

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 -

Intercontinental Business Consultants Inc. operating as Mount Douglas Park
Resort also known as Quality Resort at Mount Douglas Park
("Intercontinental")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 98/714

DATE OF DECISION: January 7, 1999

DECISION

OVERVIEW

This is an appeal by Intercontinental Business Consultants Inc. operating as Mount Douglas Park Resort also known as Quality Resort at Mount Douglas Park (“Intercontinental”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by a delegate of the Director of Employment Standards on November 6, 1998. The Director’s delegate found that Intercontinental owed Carmen Black (“Black”) compensation for length of service, overtime wages and minimum daily pay in the amount of \$1,044.28 (including interest). Intercontinental appealed the Determination on the grounds that Black received proper notice and therefore is not owed compensation for length of service, nor is she owed minimum daily pay as she worked less than 4 hours without approval and on a volunteer basis.

This appeal was decided based on the written submissions of the parties.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are whether Black is entitled to compensation for length of service and minimum daily pay?

FACTS

Black was employed by Intercontinental as a chambermaid from June 23, 1996 to October 6, 1997. Black was given two weeks written notice that her employment would be terminated on September 21, 1997. Black continued to work, however, until October 6, 1997.

The Director’s delegate found that the notice period was without effect because Black worked past September 21, 1997 and, therefore, Black was entitled to compensation for length of service. The Director’s delegate further found that Black was owed overtime wages and minimum daily pay.

Intercontinental does not dispute that overtime pay it owed to Black. It does dispute that Black is entitled to compensation and minimum daily pay. Intercontinental argues that Black was given proper notice. She agreed to work extra days past the notice period and was well aware that this was not a continuation of her employment. Further, on certain days, Black worked less than 4 hours on her own initiative and without approval from the owner. Nevertheless, Intercontinental paid her for these “volunteer” hours. Intercontinental also stated in its appeal that Black was a less than satisfactory employee and she could have been dismissed with cause for insubordination.

ANALYSIS

Under the *Act*, an employee is entitled to be paid compensation for length of service on termination of employment. An employer's liability for compensation is discharged in certain circumstances, including the giving of written notice of termination to the employee.

Section 63(3) of the *Act* states as follows:

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 week's 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)

Section 67 of the *Act* concerns rules about notice of termination. Section 67(1) provides as follows:

A notice given to an employee under this Part has no effect if

- (a) the notice period coincides with a period during which the employee is on annual vacation, leave, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons or
- (b) the employment continues after the notice period ends.**

(emphasis added)

Black received two weeks written notice of termination of employment. She continued to work, however, after the notice period ended on September 21, 1997. There was no prior written extension of the notice period. By reason of Section 67(1)(b) of the *Act*, the written notice given by Intercontinental ceased to have any effect when Black's employment continued past September 21, 1997. Even if Black agreed to work beyond September 21, 1997 and was aware this was not a continuation of her employment, such an agreement is null and void under the *Act*. Section 4 of the *Act* provides that the requirements of the *Act*

are minimum requirements and an agreement to waive any of them (including Section 67) is of no effect. Although, Intercontinental argues that it could have dismissed Black for cause, it did not do so, and it provided no evidence to support a finding that Black was dismissed for just cause. Specifically, Intercontinental provided no evidence that Black was warned about her alleged unsatisfactory performance/misconduct and advised her employment was in jeopardy, nor did it provide any evidence that Black engaged in a specific act during her employment which was of such a consequence as to repudiate the employment relationship. Therefore, I agree with the Director's delegate that Intercontinental owes Black two week wages as compensation for length of service.

I further agree with the Director's delegate that Black is owed minimum daily pay. Section 34 of the *Act* states that where an employee starts work she/he is entitled to a minimum of 4 hours pay unless the work is suspended for a reason completely beyond the control of the employer. That is, an employer is relieved from the requirement to pay for minimum daily hours only if the work is suspended for a reason that is completely beyond the employer's control. The onus of proving the reasons for the suspension of work lies with the employer.

I am not satisfied that Intercontinental has discharged its onus on the issue of daily minimum pay. Intercontinental allowed Black to work less than 4 hours on three days. It was within Intercontinental's control not to allow her to work less than 4 hours on these days. The circumstances which resulted in Black working less than 4 hours on the three days were clearly within Intercontinental's control. I also find that Black was not a volunteer on these days. Section 1 of the *Act* defines an employee, in part, as "...a person an employer allows, directly or indirectly, to perform work normally performed by an employee". In that same section an employer is defined as including "a person...who has or had control or direction of an employee". Finally, work is defined as "labour or services an employee performs for an employer whether in the employee's residence or elsewhere". Applying the foregoing interrelated definitions to this case, I am satisfied that Black was an employee at all times during her employment at Intercontinental. There is no evidence before me to suggest that Black performed anything other than her regular job on the three days in question and she received wages for the hours she did work. Intercontinental has failed to show that Black's services on the three days were not rendered in the context of an employment relationship. For these reasons, I find that Intercontinental is required to pay the minimum daily hours as calculated by the Director's delegate.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination be confirmed in the amount of \$1,044.28 plus whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance of the Determination.

Norma Edelman
Registrar
Employment Standards Tribunal

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