Employment Standards TRIBUNAL

An appeal

- by -

Fraser - Fort George Museum Society operating
Fraser Fort George Regional Museum
(the "Society")

- 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: David B. Stevenson

FILE No.: 2001/88

DATE OF HEARING: May 2, 2001

DATE OF DECISION: June 7, 2001

DECISION

APPEARANCES:

on behalf of the Appellant	Sarah Overington George Phillips Tracy Boychuck
on behalf of the individual	Ramona Rose

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Fraser - Fort George Museum Society operating Fraser - Fort George Regional Museum (the "Society") of a Determination that was issued on January 5, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded the Society had contravened Part 8, Section 63 of the *Act* in respect of the employment of Ramona Rose ("Rose") and ordered the Society to cease contravening and to comply with the *Act* and to pay an amount of $5,007.29.

The Society says the Determination is wrong and has identified three grounds upon which the Determination ought to be set aside. For convenience, I have summarized these grounds in the following order:

1. Rose was a "definite term/specific work" employee under either subsection 65(1)(b) and (c) and Section 63 of the *Act* did not apply to her;

2. Additionally, and alternatively, if the Society was liable to pay Rose compensation for length of service under Section 63 of the *Act*, Rose received three and ½ months written notice of termination and the Society's liability was deemed to have been discharged under paragraph 63(3)(a) of the *Act*; and

3. Additionally, and alternatively, if the Society was liable to pay Rose compensation for length of service under Section 63 of the *Act*, Rose voluntarily terminated her employment and the Society's liability was deemed to have been discharged under paragraph 63(3)(c) of the *Act*.

ISSUE

The issue in this case is whether the Society was liable to pay compensation for length of service to Rose.

THE FACTS

The Determination provided the following background to the complaint:

> Fraser - Fort George Museum Society operating Fraser Fort George Regional Museum (the "employer") is a business which is under the jurisdiction of the Act. Rose worked from October 1993 to December 31, 1999 as a curator - collections and research and from January 4, 2000 to April 14, 2000 as "contract curator" at the rate of $150.00 per day at the time of her termination.
>
> . . .
>
> Rose was employed under a series of employment contracts which were usually of 12 months duration. The terms, conditions and wages were reviewed annually with adjustments made from time to time. Rose was advised on December 10, 1999, that, due to financial constraints the employer was not able to offer her employment in the position of Curator, Collections and Research beyond December 31, 1999 (exhibit 1). Rose was further advised that the employer was willing to provide a series of contracts over the next year to complete ongoing projects and to complete curatorial projects that were planned for the year 2000. Rose was finally advised that the employer was hoping to restore the position of Curator, Collections and Research in 2001 following the expansion of the Museum. Rose and the employer entered into a contract dated January 4, 2000, which was to terminate April 16, 2000, unless extended by mutual agreement. Rose was advised by her supervisor on April 10, 2000 that the employer could not offer employment beyond April 14, 2000.

There was some controversy in regard to the last sentence of the above background. The Society contends that statement is not correct and that, in fact, Rose told Mr. Dan Ferguson, the Manager of Curatorial Services at the time, that she would not accept any more contract work and was leaving to find work elsewhere. I heard evidence from Mr. Ferguson, Mr. George Phillips, a Director of the Society, Tracy Boychuk, the current Assistant Director of Visitor Experience, and Rose on that point. I shall return to this matter later.

Apart from the above matter, none of the factual conclusions upon which the Determination was based were challenged in the appeal. The Determination concluded Rose was an employee under the *Act*. That conclusion has been accepted. I would add one comment. Notwithstanding the attempt by the Society to change the character of Rose's relationship from that of employee to "independent contractor" in the period commencing January 4, 2000, in every key respect Rose continued to be employed as the Museum's Curator, the same position she had worked in since she commenced her employment in October 1993.

ARGUMENT AND ANALYSIS

The first ground of appeal addresses whether Rose was, on or about April 14, 2000, a "definite term/specific work" employee who, pursuant to subsection 65(1)(b) and/or (c), was not covered by Section 63 of the *Act*. The relevant parts of Section 65 state:

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

. . .

(b) employed for a definite term

(c) employed for specific work to be completed in a period of up to 12 months,

. . .

(2) If an employee who is employed for a definite term or specific work continues to be employed for at least three months after completing the definite term or specific work, the employment is

(a) deemed not to be for a definite term or specific work, and

(b) deemed to have started at the beginning of the definite term or specific work.

In respect to whether Rose was a "definite term/specific work", the Determination stated:

> The evidence does not support the employer's contention that Rose was employed for a "definite term" as the memo of December 10, 1999 offers Rose employment for 2000 on the basis of a series of contracts.

The December 10, 1999 memo read as follows:

> Based on the weak financial position of the Fraser-Fort George Regional Museum heading into 2000, the Museum will be unable to carry the position of Curator, Collections and Research in its operating budget beyond December 31, 1999. As such, the Museum is willing to provide you with contracts over the next year to complete your current obligations, and to complete curatorial related projects that are planned for 2000. We are hoping to restore the position of Curator, Collections and Research in 2001 following the Museum's expansion.
>
> The details of these contracts are to be defined over the next two weeks and will be presented to you for signing prior to January 1st, 2000.

The Society argues that it was wrong for the Director to have allowed the December 10, 1999 memo to dictate the nature of the employment relationship, rather than giving effect to the contract, which was signed after the date of the memo and included a term stating:

> This agreement contains the entire agreement between the parties hereto and supercedes all prior and contemporaneous agreements, arrangements and understandings relating to the subject matter hereto.

The Society contends that the contract curator agreement is clear and uncontraverted evidence of "definite term/specific work" employment within the meaning of Section 65 of the *Act* and should be given that effect. In reply, the Director submits that the contract should take its character from the previous series of one-year contracts signed by Rose, which were also dependent on continued funding but which, with some modifications in terms, were continued from year to year.

The argument of the Director more closely accords with the correct interpretation and application of Section 65 of the *Act*.

From October, 1993 and until April 14, 2000, Rose had been employed on a full time basis by the Society. She was employed over that period through a succession of one-year contracts. Her employment over that period was continuous and uninterrupted. The *Act* does not contemplate a continuous series of definite terms of employment or continuous periods of employment for specific work. In fact, it provides against that result in subsection 65(2).

The Determination noted:

> It is agreed that Rose was employed by the employer under a series of employment contracts which were usually of 12 months duration.

Nothing in the appeal contradicts or challenges that statement. Rose had six one-year agreements, the last having a term ending December 31, 1999, and a 3½ month term agreement, from January 4, 2000 to April 16, 2000. In fact, her employment continued, uninterrupted, for 6½ years. Only the first one-year term could have been described as "definite term" or "specific work" employment under the *Act*. The purpose of Section 65 has been described by the Tribunal in *Re Middleton*, BC EST #321/99:

> In considering whether an employee is exempted from the statutory benefits provided by Sections 63 and 64 of the Act, the purpose for the exceptions found in Section 65, particularly those listed in subsection 65(1)(a) to (e), should be considered. Generally, the exceptions apply to employees who work for temporary periods, of either uncertain or fixed duration, and whose employment prospects past the temporary periods are unknown. It is deemed neither fair nor appropriate that these employees, who in effect have notice at the outset of their

> employment that it will be of limited or fixed duration, should be entitled to additional notice or compensation in lieu of notice.

Paragraphs 65(1)(b) and (c) are intended to apply to employment that is temporary, lasting less than twelve months. Those provisions are not intended to apply where the employment is continuous and of indefinite duration, as it was here. When Rose continued to be employed for three months *"after completing the definite term or specific work"*, her employment was, for the purposes of the *Act*, *"deemed not to be for a definite term or specific work"*. The Society may not rely on the series of contracts of employment, including the contract curator agreement, to obviate what is the clear intent and effect of subsection 65(2) of the *Act*. The Society argues that subsection 65(2) is limited in its application to "holdover" situations where an employee simply stays on past a contract expiration without anything being said or done. They argue that this case, where each period of employment was covered by a definite term agreement, is different and Rose remained a "definite term/specific work employee" throughout her employment. I disagree. Subsection 65(2) makes no reference to the basis on which an employee *"continues to be employed"*. The words in subsection 65(2), given a plain reading, are not capable of supporting the distinction that is sought to be made by the Society.

It must be remembered that the *Act* is remedial legislation and an interpretation that extends its protection to as many employees as possible is favoured over one that does not, see *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.). Exceptions and exemptions to the Act are typically narrowly construed and their interpretation and application should be consistent with the Act's objectives and purposes. Subsection 65(2) of the *Act* cannot be interpreted to have the effect of passing off employment that is, in reality, continuous and of indefinite duration as temporary employment at the expense of the minimum employment standards provided in Sections 63 and 64 of the *Act*. The first ground of appeal is dismissed.

The Society also argues that even if Section 63 applied in this case, Rose was given notice of termination in the contract curator agreement. The provision referred to in that contract, Clause 2, stated:

> The term of this Agreement shall commence on the 4th of January 2000 and shall terminate on the 16th day of April 2000, unless extended by mutual agreement.

The requirement in subsection 63(3) of the *Act* is to give *"written notice of termination"*. The Determination noted that whatever effect might be given to that provision was, "contradicted by the December 10, 1999 memo which states *". . . the Museum is willing to provide you with a series of contracts over the next year . . ."*. The Society says that the Director erred in referring to and giving effect to the earlier memo and, as a "matter of standard contractual interpretation", it was replaced by the contract curator agreement and the above provision was all that remained.

There are two responses to this ground of appeal. First, the Director did not err in concluding that the potential effect of Clause 2 of the contract curator agreement was contradicted by the December 10 memo. Simply put, the Director was not dealing with a matter of contract

interpretation. The Director was considering whether the Society had successfully met the requirements for discharging its statutory liability under Section 63 of the *Act*. In addressing that question, the Director was entitled, perhaps even obligated, to consider all the circumstances in order to determine what effect, if any, could be given to that provision in the contract curator agreement for the purpose of administering minimum employment standards under the *Act*. Second, and in any event, I agree with the submission of the Director in reply that to be an effective notice of termination, the notice must be in writing and must be clearly identified as a notice of termination. The provision in contract curator agreement relied on by the Society is, on its face, a statement that the term of the contract will commence and end on certain dates, leaving open the option to agree to a continuance of the term beyond the end date. In *Re Sun Wah Supermarket Ltd.*, BC EST#D324/96, the Tribunal stated:

> In order to bring itself within section 63(3) of the *Act*, an employer must give specific written notice of termination effective as at a particular date.

There is no reference in the contract curator agreement to termination of employment effective as at a particular date. Based on the history of the employment relationship and on the contents of the December 10 memo, I do not accept that the termination date of the term of the agreement should also have been treated by the Director as the termination date of Rose's employment.

The final argument made by the Society is that even if Section 63 of the *Act* applied in this case, Rose voluntarily terminated her employment on or about April 14, 2000 and, pursuant to subsection 63(3), discharged the Society from its statutory liability under Section 63 of the *Act*. Rose says she did not voluntarily terminate her employment. The Determination stated, as a conclusion of fact, that on April 10, 2000 Rose was told by her supervisor the Society could not offer employment beyond April 14, 2000. The Society disputes that conclusion. I heard evidence on this matter from Rose, Mr. Ferguson, Mr. Phillips and Ms. Tracy Boychuck.

In its appeal, the Society included a letter that had been prepared by Mr. Ferguson in January, 2001, and was dated January 25, 2001. The letter contained the following paragraph:

> Prior to the completion of this initial contract [the contract curator agreement] (approximately 2 weeks), Ms. Rose told me in conversation that she was not interested in any further contract work with the Fraser-Fort George Regional Museum, as she wished to search for a permanent position elsewhere. . . . Ms. Rose was never told that she would not be offered any follow-on work.

That letter was not signed. Later, in a communication with the Tribunal on March 7, 2001, the Society attached a revised version of the above letter, also dated January 25, 2001, signed by Mr. Ferguson. The above paragraph was changed to read:

> On March 20th, I indicated to Ms. Rose that follow on work was available and she told me that she was not interested in further short term work.

In response to the allegations made in that paragraph, Rose stated that on March 20, 2000 she was en route by air from Montreal to Prince George and was not offered additional work on that date, or any other date, and re-asserted the correctness of the conclusion of fact made in the Determination.

Mr. Ferguson testified that Rose had told him she was not interested in a follow on contract with the Society. He said this comment arose in a conversation close to the end of the term of the agreement. He gave no specific date for that conversation. In cross-examination, Mr. Ferguson was asked how he got the March 20th date, referred to in the letter. He acknowledged that he was mistaken about the March 20th date, but did not answer the question. He did not recall any conversation with Rose on April 10. He said that following the conversation he recalled having with Rose, he met Mr. Phillips and told him that Rose "was not interested in any follow on work". He did not testify that Rose said she wished to search for a permanent position elsewhere, as was stated in the first January 25 letter.

Mr. Ferguson had been primarily responsible for preparing the contract curator agreement, indicating that he had written the majority of it and had identified the tasks to be done and the time line for doing those tasks. He was asked whether he had done anything similar for the period following April 16, 2000 and replied that he had not. When asked why he had not, he replied it was because the Society had not identified any follow on tasks to be done.

He was asked about a memo to Rose dated April 18, 2000, which was his initial response to a claim by Rose for "severance pay". There was no indication in that document that Rose had voluntarily terminated her employment or had refused additional work. The memo refers to the Society's understanding that no "severance" was owed due the nature of her employment, being a series of fixed duration contracts not exceeding 12 months. He was asked to square that response with the position taken in the January 25, 2001 letter that Rose had told him she was not interested in doing any follow on work. His response was that the Society ". . . didn't feel that you were terminated in a way that would give rise to severance pay".

Mr. Phillips, although not able to speak directly to discussions that took place between Rose and Mr. Ferguson, testified about discussions he had with both Rose and Mr. Ferguson. He said he was told by Mr. Ferguson that Rose was not interested in short term employment, that she wanted full time, ongoing employment. He later saw Rose in the hall and said, "I understand you don't want to come back", to which she replied, "I want to look for full time work". He testified there was no shortage of work to be done, but there was a shortage of money to do it with. He testified that during 1999 and 2000, the Society was involved in a capital project to expand the Museum. He said that late in the process, the Society decided it was necessary to shut the Museum down in order to effectively and efficiently complete the project. The closure was initially planned for a period from December 1999 to May 2000, but was delayed to a period from May 2000 to August 2000. The Society knew finances would be tight, funding uncertain and that it would be difficult to sustain their normal activities through the year 2000. With that in mind, the Directors of the Society decided they needed the flexibility to have work done, not

done or done in a certain way as the circumstances allowed or dictated. He said the Directors felt that a series of short term contracts for specific periods or specific work best met the Society's needs. In respect of the situation involving Rose in April 2000, he expressed the view that Rose was telling the Society she would only stay if she received a guarantee of full time work to the end of the year 2000 and the Society was not in a position to do that. Mr. Phillips identified a number of projects that Rose could have worked on, but conceded there was no job for a full time curator. Nor did he say that any of this work was offered to her or when it was to be done.

Ms. Boychuck said she was told that Rose only wanted full time work and would not accept short term contract work.

Rose testified that she never told Mr. Ferguson or anyone else that she was not interested in continued employment. She said that on April 10, 2000, Mr. Ferguson told her he did not have any more work for her. She asked why, because she knew there was work that could be done, such as work related to a planned First Nations gallery and an exhibition on the natural and human history of the Fraser River. Mr. Ferguson said there was no money in the budget at that time for follow on work. She asked when there would be any work and Mr. Ferguson said she should call in August to see if things had changed. She then told Mr. Ferguson that she was going to look for full time work and if she was still available in August she would call.

Applying the considerations identified in *Faryna v. Chorney*, (1952) 2 D.L.R. 354 (BCCA), I prefer the evidence of Rose on this matter. I was not impressed with Mr. Ferguson's evidence. He generally demonstrated a poor recollection of the period in question. He acknowledged his error in assigning the date of March 20th to the discussion he had with Rose, but provided no answer to why he selected that date in the first place as the date of the discussion. He testified that Rose told him she was not interested in any follow on contracts with the Society. In cross-examination he said he told Mr. Phillips that Rose said she was not interested in any follow on work. His evidence on that point is inconsistent with the evidence of Mr. Phillips and Ms. Boychuck. The former said Mr. Ferguson told him that Rose was not going to accept any short term employment and that she wanted full time ongoing employment. Ms. Boychuck testified that Rose said she only wanted full time work, not short term contracts.

Mr. Ferguson denied telling Rose there was no more work for her, but also testified that no follow on contract had been prepared by him because he had not identified any follow on tasks to be done. It would seem both reasonable and probable that if the Society intended that Rose would continue working after April 16, 2000, Mr. Ferguson would have identified what available work there was and made that known to her in some way. That omission further supports the probability that Mr. Ferguson told Rose there was no more work. Mr. Phillips and Ms. Boychuk said there was work available. In that context, it was open to the Society to show that work which Rose could have done was done by someone else immediately following her alleged quit, but they did not.

Rose acknowledged telling Mr. Ferguson that she was going to look for full time work and if she was still available in August she would call. There is no rational explanation for Rose telling Mr. Ferguson that unless something caused her to believe her employment with the Society was not full time or permanent. At the time she had full time, permanent employment with the Society which, based on the assurances given verbally by Mr. Ferguson on December 10, 1999 and in his memo of that date, she had every reason to believe would continue on that basis through the year 2000. I have also taken note of several other points in Mr. Phillips' evidence. First, when he saw Rose in the hall after Mr. Ferguson had relayed his discussion with her, he said, "I understand you don't want to come back" and she replied, "I want to look for full time work". Second, he said there was no job for a full time Curator. Third, he testified that the short term contracts were used to provide the Society with the flexibility to do work as the budget and available funding allowed.

There is no doubt in my mind that Rose was told by Mr. Ferguson there was no more work for her after April 14, 2000 because of budgetary limitations and that she should call back in August to see if things had changed. I do accept that Mr. Ferguson did not say that "the Society could not offer employment beyond April 14, 2000", as indicated in the Determination. There is no indication in the evidence to any reference to "employment" with the Society in the discussion she had with Mr. Ferguson. That distinction, however, is largely irrelevant in the circumstances, because the decision to bring to an end what had been continuous and uninterrupted employment as Curator of the Museum was a significant and substantial change and was sufficient to constitute a termination of employment under the *Act*.

The Society has not shown that Rose quit her employment. Accordingly, there is no basis upon which The Society could be deemed discharged from its statutory liability under Section 63 of the *Act* to pay Rose length of service compensation.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated January 5, 2001, in the amount of $5,007.29, be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal