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-

Gateway West Management Corp.

("Gateway")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	97/221
DATE OF HEARING:	July 25th, 1997
DATE OF DECISION:	August 26th, 1997

DECISION

APPEARANCES

Roderick L. Pearce	for Gateway West Management Corp.
Valerie C. Ball	on her own behalf
Carl S. Brown	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Gateway West Management Corp. ("Gateway" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on March 11th, 1997 under file number 062-752.

The Director determined that Gateway owed its former employees, Valerie C. Ball ("Ball") and Carl S. Brown ("Brown"), the total sum of $12,882.66 (Ball = $6,413.41; Brown = $6,469.25) on account of unpaid wages and interest.

The appeal hearing in this matter was held at the Tribunal's offices in Vancouver on July 25th, 1997 at which time I heard evidence from three witnesses on behalf of Gateway--Scott Ullrich, Bryan Caspar and Michael Campanella--and from the two respondent employees, Ball and Brown. The Director did not attend the appeal hearing.

FACTS

Gateway is the property manager of two residential apartment complexes located in Prince George, B.C., namely, the Ashbury and the Hillsborough complexes. The Ashbury complex is comprised on three twelve-unit buildings; the Hillsborough complex is comprised of four twelve-unit buildings. The two complexes are owned by the same owner and are about one block apart. Historically, both complexes had separate on-site resident caretakers.

Ball and Brown (whom I understand to be common law spouses) were hired in the late fall 1995 and commenced work as the resident caretakers for both complexes as of November 1st, 1995. The evidence of both the employer and the two former employees is that the latter were hired as a "couple" to jointly manage both complexes. Their management duties included collecting rent, arranging for advertising of vacancies, showing suites to prospective tenants, attending on *Residential Tenancy Act* arbitrations, minor maintenance and repairs.

In consideration of managing the two complexes, Ball and Brown were each paid the monthly sum of $850 and were provided with a suite in the Ashbury complex. The value of the accommodation was fixed at $450 per month (in fact, the actual "market rent" for the suite may have been higher) and this amount was added to their pay ($225 each) and then deducted at the end of the month. Thus, both Ball and Brown were each paid a gross amount of $1075 per month against which a $225 payroll deduction on account of rent was charged to each of them at the end of each month. A minor benefit to this arrangement was that Ball and Brown had, in effect, an on-going thirty-day deferral of their rent obligation in that their rent was paid at the end of the month, by way of a payroll deduction, rather than, as is usual, by way of payment on the first of the month.

Although hired as a "couple" to jointly manage both complexes, Ball took primary responsibility for the "paperwork"--sending and receiving faxes, preparing leases etc.--while Brown took primary responsibility for routine maintenance work. It was understood that both Ball and Brown could earn "extra income" by carrying out additional duties, such as cleaning and painting suites in order to prepare them for new tenants, which additional work would be separately invoiced to Gateway at a rate of $10 per hour.

Ball and Brown's employment was terminated on or about October 4th, 1996.

ISSUES TO BE DECIDED

The employer does not challenge the complainant employees' entitlement to one week's wages as compensation for length of service [see section 63(1) of the *Act*] although the employer does say that the amount set out in the Determination on that account is incorrect.

The employer's primary grounds of appeal, however, are that the Determination is in error in three respects:

1. The Director erred in determining the appropriate minimum wage for Ball and Brown under section 17 of the *Employment Standards Regulation;*

2. The Director erred in failing to include the value of the suite provided to Ball and Brown as part of the "wages" paid by the employer to Ball and Brown; and

3. The Director erred in failing to include the monies paid on account of Ball and Brown's "invoices" in determining whether or not the employer had paid the appropriate monthly minimum wage under section 17 of the *Employment Standards Regulation.*

I propose to deal with each of these three grounds of appeal in turn.

ANALYSIS

The appropriate minimum wage

A "resident caretaker" is a person who "lives in an apartment building that has more than 8 residential suites, and is employed as a caretaker, custodian, janitor or manager of that building" [see section 1(1) of the *Employment Standards Regulation*]. There is no dispute that both Ball and Brown were hired as "resident caretakers" as defined in section 1(1) of the *Employment Standards Regulation.*

Section 17 of the *Employment Standards Regulation* establishes the appropriate minimum wage for "resident caretakers":

> 17. The minimum wage for a resident caretaker is,
>
> (a) for an apartment building containing 9 to 60 residential suites, $420 per month plus $16.80 for each suite, and
>
> (b) for an apartment building containing 61 or more residential suites, $1428 per month.

The Director held that Ball and Brown "were hired as resident caretakers together to manage the complex, rather than individual buildings" (see Determination, p. 3). Taken together, the two complexes comprise 84 units and thus, if Ball and Brown were jointly responsible for the management of both the Ashbury and the Hillsborough complexes, the appropriate wage rate would be $1428 per month for each of Ball and Brown as set out in the Determination.

If one applied a literal interpretation of the definition of "resident caretaker" then it could be argued that, inasmuch as Ball and Brown lived in a single 12-unit building, their minimum wage ought to be based on the formula set out in section 17(a) rather than section 17(b) of the *Employment Standards Regulation.* However, I agree with the approach taken by my colleague, David Stevenson, in *Harrison and Lander* [1996] B.C.E.S.T.D. 320.57.60-02, that is, a person may be employed as a "resident caretaker" for a "grouping" of buildings, and thus, can be a "resident caretaker" of a building in which the person does not actually reside. In my view, the key factor in determining the appropriate minimum wage for a "resident caretaker" is the number of suites for which the caretaker is "responsible".

While acknowledging that Ball and Brown were "jointly" hired to manage both complexes (a total of 84 residential units), the employer says that the total number of units should be allocated as between the two. Thus, Ball and Brown's minimum wage ought to be based on 42 rather than 84 units.

However, in my opinion, the Director did not err in determining that Ball and Brown were "jointly responsible" for a total of 84 residential units and that their respective minimum wages should, therefore, be $1,428 per month. I note that the employer's evidence, as well as Ball and Brown's evidence, was that they were "hired as a couple" to "jointly manage" the two complexes; Mr. Brown was not offered a separate suite; there was only one telephone number tenants of both complexes were told to call in order to contact the building manager; and Ball and Brown both

undertook various management or caretaker tasks for both the Ashbury and the Hillsborough complexes. The evidence before me clearly shows that the employer, the two employees, and the various tenants at the two complexes were given to understand that Ball and Brown were, in effect, jointly and severally responsible for the management of the two complexes. In such circumstances, the Director correctly fixed the appropriate minimum wage for each of Ball and Brown at $1,428 per month.

Are monies deducted on account of "rent" wages?

As noted above, both Ball and Brown were nominally paid the sum of $1,075 per month. At the end of each month, the sum of $225 was deducted from each of their paycheques on account of rent. The Director held that the "rent" deduction was an "allowance or expense" and thus, could not be considered to form part of Ball or Brown's wages. In my view, the Director has fallen into error on this particular point.

"Allowances or expenses" are excluded from the definition of "wages" found in section 1 of the *Act*. However, in my view, an "allowance" or an "expense" is a monetary amount allocated to an employee in order to reimburse that employee for actual or expected outlays incurred on the employer's behalf. The rationale for excluding such monies from the definition of wages lies in the notion that the employee does not personally benefit from the outlay in question.

However, in the present case, the employees did personally benefit from the provision of the suite. Further, this suite was provided to them as part of their overall compensation package--this fact is clearly acknowledged by the employees themselves in that they both indicated on their original Complaint forms filed with the Employment Standards Branch that their monthly income was $1,075. A "market value" of $450 (although, in fact, the actual "market value" may have been higher) was established for the provision of the suite and this was allocated equally as between Ball and Brown and deducted from their monthly pay.

This Tribunal has previously held that the value of "free" room and board is to be taken into account as "wages" for purposes of calculating compensation for length of service (see *Khalsa Diwan Society* [1996] B.C.E.S.T.D. 320.18.50-01; confirmed on reconsideration [1996] B.C.E.S.T.D. 320.39.75-07). In my view, it would be highly anomalous, and ultimately incorrect, to conclude that the value of accommodation provided by an employer is to be considered "wages" for one purpose (compensation for length of service) but not for another (minimum wage for resident caretakers).

I wish to make one final observation with respect to this particular issue. The evidence before me is to the effect that the employment bargain reached between the employer and Ball and Brown was that each employee would be paid $850 per month plus "free accommodation". However, as previously noted, Ball and Brown's payroll cheques suggest that they were each, in fact, paid $1,075 per month and that the monthly sum of $225 was deducted reflecting one-half the value of the suite they were provided. Given that the monthly wage was agreed to be $850 rather than $1,075, perhaps the employer should not have "grossed" up the monthly wage to the extent of the value of the rent and then deducted an equivalent amount; as matters now stand, it could be argued that the employer has violated section 21 of the *Act*. The employer could have, it seems to me, documented the employees' total compensation as a monthly cash payment of $850 together with a

monthly taxable benefit in the amount of $225 (reflecting the value of the accommodation provided). In this way, no issue under section 21 would appear to arise as there would not be any "deduction" from the employees' wages.

Should "invoiced amounts" be included when calculating the minimum monthly wage paid by the employer?

According to the Determination, Ball separately invoiced Gateway a total of 22 hours and Brown submitted invoices for 183 hours; in each case, the additional working hours claimed on the invoices were paid at a rate of $10 per hour. The employer submits that *all* monies paid to one or both of Ball and Brown in any given month, including monies paid on invoices, ought to be taken into account for purposes of determining whether or not the employer paid the "resident caretaker" minimum monthly wage. Accordingly, monies paid in a given month pursuant to "invoices" rendered by either Ball or Brown should be credited against the $1,428 monthly minimum wage payable for that particular month .

I cannot accede to this submission for several reasons. First, it was the evidence of both the employer and the two employees that activities that were separately "invoiced" were to be considered as supplementary to any regular caretaker duties. Second, this aspect of Ball and Brown's compensation was variable, not fixed. Third, the evidence before me is that the employer was not obliged to approve any particular minimum level of monthly invoices. Gateway reserved to itself the right to approve any additional work, such as repainting a suite, before it was undertaken. Fourth, the "invoiced work" was to be undertaken outside of Ball and Brown's "regular" working hours and, therefore, cannot be considered to have been part of their "base" compensation. The invoiced work was, in essence, "overtime" work although it appears that such work was not compensated at the overtime rates set out in the *Act.*

Summary

In my opinion, the Director correctly held that the minimum monthly wage payable to each of Ball and Brown was $1,428. However, the Director erred in failing to include the value of the accommodation ($225 per month for each of Ball and Brown) when determining the amount of "wages" actually paid by Gateway. Finally, any monies paid pursuant to "invoices" issued by Ball and Brown to Gateway cannot be lawfully credited against the $1,428 minimum monthly "resident caretaker" wage due to each of Ball and Brown.

I should also note that based on the payroll information presented at the appeal hearing (and accepted as accurate by Ball and Brown), the Determination is in error with respect to the amounts actually paid to each of Ball and Brown. Ball's actual wage payments from Gateway total $13,425.39; Brown's actual wage payments from Gateway total $15,099.27 (these latter figures include the imputed value of the "free rent" received by Ball and Brown). Further, based on these payroll records, the figures set out in the Determination representing one week's wages as compensation for length of service are in error for each of Ball and Brown. The Determination also is in error in that both Ball and Brown worked four days in October 1996 and this does not appear to have been accounted for in the Director's calculations.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter be referred back to the Director for purposes of recalculating, in accordance with the directions given in these Reasons, the proper amounts due to each of Ball and Brown, including any interest payable by reason of section 88 of the *Act*.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal