

An appeal

- by -

Edwin Arnold
("Arnold")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Cindy J. Lombard

FILE No.: 2002/596

DATE OF HEARING: March 4, 2003

DATE OF DECISION: April 1, 2003

DECISION

APPEARANCES:

Edwin Arnold appeared together with three witnesses:

Crystal Arnold, his daughter
Charles Thompson
Jim Smale

Joan Robin Pattie appeared together with two witnesses:

Brian Pattie, her husband
Tawnya Pattie, her daughter

OVERVIEW

This is an appeal pursuant to section 112 of the *Employment Standards Act* (hereinafter referred to as the “*Act*”) by Edwin Arnold (hereinafter referred to as “Arnold”) of a Determination which was issued on November 7, 2002, by a Delegate of the Director of Employment Standards (the “Director”).

The Determination found that the Respondent employer, Joan Robin Pattie (hereinafter referred to as “Mrs. Pattie”) did not owe Arnold any outstanding wages for work performed during the period June 1, 1999 and June 30, 2000, annual vacation pay nor compensation for length of service.

ISSUES TO BE DECIDED

1. Does Mrs. Pattie owe Arnold wages for the period June 1, 1999 to June 30, 2000;
2. Does Mrs. Pattie owe Arnold compensation in lieu of notice pursuant to section 63 of the *Act* or is she exempt from liability on the grounds that Arnold quit his employment?

FACTS

Mrs. Pattie owned an apartment complex known as “Caprice Manor” and located in Armstrong, B.C. and as well together with her husband, Brian Pattie (hereinafter referred to as “Mr. Pattie”) condominiums at the Big White Ski Resort at Kelowna, B.C. and an A & W Restaurant also located in Salmon Arm.

Arnold was employed between August, 1998 and August 1, 2001 as a residential caretaker at Caprice Manor and he as well did work at Big White and occasionally at the A&W.

According to Arnold:

Arnold says that he was hired by Mr. and Mrs. Pattie to be the residential caretaker for Caprice Manor at a salary of \$2,000.00 per month commencing in August, 1998. His duties in consideration for that wage included the duties of manager/caretaker at Caprice Manor.

Arnold was paid as an independent contractor although he now asserts that he was in fact an employee as it appears he ran into difficulty with Revenue Canada who determined that he was not an independent contractor for the purposes of taxation.

Arnold says that he is owed the following wages:

- a) \$125.00 per month for the period June 1, 1999 until June 30, 2000.

Arnold says that he was in fact paid \$1,875.00 per month when it should have been \$2,000.00. Arnold admits that at the time he was paid these wages he did not complain and in fact made no complaint to the Patties until the complaint that initiated these proceedings. When asked why he did not do so earlier he replied that he was too busy to get around to raising it.

- b) wages for work done at Big White during the period August and December, 2000

Arnold says that his monthly wage did not include work he performed on behalf of the Patties during this period. He asserts that he is owed \$5.00 per hour for all hours worked as he was to be paid \$15.00 per hour not \$10.00 per hour.

At Big White Arnold did work on various buildings as follows:

- a) work on behalf of the Chateau on the Ridge strata council for which he was paid by the strata council;
- b) work on condominiums owned by the Patties
- c) a condominium owned by a friend of the Patties;

Arnold furthermore says that he was let go from his employment without reasonable notice or compensation in lieu of notice. In June, 2000 Arnold suffered an eye injury and was unable to resume work prior to his employment ending on August 1, 2001. Arnold says that his wife did some of the work and was paid \$600.00 per month. Arnold was receiving Worker's Compensation Benefits.

Arnold says that he became aware that Mr. Pattie was trying to sell the apartment building. Arnold sent a registered letter to Mr. Pattie in May asking whether he intended to honor their employment contract which was to run until June, 2003 (see appendix B-1 to the Determination) in the event of the sale of the building and to disclose the contract to the purchaser. Arnold says that he did not hear from Mr. Pattie.

Arnold says that he had also asked Mr. Pattie for the name of the building's insurer as the accident had occurred on that property and that he had never received a reply.

At the same time, Arnold says that his health was not getting better. He was having difficulty walking without falling over and he was bothered with noise. Arnold and his wife therefore made the decision that they should move to a quieter place with easier access for him. Arnold gave notice to the Patties on August 1, 2001, that he was moving out and wanted to continue his employment but living off site.

Arnold feels that in the end he was ignored and pushed out because it suited the Pattie's interest because the building had been sold and Mr. Pattie did not want to disclose the employment contract to the new owner or have a lawsuit going on over Arnold's injury at the time of the sale.

Crystal Arnold

Ms. Arnold, who is Arnold's daughter, worked as an assistant manager at the Caprice while Arnold was working at Big White and was paid by Arnold for that work. It was her understanding that her father would be paid \$15.00 per hour while working at Big White but had no direct knowledge of the agreement between the Patties and her father.

According to the Patties

The majority of the evidence concerning the issues here was given by Mr. Pattie:

With respect to the issues raised by Arnold:

- a) \$125.00 per month for the period June 1, 1999, until June 30, 2000

Mr. Pattie says that the wage figure was reduced by \$125.00 per month, that is from \$2,000.00 to \$1,875.00 by agreement because from June, 1998, until June, 1999, Arnold had been responsible for his own remittances on the basis that he was being paid as an independent contractor; while between June, 1999, and September, 2000, he was paid as an employee with the Patties responsible for the remittances. The Patties requested a reduction in Arnold's salary to reflect their obligation to remit and Arnold agreed to it.

- b) Wages for work performed while at Big White

With respect to work done for the strata council, Arnold was hired by and paid by the strata council in full for work performed.

In the case of work carried out by Arnold on condominiums owned by the Pattie's Arnold's usual monthly wage covered that work. In other words, he was not working at the apartment building doing the work there, instead he was working for his wage at Big White.

Arnold was paid for the work he did for a friend of the Patties at unit #306. The friend paid Arnold \$15.00 per hour and paid him in full.

With respect to the sale of the Caprice Manor, Mr. Pattie says that he did talk with Arnold on one occasion and Arnold replied, "Do what you have to do." Arnold told him that he and his wife were going to leave the building as Arnold could not tolerate the noise and interruptions given his injury. Mr. Pattie says that he inquired as to whether the Arnold's son who lived in the building might be interested in doing the building management. That arrangement did not work out. Mr. Pattie says that he made it clear that he did not want an offsite manager.

ANALYSIS

1. Does Mrs. Pattie owe Arnold wages for the period June 1, 1999, to June 30, 2000?

a) \$125.00 per month

We accept Mr. Pattie's evidence for the agreement that was once the Patties were responsible for the remittances that Arnold agreed to reduce his gross wage to \$1,875.00 per month. Arnold did not at any time prior to submitting this complaint indicate to the Patties that he was not receiving the correct amount. Therefore, the Determination was correct on this issue.

b) Big White

We furthermore find that the Determination was correct in finding that all wages due to Arnold for work performed at Big White were paid to him. Arnold made no complaint at the time he was paid, that is in 1999, and has provided no evidence that would bring us to the conclusion on a balance of probabilities that the decision of the Director was wrong. Arnold was living at Big White and not performing his duties at the Caprice Manor and continued to be paid on a monthly basis by the Patties for that work. He did earn extra income from the work he did for the strata council and for the work he did for the strata council and for the friend of the Patties who owned #306.

2. Does Mrs. Pattie owe Arnold compensation in lieu of notice pursuant to Section 63 of the Act or is she exempt from liability on the grounds that Arnold quit his employment?

Section 63 provides that if an employer terminates the service of the employee written notice of a specified period depending on the length of service must be given or wages in lieu of that period of notice. The employer is discharged from any liability or compensation for length of service if the employee terminates the employment or that the employer had just cause for terminating the employment.

We have concluded that the Determination was correct in holding that the employer had just cause to dismiss Arnold on the basis that he refused to reside at Caprice Manor where he was employed as a residential caretaker.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal