

**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 -

Dr. Petar J. Kokan Inc. operating  
Captain's Walk Apartments  
("Kokan")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	John M. Orr
<b>FILE No.:</b>	97/431
<b>DATE OF HEARING:</b>	September 09, 1997
<b>DATE OF DECISION:</b>	September 23, 1997

## DECISION

### APPEARANCES:

John Alexander	Counsel for Dr. Petar J. Kokan Inc.
Frank Bubas	For Dr. Petar J. Kokan Inc. and Captain's Walk Apartments
Daniel Seguin	For Himself

### OVERVIEW

This is an appeal by Dr. Petar J. Kokan Inc. ("Kokan") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination (File No. 080554) dated May 14, 1997 by the Director of Employment Standards (the "Director").

The Determination found that Daniel Seguin ("Seguin") was a resident caretaker of Captain's Walk Apartments and had not been paid for his services for 3 1/2 years. The Determination found that over the 12 months of the allowable claim period Seguin was owed (including vacation pay, holidays, and interest) the sum of \$7,049.35.

Kokan has appealed on the basis that they were never given a reasonable or fair opportunity to respond to the allegations made by Seguin and, in fact, Seguin's specific allegations were not even shared with the Apartment management or owners. Kokan says that, if given the opportunity, they would have pointed out that Seguin's common law wife, Ms. Diane Delage ("Delage"), was the person actually hired as the resident caretaker and that all work performed in addition to the caretaking duties was performed by Seguin on contract, was invoiced separately, and paid in full in an amount in excess of six thousand dollars.

### ISSUE TO BE DECIDED

The issues to be decided in this case are firstly whether Seguin was employed as a resident caretaker for Captain's Walk Apartments and secondly whether, even if he were not a resident caretaker, was he otherwise an employee as opposed to being a contractor.

### FACTS

In April of 1993 Ms Diane Delage and Mr Seguin, as a result of responding to an advertisement in the newspaper, met with Mr Frank Bubas ("Bubas") to apply for the position of resident caretaker

for the 50 suite Captain's Walk Apartments. They presented a joint resume and attended an interview with Bubas. At the conclusion of the interview Bubas offered the position to Ms Delage. He agreed to pay her \$1000.00 per month plus a rent subsidy of \$285.00. It was also agreed at the interview that if Seguin wanted to set up a business account that he could also earn extra money by working as a painter. Ms Delage and Seguin agreed to this arrangement and moved into the building together in the caretakers suite.

Seguin set up his business account under the name D & D Painting. He kept this account completely separate from the family income and did not disclose it to Social Services, from whom he was receiving funds, nor to Revenue Canada. He did not fully disclose this account either to the Director's Delegate during the investigation.

Over the next forty months Seguin did a considerable amount of painting work for Captains Walk. Bubas set-up charge accounts for him at paint and hardware stores and Seguin invoiced his labour to Kokan and was paid in full for all the work invoiced (except for one invoice in the amount of \$25.00 which the landlord declined to pay). Seguin also, from time to time, did extra work, other than painting, on the building which was considered to be beyond the scope of caretaking and for which he was paid personally, not through D & D Painting. These were things such as cleaning up the roof and certain landscaping. He was always paid separately for these jobs and such payments were totally unrelated to Ms Delage's pay for caretaking. Seguin's payments through D & D Painting during this time were in excess of \$6000.00 not including the other payments made to him personally and not through D & D Painting.

Seguin also worked as a painter for other people during the same time period. He did not have to work any set hours for Kokan nor was his work supervised in any way. He was free to work for as many people as he wished. He was never asked for a social security number and never completed a TD1 form for Revenue Canada.

At no time during this forty months did Seguin raise an issue with Bubas or Kokan (who he met on several occasions) about expecting to be paid also as a resident caretaker as well as his common-law wife.

Bubas testified that he only hired Ms Delage as the caretaker and that he agreed to find other work for Seguin to help them as they were a young couple with children who would need more income than would be earned caretaking. Bubas denied completely that Seguin had any duties as a caretaker and testified that Seguin normally billed any additional work separately. If the work fell within caretaking duties Bubas expected that Ms Delage would be doing it and he testified that he never authorised, allowed, or condoned Seguin doing work that was within Ms Delage's duties.

Ms Delage testified that she was hired and employed as the resident caretaker. She did complete a TD1 form and was paid a regular salary of \$1000.00 per month less the statutory deductions. She testified that she did all the caretaker work that was required but agreed that Seguin often helped her out by driving to town to get keys cut or depositing the made-up deposits to the bank. If he were in the apartment when Ms Delage was out he would also accept rent payments if brought to

the door. However Ms Delage would make up the receipts and the bank deposits. She disagreed completely with Seguin's assertion that he did at least half the caretaking work.

Sometime shortly after moving into Captains Walk Ms Delage and Seguin actually moved into a bigger suite thereby getting a rent subsidy of \$400.00 per month. In October 1996 Ms Delage and Seguin separated. Ms Delage moved into another vacant apartment and took all the caretaking records with her and she continues to this day to be the resident caretaker for the building. A dispute then arose over the rent for the apartment in which Seguin remained. It was after this marital break-up and rent dispute that Seguin for the first time asserted that in fact he was also a resident caretaker and entitled to the minimum pay as set out in the *Act*.

## ANALYSIS

A procedural issue arose at the commencement of this case relating the nature of the investigation and the evidence allowed to be introduced for the first time on appeal. A number of the Tribunal's decisions have indicated that the employer will not be allowed to introduce new evidence at the appeal if they had the opportunity during the investigation and failed or declined to do so. Counsel for the appellant submitted that the company was not given a proper hearing at first instance in conformity with the rules of natural justice and procedural fairness and that therefore this appeal should be treated as a hearing in first instance.

This Tribunal has discussed the nature of the appeal process in a number of decisions and has taken the position that the proceeding is not a hearing in first instance but is truly an appeal. However, it was clear to me, both from the materials provided by the Director and the submissions of counsel, that the company was not given full disclosure of the nature of the complaint nor a full opportunity to respond. Although the *Act* requires the Director to "investigate" the complaint it does not contemplate nor require a full hearing as submitted by counsel. However, where full disclosure and opportunity to respond was not given in first instance then the Tribunal should be flexible enough to allow the appellant to present all relevant evidence necessary to respond to the allegations whether or not such evidence was available for presentation during the investigation stage. One of the stated purposes of the *Act* is to promote the fair treatment of employees and employers and such purpose is not fulfilled where the investigation accepts as factual the allegations of the complainant without giving the other party full disclosure and an opportunity to respond.

I considered whether to simply refer the matter back to the Director for further investigation but decided that it was more fair and efficient, another stated purpose of the *Act*, to hear the appeal and then decide whether I felt I could make a decision or at that time to refer the matter back. I allowed a considerable amount of evidence at this hearing both from the appellant and Seguin that was not submitted to the Director's Delegate and found that what was submitted was both relevant and helpful.

In this case the relevant provisions of the *Act* are as follows:

1.

**"employee"** includes

- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,

**"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;

*The Employment Standards Regulation* defines resident caretaker as follows:

"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;

The *Regulation* also provides that:

**Residential caretakers**

- 17. The minimum wage for a residential caretaker is,
  - (a) for an apartment building containing 9 to 60 suites, \$420 per month plus \$16.80 for each suite ...per month

In this case the minimum wage for the caretaker would have been \$1260.00 per month which was paid to Ms Delage by way of a \$1000.00 per month paycheque together with a rent subsidy of \$285 initially and, after the change in apartments, a rent subsidy of \$400. It was not claimed and was not raised as an issue before me whether the rent subsidy constituted compliance with the minimum wage regulation. Therefore for the purpose of this appeal I am assuming that Ms Delage was paid in full and in compliance with the *Act* and *Regulation* as the resident caretaker of the building. The question that arises is whether Bubas in fact hired two resident caretakers and that both Ms Delage and Seguin should have been paid the minimum wage as prescribed.

The Director's Delegate did not consider the issue that the minimum wage applied if he found that Seguin was a resident caretaker as well as Ms Delage. The Determination simply found that Seguin was an employee and therefore entitled to a fair wage. The Delegate applied Section 79 of the *Act* to create a wage based on a proportion of that wage paid to Ms Delage based on hours submitted by Seguin. In my opinion this was an error. If Seguin was also a resident caretaker then he would have been entitled to the minimum caretaker's wage. If he were not a resident caretaker then there needed to be a closer analysis of the work allegedly performed by Seguin, the work performed by Ms Delage, and the work for which Seguin was previously paid.

Counsel for Kokan submitted to me the Tribunal decision *Thomas Louis Harrison and Martha Lander*; BC EST #D 217/96 a decision by Adjudicator D. Stevenson, for the proposition that in law there can not be two resident caretakers in one apartment building. Counsel refers me to paragraph 16 of the decision which states, in part, as follows:

I do not accept the argument that the employ of her husband as resident caretaker from April 1, 1992 to May 31, 1994 may be attributed to her and constitute employment as a resident caretaker for her present claim. Acceptance of such an argument would result in there being two resident caretakers for the buildings. The Act does not contemplate the existence of two resident caretakers for one apartment building.

On reading the decision in full it is not clear to me the significance of the dates referred to in the above quoted paragraph nor the relationship or living arrangements between the parties. I assume that the quoted statement refers to the particular facts of that case because I can see no logical reason why a property owner could not employ two resident caretakers if he wished to do so and incur the additional cost. The Act may not contemplate the existence of two resident caretakers but it certainly does not prohibit it. I would find that it is certainly possible for a landlord to employ two resident caretakers in the same building. The question is whether Bubas did so in this case.

On hearing and weighing the evidence before me I am satisfied that Bubas never intended to hire more than one resident caretaker. All the arrangements were made with Ms Delage, her TD1 completed and all proper deductions and benefits were arranged accordingly. She performed almost all the work as the resident caretaker except when her husband helped her occasionally by driving to town or making bank deposits. I am satisfied that these occasional chores were done gratuitously by Seguin to help his wife. These activities were not authorised by the landlord and were not under the landlord's "control or direction". At no time until after the marital separation and the rent dispute, some 40 months later, did Seguin ever raise the issue of wages for himself as a caretaker.

Seguin did other work that benefitted the landlord. He cleaned carpets in the suites between tenants; he cleaned up the roof; he did some landscaping and he did the painting work which was invoiced through his business, D & D Painting. If Seguin was an employee then he would be entitled to the benefit of the minimum requirements set out in the *Act* and there would, no doubt, be money owed to him for such things as overtime, statutory holidays, and holiday pay.

The Director's Delegate was persuaded that Seguin was an employee because of the fact that Seguin had signed himself on some documents as a manager and because he had authority to sign for purchases at a paint store and hardware store. Bubas testified that Seguin was not authorised to sign any invoices on behalf of the company. He also pointed out that he, Bubas, was the manager, Ms Delage was the caretaker and Seguin was simply an independent contractor for those services he performed for the company. He did confirm that he set up the paint and hardware accounts for Seguin in the same way he had done for other trades from time to time.

There was also a document filed with the Residential Tenancy Branch by the Company's lawyer which indicated that one of the grounds for evicting Seguin from his suite was that he was fired as an employee of the company and therefore no longer entitled to a suite. I am satisfied that the reason for this terminology was in part because of the pre-printed nature of the Residential Tenancy forms and the unusual situation where in fact the status of the suite, and Seguin's use of it, changed when his wife, the resident caretaker, moved out and into another suite.

I believe that the Director's Delegate was overly impressed by these documents and they were misrepresented to the Delegate by Seguin. The Delegate did not apply the appropriate tests to determine if Seguin was an independent contractor or an employee. I find on the evidence before me that there was never an intention by either party that Seguin be an employee. Seguin set up a

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proprietorship account at his bank and invoiced the company for the jobs he performed. He was paid for three and one half years without deductions and without protest by Seguin.



Seguin had no set hours of work, was not supervised and could subcontract any of the work when he wished to do so. He did, in fact, subcontract from time to time without having to ask permission or approval from the landlord. There was no set rate of pay for any of the work performed by Seguin for the landlord. Seguin also was free and did work for other people during the same time period. He had an unlimited opportunity to make a profit or to suffer losses. He was not in any way integrated into the landlord's business and was not under the control or direction of the landlord.

I also find that Seguin was not indirectly under the landlord's control through Ms Delage. It was clear from the evidence of both Ms Delage and Seguin himself that he operated independently from her. He did not take direction from her nor did she supervise his work. He did not account to her for his earnings nor his time.

I am fully satisfied that Seguin was not a resident caretaker and that he was not an employee of the company in any other capacity.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination is cancelled.



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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**