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.: 2000/824

DATE OF HEARING: March 27, 2001

DATE OF DECISION: April 26, 2001

DECISION

APPEARANCES:

Terence W.T. Yu, Barrister & Solicitor	for the appellant
Christine Abrams	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 November 8th, 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 Ms. Christine Abrams ("Abrams"), the respondent employee, on her own behalf. Mr. Kael Campbell appeared at the appeal hearing and made submissions on behalf of the Director.

THE DETERMINATION

In a previous determination issued on October 30th, 2000, the Director's delegate declared the appellant companies to be "associated corporations" as defined by section 95 of the *Act.* The correctness of that declaration is not in dispute here and, indeed, has never been disputed before the Tribunal. By way of the Determination now under appeal before me, the delegate held that the appellant companies, having been declared a single employer for purposes of the *Act,* were jointly and severally liable to pay their former employee, Ms. Abrams, unpaid wages in the amount of $2,639.73.

Ms. Abrams' claim for unpaid wages spans the period from May 4th, 1998 to October 16th, 1999 and is further particularized below:

• Overtime and Vacation Pay	$1,826.17
• Recovery of unauthorized wage deductions	$ 653.12
• Interest payable under section 88 of the *Act*	$ 160.44
TOTAL	$2,639.73

ISSUES ON APPEAL

As noted above, the employer does not challenge the correctness of the section 95 declaration. Further, although the appellant's appeal documents raise a number of issues--including actual or apparent bias on the part of the delegate, a failure to comply with section 77 of the *Act* and an assertion that Abrams did not work any overtime hours--at the the outset of the hearing, Mr. Yu, on behalf of the appellant, indicated that only two issues were being pursued on the appeal, namely:

> • Firstly, Ms. Abrams is not entitled to any overtime pay because she was a "resident caretaker" as defined in section 1 of the *Employment Standards Regulation* (see section 35 of the *Regulation*). If the employer succeeds on this issue, Ms. Abrams' vacation pay entitlement would have to be adjusted (downwards) accordingly.
>
> • Secondly, while conceding that the employer was not entitled to deduct 11 so-called "sick days" from Ms. Abrams final pay, Mr. Yu submits that the employer was entitled to deduct at least 6 "sick days".

BACKGROUND FACTS

The appellant companies act as property managers for a number of residential apartment complexes including the "Century Royale" apartment complex situated in Richmond, B.C. I understand that the Century Royale complex includes approximately 250 suites (occupied by over 500 tenants) and, during the time that the Century Royale apartments have been managed by the employer, there has usually been an on-site "residential caretaker" (often a married couple).

Ms. Abrams was a tenant in the building prior to being employed by the appellant. A few weeks after her tenancy commenced, Abrams learned that there was an available part-time position in the on-site rental office and, in due course, was hired at a $10 per hour wage rate; her first day of work was either May 4th or 5th, 1998. She initially worked a 4-hour shift on both Saturdays and Sundays answering the telephone, greeting people, speaking with prospective tenants and assisting in the preparation of tenancy applications. In addition, Ms. Abrams also dealt with tenants' complaints at least to the extent of passing on the complaints to the resident manager or to the employer's head office.

On or about July 31st, 1998 the Century Royale's resident manger, Ms. Brouse, was terminated. Ms. Abrams approached the appellant's principal, Mr. Blackmore, and enquired if she might be appointed as "assistant resident manager", however, Mr. Blackmore informed Ms. Abrams that she did not have the requisite experience and, in any event, that the position was more suitable for a couple. According to Ms. Abrams, even though she was not given the formal "resident manager" title, as and from August 1st until the end of September 1998 she nonetheless fulfilled many, but not all, of the duties that had formerly been undertaken by Ms. Brouse.

During the period after July 31st, Abrams worked "7 days a week doing what I was told to do"--Abrams became the Century Royale's on-site "leasing agent" and she coordinated the cleaning and painting of suites and the cleaning and maintenance of common areas. Ms. Abrams also personally did some cleaning in the parkade, some gardening and pool cleaning. She collected monthly rent payments. During the period after July 31st, Ms. Abrams' hourly pay was increased to $12 reflecting her increased responsibilities. Ms. Abrams' tenure as the sole on-site residential manager continued until the end of September 1998 when a married couple, Mr. and Mrs. Codd, were hired to act as the resident managers.

As and from early October 1998, Ms. Abrams continued to be employed by the appellant but only in the capacity of a rental agent. After early October 1998, Abrams was paid a monthly salary and worked a weekday 9 A.M. to 5 P.M. schedule.

Ms. Abrams was given notice of termination on or about November 19th, 1999 due to, as recorded in the record of employment issued to her by the employer, a "shortage of work". Her last day of work was December 3rd, 1999. However, Abrams did not receive a final paycheque; rather, the employer's December 3rd, 1999 letter to her stated that: "[Y]ou will note that a deduction for sick days taken has been calculated leaving a balance of $116.88 owing to the Company." The letter continued that the employer was "writing off" this latter "balance due".

Ms. Abrams complained that the employer was not entitled to deduct these so-called "sick days" from her final paycheque and her complaint was upheld by the delegate.

I shall now address each of the two issues raised by the employer on this appeal.

ANALYSIS

Overtime Pay and "Resident Caretaker" Status

A "resident caretaker" is defined in section 1 of the *Regulation* as follows:

"**resident caretaker**" means a person who

(a) lives in an apartment building that has more than 8 residential suites, and

(b) is employed as a caretaker, custodian, janitor or manager of that building;

Pursuant to section 35 of the *Regulation*, "resident caretakers" are excluded from most of the provisions of Part 4 of the *Act* including, *inter alia*, the overtime pay provisions. As noted above, the employer says that the delegate erred in awarding Ms. Abrams overtime pay because she was a "resident caretaker".

As a preliminary matter on this issue, the Director's delegate says that (written submission to the Tribunal dated December 11th, 2000, page 4):

> "At no time did Empire ever say Abrams was a resident caretaker [and] at no time did they put forward any evidence that Abrams was a resident caretaker. Pursuant to [the] Kaiser Stables decision #D058/97 and Tri-West Tractor Ltd. decision #D268/96 I submit that the tribunal disallow new information be brought forward now when it should have been brought to the Delegate during the investigation, when the Delegate requested such information." [*sic*]

While there is some undoubtedly some merit to the delegate's submission, it also seems apparent that the "resident caretaker" issue was under consideration by the delegate during his investigation. Indeed, in his letter dated May 25th, 2000 to Mr. Damji the delegate specifically indicated that Abrams "may fall under the definition of Resident Caretaker". While the employer did not make a formal submission to the delegate on this point, the evidence upon which Abrams' status might be determined was available to the delegate through Abrams herself. Inasmuch as the "resident caretaker" issue was a "live" issue before the delegate, I do not consider that the employer is estopped from raising the matter before me.

During Ms. Abrams' employment tenure with the appellant, there were, at different times, resident caretakers at the Century Royale, namely, Ms. Brouse until July 31st, 1998 and the Codds after early October 1998. However, during the months of August and September 1998 Ms. Abrams was the only "on-site" employee at the Century Royale apartments and she did, it would appear, fulfill some of the duties that would normally be fulfilled by a "resident caretaker". Clearly, Abrams "live[d] in an apartment building that ha[d] more than 8 residential suites"; the key question is whether or not she was "employed as a caretaker, custodian, janitor or manager" of the Century Royale during September and October 1998.

Although titles are not determinative, it should be recalled that following Ms. Brouse's termination Abrams asked Mr. Blackmore, the employer's principal, to be hired as the "assistant resident manager" but her request was specifically refused. Although Abrams had some regular cleaning duties during September and October 1998, she was not the building caretaker, custodian or janitor--that function was primarily fulfilled by other employees--Chester Dunder (the appellant's "operations manager") and his subordinates. Further, I do not consider that Abrams was the primary building "manager". While she did exercise some "managerial" functions, particularly in the area of leasing, she was subject to supervision by Mr. and Mrs. Neufeld who were managing another complex in New Westminster but who, at the same time, were also frequently on-site at the Century Royale apartments. Abrams also regularly sought, and was given, direction from head office staff. Abrams testified--and this is uncontradicted evidence--that "I did what I was told to do". Thus, in her case, she had little independent decision-making authority or discretion, a hallmark of a "manager".

The evidence suggests that due to the exigencies of the moment, Ms. Abrams was directed to undertake some "managerial" duties as a stop-gap measure during the interim 2-month period following Ms. Brouse's termination and prior to the Codds being hired. However, Abrams' duties were carried out in a structured and closely supervised environment and with plenty of assistance from other employees of the appellant. Although this may be a close case, I do not

consider that Ms. Abrams was a "resident caretaker" during September and October 1998. Accordingly, she was properly awarded overtime wages by the delegate.

The Wage Deduction for "Sick Days"

By way of a memorandum dated February 18th, 1999, the employer instituted a "sick leave" policy pursuant to which certain employees would be given "5 paid sick days". The memorandum, which Abrams acknowledged receiving and signing, also stated that: "In case of any extra sick days (i.e. over the 5 paid working days) we will deduct those sick days from your remuneration". In lieu of deduction, employees were also given the option of having their "extra" sick days deducted from their vacation day allotment (although this latter option may run afoul of section 59(1)(a) of the *Act*].

Abrams concedes that she took a total of 11 "sick days" during the period from January 6th to October 12th, 1999 and that she was paid for each such day. It should be noted that 4 of these "sick days" were taken prior to February 18th, the date the sick leave policy was promulgated. The employer, while conceding that at the very least, it contravened the *Act* by deducting all 11 days (it now says only 6 days should have been deducted), submits that a 6-day deduction is proper because it represents either a recovery of an overpayment of wages or, alternatively, the deduction is permissible under section 22(4) of the *Act* as a written assignment to meet a credit obligation. I am unable to accept either submission.

First, although the employer correctly noted in its memorandum that paid sick leave is not a statutory requirement, it is my view that this is not a case where an employer simply--and properly--did not pay wages in the current pay period for work not performed (*i.e.,* on the "sick days"). Abrams testified that she took a number of sick days to care for her critically ill husband (who has since passed away). On each occasion, she telephoned the employer's accountant, Mr. Larry Alger, and was assured by him that "it was ok" and that her "sick leave had been cleared". This evidence is uncontradicted. I might add that Abrams advanced this same position in her submissions to the Tribunal; in such circumstances, and in the absence of Mr. Alger's testimony, I draw an adverse inference against the employer on this point.

Second, the fact that the employer did not deduct the sick days in question in the pay period following each sick day (or days)--or at any other time before her employment ended--corroborates Abrams' position that her employer authorized all of the sick days with pay. What we have here, in my view, is an undisguised attempt by the employer to retroactively withdraw a promise made to Abrams regarding paid sick leave. As such, the principle of promissory estoppel applies and, accordingly, the employer was not entitled to deduct *any* paid sick days from Abrams' last paycheque.

Third, and in any event, I do not consider the paid sick days to amount to a credit *obligation* toward the employer given Abrams' uncontradicted evidence that the employer, through its agent Mr. Alger, authorized the sick days in question *with pay*. At no time did Abrams give her written authority to the employer to deduct any of the 11 paid sick days from her final paycheque.

ORDER

In a submission to the Tribunal dated March 13th, 2001, the delegate noted that he incorrectly calculated Abrams' statutory holiday pay. The Determination ought to have ordered the employer to pay Abrams the sum of $2,516.04 rather than $2,639.73. Both the employer and Abrams accept the correctness of the delegate's recalculation.

Accordingly, and pursuant to section 115 of the *Act*, I order that the Determination be varied to show an amount due to Christine Abrams of **$2,516.04** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the Determination was issued.

KENNETH WM. THORNICROFT

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal