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 -

Howard House Apartments Ltd.
("Howard House" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/332

HEARING DATE: August 19, 1999

DECISION DATE: September 9, 1999

DECISION

APPEARANCES

Mr. Bruce Calen Mr. Robert W. Roote	on behalf of Howard House
Mr. Lee Ward	on behalf of himself
Ms. Linda Ward	on behalf of herself
Ms. Diane McLean	on behalf of the Director

OVERVIEW

This decision concerns an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") issued on May 6, 1999 which determined that:

> 1) Howard House was the Employer;
> 2) Mr. and Ms. Lee and Linda Ward (the "Wards") were employees of the Employer;
> 3) they were resident caretakers under the Act;
> 4) they were entitled to minimum wages pursuant to the *Employment Standards Regulation* (the "*Regulation*") for resident caretakers plus vacation pay; and
> 5) they were entitled to compensation for length of service when their employment was terminated following the Wards giving notice to leave their employment.

The Determination awarded a total of $8,522.32 to the Wards.

FACTS AND ANALYSIS

In my view there is not a great deal of dispute with respect to the material facts. There is, however, considerable dispute as to the implications that flow from the facts.

It is trite law that the appellant bears the burden of proving that the Determination is wrong.

1. "Resident caretaker"

The Employer argues that the Wards are not employees, rather they are independent contractors, and that they are not resident caretakers. In my view, there is no merit to those arguments.

I turn first to the argument that the Wards are not employees but independent contractors.

The *Act* defines an "employee" broadly (Section 1).

> "employees" includes
>
> (a) a person ... receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> An "employer" includes 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;
>
> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere;

First, it is well established that these definitions are to be given a broad and liberal interpretation. Second, my interpretation must take into account the purposes of the *Act*. The Tribunal has on many occasions confirmed the remedial nature of the *Act*. It is well established that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (see, for example, *Machtinger v. HOJ Industries Ltd.*, <1992> 1 S.C.R. 986). As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. With respect to the interpretation of these definitions, I refer to my comments in *Knight Piesold Ltd.*, BCEST D093/99, at page 4

> "Deciding whether a person is an employee or not often involve complicated issues of fact. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, <1947> 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it"."

As mentioned earlier, there is no merit to this argument. Applying the traditional common law tests to the circumstances at hand, I am not persuaded that there is anything to substantiate a relationship other than an employment relationship. I agree with the delegate that the fact that Lee Ward owned the tools used for the minor repair work (for which he was paid separately), largely capentry hand tools, does not mean that he was not an employee. The simple ownership of tools does not make a person an independent contractor. In any event, the tools used for other work was owned by Howard House. Similarly, the fact that Howard House did not set the Wards' set hours of work is not persuasive. A degree of control over hours is common for resident caretakers. Looking at the relationship as a whole, they were clearly employees.

I next turn to the issue of whether the Wards are resident caretakers.

> "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;

It is clear that they lived in the Employer's apartment building, and that it had more than 8 suites.

The arrangement between the Wards and Howard House may briefly be described as follows. Mr. Calen ("Calen") explained that he became resident caretaker of Howard House in 1985. At that time he and his wife resided in the building. In 1989 he moved out of the building, though he continued to carry out many

of his duties, and contracted with tenants to carry out certain aspects of his duties. He attended at the building frequently and regularly to see to these duties. As suggested by the delegate, I accept that in making these arrangements, Calen did not intend to contravene the *Act* or the *Regulation*. In his own words, he acted as an "agent" for Howard House. There was no dispute that he acted with the consent of the Employer. Calen's title appears to be "manager". Howard House paid Calen and Calen paid his assistants.

In September 1995, Calen agreed with the Wards, who until then had been long term tenants of Howard House, that they would become his "assistants". Calen testified that they became "assistant managers". In Calen's view, the main function of the Wards was to be available in emergencies. There was no written agreement. From his evidence, I understood that the verbal agreement between them was as follows:

1) The Wards would live rent free in their $730 a month suite;

2) In return, the Wards would perform certain duties.

   These duties were to be available for tenants, deal with tenant disturbances (whether involving the RCMP or not), locked out tenants, elevator malfunctions, and plumbing malfunctions.

   There were certain daily functions: vacuuming the lobby, cleaning of lobby windows, wash and sweep elevator floors, sweep front entrance and collect garbage around the building. Snow removal, as required, was another duty performed by the Wards.

   As well, there were certain weekly duties. These included vacuuming the three floors, cleaning the laundry room and sweeping the basement floor.

   On a bi-weekly basis, between March and October, the duties included lawn mowing.

3) Lee Ward was paid $15.00 per hour to do minor repair jobs in the building. He was also paid $150 for painting a one bedroom suites and $200 for a two bedroom. Some of the tools, mostly handtools, used to perfom this work are owned by Lee Ward who is a carpenter by trade. The tools were stored in a basement room made available to Lee Ward by Howard House. The cleaning equipment was owned by Howard House.

While Lee Ward had other employment, Linda Ward did not, and was usually at home during the day. When she was at home, she "was on call" and "available".

Calen agreed that occasionally, when he was absent or away on business, the Wards would perform some of the duties normally performed by him, including the showing of suites to potential tenants and holding rent money. In return, he said, he sometimes did some of their work, such as picking up garbage and pull

weeds.

There was some disagreement with respect to the amount of time required to perform the work. Calen said that he and his wife now does the work in about 40 hours per month. The Wards emphasized the fluctuating work load and estimated that they spent 40 to 50 hours per month on the core duties.

I agree with the Determination that the work performed by the Wards "easily fall into the definition of a custodian or janitor, even if they did not fulfill the broader duties of a caretaker or manager". In other words, the Wards were resident caretakers and entitled to compensation as such. *Regulation* 17 sets out the minimum wage for a resident caretaker. The amount awarded in the Determination is calculated in accordance with the *Regulation*. In my view, the delegate did not err in that regard.

The Employer also argues that the money paid to Lee Ward for "extra work" (minor repairs etc.) and the value of the basement room where he kept his tools, should be taken into account and deducted from the amount owed. There is no provision for that in any agreement. Accordingly, I reject this argument. In any event, I would like to add that Section 20 of the *Act* provides for payment of wages in Canadian currency, by cheque, draft or money order, payable on demand, or by direct deposit (if authorized). Section 21(1) of the *Act* proscribes unauthorized deductions from wages. Where there is a "written assignment of wages to meet a credit obligation" within Section 21(4) (see *Sophie Investments Inc.*, BCEST #D527/97, upheld in part on reconsideration in *The Director of Employment Standards*, BCEST #D447/98) deductions of rental benefits have been accepted by the Tribunal. In other cases, where the agreement does not provide for a rental benefit, the Employer is not entitled to take that into account. In this case, there is no appeal by the Wards of the fact that the Determination amount awarded to them includes the rental benefit. They did not request that and, accordingly, I make no such order.

In mid July of 1998 the Wards gave notice as a result of a dispute with Calen as to whether a tenant, who, had made threatening comments to Linda Ward, should be evicted. For the present purposes it is sufficient to note that the Wards wanted the tenant evicted and that Calen disagreed. On July 15, 1998, the Wards then gave 60 days notice in writing. It was their understanding that verbal agreement between the parties required such notice. By letter dated July 18, Calen brought the relationship to an end "immediately" and demanded the return of master keys and Howard House property. The Wards were permitted to remain in the apartment until July 31. The reason for the immediate termination, according to Calen, was that he "presumed that they would not carry on with their duties", that he "wasn't going to let them sit around for 60 days", and that he "was not going to take the chance". There was no evidence of any misconduct on the part of the Wards and, in my opinion, the Employer simply was of the view that the Wards might not carry on their duties during the notice period or might engage in some form of misconduct. There was no foundation for those views. There is nothing to substantiate just cause. In the result, the Wards are entitled to compensation for length of service. In view of the length of service, the amount awarded is correct.

In my view, the appeal must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated May 6, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal