

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Carline Holdings Ltd. operating as Golden Arms Motor Hotel

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Fernanda Martins

FILE NO.: 97/842

DATE OF HEARING: March 18, 1998

DATE OF DECISION: October 1, 1998

DECISION

APPEARANCES

| | |
|----------------|------------------------------------|
| Jerry S. Adler | on behalf of Carline Holdings Ltd. |
| David Feltham | on his own behalf |
| Diane Feltham | on her own behalf |

OVERVIEW

This is an appeal by Carline Holdings Ltd. operating as Golden Arms Motor Hotel ("Carline") pursuant to Section 112 of the *Act*. The appeal is from the Determination issued by the Director on October 28, 1997. The Director found that:

1. Carline had contravened Sections 18, 27, and 28 of the *Act*;
2. David Feltham was owed wages and vacation pay;
3. Diane Feltham was an employee and entitled to wages, overtime, and vacation pay.

David Feltham managed the Golden Arms Motor Hotel in Golden , BC from August 15, 1996 until August 12, 1997.

Diane Feltham was employed at the Golden Arms Motor Hotel from September 5, 1996 until August 8, 1997 as Office Clerk and Bartender.

On November 20, 1997 Carline filed an Appeal of the Determination and gave the following as reasons for making this appeal:

The determination is wrong because not all of the facts were available at the time.

Carline submitted that:

We are asking the Tribunal to allow us to present our evidence with a view to:

- a) reducing the award to David Feltham by deducting any remuneration claimed for the period after July 31, 1997;
- b) overturning the award to Diane Feltham as it relates to any period following September 30, 1996; alternatively, eliminating any claim for overtime after September 30, 1996; and
- c) allowing the employer to offset the sum of \$6,000.00 owed by David Feltham to the employer, from the amount of his award.

A hearing was held on March 18, 1998 in Cranbrook, BC at which time evidence was given under oath by Roy Carline, Debbie Seguin, Patsy Decker, Shirley Dunn, David Feltham and Diane Feltham.

ISSUE TO BE DECIDED AND ANALYSIS

In this Decision I will deal with each ground of appeal under the following headings:

- Sections 27 and 28 of the *Act*
- Termination date of David Feltham
- Employment status of Diane Feltham
- Wages, over time and vacation pay for Diane Feltham
- Set off

Sections 27 and 28 of the Act

In the Determination, the Director found that Carline had contravened Sections 27 and 28 of the *Act*. The Employer was not fined for this contravention.

The Employer submitted in a letter to the Tribunal dated January 15, 1998 that:

The unfortunate problem posed in respect to this matter was the fact that the claimants who were responsible for proper record keeping at the Golden Arms Motor Hotel and, in fact, they neither maintained accurate records nor made readily available by them once they ceased their relationship with the employer. Some of those records were recently located in November of 1997 but are not complete...

The position taken by A.H. Brulotte, the Industrial Relations Officer, seems to be that there is a onus upon the employer to maintain records to contradict all of the allegations of the Felthams. This is some what ludicrous in that it was the Felthams who were the ones that created and were supposed to maintain records. The employer's allegations of the conduct of the employees is serious and credibility is an important factor when dealing with such a claim and can only be viewed during the course of a full hearing of the appeal.

David Feltham and Diane Feltham filed their complaint with the Employment Standards Branch on August 20, 1997. On August 26, 1997, the Director sent the Employer a letter outlining the complaint and Demand for Employer Records with a due date of September 12, 1997. The Demand for Employer Records advised that failure to comply with a record requirement may result in a \$500 penalty for each contravention as stated in Section 28 of the Regulations. On September 2, 1997, Roy Carline signed an Acknowledgment of Receipt of certified mail sent to him by the Ministry of Labour, Employment Standards Branch. On September 16, 1997, the Director's delegate telephoned the Employer's

accountant, Jim Paskaruk, to determine why there had been no response to the Demand. Mr. Paskaruk advised that he would be meeting with the Employer to discuss the demand. On September 17, 1997 the officer again spoke with Mr. Paskaruk who advised that the Employer's lawyer would be contacting the officer the next day. On September 19, 1997 the Employer's lawyer, Kenneth Phillips wrote to the officer and advised :

I have spoken with Mr. Carline and he says one of the problems is that all of the records have been taken by Mr. and Mrs. Feltham. Apparently they were responsible for making all deposits and for paying all amounts due and owing and the records for all of this have been taken with them.

I have placed a call to the accountant for Mr. Carline, who is away until Monday, to see if I can get some information from him, but I expect most of the records that are required will be with the Felthams themselves.

On September 22, 1997 the Director sent a letter to the Employer's lawyer outlining the claimants allegations. On September 30, 1997 the Employer's lawyer replied that he had spoken with the Employer's accountant, Mr. Paskaruk. He went on to write:

I am told that Mr. Feltham was the manager of the hotel and as such he was responsible for collecting the receipts from the hotel's daily operations and for paying all accounts, including his own wages, and for maintaining all records.

Unfortunately it appears that when Mr. Feltham left he took the records with him so my client really have [sic] nothing to produce to you. Mr. Paskaruk [sic] did speak with Mr. Feltham just before he left the hotel and at that time Mr. Feltham said his lawyer had advised him to pay any amounts owed to him from the hotel receipts.

At this point Mr. Carline does not have the hotel records, the hotel receipts or an accounting from Mr. Feltham of the monies which he received while he was operating the hotel. By Mr. Carline's rough calculations the receipts would have been substantial and it appears that a large sum is owing by Mr. Feltham to Carline Holdings Ltd.

In its "Reasons Schedule", dated November 19, 1997 the Employer submitted:

Some records which had been missing were found when David Feltham phoned the hotel earlier this month to request the records and advised where they were located. The manager immediately contacted Mr. Roy Carline, president of Carline Holdings Ltd. who ordered that the records be delivered to him rather than Mr. Feltham. Other records are still missing.

In a letter to the Tribunal dated January 15, 1998, Mr. Adler submitted :

The records that the Felthams maintained were not centrally located or organized and it was not until November of 1997 that those records, that Shirley Dunn managed to retrieve, were returned to Vancouver and subsequently viewed by Mr. Paskaruk to the extent that records could be located.

Attached to the above submission to the Tribunal was a letter dated January 12, 1998 which Mr. Paskaruk wrote to Mr. Adler and advised :

During the period August 15 to November 30, 1996 the majority of the bookkeeping was done by staff at the Fort Nelson Hotel. ...

On December 1, 1996 the management of the Golden Arms Hotel took over the responsibility for paying the expenses. From December 1, 1996 to July 31, 1997 no payments were made on account of payroll deductions and liquor taxes resulting in penalties and interest to the company.

I note that Mr. Paskaruk made no comment regarding the location of employer records or any difficulty in receiving them. Mr. Paskaruk was not in attendance at the hearing.

Mr. Adler also attached a letter dated December 29, 1997 written by Shirley Dunn, the new manager wherein she describes difficulties she had in locating records but no reference is made to any telephone conversation with David Feltham regarding the location of the documents in the basement of the hotel.

During the hearing, Mr. Carline testified that he kept phoning the Felthams regarding records during the whole time they were employed there. He stated that Mr. Paskaruk would have received any documents but he kept phoning to get the documents from them. He stated that the Felthams always had the same excuse that they were just putting them together and that he would receive them. He stated that the documents were in the basement of the hotel.

Mr. Carline was asked in cross-examination by Diane Feltham if he agreed that up until November, 1996, the records were sent to his hotel in Fort Nelson. He did not agree. Mr. Carline replied that he "couldn't tell you" if the pay cheques for that time were coming from Fort Nelson.

In cross-examination Mr. Feltham asked Mr. Carline to confirm that every month the records were sent by "Loomis" to Mr. Paskaruk. Mr. Carline replied that Mr. Paskaruk was asking him for the documents.

In reply to my question of what efforts he made to retrieve the documents, Mr. Carline stated that he phoned Mr. Paskaruk right away but was told that he did not have anything. He stated that he retained Mr. Phillips before the deadline passed and contacted the new manager right away to look for the records. He was admitted to hospital at this time and had his accountant attend to these matters.

In reply to my question of what efforts he made to contact the Felthams he stated that he did not know how to get hold of them. He also stated that he was not sure that the Felthams had taken the records. He also stated that he did not know that his Fort Nelson hotel was looking after the cheques during the first months of operation.

In reply to my question regarding the financial status of the Golden Arms Hotel, he stated that he did not know what was in the account and trusted the manager to run the hotel to the best of his ability.

Shirley Dunn, the manager at the Golden Arms since October 26, 1997, testified that she found some "bits and pieces" of documents at the hotel and sent what she found to the accountant. She stated that there were "no books of any kind" when she arrived. She also stated that she had had no dealings with Mr. Feltham. In cross-examination she admitted that she did not have any knowledge of what had been done with the paperwork two and a half months before she started (the time when the Felthams had left).

Diane Feltham testified that she sent all the records to the accountant. She was asked in cross examination if she kept copies and she replied that everything was packed up and sent to Mr. Paskaruk at the end of her employment and prior to that the records were sent to him on a monthly basis.

David Feltham testified that the paperwork was sent off to the accountant every month. He testified that no one contacted him regarding the location of any records even though Mr. Carline had his phone number since he had called him there before regarding another matter. In cross-examination by Mr. Adler, Mr. Feltham stated that every month the accountant was sent banking statements, employee time sheets, daily inventory and deposit books. He asserted that Mr. Paskaruk received "the books". When asked if he had thrown away or destroyed any records he replied that he had not.

Section 27 of the *Act* states in part:

- (1) On every payday, an employer must give each employee a written wage statement for the pay period ...

Section 28 of the *Act* states in part:

- (1) For each employee, an employer must keep records of the following information: ...
- (2) Payroll records must
 - ...
 - (b) be kept at the employer's principal place of business in British Columbia

Although the parties are not in agreement regarding the location, control or movement of the Employer's records, I am left with no choice but to find that the Employer contravened

Sections 27 and 28 of the *Act* since the responsibility rests with the Employer and not his employees to maintain these records as required by the *Act*. If the employees were doing an inadequate job it would have been the Employer's responsibility to take measures to ensure compliance with the *Act*. No documents were forwarded to the Director, not even the documents for the period of August 15 to November 30, 1996 when the bookkeeping was being done by another of the Employer's hotels.

Date of Termination of David Feltham:

Mr. Feltham was hired by Roy Carline to manage the Golden Arms Hotel in Golden, BC starting August 15, 1996. Mr. Feltham testified that he had a written contract with Mr. Carline to work eight hours per day to manage, staff and upgrade the hotel. He was to be paid \$3,000.00 per month for a one year period. Although the written contract was not available at the hearing, Mr. Carline agreed with this evidence. Mr. Feltham had no previous experience or training in operating a hotel, nor did he have any book keeping or paper work experience. He had expressed these concerns to Mr. Carline when he was approached to manage the hotel. Despite these shortcomings, Mr. Feltham became willing to take on this venture and Mr. Carline hired him. Mr. Carline testified that as general manager, Mr. Feltham was responsible for everything and also had signing authority.

Mr. Feltham testified that the hotel was in a state of disrepair and in need of a great deal of work when Mr. Feltham took over its management. Although the hotel was in very rough shape and a great deal more time was required to make the hotel operational, he did not complain. The previous manager, Mr. Wilson, stayed to help him until late September 1996.

Mr. Feltham testified that he worked seven days a week and was spending all his time making repairs to the hotel. He even put two washing machines into the hotel at his own expense which he never retrieved. In reply to Mr. Adler's question during cross examination if he believed his job had changed, he stated that it had changed a great deal and that he just wanted to get the hotel running for Mr. Carline. He stated that he told Mr. Carline that he was doing all the physical labour and that he was saving Mr. Carline money by doing so.

Mr. Carline's method of operating this hotel was to have his accountant handle the finances and the staff of one of his other hotels, the Black Nugget in Sparwood, assist Mr. Feltham with training his bookkeeping staff, questions he might have and the occasional bill payment from the accounts of the Black Nugget.

Debbie Seguin, the general manager for the Black Nugget Hotel, testified that Mr. Carline had asked her to deal with Mr. Feltham occasionally. She had gone to the hotel twice. Once to train a woman named Jaylene to do financial paperwork. She testified that quite a bit of money had been transferred to the Golden Arms but in cross examination was not able to specify any amounts.

Patsy Decker, the assistant manager of the Black Nugget Hotel, also testified that funds were transferred to the Golden Arms and that Mr. Feltham had complained to her about not being able to cash his paycheque.

Mr. Feltham testified that there were many outstanding bills when he started. He was instructed to send the bills to Mr. Carline's hotel in Fort Nelson where payment would be made. In November, 1996, he was instructed not to send the bills to Fort Nelson any longer. Mr. Feltham testified that there was frequent difficulty in paying bills for propane, utilities and telephone from the hotel account because of insufficient funds. Requests were made to Mr. Carline or to the staff of the Black Nugget hotel. Sometimes the bills would get paid but the funds deposited to the hotel account would not be enough to cover the bills. Many payments were made through "Interac" which did not go into the hotel accounts. He also did not receive bank statements as they were sent directly to Mr. Carline. Mr. Feltham testified that he suffered a great deal of stress because creditors were pursuing him for payment and he was unable to make these payments himself.

Mr. Feltham was also unable to cash his pay cheques due to the lack of funds. When he contacted Mr. Carline in this regard he was told in effect that all he was concerned about was his paycheques and not the hotel. In cross examination, Mr. Carline did not deny making this statement. Mr. Carline stated that he told Mr. Feltham that there was no money and he believed that Mr. Feltham had asked for his pay for a couple of months. He stated that he only heard from Mr. Feltham when he wanted money.

Mr. Carline's attitude created a great deal of stress for Mr. Feltham to the point that he became physically unable to continue working. Mr. Feltham testified that he tried to tell Mr. Carline that he had to move on .

Mr. Carline lived in Richmond and did not attend the hotel until July, 1997 when he met Mr. Feltham for the first time. Mr. Feltham testified that he had asked Mr. Carline to attend the hotel throughout the time he managed it and Mr. Carline had been promising to go out and see the situation. Mr. Feltham testified that during this meeting Mr. Carline asked if he would stay and he agreed to, providing things would be straightened out. Mr. Carline continued to promise that things would improve but nothing happened. Mr. Carline testified that he let Mr. Feltham stay on for another month because he had nowhere to go. He did admit however, that he had not arranged to get anyone to take over the hotel at the end of July. Mr. Carline agreed that at this visit he came to see the hotel after it had been painted and repaired and what he saw looked good.

Mr. Feltham wrote to Carline Holdings in a letter dated July 23, 1997 to the attention of Roy Carline. He advised:

This letter is to advise you due to the pressures of not having enough money to operate the hotel I am leaving on July 31, 1997. I am advising you to make arrangements to have someone else come in to take over the position of Manager by July 31, 1997.

I have found this job to cause more pressure on me than if it was my own business.

Mr. Feltham testified that by August 1997 he had the hotel in “mint” condition; he had brought it up to fire code . He testified that he had done everything that Mr. Carline had asked him to do. He continued working until August 12, 1997. There was no evidence advanced by the employer to suggest that Mr. Feltham did not work until that date.

Mr. Feltham testified that there were insufficient funds in the hotel account for him to cash his paycheques and that he cashed two of his paycheques through petty cash. He was not sure how many cheques were left to be cashed but stated that there were two cheques per month for June and July and one for August, 1997. Mr. Carline testified that Mr. Feltham had not asked for severance pay and that Mr. Feltham had “taken care of that”.

During the hearing the Felthams stated that the uncashed cheques had been submitted to the Director and they expected that the cheques would have been available at the hearing. However, the Director was not in attendance, nor had these documents been attached to the Determination or to the Director’s submissions. With the agreement of the Appellant, the hearing was stopped to allow the Felthams to obtain copies of the cheques from the Director’s Cranbrook office. Once the hearing resumed, copies of four cheques were entered into evidence:

- (1) Cheque #0314 dated June 15, 1997 from the Golden Arms Motor Hotel to David Feltham in the amount of \$1,078.18 unsigned
- (2) Cheque #0356 dated June 30, 1997 from the Golden Arms Motor Hotel to David Feltham in the amount of \$1,087.18 unsigned
- (3) Cheque #0357 dated July 15, 1997 from the Golden Arms Motor Hotel to David Feltham in the amount of \$1,087.18 signed by David Feltham.
- (4) Cheque #0381 dated July 30, 1997 from the Golden Arms Motor Hotel to David Feltham in the amount of \$1,087.18 unsigned.

Mr. Adler conceded that Mr. Feltham’s uncashed cheques should be honoured.

In his Determination the Director’s delegate concluded that:

Based on the evidence presented to me, I have no option but to accept that David Feltham is owed wages and vacation pay as claimed...

I have determined that David Feltham is entitled to: wages for June/July and half of August 1997 at \$3,000.00 per month equals \$3,000.00 times 2.5 = \$7,500.00. In addition, David Feltham is entitled to vacation pay at 4 per cent of Gross Wages from August 15, 1996 through August 12, 1997. \$3,000.00 times 12 months times 4 percent equals \$1,440.00. Therefore

David Feltham is entitled to \$7,500.00 plus \$1,440.00 = \$8,940.00 plus interest from date of termination.

No evidence or argument was advanced by the Employer regarding vacation pay.

Section 18 of the *Act* states:

- (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
- (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

I find that there is no basis for reducing the award made to Mr. Feltham by the Director. Therefore I confirm the Director's finding that the Employer was in breach of Section 18 of the *Act* and that Mr. Feltham is owed \$8,940.00 plus interest from the date of termination. (I would venture to add that the Employer was also in breach of Section 17 of the *Act* which requires the Employer to at least semimonthly and within 8 days after the end of the pay period, to pay an employee all wages earned by the employee in a pay period).

Employment Status of Diane Feltham

In the Determination, the Director stated:

The Employer argues that Diane Feltham is not an employee because the Employer had advised David Feltham not to hire her. David Feltham was the Manager of the Hotel and as manager had the right to hire and fire accordingly. Whether or not David was advised by the Employer not to hire his wife, David did hire her, and she therefore became an employee whether or not the employers know about it.

I will state at the outset that I am in agreement with the Director's reasoning.

There is no dispute that Diane Feltham was employed at the Golden Arms Motor Hotel from September 5, 1996 until October 15, 1996 as an office clerk and bartender. She claims that she did not get paid for the period between October 1 to October 15, 1996, because she had claimed overtime worked and the Employer told her that she would only get paid \$1,250.00 semi-monthly. So, not only did she not get the overtime, she also did not receive payment for the regular hours. Mrs. Feltham testified that this and all the time required to operate the hotel by her and her husband caused her a great deal of stress and she terminated her employment and left for Calgary where she was hospitalized for stress.

The dispute arises as to Mrs. Feltham's claim for time worked from June 10, 1997 until August 8, 1997 as well as to any overtime she claimed.

Mrs. Feltham submitted to the Tribunal by way of an attachment to a letter dated December 10, 1997 that:

When I came back in June the May month end had not been done. Jay refused to do the books after Jim gave her heck the month before. It was understood that David could not do the paperwork. Jim and Mr. Carline kept asking Dave for the May month end so David asked me (Diane) to do it for him. I told him I would (do) it but not for nothing. I did not owe Mr. Carline anything. I only charged David \$8.00/hr. I have not worked for less than \$9.75 for years. I was doing Dave a favor.

The Employer argues that he did not authorize Mr. Feltham to have his wife working after October 15, 1996. He testified that he did not know Mr. Feltham had hired his wife until she received her first paycheque. He testified that he told Mr. Feltham that his wife was not to work at the hotel because he did not like husband and wife teams working for him and there was not enough work to justify her employment anyway. Mr. Feltham testified that he was never directed to not hire his wife. He stated that he had a telephone conversation with Mr. Carline when he advised Mr. Carline that his wife had left because she had had a "nervous breakdown" and Mr. Carline commented that it was good she left because he did not like family working. Mrs. Feltham testified that she had no indication from anybody that she was not to be working at the hotel. Mr. Carline testified that he only saw Mrs. Feltham once and he could not recall when. Mrs. Feltham testified that he would have known that she was working at the hotel when he visited because she showed him the daily room sheets that were used and he showed her how he wanted them completed. Mr. Carline testified that he asked Mr. Feltham about the room sheets and not her.

Mrs. Feltham testified that Mr. Feltham had advised Mr. Paskaruk, the accountant that she would be doing the paperwork and she herself had spoken to the accountant on the telephone.

Patsy Decker was not able to confirm whether Mrs. Feltham was working at the hotel. I find that this evidence has little weight since she was not present at the hotel and had no reason to know one way or another since her only involvement with the Golden Arms was to answer the odd question from Mr. Feltham or transfer funds from the Black Nugget to the Golden Arms.

Debbie Seguin had attended the hotel to train Jayleen Rother to do the books after Mr. Feltham took over the hotel. She did testify that she was surprised that everything was organized and Mr. Feltham had told her that his wife had done that. She also met Mrs. Feltham during this visit.

Section 2 of the *Act* defines employee as:

- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,

I find that the Appellant has not presented any evidence that is persuasive in showing that Mrs. Feltham was not an employee as defined by the *Act*. I agree with the Director's findings in this regard. I found Mrs. Feltham to be credible and accept her evidence that she was performing work normally performed by an employee. I do not accept the Employer's argument that Mrs. Feltham was just helping her husband out. The business belonged to Mr. Carline and not her husband.

Wages, overtime and vacation pay for Diane Feltham

The Reasons Schedule attached to the Employer's Appeal form stated:

Diane's alleged employment from June to August, 1997 was unnecessary at the very least. During those months the Hotel's receipts were negligible and based on those receipts, there would not have been enough work for David let alone his wife. Yet she claims overtime. All when she knew that her husband had been ordered not to hire her.

However, a review of the "Revenues Reported by Manager" as attached to Mr. Paskaruk's letter to Mr. Adler of January 12, 1997, reveals a substantial increase in receipts for the months of June and July, 1997, the time Mrs. Feltham was working. The report is set out below:

Revenues Reported by Manager

BC EST #D441/98

| | Bar | Bar Wages | Rooms | Bank Deposits |
|----------------|------------|------------------|--------------|----------------------|
| | \$ | \$ | \$ | \$ |
| September 1996 | 12,640.68 | 1,710.75 | 5,418.37 | 15,157.50 |
| October 1996 | 9,514.45 | 930.15 | 3,745.20 | 16,256.85 |
| November 1996 | 22,987.55 | 896.00 | 2,960.00 | 24,322.10 |
| December 1996 | 10,866.40 | 2,270.50 | 2,201.15 | 14,176.38 |
| January 1997 | 10,253.75 | 2,108.00 | 1,044.74 | 6,962.46 |
| February 1997 | 3,733.50 | 1,000.00 | 1,408.75 | 4,142.64 |
| March 1997 | 3,015.50 | 910.00 | 1,300.00 | 3,778.65 |
| April 1997 | 614.25 | – | 1,300.00 | 1,347.08 |
| May 1997 | – | – | 1,525.75 | 1,999.75 |
| June 1997 | 14,347.75 | 2,234.50 | 2,074.75 | 3,894.23 |
| July 1997 | 14,919.95 | 2,306.88 | 6,837.78 | 18,808.13 |

Mrs. Feltham testified that many of the hotel receipts were through “Interac” which did not go to the hotel account.

Mrs. Feltham testified that during the period between September 5, and October 15, 1996 she did whatever needed to be done. The bar was open at that time and she would talk to the agents, order the liquor, did all the laundry with only one machine at first. She ensured that supplies were maintained, she took garbage to the dump. She stated that her husband, Mr. Feltham, was not doing any office work because he was doing everything else.

She testified that she returned to the hotel at the end of December, 1996 but was not working. She testified that she came back to work in June, 1997 because the bookkeeper left.

In her submissions, Mrs. Feltham stated:

I worked every day trying to help clean rooms, work in the bar, and do the office work. I got up at night to rent rooms and there were some nights that I hardly got any sleep at all. If the bar needed anything or any help it was usually me that went and helped. I balanced the cash every morning and did the bar sheets. I also checked the inventory sheets. Yes he could of hired somebody else to do this but when I was gone there was never anything done right. It was very hard to find honest people in Golden. And those people that were honest wanted nothing to do with the Golden Arms.

She testified that she completed daily bar sheets which she sent to the accountant, she completed payroll twice a month, she checked inventory, she completed room sheets, she cashed off the “Interac” every day and got change for the bar. She completed the month end general ledger on the computer which she sent to the accountant.

She testified that she did not get paid in June and July because there was not enough money in the hotel account. She spoke to the accountant in this regard and he said that she was not

to get paid. Her husband assured her that she would get paid eventually and she trusted him. She never approached Mr. Carline directly because her husband said he would take care of it.

Mr. Feltham testified that he agreed with the time sheets which Mrs. Feltham had provided to the Director. He testified that he was short handed and needed her help. In cross examination he testified that he had paid the bookkeeper and not his wife because he could put up with his wife. The bookkeeper did have to wait to get paid though.

Mr. Carline testified that the Golden Arms has 48 to 50 rooms. There is a bar and lounge and the restaurant is not open. Under cross examination Mr. Carline did not know who had been trained to do the paperwork at the hotel, he did not know what condition the hotel was in when he hired Mr. Feltham, he did not know how many people were working at the hotel but did say that he did not want anyone working overtime. In reply to Mr. Feltham's questioning him regarding there not being enough money in the hotel account to pay bills and paycheques, Mr. Carline stated that he had given money and when asked "how much", he said "lots". He did not offer anything more specific than that and provided no records to indicate how much money he put into the hotel account. When he was asked about the payment of various bills he replied a number of times that it was "in the books" but never provided any of these records either. Overall, it appeared that Mr. Carline operated his business in a detached manner and left Mr. Feltham in the position of having to bear the risks for Mr. Carline's failing business.

Shirley Dunn who started managing the Golden Arms Motor Hotel two months after Mr. Feltham left, testified that the hotel was in poor condition at that time but had not been at the hotel when the Felthams left. In regard to the time claimed by Diane Feltham she commented that she felt it would only take seven to ten hours per month to do the office work for the hotel. She did agree that she had twenty five years of experience and it might take someone else with no training longer. She also testified that she had five full time staff working at the hotel.

I find that the Appellant has not satisfied his burden of establishing error or a basis for the Tribunal to vary or cancel the Director's Determination with regard to the hours worked by Mrs. Feltham. I found Mrs. Feltham to be credible and she was able to provide specific evidence. She had provided detailed time sheets to the Director. The opinions of Mr. Paskaruk and Ms. Dunn regarding the time required to complete office work do not persuade me that Mrs. Feltham's evidence is unreliable. Mr. Carline's evidence was not helpful in establishing the time required to do the work. I therefore confirm the Director's finding that Mrs. Feltham is owed \$7,128.32 for wages, overtime and vacation pay plus interest from the date of termination.

Set off

Although a claim of Set Off was advanced in the Appellant's written submissions, no submissions were made in this regard during the hearing. I conclude that this claim was abandoned.

After careful consideration, I find that the Director did not err in making the Determination and the appeal should be dismissed.

ORDER

Pursuant to Section. 115 of the *Act*, I order that the Determination dated October 28, 1997 be confirmed.

Fernanda M. R. Martins
Adjudicator
Employment Standards Tribunal