Employment Standards TRIBUNAL

An appeal

- by -

Dynamic Developments Ltd.
("Dynamic")

- 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: Lorne D. Collingwood

FILE No.: 2001/745

DATE OF DECISION: March 6, 2002

DECISION

OVERVIEW

Dynamic Developments Ltd. ("the employer") has appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 27, 2001. The Determination orders Dynamic to pay Garth Olson and Evelyn Olson a total of $14,120.61 in minimum wages, statutory holiday pay, vacation pay and interest.

The Olsons worked as resident caretakers. The Determination is that both are entitled to receive the minimum wage for resident caretakers. The employer, on appeal, argues that the Determination is wrong in that there was only one job available, a part time job at that. According to the employer, the Olsons chose to share that job and each is therefore entitled to no more than a share of what the job paid, the job paying more than the minimum wage for a resident caretaker. In the alternative, the employer argues that even if it did somehow end up employing two resident caretakers, the Determination is still wrong in that it awards wages on the basis of a 42 suite minimum wage in a case where a 21 suite minimum wage should apply, two employees sharing the work that one person can do. My decision is that the employer allowed both of the Olsons to work as resident caretakers, that they were jointly and severally responsible for the entire building and that they are, as such, both entitled to receive a minimum wage which reflects the total number of suites in the building.

The Appellant argues that the Determination is wrong in five other respects. One, there can be only one resident caretaker. Two, moneys paid for extra work that was performed by the Olsons should have been taken into account in calculating the amount of minimum wages owed. Three, Garth Olson ceased to be a resident caretaker in February of 2000. Four, there is no basis for awarding statutory holiday pay because the employees are unable to prove that they worked any statutory holidays. And five, the delegate has failed to consider vacations taken by the Olsons in the year 2000. I have found that there is no reason to vary the Determination in four of these respects. I do find that the delegate has overlooked a number of vacations that were taken by the Olsons and that there is a need to vary the Determination for that reason.

An oral hearing was held in this case.

APPEARANCES:

D. Addision	Counsel for Dynamic
Evelyn Olson	On behalf of herself and her husband

ISSUES

The issue is whether the Olsons are both entitled to the minimum wage for resident caretakers or only one is entitled to that minimum wage. It is also argued that the minimum wage should be calculated on the basis of only half of the building's apartments in that the work of resident caretaker was shared. It is argued that the delegate should have considered moneys which were paid for extra work in deciding what is owed in the way of minimum wages. The employer goes on to claim that Garth Olson was not a resident caretaker after February of 2000.

The matter of whether statutory holiday pay has or has not been paid in full is at issue.

At issue the delegate's treatment of vacations taken by the Olsons in 2000.

What I must ultimately decide is whether it is or is not shown that the Determination ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS

In 1998, Dynamic advertised for a "resident manager/couple" for the Parklane Apartments, a 42 suite apartment building in British Columbia. Dynamic hired the Olsons, Garth and Evelyn, knowing full well that they would both be performing the work of caretaker/manager.

The parties accept that work performed by the Olsons is that of "resident caretaker" as that job is defined by the *Employment Standards Regulation* (the "*Regulation*").

The Olsons agreed to perform the work of resident caretaker for $1,764 a month in wages plus a rent reduction of $225. It was also agreed that the Olsons could take on "extra work", work which was considered to be separate from the work of resident caretaker, and that they would be paid $12 an hour for that work. The extra work includes work like painting, plumbing and appliance repairs, snow removal, pressure washing the driveway and attending to the gardens.

There is no written contract of employment, nor is there a written assignment of wages which would allow the $225 rent reduction to be treated as wages paid.

Dynamic did not divide work between the Olsons. It was left to the Olsons to decide what Garth would do and what Evelyn would do. They chose to share the work such that they both performed some of the work of resident caretaker for all of the tenants and/or throughout the entire building.

It is the delegate's decision that Garth and Evelyn worked as resident caretakers from January 1, 1999 to and including August 15, 2000. The Olsons at the investigative stage claimed that they started work in December, 1998, not January, 2000 and, in responding to the appeal, they again make the claim that they started work in 1998, not 1999. I have decided that I will not revisit the matter of when the employment began. The Olsons did not appeal the Determination.

The employer speculates that Garth ceased to act as resident caretaker on the 8th of February, 2000. I find that Garth did in fact take a job selling recreational vehicles in the United States at this point but that it is not shown that the sales job put an end to Garth's work as resident caretaker. Evelyn Olson tells me that Garth was able to return home at night and that he continued to act as resident caretaker in the evenings and on weekends. I am given no reason to disbelieve her and that I should not accept the decision of the delegate, namely, that Garth did in fact work as a resident caretaker until the 15th of August.

Garth Olson was paid $1,764 for his work as a resident caretaker in January and February of 1999. Evelyn also worked as resident caretaker in those months but she was paid nothing, at least directly. Between March of 1999 and the employment's termination, Dynamic paid Garth $882 a month for work as a resident caretaker and Evelyn another $882 a month for work as a resident caretaker.

The Determination awards Garth $139.57 in vacation pay and Evelyn $280.69 in vacation pay. I am shown that this is obviously wrong.

The Olsons did not take a vacation in 1999 and the employer's payroll records show that an amount of vacation pay was paid out at the end of the year. Garth received $711.67 and Evelyn $502.56.

In the second year of the employment, the delegate has the employer paying the Olsons another $626.02 in vacation pay. It did not. In the second year of the employment, the Olsons took vacations. They also took leave of their employment. The Determination fails to reflect this.

As matters are presented to me, it is clear to me that the Olsons took a 5 day vacation in March of 2000 and that they took a 4 day vacation in May. It is clear to me that the Olsons advised the employer of a plan to take another 5 days of vacation in July and that the employer agreed to that but I find that they were in fact away for the better part of the month. There is disagreement on whether the other days that were taken off were taken off with Dynamic's knowledge and permission. It strikes me as unlikely that the employer would have knowingly agreed to pay for all of this the extra time off. That would be to provide the employees with what amounts to five weeks of paid vacation instead of the two to which they are entitled.

As matters are presented to me, there is agreement that Don Jesson acted in relief of the Olsons for two periods. That leads me to believe that the Olsons may also have taken a number of days off in April and June of 2000.

ARGUMENT AND ANALYSIS

The employer argues that there can only be one resident caretaker. It doing so it relies on *John Knister and Therese Dean*, BCEST No. D516/97 and *Middlegate Development*, BCEST No. D188/00. Neither of those decisions address the matter of whether there can or cannot be two resident caretakers, foursquare. Those decisions deal with decisions which treat one person as a

resident caretaker and a second person, who also performed work as a resident caretaker, as if they were the common garden variety of employee. While the Determination of interest herein clearly departs from that practise, my reading of the *Act* is that it does allow for the employment of more than one resident caretaker. That conclusion is consistent with *Dr. Petar J. Kokan Inc. operating as Captain's Walk Apartments*, BCEST No. D425/97, and *Gateway West Management Corp.*, BCEST No. D356/97, decisions in which panels of the Tribunal have accepted that there can be two resident caretakers.

In this case the employer paid both Garth Olson and Evelyn Olson wages and it can be said that the Olsons were both allowed to perform work which is normally done by an employee. That is enough to bring each of them within the definition of "employee" as that term is defined in the *Act*.

> "**employee**" includes
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee, … .

It follows from the fact that both Garth Olson and Evelyn Olson are employees that they are entitled to receive at least minimum wages.

The delegate has awarded both Garth and Evelyn the minimum wage which is to be paid to a person working as a resident caretaker. The employer, on appeal, argues that is wrong because only one job was offered to the Olsons, a part time job at that. According to the employer, the Olsons shared the job and each is therefore entitled to no more than a share of what the job paid, the job paying more than the applicable minimum wage. I am unable to agree with that reasoning. It is clear to me that the Olsons were both allowed to perform the work of a "resident caretaker" and that they performed that work month in, month out. That entitles each of them to the minimum wage that is to be paid to a resident caretaker.

The minimum wage for a resident caretaker is found at 17 of the *Regulation*. That section of the *Regulation* is as follows:

> **17** The minimum wage for a resident caretaker is,
> (a) for an apartment building containing 9 to 60 residential suites, $429 per month plus $17.20 for each suite, and
> (b) for an apartment building containing 61 or more residential suites, $1461.00 per month.

The employer makes much of how many hours were worked by the Olsons. The employees do as well in that they claim overtime wages (even though resident caretakers are not entitled to overtime wages by virtue of section 35 of the *Regulation*). Both parties have failed to recognise the unique nature of the minimum wage for resident caretakers. It is not dependent on hours worked but on the number of suites for which a person is responsible. It is a monthly salary

which is designed to reflect the fact that resident caretakers are not entitled to overtime wages, that they are "on call" for great periods of time, that they must make themselves available to tenants outside normal work hours, and that they need to work long hours in the case of emergencies.

The delegate has decided that the minimum wage is $1,151.40 per month because there are 42 suites in the Parklane Apartments. The employer argues that the minimum wage should be calculated as if the Olsons were each responsible for 21 suites, two people sharing the work which had to be done. I am satisfied that it was not 21 suites apiece for which the Olsons were responsible at all. They were in fact jointly and severally responsible for the entire building in that each of them performed work throughout the entire building.

The employer argues that the delegate should have considered, for the purpose of calculating what is owed in the way of minimum wages, all moneys paid at the rate of $12 an hour for extra work which was performed by the Olsons. I disagree. That is not money paid for work as a resident caretaker.

The Determination is confirmed in respect to the decision that both Garth Olson and Evelyn Olson are entitled to receive the minimum wage for a resident caretaker of a 42 suite building.

Statutory Holiday Pay

The employer argues that the Olsons should not be awarded statutory holiday pay because they have failed to prove that they did in fact work statutory holidays. The employer does not show that the Determination is in error however.

It is the employer that must show that it has complied with the sections of the *Act* and the *Regulation* which govern statutory holidays. It is the employer that is expected to keep a record of days worked, not the employees (section 28 of the *Act*). In this case, the employer did not keep a record of days worked and it cannot show that statutory holiday pay has been paid as the *Act* requires, indeed, that it has paid any statutory holiday pay at all.

I note, moreover, that employers are required to post notice of the hours of work of resident caretakers and days off. There is not evidence to show that that was done in this case.

> **35** (2) Each employer of a resident caretaker must
> (a) for the information of residents in the apartment building where the caretaker is employed, display in the building a schedule specifying the caretaker's hours of work and days off work, and
> (b) give the caretaker a copy of the schedule.
>
> (section 35 of the *Regulation*)

Vacations and Other Time Off

There being no agreement on vacations, the Olsons are each entitled to 4 percent vacation pay or the equivalent in paid time off, namely, two weeks a year.

Garth was paid $711.67 in 1999 and Evelyn was paid $502.56 in 1999. In the year 2000, the Olsons took vacations and, as matters have been presented to me, I am led to believe that they took a number of other days off without telling the employer that they were going to do so. As it stands, the Determination fails account for any of this time off.

There is a need to decide how much time was taken off and a need to vary the Determination so that it takes into account time taken off, at least some of it if not all of it, and the amount of vacation pay that was in fact paid to the employees. That is not something which I am in a position to decide and that matter of whether the Olsons are or are not entitled to be paid for all of the time taken off in 2000 is a matter which should be left to the Director to decide in the first instance. I therefore refer certain matters back to the Director.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated September 27, 2001 be confirmed in all respects but the matter of time off and the matter of the total amount which Dynamic owed the Olsons given that time off. In these latter respects, I refer back to the Director of Employment Standards for further investigation.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal