Employment Standards TRIBUNAL

An appeal

- by -

Nacel Properties Ltd.
("Nacel or employer")

- 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: Paul E. Love

FILE No.: 2001/67

DATE OF DECISION: April 4, 2001

DECISION

OVERVIEW

This is an appeal by the employer of a Determination dated December 27, 2000. In the Determination the Delegate found that the employees were employed as resident caretakers of a townhouse complex, and were entitled to the benefits of Part 4 of the *Employment Standards Act* (the "*Act*") including overtime pay, minimum daily pay and vacation pay. The employer appealed, alleging that the employees were employed as caretakers of an "apartment building or buildings". The Delegate's calculation was not at issue, and the only issue which determined the employee's entitlement, was whether the employees were residential caretakers of an "apartment building". While the legislature could have defined residential tenancy accommodation in a broader manner than "apartment building" in the *Regulation*, it is apparent that only one reasonable meaning could be given to apartment building. The employer's townhouse complex was not an apartment building, and therefore the resident caretakers did not fall within the exemption in s. 1 and s. 35 of the *Employment Standards Regulation* (the "*Regulation*"). The employees were entitled to the benefit of Part 4 of the *Act*, and I confirmed the Determination in the amount of $4699.47, and the zero penalty determination.

ISSUE TO BE DECIDED

Are Mr. and Mrs. Buzikievich resident caretakers of an apartment building within the meaning of the *Regulations*, and exempt from Part 4 of the *Act*?

FACTS

Marchien Buzikievich and Ronald Buzikievich were employed by Nacel Properties Ltd. as resident manager and assistant resident manager. The employees managed a townhouse rental property of approximately 82 suites. The property consists of a cluster of buildings, each building with a number of units. The caretaker is required to rent suites, collect rent, serve eviction notices, attend Residential Tenancy Branch hearings, perform minor suite repairs, maintain the ground, and respond to tenant complaints. The caretakers have no significant interior cleaning responsibilities as there are no common entrances or halls. There is an employee which has been hired for grounds maintenance.

The Delegate found that the property lacked the characteristics of an apartment building, that is common entrances and hallways. The Delegate found that Mrs. Buzikievich did not receive minimum wage pursuant to section 16 of the *Act*, which at that time was $7.15 per hour. The employer did not pay overtime wages. The Delegate determined that the amount owing to Mr. Buzikievich was $2858.38 plus interest in the amount of $114.65, for overtime wages, statutory holiday pay, annual vacation pay. The Delegate determined that the amount owing to Mrs. Buzikievich was $1,659.86 and interest in the amount of $66.58, for regular wages, overtime

wages, statutory holiday pay, and annual vacation pay. The Director's calculations of the entitlement is not in dispute.

The Delegate further ordered the employer to cease violating sections 16, 40(1)(2) and section 46(1) and (2) of the *Act* and ordered the employer to comply with all the requirements of the *Act* and *Regulation*. Another Delegate imposed a zero penalty determination for a violation of sections 16, 40(1)(2), and 46(1) and (2) of the *Act*.

Employer's Argument:

The employer says that Mr. & Mrs. Buzikievich are resident caretakers of an "apartment building" as defined in the *Regulation*. The employer says that the townhouse complex in which the employees worked is an apartment building within the meaning of the regulations. The word apartment building is not defined in the regulations or the Act. The employer argues that the work of the employees is the same whether they work in a vertical or horizontal structure, and it is an unreasonable interpretation of the *Regulation* to treat workers differently simply because the building is a horizontal structure. The employer relies on *Director of Employment Standards, BCEST #D 344/96*, a case which dealt with whether resident caretakers in a multi-unit complex, could be resident caretakers of units other than those in which they resided. The Adjudicator indicated that a literal effect should not be given to the words of a statute if the result would be absurd or unreasonable.

Employees Argument:

The employees say that there are substantial differences in the work required for a townhouse complex, as opposed to an apartment building. The employee's agree with the submission of the Delegate that the Crescentview complex did not have the appearance and characteristics of apartment buildings. The employees point out that the Crescentview is approximately 20 acres in size, and virtually all jobs performed take longer to perform because of the size of the complex.

Delegate's Argument:

The Delegate says that a resident caretaker of an apartment is a person who is exempted from portions of Part 4 of the *Act*, and since this exemption takes rights away from an employee, it should be construed in a narrow and conservative fashion. The Delegate says that while "apartment" is not defined in the *Act*, apartments generally have a common entrance and hallway, laundry, mail box area and parking areas, with individual units arranged on the same floor, often with elevator access. The Delegate says this is to be distinguished from a townhouse complex, which will have a number of units, multiple individual entrances and mail delivery, with parking spaces near the entrance way. The Delegate referred to dictionary interpretations of townhouses and apartments.

The map filed by the employer shows that the complex consists of clusters of attached units, with 2 to 5 units per cluster. There are two access roads to the complex.

ANALYSIS

The burden is on the appellant, in this case the employer, to demonstrate that there is an error in the Determination such that I should vary or cancel the Determination. I do not think that this case falls to be determined be engaging in a functional analysis of the "work" engaged by the employee. The work performed by caretakers in a setting involving residential tenants would be similar substantially whether it is work performed in a townhouse or an apartment setting. There may be a difference in the conditions of work with more tenants and a larger geographic spread in the complex causing more work for a resident caretaker. The fact that more demands are placed on a resident caretaker, would not alter the fact that the person is a resident caretaker.

In the *Regulation* a resident caretaker is defined as follows:

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;

By virtue of s. 35 of the *Act*, a resident caretaker is exempt from the overtime pay provisions of Part 4 of the *Act*. The burden falls to the employer to show that Mr. and Mrs. Buzikievich fall within that exclusion: *Re Northland Properties Ltd., BCEST #D 004/98*. It is clear from previous cases before the Tribunal that a person can be a caretaker of an apartment complex, where there are a cluster of buildings within the same complex: *Director of Employment Standards, BCEST #D 344/96*.

Unfortunately, the legislature did not provide a definition of "apartment building" in the *Act* or *Regulation*. No case authority was provided to me with judicially considered definitions of apartment building. This issue has not yet been addressed by this Tribunal.

I accept that as a matter of logic, there should be no distinction in an apartment whether the building is organized "horizontally" or "vertically". The problem for the employer is that this is not one horizontally organized unit, but consists of a large number of units, all with separate entrances organized in clusters, over a fairly large parcel of land. Each unit in the cluster appears to have a common party wall. From the sketch map provide, the complex does not look like an apartment building.

I note that *Director of Employment Standards, BCEST #D 344/96* was a fact pattern where the adjudicator considered a multi-building apartment complex. The adjudicator considered it unreasonable to consider that the employee was a "residential caretaker" when the duties were performed in the building in which the caretaker resided, and not within the complex, when the

same duty was performed elsewhere in the same complex. The adjudicator did not consider the meaning of the word "apartment". I note that it was also open to the adjudicator simply to apply s. 28(3) of the *Interpretation Act, RSBC 1996 c. 238,* where a singular expression in a statute is taken to include the plural. A resident caretaker, can take care of one or more apartment buildings on site, while being resident on site. While I agree that the words in the statute should not be construed to impart an illogical or absurd interpretation, the words used can limit the "reasonable" interpretations available for consideration.

The focus of the analysis, in this case, is on what is meant by the words "apartment building". Does it mean any multi-unit, multi-building residential premises as contended by the employer, or is it something else? Does it apply to all persons who live and work on a property that deals with residential tenants? It is apparent, from the manner in which I have framed the questions that it would have been possible for the legislature to give a very broad definition to workers who live on site and who work on or manage a residential tenancy property for an employer. The legislature has, however, chosen the words "apartment building". While it may not make business sense to have the words "apartment building" confine the relationship, an apartment building is different than a the employer's cluster of townhouses spread over a 20 acre parcel. The employer seeks to define residential caretaker in a broader way than that chosen by the legislature. My job as an adjudicator is, however, to interpret the words in the statute.

The Director's distinction between townhouses and apartments is well founded. An apartment building has a substantial degree of common area, within the building, and this is generally because the units share common property and common facilities such as entrance ways, hallways, mail, laundry, parking and other facilities. Townhouses, have less common property contained within the building, and tend to be organized in rows or clusters, with party walls.

I note that a concern expressed by the employer is that from a policy perspective, it would create chaos in the industry, if townhouse caretakers were to be treated differently from apartment caretakers. I note that the position taken the Director in this appeal, is consistent with the position that is expressed in its published interpretations of the *Regulation*. The definition set out in the Employment Standards Fact Sheet describes an apartment building as

> ... any building that has the appearance and characteristics of an apartment building, such as common entry, hallways, and is a predominantly vertical structure .. Those buildings that are predominantly horizontal are not ... The Director treats an apartment complex as one apartment building, provided the buildings are in close proximity to each other on the same lot, with a common swimming pool and recreational area.

In my view, the facility in which the employees were engaged cannot be considered to be an apartment building. In my view, an apartment building is a building or structure, which contains multiple residential accommodation units, with common areas for exterior entrance, hallways, and often common facilities for mail, laundry, parking. An apartment building is usually a

vertical structure and may have one or more elevators. A townhouse complex usually has a linear or horizontal structure and the buildings have common sidewalls or party walls. I, therefore, find that the employer has not shown any error in the Determination.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated December 27, 2000 is confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal