

An appeal

- by -

Sanja Drazic

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** Carol L. Roberts

**FILE No.:** 2001/734

**DATE OF HEARING:** January 24, 2002

**DATE OF DECISION:** January 30, 2002

## DECISION

### APPEARANCES:

On behalf of Sanja Drazic:	Guy Norman, Slobodan Drazic
On behalf of Nacel Properties:	Lawrence Lau
On behalf of the Director:	Written submissions only

### OVERVIEW

This is an appeal by Sanja Drazic ("Drazic"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued September 26, 2001. The Director found that Nacel Properties Ltd. ("Nacel") contravened sections 36(1), 46(1)(2) and 63(1)(3) of the *Act* in failing to give her hours free from work, statutory holiday pay time off, and compensation for length of service. The Director ordered Nacel to pay \$4,434.02 to the Director on Ms. Drazic's behalf.

### ISSUE TO BE DECIDED

At issue is whether the delegate erred in fact and in law in determining her normal hours of work and her hourly wage.

### FACTS

Ms. Drazic was employed as a resident building caretaker/ manger by Nacel, a property management company, from February 1, 1999 to December 31, 1999. She was paid a salary of \$2,000 per month. Ms. Drazic complained that she did not receive 32 hours free from work, either a day off or a day's pay if she worked a statutory holiday, or additional pay for working on a statutory holiday. Ms. Drazic also alleged that her employment was terminated without notice, just cause, or compensation for length of service.

Following an investigation, the delegate concluded that Nacel did not provide Ms. Drazic 32 hours free from work, pursuant to s. 36 of the *Act*. The delegate concluded that Nacel failed to provide sufficient evidence to discount Ms. Drazic's signed work records, and determined that she was owed wages for the 8 hours per day during the 32 hour time off period, overtime wages for the 43 weekends she worked without a relief caretaker, and statutory holiday pay.

The delegate also concluded that Ms. Drazic was not given one week's written notice of the termination of her employment, and was entitled to compensation for length of service.

## ARGUMENT

Ms. Drazic agrees with much of the Determination, but argues that the delegate made a factual error in computing her hourly wage rate.

Ms. Drazic contends that her employment contract supercedes the *Act*, and that, where it provides for greater benefits than that provided by the *Act*, it must be enforced. Ms. Drazic also relies on section 35 of the *Act*, her pay stubs, and Tribunal decisions in *Drover-King and King v. Director of Employment Standards* BC EST #D263/01, *Knister and Dean v. Director of Employment Standards* BC EST #D516/97, and *Harrison and Lander v. Director of Employment Standards* BC EST #D344/96 in support of her argument that her normal, or average weekly hours of work were 40, not 56, as found by the delegate.

Ms. Drazic also argues that there were a number of issues that the delegate failed to investigate. Those issues might, in essence, be characterized as unfair labour practises. Those include the claim that Nacel was in violation of s. 31(1)- posting hours of work notices, s. 6 - informing employees of their rights, and s. 27- setting out an employee's work hours in their wage statements. Another is that her husband was forced to perform her work, or she would lose her job. She seeks to have the complaint amended to include a claim on behalf of her husband, Sobodan, for wages for work he performed assisting her.

Nacel contends that the Determination should stand, although it submits that Ms. Drazic had taken the time off work that she was entitled to do. It denies that Ms. Drazic is entitled to more money, or that the work week is in excess of 40 hours.

The Director concedes that, where an employment agreement sets out terms and conditions that exceed the minimum standards of the *Act*, it will be enforced. However, she says that the contract between Ms. Drazic and Nacel is not clear in that regard.

The Director says that Ms. Drazic's hourly wage rate was calculated using Ms. Drazic's own statement that she worked 8 hours per day, 7 days per week. She contended that, had Ms. Drazic provided statements supporting her contention that she worked in excess of 56 hours per week, then that information would have been used in the calculations.

The Director submitted that, although Mr. Drazic's name was raised during the investigation, he did not file his own complaint. Further, the delegate says that Ms. Drazic failed to provide documents that were requested, and that other documents submitted on appeal that were not provided during the investigation. She argues that these documents should not be accepted in this case.

## ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has not been met.

I am without jurisdiction to, in essence, "amend" the complaint so that it includes Mr. Drazic. It was filed by Ms. Drazic, and investigated on that basis. In any event, there was no evidence that, during the time period covered by the complaint, there was any employer/employee relationship between Mr. Drazic and Nacel. I am unable to find that the delegate erred in not making any determination with respect to Mr. Drazic.

Ms. Drazic agrees with the delegate's determination that her weekly salary was \$461.53. However, she argues that the weekly salary should be determined based on a 40 hour work week, not 56. She says that her employment contract, the *Act*, Tribunal decisions, and her pay stubs all support her argument.

The employment contract between Ms. Drazic and Nacel does not indicate what her normal working hours were to be. In the absence of any contractual agreement, the delegate must have regard to other evidence.

Ms. Drazic claimed that she was "forced to work excessive hours each day", and was forced to work days off, on weekends and on statutory holidays. She then stated that "eight hours each day can be easily justified as time worked during these days."

Section 1(1) of the *Act* defines "**regular wage**" to mean

...

(e) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work,

....

In *McIver's Appliance Sales and Service Ltd. v. Director of Employment Standards BC EST #D 526/98*, the Tribunal said as follows:

The calculation of overtime for employees who are paid a monthly salary is predicated on their "normal or average weekly hours of work" There is nothing in the definition of "regular wage" that suggest such normal or weekly hours cannot exceed 40; indeed, to accept the position espoused by the delegate in the Determination would be tantamount to re-writing the definition so that it reads as follows:

(d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of *40 hours or* the employees' normal or average weekly hours of work...."

While it is open to the Legislature to redraft the definition as proposed by the delegate, it is not open to the delegate or this Tribunal to do so.

Further, this Tribunal has consistently held that there is no 40-hour "cap" on normal or average weekly hours for purposes of calculating a salaried employee's regular wage: see *RAP-ID Paper Vancouver Ltd.*, BC EST #D 182/96 and *Kocohani Holdings Ltd.* BC EST #D 337/96.

In my view, there is absolutely no ambiguity regarding how a "regular wage" is to be derived for an employee who is paid a monthly salary; the "regular wage" must be based on the employee's "normal or average weekly hours of work". There is nothing in the definition that places a 40-hour ceiling on the normal or average weekly hours of work and, in my view, the delegate erred in so concluding. ...

The delegate did not err in finding that Ms. Drazic's normal hours of work could have been something other than 40. The cases relied on by Ms. Drazic are of no assistance to the Tribunal in this instance.

The delegate examined the wage statements indicating that payment was based on a 40 hour week, and concluded that Nacel used a generic program that met the needs of most employees, but would not accurately represent Ms. Drazic's hours of work. While I agree that this contravenes the legislation, the delegate did order Nacel to cease contravening the legislation. The Director also has power to assess a monetary penalty for violations of the *Act*. However, if Nacel was in violation of the *Act*, on which I express no opinion, that would not necessarily be evidence to support Ms. Drazic's claim. Furthermore, Ms. Drazic would not be entitled to any additional wages as a result of any violation of this, or sections 27 and 31, in any event. I also note that section 35, which Ms. Drazic relies in part, does not apply to resident caretakers, by virtue of s. 35 of the *Regulations*.

I decline to admit evidence relating to Mr. Norman's complaint against Nacel. The Tribunal has held on many occasions that it will not accept evidence at a hearing which ought properly to have been put to the Director's delegate at first instance. (see *Kaiser Stables* BCEST #D058/98, and *Tri West Tractor Ltd.* BCEST #D268/96). Mr. Norman argues that, although the information he seeks to rely on to establish Ms. Drazic's "normal" or "regular" hours of work was not submitted to this delegate during the investigation, it was nevertheless before the Director as a result of his complaint against Nacel. His argument, as I understand it, is that the working hours of other building managers employed by Nacel should be used by the delegate in determining what Ms. Drazic's "normal", or "average" weekly hours would be. I am unable to conclude that, in the face of specific evidence from Ms. Drazic, the working hours of other managers would be of any assistance in determining what her normal weekly hours were.

I find no basis to conclude that the delegate's determination of 56 hours was in error, and dismiss the appeal

**ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination dated September 26, 2002, be confirmed.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**