

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C. 113

- by -

ETD Building Maintenance
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE NO.: 97/287

DATE OF DECISION: July 29, 1997

DECISION

APPEARANCES

Randy Zimmerman	for the Employer
Horacio Rojas	for the Employer
Beata Duda	for the Employer
Ana Manzano	for herself

OVERVIEW

The Employer appealed a Determination dated April 4, 1997 pursuant to Section 112 of the *Employment Standards Act*. The Determination found that the Employer had terminated the employment of Ms. Ana Manzano (“Manzano”) on June 26, 1996 and had failed to comply with Section 63 of the *Act*, which requires an employer to pay a former employee for length of service. The Employer argued that it had offered Manzano alternate employment, thereby fulfilling its obligations under Section 65(f) of the *Act*. Manzano participated in the hearing with the assistance of an interpreter provided by the Tribunal.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the Employer offered Ms. Manzano alternate employment at the time of her termination.

FACTS

Most of the facts in this case were not in dispute. Manzano was employed as a cleaner by the Employer from October 12, 1993 to June 26, 1996. The Employer provides building maintenance services to owners or managers of buildings at various locations. In 1996, Manzano was assigned to a building in Surrey, initially on the day shift. Work on the day shift consists of taking care of common areas and answering tenant calls. By contrast, the night shift work consists of cleaning offices. Because of problems in communicating in English, the Employer’s client in the Surrey building requested that Manzano be removed from the day shift. Mr. Rojas (“Rojas”), the senior supervisor, arranged for her to be transferred to the night shift in the same building. Some time after Manzano moved to the night shift, her supervisor expressed dissatisfaction with her work, and on June 26, Rojas informed her that she would be removed from the night shift position.

Evidence presented by the Employer and Manzano was in conflict on the subsequent events. Rojas testified that he offered Manzano a night position in a building on Canada Way with the same number of hours. The supervisor in Surrey was the second person in

that position to request that Manzano be moved, but Rojas stated that he was confident that Manzano could succeed elsewhere, based on his knowledge of her work. According to Rojas, Manzano declined the position, saying that she wanted a day shift. Ms. Beata Duda (“Duda”), a supervisor for the Employer, was in the Surrey building on June 26 for a quality inspection. She observed Rojas speaking to Manzano. Although they were speaking Spanish, Duda her knowledge of Italian enabled her to understand the general subjects of the conversation. She observed that Manzano was upset and in tears while speaking to Rojas. Duda testified that Rojas offered Manzano a night position in a building on Canada way, and she refused because she wanted a day shift. Duda offered her a position in downtown Vancouver on the night shift, but Manzano stated that she would go on the spare list and wait for a day position. Rojas said that he told Manzano that he could not guarantee her a day position, but would call her when another position came up, assuring her that she would work in one of his buildings at night.

Rojas testified that he called Manzano in approximately mid-July and left a message offering her another night position. He spoke in Spanish to a male and gave him the message. He did not receive a reply. After Manzano filed a complaint with the Employment Standards Branch, Rojas offered her another position, but she declined. Mr. Zimmerman stated that the overwhelming majority of positions in the building maintenance industry are on the night shift. He also acknowledged in a statement in support of the Employer’s appeal that Manzano had contacted Rojas about a position a few days after June 26 and that the Canada Way opening had been filled.

Manzano denied that Duda saw her cry. She was surprised to learn that her work was unsatisfactory. When she came to work on Monday, she found a new employee who said that she would be doing her work later in the week because Duda had told her that she would be working in the building. On Tuesday, her supervisor told her at 5:00 p.m. that she would not be working in the building. She turned her equipment in and tried to reach Rojas by telephone, without success. The following week, Rojas offered her a position on Canada Way. Manzano stated that she declined the position and wanted to go back to her day shift in the Surrey building. Rojas said he would call her when a position arose, but through the end of March 1997, she had not heard from him. Manzano stated that she was confused because if she were not working well, why would the Employer offer her another position.

The Director’s Delegate found that Rojas offered Manzano another position on Canada Way. Initially Manzano accepted the position, but she and Rojas then discussed the possibility of her working the day shift in the Surrey building. Rojas thought that there would be day positions available soon in the company. Manzano told him that she would prefer a day position to the Canada Way position and left thinking that Rojas would contact her. When she did not hear from Rojas after a few days, Manzano contacted him

and was told that no day positions were available and that the Canada Way position had been filled. Manzano still expected to hear from Rojas again, but did not receive any messages until after the complaint was filed.

ANALYSIS

This case turned on the evidence presented. The Employer did not contest that Manzano was entitled to length of service compensation had she been terminated on June 26. The Director's Delegate found that Manzano was not informed in writing that her employment was terminated or that the only offer of alternative employment was the Canada Way position. The Determination rested on the Director's Delegate's finding that the Employer did not make clear that the Canada Way position was the only alternative available to her.

While there clearly were problems of communication between the Employer and Manzano, based on the evidence before me, I conclude on the balance of probabilities that the Employer did offer her "alternative work" as contemplated in the *Act*. All parties, including the Director's Delegate and Manzano, accept that Rojas offered Manzano a position in a building on Canada Way. I conclude that Rojas made an honest effort to contact Manzano after June 26 and before she filed a complaint. Manzano seemed determined to wait for a day shift, and, perhaps unknowingly, thereby forfeited her right to length of service compensation.

ORDER

For these reasons, the Determination of April 4, 1997 is canceled.

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Mark Thompson
Adjudicator
Employment Standards Tribunal

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