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 -

Sophie Investments Inc.
("Sophie")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE NO.: 97/601

DATE OF DECISION: January 7, 1998

DECISION

OVERVIEW

This is an appeal by Sophie Investments Inc. ("Sophie") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). The appeal is from Determination No. CDET 006603 issued by Ian MacNeill, a delegate of the Director of Employment Standards on July 18, 1997. The Determination required Sophie to pay wages and holiday pay to Nancy Amery in the total amount of $6,549.18.

Sophie filed an appeal on August 7, 1997. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Sophie owns an apartment building in Victoria, B.C. and employed Ms. Amery as the resident caretaker from March 25, 1994 to May 25, 1996. A written contract was entered into by the parties, which provided that Ms. Amery would be paid a monthly wage of $1,192.80, but $320.00 of that amount would be allocated to payment of rent for Ms. Amery's suite, which was described in the agreement as a "free" suite valued at $320.00. An additional $57.20 was paid as compensation for extra hours that might be worked each month. The agreement provided that Ms. Amery was not to work on statutory holidays.

After the termination of her employment, Ms. Amery filed a complaint with the Director that she had not been paid the minimum wage required for "resident caretakers" under section 17 of the *Employment Standards Regulation* ("*Regulation*"). She also complained that she had not been paid overtime for statutory holidays occurring on the first day of the month, when she was required to be available to receive rent payments and arrange for new tenants to move into the building.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Sophie had failed to pay to Ms. Amery the minimum wage for resident caretakers and overtime pay for certain statutory holidays.

ANALYSIS

Section 17 of the *Regulation* requires employers to pay to resident caretakers a minimum wage, calculated in accordance with the number of residential suites in the building. After October 1, 1995, the minimum wage applicable to Ms. Amery was $1,192.80 per month, and prior to that date the amount was $1,107.60. Sophie argues that it complied with this requirement because its employment contract with Ms. Amery specified the correct minimum wage, and $320.00 of that wage was lawfully withheld for payment of rent for the apartment Ms. Amery occupied.

Section 21(1) of the *Act* contains an absolute prohibition against the withholding of wages by an employer, except as permitted by statute:

> **21.** (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

Section 22 of the *Act* sets out some limited instances in which an employer may lawfully withhold wages or a part thereof:

> **22.** (1) An employer must honour an employee's written assignment of wages
>
> (a) to a trade union in accordance with the *Labour Relations Code*;
>
> (b) to a charitable or other organization, or a pension or superannuation or other plan, if the amounts assigned are deductible for income tax purposes under the *Income Tax Act* (Canada);
>
> (c) to a person to whom the employee is required under a maintenance order, as defined in the *Family Maintenance Enforcement Act*, to pay maintenance;
>
> (d) to an insurance company for insurance or medical or dental coverage, and
>
> (e) for a purpose authorized under subsection (2).
>
> (2) The director may authorize an assignment of wages for a purpose that the director considers is for the employee's benefit.
>
> (3) An employer must honour an assignment of wages authorized by a collective agreement.
>
> (4) An employer may honour an employee's written assignment of wages to meet a credit obligation.

Section 22(4) of the *Act* affords in my view the only possible way Sophie could claim authority for withholding a portion of Ms. Amery's wages and applying them to her rent. Sophie submits that Ms. Amery's wages was a "credit obligation" of hers, and that its deduction of her rent each month was done pursuant to her written contract of employment.

Ms. Amery's contract of employment dated October 1, 1995 contains the following clause (underscoring in the original):

> **Wages:**
> The employee will receive the "Resident Manager" Minimum Wage" as defined by the Employment Standard Act [*sic*] of British Columbia.
>
> This wage will consist of:
>
> 1) A free suite (Declared for tax purposes at less then [*sic*] the market value.)
>
> 2) A monthly fixed pay. The amount of this pay + the declared value of the suite will be equal to the "Resident Manager Minimum Wage" according to the Employment Standards of B.C.

There is also an addendum to the contract which contains the following clause:

> Starting October 1, 1995 the legal minimum wages for the building Parkland House (46 suites) is $1,192.50 .
>
The manager will receive:	Free suite declared at	320.00 /month
	+ wage at	872.80 /month
	Total	1,192.80/month

Clearly, the Determination under appeal would never have been made if Sophie had paid wages of $1,192.80 each month to Ms. Amery, and then expected her to pay $320.00 in rent for the suite she occupied. The heart of the problem is that instead of doing this, Sophie in effect deducted from Ms. Amery's wages the amount of rent she owed each month. I find that in doing so, Sophie acted in good faith and did not derive any clear benefit from this arrangement. It is not disputed that Sophie remitted to Revenue Canada the proper deductions in accordance with a total monthly wage of $1,192.80. However, it does appear from the facts before me that Ms. Amery may not have been paid 4% vacation pay on the $320.00 deducted from her monthly wages. Apart from the vacation pay, however, I find that Ms. Amery did not suffer any loss as a result of this arrangement, because if she had been paid the full $1,192.80 each month, she would have in any event paid $320.00 to Sophie in rent.

If Sophie is to succeed on this part of its appeal, it can only be because the deduction of rent from Ms. Amery's wages was a "written assignment of wages to meet a credit obligation". The phrase "credit obligation" seems capable of broad interpretation and has been so interpreted on occasion by this Tribunal. Interpretation of the *Act* is also tempered by the Tribunal's desire to provide an expeditious and efficient resolution to matters in dispute. While written assignments pursuant to section 22(4) should be in clear terms, I do find there was no doubt in the mind of both parties that Ms. Amery's rent was being paid directly to her employer out of her monthly wages.

There is unambiguous language in the contract of employment that Ms. Amery was to be paid a total of $1,192.80 each month, but $320.00 of that amount would be allocated to rent. I impute no literal meaning to the unfortunate choice of the word "free" in the contract referring to the caretaker's suite, as it is clear to me that the parties understood rent would be paid through a deduction from wages. This state of affairs is undoubtedly awkward and the employer should require a much clearer written assignment of wages and should revise its contract of employment to better reflect the desired interpretation of section 22(4) of the *Act*. The best course is for the employer to pay the minimum wage in its entirety to the employee, and then expect the employee to

make a separate payment of rent, thus avoiding the need to rely on a generous interpretation of section 22(4). Nevertheless, I am satisfied that in signing her contract of employment, Ms. Amery gave Sophie a written assignment of her wages to meet her monthly obligation for rent.

With regard to the issue of overtime pay for statutory holidays worked by Ms. Amery, Sophie submits that because its contract of employment provides that a statutory holiday is to be a "day off," it should not be responsible for overtime when its employee disregarded the contract and worked on a statutory holiday. The issue, however, is Ms. Amery's complaint that she was required to work on those statutory holidays that fell on the first of the month, because of the number of managerial duties to attend to in an apartment building on the first day of each month. This complaint is well-founded given the nature of the rental business, and Sophie has failed to satisfy me that on the occasions in question Ms. Amery was not supposed to have been working.

ORDER

After carefully considering the evidence and argument, I find that the appeal should be allowed in part and the Determination made by Mr. MacNeill should be varied. Pursuant to section 115 of the *Act*, I confirm that part of the Determination which awards Ms. Amery statutory holiday pay in the amount of $196.62, together with 4% vacation pay on this amount and interest pursuant to section 88 of the *Act*. I cancel that part of the Determination which awards Ms. Amery wages in the amount of $5,962.80 together with interest on that amount. Vacation pay at 4% plus interest is due to the employee on the amount of $5,962.80, unless Sophie can satisfy the Director on or before January 12, 1998 that proper vacation pay had been paid to Ms. Amery, in which case by agreement of the parties this part of my order will be of no effect. I make this order because it is not completely clear to me whether Sophie had paid vacation pay on the full amount of Ms. Amery's monthly wage. I grant leave to Sophie or the Director to seek a further order should they be unable to agree on the amount of vacation pay owed, or whether the correct amount has already been paid to Ms. Amery.

Ian Lawson
Adjudicator
Employment Standards Tribunal