Employment Standards TRIBUNAL

An appeal

- by -

Rhonda Oldfield

- 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.: 2001/853

DATE OF HEARING: April 2, 2002

DATE OF DECISION: April 19, 2002

DECISION

APPEARANCES:

For the Appellant	Rhonda Oldfield
For the Respondent	No appearance
For the Director	No appearance

OVERVIEW

This is an appeal by Rhonda Oldfield ("Oldfield") pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) of a Determination issued by the Director of Employment Standards (the "Director") on November 13, 2001.

The Determination concluded that Shim Management Co., Operating Downtown Motel, had contravened Parts 4, 5 and 7 of the *Act* and specifically Sections 34, 40, 46 and 58 of the *Act.* As a remedy for these contraventions the Determination awarded a total of $706.94, including interest, to Oldfield.

The Determination also concluded that Oldfield was not owed compensation for length of service ("CLOS"), pursuant to Section 63 of the *Act,* and that she was not entitled to all hours claimed. This appeal deals with the issue of CLOS and disputed hours of work. In the appeal submissions there was also an allegation of an unfair investigation. At the onset of the hearing Oldfield informed me that she was not pursuing this issue.

ISSUES

1. Did the Director err in concluding that Oldfield was not entitled to CLOS?

2. Was Oldfield's hours work improperly calculated?

FACTS

The Downtown Motel is an establishment in Prince George that was leased and operated by Mike Grewal of Westone Ent. Ltd. until July 1, 2001. After July 1, 2001 this establishment was leased and operated by Martin Shim of Shim Management Co. Oldfield had a contract of employment with Westone Ent. Ltd. This contract of employment was of a fixed duration from February 1, 2001 until January 31, 2002. It established a salary of $2000.00 per month for Oldfield to work as an Assistant Manager at the downtown Motel. The contract also stated that Oldfield's salary would increase by $200.00 dollars a month effective September 1, 2001.

The contract of employment contained a "Termination of the Contract" clause, which stated:

> "To terminate this contract either party has the right to give one month's notice in writing if they wish to. At the end of this contract there will either be a new contract drawn up or termination of the contract. On termination of this contract Rhonda Oldfield will vacate the manager's suite at the Downtown Motel after the one months written notice has been given by either party."

Oldfield's Testimony

Oldfield provided the following testimony under oath as to the events leading up to the filing of the complaint.

Mike Grewal provided Oldfield with a notice of termination of the employment contract dated June 16, 2001. Oldfield testified that a meeting was held with Mike Grewal, Martin Shim, Lucille Meise, who was another employee of the Downtown Motel, and Oldfield on July 1, 2001 at the Motel. At this meeting Grewal acknowledged that Oldfield was entitled to salary, pursuant to the Contract of Employment until July 15, 2001. Oldfield stated that she was also entitled to occupancy of the manager's suite until July 15, 2001. She stated that Shim had wanted the suite vacated July 1 to allow his assistant manager to move in. Oldfield pointed out to Shim that a one-month notice was required under the statutes governing tenants.

Grewal agreed that he was responsible for Oldfield's salary until July 15. Grewal then departed the meeting.

Oldfield testified that Shim stated that Oldfield could stay in the suite until July 31, 2001 provided that she worked for $8.00 per hour until July 31. Oldfield refused. Shim left and then returned to the Motel at 5:00 pm. A discussion was held with Shim, Meise and Oldfield at that time. There was a discussion as to what Shim was going to do for graveyard coverage at the motel after July 31 as one person could not handle all the shifts. Shim stated that he would look at that and then get back to Oldfield. It was also agreed that at this meeting that Oldfield would continue on as the assistant manager at her current salary until July 31.

Oldfield stated that she reported to Shim from July 1 onward and continued to work the front desk until she vacated the suite on July 31. She then contacted Shim to see when she would next be working and Shim informed her that July 31 was her last day of employment.

The evidence of Oldfield was credible and stood up to extensive probing by myself.

Oldfield also gave testimony relating to the number of hours worked in July. At the conclusion of Oldfield's testimony I must concur with the hours listed in the Determination's appendix with the exception of the following dates:

July 14 – Oldfield was credited with 2 hours and is claiming 8
- Oldfield was adamant about this date as she specifically remembered occurrences on this shift. 6 hours straight time claimed

July 17 – Oldfield was credited with 2 hours and claimed 16.
- Oldfield checked all guests in this day which, on a balance of probabilities would suggest that he claim is accurate. 6 hours straight time claimed and eight hours overtime claimed.

July 20 – Oldfield was credited with 2 hours straight time and claimed 8
- Oldfield credibly testified that since her employment commenced at the Downtown Motel she had never had time off on a Friday.

Regarding all the other disputed hours Oldfield could not meet the onus to establish that the Director had erred in establishing the hours that she had worked.

ARGUMENT

Oldfield argues that the notice provided by Grewal is invalid as she continued her employment with Shim after the conclusion of the notice as per Section 67(1)(b) of the *Act* and that pursuant to Section 97 of the *Act* her employment should be seen as continuous and that, as per the evidence, Shim had not indicated to her that her employment would end on July 31 until July 31. Based on this Oldfield argues that she is entitled to two weeks CLOS.

Oldfield further submits that she has met the onus to show that the Director erred in the calculation of hours worked and that the hours submitted by her are owing.

In the director's written submission the Director submits that notice was given to terminate employment on July 15, 2001 and that at the meeting on July 1, 2001 "it was determined that Oldfield's notice continues to be effective" until July 31.

The Director further submits that on a balance the hours worked in July were properly calculated.

ANALYSIS

The burden of proof to show that the Director has erred in fact and law falls on the Appellant.

Section 63 (3) (a) of the *Act* states that "written" notice of termination must be given. It is clear from the submissions and from the evidence that Grewal provided written notice of termination of employment to Oldfield to comply with the terms of the Employment Contract. It is also clear

that this notice of termination took effect on July 15, 2001. The evidence clearly shows that Oldfield worked for and was paid by Shim for the period of July 16, 2001 until July 31, 2001.

Section 67 (1) (b) of the *Act* reads:

> **"Rules about notice**
> 67 (1) A notice given to an employee under this Part has no effect if
> (b) the employment continues after the notice period ends."

It is clear from the evidence that Oldfield's employment continued after the written notice period ended.

The Director submits that after the meeting on July 1 it was determined that Oldfield's notice continued until July 31, 2001. This does not meet the requirements of the *Act.* The *Act* is very clear that a written notice is required. This was not done by Shim. Based on these Sections of the *Act* I can only conclude that Oldfield is entitled to compensation for length of service and that the successor employer is liable for this payment, see *BC EST #D070/96 Columbia Recycle Ltd.*

As Oldfield continued to work for Shim, the successor employer, past the July 15 termination date outlined in the June 16 notice, her service is deemed continuous and uninterrupted, pursuant to Section 97 of the *Act,* from September 1, 1999 until July 31, 2002, for the purposes of calculating CLOS. Based on this Oldfield is entitled to 2 weeks CLOS.

I am satisfied that Oldfield has met the onus of showing an error in the Directors findings of fact regarding the hours worked by Oldfield on July 14, 17 & 20. Oldfield provided credible evidence that was not contradicted.

CONCLUSIONS

I conclude that the Determination will be varied to the extent that Oldfield will receive two weeks of compensation for length of service.

Oldfield will also be credited with an additional 6 hours straight time worked on July 14, 6 hours straight time and eight hours overtime on July 17 and 6 hours straight time on July 20. These hours are to be included in the Directors calculations of remedy and hours worked.

ORDER

Pursuant to Section 115 of the *Act* the Determination dated November 13, 2001 is varied to reflect the conclusions above and the Determination is referred back to the Director for a recalculation of the remedy to reflect this variance including any interest accrued pursuant to Section 88 of the *Act.*

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal