Employment Standards TRIBUNAL

An appeal

- by -

Karen Drover-King and Terry King
(the "employees")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2001/486

**DATE OF DECISION:** September 13, 2001

# DECISION

## OVERVIEW

This matter comes back before me in order to determine the amount of unpaid wages owed to the appellants, Terry King and Karen Drover-King (the "employees"), under the *Employment Standards Act* (the "*Act*"). The employees appealed a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 23rd, 2000 (the "Determination") pursuant to which Sheridan Investments Ltd. (the "Sheridan") was ordered to pay certain monies on account of unpaid wages to the employees.

Sheridan is the property manager of a 193-suite apartment building situated in Vancouver's "west end". The suites are leased by individual lessees who hold 99-year leases. Sheridan is the property manager for the "common areas" and is *not* responsible for carrying out maintenance and repairs in the suites occupied under 99-year lessees. The employees were hired to serve as "relief caretakers" on weekends and statutory holidays; they were each paid a monthly salary of $300 in addition to a rent reduction. The employees were also required to be "on-call" every weekend and on weekday evenings every other week. During their alternate "on-call" weeks, any telephone inquiries would be routed to the employees' apartment from 5 P.M. until 7 A.M. the next morning. Further, during their "on-call" weeks (as on weekends and statutory holidays), the employees were obliged to carry out the building "lock-up" procedure which involved clearing and securing all of the common areas (*e.g.,* the pool, the laundry) at 10:00 P.M. The employees' employment commenced on August 1st, 1998 and ended on or about January 30th, 2000.

The appeal hearing took place at the Tribunal's offices in Vancouver on March 20th and April 12th, 2001; as directed, I subsequently received further written submissions from the parties on certain issues. There were two issues properly before me in this appeal, namely, the employees' wage rate and the number of hours that the employees' actually worked during the period in question. The employees claimed that the delegate ought to have used a higher wage rate in her calculations and that the delegate did not credit them for all of their working hours.

The "rate of pay" used by the delegate to calculated the employees' unpaid wage entitlement was stated to be $7.15 per hour, however, it appeared that the actual wage rate used in the delegate' calculations was $8.65 per hour ($34.60 was awarded for each 4-hour weekend shift). The delegate based her calculations on each employee working 4 hours [or less, in which case section 34(2)(a) was applied] each Saturday and Sunday and on statutory holidays. According to the Calculation Schedules appended to the Determination, neither employee was credited with any working hours for the alternate "on-call" weeks.

On May 23rd, 2001, I issued written reasons for decision (B.C.E.S.T. Decision No. D263/01), allowing the appeal in part and ordering that the Determination be varied. In my decision, I noted that the delegate allowed the employees [through the application of section 34(2)(a) of the

*Act*] a total of 16 hours for weekend relief work (4 hours to each employee for each weekend day) and a further 8 hours' work (4 hours each) for every statutory holiday. I confirmed the Determination as to the number of compensable hours for work performed by the employees on weekends and statutory holidays. I determined the employees' hourly wage rate to be $7.69.

With respect to the so-called "on-call" hours, I was satisfied that the employees were fully compensated for all work performed during their "on-call" periods on weekends and statutory holidays. However, with respect to the alternate weeks when the employees were "on-call" and performed the nightly "lockup" duties, I held that the delegate erred in failing to award the employees any compensation on that account (a page 8):

> ...whether or not Mr. King and Ms. Drover-King jointly carried out the lockup duties, this was a "one-person" task and ought to be compensated accordingly. Further, even though this latter task could be completed in a comparatively short period of time--10 minutes or even 30 minutes--I do not see how one can simply ignore the dictates of section 34 of the *Act.* In my view, one of Mr. King or Ms. Drover-King is entitled to be paid 4 hours for the "lockup" duties performed each night of their alternate "on-call" weeks. Since these duties were not time consuming, to the extent that the Kings were required to field any evening telephone calls when they were "on-call", I am satisfied that the total working time associated with such calls, together with the lockup duties, would not exceed (or even come close to) the 4 hours' minimum pay that must be awarded by virtue of section 34(2)(a) of the *Act* for each evening's work during the "on-call" weeks.

I summarized my findings (at page 9 of my decision) as follows:

> *Summary*
>
> I find that Mr. King and Ms. Drover-King, together, worked not more than 16 hours each weekend and a further 4 hours each alternate "on-call" week. I accept the delegate's conclusion that, together, they worked not more than 8 hours on statutory holidays. I calculate their "regular wage" to be $7.69 per hour and they are both entitled to be paid at that rate for 8 hours each weekend and 4 hours each statutory holiday. In addition, section 34(2)(a) of the Act applies with respect to work performed on alternate "on-call" weeks such that one employee is entitled to a minimum of 4 hours' pay for each evening during the alternate "on-call" weeks. This nightly 4-hour minimum pay can be credited to one employee or awarded jointly to both employees.

In light of the above findings, I issued the following Order:

> **ORDER**
>
> Pursuant to section 115 of the *Act,* I order that the Determination be varied and that this matter be referred back to the Director for purposes of calculating the unpaid wage entitlement of Terry King and Karen Drover-King (and concomitant section 88 interest) in accordance with these reasons for decision.

**THE DELEGATE'S REVISED CALCULATIONS**

The delegate, in accordance with my directions, recalculated the employees' respective entitlements and prepared a report (to which was appended a detailed calculation schedule), addressed to the Tribunal, dated May 30th, and filed June 1st, 2001. The relevant portions of the delegate's report are set out below:

> ...the work performed by [the employees] during the alternate 'on-call' weeks commenced the week of October 11, 1998. The 4-hour minimum pay has been awarded jointly to both [employees] as suggested by the adjudicator.
>
> Pending the appeal of the Determination, the employer paid the following wages (including interest) to the Employment Standards interest-bearing Trust Account:
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> | | |
> |---|---|
> | Drover | $1,165.47 |
> | King | $1,324.09 |
> | Total owing: | $2,489.56 |
>
> The following additional wages (including interest pursuant to Section 88 of the [*Act*] to May 30, 2001) are owing to:
>
> | | |
> |---|---|
> | Drover | $2,218.11 |
> | King | $1,951.09 |
> | Total owing: | $4,169.20 |

**THE PARTIES' SUBMISSIONS**

On June 26th, 2001 the Tribunal's Administrator forwarded the delegate's report and attached calculations to the parties for their comments.

The employees' submission, dated July 17th, 2001, raised a number of points:

- "Somehow the issue of whether we were or were not Resident Caretakers has been sidestepped and we want this issue addressed.";

- "...the work performed by us during the alternate 'on-call' weeks commenced at the beginning of our employment, August 1, 1998 and not on October 11, 1998.";
- "[the delegate] appears to have arbitrarily chosen the days on which we performed the 'on-call' function.;
- "We disagree with the Payroll Total (monies actually received) for both of us."; and
- "...we have not been credited with 2 hours each for performing the evening and night 'on-call' function on Saturdays, Sundays and statutory holidays."

Sheridan's legal counsel accepts the delegate's calculations except that he concedes the employees' alternate week "on-call" pay should run as and from August 1st, rather than October 11th, 1998. Thus, the employees are entitled to an additional $639.80 (including vacation pay) on this latter account.

**FINDINGS**

I have reviewed the delegate's calculations and the parties' respective submissions. I wish to specifically address the various concerns raised by the employees in their July 17th submission.

Contrary to the employees' assertion, the issue of whether or not they were "resident caretakers" was not "sidestepped". This issue was specifically addressed at page 3 of my decision under the heading "Scope of the appeal".

As noted above, counsel for Sheridan agrees with the employees that their "on-call" pay should run as and from August 1st rather than October 11th, 1998. The compensation for the employees' on-call work during their alternate "on-call" weeks was not "arbitrarily" allocated between the two employees but rather divided equally between the two in accordance with my directions.

The matter of the actual wages paid to the employees is not a matter that is now properly before me. This issue was addressed in the Determination; the employees did not appeal the delegate's findings and, further, the employees made no mention of this point in their appeal materials or before me at the appeal hearing. This issue appears to have been raised for the first time by way of comment on the delegate's "recalculation" report.

Finally, and again contrary to the employees' assertion, there were fully credited with their on-call hours for their normal weekend and statutory holiday hours--see my decision at page 7.

Accordingly, I find that the delegate's calculations are substantially correct and ought to be confirmed save that the employees are entitled to an additional $639.80 (or $319.90 each) for work performed during their alternate "on-call" weeks for the period August 1 to October 11th, 1998.

**ORDER**

The sum of $1,165.47 (including accrued interest) currently being held in the Director's trust account to the credit of Ms. Karen Drover-King, is to be paid out to her (if not already paid) forthwith.

The sum of $1,324.09 (including accrued interest) currently being held in the Director's trust account to the credit of Mr. Terry King, is to be paid out to him (if not already paid) forthwith.

In addition to the foregoing amounts, Sheridan is ordered to pay Ms. Karen Drover-King the further sum of $2,538.01 and Mr. Terry King the further sum of $2,270.99.

Both Ms. Drover-King and Mr. King are also entitled to any additional interest that may have accrued, pursuant to section 88 of the *Act*, as and from May 31st, 2001.

The Determination is varied accordingly.

**Kenneth Wm. Thornicroft**
**Adjudicator**
**Employment Standards Tribunal**