

An appeal

- by -

Nacel Properties Ltd.
("Nacel")

- 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: Carol L. Roberts

FILE No.: 2002/477

DATE OF DECISION: December 2, 2002

DECISION

This is a decision based on written submissions by Guy Norman, and David Buchanan, Clark Wilson, Barristers and Solicitors, on behalf of Nacel Properties Ltd.

OVERVIEW

Both the Normans and Nacel appealed a Determination of the Director of Employment Standards ("the Director") issued October 31, 2001. The Director found that Nacel Properties Ltd. ("Nacel") contravened sections 17, 36(1), 40(1)(2), 45 and 58(1) of the *Act* in failing to pay the Normans regular and overtime wages, statutory holiday pay and annual vacation pay, and Ordered Nacel to pay amounts to the Director on Mr. and Mrs. Norman's behalf.

While upholding the Determination in part, I referred the award to Mr. Norman back to the Director for reconsideration. The issue as to whether Nacel had contravened other provisions of the *Act* was referred back for investigation and a determination. (BC EST #D279/02)

This decision is in respect of the Determination made on those matters referred back, issued September 4, 2002.

FACTS

Although the facts of this matter are set out in my decision of June 25, 2002, I will briefly restate those facts relevant to the current issues.

Both Ms. Norman and Mr. Norman applied for a position as resident caretaker for Nacel, a property management company. Ms. Norman was hired as the building manager for an apartment building in Port Coquitlam and a townhouse complex in Coquitlam in late 1996. In October 1997, she also became responsible for two additional buildings. At that time, she was responsible for the leasing, administrative, cleaning and maintenance duties of almost 225 units in four buildings, situated several kilometers from each other. She resigned her position effective February 28, 1999.

On August 16, 1999, both Mr. and Ms. Norman filed complaints with the Employment Standards Branch.

Mr. Norman alleged that he worked full time for Nacel during the term of Ms. Norman's employment, with its knowledge and consent, for which he was not compensated. He provided the delegate with records showing the time he spent appearing at RTB hearings, making bank deposits, performing maintenance duties, monitoring a pager, and summarizing the rent roll.

The delegate issued a Demand for Employer Records on Nacel in September, 2000. Nacel maintained no daily record of hours worked for Mr. Norman. It supplied the delegate with a record of payments made to Mr. Norman for various work, either as relief caretaker for Ms. Norman or other resident caretakers, as well as other types of work.

I concluded that the delegate had not erred in finding that Mr. Norman was an employee, or that he was owed wages and overtime wages. However, I found sufficient discrepancies in Mr. Norman's claim to conclude that the calculation of his wages ought to be referred back to the delegate.

In her investigation of Mr. Norman's claim, the delegate spoke to several witnesses who had worked for Nacel and had "first hand knowledge" of the Normans' work. Although the delegate does not identify these witnesses, she notes that they had supervised both Mr. and Mrs. Norman. She found that Nacel maintained no daily record of hours worked for any resident caretakers "in spite of [its] knowledge of the Act and experience with the Employment Standards Branch". Although the delegate does not expressly say so, I infer that she drew a negative inference from Nacel's failure to keep records on the basis that it was fully aware of its obligation to do so.

The delegate concluded that Mr. Norman's time records were made contemporaneously, and that they were conservative and supportable. She was of the view that any errors in his records would not, overall, benefit one party or the other. The delegate also accepted that Norm Cressy, Nacel's President, was aware of the extent of Mr. Norman's involvement at the properties, based on her interview of witnesses and Mr. Norman's evidence. She further noted that, after the Normans left their employment, they were replaced by 4 resident caretakers.

The delegate concluded that Mr. Norman was entitled to wages as a regular employee, not as a resident caretaker, since he performed basic plumbing and maintenance work in addition to assisting his wife with suite inspections and rent collection. I note here that the delegate changed her classification of Mr. Norman's position from that of resident caretaker, as originally decided. She further accepted the witnesses' evidence that the Normans worked "7 days a week", and that it would have been impossible for one person to perform the duties expected of them.

Although I confirmed the original Determination with respect to Ms. Norman's status and wages owing, and the delegate acknowledged that there were only two issues referred back to her, she nevertheless also concluded that Ms. Norman was now entitled to wages and interest in the amount of \$17,776.31. I find the delegate without jurisdiction to vary the Determination at this point, as it was not an issue referred back to her for reconsideration.

The delegate also concluded that Guy Norman was entitled to wages commencing June 1, 1997, and found that was owed wages and interest in the amount of \$53,216.17. The Determination contains no reasons for why the date of June 1 was found to be the commencement of Mr. Norman's employment.

The delegate also acknowledged that she did not "make a finding on the issues regarding Sections 31, 6, 27 and 39 simply because they got lost in the other issues". Although the delegate does address those issues in the Determination of September 4, nothing arises in respect of those issues for the purposes of this decision.

ISSUE TO BE DECIDED

At issue is whether the delegate erred

1. in determining that Mr. Norman was a regular employee, rather than a resident caretaker;
2. in determining that he became an employee as of June 1, 1997; and
3. in not concluding that Mr. Norman had a duty to inform Nacel of his wage claim prior to August, 1999.

ARGUMENT

Nacel advanced arguments similar, or identical, to those advanced in the initial hearing, contending that Mr. Norman was not an employee, and that Mr. Norman had a duty to advise Nacel of his wage claim prior to August 1999.

Nacel contends that Mr. Norman's failure to advise Nacel of his wage claim, letting his losses build to Nacel's prejudice, ought to be held against him, on the basis of the common law principle of contributory negligence, or mitigation.

Mr. Norman seeks to have the Determination upheld.

DECISION

In my view, I need not address Mr. Norman's status as an employee, as that was decided in the June 25 determination. I concluded there that Mr. Norman fell within the statutory definition of an employee. This Tribunal has held that the *Act*, as remedial legislation, is to be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects. (see, for example, *On Line Film Services Ltd v Director of Employment Standards* BDEST 319/97 and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.)). The delegate has calculated wages owing on that basis, and I find no basis to interfere with that conclusion.

The delegate reviewed the amount of work the Normans were expected to perform, interviewed witnesses, and, in the absence of any evidence from Nacel to the contrary, concluded that Mr. Norman worked essentially full time. I am not prepared to disturb that conclusion, given that the persons who supported Mr. Norman's evidence that he worked "non-stop" were his supervisors and also Nacel employees. There is no evidence Nacel was unaware of its obligations under the *Act* to maintain proper employee records. It cannot use its failure to do so as grounds to argue that Mr. Norman was not an employee.

However, the delegate provides no reasons for her conclusion that Mr. Norman's wages are to be paid commencing June 1, 1997. Ms. Norman was hired in late 1996. There is nothing in the Determination that reflects the delegate's rationale for concluding that Mr. Norman began his work over six months later. Given that this issue has already been referred back to the delegate, it is in the interests of the parties to have the matter conclusively decided. However, on the evidence before me, I am unable to arrive at a conclusion on this issue. Although I appreciate this may cause inconvenience to the parties, I refer this back to the delegate once again for reconsideration.

Finally, Nacel argues that Mr. Norman had a duty to mitigate his losses by demanding payment for work performed long before he did, so that it could ask him to stop. This argument is only sustainable where it can be demonstrated that the employer had no knowledge that the employee was performing work for it. In this case, the delegate found that Nacel's President and supervisors did have knowledge of the work Mr. Norman was performing. Mr. Norman's evidence, which was accepted by the delegate, was that he was advised to keep track of his hours of work, and promised that he would eventually get paid for them. Nacel did not challenge this conclusion. Given that Nacel had knowledge of Mr. Norman's work, the principle of mitigation or contributory negligence is not applicable.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated September 4, 2002, be referred back to the delegate on an expedited basis. The matter to be decided by the delegate is the starting date of Mr. Norman's employment with Nacel.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal