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 -

Michael Shore operating as Harbourview Manor

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April D. Katz

FILE No.: 2000/450

DATE OF HEARING: September 14, 2000

DATE OF DECISION: October 6, 2000

DECISION

APPEARANCES:

For the Employer	Michael Shore and Dorothy Mudie
For the Employee	Peggy Schmaltz
For the Director	Ron Corrigal

OVERVIEW

The Employer, Michael Shore operating as Harbourview Manor, appealed the Director's Determination ER #:098-657 in which the Employer was found to owe, his former resident caretaker, Peggy Schmaltz, at total of $1,890.83 for unpaid wages, vacation pay and compensation for length of service plus interest.

The Employer disputed the finding that he failed to pay minimum wage as prescribed by the *Employment Standards Act* ("*Act*"). The Employer argued that the employee was a part time employee and therefore was not entitled to the amount found in the Determination. The Employer's submission stated he was unsure if the employee was fired or quit and therefore disputed the obligation to pay compensation for length of service. The Employer disputed the claim for holiday pay on the basis that the Employee had taken three weeks vacation during her employment.

This decision is based on the written and oral evidence from the Employer the Employee and the Director's Delegate.

ISSUE TO BE DECIDED

The issues to be determined are:

1. Was the Employer obligated to pay the Employee the minimum wage for a resident caretaker prescribed in section 17 of B. C. Regulation 396/95?

2. Was the Employee entitled to vacation pay?

3. Was the Employee entitled to compensation for length of service as set out in section 63 of the *Act*?

FACTS

The Employer's and the Employee's evidence was consistent and therefore it is not difficult to determine the factual background for this appeal. Mr. Corrigal, the Director's Delegate, was helpful when there was any uncertainty during the hearing.

Ms Schmaltz's employment as the resident caretaker of Mr. Shore's 46-suite apartment building commenced on July 1, 1998. She was a resident of the building from December 1, 1995 and knew the previous caretaker and what she did. Ms Schmaltz's rent was $600, which was waived as part of her

compensation. Ms Schmaltz retained an additional $500 from the rent receipts she collected each month.

The Director's delegate found that the Employee was paid $1200 per month until September 1999 and this was not disputed. Ms Schmaltz agreed that she received $1200 per month for the period July 1, 1998 to August 31, 1999 from Mr. Shore. She based this conclusion on the fact that her apartment was normally rented for $695 per month and therefore had a higher value than the $600 attributed because that had been her rent.

The Employee was in a common law relationship and her partner, Mr. Wilson, did some repairs and maintenance in the building. At the end of August 1999 Mr. Wilson asked Mr. Shore if he could move into another suite, rent free. Mr. Shore agreed to Mr. Wilson's renting a suite, which had a normal rent of $575, on the understanding that Mr. Wilson would continue to do the maintenance work he had been doing. Neither Mr. Wilson nor Mr. Shore spoke to Ms Schmaltz about this arrangement and it came as a complete surprise to her that Mr. Wilson had moved to another suite in the building. In mid October Mr. Wilson left the building.

The Employee's mother resides in the building and does work for the Employer on an as needed basis. She is currently in poor health and gave evidence by telephone.

The Employer does maintenance work in the building on an as needed basis. In November 1999 Mr. Shore moved into an empty suite in the building.

In December 1998 Ms Schmaltz took a 10-day holiday to Mexico and asked her mother to cover any emergencies in the building. She prepared everything she could in advance. Mr. Shore did more maintenance work during her absence. In June 1999 Ms Schmaltz took a week of holidays. During the hearing the Director's delegate acknowledged that the vacation time with pay was the equivalent of the amount set out in the Determination for vacation pay.

In September 1999 and October 1999 the Employee did not pay rent but she was not allowed to take the $500 per month for her wages from the rent receipts. Mr. Shore told Ms Schmaltz that Mr. Wilson's rent made up the difference. Mr. Shore paid Ms Schmaltz $100 cash in October.

Mr. Shore was not happy with the work arrangement in the fall. Mr. Wilson was not doing the things he expected of him. Mr. Shore was not specific in his complaints to Ms Schmaltz. She felt she was doing the same job she and her predecessor had always done. She knew Mr. Shore was having domestic problems and attributed his manner to his personal circumstances.

Ms Schmaltz was angry that she was not being paid. On November 14, 1999 Mr. Shore accused Ms Schmaltz of taking money from the bank deposit because the bank could not find the deposit. Ms Schmaltz was insulted by the implied shadow on her integrity. Mr. Shore demanded that Ms Schmaltz return her keys, which she did. That was her last day of work. Ms Schmaltz told Mr. Shore that the deposit had been made and the bank subsequently identified their error in misplacing the deposit.

Mr. Shore submitted that he under paid the resident caretaker by $25 for September and overpaid $275 October. He calculated these amounts from Mr. Wilson's rent. Mr. Wilson's departure in mid October had left the suite vacant for half a month. Mr. Shore felt Ms Schmaltz's rent for November of $600 was full compensation for the half month worked.

Ms Schmaltz issued a receipt to herself for December rent prior to surrendering her keys. Mr. Shore proceeded to arbitration claiming December rent. The arbitrator allowed $400 of December rent as September wages. Ms Schmaltz accepted this plus the $100 cash payment as equivalent to the September wages.

Ms Schmaltz complained to the Director Employment Standards claiming 2 weeks wages for compensation for length of service.

EVIDENCE AND ANALYSIS

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the evidence from the appellant must demonstrate some error in the Determination, either in the facts accepted, or the factual conclusions reached or in the Director's analysis of the applicable law.

Section 112 provides as follows

> *112 (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.*

The Employer's appeal raises three issues and I propose to deal with them in order.

RESIDENT CARETAKER WAGES

The first issue is the rate of pay for the Employee. The *Act* recognizes that resident caretakers are in a unique employment situation. The hours are not regular, the work has peaks and valleys and the work is multifaceted. The legislators have elected to attribute a standard rate of pay unrelated to the specific hours.

The onus is on the appellant to show that the Determination was in error. The Employer argues that the job was part time. If the Employer proved that this was true it would not change the amount of wages owed as the wage is monthly and not based on the number of hours worked. Mr. Shore argued that he had two part time employees. Mr. Shore gave no evidence of any payment of wages to Mr. Wilson until the rent waiver in September 1999.

In this building the Employer is obligated to pay the resident caretaker $1220.20 per month based on the number of suites in the building. Mr. Shore did not pay these wages. He made undocumented arrangements with Ms Schmaltz and felt free to change them without consulting her. There is no evidence that he had a contract with Mr. Wilson or paid him any money for this position. Mr. Shore negotiated the terms of the employment with Ms Schmaltz. Ms Schmaltz accepted $120.20 less per month than she was entitled to under the *Act* based on the long term relationship she had with her landlord. It might have been helpful to analyze the job being performed by Ms Schmaltz compared to the previous caretaker. In this instance I do not have the benefit of the evidence of the previous resident caretaker.

I find that there is insufficient evidence to disturb the finding of the Delegate that the Employee was the resident caretaker entitled to the prescribed salary of $1220.20 per month. The Employer is obligated to pay Ms Schmaltz the difference between what she received and the wages she was entitled to by law.

VACATION PAY

The second issue is the claim for Vacation Wages. The Employee had not claimed any vacation pay when she made her complaint. The Director's Delegate did not raise this issue with the employer during the investigation. The Employee and the Employee agreed in the oral evidence that the Employee was absent from work on full pay for at least the equivalent of the time she earned during her employment.

The Employer has provided new evidence that he did not have an opportunity to provide during the investigation. The new evidence supports the conclusion that the Determination should be varied.

COMPENSATION FOR LENGTH OF SERVICE

The third issue is the claim for compensation for length of service based on section 63 of the *Act*. Section 63 provides as follows.

> *Liability resulting from length of service*
>
> *63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
>
> *(2) The employer's liability for compensation for length of service increases as follows:*
>
> *(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*
>
> *(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.*
>
> *(3) The liability is deemed to be discharged if the employee*
>
> *(a) is given written notice of termination as follows:*
>
> *(i) one week's notice after 3 consecutive months of employment;*
>
> *(ii) 2 weeks' notice after 12 consecutive months of employment;*

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

There is no dispute from the evidence with the finding in the Determination that Ms Schmaltz was employed from July 1, 1998 to November 15, 1999. Mr. Shore raised performance issues at the hearing but he did not establish that Ms Schmaltz was dismissed for cause. If he wanted to establish cause he would have needed to prove cause. There was no evidence of cause before me.

Mr. Shore was confused about whether he fired Ms Schmaltz. I find on his evidence that he dismissed Ms Schmaltz by demanding that she return the keys necessary for her work. She could no longer carry out her duties. The allegation of misappropriating money was unfounded.

The Determination concluded that the Employee was entitled to two weeks compensation for length of service in the amount of $563.16. I do not find any new evidence to draw a conclusion that there is an error of fact in the Determination.

CONCLUSION

I find based on the evidence presented that the Employer has not discharged the onus of proof required to set aside the Determination with respect to wages owed or compensation for length of service. The Determination is confirmed in these respects.

Mr. Shore was successful in proving that Ms Schmaltz had received paid vacation during her employment. I vary the Determination by deleting the amount of $827. 86 for vacation pay plus interest.

The Determination is varied and the amount owing from the Employer to Peggy Schmaltz is confirmed to be **$996.46** plus interest under section 88 of the *Act*.

ORDER

Pursuant to section 115 of the Act, Determination ER: 098-657 dated June 6, 2000 is varied to show that Michael Shore operating as Harbourview Manor owes Peggy Schmaltz $996.46 plus interest pursuant to Section 88 of the *Act*.

April D. Katz

April D. Katz
Adjudicator
Employment Standards Tribunal