EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Banavern Manor Ltd.
("Banavern")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Carol Roberts

FILE NO.: 96/569

DATE OF DECISION: **November 26, 1996**

DECISION

APPEARANCES

This appeal was by way of written submissions by M.L. Nielsen for the Appellant, and a reply by the Director.

OVERVIEW

This is an appeal by Banavern Manor Ltd. ("Banavern"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued on September 9, 1996 (Determination No. 003977). The Director found that the employer had contravened Section 63 (compensation for length of service) in respect of nine employees and ordered that Banavern pay $13,869.48 to the Director of Employment Standards.

ISSUE TO BE DECIDED

The issue on appeal is whether the employees received proper notice of termination as required under Section 63 of the *Act.*

Banavern claims that length of service compensation is not owed, and seeks to have the determinations canceled.

FACTS

The facts, which were not disputed, were set out by the Director as follows:

Banavern operated a community residential program facility under the name of McClure House in Victoria. On or about March 23, 1996, the Ministry of Health notified Banavern that it would discontinue funding the facility and transfer patients on or before March 31, 1996. Banavern ceased operations of McClure House on March 31, and all employees were terminated as of that date. No written notice of termination were received by any of the employees, although some length of service compensation was paid to some employees.

Following a review of company records, the Director calculated wages owing, including daily overtime, weekly overtime, vacation pay, pay for working on a statutory holiday and length of service compensation, and informed Mr. Nielsen of those amounts. All amounts but for the length of service compensation was agreed upon for all employees.

Mr. Nielsen acknowledged that no individual written notices of termination were issued, but claims that it was common knowledge that Banavern would be closing its operations effective March 31, on or about March 23. He also claims that general written notice was given to employees by means of a reference in the staff log on March 23, which stated as follows:

Staff: McClure will be closed March 31, 1996. There will be no schedule for April.

All staff were expected to consult the log daily.

The Director contacted eight of the nine employees during the course of the investigation. None received individual written notices of termination. Of the eight, five were asked whether they had seen the notation in the log. All said they had not although they viewed the log regularly, and two specifically claimed it was not in the log.

The Director found that no written notice of termination had been received by the individual employees, contrary to the requirements of Section 63. He also found the general notice contained in the log did not meet the requirements of Section 63 as it did not specifically state that staff would be terminated. He concluded it was sufficiently vague to be capable of misinterpretation as a lay off notice. He also stated that because it was not delivered to each individual employee, rather leaving it to employees to discover, was inadequate notice of the termination.

ARGUMENT

Banavern claims that a company is not required to give notice of termination if it was impossible to perform the work because of some unforeseeable event or circumstance. Mr. Nielsen claims that the suspension of the facility's license by the Ministry made it impossible to continue the operations at the facility. He argued that as there was no work was available due to the license suspension, the company could not have provided notice of termination.

Mr. Nielsen seeks to have the length of service compensation portion of the Determination canceled.

The Director argued that although the facility's license was suspended on March 28, 1996, the company was aware, as of March 21, that the Ministry of Health would be canceling its Residential Services Agreement with Banavern effective March 31. Consequently, he argues that the license suspension is of little relevance to the issue.

The Director argues that Banavern knew, or ought to have known, that non compliance with the Agreement would lead to a cancellation of the agreement. Banavern had been subjected to a joint care and financial audit conducted by the Capital Regional District and the Ministry of Health on February 6, 7 and 8, 1996 due to ongoing concerns regarding the operation of the facility. Banavern was subsequently issued a Notice to Comply on February 8, 1996. On February 16, the Ministry of Health's lawyer sent a letter to Banavern regarding the Ministry's concerns that clients were being placed at risk. Consequently, the Director argues that the license suspension was reasonably foreseeable in any event.

ANALYSIS

I have reviewed the written submission from Mr. Nielsen, the Determination and the submission from Director in arriving at my decision. After considering the evidence and submissions of the parties, I am unable to conclude that the Determination is in error.

Section 63 of the Act sets out the employer's liability for compensation for length of service. The liability is discharged if the employee is given notice as provided in subsection (3).

Section 64 (d) provides that Section 63 does not apply where an employee is employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act.

Although I agree that the contract cancellation, and later, the license suspension, made the employment contract impossible to perform, the evidence is that the event was foreseeable. Banavern knew as early as February 16 that the contract was at risk. The letter from the Ministry's solicitor to Banavern's lawyer stated that "(t)he Province's concerns are that Banavern Manor Ltd. may not be providing the Services contracted for, and that the health and safety of the residents may be at risk as a result. The seriousness of these concerns necessitates a firm approach by the Province and prompt compliance by your client."

Consequently, I am unable to find that Banavern is exempted from the provisions of Section 63 under Section 65(d) as the closure of the facility was foreseeable.

I dismiss the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that Determination No. 0003877 be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal