

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Charles Hudson Operating as Capri Apartments
("Hudson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/737

DATE OF HEARING: April 11 1997

DATE OF DECISION: April 25, 1997

DECISION

OVERVIEW

The appeal is by Charles Hudson operating as Capri Apartments (“Hudson”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 4607 of the Director of Employment Standards (the “Director”), a decision dated November 21, 1996. In the Determination, Peggy Collins is found to be a resident caretaker and owed resident caretaker pay and other moneys pursuant to the *Act*.

APPEARANCES

Charles Hudson	Owner of Capri Apartments
H. David Edinger	Counsel for Hudson
Peggy Collins	On Her Own Behalf
Trish Holland	Witness for Collins
Paul Harvey	For the Director

ISSUES TO BE DECIDED

At issue is the matter of whether Collins was an employee of Hudson or engaged as an independent contractor. The appeal argues that Collins is an independent contractor for much the same reason as Barbara Twyman was found to be in *Joseph B. Horwath and M. Wynne Horwath operating as Cedar Crest Mobile Home & RV Park*, [1996] BCEST No. D136/96.

Should it be found that Collins was an employee, and therefore covered by the *Act*, at issue is the matter of whether she can properly be considered to be a ‘resident caretaker’. The appeal argues that Collins was not a resident caretaker but merely a part-time employee. That in part goes to the extent of her work and that is at issue.

At issue is the amount of the rent reduction received by Collins.

FACTS

Peggy Collins was a tenant in the 18 suite Vancouver apartment building known as Capri Apartments when Charles Hudson asked her if she would undertake work in and about the apartment building. Collins accepted his offer and began work around the beginning of May, 1992 and worked for him until April 30, 1996 when she was terminated without notice or cause. The Determination sets May 1, 1992 as the start of employment. That is the start of work as matters are presented to me.

The parties agree that at the start of her work Collins’ duties included at least the following:

- a) Vacuuming hallways on a weekly basis;
- b) keeping the lobby and laundry clean and tidy;
- c) raking leaves in the fall;

- d) snow removal;
- e) meeting trades-people, inspectors and others who needed entry into the building in an official capacity; and
- f) referring major problems to Hudson or in his absence, his property manager, Patricia Wispinski.

The parties agree that Hudson provided the vacuums, shovels, rakes and brooms used by Collins for the above work.

In addition to the above, Collins would show suites and rent them out, normally on weekends, as that is how Hudson wanted it. As she rented a suite Collins would see to the execution of rental agreements and collect security deposits. That she rented out suites on some 35 occasions is not disputed. What Hudson says, however, is that the work was not part of her regular duties but over and above that, something for which she was paid separately, \$35 for each suite rented. There are no records of that beyond two hand-written documents, of the roughest sort, and as I read them they suggest that Collins was once paid \$35 for renting a suite but hardly confirm it. In the absence of hard evidence that Collins was paid separately for renting suites, I conclude that she was not: That such work was part of her regular work.

Collins took on other work around the apartment. The parties disagree on the extent of such work and whether or not it was required. As matters are presented to me, I conclude that Collins performed the following additional work:

- a) Dealing with rowdy and noisy tenants;
- b) collecting late rents on occasion;
- c) turning the hot water heat on in the fall and off for the summer, including the bleeding of radiators;
- d) minor repairs;
- e) tending to emergencies such as a collapsed roof, a plugged sewer, break-ins and thefts, outbreaks of cockroaches and mice; and
- f) the overseeing of trades-people, at least to the extent that things got done.

That such work was done is my conclusion given the testimony of Collins, which I prefer over the contrary testimony of Hudson on the point. That of Collins is the clearer and is corroborated by the testimony of Trish Holland. Holland is in a position to know how things were done at Capri Apartments, she was a tenant in the apartment for several months, and it was her bathroom into which the sewer backed up. Hudson denies that the work was performed but offers nothing in support of his assertions. It is, moreover, not at all clear to me that he was in a position to know what Collins did on a weekly basis. Hudson paid only the occasional visit to Capri Apartments and was frequently away from Vancouver for extended periods, leaving problems to Wispinski and Collins in his absence.

Collins went by the title, Manager of Capri Apartments, but there is disagreement on whether Hudson gave her that job or whether she was self-appointed. No hard evidence to the contrary, I conclude that Collins was manager of the building. The building's intercom presented her as the manager. Hudson did not change that and people as a result would conclude that she was the manager. Collins signed rental agreements as Manager. Hudson knew of that and did not put an end to it. And through that tenants were given further reason to think that Collins was the manager. Holland makes it clear that she looked to Collins as manager. And while Hudson says that Wispinski was the manager of Capri Apartments, the evidence put before the Director's delegate has Wispinski describing Collins as the building manager. Collins may not have been

formally offered the position of manager or told that she was the manager but she was constructively placed in that role and, once there, she was allowed by Hudson to continue in it. I find that Collins performed the work of Manager of Capri Apartments.

As the resident manager of the building, tenants and other people would look to Collins for assistance at all hours. In an effort to put an end to that, Collins posted a notice setting out the hours of the manager as 10:00 a.m. to 8:00 p.m.. Collins was usually available during those hours but that was not always so. Collins worked part-time as a typesetter, for a few hours each week. And beyond that, as matters are presented to me, it is clear that Collins had considerable freedom to come and go as she pleased.

The number of hours worked by Collins in an average day, and the number of days worked by her in an average week, are matters which I cannot determine with precision. There were no set hours, neither Hudson or Collins kept a record of hours and days worked, and neither demonstrates much of an ability to recollect such details. Only a general conclusion in respect to the amount of work is possible. The size of rental operation that is Capri Apartments, the duties of Collins, and the fact that she came to be viewed as manager leads me to conclude that she was either working, or on call, for a substantial part of each week, in the neighbourhood of her posted hours.

Prior to beginning work for Hudson, Collins lived in suite 102 and paid rent of \$550 per month. Collins, in agreeing to work for Hudson, did so in return for a rent reduction which she says was \$250. Hudson says it was \$300. I conclude, no hard evidence to the contrary, that initially it was as is found in the Determination, namely \$250. It is likely that Collins would remember the amount of her net rent, she having to pay it month after month as she did. Hudson on the other hand rents four apartment buildings, a total of 86 suites, and assorted single units that he owns, and does not demonstrate to me that he is likely to remember what any particular renter paid.

In the spring of 1993 Collins moved into apartment 304. On learning of her move, Hudson informed her that the rent of that unit was higher. In doing so, he increased the amount of her rent reduction by \$20, that is my conclusion. Prior to Collins moving in, Suite 304 had been renting for \$620 per month, there is hard evidence of that, and I find it unlikely that Hudson reduced the rent at that point. Collins had to pay more, yes, but she was not required to pay another \$70 more per month, only another \$50. As such I find that from October, 1993 on, Collins was paid wages in the form of a rent reduction of \$291, not \$271 as is found in the Determination.

Earning \$291 as she did as manager, and working the few hours that she did as a typesetter, Collins needed another source of income. She made jewellery for three or four hours a day in her home. As matters are presented to me, that work was not performed at the expense of her work for Hudson but while on call and as her duties as manager of Capri Apartments permitted.

ANALYSIS

Section 1 of the *Act* defines employee and employer as follows:

“**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 the 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.

The case law in respect to whether a person is or is not an employee is set out in the decision of the Tribunal, *Larry Leuven* (1996), BCEST No. D136/96. I am required to give the above definitions a liberal interpretation. The Tribunal will consider several factors in deciding whether a person is an employee or an independent contractor, including:

- Control by the employer over the work;
- ownership of tools;
- chance of profit/risk of loss;
- remuneration of staff;
- discipline/dismissal/hiring;
- perception of the relationship;
- intention of the parties; and
- integration into the employer’s business.

In the Determination, Collins is found to be an employee. Nothing advanced by the appellant leads me to a different conclusion. *Joseph B. Horwath*, the decision cited above, is distinguished on the facts. In this case there are no agreements setting out Collins as a contractor. Collins was neither in the business of managing or cleaning apartments or operating some multifaceted business enterprise. Collins was simply the manager of one apartment building, Capri Apartments, who took on odd jobs to facilitate her meagre income. As manager of the building she was an integral part, indeed a key part of Hudson’s business. What control was exercised by Hudson over the work of Collins is consistent with that of an employer of an apartment building manager. Hudson exercised a power to dismiss and discipline which is consistent with an employment relationship. And Hudson owned all important tools used by Collins. All this leads me to conclude that Collins is properly viewed as an employee and covered by the *Act*.

As an employee of Hudson, Collins is either a ‘resident caretaker’ under the *Act* or an employee who is entitled to be paid wages for her hours of work. The Director’s delegate, on finding that Collins performed substantial work; no hourly record of her hours, or other payroll records; and that Collins could be called to work at all hours, concluded that Collins was resident caretaker of Capri Apartments. The appeal argues that Collins is not a resident caretaker as she was not employed as a caretaker, custodian, janitor or manager, and much is made of the fact that Collins was not required to work or be on call during certain specific hours. But the *Act* and the *Employment Standards Regulation* do not require that. The Director may find that an employee ‘resident caretaker’ in the absence of the setting of an employee’s hours by the employer. It is necessary only that there be sufficient work to justify such a finding, that the person reside in a building in which there are more than 8 residential suites, and that the person be employed as caretaker, custodian, janitor or manager of the building. Collins’ work was of a substantial nature, the time taken to rent suites, the hours in which she was on call, and her other work all considered. And she was the manager of the 18 suite building in which she lived and she performed caretaker, custodial and janitorial duties beyond those of manager. I find the decision

of the Director's delegate, that Collins worked as a resident caretaker, to be an entirely reasonable one.

The Director's delegate expresses an uneasiness with his decision given the distinct lack of information in respect to hours and days worked. I am faced with that same lack of information and conclude that there is no way of knowing which particular days were worked and, most importantly, which were not. The Director's delegate awards statutory holiday pay and vacation pay as if no days were taken off but given Collins' freedom to come and go I find it as most unlikely that Collins did not take days off here and there, lots of them, enough to satisfy the requirements of the *Act*. I am unable to find that statutory holiday pay and vacation pay is owed Collins beyond that vacation pay which is due for the last year of her employment. As she was terminated on the anniversary date of her employment, none of that vacation could possibly have been taken.

I have already found that the amount of wages paid Collins is \$291, not \$271. Reducing the award so as to reflect the above leads to the conclusion that Collins earned wages of \$15,574 after May 1, 1994 and is owed compensation for length of service of \$651 and vacation pay of \$341. From that must be subtracted the amount of her rent reduction which is 24 x \$291 or \$6,984, leaving a net total of \$9,582. Interest on that is \$344. The total amount owed is \$9,926.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination No. CDET 4607 be varied. The amount owed Collins is reduced to \$9,926.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc