Employment Standards TRIBUNAL

An appeal

- by -

Nacel Properties Ltd.

- and by -

Rochelle and Guy Norman

- 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: Carol L. Roberts

FILE No.: 2001/825 and 2001/826

DATE OF HEARING: May 7, 2002

DATE OF DECISION: June 25, 2002

DECISION

APPEARANCES:

Guy Norman	On behalf of Guy Norman and Rochelle Norman
Greg Anctil, Clark Wilson	On behalf of Nacel Properties

Written submissions only by the Director of Employment Standards

OVERVIEW

This is an appeal by Guy Norman and Rochelle Norman, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued October 31, 2001. The Director found that Nacel Properties Ltd. ("Nacel") contravened sections 17, 36(1), 40(1)(2), 45 and 58(1) of the *Act* in failing to pay the Normans regular and overtime wages, statutory holiday pay and annual vacation pay. The Director ordered Nacel to pay $61,112.08 plus interest to the Director on Mr. Norman's behalf, and $14,597.40 plus interest on Ms. Norman's behalf.

Both the Normans and Nacel appeal the decision.

FACTS

Both Ms. Norman and Mr. Norman applied for a position as resident caretaker for Nacel, a property management company. On October 29, 1996, Ms. Norman was hired as the building manager for an apartment building in Port Coquitlam ("Cedarway") and a townhouse complex in Coquitlam ("Crestview"). Her employment contract set out the terms and conditions of her employment. Among other things, the contract specified that she was to receive time off for statutory holidays and 32 continual hours free from work each week. Ms. Norman was paid $2000 per month, and was provided with a subsidized caretaker's suite in Cedarway, which was several kilometres away from Crestview.

In October 1997, Ms. Norman was transferred to Monteclair apartments ("Monteclair") in Coquitlam. She became responsible for both Monteclair and Fieldridge apartment and townhouse complexes, which were approximately 10 kilometers apart, while retaining responsibility for Cedarway and Crestview. Her pay increased to $2700 per month. At that time, she was responsible for the leasing, administrative, cleaning and maintenance duties of almost 225 units in four buildings, situated several kilometers from each other.

In April 1998, Nacel hired an assistant cleaner/manager to assist Ms. Norman with the cleaning and management of Cedarway and Montclaire. The assistant cleaner/manager's duties were to clean the interior common spaces at the two apartment buildings as well as litter control at the Montclaire Townhomes, and assistant management duties at the three properties, which included, but was not limited to, rent collection, tenant liasion and suite viewings, as well as carrying Ms. Norman's pager during her two days off.

Ms. Norman resigned her position effective February 28, 1999.

On August 16, 1999, both Mr. and Ms. Norman filed complaints with the Employment Standards Branch.

Ms. Norman alleged that she did not receive wages, overtime wages, 32 hours free from work, either a day off or a day's pay if she worked a statutory holiday, or additional pay for working on a statutory holiday.

Although Ms. Norman signed sheets acknowledging that she had taken 32 hours free from work, and other documents acknowledging that she took time off on statutory holidays for the entire period of her employment, she claimed that she only did so under duress. The delegate determined that the signed sheets were determinative of the hours Ms. Norman worked, and concluded that she was not entitled to overtime wages.

The delegate also determined that Ms. Norman could only be considered a resident caretaker in the building in which she resided, and calculated wages for the hours Ms. Norman worked at the other Nacel properties as if Ms. Norman was a regular employee.

Mr. Norman alleged that he worked full time for Nacel during the term of Ms. Norman's employment, with its knowledge and consent, for which he was not compensated. He provided the delegate with records showing the time that he had appeared at RTB hearings, made bank deposits, performed maintenance duties, monitored a pager, and summarizing the rent roll notice.

The delegate issued a Demand for Employer Records on Nacel in September, 2000. Nacel maintained no daily record of hours worked. It supplied the delegate with a record of payments made to Mr. Norman for various work, either as relief caretaker for Ms. Norman or other resident caretakers, as well as other types of work. On January 27, 1997, Mr. Norman submitted an invoice for 27.5 hours of work that he characterized as falling "outside the scope of my wife's position" performed in November 1996 and January 1997. That invoice was paid in full. Mr. Norman was also paid for his duties as relief manager on seven occasions between 1997 and 1998. Nacel argued that it had not employed Mr. Norman as a property manager, but that when Mr. Norman performed services for Nacel, including acting as a relief caretaker, he was paid in full.

Based on the documents provided, the delegate concluded that Mr. Norman was a Nacel employee for the following reasons:

- he performed the same work as Ms. Norman as well as light maintenance work;
- he attended Residential Tenancy Branch ("RTB") hearings on Nacel's behalf;
- senior Nacel managers wrote letters of reference for Mr. Norman that stated he had been employed as a resident manager;
- Nacel accepted Mr. Norman's name and signature on internal documents;
- Nacel's own internal documents, including the traffic reports, list the resident caretakers as Guy and Rocella Norman;
- Nacel accepted Mr. Norman's name and signature on internal documents; and
- Nacel was aware of Mr. Norman's participation in the daily work and did not take any action.

The delegate determined that Mr. Norman also performed work as a resident caretaker and an employee, and concluded that he was owed wages and overtime wages. Mr. Norman supplied the delegate with a breakdown of his daily hours of work, which the delegate accepted as the best evidence of hours worked. Mr. Norman's wages were calculated in the same manner as those of Ms. Norman.

ISSUE TO BE DECIDED

The issues to be decided are whether the delegate erred:

1. (a) in determining that Ms. Norman was a resident caretaker, and

   (b) in finding that she had 32 hours free from work;

2. (a) in concluding that Mr. Norman was an employee, and if not

   (b) in calculating his hours of work;

3. in calculating the wages owed to both Mr. Norman and Ms. Norman; and

4. in failing to find Nacel in contravention of a number of other sections of the Act.

I will address each issue in turn.

1.(a) Was Ms. Norman a resident caretaker?

Section 1 of the *Regulation* defines resident caretaker as follows:

> "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.

Section 35 of the *Regulation* exempts resident caretakers from the overtime and hours of work provisions of Part 4 of the *Act*.

Ms. Norman argues that the delegate erred in finding that she was a resident caretaker. She contends that, although she lived in one apartment complex, she was responsible for many others, and that her duties went beyond "caretaker, custodian, janitor or manager" duties. She argues that she should be considered an employee for all hours of work.

Ms. Norman was hired in response to Nacel's advertisement for a resident manager. Nacel's letter of employment identifies her position as resident manager. Attached to the letter of employment was a position description for a Resident manager. It set out job duties that included the following:

> LEASING
>
> ...
>
> b) field all rental inquiries
>
> c) meet, greet and show prospective tenants suites available for rent

...

l) complete inspection reports together with tenants on move-in and move-outs and submit documents to head office

ADMINISTRATIVE

a) maintain all records for building and prepare reports as required by head office

...

c) prepare bank deposits and bank monies as required...

...

h) coordinate and file all necessary documentation with the Residential Tenancy Branch, notifying Area Manger of all scheduled hearings and preparation and attendance of those hearings.

MAINTENANCE

...

d) perform minor repairs and mantenance as necessary

...

m) perform all cleaning duties in the common area as detailed in the cleaning schedule

Ms. Norman was provided with a residential suite in Cedarway, and then Monteclair, both of which were apartment buildings having more than 8 residential suites. She performed work including that outlined above, which, in my view, may fairly be categorized as caretaking, custodial, janitorial and managerial tasks. I am unable to conclude that the delegate erred in finding that Ms. Norman was a resident caretaker. (see also *Novko* BC EST #D109/99)

The delegate also concluded that Ms. Norman was a resident caretaker only to the extent of the work performed in the building in which she resided. Nacel submits that the delegate's characterization of Ms. Norman as a resident caretaker for some buildings and not others was an absurd interpretation of the Regulations, and inconsistent with other Tribunal decisions. I do not agree.

As benefits conferring legislation, the *Employment Standards Act* is to be given a large and liberal interpretation. Regulatory provisions that limit or exclude an employee's entitlement to statutory benefits (such as, in this case, overtime and mminimum daily pay) are to be narrowly interpreted. The burden of establishing that a person is excluded from the protection of the *Act* or any part of it, lies with the person asserting it, and there must be clear evidence justifying that conclusion.

Cedarway is located several kilometres away from Crestview. The resident caretaker exemption does not apply to townhouses (*Nacel v. Director of Employment Standards*, #RD593/01). Furthermore, previous Tribunal decisions concluding that resident caretakers living in one building and and working in others owned by the same employer, were resident caretakers for the purposes of both buildings apply only where buildings are closely proximate: *Harrison and Lander* (BC EST #D344/96, and *Gateway West Management Corp.* (BC EST #D356/97). In the former case, the resident caretakers were responsible for an apartment building located "contiguous or nearby" the apartment they resided in; in the latter case, the residential apartment building was located about 1 block away from several 12 unit apartment buildings the caretakers were also responsible for.

The four buildings for which Ms. Norman was responsible were located up to 10 kilometers apart. The evidence is that she could not perform her work without driving between the properties. Furthermore, the commute between them was often made difficult due to traffic on major highways. In my view, the properties cannot be considered to be a "grouping" of buildings, nor can they be considered "nearby" or "contiguous". I find no error in the delegate's determination in this respect.

1. b) Did the delegate err in finding that Ms. Norman took 32 hours free from work.

Section 35 of the *Regulation* provides that Part 4 of the *Act* (those provisions relating to hours of work and overtime) except s. 31, 36 and 39, do not apply to a resident caretaker.

Section 36 provides that an employer must ensure that an employee has at least 32 consecutive hours free from work each week. The delegate found that the signed sheets to be definitive evidence that Ms. Norman took 32 hours free from work. Mr. Norman contends that Ms. Norman signed the forms under duress. There is no evidence that Ms. Norman was subject to any duress or undue influence, and I find no basis to interfere with the delegate's determination on this issue.

Section 39 provides that an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee's health or safety.

I do not find Ms. Norman's claim that she worked excessive hours to be credible. Ms. Norman worked for Nacel for 2.5 years. She received a pay increase, and was in regular communication with office staff. She signed forms acknowledging that she took her time off on a regular basis. It is difficult to conclude that she would sign the forms for the length of time she did if she in fact did not take that time off, and I find no grounds for the appeal on this issue.

2. Did the delegate err (a) in concluding that Mr. Norman was an employee, and if not (b) in calculating his hours of work?

Section 1 of the *Act* defines employee to include

...

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee

...

Employer is defined to include 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

...

Although both Mr. Norman and Ms. Norman applied for a position of building manger, only Ms. Norman entered into an employment agreement with Nacel. Nacel issued paycheques, T-4's, and other indicia of an employment relationship to Ms. Norman for the period October 1996 through to February, 1999. Mr. Norman and Nacel did not enter into an employment contract, and there is no evidence they intended to

do so. Furthermore, there is no evidence Nacel had any "control or direction" over Mr. Norman. Mr. Norman had no set hours of work, and was not supervised. In my view, it cannot be concluded that Nacel fell within the statutory definition of "employer".

I infer that the delegate determined that Mr. Norman fell within the statutory definition of an employee based on her conclusion that Nacel, directly or indirectly, allowed Mr. Norman to perform work normally performed by an employee, and that she arrived at this conclusion after considering, among other things, Mr. Norman's signature on documents such as purchase orders and department store invoices, and his appearance at RTBhearings on Nacel's behalf.

Nacel contends that this evidence is insufficient to arrive at the conclusion that Nacel allowed Mr. Norman to perform work, and in particular, to perform work in exess of that for which he invoiced Nacel.

Nacel refers to a conflict of interest form completed by Ms. Norman in January 1997 in which she verified that she had not relatives working for Cressy Development (Nacel's parent company), or any of its affiliated companies in support of its argument. It also submits that Mr. Norman never sought or demanded payment for work other than for the invoices that were submitted and paid, until well after his wife's employment ended. It contends that, had Mr. Norman been of the view that he was entitled to further wages, he ought to have submitted claims earlier, and that his failure to do before August 1999 prejudiced Nacel. It also argues that Mr. Norman had a duty to mitigate his losses by demanding payment earlier, as he had with other work, so that it could ask him to stop.

In *Kokan v. Director of Employment Standards* (BC EST #D425/97), the common law partner (Seguin) of a woman (Delage) hired as a resident caretaker of an apartment complex filed a claim for wages. The delegate concluded that Seguin was a resident caretaker based on some documents in which Seguin identified himself as a manager, and his signature on purchases made at a paint and hardware store. There was also some evidence that Seguin's name was on RTB documents. In setting aside the determination, the Tribunal said as follows:

> .. .I am satisfied that Bubas never intended to hire more than one resident caretaker. All the arrangements were made with Ms. Delage, her TD1 completed and all proper deductions and benefits were arranged accordingly. She performed almost all the work as the resident caretaker except when her husband helped her occasionally by driving to town or making bank deposits. I am satisified that these occasional chores were done gratuitously by Seguin to help his wife. These activities were not authorised by the landlord and were not under the landlord's "control or direction". At no time until... some 40 months later, did Seguin ever raise the issue of wages for himself as a caretaker.

According to Ms. Norman's job description, she was responsible for maintaining all records for the building, preparing reports and bank deposits, and appearing at RTB hearings.

In my view, Mr. Norman's signature on internal documents is equally consistent with a employment relationship between Mr. Norman and Ms. Norman as it is with an employment relationship between Mr. Norman and Nacel. Alternatively, it could also be inferred, as the Tribunal concluded in Kokan, that Mr. Norman performed these tasks gratuitously to assist his wife.

However, on August 20, 1997, G.B. Melkjorsen, property manager of Nacel, wrote a letter of recommendation for Rennie and Guy Norman on Nacel Properties Ltd. letterhead. That letter stated, in part, as follows:

> Rennie and Guy Norman have been employed by Nacel Properties Ltd. as Resident Managers...As a team, Rennie and Guy were considered to be one of the best Resident Management couples in the Group.... Guy is tireless in ensuring that the complexes are serviced by the maintenance crews and he ensures that the work required is scheduled accurately so as to ensure efficiency of resource utilization. He has been proactive in his dealings with Local Government authorities, which has resulted in cost benefits to the firm. He has ensured that the complexes under his responsibility are kept to the standards required by both the firm and the authorities, and often, and unstintingly, works beyond the normal time requirements to achieve this.

On August 10, 1998, A. (Tony) Dumond, general manager of Nacel, also wrote a letter of recommendation for Mr. and Mrs. Norman on Nacel Properties Ltd. letterhead. In that letter, Mr. Dumond said, in part, as follows:

> The Normans have worked with our corporation for several years.... They have pro-actively managed;...In every case, their work has been knowledgeable, appropriate and increasingly effective.. I have absolutely no hesitation in recommending the Normans as thoroughly knowledgeable...

I find that, in conjunction with all of the other evidence, Nacel allowed Nr. Norman to perform work on its behalf.

Although resident caretakers live at their place of work and their employer can neither control their hours of work or supervise the type and nature of the work they are doing, these letters demonstrate that, as early as August 1997, Nacel knew that Mr. Norman was performing work on its behalf, and indeed, that he was working "beyond the normal time requirements". Furthermore, Nacel did receive copies of RTB decisions in which Mr. Norman was identified as appearing, without Ms. Norman, as Nacel's representative. Considering all of the evidence, I find no basis to interfere with the delegate's conclusion that Mr. Norman was an employee, or that Nacel, directly or indirectly, allowed Mr. Norman to perform work normally performed by an employee.

More troublesome however, is the delegate's determination that Mr. Norman worked, in essence, full time for Nacel for 2 years. I am unable to agree that the evidence supports such a conclusion.

Mr. Norman contended that he was advised to keep track of his time and bill Nacel for the work he performed. However, despite invoicing Nacel seven or eight times in 1997 and 1998 for work performed as relief caretaker, Mr. Norman at no time sought payment for any other work until he filed his complaint with the Branch in August 1999. I find his failure to do so impacts on his credibility.

Furthermore, in January 1997, Mr. Norman submitted an invoice for work purportedly performed between November 2, 1996 and January 27, 1997. That invoice suggested that he performed 27. 5 hours of work over a 3 month period.

There are other discrepancies in Mr. Norman's claim. Mr. Norman was paid as a relief caretaker for periods he alleges he was already working full time. There is also no rational explanation, for example, for Mr. Norman not to submit an invoice for work performed for the months of March, April and May 1997, when he submitted an invoice for work performed from April 3 - 15, 1997. It is reasonable, in that instance, to infer that Mr. Norman did not perform work before April 3 or after April 15. However, the delegate has awarded Mr. Norman wages for full time work during this period. In light of these discrepancies, I refer this aspect of the Determination back to the delegate for reconsideration.

3. Did the delegate err in calculating the wages owed to Ms. Norman?

Mr. Norman submits that the delegate erred in calculating the wages for Ms. Norman over and above the resident caretaker hours. He submits that the wage calculation should be based on a 40 hour work week, and that all hours worked in excess of 40 hours should be paid at overtime rates.

Section 1(1) of the *Act* defines "regular wage" to mean

....

> (e) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work...

As the Tribunal has noted on several occasions, there is no basis to conclude that there is a "normal" or "standard" 40 hour work week. In McIver's Appliance Sales and Service Ltd. v. Director of Employment Standards BC EST #D 526/98, the Tribunal said as follows:

> The calculation of overtime for employees who are paid a monthly salary is predicated on their "normal or average weekly hours of work". There is nothing in the defiinition of "regular wage"' that suggest such normal or weekly hours cannot exceed 40; indeed, to accept the postion espoused by the delegate in the Determination would be tantamount to re-writing the definition so that it reads as follows:
>
> > (d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of 40 hours or the employees' normal or average weekly hours of work...."
> >
> > While it is open to the Legislature to redraft the definiton as proposed by the delegate, it is not open to the delegate or this Tribunal to do so.
> >
> > Further, this Tribunal has consistently held that there is no 40-hour "cap" on normal or average weekly hours for purposes of calculating a salaried employee's regular wage: see RAP-ID Paper Vancouver Ltd., BC EST #D 182/96 and Kocohani Holdings Ltd. BC EST #D 337/96.

In my view, there is absolutely no ambiguity regarding how a "regular wage" is to be derived for an employee who is paid a monthly salary; the "regular wage" must be based on the employee's "normal or average weekly hours of work". There is nothing in the definition that places a 40-hour ceiling on the normal or average weekly hours of work and, in my view, the delegate erred in so concluding.

In determining the wages owed, although noting that hours worked as a resident caretaker were not paid at overtime rates, the delegate did not differentiate between the hours worked as a resident caretaker and hours worked in other buildings as a regular employee. After calculating the total hours worked in a day, the delegate calculated and subtracted the wages owed for time worked as a resident caretaker from the total wages earned, and added back the minimum wage for a resident caretaker using minimum wage rates in effect at the time. In other words, the delegate applied the minimum wages for a caretaker to all the hours Ms. Norman worked at her place of residence. Additional wages were credited to hours worked at other sites, using minimum the wage at the time.

The delegate submitted that Nacel made no attempt to maintain a record of hours worked for the Normans. She also notes that, despite disclosure of documents that clearly set out the basis for the wage complaint, Nacel could not, or would not, confirm or dispute those records.

I am unable to find, on the evidence, that the delegate erred in calculating wages for Ms. Norman.

4. Did the delegate err in failing to find Nacel in contravention of a number of other sections of the Act?

Mr. Norman contends that the delegate failed to investigate and enforce a number of sections of the *Act*. They include the allegation that Nacel was in violation of s. 31(1)- posting hours of work notices, s. 6 - informing employees of their rights, s. 27- setting out an employee's work hours in their wage statements, and s. 39 - requiring an employee to work excessive hours. He submits that the delegate failed to enforce the provisions of the *Act* dealing with minimum standards and employee rights, and her failure to do so is "conducive to [Nacel's] continued abuse and intimidation of Resident managers/caretakers".

Because the delegate did not address this aspect of the Normans' complaints in the determination, it is impossible to determine whether she has refused to exercise her jurisdiction, or exercised her discretion fairly for reasons that are both relevant and bona fide. (*Jody L. Goudreau et al* (BC EST #D066/98).

I refer this aspect of the complaints back to the Director for investigation and determination.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination dated September 26, 2002, be varied as follows:

- The order in respect of the award to Ms. Norman is confirmed, together with whatever interest may have accrued since that date, pursuant to s. 88 of the Act;
- The order in respect of the award to Mr. Norman is sent back to the Director for reconsideration; and
- the issue as to whether Nacel has contravened other provisions of the Act is referred back to the Director for investigation and a determination.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal