Employment Standards TRIBUNAL

An appeal

- by -

Charles Parnell
("Charles")

- and -

Wendy Parnell
("Wendy")

- 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.: 2002/260

DATE OF DECISION: July 22, 2002

DECISION

OVERVIEW

This is an appeal filed jointly by Charles Parnell and Wendy Parnell. I shall refer to them jointly as the "Parnells" and individually as "Charles" and "Wendy", respectively. The Parnells' appealed, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on April 29th, 2002 (the "Determination").

The Director's delegate determined that the Parnells were "resident caretakers" as defined in section 1 of the *Employment Standards Regulation* (the "*Regulation*") and that their employer, 494637 B.C. Ltd. operating as "Evergreen Place Apartments" (the "Employer"), did not pay them in accordance with the provision of the *Act* and *Regulation*. In the end result, the delegate determined that each of Charles and Wendy was owed an additional amount of $495.80 plus section 88 interest.

As I understand the situation, the Employer accepts its liability as determined by the delegate and has now remitted the requisite funds which are currently being held in the Director's trust account. The Parnells, on the other hand, are of the view that they are entitled a much larger sum and, accordingly, have appealed the Determination.

By way of a letter dated July 5th, 2002 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

I shall address each of the issues raised by the Parnells in turn.

FINDINGS

Payment for January 13th and 14th, 2001

The Parnells claim that they were not paid for their first two days of work, namely, January 13th and 14th, 2001. Although the delegate held, at the top of page 2 of the Determination, that the Parnells' employment commenced on January 13th, 2001 (and ended on March 31st, 2001) as I read the calculation schedule appended to the Determination, compensation was awarded based only on their having commenced employment on January 15th (i.e., the delegate awarded 50% of the "resident caretaker" minimum wage for this month). On the face of things, the Determination is in error in this regard. It appears to me that the Parnells were each entitled to be paid $952.45 for January 2001 (19/31 x $1554) rather than the $777 awarded to each of them.

Section 36 and Overtime pay claim

The delegate concluded that the Employer contravened section 36 of the *Act* and thus, in the absence of proper time records, awarded each of the Parnells a further 4 hours (presumably, applying section 34 of the Act) at minimum hourly wage of $7.60 for each day (a total of 10 days each) that they worked contrary to section 36.

I am somewhat confused by this particular calculation. First, I am not sure why the delegate used a minimum hourly wage of $7.60 rather than an hourly wage based on the minimum wage for "resident caretakers" and calculated in accordance with the "regular wage" formula set out in section 1 of the *Act*. Second, as I read the Determination, the delegate was awarding compensation for weekend work whereas the calculation schedule lists a series of "Fridays" for which additional compensation is being awarded.

Since the Parnells were obliged to only work 5 days per week (Monday to Friday--see page 2 of the Determination: "...[the Parnells] made it clear that they were unwilling to work weekends"), it would appear they both ought to have been awarded compensation for working on weekends--4 hours each day. This matter is thus referred back to the Director for further investigation and clarification.

The Parnells say that they ought to have been compensated for weekend work at double the minimum wage since this was "overtime" work. However, resident caretakers are not entitled to overtime pay--see section 35 of the *Regulation*. Nevertheless, "resident caretakers" are entitled to be paid, albeit not at premium overtime rates, for all hours worked in excess of their contractual obligation (which, in this case, was expressly limited to a 5-day work week--see paragraph B of Parnells' employment contract dated December 29th, 2000).

In light of the confusion in this matter, I think the most appropriate disposition is a referral back to the Director for further investigation and clarification. Unfortunately, the parties' various written submissions do not allow me to unequivocally determine the proper outcome of this matter.

ORDER

Pursuant to section 115(1)(b) of the *Act*, I order that this matter be referred back to the Director for further investigation.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal