BC EST #D019/99

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 -

Branislav Novko
(the "Employee")

- and -

Svetlana Novko
(the "Employee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/512

HEARING DATE: October 5, 1998

DECISION DATE: January 26, 1998

DECISION

APPEARANCES

Mr. Branislav Novko	on behalf of himself
Ms. Svetlana Novko	on behalf of herself
Mr. Michael DeMars	on behalf of Hollyburn Properties Ltd. (the "Employer" or "Hollyburn")

OVERVIEW

This decision concerns two appeals pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") issued on July 13, 1998 which determined that the Employer, Hollyburn Properties Ltd. ("Hollyburn"), was not liable for regular and overtime wages, statutory holiday pay, vacation pay, compensation for length of service and for unauthorized deductions from wages to the Novkos (the "Employees" or the "Complainants"). The appeal is brought by the Employees.

FACTS

Branislav and Svetlana Novko started working for the Employer in September 1996 at Central Plaza in Vancouver. Branislav Novko commenced employment as an assistant manager; Svetlana Novko's employment was also as an assistant manager, but on a part time basis, providing services in the same building. Before they started working for the Employer, they had obtained a Residential Manager Certification. When they commenced employment there was another couple working in the building as resident manager and another couple working as assistant caretakers. From the Employer's head office, the Novkos from time to time dealt with, and ultimately reported to, Dan Lazar ("Lazar"), a property manager with the Employer.

Mr. Novko's agreement with the Employer, dated September 16, 1996 provided (in part):

> "D. .... the Employer will pay the Employee a monthly salary of ... $1,350 ... dollars.
>
> G. In consideration of the performing extra duties during normal time off, the Employer will compensate the Employee in theamount of $650.00 by temporarily reducing the rent of the suite in which the Employee resides. ...

> H. The temporary rent reduction compensation paid to the Employee ... will be paid only while the Employee is in the employment of the Employer. ..
>
> I. Notwithstanding Article "G" the Employee's hours of work shall be 40 consecutive hours Monday through Friday in accordance with the Employment Standards Act.
>
> L. The Employee shall take thirty-two (32) consecutive hours off each week. ...
>
> M. The Employee shall take off all statutory holidays. ..."

His duties were set out in considerable detail in the agreement. In cross examination, Mr. Novko agreed that his duties, when he was assistant manager, were the same as those of the resident manager. He also agreed that when he became resident manager, he did the same things as his predecessor.

Ms. Novko's agreement with Hollyburn, dated September 16, 1996 provided (in part):

> "B. This Agreement is for part-time employment only and the Employee's hours shall not exceed twenty hours (20) per week.
>
> C. ... at a monthly salary of One Thousand ($1,000) Dollars."

In brief, therefore, the agreement between the Novkos and the Employer was that Mr. Novko received a salary of $1,350 plus a $650 rental benefit. When he became resident manager in early March 1997, Mr. Novko agreed that his salary was increased to $1,500. Ms. Novko received a monthly salary of $1,000. Her hours of work were not to "exceed" 20 hours per week. She received an increase of $200 when she became residential manager. I understood both the Novkos and Hollyburn to agree that her employment became full time from early March. The Novkos were of the view that they would receive raises after three months employment.

On March 7, 1997, the tenants were advised that the resident caretakers would be leaving and that the Novkos would be assuming the duties of resident caretakers. The Novkos were appointed resident managers. However, they never entered into any new written employment agreement with their Employer. Mr. Novko stated that the Employer promised them a new written agreement.

On April 17, 1997, the Novkos wrote to Lazar. They told Lazar that the Anticas had not yet moved into the apartment building such that they had to be available to the tenants around the clock. As well they complained that Lazar wanted them to open the office earlier and wanted them to work later in the evening. While they claimed to be working long hours, they did not provide any detail

of those hours to the Employer. At the hearing, Mr. Novko testified that he and his wife worked "around the clock" due to an "extreme overload of work" during their entire employment, from September 1996 until their resignation. He said that he spoke with Lazar about the hours of work. In early April there was a fire in the building, causing substantial damage. Following the fire, there were contractors in the building around the clock. Lazar was aware of the hours they worked and, according to the Novkos, told them "put down the over time, I'll pay".

On March 21, 1997, Hollyburn appointed two new assistant managers, Lili and John Antica. Mr. and Ms. Antica had worked for Hollyburn at various buildings but were eventually terminated due to the Employer's dissatisfaction with the performance of Mr. Antica. Ms. Antica, who was called to give evidence for the Novkocs, stated in cross examination that Lazar had said that "he would pay" the Novkos. She agreed with the statement put to her that Lazar had said that "he would pay what he owed". However, in her mind, that did not mean that he would pay whatever was put in writing by the Novkos. She did not recall when this was said.

Lazar, who had been terminated by the Employer and testified under summons, explained that he spent considerable time in Central Plaza, being there at least two times per week, between one and three hours each time. He said that the Employer did not expect the employees to work overtime or to work on statutory holidays. He also explained that he had not received any claim for overtime before April 28, 1997. Moreover, the Novkos had not requested authority to work overtime.

On April 28, 1997, the Novkos resigned from their employment effective May 28, 1997. Mr. Novko explained that Hollyburn accepted their resignation. He also testified that the Employer offered them a $500 bonus and – as he explained – "extra time payment". A letter from the Employer dated April 29, 1997 stated that Hollyburn expected:

> " you to professionally maintain Central Plaza and assist in a smooth transition period during the month of May 1997. Should his be achieved, Hollyburn Properties Ltd. will pay you an additional sum of $500.00 each (net) on top of your regular salary. This sum will be delivered along with your separation papers, regular pay, and extra time payments on the 28th of May 1997."

On May 20, 1997, the Employer announced to the tenants that two new resident managers had been appointed.

Time sheets dated April 28, 1997 set out the hours, the Novkos claimed to have worked in March and April 1997. Lazar testified that Mr. Novko brought the April 28 time sheet to the office the date he came to the office to hand in his written resignation. Lazar stated that no other time sheets were attached with the resignation or handed in to the Employer at that time. I understood Lazar's evidence to be that he presumed the request for "extra time" pay handed in on April 28 would be properly analyzed and paid if proper and that the Employer would be agreeable to pay a

"reasonable" amount on account of "extra time" to facilitate the transition to the new resident managers and in recognition of the work done by the Novkos following the fire in Central Plaza. I did not understand his testimony to be that it was his understanding that there was an agreement to pay or an obligation to pay on the part of the Employer.

Time sheets dated May 23, 1997 set out the hours the Novkos claimed to have worked from the end of April to the end of May, 1997. On May 26, 1997, the Novkos wrote the Employer. In the letter they claimed over that they were entitled to overtime wages for their first six months of employment "while we were performing as assistant managers", overtime wages for the last three months of employment and other things. They attached time sheets indicating hours worked. It appears from the document that it was faxed to the Employer on May 26, 1997. The Lazar's evidence was that he first saw those time sheets. He did not believe they had worked the hours claimed. In his view the Novkos were not entitled to pay for extra hours because they were residential caretakers. However, he agreed that he would give them the benefit of the doubt and be reasonable. He denied that he agreed or promised to pay overtime wages.

When their employment came to an end, Hollyburn paid the Novkos an amount on account of "extra time", $3,389.78 in the case of Mr. Novko and $2,116.74 in the case of Ms. Novko. The Employer also paid the $500 bonus.

ISSUES

The issues in this appeal are the following:

1. Are the Novkos resident caretakers as defined in the *Regulation*?

2. Are they entitled to overtime wages?

3. Is the Employer entitled to include the rent benefit in the calculation of wages?

4. Are the Novkos entitled to compensation for length of service?

ANALYSIS

It is trite law that the appellant bears the burden of proving that the Determination is wrong.

1. "Resident caretaker"

The Employer argues that the minimum wage for residential caretakers is set out in Section 17(b) of the *Regulation* and that both Mr. and Ms. Novko were paid more than the minimum wage provided. Mr. Novko was a residential caretaker for the entire period of employment and, as such, not entitled to overtime wages. There is no reason why an employer cannot have two residential caretakers in an apartment building (*Dr. Peter J. Kokan Inc.*, BCEST #D425/97). In Ms. Novko's case, the hourly wage rate was $11.54 per hour. When Ms. Novko was made a full time residential caretaker, her salary should have been increased to $1,428. It was not. However, she should also have been allocated a portion of the rental benefit. The Novkos are arguing that they were not "resident caretakers" before March 7, 1997 and that Ms. Novko was not a resident caretaker after that date.

There is no issue that Mr. Novko was a "resident caretaker" after March 7, 1997. A "resident caretaker" is defined in Section 1 of the *Regulation*:

> "resident caretaker" means a person who
>
> (a) lives in an apartment building that has more than 8 residential suites, and
>
> (b) is employed as a caretaker, custodian, janitor or manager of that building;

Despite the fact that in the September 1996 Agreement, Mr. Novko was characterized "assistant manager" he was clearly employed as a resident caretaker. He lived in the building at the material times. He was employed by the Employer, Hollyburn. His duties, which were set out in the agreement, included collection of rent, renting of suites, cleaning of vacant suites, check-in and check-out of tenants, maintaining cleaning standards in the common areas, supervise the building, lawn moving, snow removal, replacing light bulbs, carpet cleaning, minor repairs of suites, and mechanical maintenance. In my view, those duties are caretaker/manager duties with respect to that building. Mr. Novko agreed that he performed the same duties as the resident manager, when he as the assistant manager, and that he also performed those duties when he became resident manager. The fact that there was a resident manager for the first six moths of employment, and the fact that there were other assistant managers in the building from time to time, is irrelevant. There is nothing in the *Act* or the *Regulation* that prohibits an employer from having two resident caretakers or more in an apartment building provided the requirements of the *Act* and *Regulation* are otherwise met (*Kokan*, above). In my view, therefore, Mr. Novko was a resident caretaker during his entire employment.

Ms. Novko's agreement with the Employer is somewhat different. Her duties, as described in the September 1996 agreement, were mostly office and administrative duties. Her employment was clearly part-time, and not to exceed 20 hours per week until March 1997. Until that time, she was

paid a salary of $1,000 per month. In March, the employment relationship changed in at least two respects: she became full time and her salary increased by $200. It was the Employer's understanding that part of the rental benefit should have been allocated to Ms. Novko. As I understood the evidence, this, in fact, did not happen. In any event, in my view, she became a resident caretaker as of March 7, 1997 when she accepted the appointment as such by the Employer.

2. Overtime Entitlement

The Employer argues that residential caretakers are not entitled to overtime payments. Their situation as resident caretakers is unique because, unlike most employees, they live at their place of work. The Employer can set hours, but cannot monitor or control the hours actually worked. The agreement between the Novkos and their Employer expressly provided for the Employees' hours of work. If they worked more than permitted by the agreement, it was contrary to the Employer's policy. In any event, both the Novkos were, in fact, paid money on account of overtime, $3,389.78 in the case of Mr. Novko and $2,116.74 in the case of Ms. Novko and were paid a $500 bonus. They did not provide any records of overtime work prior to March until May 26, 1997, immediately before their last day of employment.

Regulation 17(b) provides that the minimum wage for a resident caretaker is, for an apartment building containing 61 or more residential suites is $1,428 per month. In this case, based on the number of suites, the minimum wage is $1,428 per month.

I turn first to Mr. Novko's situation. As a resident caretaker, he is not entitled to overtime wages under the *Act* and *Regulation*. The agreement between Mr. Novko and the Employer was that he received a salary of $1,350 plus a $650 rental benefit. His salary was increased to $1,500 when he became resident manager. At all times, he received more than the minimum wage of $1,428 when the rental benefit is taken into account.

The next question is whether he is entitled to overtime payments based on the agreement dated September 16, 1996, between him and the Employer, any changes to that agreement or any other agreement. The September 1996 agreement provided that the Employee work 40 hour work week Monday through Friday in "accordance with the *Employment Standards Act*" at a certain salary. Given the nature of the employment, there was a certain amount of flexibility to perform "extra duties during normal time off". It provided for time off each week. It also required the Employee to take statutory holidays off. If the Employee was to perform work in excess of that specified in the agreement, he should have obtained his Employer's approval. After the appointment to resident manager, for which consideration was provided in the form of a salary increase, Mr. Novko could clearly be required to work in excess of those hours.

I am not persuaded that the Employer agreed to pay overtime wages to Mr. Novko except to the extent that it was prepared to pay "something" on account of "extra time" as per the Employer's letter dated April 29. The Employer voluntarily paid Mr. Novko an amount on account of extra

time worked and to assist with the transition to the new managers. In my view, when Lazar agreed to consider paying the Novkos an amount on account of extra time, he did not agree to pay "whatever the Novkos put down" or claimed.

I add, even if I agreed with Mr. Novko, namely, that he is entitled to overtime wages for part or all of his employment with the Employer, I would not award any payment on that account. I prefer the evidence of the Employer that Mr. Novko did not present any time sheets, or other evidence of hours worked, for the period before March 1997 until a very few days before his employment came to an end and, in the result, if he were entitled to overtime wages, I am not satisfied that he has proven on the balance of probabilities that he worked the hours claimed.

Initially, Ms. Novko received a monthly salary of $1,000 based on 20 hours of work per week. She received an increase of $200 when she became residential manager. As a resident caretaker she would be entitled to the minimum provided for in the *Regulation*. In my view, she was paid less than she was entitled to following March 7, 1997, when she became a residential manager. There is a difference of $228 per month, not counting the rental benefit. However, considering that the Employer paid a $500 bonus and paid her $2,116.74 in "extra time payments", I will not award anything on that account.

As for the period before March 7, 1997, I am not persuaded that she has established that she, in fact, worked the hours claimed. I prefer the evidence of the Employer that Ms. Novko did not present any time sheets, or other evidence of hours worked, for the period before March 1997 until a very few days before her employment came to an end.

3. Rent Benefit

The Employer also argues that the rental benefits should be taken into account. The value of the rental benefit is expressly provided for in the written agreement between the Employer and Mr. Novko. There is no provision for a rental benefit in Ms. Novko's case.

Section 20 of the *Act* provides for payment of wages in Canadian currency, by cheque, draft or money order, payable on demand, or by direct deposit (if authorized). Section 21(1) of the *Act* proscribes unauthorized deductions from wages. In the case of Mr. Novko, there is a "written assignment of wages to meet a credit obligation" within Section 21(4) (see *Sophie Investments Inc.*, BCEST #D527/97, upheld in part on reconsideration in *The Director of Employment Standards*, BCEST #D447/98). In the case of Ms. Novko, the agreement between her and the Employer does not provide for a rental benefit. As such, the Employer is not entitled to take that into account.

4. Compensation for length of service

The Employer argues that the Novkos are not entitled to compensation for length of service because they resigned from employment and, in fact, gave one month's notice.

I agree with the Employer. The Novkos wrote a letter to the Employer on April 28, 1997, indicating that they wished to resign from employment effective May 28, 1997. The Employer accepted their resignation. They worked at least until that date. An employer is not liable for compensation for length service where the employee "terminates the employment" (*Act*, Section 63(3)(c).

In my view, the appeal must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated July 13, 1998 be confirmed.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal