

An appeal

- by -

Celerity Capital Corp., operating as Helmsman Apartments and Bayview
Apartments
("Celerity")

- 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: John M. Orr

FILE No.: 2002/099

DATE OF DECISION: June 6, 2002

DECISION

OVERVIEW

This is an appeal by Celerity Capital Corp. (“Celerity”) operating as Helmsman Apartments and Bayview Apartments pursuant to section 112 of the *Employment Standards Act* (“the Act”) from a Determination of the Director of Employment Standards (“the Director”) dated February 18, 2002.

The Director determined that a casual worker, Sandra Bond (“Bond”), hired by Celerity’s manager, was properly defined as an ‘employee’ and therefore entitled to vacation pay and compensation for length of service in an aggregate amount of \$915.34.

Celerity had submitted that Bond was a contract worker paid on a piecework basis and that her contract was terminated because of an unbecoming attitude toward some of the tenants in the apartments. The Director considered these submissions but decided in favour of the worker.

Celerity appeals the Determination on the same basis.

ANALYSIS

Celerity has made submissions on this appeal but largely relies upon the arguments that were previously made to the Director. It is submitted that the “unbecoming attitude” had happened on more than one occasion and that Bond’s services had been suspended on previous occasions for variable lengths of time. Bond has made a submission and in her submission she conceded that she had been “fired” in August 1998 but rehired in March 1999. As a result, the Director recognized that her employment had not been continuous over the period included in the determination and recalculated the amount owing to Bond as \$576.00 plus interest.

The onus on an appeal from the Director’s determination is on the party alleging that the determination is wrong. In this case Celerity asserts that the Director came to the wrong conclusion about Bond’s employment status and about the termination of her employment. While the Director does not extensively analyze the jurisprudence in relation to the distinction between ‘employees’ and ‘contractors’ there is a rational and reasonable basis setout for the decision. Celerity asserts that Bond was a contractor but provides little evidence to substantiate that claim. The mere assertion is not sufficient to meet the onus of persuading me that the appeal should succeed.

I am satisfied that the Director correctly determined that Bond was an ‘employee’. Under the Act an employee is entitled to receive compensation for length of service unless the employer’s liability is discharged for certain specified reasons. In this case the employer submits that the employee was terminated for cause.

Not only is the onus on the appellant in the appeal but the onus is also on an employer to establish that there was just cause for dismissal. In this case the employer alleges that the employee had an ‘unbecoming attitude’. While there may be cases where an employee’s attitude could be cause for dismissal, the behaviour must be analyzed on the basis of whether it is such as to amount to misconduct or whether it is a work performance issue. If it is the latter then the four-part test must be applied. In short that a standard has been set and communicated and that the employee has failed to meet that standard,

having been given a reasonable opportunity to do so. There is no evidence that the employer applied any of these factors in this case. Misconduct by an employee may result in summary dismissal but it would be unusual that a bad attitude would amount to misconduct. In any case, I am not persuaded that the employer has met the onus of establishing that there was such a bad attitude as to be misconduct that could justify summary dismissal and be just cause for termination of Bond's employment. Therefore she was entitled to compensation for length of service.

While I would confirm the conclusions of the Director I am satisfied that the determination should be varied in light of the recalculation submitted by the Director.

ORDER

I order that the determination dated February 18, 2002 is varied to find that the amount payable by Celerity is \$576.00 plus interest in accordance with the *Act*.

John M. Orr
Adjudicator
Employment Standards Tribunal