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 -

John Knister and Therese Dean
("Knister" and "Dean")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Niki Buchan
FILE NO.:	97/646
DATE OF HEARING:	October 24, 1997
DATE OF DECISION:	January 28, 1998

DECISION

APPEARANCES

John Knister	On his own behalf
Therese Dean	On her own behalf
Angelina Prijatelj	On her own behalf
Erik J. Ronse	For the Director

OVERVIEW

This is an appeal brought by John Knister ("Knister") and Therese Dean ("Dean") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination, dated August 1, 1997, by a delegate of the Director of Employment Standards (the "Director").

The Determination found that the employer had contravened Sections 27(1)(b)(c)(e), 28(1)(d)(h), 35 and 45 of the Act. It ordered the employer to cease contravening these sections of the Act and comply with the requirements of the Act. The Director determined that Ivan and Angelina Prijatelj, also known as Priatel, (the "employer") owed Knister $826.89 based on a monthly salary of $1428.00 and that Therese Dean had been overpaid $2272.62. It ordered the employer to pay $826.89 to John Knister and states that "the Branch is not authorized to recover overpayments".

Knister and Dean filed their complaints for wages, including regular and overtime earnings and statutory holiday pay adjustments. Knister also advanced claims for moving expenses, the purchase of a car and insurance, which were stated in the Determination "to be beyond the scope of the jurisdiction of the Branch". The Determination states that they were each seeking to be paid $2200.00 per month. In fact, this is an error. They claim that each was entitled to be paid $1428.00 per month, the minimum wage set out in the Regulations for a residential caretaker in a building containing 61 or more residential suites.

An oral hearing was held in Victoria at which time sworn evidence was taken from Knister and Angelina Paijatelj.

ISSUES TO BE DECIDED

Whether the Director correctly designated Knister as the resident caretaker allocating his wages as having worked a 5-day week and Dean as an employee who worked a 2-day week?
Whether Knister and Dean are entitled to overtime pay and/or statutory holiday pay?

FACTS

The Princess Louise Apartments is a dwelling consisting of 73 suites owned and operated by the employer.

The employer required someone to be available to cover seven days a week. Angelina Prijatelj decided to hire a couple (one to work 5 days, the other 2 days) to provide coverage on weekends.

Under a written contract dated August 25, 1996, the employer hired Knister and Dean as resident managers of the Princess Louise Apartments. They were to assume their duties as of October 1, 1996. Their joint wage was agreed to be $2200.00 per month gross, which they requested to be split equally between them. The records indicate that each was paid $1100.00 per month. Dean was paid on the 15th of the month and Knister was paid at the end of the month. There is also a provision in the contract to provide them with an apartment in the building for which they will pay the owners a rental fee of $200.00 per month. That fee was deducted from their wage payments.

Dean's job included the bookkeeping duties, writing the cheques and general cleanup. Knister did the maintenance and yard work.

Shortly after they assumed their duties in October, Knister asked when he would get a raise. He was told their salary would be reviewed in March or April. There was no salary increase as they were terminated effective the end of March 1997. There is no issue over compensation for length of service.

Knister gave sworn evidence that both he and Dean worked a seven-day week and did not have any time off. When Knister requested time off the employer told him that he could have a day off but the other must cover. Knister wanted them to have time off together.

The employer did not pay the employees for three statutory holidays worked during their employment and they did not receive any overtime payment.

The employer did not post a schedule in the building specifying the caretaker's hours of work and days off work. There were no records of daily hours worked available.

The policy of the Employment Standards Branch set out in the Fact Sheet on Residential Caretakers states:

> "Only One Resident Caretaker
> Only one person can be designated as the resident caretaker of an apartment building. Others employed to assist the resident caretaker or to work on the premises, including persons providing evening, weekend or holiday relief for the resident caretaker, are considered regular employees to whom all the standard provisions of the Act and Regulation would apply."

The Determination was issued based on the policy that only one person can be designated as the resident caretaker. The Director made calculations designating Knister as the resident caretaker with a minimum salary of $1428.00. Dean was designated as an "employee" for the purposes of the "Act". Calculations for Dean's entitlement were based on 2-days work per week prorated on a salary of $1428.00.

ANALYSIS

Knister argues the Determination is wrong for the following reasons:

1. They were both employed as resident managers, regardless of the Act.
2. Both had full time positions, not as one employed for five days and the other for two days per week.
3. Both were paid the same amount per month.
4. They are seeking the difference between the $1100.00 they were paid and the $1428.00 they now claim should have been paid to each one.
5. During the six months they were employed they did not have a day off and they were never offered or paid overtime.
6. They worked but were not paid for three statuary holidays during their employment.

Issue 1. Whether the Director correctly designated Knister as the resident caretaker allocating his wages as having worked a 5-day week and Dean as an "employee" who worked a 2-day week?

There is no dispute that the written contract states both Knister and Dean were hired as "resident managers" for a joint salary of $2200.00 per month. The employer argues that when Knister wrote the contract he included the term "resident managers" which she did not like. The employer's evidence is that she did not need two managers and that she hired a couple to provide coverage (one for 5 days and one for 2 days). Knister selected the amount to be paid to each: he chose that each be to be paid $1100.00 per month. Knister and Dean now allege they are each entitled to the minimum set out in Section 17 of the Regulations because they were both termed "resident managers" in the contract, did different jobs and were paid the same amount. That was not the expectation of any of the

parties when they signed the agreement for a joint wage of $2200.00 per month. I agree with the statement in the Determination that "A reasonable interpretation of the facts excludes the allegations as they are presented in the complaints". The employer's creditable evidence is that she did not need or hire two full time managers.

The agreement, however, does not reflect the policy of the Employment Standards Branch to designate only one as the residential caretaker and the other as an employee. Knistner argues that this policy is unreasonable and should be changed. It is not within my jurisdiction to alter a policy of the Director. Any revision to the policy is a matter for the Director of Employment Standards who is able to determine what is happening in the industry and whether the Act is being properly applied.

I am aware of a recent decision of the Tribunal, Gateway West Management Corp., BC EST #D356/97, in which Adjudicator Thornicroft found the Director correctly fixed the appropriate minimum wage for each of two resident caretakers at $1428.00 per month. The Director in that case held that the employees "were hired as resident caretakers together to manage the complex, rather than individual buildings". On the evidence before him, he states it was clear that the employer, the two employees, and the various tenants at the two complexes were given to understand that the employees were jointly and severally responsible for the management of the two complexes. Historically, both complexes had separate on-site resident caretakers. Those are not the facts before me. I do not accept that this employer hired two full time resident managers (or caretakers) to manage one building.

I find that the Director properly applied the policy when Knister was designated the residential caretaker allocating his wages as having worked a 5 day week and Dean as an employee who worked a 2 day week. With respect to this first issue, I find that the Determination is not unreasonable.

Issue 2. Whether Knister and Dean are entitled to overtime and/or statutory holiday pay?

Knister is not entitled to overtime payments. The Regulations exclude residential caretakers from overtime. He supplied no evidence to justify his claims for working 7 days a week and not having a day off. He was told he could take time off as long as Dean covered for him. This did not suit him, as he wanted them to have time off together. Dean, on the other hand, as an "employee" would have been entitled to all the standard provisions of the Act and the Regulations. Again the Director had no records available to determine the rate of pay or the hours she worked. It is not unreasonable that the Director calculated Dean's wage entitlement using $1428.00 converted to an hourly wage rate pro-rated for a 2-day workweek. This was a generous rate of $8.24 per hour rather than the minimum of $7.00 per hour. Without a clearly defined rate of pay and time records there was no way to calculate overtime or whether it was actually worked. They are entitled to the statutory holiday pay that has been factored into the calculations in the Determination.

An additional comment must be made with respect to my concern that the calculations in the Determination do not reflect the manner in which the rental fee was handled. Since no

payroll records were submitted to me, I am unable to determine how or what deductions were made. Since the Director has not determined there was a contravention of Section 21 which prohibits deductions from and employee's wages except as permitted by the Act, I will not deal with this issue.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated August 1, 1997 be confirmed in the amount of $826.89 together with whatever further interest that may have accrued, pursuant Section 88 of the *Act*, since the date of issuance.

Niki Buchan
Adjudicator
Employment Standards Tribunal