**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 -

Thomas Louis Harrison and Maartha Lander
("Harrison" and "Lander")

- of Determinations issued by -

The Director Of Employment Standards
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 96/108 and 96/109

**DATE OF HEARING:** July 24, 1996

**DATE OF DECISION:** August 21, 1996

**DECISION**

**APPEARANCES**

C.B. (Joe) Coutts, Esq. on behalf of Harrison and Lander

Donald MacKinnon, Esq. on behalf of Equitable Real Estate Investment

Elaine Livingston on behalf of the Director of Employment Standards

**OVERVIEW**

This matter involves two appeals, one brought by Thomas Louis Harrison ("Harrison") and the other by Maartha Lander ("Lander"), pursuant to Section 112 of the Employment *Standards Act* (the *"Act"*), against Determinations No. CDET 000678 and No. CDET 000680, both of which were issued January 17, 1996. The Determinations dismissed complaints by Harrison and Lander that Equitable Real Estate Investment Corporation Ltd. ("Equitable") had failed to provide them with the required hours free from work in contravention of Section 36 of the *Act* and had failed to compensate them for work performed on statutory holidays in contravention of Sections 45 of the *Act*.

A hearing was held on these appeals on July 24, 1996. I received evidence from Harrison and Lander on their own behalf and from Agnes Kerr and Gordon Hill on behalf of Equitable. Mr. Coutts and Mr. MacKinnon filed written arguments on their respective positions.

**ISSUES TO BE DECIDED**

There are a number of issues raised by this appeal:

1. Does any part of the old *Employment Standards Act* apply to this complaint and proceeding ? ;

2. Are the appellants resident caretakers for all of the work they performed for Equitable ? ;

3. If not, what are the consequences of designating them "employees" for some of the work they perform for Equitable ? ; and

4. If the appellants have proven they performed "work" during their designated rest periods and / or statutory holidays, what is the "work" performed and what is the entitlement, if any, of the appellants to compensation under the *Act* for it ?

**FACTS**

There are few facts in dispute. Equitable is the manager of twenty-five residential apartment buildings owned by a charitable foundation. During the relevant period of time, Harrison and Lander were employed by Equitable as resident caretakers. Harrison was manager / caretaker of two apartment buildings comprising 46 suites. He had a residence in one of them. Lander was manager / caretaker of three apartment buildings comprising 54 suites. She had a residence in one of them.

Prior to his employment, Harrison's wife was the manager / caretaker. In 1988, when Mrs. Harrison was hired as manager / caretaker, the basic terms of employment were stated in a letter dated March 10, 1988. The letter specified the required 32 consecutive hours free from work were to be from 11 p.m. Monday to 7 a.m. Wednesday in each week. Harrison assumed these conditions when he assumed the position of manager / caretaker in February of 1993.

Lander, according to the terms of her engagement, was to have the same 32 hours free from work as Harrison.

The job of Harrison and Lander generally involved tending to the welfare of the tenants and the buildings they were employed to look after. As Mr. Hill put it in his evidence, "They were asked to keep the buildings neat and do what they had to do". This included collecting rents and delivering those rents to the office of Equitable, doing the paperwork associated with the collection of rents, responding to complaints and inquiries from tenants, dealing with any requests for repairs, including contacting approved tradespersons, establishing appointment times for attendance of tradespersons, providing entry to the buildings and apartments for the tradespersons, receiving the purchase order from the tradesperson upon completion of the work, sometimes inspecting the work and allowing exit from the apartment for the tradesperson, maintaining the common areas in the buildings, including gardening, rubbish removal, vacuuming, painting, cleaning windows, halls and floors, ordering supplies required for the maintenance of the common areas, inspecting and cleaning vacated suites, showing vacated suites to prospective tenants, maintaining a list of persons interested in renting apartments and preparing rental documents.

For the most part Harrison and Lander were left to set their own schedule for the performance of the work which was required, although on occasion they were directed to correct observed deficiencies in their maintenance of the buildings. It was understood the rents were to be collected on the first day of each month and delivered to the office of Equitable. Any delinquent rents were to be collected as soon as possible following the first day of the month. The need for a repair could arise at any time and was not a matter within the control of the resident caretaker. When a repair was needed it was attended to as quickly as possible.

The tenants were given the telephone number of the resident caretaker. No other number was given to a tenant as an alternative contact in the event of the unavailability of the resident caretaker. The tenants contacted Harrison and Lander without regard to time of day, day of the week or day of the year if they had a problem or a question.

Equitable made no arrangement during the period relevant to the complaints for relief for either Harrison or Lander during required rest period or on statutory holidays. They were informed by Lander in January 1995 she had never received the required 32 hours time off during her employment with Equitable. There was no response from Equitable to this information. No alternate arrangements were made and Lander was not told to take the required time off or to otherwise ensure no work was done during the required rest period or on statutory holidays.

**ANALYSIS**

The *Employment Standards Regulation* defines resident caretaker:

**"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 substance of that definition is unchanged from the old *Act*. At the commencement of the hearing I raised a concern that Harrison and Lander were employed as manager/caretakers of more than one building and I quiered whether either could be "resident caretakers" of buildings they did not live in. I asked counsel to address that issue in argument. Both have done so. The delegate of the director, Mrs. Livingston, also addressed the issue. The delegate and Mr. MacKinnon argue the definition should be read purposively, rather than literally. They say as long as the apartment buildings the manager/caretaker is employed to manage are "grouped" in close proximity and the manager/caretaker is being paid the minimum wage based on the total number of units managed, the purpose of the *Act* is met. Mr.

MacKinnon also argues the alternative would be detrimental to the interests of tenants, resident caretakers and building owners.

Mr. Coutts argues the definition should be read expansively, meaning if the *Act* can be interpreted to provide a broader scope of protection that should be done. He points out if Harrison and Lander are not resident caretakers for the buildings other than the one in which they live they are employees in respect of the work they perform in those buildings and are entitled to broader rights under the *Act*.

All parties noted the situation of one person being employed as manager/caretaker to manage a "grouping" of buildings while living in one of them has had long standing acceptance under the *Act*.

I find for the purpose of this appeal that Harrison and Lander are resident caretakers in respect of the buildings for which they were employed by Equitable. They would not be resident caretakers for any other buildings for which they might be asked to provide relief.

I also find, for the purpose of this appeal, that Harrison has been a resident caretaker since March 1, 1993 and Lander was employed as a resident caretaker from June 1, 1994 until June 28, 1995 when she left the employ of Equitable. I do not accept the argument that the employ of her husband as resident caretaker from April 1, 1992 to May 31, 1994 may be attributed to her and constitute employment as a resident caretaker for her present claim. Acceptance of such an argument would result in there being two resident caretakers for the buildings. The *Act* does not contemplate the existence of two resident caretakers for one apartment building.

Mr. MacKinnon argues the substantive provisions of the old *Act* apply to the employment of Harrison and Lander. He argues, notwithstanding Section 128(3), the new *Act* has no retrospective application to substantive matters. I do not accept that argument. As I stated in *Burnaby Select Taxi Ltd and Zoltan Kiss*, BC EST #091/96:

> *Section 128(3) is a clear statement of legislative intent for the retrospective operation of Section 80 to complaints that were pending when the former Act was repealed. [page 8]*

The specific reference to Section 80 is inclusive, not exclusive, and exists for greater clarity as that provision has the potential effect of increasing the legal liability of an employer to an employee from six months to twenty-four months. In all respects Section 128(3) is a clear statement of legislative intent for the retrospective operation of the provisions of the *Act*, procedural and substantive. The complaints of Harrison and Lander are "for all purposes" governed by the provisions of the new *Act*. This includes application of the definition of "work" under the new *Act*, which says:

> **"work"** means the labour or services an employee performs for an employer - whether in the employee's residence or elsewhere.

There is a caveat placed on that definition in subsection (2) of Section (1) of the *Act*, which says:

> (2) An employee is deemed to be at work while on call at a location designated by the employer, unless the designated location is the employee's residence.

I agree with Mr. Coutts that the definition of work no longer excludes work performed by an employee in their own living accommodation. The definition does suggest the performance of some activity related to the requirements of the job. When Harrison and Lander performed some activity in their accommodation relating to their jobs as resident caretakers they were performing "work". I disagree with Mr. Coutts, however, that mere presence in their private residence that is unrelated to any activity going to the performance of the requirements of the job constitutes work. Harrison and Lander were not required by the job or by the employer to be physically present in their residence twenty-four hours a day, seven days a week, three hundred and sixty-five days a year. Like any other individual, Harrison and Lander were free to come and go from their private residence as they wished and, on the evidence, both did so.

The evidence indicates Harrison and Lander performed work during the required rest period and on statutory holidays. They regularly performed some activity relating to the requirements of the job during the required rest period and on statutory holidays. They did so with the knowledge of Equitable and its tacit approval. It is improbable, based on any understanding of the nature of the position of resident caretaker, that Equitable was not aware Harrison and Lander would have to perform work during their rest periods and on statutory holidays. Mr. Hill testified a resident caretaker did what had to be done. How and when it was done was left to them to decide "as a matter of common sense". He also testified resident caretakers are employed by Equitable because tenants like the idea of having someone there.

The statutory obligation to ensure an employee has the required rest period free from work belongs to the employer. Equitable took no steps at any time to ensure the statutory requirement was met. The employer is also statutorily responsible for ensuring an employee is given a day off with pay for each statutory holiday. This statutory obligation was also not met by Equitable.

The difficulty with this appeal is quantifying the amount of work performed. Can I compensate Harrison and Lander if I cannot find some objective proof of hours worked? There is nothing in the *Act* that compels or requires exactitude in respect of remedial relief. Section 79, and in particular subsection (3)(b) says:

> (3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may do one or more of the following:
>
> (b) require the person to remedy or cease doing an act;

No records were kept by the resident caretakers or Equitable of the actual time worked during required rest periods and statutory holidays. This should not deny Harrison and Lander a remedy where a statutory breach has been proved. The purposes of the *Act* suggest if there is a contravention there should be a remedy. When determining the remedy the director should act fairly and reasonably, even though the amount of compensation given may involve some element of speculation. Having heard the evidence of the parties, I can be of some assistance. Based on the evidence, I conclude Harrison and Lander worked, on average, one hour in each required rest period during their respective relevant periods of employment for each. I also conclude that each worked, on average, one hour on every statutory holiday during those same periods.

Section 36(1) says the employer must ensure a 32 hour period free from work each week or pay the employee double the regular wage for the time worked during the 32 hour period. The minimum daily hours provisions of the *Act* do not apply to resident caretakers by application of Section 35 of the Regulations. If Harrison and Lander are entitled to be paid for work during the required rest periods, it would be pay for actual time worked at double the regular wage.

Harrison would be entitled to one hundred and four hours at double time for work performed during the required period of rest and to eighteen hours at time and one-half for work on statutory holidays. Lander would be entitled to fifty-six hours at double time and to nine hours at time and one-half. For the purpose of determining the regular wage of Harrison and Lander, 40 hours shall be deemed to be their normal or average weekly hours of work.

**ORDER**

I order, pursuant to Section 115 of the *Act*, that the Determinations be set aside and referred back to the Director to recalculate the amount owing.

I would like to thank Mr. Coutts and Mr. MacKinnon for their comprehensive presentations and for their courtesy throughout the hearing.

**David Stevenson**
**Adjudicator**
**Employment Standards Tribunal**