Employment Standards TRIBUNAL

An appeal

- by -

Karen Drover-King and Terry King
(the “employees”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2000/779

DATES OF HEARING: March 20 and April 12, 2001

DATE OF DECISION: May 23, 2001

DECISION

APPEARANCES:

Jacques Dénommeé, Agent	for Terry King & Karen Drover-King
Michael A. Watt, Barrister & Solicitor & Susan Sangha, Barrister & Solicitor	for Sheridan Investments Ltd.
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal filed by Terry King and Karen Drover-King (the "employees") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Mr. King and Ms. Drover-King appeal a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 23rd, 2000 under file number ER#098357 (the "Determination").

The Director's delegate determined that Sheridan Investments Ltd. ("Sheridan" or the "employer") owed its former employees, namely, Mr. King and Ms. Drover-King, the total sum of $2,489.56. The Director's delegate awarded Terry King $1,324.09 on account of unpaid wages ($1,244.05) and section 88 interest ($80.04) and Karen Drover King $1,165.47 on account of unpaid wages ($1,095.02) and section 88 interest ($70.45).

This appeal was heard at the Tribunal's offices in Vancouver on March 20th and April 12th, 2001. Following the parties' final oral submissions, I directed the parties to submit further written submissions, on or before April 27th, 2001, with respect to two matters. I wish to thank both Mr. Dénommeé and Mr. Watt for their submissions on the two issues that I asked them to address, namely, i) the employees' "regular wage" and ii) the relationship, if any, between the "regular wage" and the minimum daily pay provision of the *Act* (section 34).

PRELIMINARY MATTERS

Mr. Watt, at the outset of the hearing, raised two preliminary objections one relating to Mr. Dénommeé's right to appear as counsel, the second relating to the scope of the appeal. I refused the first objection but sustained the second. Although I did deliver brief oral reasons at the hearing, I wish to record my reasons in a more complete fashion in this decision.

Mr. Dénommeé's right to appear as counsel

At the outset of the appeal hearing Mr. Watt, on behalf of Sheridan, objected to Mr. Dénommeé appearing before the Tribunal as the employees' agent on the basis that Mr. Dénommeé was practicing law contrary to section 15 of the *Legal Profession Act.* However, the section 1 definition of "practice of law" specifically excludes, *inter alia*, "appearing as counsel or

advocate...if not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed" [see subsection (h)].

Mr. Dénommeé advised me, in the presence of the employees, that he was appearing *pro bono* and, accordingly, I allowed Mr. Dénommeé to appear and make submissions as counsel for the employees.

Scope of the appeal

The Director's delegate held, at page 6 of the Determination, that neither Mr. King nor Ms. Drover-King was a "resident caretaker" as defined in section 1 of the *Employment Standards Regulation.* In his opening, Mr. Dénommeé indicated that the employees were planning to challenge that finding. Mr. Dénommeé conceded that this particular issue had not been raised in the notice of appeal or in any other subsequent submission to the Tribunal.

Further, in his opening statement, Mr. Dénommeé also submitted that the employees were entitled to relief under sections 8 (prehire misrepresentations) and 63 (compensation for length of service), however, neither issue was raised in the employees' initial complaint nor was either issue addressed in the Determination. Indeed, the issues relating to sections 8 and 63 appear to have been raised for the first time in Mr. Dénommeé's submission to the Tribunal dated March 1st, 2001.

In light of the foregoing, I allowed Mr. Watt's preliminary objection and ruled that none of these three issues was properly before me.

ISSUES ON APPEAL

There are two issues that are properly before me. The first issue concerns the employees' wage rate; the second issue concerns the number of hours that the employees' actually worked during the period in question.

The delegate purportedly calculated the employees' unpaid wages based on the minimum wage rate although, as will be seen, the delegate's actual calculations appear to be based on a higher hourly wage rate. The delegate applied section 34 of the *Act* for purposes of establishing the employees' total compensable hours. The relevant subsections, subsections 34(1) and (2), read as follows:

> **Minimum daily hours**
>
> 34 (1) If an employee reports for work on any day as required by an employer, the employer must pay the employee for
>
> (a) at least the minimum hours for which the employee is entitled to be paid under this section, or

(b) if longer, the entire period the employee is required to be at the workplace.

(2) An employee is entitled to be paid for a minimum of

(a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or
(b) 2 hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with the Industrial Health and Safety Regulation of the Workers' Compensation Board.

As previously noted, the delegate purportedly held that both Mr. King and Ms. Drover-King should be compensated at the applicable minimum wage rate, in this case, $7.15 per hour. The employees say that the delegate erred inasmuch as they should have been compensated at a $10 hourly rate. In addition, the employees say that they worked considerably more hours than determined by the delegate.

BACKGROUND FACTS

The employees' duties

Sheridan is the property manager for a 27-floor, 193-suite apartment building situated in Vancouver's "west end" and known as the "El Cid" apartments. The suites are leased by individual lessees who hold 99-year leases. Sheridan holds nine of the 99-year leases and, in turn, rents seven of these suites to tenants. Currently, two of Sheridan's suites are used to accommodate Sheridan employees who manage and otherwise maintain the El Cid apartments. Sheridan is the property manager for the "common areas" and is not responsible for carrying out maintenance and repairs in the suites occupied under 99-year lessees. Thus, the individual on-site manager/caretaker(s) have considerably fewer duties than would, say, a caretaker in a 193-unit rental apartment complex who would have additional duties relating to renting suites, rent collection, in-suite repairs etc.

In the summer of 1998, Terry King and Karen Drover-King responded to an advertisement seeking a "live-in couple for weekends, public holidays & every other week after hours on call". The advertised salary was $600 per month "with reduced rent". Mr. King and Ms. Drover-King met with the building's on-site manager, Ms. Mary Blyth, who offered them the position. They accepted and subsequently commenced their employment on August 1st, 1998. The employees were replacing the former "weekend" relief caretaker, Mr. Gerard D'Anjou, who was reassigned to be the full-time "weekday" caretaker. Ms. Blyth lived in a suite at the El Cid as did Mr. D'Anjou and the employees.

The employees did not enter into a written employment contract, however, a list of duties was provided to them--this document outlined the tasks that had to be completed every Saturday and

Sunday such as keeping the entrances, hallways and three elevators clean and, in general, opening (at 8:00 A.M.), closing (at 10:00 P.M.) and cleaning all of the common areas (e.g., the pool area, the laundry, the parking garage, two lounge areas/function rooms etc.). It should be noted that the "Saturday/Sunday duties list" is quite similar to the list of daily duties for the regular weekday caretaker although the weekday caretaker's duty list also includes other tasks that are to be undertaken on a weekly, monthly and quarterly basis (e.g., cutting the lawn, checking fire alarms, some painting and repair duties). The parties disagree as to the number of hours required to complete the weekend relief duties.

Separate and apart from their $600 monthly salary (each was paid $300) and monthly rent reduction (the reduction, I understand, was about $400), additional duties were undertaken on an "as-needed" basis for which the employees were paid, upon the submission of an invoice, at the rate of $10 per hour. For the most part, these extra "weekday" duties were assigned to, and undertaken by, Ms. Drover-King. There is no dispute before me with respect to the employees' compensation for this latter work. Further, in September of 1998 and 1999, Mr. King replaced the regular full-time caretaker while the latter was away on vacation; Mr. King was paid an additional $512 for each of those two weeks. The delegate credited Mr. King with 8 working hours on each weekday during those two weeks--there is nothing before me which leads me to conclude the delegate erred on that matter.

In addition to their regular weekend and statutory holiday relief caretaking duties, the employees were "on-call" every weekend and on weekday evenings every other week. During their "on-call" weeks, any telephone inquiries would be routed to the employees' apartment from 5 P.M. until 7 A.M. the next morning. The employees might get a call from residents who, for example, had locked themselves out of their apartment or had a problem in the parkade or had not retrieved their laundry before the room was locked up. The parties disagree about how many such calls might be received in a typical evening. Further, during their "on-call" weeks (as on weekends and statutory holidays), the employees were obliged to carry out the building "lock-up" procedure which involved clearing and securing all of the common areas (e.g., the pool, the laundry) at 10:00 P.M. The parties also disagree as to the time required to complete the nightly "lockup".

The employees' employment ended on or about January 30th, 2000.

The delegate's findings

The key portions of the Determination (at pp. 5-6) are set out below:

> "Neither the Kings nor Sheridan kept a contemporaneous daily record of hours worked...
>
> I am not convinced that the summary of hours worked, which the Kings produced after they filed the complaint, reflects the actual hours of work performed...

> While the Kings may have worked more hours as they wanted to make a good impression on Sheridan, there is insufficient evidence to establish the exact hours worked on a daily basis. However, under Section 34, the Act provides a minimum daily pay of 4 hours for work performed on any day...
>
> Since the Kings were unable to establish more than the minimum daily hours of work, a Wage Calculation Summary has been prepared based on the work performed on Saturdays, Sundays and statutory holidays from August 1st, 1998, to January 30th, 2000, which appears to be the amount of work which can be established by the Kings."

In the two Calculation Schedules (one for each employee) appended to the Determination, the "rate of pay" used to calculated the employees' unpaid wage entitlement is stated to be $7.15 per hour, however, so far as I can gather, the actual wage rate used in the delegate' calculations was $8.65 per hour ($34.60 was awarded for each 4-hour weekend shift). Although the Determination is silent on the point--as I noted, the "rate of pay" was stated to be the $7.15 per hour minimum wage--I presume that this latter figure was derived from the definition of "regular wage" contained in section 1 of the *Act* from the following calculation:

> [$300 per month x 12 months] ÷ [52 weeks x 8 hours per week] = $8.65 per hour

The delegate based her calculations on each employee working 4 hours [or less, in which case section 34(2)(a) was applied] each Saturday and Sunday and on statutory holidays. According to the Calculation Schedules, neither employee was credited with any working hours for the alternate "on-call" weeks.

FINDINGS AND ANALYSIS

Hours Worked on Weekends and Statutory Holidays

As noted above, the delegate held that Mr. King and Ms. Drover-King each worked not more than 4 hours on their regularly scheduled Saturdays, Sundays and statutory holidays. The employees say that on each and every weekend they were "on duty" from 7 A.M. Saturday until 7 A.M. Monday and ought to be compensated accordingly. They also say that each of them worked not less than 8 hours on statutory holidays. Their joint claim for unpaid wages exceeds $60,000.

Ms. Mary Blyth is the resident manager of the El Cid apartments and has been employed by Sheridan for some 20 years. Ms. Blyth testified that the weekend relief caretakers' duties would take one person between 4 and 6 hours to complete each day (generally, in the morning hours) and that the evening "lock-up" procedure would take one person no more than 25 minutes. Thus, according to Ms. Blyth, Mr. King and Ms. Drover-King, working together, would not have taken any more than 13 hours to complete their weekend relief caretakers' duties.

Mr. Gerard D'Anjou, who testified on behalf of Sheridan, is currently the regular full-time caretaker at the El Cid but was, for some ten months prior to the Kings being hired, the sole weekend relief caretaker. Upon being hired as the weekend relief caretaker, Ms. Blyth gave him a list duties that was much the same, if not identical to, the list given to the Kings. Mr. D'Anjou testified that his workday on weekends and statutory holidays typically commenced at about 7:00 A.M. and ended at about noon; he usually took a 30 minute breakfast break at around 8:00 A.M. He sometimes, though not often, had some additional duties to complete in the afternoon. The evening "lockup", according to Mr. D'Anjou, was a 10-minute procedure. Overall, Mr. D'Anjou stated that he worked about 5 hours each day when he was the weekend relief caretaker.

Mr. Watt cross-examined Mr. King as to the length of time all of the duties on the "duty list" might take--I have summed the various estimates and it would appear that Mr. King, *by his own admission*, took less than 8 hours to complete *all* of the tasks on the list (including the evening "lockup"). Mr. D'Anjou--who has prior relevant work experience--and Ms. Blyth both testified that all of the weekend relief duties would not take more than 10 to 13 hours to complete. I find both Ms. Blyth and Mr. D'Anjou to be credible witnesses. The delegate allowed the employees, in essence [through the application of section 34(2)(a) of the *Act*], a total of 16 hours for the weekend work (4 hours to each of the Kings for each weekend day) and a further 8 hours' work (4 hours each) for every statutory holiday. I do not find the delegate's Determination on this point to be in error and, accordingly, I confirm the Determination as to the number of compensable hours for work performed by the employees on weekends and statutory holidays.

Compensation for "on-call" weeks

The evidence before me shows that on weekends, and on alternate weeks when the Kings were "on-call", they would receive some telephone calls in their suite. The employees claim compensation for each and every hour that they were "on-call" in their suite both on weekends and every other week.

However, section 1(2) of the *Act* states that: "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*" (my *italics*). Thus, when the employees were simply "on-call" in their apartment, that time is not compensable. However, in my view, when an employee actually answers a call and carries out some work-related function (say, in this case, opening a suite for a tenant who locked themselves out) that sort of work is clearly compensable. Indeed, in some circumstances, merely answering a work-related telephone call is compensable work under the *Act* (see *Labour Ready Temporary Services Ltd.,* B.C.E.S.T. Decision No. D457/99; reconsidered D426/00).

Notwithstanding my previous comments, however, the preponderance of the evidence before me shows that telephone calls to the weekend relief caretaker were comparatively rare and resulted in, at most, a few minutes work. Although Mr. King testified that evening telephone calls were "common occurrences", both Mr. D'Anjou and Ms. Blyth--who both had previous experience with weekend "on-call" duty--testified that such calls were infrequent and that on very many nights there would be no calls at all. It must be remembered that the El Cid was not a typical rental apartment inasmuch as the property manager was not responsible for "in-suite" repairs for

almost all of the suites (which were subject to 99-year leases). The only real problems would concern the common area and these areas were closed off after 10:00 P.M. To the extent that there were some telephone calls on weekends and holidays, I am satisfied that any compensable time associated with such calls is more than accounted for by the total number of hours credited to the Kings by the delegate for their work on weekends and statutory holidays.

The on-call and "lockup" duties undertaken by the Kings every alternate week is another matter, however. As previously noted, the delegate did not award the Kings *any* compensation for work performed on alternate weeks when they carried out the "lockup" each night at 10:00 P.M. and were "on-call" in their suite from 5:00 P.M. to 7:00 A.M. the next morning. Even if no telephone calls were received during these weeks, the "lockup" duties constitute compensable working time. The question is, of course, how is this work to be compensated?

I start with the proposition that regardless of whether or not Mr. King and Ms. Drover-King jointly carried out the lockup duties, this was a "one-person" task and ought to be compensated accordingly. Further, even thought this latter task could be completed in a comparatively short period of time--10 minutes or even 30 minutes--I do not see how one can simply ignore the dictates of section 34 of the *Act*. In my view, one of Mr. King or Ms. Drover-King is entitled to be paid 4 hours for the "lockup" duties performed each night of their alternate "on-call" weeks. Since these duties were not time consuming, to the extent that the Kings were required to field any evening telephone calls when they were "on-call", I am satisfied that the total working time associated with such calls, together with the lockup duties, would not exceed (or even come close to) the 4 hours' minimum pay that must be awarded by virtue of section 34(2)(a) of the *Act* for each evening's work during the "on-call" weeks. Based on the evidence before me I am satisfied that the employees' total *working* hours (to be contrasted with the minimum number *compensable* hours) during the alternate "on-call" weeks would not have exceed 4 hours for the entire week.

The Employees' Wage Rate

The employees say that they ought to be paid at the rate of $10 per hour since this was the agreed wage rate for the "additional" duties that were separately invoiced. I cannot accept this submission given that the employees were paid a monthly salary for the weekend relief caretaking position, namely, $600 per month (or $300 each per month). Accordingly, their "regular wage" must be calculated as directed by the subsection (d) definition in section 1 of the *Act*.

Thus, in an average week, the two employees would not have worked more than 16 hours (weekend relief) plus 2 more hours (4 hours worked during "on-call" weeks, averaged over two weeks) for an overall weekly average of 18 hours' work for both employees, or 9 working hours per week for each of Mr. King and Ms. Drover-King. By applying the formula prescribed in section 1 of the *Act*, I find that Mr. King's and Ms. Drover-King's "regular wage" was $7.69 per hour calculated as follows:

[$300 per month x 12 months] ÷ [52 weeks x 9 hours per week] = $7.69

It is to be noted that the employees' "regular wage" calculation is based on actual *working* hours rather than total *compensable* hours. The prescribed "regular wage" formula is based on "normal or average weekly hours of *work*" (*i.e.,* labour or services *performed* by an employee for an employer). While section 34 requires that employees be *paid* a certain minimum number of hours, in my view, any paid hours beyond actual working time should *not* be taken into account for purposes of establishing an employee's "regular wage".

I conceive section 34 to be a "premium pay" provision, not unlike the overtime provisions of the *Act.* When calculating a "regular wage", overtime hours are not credited at the premium rate (say, 1.5 or 2 multiplied by the actual working hours) but rather on an "hour for hour" basis; in my opinion, nonworking hours that are nonetheless compensable under section 34 ought to be treated in a similar fashion for purposes of establishing an employee's "regular wage".

Summary

I find that Mr. King and Ms. Drover-King, together, worked not more than 16 hours each weekend and a further 4 hours each alternate "on-call" week. I accept the delegate's conclusion that, together, they worked not more than 8 hours on statutory holidays. I calculate their "regular wage" to be $7.69 per hour and they are both entitled to be paid at that rate for 8 hours each weekend and 4 hours each statutory holiday. In addition, section 34(2)(a) of the *Act* applies with respect to work performed on alternate "on-call" weeks such that one employee is entitled to a minimum of 4 hours' pay for each evening during the alternate "on-call" weeks. This nightly 4-hour minimum pay can be credited to one employee or awarded jointly to both employees.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be varied and that this matter be referred back to the Director for purposes of calculating the unpaid wage entitlement of Terry King and Karen Drover-King (and concomitant section 88 interest) in accordance with these reasons for decision.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal