

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 -

Pacifica Housing Advisory Association

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April D. Katz

FILE No.: 2000/362

DATE OF HEARING: August 31, 2000

DATE OF DECISION: September 25, 2000

DECISION

APPEARANCES:

For the Employer	Jill Savage, P. Michael Savage, Tracy Albus, Kim Scragg, Andrea Rempel
For the Employee	Carol Colleaux and Gordon Colleaux
For the Director	Karyn Luttmer

OVERVIEW

This is an appeal by the Employer, Pacifica Housing Advisory Association (“Pacifica”) of Determination ER #:055600 in which Pacifica was found to owe the employees, Carol Colleaux (“Carol”) and Gordon Colleaux, (“Gordon”) a total of \$1561.48 and \$793.45 respectively as compensation for length of service, for an unauthorized deduction and vacation pay.

Pacifica hired both Carol and Gordon as caretakers of their 54 townhouse complex. Pacifica is appealing the Delegate’s conclusion that Carol and Gordon were employees and not independent contractors. Pacifica disputes the Director’s finding in the Determination that Carol and Gordon were employed over the same period of time. Pacifica disputes that any money is owed in wages or vacation pay to either Carol or Gordon. Pacifica asks that the payment made to Carol and Gordon on the basis that they were Resident Caretakers be returned. Pacifica argues that the provisions of Section 28 of the Act do not apply to this type of employment situation.

ISSUES

1. Does the *Employment Standards Act* (“Act”) apply to the contractual arrangement between Pacifica and Carol and Gordon?
2. Were Carol and Gordon ‘Resident Caretakers’ within the meaning of the *Act*?
3. Did Pacifica employ Carol and Gordon at the same time?

FACTS

In early 1998 Pacifica was completing construction of a new 54 unit townhouse complex called ‘Tamarak Close’ and were looking for a resident caretaker for the property. In an affidavit dated September 29, 1999, the Property Manager, Kim Scragg stated that Pacifica typically tries to find a

“husband and wife team who can cover for each other when one spouse is busy. In all such circumstances, [Pacifica] issues two identification badges and deal with both spouses but have a written employment contract with only one of them”

The BC Housing Commission directive requires the housing authority to have only one caretaker per contract. Pacifica finds a couple and then enters into a contract with one of them and pays only one of them. In her evidence, Ms Scragg stated Pacifica now employs couples in all but two of their 21 complexes. Pacifica has one apartment building and 20 townhouse complexes for which they employ a total of 11 caretakers. The caretakers understand that their spouses can help them with their work but only one person receives payment from Pacifica.

After Carol and Gordon were approved for housing in Tamarak, Kim Scragg approached Carol about becoming a caretaker. Carol did not think she could do the job and wanted time to think about it. Kim told Carol that she and Gordon could do the job together as a couple. Gordon and Carol accepted the position on March 3, 1998 for a salary of \$1327.20 per month. Carol signed the contract with Pacifica on March 3, 1998 and agreed to move in early to prepare for the new tenants. Carol and Gordon moved in on March 15, 1998 and started work immediately. Both Gordon and Carol were issued identification badges and were introduced with pictures to the tenants as the ‘caretakers’ of the complex. Gordon worked part of the time away from the complex. Carol was at home with the children most of the time.

Pacifica paid Carol commencing April 1, 1998 which they acknowledge was in error. Pacifica agrees that they owe Carol \$663.80 for the period March 15, 1998 to March 31, 1998.

Pacifica has other staff to collect rents, do incoming and outgoing inspections, repairs and gardening. Pacifica requires their caretakers to deal with tenant complaints and do regular cleaning of the community room, laundry area, walks, garbage area and parking area, monitor parking for compliance, pick up garbage and debris, replace light bulbs and monitor the complex for security and repair needs. When a tenant is leaving the caretaker is responsible for seeing that the unit is clean for the new tenant. If the unit requires cleaning, the caretaker is expected to vacuum, clean the refrigerator and the stove, arrange for carpet cleaning, patch holes in walls and attend to minor repairs.

Carol and Gordon shared these responsibilities. Carol was paid until March 15, 1999. In early March Gordon asked Pacifica if they could change the contract to his name. Carol was having trouble with a creditor. Pacifica agreed to change the written contract to Gordon’s name based on their experience with him. He had done work around the complex and been paid on a “fee for service” basis. He had a good working style with the other tenants. On March 4, 1999 Gordon went to the Pacifica office and met with Kim Scragg. The contract was being printed in duplicate and he was given pages as they came off the printer. He noted that the salary was the same and signed the contract after noting that some of the tasks in the job description were not accurate. The first page of the contract stated that when his job ended his housing must be vacated. This clause was

different from Carol's contract. When the employment ended there was a lengthy dispute over Pacifica's demand that they have vacant possession of Carol and Gordon's home. Pacifica was not successful.

From March 15, 1999 until August 3, 1999 Pacifica continued to ask Carol to do caretakers' work, issuing her notes as follow up to complaints raised at the office or tasks in the complex. Some of these notes were produced in evidence. Carol continued to deal with tenants as she had before the contract name was changed. Gordon continued to deal with tenants as he had before the contract was changed. Gordon was less available than Carol throughout the period of employment.

On July 31, 1999 Gordon went out on his boat and left Carol in charge when he knew a tenant without a phone was due to vacate at 1PM. Gordon had notified the tenant that the inspector, Tracy Albus, would be coming at noon. There was no one home at noon and Ms Albus had to wait with Carol until 1PM to enter the unit. The new tenant was scheduled to arrive before 2PM with her children. The unit was a mess.

Based on her inspection, Tracy Albus estimated that the unit required 13-14 hours to clean it. Tracy Albus called her supervisor, Michael Savage, to determine what to do. Michael Savage insisted on speaking to Carol. He demanded to know where Gordon was. When he learned Gordon was away, he told Carol that Gordon was fired. Carol became upset. Mr. Savage then told Carol that she had to do the cleaning with Ms Albus. Carol asked why she should do work if she and Gordon were fired.

Tracy Albus had appointments for inspections for the rest of the afternoon. She decided she could cancel them and start cleaning but she did not have cleaning supplies with her. She had to return to the new tenant's old premises to do an inspection and tell her what was happening.

Carol did not give Ms Albus her cleaning supplies. Ms Albus went looking for cleaning supplies in the complex but did not find them. Carol arranged for carpet cleaning.

The new tenant arrived and Ms Albus told her that Pacifica would put her up in a hotel until the unit was cleaned. Ms Albus thought that she could clean the kitchen and bathroom immediately but did not expect to get the rest cleaned before the tenant needed a place to put her family to sleep. Michael Savage arranged for a hotel for the new tenant and her family. The tenant completed her moving trips back and forth from the old premises to the new on July 31, 1999 and went to the hotel. She returned on Sunday morning around 11AM and found Gordon working in the unit. Gordon had worked with Carol's help until 1AM and again from early morning on Sunday, August 1, 1999 until the tenant arrived. The tenant told Gordon she would clean the remaining walls and windows that needed washing. The kitchen and bathroom and carpets were ready for her to move in. The tenant's evidence was that she found the place basically clean on Sunday. She billed Pacifica for 4 hours of cleaning.

On the first working day in August, August 3, 1999 a letter was sent to Gordon terminating his employment. After the comments from Mr. Savage, Carol persuaded

Gordon not to dispute the termination. Pacifica had not expressed any concerns about Carol or Gordon's work performance to either of them before this letter was sent. The employment ended effective August 15, 1999. Gordon was originally paid for one week and ultimately paid for two weeks in compliance with notice without cause provisions.

Pacifica provided Gordon with a record of employment dated August 20, 1999 and Carol with a record of employment dated October 25, 1999. Carol applied for Employment Insurance and the status of her employment was disputed. On November 16, 1999 Canada Customs and Revenue Agency ruled that Carol was an employee and not an independent contractor. They based their ruling on the findings that she used Pacifica's equipment, worked the hours prescribed by Pacifica, was not allowed to hire others to do her work, had to take direction about the work she was to do and follow Pacifica's deadlines and priorities.

LAW AND ANALYSIS

The onus of proof is on an appellant to demonstrate that the Director erred in reaching the Determination. Pacifica alleges that the Director's Determination has several errors.

Application of the Act

Pacifica believes that the *Act* does not apply to the work performed by Carol and Gordon. The *Act* applies to employees. An employee is defined in section 1 the *Act* as

“employee” includes

- (a) a person, including a deceased 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,*
- (c) a person being trained by an employer for the employer's business,*
- (d) a person on leave from an employer, and*
- (e) a person who has a right of recall;’*

The job description directs the activities of Caretakers. The Caretakers are not free to assign work, chose the days or weeks they work. The Caretakers must perform the work normally performed under the directions of Pacifica like any employee would be expected to do. There is nothing in the definition to suggest the *Act* does not apply to the employment of Carol and Gordon.

Resident Caretaker

The *Act* applies to Resident Caretakers. There is a specific salary rate established in the regulations. A 'Resident Caretaker' is defined in the regulations as

'a person who

(a) lives in an apartment building that has more than 8 residential suites, and

(b) is employee as a caretaker, custodian, janitor or manager of that building;'

In *Gateway West Management Corp.* BC EST #D356/97 Adjudicator Thornicroft was considering a situation where two caretakers shared the caretaking of two buildings with a total of 84 units. The caretakers both lived in buildings with 12 units. In determining the appropriate salary Thornicroft adopted the reasoning of Adjudicator Stevenson in *Harrison and Lander* [1996] B.C.E.S.T.D. 320.57.60-02. that

“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.

Thornicroft then went on to conclude

“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”.

I adopt this line of reasoning and find that although the 54 units in the complex are not in an apartment building they are a ‘grouping of buildings’ for which Carol and Gordon were hired to be resident caretakers. The regulations under the *Act* therefore apply to this employment. The salary and salary adjustments for resident caretakers apply to Gordon and Carol.

Term of Employment

Pacifica argues that they only employed either Carol or Gordon at any given time. They rely on the written contracts for the proposition that Carol was employed from March 15, 1998 until March 14, 1999 and that Gordon was employed from March 15, 1999 until August 15, 1999.

The evidence supports Carol’s position that Pacifica continued to treat her as an employee without salary after March 14, 1999. She considered the employment to continue on the same basis as before with Gordon’s name on the contract.

On July 31, 1999, Pacifica expected Carol to act as an employee and perform work on the direction of other Pacifica staff. If Pacifica had any expectation of 13 hours of work

being done after the inspection at 1:30PM before the family needed to sleep in the premises then more than one employee had to do the work. Based on the evidence before me I must conclude that Pacifica expected Carol and Gordon to do the work ordinarily. The unusual situation was to have Ms Albus participate in the cleaning. All the evidence supports the conclusion that Pacifica pays the going wage to one member of a couple but expects both members of the couple to work at peak demand periods, like turnovers at the end of the month. Normally one person at a time is sufficient and either one in the couple can do the work. At peak times both members of the couple are expected to work.

If Gordon had started working at 1PM when he had access to the unit, he could not have had the premises ready for occupancy. I must conclude that Pacifica relied on Carol to be there to help Gordon without compensation. It was reasonable for Carol to have had the reaction to the filth and volume of disgusting debris she did. Her reaction to Mr. Savage's attack is also quite understandable.

I find the Delegate's conclusion that Pacifica employed both Carol and Gordon from March 15, 1998 until August 3, 1999 to be consistent with the evidence before me.

Deductions from Wages

The *Act* prohibits making deductions from wages in section 21.

Deductions

- (1) *Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*
- (2) *An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*
- (3) *Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.*

There was no federal or provincial statute that allowed Pacifica to deduct any money from Gordon's wages. Pacifica needed to prove their claim in court, obtain a judgment and then a court order to garnish Gordon's wages before this deduction could be made from Gordon's wages.

CONCLUSION

I agree with the Director's determination that Pacifica Housing Advisory Association employed Carol Colleaux and Gordon Colleaux for the period March 15, 1998 until August 15, 1999. I find that Carol Colleaux and Gordon Colleaux were employed jointly as resident caretakers within the meaning of the *Act*. The facts support the conclusion that the job was shared. Neither person could perform the contract alone at certain times of the month when it took two people to meet the turnaround time for cleaning and preparing units for new tenants. When one of them was named on the contract the expectation was that the other would be delegated some functions of the job.

I confirm the Director's Determination that Pacifica did not prove there was 'cause', within the meaning of the *Act*, to terminate Carol Colleaux's or Gordon Colleaux's employment as was done by the letter dated August 3, 1999. As a result of 'cause' not being proven, Carol Colleaux and Gordon Colleaux were entitled to two weeks wages for length of service under section 63 of the *Act*. I understand from the pay roll records that Gordon Colleaux was paid until August 13, 1999. I set aside the finding in the Determination that additional length of service wages are owing to Carol and Gordon.

Neither the employees nor the employer kept records of hours worked which could support or dispute a claim for wages beyond the wage paid to the caretaker's position. I confirm the conclusion in the Director's Determination that a quantum for additional wages can not be determined.

I confirm the Director's Determination that Carol Colleaux is owed for half a month's work from March 15, 1998 to March 31, 1998 which is $\$1327/2 = \mathbf{\$663.50}$ plus interest under section 88 of the *Act*.

I find that the rate of pay for Carol Colleaux and Gordon Colleaux is the rate of pay under section 17 of the Regulations, for a resident caretaker, \$429 per month plus \$17.20 for each of 54 units from April 1, 1998 or \$1357 per month. I find the rate of pay for Carol for March 15, 1998 to March 31, 1998 to be \$1327 per month. I find the amount payable to Carol Colleaux and Gordon Colleaux, based on 54 units in the complex, to be 17 months x $(\$429 + 54(17.20)) - (15 \text{ salary differential before April 1, 1998}) = \$23,067.60$.

Pacifica paid Carol \$15,262.80 and Gordon \$6,636 in regular pay cheques. In addition in December 1999 Gordon was paid \$153.00 and Carol was paid \$351.90. The total paid was \$22,403.70. The balance due is \$663.90, most of which is reflected in the \$663.50 found to be owing to Carol above.

Having found that Carol and Gordon were resident caretakers, I find no evidence to support the conclusion that Pacifica made an overpayment to Carol Colleaux or Gordon Colleaux as claimed by Pacifica.

I find that Carol and Gordon are entitled to 4% holiday pay for the full period of their employment in which they earned \$23,067.60 or \$922.70. Pacifica paid Carol \$451.19 (Dec/98) + \$159.25 (June/99) + \$14.08 (Dec/99) = \$624.52 for vacation pay. Pacifica paid

Gordon \$26.54(June/99) + \$106.16(Aug/99) + \$6.12(Dec/99) = \$138.82 as vacation pay. I order Pacifica to pay Gordon Colleaux the balance of vacation pay of **\$159.36**.

I confirm the Director's Determination that Pacifica had no authority to deduct **\$176.33** from Gordon Colleaux's wages and order it be paid to him.

I recognize the difficult time the employer has in making reasonable arrangements with its caretakers to meet the unusual and unpredictable peaks and valleys of workload in this business. Pacifica has demonstrated through the letters from other caretakers that Pacifica has been fair and flexible in setting expectations.

If Mr. Savage had not threatened Ms Colleaux on July 31, 1999 I do not believe this complaint would have been filed. The performance of the Colleauxs throughout their employment had not given cause to Pacifica to raise any performance concerns with either of them prior to that occasion. Hopefully this brings closure to the extensive litigation and time taken addressing the disputes, which arose from this incident.

ORDER

Pursuant to section 115 of the Act, I order that Determination ER3 055600 is varied in accordance with the findings made in this Decision.

Based on the findings, I order Pacifica Housing Advisory Association to pay Carol Colleaux **\$663.50**, and Gordon Colleaux **\$335.69** plus any interest payable by application of section 88 of the *Act*.

April D. Katz

April D. Katz
Adjudicator
Employment Standards Tribunal