

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-

Strataco Management Ltd.

(“Strataco” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/525

DATE OF HEARING: October 27th, 1997

DATE OF DECISION: December 9, 1997

DECISION

APPEARANCES

G. Stephen Hamilton	for Strataco Management Ltd.
Bertha A. Litowsky	on her own behalf
Joseph N. Litowsky	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Strataco Management Ltd. (“Strataco” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 006461 issued by the Director of Employment Standards (the “Director”) on June 20th, 1997 under file numbers 198133 and 198134 (the “Determination”).

The Director determined that Strataco owed its former employees, Bertha Litowsky (“Bertha”) and Joseph Litowsky (“Joseph”), a total sum of \$3,173.48 on account of an additional four weeks’ wages representing compensation for length of service (section 63 of the *Act*) and interest (section 88 of the *Act*). The Director found that, inclusive of interest, Joseph and Bertha were each entitled to \$1,586.74. I shall refer to Bertha and Joseph jointly as the “employees”.

ISSUE TO BE DECIDED

The appellant’s appeal documents set out three grounds of appeal, namely, that:

- the employees were never employed by Strataco, but rather were employed, in turn, by two separate strata corporations established pursuant to the provisions of the *Condominium Act*;
- at the point of termination, the employees had worked for a period of less than ninety days (for the second strata corporation) and, accordingly, were not entitled to compensation for length of service under the *Act*; and
- the employees were terminated for just cause and thus have no entitlement to compensation for length of service.

At the outset of the appeal hearing, held at the Tribunal's offices in Vancouver on October 27th, 1997, counsel for the employer, Mr. Hamilton, advised that the employer was only proceeding on the first ground and was abandoning the other two grounds of appeal set out above.

FACTS

The employer called only one witness--Jean-Pierre Daem (the company president and a director). Mr. Daem testified that Strataco manages large condominium projects on behalf of the strata owners. Currently its management portfolio consists of over 100 such projects.

Mr. and Mrs. Litowsky were first hired in late November 1989 to serve as resident caretakers of tower "A" in a complex known as the "Timberlea"--a complex managed by Strataco. They served as the resident caretakers at this facility from December 4th, 1989 until February 29th, 1996 when they submitted written "resignations" although it is clear from the evidence that their resignations were prompted by some concerns expressed by the "Timberlea" strata council. Their resignations were dated February 15th and took effect on February 29th, 1996.

On March 1st, 1996, Mr. and Mrs. Litowsky were installed as the resident caretakers at another Strataco-managed project, "La Mirage". They continued as resident caretakers at "La Mirage" until their termination, allegedly for cause, on May 15th, 1996. It is important to note that there was absolutely no "gap" in their pay or benefits when they transferred from "Timberlea" to "La Mirage" and that this transfer was entirely facilitated by Strataco.

As noted above, the only issue that I need determine is whether or not Mr. and Mrs. Litowsky were employed by Strataco or solely by the "La Mirage" strata corporation.

ANALYSIS

In my opinion, the evidence overwhelmingly discloses that Mr. and Mrs. Litowsky were employees of Strataco. In reaching this conclusion I particularly rely on the following evidence:

- Bertha and Joseph first responded to an advertisement placed by Strataco and were initially interviewed by Strataco personnel who recommended that they be hired;
- the original written contract of employment stated that Mr. and Mrs. Litowsky "are hereby employed by Strataco/Bradson on behalf of The Owners, Strata Plan N.W. 319, Timberlea Tower 'A'"; a second contract regarding "La Mirage" was never executed due to the shortness of their employment at that facility;
- Bertha and Joseph were paid via Strataco payroll cheques (debited from an internal payroll account held in the name of the particular condominium complex) and Strataco issued their annual T-4 record of earnings;

- Strataco personnel supervised Bertha and Joseph's performance and the two employees reported directly to Strataco, and not to strata lot owners or members of the strata corporation's strata councils;
- Strataco made recommendations regarding annual salary adjustments which were always approved by the strata council;
- Strataco issued, in its own name as "employer", Records of Employment for both Bertha and Joseph when their employment at "La Mirage" was terminated;
- These two Records of Employment show their employment commencement date as December 4th, 1989 and their "last day worked" as May 16th, 1996--this record is entirely inconsistent with the employer's assertion that there were two separate employment contracts during this period between Bertha/Joseph and the two strata corporations;
- Finally, Strataco issued, on its own letterhead, the letter of termination dated May 15th, 1996 which states, in part, "It has become apparent that you are unable to maintain the building in accordance with the terms of *our employment agreement* and *your employment* as caretakers is hereby terminated effective immediately." (emphasis added).

While Bertha and Joseph were paid out of funds that were, ultimately, traceable back to the strata corporation, and used equipment (and occupied a suite) that was owned by the two strata corporations, I am satisfied that the greater measure of control (indeed, virtually all control) with respect to their employment duties was exercised by Strataco, rather than the two strata corporations that had contracted for Strataco's management services. Thus, I am of the view that Strataco was Bertha and Joseph's employer throughout the entire period from December 1989 to May 1996.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 006461 be confirmed as issued in the amount of \$3,173.48 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal