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 -

Preston R. Sauer
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No: 1999/648

DATE OF HEARING: January 17, 2000

DATE OF DECISION: March 24, 2000

DECISION

APPEARANCES:

Preston Sauer	for himself
Frankie Chu	for Proda Enterprises Ltd.
Stephen Chu	for Proda Enterprises Ltd.
Anna Wong	Interpreter – Cantonese/English
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by the complainant, Preston Sauer, from a Determination dated October 6, 1999. In that Determination the Director's Delegate found that the Respondent employer was liable for payment to the complainant for the sum of $9,045.35 less the aggregate of two Orders under the *Residential Tenancy Act* in the amount of $4,544.50 for a net amount owing of $4,500.85. The complainant appeals on four points; firstly that the Delegate erred in her finding of fact regarding the definition of Resident Caretaker; secondly, the Director erred in the finding of fact regarding the provision of a thirty-two hour break pursuant to Section 36 of the *Act*; thirdly, the Delegate erred in finding that the complainant had resigned from his employment; and fourthly the Delegate erred in offsetting the orders under the *Residential Tenancy Act* from her Determination under the *Employment Standards Act*.

ISSUE(S) TO BE DECIDED

1. Was the complainant a Resident Caretaker at both 1835 Comox Street and 1222 Harwood Street?

2. Did the employer provide a thirty-two hour break between shifts?

3. Is the employer liable for compensation for length of service?

4. Did the Director's Delegate have the authority to offset Orders under the *Residential Tenancy Act* from the Determination?

FACTS

The employer, Proda Enterprises Ltd. ("Proda") owns residential apartment buildings in the West End of Vancouver. Two of the properties are located at 1835 Comox Street and 1222 Harwood

Street respectively. Those residential apartment buildings fall under the jurisdiction of the *Act*. Proda purchased the residential apartment building at 1835 Comox Street in September 1995. That building contains twenty-five suites. At that time the complainant was employed by the previous owner. The complainant had been hired by the previous owner to perform work related to the maintenance of the 1835 Comox Street property.

The complainant commenced employment for the previous employer on August 1, 1995. His employment with Proda terminated on September 6, 1998. The complainant resided in the 1835 Comox Street building and was considered the Resident Caretaker. He received a rent credit of $720.00 per month for the work that he performed. That rent credit and Mr. Sauer's employment were continued when Proda purchased the building.

Commencing on May 1, 1996 the complainant was hired to perform similar maintenance duties at 1222 Harwood Street. That building was also a twenty-five suite apartment owned by Proda. The complainant and Proda agreed that the complainant would receive an additional $250.00 rent credit for the services performed at 1222 Harwood Street. The complainant continued to reside in the apartment in the Comox Street building. He did not reside nor did he keep an apartment in the Harwood Street building.

In a letter dated September 6, 1998 the complainant informed Proda that he was resigning from his position as Property Manager and Non-Resident Manager of the properties situated at 1835 Comox Street and 1222 Harwood Street respectively effective that day.

ANALYSIS

Issue #1 – The complainant argues that it is not essential that he reside in an apartment building in order to claim that he is a Residential Caretaker. He argues that the focus of the analysis should be on the duties performed and the work description of a Residential Caretaker. He argues that his actual place of residence should have no bearing on the employment issue. The complainant states that the duties performed at both buildings were essentially the same and included such things as building cleaning, yard maintenance, showing suites, performing minor repairs to the suites, collecting rents and dealing with tenant complaints, etc.

The complainant focuses his argument on the duties he performed at both buildings. He acknowledges that he did not reside in nor keep an apartment at the Harwood Street building. He further acknowledges that the buildings are approximately a five minute walk from each other. He argues that the location of his personal residence should have no bearing on the employment relationship with Proda. He urges this Tribunal to consider the duties and functions of the job of Resident Caretaker as being paramount to a residency requirement.

The regulations to the *Employment Standards Act* speak directly to this point.

> Part 1 – Interpretation states that a "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 complainant's vigorous argument I am not able to accept that the Delegate erred in making the determination that he was not a resident caretaker at both buildings. The regulation, in its definition of resident caretaker, clearly states that such a person must live in an apartment building that has more than 8 residential suites and must be employed as a caretaker, custodian, janitor or manager of that building. It is clear that the complainant qualifies under that definition for the Comox Street property. It is equally clear that he did not live in the apartment building at 1222 Harwood Street. Therefore, despite the similarities in duties at the two buildings he cannot claim the compensation set out for Resident Caretakers under Regulation 17 for the Harwood Street property. The Director's Delegate determined that the complainant did qualify as a Resident Caretaker for the Comox Street property but rather than being a Resident Caretaker at the Harwood Street property was instead an employee entitled to the protection of the *Act* for labour and services performed at Harwood Street. I concur with the Delegate's Determination on this point. The complainant does not succeed in his appeal on this issue.

Issue #2 – In her Determination the Director's Delegate determined that the complainant was not entitled to claim hours on Saturday and Sunday under Section 36 of the *Act*. The Delegate, having determined that the complainant resided at the Comox Street property and did not reside or maintain a residence at the Harwood Street property, found that he could not claim a breach of Section 36 with respect to the Harwood Street property because he could not show that he had attended there regularly on Saturday and Sunday to perform duties without having the required 32 hour break. Similarly the Delegate found that the complainant was unable to show, because no hourly records were kept, that he had consistently provided service to the employer at the Comox Street property on Saturday and Sunday such that he did not receive a 32 hour break. The Delegate did accept that there was no Assistant Caretaker designated at either property nor was there any evening, weekend or holiday relief staff provided by Proda. She determined that the employer in this instance had not designated specific hours or break times for the complainant. Furthermore, the complainant is not able to provide any record to support a claim that he had performed work seven days per week or that he did not take time off on weekends.

The complainant argues that the Delegate has erred on two points. Firstly, he argues that because he was available by cellular phone and had to respond to calls from tenants at both buildings that he should be considered to have been on-call seven days a week. He further argues that the use of the cellular phone was not an extension of his personal residence as found by the Delegate but rather an incident of continuous employment at both buildings. He argues that the designated location for determining whether he had a 32 hour break should not be limited to the Comox Street property but rather should encompass both apartment buildings. He argues that despite the fact that his compensation package was based on a flat rate which was off set from his total rent that the Delegate didn't appreciate that he felt that he was on-call for both buildings seven days per week. He argues that the Delegate, although acknowledging that the employer was not providing 32 hour breaks, erred in not awarding compensation.

The Delegate in her determination noted that the *Act* defines work as a labour or services an employee performs for an employer whether in the employee's residence or elsewhere and that such an employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence. The Delegate considered the use of

the cellular phone as an extension of the complainant's residence. She further determined that Mr. Sauer had no records of days or hours worked nor was he able to provide evidence to show that he actually performed work during the period that he deemed to be his 32 hour break. She further found that there was no office at 1222 Harwood Street and therefore there was no location designated by the employer as a work site or a site that Mr. Sauer would be on-call at. As a result she determined that since Mr. Sauer was not a Resident Caretaker at 1222 Harwood Street the issue of a 32 hour break does not apply at that location.

I am unable to agree with the complainant's argument on this point. The complainant asked the Delegate and asks this Tribunal to imply that because he was packing a cellular phone on the weekends which number was known to the tenants that he was effectively on call. I do not accept that argument. Had the complainant been able to show specific dates, calls, and his attendance on those calls I may have been persuaded that he should be entitled to compensation. However, with the lack of such evidence I am not prepared to imply that carrying a cellular telephone and enjoying the freedom of mobility that those devices allow makes the fact that he may be accessible to tenants tantamount to being on-call. I confirm the Delegate's finding on this point.

Issue #3 – The complainant argues that the Delegate erred in finding that he was not entitled to compensation for length of service. The complainant acknowledges that he wrote a resignation letter dated September 6, 1998 and that he ceased performing the duties of the Resident Caretaker at both locations on that date. He argues that Proda's reluctance to correct unsafe conditions in the apartment buildings was a factor that caused him to resign his employment. He felt that he could not in good conscience be responsible for any liability that would or could possibly arise from the use by the employer of maintenance crews that were unlicensed tradesmen. He pointed specifically to an incident on September 3, 1998 in which the Harwood property experienced a power outage and, when he arrived, he noted that the emergency lighting fixtures had failed to react in the hallways and staircases. He felt that had there been a fire at that time there would have been a possibility of death or injury. He felt that this was reckless disregard for an order that had been made the previous June by the Fire Inspectors. He stated that he entered a complaint with the City of Vancouver Fire Safety Inspectors on September 7 and 17, 1998 after his resignation.

The complainant argues that ". . . [T]o insure the safety of the tenants and to keep my own work integrity I had no other choice but to resign. I have received no compensation for this from the Director. It seemed to bear no relevance to the Director that I resigned in order to safeguard the tenants and my personal and professional liability from this Reckless Endangerment (sic) liability that I had been placed in by my Employer."

I do not accept the complainant's argument that he should be compensated for length of service. In my view the complainant resigned his employment. The test of subjective and objective elements is present. Subjectively, he intended to quit and submitted a letter of resignation. He was upset with the manner in which he felt the employer was not responding to safety issues in the building. Objectively, upon submitting his letter of resignation, he ceased performing the duties of the Resident Caretaker. Furthermore, he pursued the safety issues with the Vancouver

Fire Safety Inspector. For these reasons I find that the complainant voluntarily resigned from his job and is therefore not entitled to compensation for length of service under Section 63 of the *Act*.

Issue #4 – The complainant argues that the Delegate should not have deducted from the Determination the amounts that had been ordered paid by the complainant to Proda under the *Residential Tenancy Act*. The complainant argues that garnishee orders should have been issued against the amount in the Determination and that the monies should have been paid into Court so that he could contest the payment. He further argues that, due to the fact that he has brought an application for judicial review of those orders, the Delegate should have allowed that legal proceeding to complete rather than offsetting the amounts of the orders from her determination.

The Director's Delegate did respond in writing on November 18, 1999 to the argument made by the complainant that the Residential Tenancy Arbitration Awards should not be deducted from the Determination. The Delegate argued that under Section 21 of the *Act* an employer may be permitted or required by the *Employment Standards Act* or any enactment of British Columbia or Canada to withhold directly or indirectly or deduct or require payment of all or part of an employee's wage for any purpose. The Director's Delegate argued by analogy that her Determination, being made under the *Employment Standards Act*, fell within the scope of an enactment of British Columbia and thereby allowed her to offset the Residential Tenancy Arbitration Awards which were also made pursuant to an enactment of the Province of British Columbia.

I am unable to accept that argument. Firstly, Section 21 of the *Act* states that an employer must not directly or indirectly withhold, deduct or require payment of all or part of an employee's wages for any purpose except where permitted or required by the *Employment Standards Act* or any other enactment of British Columbia or Canada. That section does not provide the Delegate with the authority to make an offset from wages owing an employee that an employer would not be able to make. The Employment Standards Branch is not a collection agency (see Consumer Direct Contact Ltd. B.C.E.S.T. #D082/00). Section 21 speaks not to the enforcement of judgments but rather to the deduction of statutorily required monies such as income tax, Canada Pension Plan contributions and Employment Insurance deductions. There are no provisions in the *Act* that allow the Director to enforce judgments of other Tribunals or Courts when making a Determination.

The troubling aspect of this case is the appearance of inequity and unfairness to the employer Proda Enterprises Ltd. Proda has a judgment against the complainant in the amount of $4,544.50. Conversely Proda owes the complainant monies pursuant to the Determination dated October 6, 1999. The complainant does not agree to the assignment of the debt under Section 22 of the *Act* for the amount of the Residential Tenancy Arbitration Awards. Indeed the complainant has commenced judicial review proceedings to challenge those awards. However, I cannot in good conscience require Proda to pay the entire amount of the $9,045.35 (less statutory deductions of $4,949.90 which have been remitted to the Receiver General) pursuant to the October 6, 1999 Determination to the complainant without some form of security or assurance from the complainant that the monies will be preserved to satisfy the Residential Tenancy

Arbitration Awards. One of the purposes of the *Act* as set out in Section 2(b) is "to promote the fair treatment of employees and *employers*". (emphasis by writer)

My finding that the Director's delegate did not have the jurisdiction to offset the amounts of the Residential Tenancy Arbitration Awards from her Determination and the fact that the complainant has commenced judicial review proceedings with respect to those awards does not relieve the complainant of his obligation to pay the amounts prescribed by those awards. The complainant is a judgment debtor. This is not a case where an employer wishes to offset an unliquidated amount from the wages on an employee without that employee having granted consent pursuant to Section 22(4) of the *Act*. (See *Pacific Business Equipment Ltd.* (re) B.C.E.S.T. No. D031/99 and the cases cited at paragraph 15 therein). However, the legal hurdle that is faced in this instance is that the *Employment Standards Act* requires the payment of amounts pursuant to determinations and does not allow for the offset of other credit obligations without the specific written consent of the employee pursuant to Section 22(4) of the *Act*.

To provide an element of fairness in this matter I direct that Proda Enterprises Ltd. pay the amount of $4,544.50, which is the amount of the two orders pursuant to the Residential Tenancy Arbitration Awards, into British Columbia Supreme Court under Action No. A982898. The complainant has commenced judicial review proceedings in that matter. If he does not pursue that application within a reasonable period of time Proda could make an application for payment out of the monies.

ORDER

I confirm the Determination dated October 6, 1999 except for that portion that requires payment of monies into Court.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal