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 -

Shane Kit Cheung
("Cheung")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:

FILE NO.: 98/549

DATE OF HEARING: November 16, 1998

DATE OF DECISION: December 8, 1998

DECISION

APPEARANCES:

Frances Cheung:	On behalf of Shane Kit Cheung
Charlene Filtness:	On behalf of herself
Julie Brassington:	On behalf of the Director

OVERVIEW

This is an appeal by Shane Kit Cheung ("Cheung") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination issued on August 7, 1998 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Cheung had failed to pay Charlene Filtness ("Filtness") the minimum wage for a resident caretaker provided by the *Employment Standards Regulation*. Cheung's appeal was that Filtness was not a resident caretaker under the *Regulation* and thus was not entitled to any additional compensation. A hearing took place with the assistance of an interpreter.

ISSUE TO BE DECIDED

The issue in this case is whether Filtness was a resident caretaker.

FACTS

Cheung purchased an apartment building at 6004 Wilson Avenue in Burnaby in November 1992. At the time, Filtness and her husband, Richard Filtness, were residents in the building. They had assisted the previous owner with the operation of the building, including the collection of rents, showing suites to prospective tenants and cleaning of the common areas. Mr. John Woo was the real estate agent for the sale, and he compiled a list of the suites and the rental income each generated. On the list was a note that the rent charged to Filtness was reduced by $100 per month in consideration of their services. Mr. Woo recommended to Cheung that he continue the arrangement after he purchased the building. Mr. Woo further stated that the former owner's only obligation to Filtness was the $100 credit toward her rent.

In fact, Filtness and her husband both performed services in the two buildings, but the Determination found that only one person should be the complainant and designated Filtness. Cheung did not object to that element of the Determination.

The parties agreed that Cheung purchased the building adjacent to 6004 Wilson Avenue in January 1997, and Filtness assumed some responsibilities for the operation of that building. Cheung increased Filtness's monthly rental rebate to $720, the normal rent for the suite in which she lived. Cheung wrote to the tenants in the 6006 Wilson Ave. building on January 4, 1997 as follows:

> Please be advised that Michel Lavergne (Building Manager) has resigned on his own accord as of this day, January 4, 1997.
>
> Subsequently, the Landlord has appointed Charlene and Rick Filtness (Building Manager of 6004 Wilson Ave.) to assume managing 6006 Wilson Ave., effective immediately.
>
> Therefore, the tenants of 6006 Wilson Ave. should direct all future rent payments, questions or concerns to Charlene or Rick. . . .

Cheung terminated Filtness's services on August 5, 1997. Each building contains 11 suites. On July 29, 1997, each tenant in the two buildings received a letter from Cheung stating that the two buildings would be "under the direct management by the Landlord, Shane Cheung." The letter outlined the specific arrangements for managing the buildings and stated:

> Charlene and Rick Filtness, the previous managers, will not be handling anymore tenant operations after this date due to this streamlining of the family business.

The parties presented considerable evidence about Filtness's duties. Mr. Jimmy Chiu did maintenance work for Cheung on the buildings. He observed Cheung painting paparments, cutting lawns, cleaning up and displaying suites. Cheung's son in law also did maintenance. Mr. Chiu did see Filtness cleaning the buildings, including washing the walls, and he saw Richard Filtness painting, cutting the lawn and pruning trees.

Cheung presented copies of many receipts for work done and supplies purchased for the maintenance of the two buildings. He stated that when work needed to be done, the tenants called Filtness, who told Cheung. He did the work or arranged for it to be done.

Filtness introduced a checklist for each suite in the 6004 Wilson Avenue building from 1992 to July 1997 noting rents collected. A plumbing contractor provided a statement that Filtness had made all the arrangements for work done at the two buildings in question. Filtness also presented copies of notices dated from 1993 and 1997 from four former tenants that they would be vacating their apartments. She was also named in two actions by the Residential Tenancy Branch to end tenancies and was identified as Cheung's representative in an arbitration under the *Residential Tenancy Act*. The Progressive Housing Society stated that they had dealt with Filtness as managers of the two buildings.

Mr. Pope-John Kanyi, who had lived in 6004 Wilson Avenue for five years, testified that all of his dealings in connection with his tenancy were with Filtness. He observed Rick

Filtness doing yard work, and Filtness cleaned the building about once a week. When he had a problem with his shower, he spoke to Filtness or Mr. Chiu.

Mr. Aaron Bull, who had been a tenant in the building since August 1990 gave much the same evidence. When minor repairs were necessary, she arranged for necessary work to be done. She admitted fire alarm inspectors into the suites. Mr. Bull had little contact with Cheung until August 1997. Similarly, Diane Thomas, who had lived at 6004 Wilson Ave. for two years, always gave her rent cheque to Filtness and observed her vacuuming the common areas. Rick Filtness did yard work for the building. When her applicances needed repairs, she called Filtness, who also authorized her to buy paint for her apartment.

In the course of presenting evidence, Mr. Frances Cheung pointed out an error in the calculation of wages owing in the Determination. He calculated that Filtness had received $10,080 in rent reductions, not the figure of $7,920 contained in the Determination. Ms. Bassington accepted the recalulation.

ANALYSIS

In a statement to the Tribunal, Cheung argued that Filtness were never employees

> because the issues of benefits, income taxes or Unemployment Insurance were never part of the agreement I had with Filtness. Essentially the Filtness' were an independent contractor who performed a limited amount of work to receive monthly rent credit. The agreement that I had with the Filtness' did not include wages; therefore, they are not considered as an 'employee' as defined under the Employment Standards Act. And therefore they are not considered a 'residential caretaker.'

Filtness acknowledged that she had no idea that she was entitled to the benefits claimed, but because of the circumstances of her termination, she requested that the Determination be confirmed.

Ms. Brassington pointed out that the *Act* does not require a written contract and that the definition of an "employee" covers Filtness, as does the definition of a "residential caretaker" in the *Employment Standard Regulation*.

The *Act* defines an employee as follows:

> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,

The *Act* defines an "employer" as 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 Standard Regulation* defines a "residential caretaker" as 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.

Section 17 of the *Regulation* sets out the minimum wage for a resident caretaker, a formula based on a monthly sum, plus an allowance for each suite.

Section 35 of the *Regulation* exempts residential caretakers from most of the hours of work provisions of the *Act.*

Filtness fell under the definition of an employee in the *Act.* In many decisions, this Tribunal has adopted tests for the status of a contractor. These include ownership of tools, integration of the individual into the employer's business, the chance of profit and loss and the like (*Hudson*, BC EST #D197/97). Filtness did not come under any of these standards for the status of a contractor. While she did not work directly under Cheung's supervision, her work was integrated into his business. She had no chance of profit and owned no tools. Similarly, Cheung was an employer under the *Act,* as he was responsible for Filtness's employment. Cheung's failure to withhold taxes and statutory payments from Filtness's wages did not affect her status.

Moreover, Filtness was a residential caretaker as defined in the *Regulation*. She clearly met the test in paragraph (a), and she acted as a caretaker, janitor and manager of the building. Several witnesses testified that she did basic cleaning in the building, i.e., janitorial work. She was a caretaker in that she was responsible for dealing with problems that arose. Her duties were managerial as she showed prospective tenants the building, collected rents and communicated with tradespersons or vendors on behalf of the owners. (See *Hudson*, BC EST #D197/97). The definition of a residential caretaker in the *Regulation* is relatively broad, covering varying degrees of responsibility. It is not necessary for the owner of a building to separate him or herself from the operation completely for an employee to be a residential caretaker.

The *Act* does not require that a written contract of employment exist in order for a person to be an employee. Nor does the terminology used to describe a person's job affect his or her status under the *Act.* In this case, however, third parties and Cheung himself referred to Filtness as the "manager." The reduction in Filtness's rent can be classified as "wages" for purposes of the *Act*.

ORDER

For these reasons, the Determination of August 7, 1998 is varied. The amount of Filtness's rent reduction is raised to $10,080, and the total amount owed to her should be adjusted accordingly, plus any further interest that has accrued, pursuant to Section 88 of the *Act*, since the Determination was issued.

Mark Thompson
Adjudicator
Employment Standards Tribunal