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-

Raymond Kwan and Saka Atmadjaja operating as the "Wilson Apartments"

("Wilson Apartments")

-and by-

Catherine Elise Nelson
("Nelson")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE Nos.:	99/78 (Wilson Apartments Appeal); 99/115 (Nelson Appeal)
DATE OF HEARING:	April 6th, 1999
DATE OF DECISION:	May 19th, 1999

DECISION

APPEARANCES

Raymond Kwan	on his own behalf
Sophia Atmadjaja	on behalf of Saka Atmadjaja
Catherine Elise Nelson	on her own behalf
Murray N. Superle	for the Director of Employment Standards

OVERVIEW

I have two appeals before me both brought 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 February 5th, 1999 under file number 088-631 (the "Determination").

The Director's delegate determined that Raymond Kwan and Saka Atmadjaja, operating as the "Wilson Apartments" ("Wilson Apartments"), owed their former employee, Catherine Elise Nelson ("Nelson"), the sum of $865.61 on account of unpaid vacation pay, recoverable expenses, compensation for length of service and interest. By way of the Determination, Wilson Apartments was also assessed a $0 monetary penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

The two appeals were heard concurrently at the Tribunal's offices in Vancouver on April 6th, 1999 at which time I heard evidence and submissions from Mr. Kwan and Ms. Sophia Atmadjaja, on behalf of Wilson Apartments, and from Ms. Nelson on her own behalf. The Director's delegate did not present any evidence but did participate in the hearing by way of questioning the parties and presenting a final summary of the Director's position.

ISSUES TO BE DECIDED

Wilson Apartments appeals the Determination on three grounds:

- Nelson was an independent contractor rather than an employee and, therefore, was not entitled to file a claim under the *Act;*

- Nelson was, in fact, given 6 weeks' written notice of termination and not merely 2 weeks' notice as determined by the Director's delegate; and

- the delegate erred in awarding Nelson $179.47 on account of recoverable expenses.

Nelson appeals the delegate's finding that she was not a "resident caretaker" as defined in section 1 of the *Employment Standards Regulation* and thus seeks a concomitant adjustment in her unpaid wage claim based on the minimum wage established for resident caretakers in section 17 of the *Regulation*.

FACTS AND ANALYSIS

I propose to deal with each appeal separately after first setting out some background facts.

Background Facts

Wilson Apartments is a 21-unit rental apartment complex situated in Burnaby, B.C. Neither Mr. Kwan nor Mr. Atmadjaja reside in the complex. At all material times, Nelson resided in a suite in the building and served as the building's janitor/gardener for which she was paid, at the point of her termination, $300 per month. Nelson was also entitled to invoice Wilson Apartments for other duties she--or her husband--may have undertaken other than janitorial duties. Nelson paid a fair-market rent for her suite. According to Ms. Atmadjaja, Nelson used cleaning equipment owned by Wilson Apartments and was reimbursed for cleaning supplies she purchased. Nelson was paid in response to invoices she submitted at the end of each month. Mr. Kwan testified that although Nelson was initially hired strictly as a janitor her duties expanded over time. Nelson received and passed along rent cheques; she wrote rent receipts; she sometimes showed prospective tenants suites

that were available for rent; Nelson took tenant application forms and had a set of such forms in her suite; Nelson did suite inspections when tenants moved out.

Nelson's evidence is that she and her husband were residing in the Wilson Apartments when a neighbour, who had been the building janitor, gave up her position. In March 1993 she approached Mr. Kwan and was offered the position.

There is a card above her mailbox in the building which identified Nelson as the building "manager". Her duties included vacuuming and sweeping, cleaning windows, raking leaves and interacting with the other tenants. In this latter regard, she gave monthly rent receipts to 2 tenants who paid their rent in cash, she regularly collected rent cheques from some 13 other tenants and turned these cheques over to Mr. Kwan--the remaining tenants either paid, or some agency on their behalf paid, the landlord directly. Nelson posted eviction notices on occasion; she showed suites to prospective tenants; she posted "vacancy" signs when necessary; she maintained a supply of rental application forms, took such applications on the landlords' behalf and in such cases collected security deposits from the new tenants.

The present dispute appears to have been triggered when, in early January 1998, Nelson approached Kwan and Atmadjaja and suggested that she was not being paid the minimum wage to which she was entitled as a "resident caretaker"--I have, in accordance with section 17 of the *Regulation,* calculated her minimum entitlement to be well more than double the $300 per month Nelson was being paid. Wilson Apartments responded to Nelson's request by offering her a form of "Contract of Service" whereby she was to act as the janitor at the subject complex for a period of 1 year during which time she would be paid $300 per month. Nelson refused to sign the agreement but continued performing her usual duties at the apartment complex. In early February 1998 Nelson filed an unpaid wage complaint with the Employment Standards Branch. In mid-April Mr. Kwan delivered the following letter, dated April 16th, 1998 and addressed to Nelson, but actually handed to Nelson's husband:

> "It has been three and half months [sic] since we last handed you the work contract agreement. To date, you have not signed and given it back to us. We therefore assume you do not accept the contract. We are giving you notice now as of May 1, 1998, you are no longer an outside contractor for our building. Please return all keys for access to the cleaning sites on or before May 1, 1998.

Your cooperation is greatly appreciated."

Wilson Apartments' Appeal

I find no merit whatsoever in the submission that Nelson was an independent contractor. The employer principally relies on a ruling from Revenue Canada that Nelson was not eligible to claim employment insurance because she was "not employed under a contract of service". I note that this ruling is now under appeal and, in any event, has no precedential value in terms of Nelson's status under an entirely separate enactment, namely, the *Employment Standards Act.* Nelson was subject to the ultimate direction and control of Wilson Apartments and used that firm's equipment and various forms in her duties; Wilson Apartments either directly supplied, or reimbursed Nelson for the cost of, supplies used while carrying out her duties. The fact that Wilson Apartments did not closely supervise Nelson in the performance of her tasks does not lead me to conclude that she was an independent contractor.

Indeed, I would go further and find--upholding Nelson's appeal--that not only was Nelson an "employee" as defined in section 1 of the *Act,* she was also a "resident caretaker" as defined in section 1 of the *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.

The uncontradicted evidence before me is that Nelson resided in one of the 21 suites in the Wilson Apartments and was employed as the custodian/janitor for that building--while Nelson may not have been the building's "manager" she certainly had some managerial duties and, in any event, her janitorial duties, standing alone, bring her within the above-quoted definition. In his final submissions, the Director's delegate conceded that--based on the evidence given by parties at the appeal hearing--it was at least "arguable" that Nelson was employed as a "resident caretaker". Thus, Nelson is entitled to claim back wages based on the minimum wage mandated by section 17 of the *Regulation*--this minimum figure currently

stands at $790.02 per month, however, the present formula was not in effect throughout Nelson's last 2 years of employment and, therefore, Nelson's entitlement will have to be calculated based on the various formulae that were in effect, from time to time, during the relevant period.

Wilson Apartments concedes that Nelson continued to work--indeed, she was specifically asked to do so--and was paid until June 1st, 1998. Thus, on April 16th, 1998 Wilson Apartments gave Nelson only 2 weeks' written notice of termination. No further written notice of termination was ever given to her. Nelson was entitled, given her tenure, to 5 weeks' notice written notice of termination but she only received 2 weeks' written notice. Accordingly, she is entitled to an additional 3 weeks' wages as compensation for length of service which must, incidentally, be calculated based on her minimum entitlement as a "resident caretaker" rather than the $300 monthly wage she was actually paid.

Finally, I am of the view that the employer's appeal with respect to the $179.47 award on account of recoverable expenses ought to be allowed. Nelson's evidence was that she and her husband moved from a second to a third floor suite in July 1994. The expenses in question relate to paint and other materials used in improving the new suite. The receipts for these expenses were never submitted for reimbursement during her period of employment and Nelson testified that these expenses might possibly have been deducted from one of her rent payments. I consider these expenses to have been personal in nature and in the absence of evidence of an agreement whereby Wilson Apartments agreed to pay for these costs I do not find them claimable under the *Act.* Further, the evidence is at least equivocal as to whether or not, in fact, Nelson has already been reimbursed--by way of a rent reduction--for these expenses.

Nelson's Appeal

For the reasons set out above, I find that Nelson was a "resident caretaker" as defined in section 1 of the *Regulation.*

ORDER

Pursuant to section 115 of the *Act*, I order that the this matter be referred back to the Director's delegate so that Nelson's unpaid wage entitlement (including her entitlement to unpaid "resident caretaker" wages, compensation for length of

service and concomitant vacation pay) may be recalculated in accordance with the findings set out in these Reasons for Decision. Nelson is also entitled to interest on her unpaid wages to be calculated by the delegate in accordance with section 88 of the *Act.*

The $0 monetary penalty is confirmed.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal