



An appeal

- by -

W. Tobien Enterprises Ltd.
("Tobien Ltd.")

- 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.: 2000/799

DATE OF HEARING: February 23, 2001

DATE OF DECISION: March 12, 2001

DECISION

APPEARANCES:

For the Appellant: Wilma Tobien

For the Respondents: Larry Depper

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by W. Tobien Enterprises Ltd. (“Tobien Ltd.”) of a Determination which was issued on November 3, 2000 (the “Determination”) by a Delegate of the Director of Employment Standards (the “Director”) finding that Tobien Ltd. had dismissed the Respondents, Larry Depper and Frances Depper (the “Deppers”) without reasonable notice or compensation in lieu thereof as required by Section 63 of the *Act*. The Delegate of the Director determined that the Deppers were due the sum of \$266.98 each being:

1)	one week wages in lieu of notice	\$207.69
2)	wages for June 1, 2000	\$41.59
	vacation pay	\$9.97
	interest	\$7.78
		<u>\$266.98</u>

ISSUES TO BE DECIDED

Is the employer, Tobien Ltd., liable to pay compensation in lieu of reasonable notice or is the employer excused from liability pursuant to Section 63(3)(c) on the grounds that the Deppers quit their employment and therefore are not due reasonable notice or compensation in lieu of notice;

Is the employer, Tobien Ltd., liable to pay compensation in lieu of reasonable notice or is the employer excused from liability pursuant to Section 63(3)(c) on the grounds that the employer had just cause for terminating the employment of the Deppers

Were wages owing for work performed on June 1, 2000.

FACTS AND ANALYSIS

Larry and Frances Depper were hired by Tobien Ltd. to manage a motel it owns located in Osoyoos, British Columbia, the Riviera Motel. They commenced their employment on

September 22, 1999, at a rate of \$900.00 each per month. That employment ended on June 1, 2000.

A. According to Tobien Ltd.

Wilma Tobien on behalf of Tobien Ltd. says that:

- i) The Deppers quit.
- ii) Tobien Ltd. had just cause to terminate their employment because they had stolen cash from the till.
- iii) The Deppers did not work on June 1, 2000, and therefore they are not due wages for that day.

Wilma Tobien says that on June 1, 2000, she left her home in Salmon Arm, British Columbia, at 4:30 a.m., and arrived at the Riviera Motel in Osoyoos at 8:00 a.m. Ms. Tobien says that she traveled there to help clean up the motel in preparation for the summer season. She says that shortly after arriving she found new wash cloths, towels and linens thrown out.

Ms. Tobien says that she then had a conversation with Mrs. Depper in which she asked her about the following monies, which Tobien says was missing:

- 1) In February, 2000, the Deppers told her that 10 kitchen units were rented by the month. She says that only two showed on the month end report.
- 2) Chi Chi Pascal paid \$630.00 which was kept by the Deppers.
- 3) Amy Brown paid \$400.00 for the month of May, 2000, and this was kept by the Deppers.
- 4) Mr. and Mrs. Pederson paid \$400.00 to the end of April, 2000, of which half (i.e. \$200.00) was kept by the Deppers.
- 5) A friend of the Deppers put a cheque in the till and removed cash.

Later she saw Mr. Depper sitting in front of a mess and smoking who Ms. Tobien says got up and yelled at her with his fist up ready to hit her. Ms. Tobien says that she said "if you hit me we will have the police here faster than the fireware." Mr. Depper then lowered his voice and said to his wife, "Let's pack and leave." The Deppers then spent all day packing and moving.

Ms. Tobien denies that she fired the Deppers rather she says that they quit without notice. Ms. Tobien says that she left the motel at 6:00 p.m. at which time the Deppers were still there packing and moving.

Ms. Tobien says that upon returning to the Riviera Motel the following day, i.e. June 3, 2000, she discovered that:

- 1) \$696.00 was missing from the till and
- 2) Money was missing from the pop machine

B. According to the Deppers

Larry Depper says that he and his wife:

- i) Did not quit rather they were fired.
- ii) Tobien Ltd. did not have just cause to dismiss them. At no time did they steal cash as alleged by Ms. Tobien.
- iii) They did work most of the day on June 1st.

Mr. Depper says that Ms. Tobien did not arrive at the Riviera Motel on June 1st until approximately 10:30 a.m. At that time he says that he was busy in room 15 taking out an air conditioner. Mr. Depper says that at noon he went downstairs to the office and had lunch with his wife. After lunch he returned to the upstairs part of the motel and shortly after heard Ms. Tobien yelling and looked down to see her waving towels and yelling something about poor cleaning habits. Mr. Depper asked her whether she was just trying to get rid of them and Ms. Tobien replied: "The sooner you're packed and out of her the better."

Mr. Depper says that he finished what he was doing and went down to the office where he found Ms. Tobien talking to his wife telling her that Mr. Depper had been yelling at her. Mr. Depper says that he asked Ms. Tobien whether she had told his wife what she had said. Mr. Depper says that he told his wife that Ms. Tobien said that she wanted them to pack up and go.

Mrs. Depper said that she was going to finish the bookwork and Mr. Depper says that he packed and started moving while Mrs. Depper watched.

At 9:30 p.m. Mr. Depper says that he left the keys on the desk. Mr. Depper says that Mrs. Depper had turned all cash over to Ms. Tobien and she signed for it. A copy of a receipt was produced which Mr. Depper says was signed by Ms. Tobien. Ms. Tobien denies that it is her signature. The receipt is marked as Exhibit #1.

The onus is on the employer to show that the Determination was wrong.

Section 63 of the *Act* states that an employer is liable to pay an employee compensation for length of service when discharged unless the employee:

“...(c) terminates the employment, retires from employment or is dismissed for just cause.”

Furthermore, the onus is on Tobien Ltd. to show that the Deppers did quit or that there was just cause for their dismissal.

I have concluded based on the evidence that Tobien Ltd. has not discharged its onus of showing that the Deppers quit their employment or that there was cause for their dismissal.

I accept Mr. Depper’s evidence that Ms. Tobien did say “the sooner you pack your bags and leave the better.” Although Ms. Tobien remained at the motel for some time while the Deppers were packing, she made no effort to dissuade them.

Nor is there evidence of reasonable cause for the dismissal of the Deppers. Ms. Tobien raises allegations of money missing but there is no evidence of any truth to these allegations.

Furthermore, I accept Mr. Depper’s evidence as credible that he and his wife did work until sometime after their lunch break and therefore the Director was correct in his finding that they were due wages for June 1st, 2000.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter dated November 3, 2000, be confirmed.

CINDY J. LOMBARD

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal