Employment Standards TRIBUNAL

An appeal

- by -

Empire-International Investments Corporation and Century Royale Apartments and Country Club Estates Ltd. and Carlton Park Gardens Operating as the Empire Group

(the"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: Ib S. Petersen

FILE No.: 2001/171

DATE OF HEARING: June 18, 2001

DATE OF DECISION: June 21, 2001

DECISION

APPEARANCES:

Mr. Daniel Le Dressay — on behalf of the Employer

Mr. Bogdan Kulibarda — on behalf of himself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on February 1, 2001. The Determination against the Employer concluded that the Employer terminated Bogdan Kulibarda, Howard and Judy Jackson, and Margareth Robertson (the "Employees") and that they, in the result, were owed $6,918.47 on account of compensation for length of service.

FACTS AND ANALYSIS

The facts and grounds of appeal may briefly be set out as follows:

1. Kulibarda worked for the Employer, as maintenance worker from January 3, 1997 to April 10, 1998. He was paid $10.00 per hour. On December 30, 1997, he was given two weeks notice and his last day of employment would be January 15, 1998. As it happened the Employer offered some temporary employment to him and he continued to work until April 10, 1998. The employer's evidence at the hearing was that there were some differences in the work performed by Kulibarda: before January 15, he worked at one building, doing all maintenance work there; after that date he worked mostly at other buildings, doing specific tasks as directed.

2. The Jacksons were employed as resident caretakers between March 4, 1997 and July 13, 1998. They were paid at the rate of $1,825 per month each. After one year of employment they took two weeks' vacation. They Employer's position was that they abandoned their employment. There was a letter on file from the Jackson's immediate supervisor, who had approved the vacation time. This was not in dispute. The Employer's evidence was that several management employees had told the Jacksons subsequently that they were not to take the vacation time but that they did it anyway. The Employer had to scramble to find replacements. In the result, they were terminated on July 13, 1998.

3. Robertson was employed from May 16, 1996 until April 21, 1998 as office staff. She was paid at the rate of $10.00 per hour. The Employer's position was that she was terminated for cause in that she fraudulently filed out a time card to indicate that she had worked when, in fact, she had not. As well, the employer suggests that she is not entitled to overtime and statutory holiday pay because her time cards are not reliable due to fraud. From the Determination it appears that Robertson claimed that she closed the office 8 minutes early on one occasion.

First, with respect to Kulibarda, I am of the view that the delegate did not err. Section 67 provides that "a notice given ... has no effect if employment continues after the notice period ends." In this case, even if I accept that the work was done at different locations and was more specific, that was clearly the case. I uphold the determination in this regard.

Second, turning to the Jacksons, it is unfortunate that they did not participate in the hearing. In my view, the issues on appeal are largely of a factual nature: did they or did they not have authorization to take vacation at the time. If they went on vacation despite having been told not to go, the Employer may properly terminate their employment and they are not entitled to compensation for length of service. Such conduct constitutes both insubordination and abandonment of their employment. In this case, the Jackson's submitted a letter from their former immediate supervisor, who says that she approved the vacation time and, as well, informed Fatah Damji (who testified for the Employer at the hearing) of the vacation plans and that he agreed. Damji agreed that the immediate supervisor had approved of the plans but that he and others from the Employer's head office subsequently told the Jacksons that they could not go. I cancel the Determination with respect to the Jacksons.

Third, turning to Robertson, I am of the view that the delegate did not err in his conclusions. Robertson did not participate in the hearing. All the same, in my view, there must be clear and cogent evidence to support an allegation of fraud. That evidence was not present. Damji did not have personal knowledge of the events that he testified to. Moreover, even if Robertson closed the office a few minutes early--8 minutes, according to the Determination--and her time records (which were not before me) indicated that she worked a full shift, fraud connotes some intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender some legal right (*Black's Law Dictionary* (5th), West: St. Paul's, Minnesota, 1979). I do not accept that there was fraud on her part. I uphold this part of the Determination.

In the result, the appeal succeeds in part.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated February 1, 2001 be confirmed with respect to Kulibarda and Robertson. I order the Determination with respect to Howard and Judy Jackson cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal