

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 -

Donna Tyrrell and Dan Tyrrell
(the "Tyrrells")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: } Richard S. Longpre

FILE NO.: 98/517

DATE OF HEARING: November 30, 1998

DATE OF DECISION: January 6, 1999

DECISION

APPEARANCES

Michael Watt	Counsel for Lepik Construction Ltd.
Debbie Jung	Counsel for Lepik Construction Ltd.
Vaike O'Dwyer	on behalf of Lepik Construction Ltd.
William Lepik	on behalf of Lepik Construction Ltd.
Joy Eekhof	on behalf of Lepik Construction Ltd.
Kalman Racz	on behalf of Lepik Construction Ltd.

OVERVIEW

This is an application by Donna and Dan Tyrrell pursuant to Section 112 of the *Employment Standards Act* (the "Act"). The Tyrrells appealed a Determination (File No. 048-217) issued by the delegate of the Director of the Employment Standards Branch on July 15, 1998.

The Tyrrells were employed as resident caretakers of a residential suite apartment owned by Lepik Construction Ltd. The Tyrrells' employment was terminated effective December 31, 1997. The Tyrrells' complaint to the Branch covered several sections of the *Act* and sought total compensation of over \$60,000.00.

The Determination concluded the Tyrrells were owed wages, statutory holiday pay, vacation pay and interest of a total of \$698.15.

ISSUE

The major issue in the Tyrrells' appeal is whether the delegate was correct in determining that Donna and Dan Tyrrell could each be paid as resident caretakers under Section 17 of the *Employment Standards Regulations*. The Tyrrells argued that only one of them could be paid as a caretaker. The other, in this case Dan Tyrrell, was an employee of Lepik and should have been compensated as an employee under the *Act*. Dan Tyrrell sought wages for regular and overtime hours allegedly worked as well as statutory holiday pay allegedly owed. His complaint requested payment of \$51,518.74.

Donna Tyrrell sought payment for overtime hours allegedly worked, minimum wages allegedly owed, wages allegedly owed for ten days worked in December 1997, wages allegedly owed for Lepik's failure to grant her 32 hours rest between certain weeks, statutory holiday pay and vacation pay allegedly owed to her. Her complaint requested payment of a total of \$9,404.04.

PRELIMINARY ISSUE

The Tyrrells have moved out of the country. The Tribunal arranged for them to participate in the hearing by way of teleconference. Lepik filed a written submission objecting to Tyrrells giving evidence in the teleconference. That objection was to be dealt with at the hearing. I note that the Tribunal has conducted teleconference hearings in the past where there are legitimate reasons to do so.

On the morning of the hearing and prior to the hearing commencing, the Tyrrells faxed a letter to the Tribunal. The letter read:

We have learned only hours ago that the Tribunal telephone conference scheduled for today has been cancelled. This is extremely distressing for us as we had made substantial arrangements to accommodate your requirement in your letter of October, 1998.

While we do not yet know the reasons for the cancellation, we understand that our appearance in person was again made conditional in proceeding with an appeal hearing. This of course is impossible at this late date for the reasons previously provided to you.

We are not prepared to abandon our right under the Act to an appeal hearing by a Tribunal and again request that you make suitable arrangements that can satisfy our situations.

No one from the Tribunal cancelled the hearing. No one from Lepik mislead the Tyrrells. When the above letter was received, the Tribunal immediately attempted to contact the Tyrrells by telephone but was unsuccessful. A message was left on the telephone's answering machine requesting the Tyrrells to contact the Tribunal. As of the date of this decision, they have not done so. The Tribunal sent a letter by fax to the Tyrrells with the same request and same result.

In August 1998, the Tyrrells made two submissions to the Tribunal in support of their appeal. They made other submissions in September and October, 1998. Their final submission made a statement relevant to this preliminary issue. Noting that they now live in the Caribbean and could not attend a hearing in Vancouver, the Tyrrells state:

We have made detailed submissions in writing to the Director and to the Appeal Tribunal and could add little by personal attendance at the Hearing. At this time we have nothing further to submit to the Tribunal and no witnesses to call.

Considering all of the above, I decided to commence the appeal hearing as scheduled. The Tyrrells' case was limited to their written submissions.

FACTS

Lepik employed two married couples as residential caretakers at the 119 suite apartment where the Tyrrells worked. The four people were each compensated as residential caretakers in accordance with Section 17 of the *Regulations*.

17. The minimum wage for a resident caretaker is,
- (b) for an apartment building containing 61 or more residential suites, \$1428 per month.

The Tyrrells were employed from October, 1996 to December 31, 1997 as the senior managers. I understand they were paid more than the minimum wage. For most of the Tyrrells' employment, there were two other assistant residential caretakers who worked with the Tyrrells.

In the Tyrrells' original complaint, the delegate first considered whether an owner could employ more than one residential caretaker. The delegate noted that the Interpretation Guidelines, provided by the Branch to assist people in understanding the application of the *Act*, referred to a single residential caretaker. The Branch advanced a similar interpretation in its Fact Sheet, a similar document to assist with the understanding of the *Act*. It reads:

Only one person can be designated as the resident caretaker of an apartment building. Others employed to assist the resident caretaker including persons providing evening, weekend or holiday relief for the caretakers, are considered regular employees to whom all the standard provisions of the *Act* and *Regulations* would apply.

The delegate noted that the Fact Sheet was "for information purposes only and is not a legal document."(p.7) The delegate also considered a recent decision of the Tribunal, *Dr. Petar J. Kokan Inc., (c.o.b. Captain's Walk Apartment)* BC EST #D425/97. In that decision, Adjudicator J.M. Orr concluded that the *Act* and *Regulations* permitted an apartment owner to employ two residential caretakers.

The *Dr. Petar J. Kokan Inc.* decision contradicted an earlier decision of the Tribunal in *Thomas Louis Harrison and Martha Lander* BC EST #D217/96 (the "Harrison" decision). The delegate adopted the *Dr. Petar J. Kokan* decision's analysis. The delegate decided that the *Act* and *Regulations* did not restrict an apartment owner from employing more than one caretaker so long as the requirements of the *Act* and *Regulations* were met. The delegate found these requirements were met by Lepik and dismissed this aspect of the Tyrrells' complaint. The delegate also found that as both Tyrrells were residential caretakers, the Tyrrells were not covered by the overtime sections of the *Act*: this complaint was also dismissed.

The delegate then considered whether the minimum wage requirements of the *Act* were met by Lepik. Lepik relied on certain "perks" as part of the Tyrrells' salary. The delegate disagreed and concluded they were owed a total of \$252.72.

The delegate then considered whether the Tyrrells were paid for statutory holidays in accordance with the *Act*. After reviewing Section 4 and Part 5 of the *Act*, the delegate found that Lepik owed the Tyrrells a total of \$783.83.

The delegate then considered whether the 32 hour break between shifts as required by the *Act* had been met by the Tyrrells' schedule. The delegate noted that the Tyrrells had the obligation to prove the allegation. The Tyrrells failed to do so and the allegation was dismissed.

The delegate then considered whether vacation pay had been paid in accordance with the *Act*. The delegate found that the Tyrrells were owed a total of \$538.48.

Finally, the delegate dealt with the obligation on Lepik pursuant to Section 35 of the *Regulations*, which reads:

35. (1) Part 4 of the Act, other than sections 31, 36 and 39, does not apply to a resident caretaker.
- (2) Each employer of a resident caretaker must
 - (a) for the information of residents in the apartment building where the caretaker is employed, display in the building a schedule specifying the caretaker's hours of work and days off work, and
 - (b) give the caretaker a copy of the schedule.

The delegate found that there was a calendar that clearly displayed the work schedule of the senior and assistant caretakers. When a "set" of caretakers was off duty, arrangements were in place to notify tenants and others. The delegate found that Lepik had complied with the *Regulations*.

The delegate calculated the wages owing to the Tyrrells and the wages paid on their final pay cheque. She ordered Lepik to pay the Tyrrells' \$698.15, including interest.

The Tyrrells' appeal submission to the Tribunal, dated August 5, 1998, made a number of points they wished reviewed. Their submission dated October 22, 1998, focused on whether a residential apartment can have more than one residential caretaker. The Tyrrells answered this question in the negative and argued that Dan Tyrrell should have been paid as an employee. He would then have been entitled to all rights under the *Act* including minimum wage and overtime.

All evidentiary allegations made in the Tyrrells' submission were addressed by Lepik's witnesses at the hearing. Kalman Racz and Joy Eekhof were called to testify. Racz and his wife worked with the Tyrrells at the apartment as assistant caretakers from July 1995 to March 1997. Eekhof and her husband worked from March 1997 to October 1997. Neither Eekhof nor Racz presently work for Lepik.

Their evidence contradicted the Tyrrells' submission on virtually every point. For example, the Tyrrells submitted that they worked seven day weeks. Eekhof and Racz testified that did not happen. The resident caretakers had designated days off work each week. After June 1997, each couple worked four days and then took three days off work: all four caretakers worked Wednesdays. As each husband and wife were paid as residential caretakers, both performed their own duties on each day worked. Both Eekhof and Racz questioned the amount of work both Tyrrells performed on their scheduled days of work.

A system was installed to ensure all calls, whether on the telephone, at the office, or from the front door, as well as calls in the evenings, would go to the caretakers on duty for the day. All caretakers ensured this occurred. Eekhof and Racz noted that there were very few times that the caretaker on duty was called on to actually perform work in the evenings: most of these times were emergencies. Eekhof and Racz explained that work schedules, statutory holiday schedules and vacation were worked out by the two sets of caretakers to everyone's mutual satisfaction. Both witnesses took me through the normal day of work and the amount of work performed after five o'clock. The evidence contradicted the Tyrrells' submission of the amount of worked they were expected to (and actually did) perform.

ANALYSIS

Lepik emphasized that the appellants bore the onus to establish a *prima facie* case. It argued that the Tyrrells' failure to participate in the hearing, even by teleconference, should weigh heavily against their appeal application.

As a general principle, the Tribunal will not engage in a new hearing on appeal. A determination sets out findings of fact that will not be disturbed on appeal except where a party can show an error in law or natural justice or when new evidence is now available. Eekhof and Racz were most credible witnesses. They both spoke to the best of their memories and without embellishment. Their evidence contradicted the Tyrrells on virtually every point made in their written submissions. Their evidence corroborated the findings of fact made by the delegate in reaching her Determination on the six issues. I, therefore, dismiss all statements of fact advanced by the Tyrrells in their written submissions.

The main issue in the Tyrrells' appeal is whether the *Act* and *Regulations* restrict the number of resident caretakers to one caretaker per building. If the *Act* permitted Lepik to

employ more than one caretaker, then Lepik was entitled to employ the four caretakers. It should also be noted that Lepik paid the four caretakers appropriately. Each of the caretakers' compensation was based on the total number of suites. Further, the *Act* and the *Regulations* set out several requirements in the employment of a residential caretaker. Lepik's employment of the Tyrrells met those terms.

The *Harrison* decision supports the Tyrrells' appeal. It concluded that the *Act* did not contemplate two residential caretakers at an apartment building. Adjudicator Orr considered the language of the *Act* and *Regulations* and disagreed with *Harrison* stating: "The *Act* does not contemplate the existence of two resident caretakers but it certainly does not prohibit it." (Para22)." I adopt this point and note that the Branch's early interpretation of the *Act* and *Regulations* took a restrictive approach to the definition of a residential caretaker.

Lepik relied on *Gateway West Management Corp.* BC EST #D356/97. In that decision, two apartment buildings were found to be a single complex of 84 suites. The decision found that the two caretakers were jointly responsible for all 84 suites and should be paid accordingly under Section 17. Important to this case, the decision accepted that the apartment owner could employ two resident caretakers at the apartment complex.

Finally, the Fact Sheet and the Interpretation Guidelines were documents prepared by the Branch. The interpretation of the *Act* by the Branch's delegate in this decision is consistent with the Tribunal's recent decisions. The Branch's information documents will have to be amended accordingly.

ORDER

Pursuant to Section 115 of the *Employment Standard Act*, the Determination dated July 15, 1998 is confirmed.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal