

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 -

Lee's General Maintenance & Construction Ltd.
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NO.: 98/148

DATE OF DECISION: May 21, 1998

DECISION

OVERVIEW

This is an appeal by Lee's General Maintenance & Construction Ltd. (the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from Determination No. CDET 007543 issued on February 16, 1998 (the "Determination") by a Delegate of the Director of Employment Standards (the "Director"). The Determination in this case was one of three issued on the same date involving the Employer and its officers or directors. The Determination in question found that the Employer had failed to pay two former employees, Doris and Steven Krysanski, the minimum wage for resident caretakers and ordered the Employer to pay the complaints \$2,009.17, including interest accrued through February 16, 1998. The Employer based its appeals on a number of alleged procedural errors in the Determination and a claim that Steven Krysanski had not been an employee. The appeal was decided on the basis of written submissions.

ISSUES TO BE DECIDED

The Employer's appeal raised a number of issues that can be summarized as follows: Did the Delegate of the Director of Employment Standards follow the *Act* in issuing the Determination? Did the complaint fall properly under the *Act*? Was Steven Krysanski an employee of the Employer?

FACTS

The Employer acknowledged that Doris Krysanski was employed as a resident manager in an apartment building from March 1, 1995 to August 31, 1996. The Determination found that Steven Krysanski, apparently Doris Krysanski's husband, was also employed as a resident manager during the same period. The resident manager received \$633.60 per month, plus a monthly rent subsidy of \$30 during the period of March 1, 1995 to March 1, 1996. In addition, the complainants received a lump sum payment of \$325 to defray rental expenses from April 1, 1996 to August 31, 1996. Both complainants had other full-time jobs. According to the Determination, they shared the resident manager position. In addition, Steven Krysanski performed other work for the Employer as an independent contractor.

The Employer provided evidence that Doris Krysanski had written to the Employer to apply for the position of "Resident Manager," citing her qualifications for the job. Both complainants signed the Employer's application form, and the Employer's letter offering the position of resident manager was addressed to Steven and Doris Krysanski. The letter stated that compensation for the position would be \$633.60 per month, plus 4 per cent

vacation pay. According to the Employer, Doris Krysanski requested that Steven Krysanski be paid for the position.

The Director's Delegate reviewed a job description for the "Resident Caretaker" position. The Employer was unable to provide any records of time worked by the complainants. The complainants did provide estimates of the time they worked, primarily on the weekend, with an average of 10 hours on weekdays. The Employer submitted records of maintenance work done by Steven Krysanski on a contract basis at the rate of \$10 per hour.

On July 22, 1996, the Employer informed Steven Krysanski that his employment would be terminated on August 30, 1996 as the new owner of the building would not require a resident caretaker.

Steven and Doris Krysanski filed a complaint claiming the minimum wage for resident caretakers and holiday pay. They also claimed compensation for the Employer's failure to provide weekend relief. Because there were no records of time worked, the Director's Delegate concluded that it would not be possible to determine if there had been violations of the statutory holiday pay or hours free from work requirements of the *Act*. The complaints agreed to withdraw their complaints regarding statutory holiday pay and hours free from work.

The Determination found that current *Employment Standards Act* applied to the complaint, although some of the work subject to the complaint had been performed before the *Act* took effect. The Director's Delegate further found that the complaints were residential caretakers within the meaning of the *Act* and that their wage entitlement should be calculated under the formula contained in the previous statute and Section 17 of the *Regulation* for the current *Act*. The Determination concluded that the rate of pay in the *Regulation* did not depend on full-time or part-time work and that any contract of employment containing an amount less than the *Regulation* was invalid. However, the Delegate reviewed the job logs submitted by Steven Krysanski and found that some of the work fell within the definition of a resident caretaker in the *Regulation* and deducted the amounts paid for that work from the wages owing to the complainants.

ANALYSIS

In support of its appeal, the Employer referred to Section 117 (2) of the *Act*, alleging that the Director's Delegate violated the *Act* by imposing a penalty. The Employer further argued that the Director violated Section 74(3) of the *Act* by failing to determine who was the real complainant until June 30, 1997, i.e., more than six months after the complainants' termination of employment. The Employer argued that Steven Krysanski had never been an employee, citing correspondence it carried on with the Director's Delegate and a ruling from the Director of Revenue Canada that Steven Krysanski was not an employee for purposes of taxation. Because Steven Krysanski had not appealed that decision, his complaint was out of time under Section 74(3) of the *Act*. The Employer further alleged that the complainants had

failed to report their income properly to Revenue Canada. The Employer argued that the Director's Delegate had failed to inform it that the current *Act* applied to the complaint in question and that she had made errors in her estimations of the amounts due to the complainants.

In reply, the Director's Delegate pointed out that Section 117(2) of the *Act* refers to the power to impose penalties under Section 98 of the *Act*. The Determination did not impose a penalty, so that Section 117(2) did not apply. The Director's Delegate stated that Steven and Doris Krysanski had filed their complaint on July 5, 1996, prior to the termination of their employment. After the complaint was received, a file only in the name of Steven Krysanski was opened. The Delegate's investigation established that the two complainants shared the residential caretaker job and issued a Determination accordingly. She argued that the decision by Revenue Canada had no bearing on the time limits for filing a complaint under the *Act*. The employer's argument that it was unaware of Doris Krysanski's status as a complainant until June 30, 1997 did not bear on the timeliness of her complaint. The Director's Delegate noted that she had enclosed the relevant sections of the *Act* in her correspondence with the Employer. Any confusion about the statute in effect must have arisen from the Employer's counsel, not the Delegate. Finally, statements of wages that might be owing to the complainants in correspondence with the Employer prior to the issuance of a Determination do not bear on the Determination itself.

The procedural issues raised by Employer's appeal did not address the Determination itself and are based on several misinterpretations of the *Act*.

Section 117(2) of the *Act* states:

The Director may not delegate to the same person both the function of conducting investigations into a matter under section 76 and the power to impose penalties in relation to that matter.

This section of the *Act* refers to the power of the Director to impose penalties under Section 98 of the *Act*. The Determination in question did not impose any penalty against the Employer. In this case the Director's Delegate investigated the complaint, attempted to reach a settlement between the Employer and the complainants and issued a determination that included a conclusion that the Employer owed wages under the *Act*. Therefore, Section 117(2) does not apply to this case.

Section 74(3) of the *Act* requires that a complaint relating to an employee whose employment has terminated must be delivered [to the Ministry of Labour] within six months of the last day of employment. This section requires former employees to file their complaints in a timely fashion. An employer or former employer may become aware of a complaint only when the Director's Delegate initiates an investigation. In this case, Steven and Doris Krysanski jointly filed a complaint on July 5, 1996, several weeks before their last day of employment. They clearly met the requirements of Section 74(3). The Employer has no grounds for attacking the Determination on the grounds that there was any delay in the

processing of the complaint, which seems to have occurred in this case. The Employer did not argue that it suffered any prejudice because of the delay in the initiation of the investigation of the complaint.

The Employer's sole argument for the proposition that Steven Krysanski had not been an employee was a decision by Revenue Canada concerning his employment status for purposes of income taxes. While the Revenue Canada decision is worthy of consideration, the Director's Delegate reviewed the evidence of Steven Krysanski's employment status carefully. She noted, for instance, that both Steven and Doris Krysanski had completed the Employer's application form for the position of resident caretaker and that the Employer's letter offering employment was addressed to both complainants. The Employer's letter of termination was addressed to Steven Krysanski. Based on this evidence, the Director's Delegate concluded that Steven Krysanski had been an employee of the Employer. The Employer's evidence in support of its appeal was insufficient to challenge the conclusion in the Determination.

The *Act* contains no requirement that the Director's Delegate instruct an employer or any other party on its provisions. In this case, the Director's Delegate attached copies of the *Act* and the *Regulation* issued under the statute in her correspondence with the Employer. The current *Act* took effect on November 1, 1995, over eight months before the complaint was filed. The Employer's misinformation about the applicable statute is not grounds for overturning a determination. Moreover, Section 128(3) of the *Act* states that any complaint made before the repeal of the previous statute shall be treated as a complaint made under the current *Act*.

The appeal in question is against the Determination. The Employer did not challenge the calculations of amounts owed to the complainants in the Determination. Evidence of other correspondence between the Director's Delegate and the Employer is not relevant to an appeal against the Determination.

ORDER

For these reasons, Determination No. CDET 007543 of February 16, 1998 is confirmed, pursuant to Section 115 of the *Act*. The complainants are entitled to payment of the amount contained in the Determination, plus additional interest that has accrued since the Determination was issued.

Mark Thompson
Adjudicator
Employment Standards Tribunal