes In Hours Constitute A Substantive Change To Herd's Conditions Of Employment To The Extent That The Change Constituted A Termination Of Employment?

Section 66 of the *Act* reads:

> "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated."

In the circumstances before me there is no dispute on the facts in question. Herd, who had worked as a cashier at the rate of $9.00 per hour, worked a shift schedule on graveyards of five days on and two days off per week.

The Employer changed this schedule to four days on and four days off. The reason given by the Employer was that he wanted experienced reliable employees working the graveyard shift on the weekends, as that was when problems usually arose.

Under Herd's old schedule Herd receive payment for a total of 261 eight-hour shifts (including vacation and statutory holiday pay) over the course of a year. Under the new schedule Herd would receive payment for a total of 183 eight-hour shifts (including vacation and statutory holiday pay) over the course of a year. This constitutes a reduction of 30% of the wages Herd had previously earned.

Based on these facts I must find that Herd's conditions of employment were altered to the extent that the shift schedule change constituted a termination of employment and I concur with the Director's Determination on this issue.

3rd Issue – Did Herd Quit His Employment?

The Employer asserted in his written submissions that if Herd did not like his new shift he could have exercised his seniority to another shift to maintain his hours of work. The Employer stated that he had previously worked with a unionized environment and always acknowledged the seniority of employees.

He asserted that Herd was aware of this and chose not to do so. He stated that Herd approached him at the end of his last scheduled shift, prior to the implementation of the new shift schedule, and stated he could not work the new schedule and left. The Employer's position is that as Herd failed to request a change of shifts he had quit his employment.

Herd's position was that he was unaware of any such policy.

The Employer did not call any witnesses to support his policy on seniority, though he asserted in his written submissions that other employees could verify this fact, nor did the Employer produce any documentation outlining this policy on seniority.

I asked the Employer if he had offered an alternative shift to Herd and he replied that he had not. I also asked Herd if he had requested a change in shifts and he replied that he had not.

Again the Employer did not meet the burden of proof to show the facts and the conclusions of the Director were in error. The appeal fails on this issue.

4th Issue – Did the Director Err In Awarding As A Remedy 6 ½ Weeks Of CLOS?

Herd argues that as the Employer never provided written notice of termination he is entitled to eight weeks of CLOS instead of the 6-½ weeks that the Determination awarded as a remedy.

Section 63 (3) states that notice of termination must be in writing. In the instant case the Employer, on the facts, had no intention to terminate the employment of Herd. The changes the schedule were discussed with Herd one month prior to the implementation date. There is a dispute on when the new schedule was posted. The Director interviewed the parties and preferred the timing of the posting that was alleged by Herd, 1½ weeks prior to the implementation of the new shift schedule.

The Director concluded that the posting of the new schedule constituted written notion of the change in working conditions. I must agree with the Director. As the termination was determined at the discretion of the Director, pursuant to Section 66 of the *Act*, it is appropriate to defer to the Director's discretion in determining that the shift schedule constituted written notice.

The appeal fails on this issue.

5th Issue – Interest Accrual Pursuant to Section 88 Of The *Act.*

The Employer argues that interest should not be accrued on the damages as the delays were not of his doing.

Section 88 states "the employer must pay interest at the prescribed rate on the wages or other amount". Neither the Director nor the Tribunal has any discretion as to whether or not interest is paid on damages awarded for a violation of the *Act.* The language of Section 88 is mandatory.

6th Issue – Delay In Process

Both the Appellants commented on the delay in all the proceedings outlined above under the background section of this decision. I must concur with them that the delays in the issuance of the various Determinations was excessive, however, I feel that the Employer was a major contributor to the delay. It was within his power to identify himself as the proper party named in the original Determination when the appeal went before the 1st Adjudicator. He chose not to do so. The Adjudicator had no option but to refer the Determination back to the Director for further investigation based on a technicality. For this reason I fail to see any prejudice to the Employer's position. Indeed this was a benefit to the Employer as he had the use of the funds in the interim period.

CONCLUSIONS

For the forgoing reasons I conclude that all appeals of the two Determinations issued on October 3, 2001, must fail.

ORDER

Pursuant to Section 115 of the *Act* I order that the two Determinations dated October 3, 2001 be confirmed along with any interest accrual pursuant to Section 88 of the *Act.*

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal