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 -

Alexander Donetz
(the “Employee”)

- and-

Carolyn Almond
(the “Employee”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No: 1999/666

DATE OF HEARING: January 17, 2000

DATE OF DECISION: February 11, 2000

DECISION

APPEARANCES:

Mr. Alexander Donetz	on behalf of himself
Ms. Carolyn Almond	on behalf of herself
Mr. Michael Demers	on behalf of Hollyburn Properties Ltd.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") issued on October 15, 1999 which determined that the Employer, Hollyburn Properties Ltd. ("Hollyburn" or the "Employer"), was not liable for overtime wages to Alexander Donetz ("Donetz") and Carolyn Almond ("Almond"). The appeal is brought by the Employees.

FACTS AND ANALYSIS

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

The Determination concluded that the Employees were employed as resident caretakers from November 15, 1997 to December 31, 1998 and that Part 4, other than Sections 31, 36 and 39, did not apply. In the result, the Employees were not entitled to overtime wages. The Employees take issue with the conclusion that they were resident caretakers.

The Employees responded to an add in a local newspaper--the Vancouver Sun--for, among others, resident managers and caretakers. On November 13, the entered into agreements with Hollyburn, hiring them as resident caretaker trainees at the Harbourview property on Alberni Street in Vancouver. There is little doubt that the Employees were hired as resident caretakers.

Donetz' agreement provided for a salary of $1,000 per month and a suite valued at $600. Donetz' duties were set out in the agreement, including the following:

- collecting rent and other receivables;
- renting suites and credit checks of potential tenants;
- keeping occupancy at 100%;
- cleaning vacant suites;
- maintaining standards of cleanliness in common areas;

- supervising the building and common areas;
- cleaning, vacuuming and dusting;
- collecting of litter in the building and the grounds;
- lawn moving and snow removal;
- replacing light bulbs;
- mechanical maintenance;
- maintaining the pool; and
- minor repairs and general improvement of the suites, including painting.

The agreement between Hollyburn and Almond provided for a monthly salary of $1,400 and set out the duties as follows:

- showing suites;
- interviewing potential tenants, preparing rental applications, leases and similar services;
- using best efforts to lease suites;
- collecting rent and other receivables;
- administration of rent etc. and other office duties;
- maintaining standards of cleanliness in common areas; and
- cleaning of vacant suites.

The Employees testified that they were promised a salary of $3,600 plus the $600 rental benefit. Clearly this is at odds with the written agreement with Hollyburn.

In early December 1997 the Employees moved to another building administered by the Employer, Marlborough Tower in North Vancouver. There was no new agreement between the parties in connection with this move. Over time the Employer raised the salary of the Employees. In January 1998, Donetz' salary increased to $1,400 and Almond's to $1,800 and, again, in May, Donetz' salary increased to $1,600 and Almond's to $2,000. At the end of May, therefore, the combined salary was $3,600 plus the rental benefit of $600. The Employees performed the duties described above at Harbourview and continued to perform the duties at Marlborough Tower. At Marlborough Tower they also became involved in other duties, in particular, the zoning of a piece of property next to the Tower. In that regard, Almond made representations to the city council and presented a petition signed by tenants against the proposed development.

While the Employees deny that they were resident caretakers, they, nevertheless, in many instances identified themselves as "resident managers". On a performance evaluation form, dated July 28, 1998, Donetz indicated that his title was "resident manager". On receipts, submitted to the Employer they signed as "resident managers". While I do not place a great deal of weight on the title chosen by the parties--what matters is the substance of the relationship, not the form--in my view, the title is consistent with the duties and responsibilities they actually performed.

On December , 1998, the Employees resigned from their employment.

While Donetz argued that he was a "construction manager", there was little, if any evidence, to support that claim. in my opinion, there can be no issue--given the duties and responsibilities performed--that both Employees were "resident caretakers" (Section 1, *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 the written agreement was not expressly amended to take into account the new building, the Employees performed substantially the same duties and responsibilities albeit at a higher rate of pay. There is nothing in the evidence to support and argument that their duties and responsibilities changed such that they were no longer resident caretakers. The only thing that changed was the higher rate of pay.

Section 17 of the *Regulation* provides for minimum wages for resident caretakers: 17(b) provides that the minimum wage for a resident caretaker for an "apartment building containing 61 or more suites is $1,461 per month. In the instant case, the Employees were paid above the minimum wage. Naturally, the *Act* and *Regulation* do not prevent employers from agreeing to pay more, or to enter into separate agreements that certain work be separately compensated. In this case, it appears that Hollyburn compensated the Employees for 26 days of additional work done with its knowledge and consent between January 9 and July 31, 1998. A further claim for overtime for the period August 1 to October 31, 1998 was not approved. In a memorandum, dated November 19, 1998, entered into evidence at the hearing, the Employer stated:

> "As you are aware, overtime must be pre-approved and this submission encompasses times in which the building was fully staffed. On many occasions, this writer and other Hollyburn staff members would have direct contact with Steve and Danielle due to the fact that it was your time off. Recently, there have been camping trips and/or fishing trips which one would anticipate constitute time off. We find it difficult to understand this particular claim, as it clearly indicates that you have not had any time off for the entire month of September and October 1998. We do not consider this a valid claim."

There is no evidence to support an argument that there was an agreement to pay for "overtime" work performed without the Employer's knowledge or consent.

In the result, the appeal is dismissed.

ORDER

I order that the Determination in this matter, dated October 15, 1998 be confirmed.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal