Employment Standards TRIBUNAL

An appeal

- by -

Century Royale Apts. Ltd and Empire-International Investments Corporation and Country Club Estates Ltd. and Park Regency Apartments Ltd., operating as The Empire Group

(the “employer” or the “appellant”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2000/797

DATE OF HEARING: March 27, 2001

DATE OF DECISION: April 26, 2001

DECISION

APPEARANCES:

Terence W.T. Yu, Barrister & Solicitor	for the appellant
Dale Codd	on his own behalf (by teleconference)
Lois Codd	on her own behalf (by teleconference)
Kael Campbell, Employment. Standards Officer	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Century Royale Apts. Ltd., Empire-International Investments Corporation, Country Club Estates Ltd., and Park Regency Apartments Ltd. operating as the "Empire Group" (the "employer" or the "appellant") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 30th, 2000 under file number 004-465 (the "Determination").

This appeal was heard at the Tribunal's offices in Vancouver on March 27th, 2001 at which time I heard the testimony of Mr. Fateh Damji, vice-president of the appellant companies, on behalf of the employer, and Dale and Lois Codd, the respondent employees. Mr. Kael Campbell appeared at the appeal hearing and made submissions on behalf of the Director.

THE DETERMINATION

The Director's delegate declared the appellant companies to be "associated corporations" as defined by section 95 of the *Act.* Accordingly, the various companies were treated "as one person for the purposes of the *Act*" and were thus "jointly and separately [severally] liable for payment of the amount stated in [the] Determination". The delegate determined that the appellant owed its former employees, Dale and Lois Codd (the "Codds"), the sum of $1,417.86 ($708.93 each) on account of unpaid compensation for length of service, recovery of unauthorized wage deductions and interest. In addition, by way of the Determination the Director levied a $0 penalty against the appellant pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

ISSUES ON APPEAL

The correctness of the section 95 declaration is not in dispute before me. Further, although the appellant's appeal documents raise a number of issues--including actual or apparent bias on the part of the delegate and a failure to comply with section 77 of the *Act*--at the outset of the

hearing, Mr. Yu, on behalf of the appellant, limited his attack on the Determination to the following grounds:

> • Dale and Lois Codd resigned their employment and, accordingly, were not entitled to any compensation for length of service [see section 63(3)(c) of the *Act*]; and
>
> • the delegate ought to have determined that the wage deductions in question ($151.60 for each employee) were permitted under section 22 of the *Act.*

I propose to address each issue in turn.

FACTS AND ANALYSIS

Compensation for Length of Service

The delegate awarded both Dale and Lois Codd one week's wages as compensation for length of service. In light of their service, their entitlement was two weeks' wages but only one week was awarded to each of them after giving effect to the employer's one week's written notice [see section 63(3)(b)].

As noted above, the appellant takes the position that Dale and Lois Codd, who were employed as resident caretakers at an apartment complex owned by one of the appellant companies, were not terminated but, rather, voluntarily resigned their employment. For their part, Dale and Lois Codd vigorously deny that latter assertion.

The only evidence from the employer on this point consists of the hearsay statement of Mr. Damji--he was apparently told by Mr. Dale Blackmore (a principal of the appellant companies) that Dale Codd indicating that he was "quitting" during an apparently "heated" telephone conversation that occurred on December 24th, 1999. This latter conversation was followed by a letter to the Codds dated December 31st, 1999, under the signature of Mr. Damji, in which he states, in part:

> "This is further to Mr. Blackmore's discussion with Dale Codd on Friday, Dec. 24/99 during which you both agreed that you and your wife's employment as resident managers for CRA should and would be *terminated.* You requested a formal letter confirming the aforementioned. This is the letter you requested.
>
> Please be advised that *termination* will be effective Jan. 7/00. As you know, you are required to vacate the suite allocated to you at CRA upon the *termination of your employment.* To assist and facilitate you in your move, *we will no longer require your services as resident managers after today.* You will receive your regular salary and holiday entitlement up to and including Jan. 7/00."
>
> (my *italics*)

Quite apart from the fact that there is no proper evidence of the Codds having quit their employment--I do not consider the hearsay evidence of Mr. Damji to be probative--the above letter does not, in my view, purport to corroborate the employer's present position. Indeed, if anything, it corroborates the *Codds'* position that they were fired. In a "quit" situation, the employer rarely, if ever, fixes the employee's last day of work. If the Codds quit on December 24th, 1999, why was the employer willing to pay the Codds until January 7th, 2000? In a quit situation the employer does not provide a letter confirming *termination;* rather, if anything, one would expect the employer to request that the employee confirm their resignation. Finally, on January 7th, 2000 the employer issued records of employment to both Dale and Lois Codd, however, these documents do not indicate that the Codds resigned (Code E on the form) but rather that the ROEs were issued for some "Other" reason (Code K).

In my view, the evidence before me overwhelmingly supports the delegate's conclusion that the Codds did not resign their employment on December 24th, 1999 but were, in fact, terminated on or about December 31st, 1999, effective January 7th, 2000.

Wage Deductions

The final paycheques issued to both Dale and Lois Codd itemized two wage deductions, namely, "rent" ($27.10) and "moveout" ($124.50). I understand the latter deduction represents costs incurred to clean the Codds' suite. This latter deduction was clearly unlawful. The Codds say that their suite was left is a reasonably clean condition. That may or may not have been the case. However, if the appellant was of the view that it had a valid claim for cleaning costs, it ought to have filed a claim under the provisions of the *Residential Tenancy Act.* The appellant was not entitled to, in fact, effect a preemptive self-help remedy by deducting its claim for cleaning costs from the Codds' final paycheque. I might add, since this argument was raised before me, the fact that the appellant did not hold a security deposit from the Codds did not, in any fashion, fetter its ability to file a monetary claim for cleaning costs under the *Residential Tenancy Act.*

As for the rent deduction, at the outset of their employment the Codds signed an agreement setting out the terms and conditions of their engagement by the "Empire Group" as resident managers for the Century Royale apartment complex situated in Richmond, B.C. Pursuant to this latter agreement, the Codds were to receive an annual salary of $55,000 (for the two of them) and also agreed to pay monthly rent in the amount of $840 for their suite in the Century Royale complex. The agreement states that their rent shall "be deducted at the end of the month for said accommodation" and continues: "Subject to the applicable Residential Tenancy Act, part and section, the Resident Manager herein agrees to vacate the above noted premises upon termination of the Agreement".

However, notwithstanding the foregoing agreement, the evidence before me shows that the Codds were *not* paid a $55,000 annual salary nor, unlike the situation in *Sophie Investments Inc.* (B.C.E.S.T. Decision No. 527/97), was their monthly rent *ever* deducted from their pay. In fact, the Codds were paid wages--and received wage statements and T-4s confirming such wages--in a lesser "net amount" reflecting the $840 montly rent that was supposed to be paid by them. In other words, in exchange for a commensurately lower salary, the Codds, in effect, received "free

rent" as a perquisite. I should note that the Codds' wage statements, again, unlike the situation in *Sophie*, indicate wages being paid at the lower "net of rent" amount but do not indicate that any rent was ever deducted from their pay. Structuring the Codds' compensation in this fashion no doubt improved their tax position since it would appear that the value of the rent was never recorded or reported (by either the employer or the Codds) as a taxable benefit.

In light of the above circumstances, I consider that the agreement to pay the higher wage and deduct therefrom the monthly rent was superseded by a subsequent agreement whereby the Codds accepted a lower salary in exchange for "free rent"--this latter agreement constituted in law, in my view, a novation. Accordingly, there was no "written assignment" [see section 22(1)] in effect in January 2000 when the rent deduction was made.

Even if I am incorrect with respect to there being no "written assignment" in place in January 2000, given that the Codds dispute--and, it appears to me, with some justification--their liability for the 2 days' rent deducted from their pay, I do not consider, despite counsel's able argument, the rent claimed to be a "credit obligation" within section 22(4). In light of the seemingly *bona fide* dispute with respect to the employer's right to claim the rent in question, it seems to me that the employer had in January 2000, at best, a *claim* for rent that had not (and still today has not) been crystallized into an *obligation* when the deduction was made. In the circumstances of this case, the employer's rent claim would have only constituted an *obligation* if a residential tenancy arbitrator had issued an order against the Codds for payment of the rent in issue.

Alternatively, if one accepts (and I certainly do not) that the Codds *were* paid a $55,000 annual salary and that the monthly $840 rent was nominally "deducted" from their pay each month, I still fail to comprehend on what basis the employer can advance a claim for unpaid rent. The Codds were paid their "net of rent" salary up until January 7th, 2000; accordingly, rent was "paid" for that week. The delegate, quite properly as I have found, awarded the Codds an additional one week's wages as compensation for length of service, however, that award was also based on their "net of rent" salary. Thus, at least in a nominal sense, the Codds also "paid" rent for the second week in January. The employer deducted two days' rent for January 8th and 9th, 2000 but, so it would appear, the Codds' rent obligation was satisfied until the end of the second week of January. Therefore, if anything, the Codds are entitled to a rent "rebate" since rent was "paid" twice over for January 8th and 9th, 2000 and further rent was "paid" for the balance of the week when they were, apparently, no longer tenants in possession. Nevertheless, it appears to me that the proper forum to adjudicate the Codds' rent obligation or rebate entitlement is an arbitration under the *Residential Tenancy Act;* suffice to say, in my view, the employer was not legally entitled to deduct the two days' rent in question from the Codds' final paycheque without the appropriate written consent or an order from a tribunal of competent jurisdiction.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$1,417.86** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

In light of the fact that I have found that the employer contravened various sections of the *Act*, including sections 18, 19, 21 and 63, it follows that the $0 penalty is similarly confirmed.

KENNETH WM. THORNICROFT

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal