Employment Standards TRIBUNAL

An appeal

- by -

Charles and Wendy Parnell

- 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.:** 2002/485

**DATE OF DECISION:** December 17, 2002



British Columbia

# DECISION

## INTRODUCTION

This appeal, filed jointly by Charles Parnell and Wendy Parnell (I shall refer to them jointly as the "Parnells" and individually as "Charles" and "Wendy"), is filed pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The Parnells appeal a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on April 29th, 2002 (the "Determination").

The Director's delegate determined that the Parnells were "resident caretakers" as defined in section 1 of the *Employment Standards Regulation* and that their employer, 494637 B.C. Ltd. operating as "Evergreen Place Apartments" (the "Employer"), did not pay them in accordance with the applicable provisions of the *Act* and *Regulation.* In the end result, the delegate determined that each of Charles and Wendy was owed an additional amount of $495.80 plus $27.95 on account of section 88 interest. The delegate indicated, at page 4 of the Determination, that the Employer had remitted the entire amount payable under the Determination, including section 88 interest, and that the funds were being held in the Director's trust account "pending the outcome of any appeal".

In reasons for decision issued on July 22nd, 2002 (B.C.E.S.T. Decision No. D342/02) I concluded that there may have been errors in determining the Parnells' unpaid wage claims and, accordingly, I referred the matter back to the Director for further investigation [see section 115(1)(b) of the *Act*]. My reasons for decision identified two principal areas of concern, namely, the precise date when the Parnells commenced employment and their claim for compensation for hours worked over and above their contractual obligation (*i.e.*, hours worked on weekends).

## THE PARTIES' SUBMISSIONS

*The Delegate's report*

The Director's delegate (who, incidentally, was not the same delegate who issued the original Determination), upon receipt of my reasons, requested further submissions from both the Parnells and the Employer and subsequently prepared a report, dated September 18th and filed with the Tribunal on September 19th, 2002. The Employer provided a further submission to the delegate; the Parnells did not (they seemingly were content to rely on their previously filed submissions).

The delegate concluded that the Parnells commenced their employment on January 15th, 2001 rejecting the Parnells' position that their employment commenced two days earlier on January 13th. In so concluding, the delegate relied on evidence from the Employer as well as a written statement provided by the former caretakers.

With respect to the Parnells' claim for additional compensation (*i.e.,* beyond their contractually mandated hours of work), the delegate concluded that the Parnells did work hours over and above their contractually agreed "weekdays only" schedule. The delegate concluded that Charles was entitled to an additional (over and above the amount payable under the original Determination) $1,039.60 in unpaid wages and interest and Wendy was owed an additional $1,055.31 on account of unpaid wages and interest. The

additional wage awards to each of Charles and Wendy consists primarily of wages earned for "weekend" work.

*The Parties' Replies to the Delegate's Report*

Upon receipt of the delegate's September 18th report, the Tribunal's Vice-Chair wrote to the parties on September 20th, 2002 and requested that any reply that they might wish to make be filed by October 11th, 2002. Both parties filed replies, the Employer's dated October 4th and the Parnells' dated October 8th, 2002.

The Parnells' in their submission bemoan--in general and specific terms--their association with the Employer but do not address the delegate's report in any substantive fashion except to reiterate their position that they commenced employment prior to January 15th, 2001.

The Employer's response is considerably more detailed. In particular, the Employer challenges the veracity of the Parnells' claimed weekend hours.

## FINDINGS

*Employment commencement date*

The Parnells worked as resident caretakers pursuant to a written contract entered into between the parties on December 29th, 2000. The agreement was to be effective as of January 15th, 2001. The evidence of the former caretakers, coupled with this agreement leads me to conclude, on a balance of probabilities, that the Parnells did not commence their employment until January 15th, 2001. Accordingly, in my opinion, their claim for compensation for January 13th and 14th, 2001 was properly dismissed.

The December 29th contract purports to create an independent contractor relationship between the Parnells and the Employer. In light of their duties and the relevant statutory definitions contained in section 1 of the *Act* ("employee", "employer", "wages" and "work") I am satisfied (and there is no longer any dispute about this matter) that, as a matter of law, the Parnells were "employees" for purposes of the *Act.*

*Compensation for "weekend" work*

The delegate relied on the Parnells' time records, namely, a calendar that the delegate accepted as a document that was "maintained in a contemporaneous manner". The delegate's task was complicated by the fact that the Employer did not maintain any records of the hours worked by the Parnells.

With respect to the Parnells' calendar notations, on some weekend days the calendar shows a start and finish time while on other days there are simply notations recording the various tasks that were undertaken. The delegate's calculations proceed on the assumption that "If the calendar does not show a different time for Charles and Wendy I have assumed that both worked for the time indicated". With respect to those days where no specific start and finish times were recorded, the delegate "assumed that 4 hours was worked". The delegate's calculation also reflects wages awarded at double-time for one of the weekend days pursuant to section 36 of the *Act* (hours free from work provision). Although "resident caretakers" are excluded from the overtime provisions of the *Act*, they are not excluded from the

operation of section 36 (see *Regulation*, section 35). Section 36(2)(b) provides that work undertaken during the mandated "32-hour work-free" period is to be paid at double the employee's regular wage rate.

As previously noted, the Employer challenges the veracity of the weekend hours claimed to have been worked and also points out that no claim for weekend work was submitted by the Parnells at any time during their 3 months of employment.

The evidence before me with respect to the weekend hours is far from satisfactory. While it appears to be the case that weekend work was performed, I find it difficult to accept that *both* Charles and Wendy were working the very substantial number of weekend hours claimed. Among other reasons, the notations on their calendar do not convince me, on a balance of probabilities, that the itemized tasks would have occupied both of them for the entire time claimed.

I also think it reasonable to assume that if the Parnells had submitted a claim for weekend hours during the currency of their employment (say, at the end of January), the Employer would have issued clear instructions about what weekend work ought to done. On the other hand, the Employer's failure to maintain time records and adequately supervise the Parnells is also a factor that cannot be ignored. Clearly, some weekend work was undertaken and that work was of value to the Employer. It appears that the Employer, at least indirectly, permitted that work to be undertaken.

In light of the foregoing, and recognizing that I am only making a rough estimate as to the actual hours worked on the weekends (which represents my view as to the more probable scenario), I am awarding each of the Parnells one-half of the additional weekend wages the delegate calculated to be owing. In all other respects the Determination is confirmed.

## ORDER

Pursuant to section 115(1)(a) of the *Act,* I order that the Determination be varied to indicate that the Employer is ordered to pay Charles Parnell the additional sum of $791.66 on account of unpaid wages (including vacation pay) and Wendy Parnell the additional sum of $798.99 (including vacation pay) together with interest on the foregoing amounts to be calculated in accordance with the provisions of section 88 of the *Act.*

The foregoing amounts are to be paid in addition to the monies that are currently being held in the Director's trust account (namely, $523.75 for each of Charles and Wendy Parnell) which funds are to be remitted to Charles and Wendy Parnell forthwith.

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