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 -

Empire International Investment Corporation
("Empire")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Geoffrey Crampton
FILE NO.:	98/680
DATE OF HEARING:	January 29, 1999
DATE OF DECISION:	February 19, 1999

DECISION

APPEARANCES

Terence Yu	on behalf of Empire
Harold Bustard	on behalf of himself and Laila Bustard
Pat Cook	on behalf of the Director

OVERVIEW

This is an appeal by Empire International Investment Corporation ("Empire"), under Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination which was issued on October 7, 1998 by a delegate of the Director of Employment Standards (the "Director"). The Determination requires Empire to pay $4,098.00 to Harold and Laila Bustard, who were employed as resident caretakers, on account of a finding that they were entitled to compensation for length of service under Section 63 of the *Act*. Vacation pay and accrued interest were included in the amount which the Director determined to be owed to Mr. & Mrs. Bustard.

Empire offers several grounds for its appeal:

- Mr. Bustard's actions constituted a fundamental breach of the employment contract thereby entitling Empire to dismiss him without notice or compensation for length of service;
- Mr. Bustard was incompetent in the performance of his duties;
- Mr. Bustard was dishonest; and
- the calculation of entitlement to compensation under Section 63 of the *Act* is incorrect.

Empire's appeal makes no mention of Mrs. Bustard's work performance.

The appeal proceeded by way of an oral hearing at the Tribunal's offices on January 29, 1999. Evidence was given under oath or affirmation.

ISSUES TO BE DECIDED

1. Did the Director err in determining that Harold and Laila Bustard are entitled to compensation for length of service under Section 63 of the *Act*?
2. Is Empire entitled to rely on facts, about which it was unaware at the time it dismissed Mr. Bustard, to support its appeal against the Determination?

FACTS

Harold and Laila Bustard were employed by Empire as "caretakers/resident managers" at Park Regency Apartment from September 1, 1993 to April 30, 1998 under the terms and conditions of a written employment contract dated August 25, 1993. There is no dispute that they met the definition of "resident caretaker" contained in Section 1 of the *Employment Standards Regulation* (BC Reg 396/95). Mr. & Mrs. Bustard began working as resident caretakers at Park Regency Apartments in September, 1988. When Empire purchased the Park Regency from Asgar Holdings Ltd. on September 1, 1993 it continued to employ Mr. & Mrs. Bustard as resident caretakers at a "combined remuneration" of $1,275/month (net of rent). Empire provided Mr. & Mrs. Bustard with a detailed job description which sets out the scope and purpose of the resident manager position as well as a comprehensive list of duties and responsibilities. Mr. Damji reviewed the employment contract and the job description with Mr. & Mrs. Bustard before they signed the documents.

Item #6 in the job description states:

> Landscaping
> The manager is responsible for landscaping and ensuring daily watering of the grass, flowers and shrubs.

The following statement appeared on the final page of the job description:

> Operations
>
> ALL PURCHASES AND EXTRA CONTRACTORS ARE TO BE ORDERED ONLY UPON PRIOR APPROVAL FROM HEAD OFFICE. PURCHASE ORDERS WILL BE PROVIDED AND ARE TO BE USED ONLY AFTER AUTHORIZATION IS GRANTED.
> ...

Mr. & Mrs. Bustard's employment was terminated, without notice, on April 30, 1998 by way of a letter from Fateh Damji, Empire's Vice-President, Finance & Administration. The letter, which was hand delivered at 9:30 p.m. by Larry Alger (Empire's Accountant) stated, in part:

> This is to advise you both that your employment as Resident Managers for Park Regency Apartments is herewith terminated immediately.
>
> This is your formal notification of 'Termination With Cause' as detailed below:
>
> - Due to the serious incident as per our letter dated April 30th, 1998 which is cause for termination.
> - You neglected to advise the incident to ICBC and the RCMP.

- Several people over the recent past have informed us that they made various appointments to meet with you and you failed to keep that appointments.
- Residents have informed the Head Office of requests for service to you that have not been addressed resulting in our serious increase in vacancy in the last three months.

At the same, Mr. Alger delivered a second letter from Mr. Damji (also dated April 30, 1998) which requested that Mr. Bustard provide, in writing, full details of the incident involving Mr. Bustard and Ms. Poole, one of the tenants at Park Regency Apartments. Mr. Damji's letter noted, in part:

> It was your duty and responsibility to have reported this serious matter to me immediately. I regret that you did not see fit to do so. Furthermore, you did not see fit to report this matter to the RCMP nor to ICBC.
>
> I find your actions incomprehensible and negligent ....

In the Determination, the Director set out the following analysis to support her conclusion that Empire had not established that it has just cause to dismiss Mr. & Mrs. Bustard without notice or compensation for length of service.

> **Analysis**
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> In the course of this investigation, the Employer was requested to provide all documentation / information pertaining to the employment and termination of the Complainants. The only information provided were the two letters both dated April 30, 1998, their eviction notice and the letter from the replacement employees. Since there were no other letters forwarded, the conclusion must be drawn that there was no written notice of termination.
>
> The other issue that must be addressed is whether there was just cause to terminate the Complainants without compensation for length of service. The onus is on the Employer to establish that cause exists. The Employer has not established this.
>
> The Employer gave the Complainant four reasons for termination. The first and second reasons for termination relate to a motor vehicle accident. The accident occurred on April 24, 1998. ICBC was involved and conducted an investigation. The investigator informed me that the claim was settled and their was no evidence of gross negligence; that it was a case of both parties being at the wrong place at the wrong time. The investigator stated the Complainant did not run over the tenant but rather there was a collision. It did not occur in the parking garage but rather at the entrance to the street.

> There was no evidence of misconduct, or incompetence but was accidental.(sic) There was no malice intended. Having an accident is not cause for dismissal. Even if at fault in the accident, there is nothing to prevent the Complainants being able to work out a period of notice.
>
> With respect to the third and fourth reasons for termination, these both relate to work performance. Neither of these issues can be construed as gross incompetence or gross misconduct that would warrant immediate dismissal. Neither problem has been addressed with the Complainants. As a result, they were unaware their position was in jeopardy.
>
> An employer who relies on just cause for terminating an employee has an obligation to advise an employee of deficiencies in their job performance. They must set out reasonable standards to be met and communicate them to the employee. They must also advise the employee of the consequences of not meeting those standards within a given time frame. None of this was done by this Employer.
>
> With respect to the letter from the replacement Resident Managers, there appears to be a six week time gap between the Complainants' termination and when they started work. Thus their letter has little relevance in this matter. As well, there is no evidence to support that any of the problems addressed in their letter were ever communicated to the Complainants as being problems prior to their dismissal.
>
> **Conclusion**
>
> I have determined that the Employer did not have just cause to terminate Harold and Laila Bustard and they are entitled to compensation for their length of service.

The Director relied both on Section 63 and Section 97 of the *Act* to find that Mr. & Mrs. Bustard are entitled to receive the equivalent of 8 weeks' wages as compensation for length of service.

Mr. Damji swore an affidavit on November 17, 1998 that, at the time he terminated Mr. & Mrs. Bustard's employment, he was not aware that Mr. Bustard had authorized non-residents to park on Park Regency property "for a fee which the Employer is unable to account for ...". The affidavit also contains Mr. Damji's opinion "(t)hat blatant breach of parking policy and the failure to account for the monies charged, if know at the time of dismissal, would have been further grounds to justify the dismissal of (Mr. & Mrs. Bustard) for just cause."

In their written reply submission (dated November 12, 1998), Mr. & Mrs. Bustard responded to the various grounds of Empire's appeal. Their response included the following statement:

> To help us do a better job in and around Park Regency, we hired the services of Cedar Gardenscape to look after the lawns, shrubs etc. so we could do a better job inside the Park Regency. The Cedar Gardenscape people were also paid each month, beginning in 1995 to April 30, 1998. We, Harold and Laila, paid the sum of $235.40 out of our own money.

Mr. Bustard entered into four separate agreements with Cedar Gardenscape for the periods March, 1 to November, 30 in each of 1995, 1996, 1997, and 1998. Each of the agreements were between "Park Regency Apts." and Cedar Gardenscape, were signed by Mr. Bustard, and contained a clause which stated: "The undersigned represents that they are the Owner's Agent of Strata Plan __."

Mr. Damji testified at the hearing that he had become aware of the contract with Cedar Gardenscape only when the Bustard's submission of November 12, 1998 was disclosed to Empire through the Tribunal's normal process of disclosure.

Empire seeks to rely on these unauthorized contracts with Cedar Gardenscape as another ground for terminating the Bustard's employment. It views the entering into the contacts as a fundamental breach of the employment contract between Empire and Mr. & Mrs. Bustard.

ANALYSIS

'After-the-fact' justification for terminating employment

I begin my analysis by first addressing the question of whether or not Empire may rely on facts about which it was unaware at the time that it terminated Mr. Bustard's employment on April 30, 1998.

It is a well-established legal principle that an employer, who is not aware of an employee's conduct at the time of terminating his or her employment, is not prevented from relying on that conduct in defense of an action for wrongful dismissal. See for example, *Rupert-Brown v. Clearly Canadian Beverage Corp*. [1996] B.C.J. No. 1679, Vancouver Registry No. C9321227 (B.C.S.C.); *Durand v. Quaker Oats Company of Canada Limited* [1990] 45 B.C.L.R. (2d) 354; and also *Carr v. Fama Holdings Ltd.* [1989] 40 B.C.L.R. (2d) 125. In short, an employer may justify, at a later date, dismissing an employee without notice or compensation by relying on that employee's misconduct even where it was unknown to the employer at the time of dismissal: *Lake Ontario Portland Cement Co. v. Groner* [1961] 28 D.L.R. (2d) 589 (S.C.C.).

There is no dispute in the facts of this appeal that Mr. Bustard entered into four separate contracts with Cedar Gardenscape while he was employed by Empire and that he did so without Empire's knowledge or approval. Empire became aware of the contracts' existence in November, 1998 only as a result of this appeal process. Each of the four contracts purport to bind "Park Regency" or "Park Regency Apts." as a party and each is

signed by Harold Bustard, not merely as an employee of Empire, but as an agent with apparent authority to act on behalf of Empire. However, there is also no dispute that the employment contract which Mr. & Mrs. Bustard entered into with Empire became effective on September 1, 1993. Mr. & Mrs. Bustard's duties and responsibilities were incorporated into that contract of employment by way of the "job description" which was attached to it. As noted above, the "job description" contained an express provision which made Mr. & Mrs. Bustard "...responsible for landscaping and [to] ensure daily watering of the grass, flowers and shrubs." It also contained an express provision which required "prior approval from head office" for all purchases and "extra contractors."

Mr. Bustard, by entering into the agreements with Cedar Gardenscape, breached at least two provisions of his employment contract. I accept fully Mr. Bustard's evidence that he believed that his contract of employment made him responsible for landscape maintenance but that it did not require him to perform those duties personally. That is, Mr. Bustard believed that it was within his discretion to employ another person to perform the landscape maintenance tasks which were set out in the resident caretaker job description despite the provision which required "prior approval from head office" to engage contractors. As Mr. Bustard testified "...it was worth (his) money to get the lawn-care work done by a contractor so (he) could do other jobs...". in his opinion, the building looked a lot better, he could concentrate on other duties and the combined effect "...helped (him) to rent vacant suites."

While I acknowledge that Mr. Bustard's motives were honourable, I cannot ignore the clear terms of the employment contract which required Mr. and Mrs. Bustard to perform specific duties, including landscape maintenance, and which prohibited entering into contracts without prior approval from his employer. The B.C. Court of Appeal described the current state of the law as being "...that if an employee has disregarded essential conditions of employment, the employer is entitle to terminate the employment for just cause": *Stein v. British Columbia (Housing Management Commission)* [1992] 65 B.C.L.R. (2D) 181. The Court also decided, at page 185:

> ...an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.
>
> It is not an answer for the employee to say: "I know you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it."

When I apply the facts of this appeal to the legal principles which I have summarized above, I am led to conclude that Empire had just cause to terminate Mr. Bustard's

employment because of his fundamental breach of an essential condition of his employment. For that reason, Mr. Bustard is not entitled to receive compensation for length of service under Section 63 of the *Act* and the Determination must be varied accordingly.

However, that is not the end of this matter. As noted above, both Harold and Laila Bustard were employed by Empire as "resident caretakers" at a "combined remuneration" of $1,275 per month (net of rent). Nothing in Empire's appeal speaks specifically to there being just cause to terminate Mrs. Bustard's employment. All of the evidence given at the hearing dealt with Mr. Bustard's work performance and the various grounds on which Empire submitted that it had just cause to terminate Mr. Bustard's employment. The Director determined that Empire "...did not have just cause to terminate Harold and Laila Bustard" and calculated the amount of compensation owing on that basis. I find that Empire has not established through this appeal that it had just cause to terminate Mrs. Laila Bustard's employment. Accordingly, she is entitled to receive compensation for length of service under Section 63 of the *Act.*

ORDER

I order, under Section 115 of the *Act*, that the Determination be varied as set out above and be referred back to the Director to calculate Mrs. Bustard's entitlement to compensation under the *Act.*

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/lb