EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

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

-by-

Empire International Investment Corporation

("Empire" or the "employer")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	99/174
DATE OF DECISION:	May 31st, 1999

DECISION

OVERVIEW

This is an application filed by Empire International Investment Corporation ("Empire" or the "employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision.

By way of a determination issued by a delegate of the Director of Employment Standards on October 7th, 1998 under file number ER 004465 (the "Determination"), the delegate held that Harold and Laila Bustard, who had formerly been employed with Empire as resident caretakers, were terminated without just cause and, therefore, were entitled to 8 weeks' wages as compensation for length of service pursuant to section 63 of the *Act.*

The employer appealed the Determination to the Tribunal and, following an oral hearing, the Tribunal Chair held, in a written decision issued February 19th, 1999 (B.C.E.S.T. decision number D076/99), that the employer had just cause to terminate Harold Bustard's employment. The Chair confirmed the delegate's finding that Laila Bustard was terminated without just cause.

Empire now requests reconsideration of the Chair's decision with respect to Laila Bustard. Empire's request for reconsideration is contained in a letter, dated March 23rd, 1999, from its solicitors to the Tribunal.

GROUND FOR RECONSIDERATION

The employer says, in essence, that the Chair's reasons for finding the employer had just cause to terminate Harold Bustard apply with equal force to Laila Bustard whose claim for termination pay ought, similarly, to have been dismissed.

Harold and Laila Bustard, as well as the Director of Employment Standards, were advised that the employer had filed a reconsideration request. The Tribunal Registrar wrote to those parties on March 25th, 1999 enclosing the Empire's submission and directing the parties as follows:

> "If you wish to respond to this application [Empire's request for reconsideration], please forward your written submissions to me **no later than 4:00 p.m. April 15th, 1999.**" (**boldface** in original)

As of today's date, neither Harold or Laila Bustard, nor the Director, have filed any submission with the Tribunal.

ANALYSIS

The Chair upheld Mr. Bustard's dismissal on the basis of evidence that was discovered by the employer until after the Bustards were terminated; this evidence was not before the delegate.

As detailed in the decision now under reconsideration, the Bustards signed an employment agreement/job description which contained the following provisions:

> "The manager is responsible for landscaping and ensuring daily watering of the grass, flowers and shrubs...
>
> All purchases and extra contractors are to be ordered only upon prior approval from head office. Purchase orders will be provided and are to be used only after authorization is granted."

These two particular provisions were alleged to have been breached by the Bustards. The relevant portions of the Chair's decision read as follows (commencing at p. 6):

> "Mr. Bustard entered into four separate agreements with Cedar Gardenscape for the periods March 1 to November 30 in each of 1995, 1996, 1997 and 1998. Each of the agreements were between 'Park Regency Apts.' and Cedar Gardenscape, were signed by Mr. Bustard, and contained a clause which stated: 'The undersigned represents that they are the Owner's Agent of Strata Plan _____ '...
>
> Empire seeks to rely on these unauthorized contracts with Cedar Gardenscape as another ground for terminating the Bustards' employment. It views the entering into the cont[r]acts as a fundamental breach of the employment contract between Empire and Mr. & Mrs. Bustard...
>
> There is no dispute...that Mr. Bustard entered into four separate contracts with Cedar Gardenscape while he was employed by Empire and that he did so without Empire's knowledge or approval...

> Mr. Bustard, by entering into the agreements with Cedar Gardenscape, breached at least two provisions of his employment contract...
>
> While I acknowledge that Mr. Bustard's motives were honourable, I cannot ignore the clear terms of the employment contract which required Mr. and Mrs. Bustard to perform specific duties, including landscape maintenance, and which prohibited entering into contracts without prior approval from his employer...
>
> ...I am led to conclude that Empire had just cause to terminate Mr. Bustard's employment because of his fundamental breach of an essential condition of his employment. For that reason, Mr. Bustard is not entitled to receive compensation for length of service under Section 63 of the *Act* and the Determination must be varied accordingly."

Of course, the employer does not take issue with the Chair's above-quoted analysis of the situation as it relates to Mr. Bustard. However, it does contest Mrs. Bustard's entitlement to termination pay as confirmed on appeal:

> "Nothing in Empire's appeal speaks specifically to there being just cause to terminate Mrs. Bustard's employment. All of the evidence given at the hearing dealt with Mr. Bustard's work performance and the various grounds on which Empire submitted that it had just cause to terminate Mr. Bustard's employment...I find that Empire has not established through this appeal that it had just cause to terminate Mrs. Laila Bustard's employment. Accordingly, she is entitled to receive compensation for length of service under Section 63 of the *Act.*"

So far as I can gather, the issue of engaging Cedar Gardenscape without authority was first raised in the employer's written submission to the Tribunal dated December 4th, 1998 (this date being slightly less than 2 months prior to the appeal hearing). I have reviewed this submission and it is clear that the employer was taking the position that this was a breach by *both* Mr. and Mrs. Bustard. By way of reply to this submission, Mr. and Mrs. Bustard submitted a letter (which they both signed) to the Tribunal on November 12th, 1998--this letter is referred to by the Chair at page 6 of his decision--which stated, in response to this new allegation of misconduct:

> "To help *us* do a better job in and around Park Regency *we hired* the services of Cedar Gardenscape to look after the lawns, shrubs, etc. so *we* could do a better job inside the Park Regency. The Cedar Gardenscape people were also paid each month, beginning in 1995 to April 30/1998. *We Harold and Laila paid them* the sum of $235.40 out of *our own money*." (my *italics*)

It is clear that the Bustards were hired as a couple to serve as the resident caretakers at the subject apartment complex. The employment contract was offered to the Bustards jointly; they were paid jointly; together they resided in an apartment in the subject complex; they were terminated jointly and upon termination they filed a joint complaint with the Employment Standards Branch.
While only Mr. Bustard signed the contracts with Cedar Gardenscape, both Mr. and Mrs. Bustard signed the employment agreements/job description that contained the provisions that were found to have been breached by Mr. Bustard.

It does not necessary follow from the finding that Mr. Bustard violated the provisions of his employment agreement that Mrs. Bustard also did so. Mrs. Bustard did not appear at the appeal hearing and thus she did not give any *viva voce* evidence concerning her possible breach of her employment agreement. Thus, the only evidence before the Tribunal on appeal consisted of written submissions made by, or on behalf, of Mrs. Bustard. I note that neither Mr. or Mrs. Bustard has filed any submission with the Tribunal contesting the employer's assertion that they were engaged in a joint enterprise when they hired Cedar Gardenscape.

As is clear from the italicized portions of the Bustards' November 12th, 1998 submission (see above), however, the unauthorized decision to retain the services of Cedar Gardenscape very clearly appears to have been a joint decision by the Bustards. As such, in my view, it follows that both Mr. and Mrs. Bustard must suffer whatever adverse consequences that flow from such unauthorized action.

If the employer had just cause to terminate Mr. Bustard by reason of his unauthorized actions, the same result must logically follow with respect to Mrs. Bustard. Accordingly, inasmuch as the employer had just cause to terminate Mr. Bustard's employment, the employer also had just cause to terminate Mrs. Bustard's employment.

ORDER

The application to cancel the decision of the adjudicator in this matter is allowed; the Determination is cancelled in its entirety.

_____

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal