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 -

Jaspal Grewal
("Grewal")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/659

DATE OF DECISION: December 19, 2000

DECISION

OVERVIEW

This is an appeal by Jaspal Grewal ("Grewal"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued August 31, 2000. The Director found that E. & M. Estates Ltd. operating Overlander Motor Inn ("Overlander") contravened Section 63 of the Act in failing to pay Grewal compensation for length of service, and Ordered that Overlander pay $724.12 in wages and interest to the Director on Grewal's behalf.

ISSUE TO BE DECIDED

Whether the Director erred in determining Grewal's entitlement to compensation for length of service.

FACTS

There was no dispute to the facts as set out by the Director's delegate.

Grewal worked for Overlander, a motor inn/restaurant, as a dishwasher/salad preparer from March 1979 to December, 1999 earning $11.85 to $12.05 per hour. During that period of time, she had been laid off on several occasions due to shortage of work. The coffee shop eventually closed, and Grewal was offered, and for a short period of time, accepted, a position as dishwasher in the newly renovated dining room opened at the rate of $7.50 per hour. Grewal worked a total of approximately 160 hours in 1999.

Following an investigation of the Grewal's complaint, the delegate concluded that Grewal was entitled to compensation for length of service.

The delegate found no evidence that Grewal was given any written notice of termination. He also concluded that, when Grewal was offered the position of dishwasher at $7.50 per hour, a reduction from $11.85 per hour she had previously been receiving, the offer constituted a substantial alteration of a condition of employment. He determined that Grewal's employment was terminated under section 66 of the Act.

The delegate found that Grewal was entitled to compensation for length of service for 8 weeks, calculated according to section 63(4) of the Act, and taking into account the fact that, in 1999, Grewal had worked on an intermittent basis. The delegate states that, had he considered that 1998 was the last time Grewal worked "normal or average hours" of work, he would have had to conclude that Grewal's employment had been terminated at the end of that year, and that he would have no jurisdiction to consider it since the complaint would have been filed outside of the time limits provided in section 74. Consequently, the delegate found that when Grewal's hours were changed from full time to part time in 1999, this constituted a change to the terms and conditions of employment. Grewal continued to work part time through 1999, and these hours

formed the "average or normal hours" of work for the purposes of section 63(4). The wage calculation was based on the average hours of work in October and December 1999, which were 23 and 32, respectively.

ARGUMENT

Grewal argues that she did not receive a week pay for each year of service, as required under section 63(5). She contends that the delegate erred in calculating the amount owed, and that she ought to have received $2226.40 (8 weeks X $11.85 X 23).

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Section 63 of the Act sets out an employer's liability for compensation for length of service.

63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases a follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 week's wages.

...

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

Section 63 sets out an employer's obligation on termination. There is no obligation to pay one week's wages for every year of service. There is an obligation to pay 8 week's wages after 8 consecutive years of work. Grewal's employment commenced in 1979. Therefore, her maximum entitlement was 8 weeks wages.

The Director's delegate found that Grewal worked at Overlander for 23 hours during October 1999 and 32 hours in December 1999, or a total of 55 hours. Overlander states that the total hours worked from October - December 1999 was 59. I will accept that number as accurate, as it is against Overlander's interest. Grewal did not work in November. Consequently, the total number of hours Grewal worked in the last 8 weeks during which she worked normal hours is 59. Grewal's total weekly wages during that period were $699.15 (59 X $11.85). That is to be divided by 8 ($87.39) and multiplied by 8 (weeks entitlement), for a total of $699.15. Vacation pay of 6% is $41.94, for a total of $741.10.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated August 31, 2000 be confirmed in the amount of $741.10, plus whatever interest might have accrued since the date of issuance.

C.L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal