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-

Judy A. Harvey

and

Marlow K. Harvey

(the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	98/820
DATE OF HEARING:	March 22, 1999
DATE OF DECISION:	April 1, 1999

DECISION

APPEARANCES

Brooke Styba	authorized agent for Judy A. Harvey and Marlow K. Harvey
Dale Codd	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Judy A. Harvey and Marlow K. Harvey (to whom I shall collectively referred to as the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 3rd, 1998 under file number 87-962 (the "Determination").

The Director's delegate determined that the Harveys, along with a third individual, Gerald Namek, owed their former employee, Dale Codd ("Codd"), the sum of $3,410.73 on account of unpaid wages (compensation for length of service, vacation pay and statutory holiday pay) and interest.

It should be noted that Gerald Namek has not appealed the Determination. The Harveys' appeal was heard in Chilliwack, B.C. on March 22nd, 1999 at which time I heard evidence and submissions from Mr. Brooke Styba, on behalf of the appellants, and from Mr. Codd on his own behalf.

ISSUE TO BE DECIDED

The appellants' notice of appeal raises two issues; firstly, that Codd was a self-employed contractor and, therefore, not entitled to file a claim under the *Act*, and secondly that, in any event, Codd is not entitled to be paid compensation for length of service because he was terminated for just cause. At the appeal hearing, Mr. Styba, on behalf of the appellants (who did not appear in person at the hearing) indicated that he was no longer alleging just cause for termination. I might add, based on the material before me, that there does not appear to be merit to the just cause assertion in any event.

Accordingly, I shall now turn to the issue of Codd's status under the *Act*.

FACTS AND ANALYSIS

The evidence before me is that Codd, along with his wife, was retained by the employer in May 1996 to be the resident manager or caretaker of a 51-suite rental complex situated in Chilliwack. Codd's duties included showing suites to prospective tenants, collecting rents (which were deposited to the employer's bank account), administering a small petty cash account and generally maintaining the apartment complex which maintenance duties entailed janitorial, minor repair and gardening tasks.

Codd and his wife resided in a suite in the complex for which they paid a monthly market rent. Codd was compensated by way of a 10% commission based on the gross monthly rental receipts. Codd was subject to the direction and control of the employer although, in his daily tasks, he did have considerable leeway as to how and when his duties were undertaken so long as they were, in fact, undertaken. Although he did use his own hand tools, larger tools--such as a lawnmower--were provided by the employer.

Codd was paid monthly by way of a cheque paid against an invoice Codd issued to the employer. The employer asserts that Codd characterized himself as a contractor for purposes of the federal *Income Tax Act* and indeed, Codd's "management agreement" (prepared by Codd but never signed by the employer) referred to Codd as a contractor. However, Codd's status under the *Income Tax Act* is of limited, if any, assistance in determining his status under the *Employment Standards Act.*

The following provisions in the *Act* and *Employment Standards Regulation* are relevant:

> 1. (1) In this 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...
>
> "**employer**" includes a person
>
> (a) who has or had control or direction of an employee, or
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee...
>
> "**wages**" includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work...
>
> "**work**" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere...

1. (1) In this 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.

In my view, the evidence overwhelming shows that Codd was an employee rather than an independent contractor. He provided services to the employer, was subject to their ultimate control and was economically dependent upon the employer for his livelihood (see also *Hudson*, B.C.E.S.T. Decision No. 179/97 to the same effect). Mr. Styba, when queried, agreed that Codd appeared to fall squarely within the definition of a "resident caretaker".

During the appeal hearing, Mr. Styba submitted that Codd was not entitled to vacation pay or statutory holiday pay because Codd received paid vacation time and was not required to work on statutory holidays (parenthetically, I note that both of these assertions seriously undermine the employer's position that Codd was an independent contractor). In any event, the employer has not produced any evidence to substantiate these assertions, nor any evidence to show that Codd was actually paid either vacation pay or statutory holiday pay. Thus I see no reason to set aside or vary the Determination on these points.

As noted above, Codd was also awarded 2 weeks' wages as compensation for length of service. In my opinion, this aspect of the Determination is in error. Codd was terminated by way of a letter dated and delivered to him on October 31st, 1997--this letter purported to terminate Codd's employment effective November 30th, 1997. It should be noted that the employer was only obliged to give Codd 2 weeks' written notice of termination [see section 63(3)(a)(ii)]; thus, Codd was initially given more notice than he was entitled to under the *Act*. Shortly thereafter, on November 6th, 1997, Codd's employment was terminated "effective immediately". I understand that the employer took this action due to what it characterized as a "severe conflict" between Codd and Styba.

Under the *Act*, Codd was entitled to 2 weeks' written notice of termination (or pay in lieu); in fact, as events unfolded, he actually received only 1 week's notice of termination. Section 63(3)(b) of the Act allows for a combination of termination pay and written notice to be given so long as the combination at least equals the employee's overall entitlement. Thus, in my view, Codd was only entitled under the *Act* to an additional 1 week's wages as compensation for length of service, not the 2 weeks' wages that was actually awarded to him.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination be varied and that Codd be awarded the following:

Vacation Pay:	$1,175.49
Statutory Holiday Pay:	$1,057.94
Compensation for length of service (including vacation pay adjustment):	$ 500.54
	$2,733.97

together with interest to be calculated by the Director's delegate in accordance with section 88 of the *Act*.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal