

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 -

Frances Walker
(the “Employee”)

- and -

Michael Walker
(the “Employee”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	1999/359
HEARING DATE:	September 3, 1999
DECISION DATE:	October 22, 1999

DECISION

APPEARANCES

Mr. Michael Walker	on behalf of himself
Ms. Frances Walker	on behalf of herself
Mr. Randall Scott Ullrich	on behalf of Sharmerob Investments Ltd. (the “Employer” or “Sharmerob”)

OVERVIEW

This is an appeal by the Walkers pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on May 14, 1999.

The following sets out the back ground for the appeal. The Walkers were employed as resident caretakers until March 31, 1998 at an apartment building, owned by Sharmerob Investments Ltd. Mr. Walker was employed from March 1, 1997 and Ms. Walker was employed from December 1, 1997. Mr. Walker entered into a written agreement between himself and Gateway West Management Corporation (“Gateway”) as agents for Sharmerob. Gateway, whose president is Mr. Scott Ullrich, managed the building pursuant to an agreement between Gateway and Sharmerob. Prior to the termination of their employment in late February, effective March 31, the Walkers had filed a complaint with the Employment Standards Branch. Among their concerns were whether they were paid the appropriate minimum wage for resident caretakers.

By the time the delegate issued his Determination a number of issues had been resolved. The following remained in dispute:

1. whether Ms. Walker was entitled to wages from December 1, 1997 to January 31, 1998;
2. whether Mr. Walker was entitled to wages for painting the underground garage; and
3. whether the Employer contravened Section 83 of the Act when it terminated the Walkers’ employment.

The delegate determined:

1. Ms. Walker was entitled to wages for the period claimed, i.e., from December 1, 1997 to January 31, 1998.

2. The Employer was unaware of Mr. Walker painting of the underground garage and argued that they had a painting contractor paint the garage. Mr. Walker did not have any daily records of the 25 hours he claimed he had spent on the painting job and the delegate dismissed the claim.
3. The Walkers had indicated their intent to file a complaint with the Branch to Gateway's property manager on February 16, 1997 and told him, on February 20, 1997, that they, in fact, had filed a complaint (which they had February 18, 1997). The delegate accepted the Employer's argument that the Walkers were not dismissed because of the complaint to the Branch but were going to have been dismissed in any event because of the Employer's dissatisfaction with their services.

The Determination dismissed the Walkers claim for compensation for items 2 and 3 above, and awarded them \$2,465.73, mostly on account of wages to Ms. Walker.

The delegate determined that Sharmerob was the Employer. This conclusion has not been appealed and I am proceeding on the assumption that Sharmerob was the Employer at the material time.

The Walkers' appealed the Determination and argued that Mr. Walker was entitled to wages for painting the underground garage and that they were terminated in contravention of Section 83 of the Act. In the result, those were the issues before me at the hearing held at the Tribunal's offices in Vancouver on September 3, 1999. The Employer was represented at the hearing by the president of Gateway. There were no other representatives for the Employer.

The Employer stated that the Determination amount had been paid to the delegate pending the outcome of the appeal.

FACTS AND ANALYSIS

1. The "paint job"

With respect to painting the underground garage in the building, Mr. Walker testified that he made an agreement with Ms. Haber. Ms. Haber is the secretary of Sharmerob and had an office in the building. It appears from Mr. Walker's testimony that she took quite an active role in the management of the affairs of the building. It was his evidence that he made an agreement with her outside the parameters of the March 1, 1997 written agreement. As pointed out by Mr. Ullrich, that agreement provided under the heading "general duties" of the caretaker:

"9) paint all areas of the mechanical room, locker rooms, storage rooms, underground parking, bicycle room etc., annually or as needed."

Mr. Walker claims \$250 for the "paint job", 25 hours at \$10.00 per hour.

The Employer denies that Mr. Walker painted the underground garage. It points to the fact that the painting of the garage had been started by the Walkers' predecessors as resident caretakers. As well, the Employer says that the job was completed by a painting contractor. Mr. Walker did not dispute that a contractor was called in to finish the painting. He explained that the reason was that Ms. Haber was not satisfied with the progress and wanted a contractor involved.

The onus is on the appellant Employees to show that the Determination was wrong. The Determination states that the Employer was unaware of the work and that it hired a contractor. From an evidentiary standpoint, Mr. Walker must satisfy me that there was an agreement between himself and the Employer to do the work--apart from the caretaker agreement--and that he performed the agreement. Mr. Walker's evidence was the only direct evidence before me with respect to this point. Mr. Ullrich did not have any personal knowledge and, while he took the position that Mr. Walker did not do the painting, he was not in a position to dispute the evidence. Ms. Haber might have been able to shed light on these matters but she did not appear at the hearing. In the result, I accept that there was a separate agreement between Ms. Haber and Mr. Walker that he paint the underground garage and that he did paint work for some 25 hours. In my view, he is entitled to compensation for the work performed and I order the Employer to pay the \$250.00 claimed.

2. Section 83

Section 83 of the Act reads:

83.(1) An employer must not

- (a) refuse to employ or refuse to continue to employ a person,
- (b) threaten to dismiss or otherwise threaten a person,
- (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
- (d) intimidate or coerce or impose a monetary penalty on a person,

because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.

83.(2) If satisfied that a person has contravened subsection (1), the director may make any determination authorized by section 79(3) or (4).

Section 79(3) sets out the typical remedies: compliance, remedy and/or penalty. Section 79(4) provides:

79.(4) In addition, if satisfied that an employer has contravened a requirement of section 8 or Part 6, the director may require the employer to do one or more of the following:

- (a) hire a person and pay the person any wages lost because of the contravention;
- (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
- (c) pay a person compensation instead of reinstating the person in employment;
- (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him because of the contravention.

Mr. Walker admitted that he had a dispute with Haber in October 1997 over a tenant. Apparently, this matter went to arbitration under the Residential Tenancy Act. Nevertheless, he explained that he was on good terms with Haber, receiving an expensive Christmas basket on December 19. He was also on good terms with Gateway's property manager, Sheryl Jacobson, who he said offered him a letter of reference. Mr. Ullrich agreed that Ms. Jacobson had agreed to provide the reference, but not that it had been offered by her. It was his evidence that the Walkers requested the reference. In any event, Ms. Jacobson was not present and did not testify. I understood that Jacobson was replaced as the property manager responsible for the Walkers' building with Mr. Cbovic and that this took place in January.

In this case, Mr. Walker's testimony is that he told a Gateway's property manager, Mr. Cbovic, on February 16, 1998, that he intended to file a complaint with the Branch. He filed the complaint on February 18. On February 20, there again was a conversation between the property manager where Mr. Walker told him that he had filed a complaint. Part of the complaint was that he had been paid less than minimum wages. Ms. Haber was out of town on vacation at that time, returning on February 26. The Employer did not dispute that these conversations had taken place. Mr. Cbovic did not give evidence at the hearing.

On February 20, Gateway provided a letter to Mr. Walker which stated (in part):

"I have asked our accounting department to review your calculations regarding minimum wage and upon receipt of their report shall analyse this issue. With regards to Frances' wages please have her fill out the attached TD1 and provide us with a photocopy of her Social Insurance card. Upon receipt of this information we can add Frances to the payroll and forward a cheque to her. We will require confirmation of her starting date."

The Walkers provided a TD1 form as requested indicating that Ms. Walker commenced working on December 1, 1997.

On February 26, 1998 they were given notice under the Residential Tenancy Act. As well, they were terminated from their employment on February 27, effective March 31, 1998. On that day, their keys were taken away by Mr. Ullrich and Mr. Cbovic. Both Mr. and Ms. Walker stated that Mr. Ullrich told them that they were not being fired "for cause".

The Walkers did not receive their pay cheques for the months of February and March. The Walkers were normally paid semi-monthly. However, for those months their pay cheques were withheld.

The Employer did not cross examine on the Walkers' testimony. Nevertheless, the Employer had a different version of the events. Essentially, the Employer's argument boils down to the proposition that the Employer had determined to terminate the Walkers' employment long before they filed a complaint with the Branch (February 18). Mr. Ullrich testified that he had met with Ms. Haber on December 9 to discuss Mr. Walker's continued employment. Mr. Ullrich explained that he personally was not aware that Ms. Walker was in the building from December 1, 1997. Ms. Haber, Mr. Ullrich testified, had instructed him to find a new manager because she was dissatisfied with Mr. Walker's performance. Mr. Ullrich met again with Ms. Haber on January 14, 1998 to discuss Ms. Jacobson's move and the termination of the Walkers. Mr. Ullrich did not dispute that Mr. Cbovic had met with the Walkers on February 16 and the possibility that they would file a complaint with the Branch. Mr. Ullrich stated that he heard of this two days later.

Mr. Walker engaged in cross examination of Mr. Ullrich. One of the points that he raised with Mr. Ullrich was Ms. Haber's alleged dissatisfaction with the Walkers that could give rise to the termination. He mentioned the situation with the tenant, referred to above, where Mr. Walker apparently had paid some money to a tenant against instructions. While the tenant was successful at arbitration, Ms. Haber felt that Mr. Walker's conduct constituted insubordination. In any event, Mr. Ullrich agreed that the termination was "without cause". That, however, had nothing to do with the fact that the Employer was not satisfied with the Walkers' performance. Rather this was a "business decision" the Employer made and gave notice. From the evidence, I understood that Mr. Ulrich attempted to find the Walkers another caretaker position within Gateway and that he would have been pleased to have them associated with Gateway.

As mentioned above, the burden is on the appellants to show that the Determination is wrong. They must show that--at least in part--their termination was caused by the filing of the complaint. In essence, the Walkers' argument boils down to this: because the Employer knew of the complaint to the Branch before the termination, it contravened Section 83. The delegate interviewed Mr. Ulrich and Mr. Cbovic and they told him that they had been instructed to terminate the Walkers prior to the complaint. As well, the delegate considered the evidence submitted by the Walkers, including transcripts of audio tapes between the Walkers and Mr. Cbovic. The delegate was not satisfied that the tapes were conclusive evidence that the Walkers were terminated from employment because they had filed a complaint with the Employment Standards Branch. I agree that the tapes (or the transcript) are not conclusive evidence. The transcripts indicates that Gateway was aware of the complaint. Mr. Ulrich testified that he was ware of the complaint a couple of days after the conversation between the Walkers and Mr. Cbovic. Nevertheless, Mr.

Ulrich testified that he had been instructed by Ms. Haber to terminate the Walkers in January, long before the Employer had actual knowledge--or constructive knowledge through its agent, Gateway--of the complaint and that the actual termination had been delayed because Mr. Ulrich sought to find another building for them within Gateway. I agree with the Walkers that the timing of the termination is suspicious. However, at the end of the day, the Walkers simply are not in a position to offer anything other than their opinion that they were terminated because of the complaint. Mr. Walker testified that the building had many caretakers over the last few years and by all accounts Ms Haber was a difficult person to work for. She may well have requested the firing of the Walkers "on a whim". From Mr. Walker's testimony, I got the impression that she was certainly capable of this. As mentioned, she did not testify at the hearing. While I am concerned about her failure to appear, on the balance of probabilities, I accept Mr. Ulrich's evidence that he had been instructed to terminate the Walkers prior to the complaint.

In the result, I dismiss the appeal with respect to Section 83.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination in this matter, dated May 14, 1999 be varied and confirmed, to the extent that the Employer must pay an additional \$250.00 to Mr. Walker.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal