Employment Standards TRIBUNAL

An appeal

- by -

Celerity Capital Corp.
("Celerity" or "employer")

- 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: Paul E. Love

FILE No.: 2000/867

DATE OF DECISION: May 16, 2001

DECISION

OVERVIEW

This is an appeal by Celerity Capital Corporation ("employer") of a Determination, dated November 30, 2000, in favour of Andre Rousseau ("employee"). The Delegate found that Mr. Rousseau had worked three months, and was entitled to one week notice as compensation for length of service pursuant to s. 63(1) of the *Employment Standards Act, R.S.B.C. 1996 c. 113 ("Act").* Mr. Rousseau was terminated without notice by the employer on or about January 6, 2000. The Delegate also determined that the company had deducted an amount from the employee's wages, which the employer claimed represented the value of tools "stolen" by the employee, and was obliged to pay these monies to the employee. The employer appealed alleging that the Delegate erred in finding that Celerity Capital Corp. was the employer (rather than John Davies). The employer further alleged that the Delegate erred in finding that Mr. Rousseau had three months employment necessary for compensation for length of service. The employer further alleged that the Delegate erred in finding that the employer deducted monies from wages in violation of s. 21(1) of the *Act*. I dismissed the employer's appeal, as the employer did not show any error in the Determination.

ISSUES TO BE DECIDED

Is Celerity Capital Corporation the employer of Andre Rousseau?

Is Mr. Rousseau entitled to compensation for length of service?

Is the employer entitled to deduct from Mr. Rousseau's wages the cost of tools?

FACTS

Mr. Rousseau was employed as a maintenance man providing service to four apartment buildings, in Prince Rupert, owned by Celerity Capital Corp. He worked as a maintenance person between October 5 1999 and January 6, 2000. The Delegate concluded, on the basis of the information before him, that Rousseau had completed three months of employment and was entitled to compensation for length of service. After termination, when Mr. Rousseau raised with the employer his wage entitlement, the employer paid for the four days work in January, but deducted the sum of $192.29 for tools. In dealings with the Delegate, the company took the position that Rousseau quit on December 22, 1999, however, he was paid his full salary for December of 1999 plus 31 hours in January. Mr. Rousseau certified in his complaint form that he worked for the period October 5, 1999 to January 6, 2000 with the company. I note that the Delegate confirmed with the apartment manager, Leslie Ebdon, that Mr. Rousseau worked after December 31, 1999. The Delegate had some trouble reaching Ms. Ebdon before the issuance of the Determination, but was able to confirm this information after he issued the Determination.

While there was some suggestion by the employer during the investigation that the employee quit as of December 22, 1999, the quit issue was not raised by the employer on appeal. It is clear from the evidence before me that Mr. Rousseau was terminated in January of 2000. Mr. Rousseau may have expressed an intention to quit at an earlier time, but he did continue to work after that expression of intent. He therefore did not quit his employment.

The employer claims that Mr. Rousseau purchased tools on the employer's account without authorization by the employer, and that the employee took the tools with him when he ceased employment. The employer says there is no sign of forced entry to support a theft of the tools. The employer filed a written statement from the apartment manager, which supports this theory. The employee says that the tools were stolen from the apartment, along with some of his own tools, and that the door was damaged, and he fixed the door.

The employee alleges that he responded to an advertisement for a full time maintenance person. He indicates that he found out later that he was being used by the employer to replace a person named "Sandra" who was the maintenance employee, who was off work for a period of three months recovering from knee surgery. After Mr. Rousseau was terminated in January of 2000, "Sandra" became the maintenance person again.

The Delegate found that Mr. Rousseau was entitled to the sum of $528.07, representing $304.49 as compensation for length of service, $192.29 for the unauthorized deduction, and interest in the amount of $31.29.

ANALYSIS

In this appeal, the burden rests with the employer to establish an error in the Determination, such that I should vary or cancel the Determination. In my view, the grounds raised by the employer in this appeal are without merit. In the analysis below, I deal with the grounds raised by the employer.

Identity of the Employer:

Celerity Capital Corp. is the owner of the buildings in which Mr. Rousseau performed services. There is no written contract of employment between the parties. The Record of employment was issued naming John Bryan Davies as the employer. Cheques which were filed were drawn on the account of the Helmsman apartment. The Delegate noted that he addressed all correspondence to Celerity Capital Corp., and Mr. Davies did not raise any dispute concerning the identity of the employer prior to the issuance of the Determination. The submission of the employer to the Tribunal was faxed from a fax machine noted as "Celerity Capital Corp.". I am not satisfied that the Delegate erred in finding that Celerity Capital Corp. was the employer of Mr. Rousseau.

Compensation for Length of Service:

This is an issue of fact. There was evidence before the Delegate supporting a finding that Mr. Rousseau worked three months, and therefore under s. 63(1) of the *Act*, Mr. Rousseau is entitled to one week's notice of termination, or pay in lieu. I note that this is a matter which should have been resolved easily had the employer kept proper records of the dates of employment, as it is required to do by virtue of s. 28 of the *Act*. The Delegate reviewed the records of both parties. Mr. Rousseau had records of duties performed by him after the date the employer alleges the employee quit. I am not persuaded that the Delegate erred.

Deduction for Tools:

It is unnecessary for me to make any finding in this case whether the employee stole tools belonging to the employer. If the employer truly believes that a theft occurred, there are other forums for pursuing this issue. The Delegate was not satisfied that there was any evidence that a theft occurred. Even if a theft occurred, the employer has no right to offset its claim against the employee's wages. Section 21(2) of the *Act* clearly indicates that an employer cannot withhold wages for any purpose:

> 21(1) Except as permitted or required by this Act, or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

For all the above reasons, I dismiss the company's appeal.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I confirm the Determination dated November 30, 2000.

Paul E. Love
Adjudicator
Employment Standards Tribunal