

An appeal

- by -

Nacel Properties Ltd.
("Nacel")

- 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.: 2003/3

DATE OF DECISION: April 8, 2003

DECISION

This is a decision based on written submissions by Keri T. Grenier, Clark Wilson, Barristers and Solicitors, on behalf of Nacel Properties Ltd., Guy Norman, and by Jim Ross, a delegate of the Director of Employment Standards.

OVERVIEW

On October 31, 2002, the Director of Employment Standards (the “Director”) issued a Determination finding that Nacel Properties Ltd. (“Nacel”) had contravened sections 17, 36(1), 40(1)(2), 45 and 58(1) of the *Act* in failing to pay Guy Norman and Rennie Norman regular and overtime wages, statutory holiday pay and annual vacation pay. The delegate Ordered Nacel to pay amounts to the Director on Mr. and Mrs. Norman's behalf. Both Nacel and the Normans appealed the Determination.

While upholding the Determination in part, I referred the award to Mr. Norman back to the Director for reconsideration. (BC EST #D279/02 (“Nacel #1”))

On September 4, 2002, the delegate issued a decision concluding that Mr. Norman was entitled to wages as a regular employee, rather than a resident caretaker, commencing June 1, 1997. That conclusion was appealed by Nacel.

On December 2, 2002, I referred the issue of the starting date of Mr. Norman’s employment matter back to the delegate, as I found no rational basis for the delegate’s conclusion that Mr. Norman’s employment commenced June 1, 1997. (BC EST #D523/02 (“Nacel #2”)).

Following the second referral back, the delegate concluded that Mr. Norman worked for Nacel from October 29, 1996 to February 28, 1999, and that he was entitled to wages and interest in the amount of \$80,684.35.

FACTS

Although the facts of this matter are set out in my earlier decisions, for the purpose of this appeal, the relevant facts are as follows.

Mr. Norman filed a complaint with the Employment Standards Branch on August 16, 1999, alleging that he had worked full time for Nacel from October 1996 to February 28, 1999, and that he had not been compensated for that work.

In the initial determination, the delegate found that Mr. Norman was a resident caretaker at buildings at which he resided, and a regular employee for all other hours of work, and entitled to wages of \$61,112.08. While I concluded that the delegate had not erred in concluding that Mr. Norman was both a resident caretaker for some work and a regular employee for others, I found that the calculation of Mr. Norman’s wages ought to be referred back for reconsideration given the discrepancies in his claim.

Following the referral back, the delegate concluded that Mr. Norman was entitled to wages not as a resident caretaker, but as a regular employee for all work, since she found that Mr. Norman performed basic plumbing and maintenance work in addition to assisting his wife with suite inspections and rent

collection. The delegate also accepted witnesses' evidence that the Normans worked "7 days a week", and found that it would have been impossible for one person to perform the duties expected of Mrs. Norman. She determined that Mr. Norman was a full time employee, and that his employment commenced June, 1, 1997. As noted above, given that the Determination contained no reasons for the basis upon which date of June 1 was found to be the commencement of Mr. Norman's employment, the matter was referred back to the delegate a third time for a determination on that issue.

After the second referral back, another delegate assumed responsibility for the file. After reviewing all the material, he concluded that Mr. Norman was employed by Nacel from October 29, 1996, and at least from March 1, 1997, which represented the 24 month limit on the employer's liability for unpaid wages. The delegate stated that the previous delegate had not made a decision regarding the March 1, 1997 to May 31, 1997 time frame. He described her reason for doing so as she "... sought to have the matter concluded by addressing the Tribunal's concerns in this manner of leaving the wage calculation blank for this period."

The delegate concluded that Mr. Norman was entitled to wages and interest as a resident caretaker/ relief caretaker, and as a caretaker.

ISSUE TO BE DECIDED

At issue is whether the delegate erred in determining that Mr. Norman was a Nacel employee as of October 29, 1996, and continued to be an employee up to February 28, 1999. Because Nacel's liability is limited to a 24 month period, I will focus on the issue of whether Mr. Norman was an employee from March 1, 1997 to February 28, 1999, although a determination of his status prior to that time is relevant for, among other things, Mr. Norman's entitlement to vacation pay.

ARGUMENT

Nacel argues that the delegate had no evidence upon which to base his conclusion that Mr. Norman was an employee from October 29, 1996 to February 28, 1999. It contends that Mr. Norman's records are unreliable, and that, for the work Mr. Norman could support and which Nacel authorized, he was paid in full. It further argues that Mr. Norman is not entitled to wages for those periods of time in which he acted as relief manager, or invoiced Nacel, as he has already been compensated for that work.

Both the delegate and Mr. Norman seek to have the Determination upheld.

DECISION

There can be no dispute that this matter has caused frustration for all of the parties. The record shows that the first delegate initially determined that Mr. Norman was a resident caretaker at the building at which he resided, and an ordinary employee for work performed elsewhere. Upon having the matter referred back on specific issues, the delegate changed her conclusion, and determined that Mr. Norman was a regular employee for all of the work he performed. The second delegate has concluded that Mr. Norman was a resident caretaker/relief caretaker and a caretaker. The delegates have determined three different amounts owing.

Despite the first delegate's earlier conclusion that the starting date of Mr. Norman's employment was June 1, 1997, the second delegate has determined that Mr. Norman became an employee on October 29, 1996. His statements about the first delegate's reasons for determining that Mr. Norman was an employee effective June 1, 1997 are unintelligible. The delegate's reasons for determining the start date of Mr. Norman's employment were his presence at the hiring interview, and the "overall evidence (such as the statement of Drummond)". No further reasons are set out, and the delegate does not address the discrepancies and inconsistencies in Mr. Norman's evidence in the decision.

Although the present decision with respect to Mr. Norman's entitlement is far from satisfactory, it is not my intention to refer this matter back to the delegate further.

In Nacel #1, although I concluded that Nacel knew, or ought to have known, that Mr. Norman was performing work on its behalf, I noted that the delegate's determination that Mr. Norman worked, in essence, full time for Nacel for two years was "troublesome", given the discrepancies in Mr. Norman's evidence.

The test to be applied in circumstances where the amount of work is in dispute at issue is "the best evidence rule." In *Hofer v. Director of Employment Standards* (B.C.E.S.T.D. #542), the Tribunal said as follows:

In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's delegate) to consider employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's incomplete records to determine the employees' entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to establish that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable.

Further, the Tribunal stated

Thus, in my opinion, the appropriate test to apply in such circumstances is the "the best evidence rule". That is, the Director's delegate must make a reasoned decision, based on an evaluation of all the records and evidence which is available, to determine what is the best evidence of the number of hours actually worked by the employee.

In Nacel #2, after reviewing the delegate's reasons for arriving at her conclusion that Mr. Norman worked essentially full time, I decided that I was not prepared to disturb her conclusion. I noted that she had interviewed a number of witnesses and reviewed many documents including Mr. Norman's time records, and his signature on documents such as bank deposits, purchase and work orders and store invoices. There was also evidence that Mr. Norman appeared at Residential Tenancy Branch ("RTB") hearings on Nacel's behalf. The delegate also noted that it would have been impossible for one person to perform the work of resident manager for four buildings, situated several kilometres away from each other, and that, after the Normans left Nacel's employment, several managers were hired in their place.

Although not referred to in that decision, I note here that the Tribunal has held that the Director has been accorded considerable latitude in deciding what evidence will be received and relied on when making decisions subject to fair hearing considerations, and that, when challenging a conclusion of fact, the

appellant (here Nacel) must show that the findings were unreasonable, manifestly unfair, or that there was no rational basis upon which the findings of fact could be made (*Michnick v. Director of Employment Standards* BC EST #D006/02). Although Nacel challenged the reliability of Mr. Norman's records, it never denied that Mr. Norman's signature appeared on bank deposits, RTB decisions, work orders, or denied that its general manager or a property manager had provided letters of reference attesting to Mr. Norman's work efficiency.

Given that Mr. Norman's name appears on those documents before March 1, 1997, I find no basis to conclude that the delegate erred in finding that he was employed as of March 1, 1997, and continued to be up to February 28, 1999. I also find no basis to disturb the delegate's conclusion that Mr. Norman was employed as a resident and relief caretaker, and caretaker for the purpose of calculating wages owing. Any amounts already paid by Nacel to Mr. Norman in this time period for work he performed as relief caretaker or in any other capacity must be deducted from the amounts determined owing.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated January 10, 2003, be confirmed, subject to confirmation that Mr. Norman is not recovering wages for work performed as a relief caretaker or in any other capacity for which he has already been paid.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal