EMPLOYMENT STANDARDS TRIBUNAL

In the matter of two appeals pursuant to Section 112 of the

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

-by-

G.A. Fletcher Music Company Limited
("Fletcher")

and

Carol Irg
("Irg")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE NO.:	96/781
DATE OF DECISION:	June 6th, 1997

DECISION

OVERVIEW

There are two appeals before me, both filed pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), from Determination No. CDET 004895 issued by the Director of Employment Standards (the "Director") on December 5th, 1996. The Director held that G.A. Fletcher Music Company Limited ("Fletcher" or the "employer") owed four former employees the total sum of $16,157.19 on account of compensation for length of service, concomitant vacation pay and interest. I would parenthetically note that the "Amount Owed" set out in the Determination appears to be in error; the correct figure, as noted below, is $16,872.32. The particulars of the employees' claims are set out below:

Employee	Position	Termination Pay	Total Claim
Ronald Paulson	Sales Staff	8 weeks	$5,344.03
Shannon Dore	Office Manager	3 weeks	$2,019.52
Dianne Mayes	Sales Staff	6 weeks	$5,958.03
Carol Irg	Sales Staff	7 weeks	$3,550.74
Total			$16,872.32

The first appeal was filed by by Fletcher and is predicated on the assertion that an officer in the Nanaimo office of the Employment Standards Branch advised the employer that verbal notice of termination was legally sufficient under the *Act.* Alternatively, the employer says that verbal notice ought to accepted as valid notice under the *Act.*

Carol Irg ("Irg") has also filed an appeal on the ground that her entitlement to compensation for length of service should have been based on eight, rather than seven, years' service.

FACTS

The employer operates a number of home furnishing retail stores. Sometime prior to the summer of 1996, the employer made a decision to close its Port Alberni store. Accordingly, written notices of termination, dated July 12th, 1996 and effective as at August 31st, 1996, were issued to the four complainant employees. However, August 31st came and went with the employees still on the payroll. By way of letters dated September 3rd, 1996, the employer issued new notices of termination in which the employer stated that it had "decided to keep the Port Alberni store open, past the planned closing date". The employer further advised that it was "not sure of an exact

closing date...it appears to be September 28, 1996" and that the second written notices of termination "in effect, [increase] the length of notice period originally given".

Once again, September 28th came and went; three of the four employees were eventually terminated on October 6th, 1996. Apparently, no written notices were issued with respect to the October 6th termination date. According to the employer's written submission to the Tribunal, dated March 2nd, 1997, during a meeting held at the Port Alberni store on September 14th, 1996 the employees were verbally informed that their employment would be continued until October 6th, 1996 when the store was, in fact, closed. The employment of all but one of the employees ended as at October 6th, 1996; Shannon Dore's employment continued for a few extra days, ending on October 11th, 1996.

ISSUES TO BE DECIDED

Two issues need to be addressed in this appeal:

1. Has the employer complied with its notice of termination obligations under the *Act*?; and

2. Is Carol Irg entitled to an additional weeks' wages as compensation for length of service.

ANALYSIS

I propose to deal with each appellant's appeal separately.

The Fletcher Appeal

Under the *Act,* an employee is entitled to be paid certain monies on termination of employment as "compensation for length of service" [see subsections 63(1) and (2) of the *Act*]--the amount payable, ranging from one to eight weeks' wages, is based on the employee's uninterrupted tenure at the point of termination.

An employer's liability for termination pay is "deemed to be discharged" in certain circumstances, including the giving of prior *written* notice of termination to the employee. Specifically, subsection 63(3) provides as follows:

(3) The liability is deemed to be discharged if the employee

> *(a) is given **written notice of termination** as follows:*

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

(emphasis added)

Subsections 63(3)(b) and (c) are not relevant here. The employer asserts that, when considered together, the two written notices given to the employees in this case fully satisfied the employer's statutory notice obligation because the employees received, in total, nearly 11 weeks' notice of termination. However, this submission ignores the effect of section 67(1)(b) of the *Act* which provides that:

67. (1) A notice given to an employee under this Part has no effect if

(b) the employment continues after the notice period ends.

While it is permissible, under the *Act*, to extend a termination date previously established by lawful written notice, the extension, in order to have any retroactive effect, must be issued, in writing, prior to the expiration of the original notice period.

Thus, by reason of section 67(1)(b) of the *Act*, the written notices of termination dated July 12th, 1996 ceased to have any legal effect as a result of the continuation of the employees' employment beyond August 31st, 1996. Similarly, the second set of termination notices, dated September 3rd, 1996, also ceased to have any legal effect when the employees' employment continued beyond the proposed September 28th termination date.

As an alternative position, Fletcher submits, relying on the Ontario High Court of Justice [now known as the Ontario Court-General Division] decision in *Fanaken v. Bell, Temple* (1984) 9 D.L.R. (4th) 637, that:

> "...notwithstanding the statutory, mandatory requirement for a written notice of termination to be provided to an employee, where the employer was generous in his overall treatment of employees in the termination exercise, which we feel we were, then this would relieve us from the strict statutory requirement of providing written notice". (see Employer's written submission to the Tribunal dated January 8th, 1997)

In my view, however, the *Fanaken* case is not directly applicable to the case at hand. It is important to note several factual distinctions between the situation in *Fanaken* and the present case.

First, although the plaintiff employee, a lawyer, was not given written notice of termination he was given verbal notice and was specifically told that he need not attend the workplace during the notice period. Thus, he was paid his wages throughout the notice period without any concomitant obligation to provide any sort of services to his employer. This is unlike the present situation where the complainant employees were obliged to attend to their regular work duties during the verbal notice period.

Second, and more fundamentally, the Ontario High Court of Justice based their decision on a statutory provision contained in the Ontario *Employment Standards Act* which does not appear in our *Act*, namely, subsection 4(2):

> (2) A right, benefit, term or condition of employment under a contract, *oral or written,* express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher remuneration in money, *a greater right or benefit* or lesser hours of work than the requirement imposed by an employment standard *shall prevail over an employment standard.* (emphasis added)

Thus, under the Ontario *Employment Standards Act* an *oral* agreement to give substantially greater notice than the minimum written notice called for under the legislation can be enforced. As noted above, however, there is no similar provision in our *Act.* Nevertheless, the Director's legal counsel, in a written submission to the Tribunal dated April 4th, 1997, relying on the Director's authority to refuse to investigate a complaint that has not been made in "good faith" (see section 76 of the *Act*), submits that:

> "If an employee has received a greater period of oral notice than they would have otherwise received under the *Act*, how can a complaint asking for further notice be made in good faith?"

and continues:

> "The position adopted in *Fanaken*...is...appropriate given the general purposes of the *Employment Standards Act* as a remedial statute, and the requirement that the equities between the parties be given regard to so that disputes between employers and employees be resolved in a fair and efficient manner.
>
> The concept of notice is defined in order that employees know exactly when their jobs are to end so that they are able to make plans for the future. There are cases in which on the facts an oral notice may have more than fully satisfied this requirement. There is no equitable reason why these circumstances should be negated by a rigid and literal application of the *Act.*"

I note that the foregoing submission by the Director's counsel runs counter to the submission filed by the Director's delegate in this matter--the Director's delegate submits that the statutory requirement for *written* notice of termination be confirmed (see January 15th, 1997 memorandum and April 28th, 1997 letter from Ian MacNeil to the Tribunal).

In my view, the Tribunal should not embark on an exercise in legislative re-drafting, using the "good faith" requirement found in section 76(1)(c) of the *Act* as a springboard. Under section 63 of the *Act*, an employee's entitlement to compensation for length of service is, in effect, a form of deferred contingent compensation. An employee's entitlement accrues during the course of his or her employment tenure to a maximum of eight weeks' wages. The employer's obligation to pay compensation for length of service can only be avoided in a few limited circumstances including the giving of the appropriate amount of *written* notice.

The requirement for written notice, quite apart from the statutory mandate, creates certainty by side-stepping the sort of arguments that might arise if verbal notice was deemed to be sufficient (such as whether the notice was given at all; or, if given, when the notice was to take effect). The Tribunal has consistently held that the requirement for *written* notice cannot be satisfied by an equivalent amount of *verbal notice* and I see no reason to depart from that line of authorities (see *e.g., Workgroup Messaging,* BC EST #D025/97; *Dr. Robert S. Wright Inc.*,BC EST #D060/96; *Frans Markets,* BC EST #D309/96; *Sun Wah Supermarket Ltd.,* BC EST #D324/96).

Finally, I wish to address the employer's assertion that it received incomplete or inaccurate advice from the Nanaimo office of the Employment Standards Branch. In particular, the employer says that it received a copy of an "Interpretation Guideline" dated February 22nd, 1993--I would parenthetically note that this "guideline" refers to the termination of employment provisions found in the now-repealed (as of November 1st, 1995) *Employment Standards Act.*

The "guideline" in question simply does not corroborate the employer's position. First, the "guideline" does not indicate that verbal notice is sufficient; second, it specifically says that a

(written) notice of termination expires and ceases to have any effect if the employee works beyond the notice period; and third, any extension of the notice period can only be lawfully given "while the notice period is running".

I might also add that the I.R.O. in question apparently disagrees with the employer's assertion that it was told "verbal notice", standing alone, was legally sufficient. Indeed, in a meeting with the Director's delegate who issued this Determination, an employer's representative apparently acknowledged that he had been told to give notice verbally "and then follow it up in writing" (see Ian MacNeil's memorandum dated January 15th, 1997 addressed to the Tribunal). This latter assertion has not been challenged by the employer.

The Irg Appeal

Irg says that her entitlement to compensation for length of service should be based on eight, rather than seven, years' service. Irg has provided payroll records attesting to her assertion. The employer does not dispute that Irg's service exceeds eight years. Finally, the Director's delegate has also recognized the validity of Ms. Irg's appeal and has, in fact, provided the Tribunal with an amended calculation schedule regarding Ms. Irg's claim.

ORDER

Fletcher's appeal is dismissed; Irg's appeal is allowed.

Pursuant to Section 115(1)(a) of the *Act*, I order that Determination No. CDET 004895 be confirmed as issued with respect to the amounts owed to the complainant employees Ronald Paulson, Shannon Dore and Dianne Mayes. The Determination is varied with respect to Carol Irg; the amount now due and payable to Carol Irg under the Determination, as varied, is $4,057.65.

The employees are also entitled to whatever further interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance of the Determination.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal