Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Nacel Properties Ltd.
(the "Employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft, Panel Chair
Carol L. Roberts
April D. Katz

FILE No.: 2001/478

DATE OF DECISION: October 31, 2001

DECISION

OVERVIEW

This is an application filed by Nacel Properties Ltd. (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on April 4th, 2001 (B.C.E.S.T. Decision No. D160/01). The adjudicator confirmed a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 27th, 2000 pursuant to which the Employer was ordered to pay the sum of $4,699.47 to its former employees, Ronald Buzikievich ($2,973.03) and Marchien Buzikievich ($1,726.44)--the "Employees"--on account of unpaid wages and section 88 interest.

In addition, by way of the Determination a $0 penalty was levied against the Employer pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation* (*"Regulation"*).

BACKGROUND FACTS

The Determination

The Employer, *inter alia*, provides property management services for multiple-unit residential projects and in that capacity hired the employees, jointly, to be the resident manager and assistant manager, respectively, of an 82-unit rental "townhouse" complex. The complex consists of a "cluster" of 20 multi-unit buildings situated on a 20-acre parcel of land. The number of townhouses in each "cluster" ranges from 2 to 6. The Employees were employed from April 22nd to June 13th, 2000; Ronald Buzikievich was paid $2,100 per month and Marchien Buzikievich was paid $700 per month.

The Employees' filed a complaint with the Employment Standards Branch alleging that they had not been paid in accordance with the *Act* for all of their working hours. A central issue before the delegate was whether or not the Employees were "resident caretakers" as defined in section 1 of the *Regulation:*

> "**resident caretaker**" means 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;

Resident caretakers must be paid a minimum wage based on the number of suites for which they are responsible, however, resident caretakers do not have a statutory entitlement to overtime pay or minimum daily pay (see *Regulation*, sections 17 and 35). The delegate

rejected the Employer's position that the Employees were resident caretakers because the townhouse complex in question was not an "apartment building" (Determination, page 3):

> An apartment building is a building with common hallways and a common entrance. The complex the complainants managed was a series of buildings with individual ground floor entrances and no common hallways. The units are owned and managed by [the Employer]. The units lack the characteristics of an apartment building, that is common entrances and hallways.

Thus, the Employees were awarded compensation on the basis that they were ordinary employees and not resident caretakers.

The Appeal

The Employer appealed the Determination to the Tribunal. The only issue before the Tribunal was the correctness of the delegate's conclusion that the Employees were not "resident caretakers". The Employer asserted that the Determination was inconsistent with an earlier reconsideration decision of the Tribunal, *Director of Employment Standards (Harrison and Lander)*, B.C.E.S.T. Decision No. D344/96. In addition, the Employer submitted that the "work of the employees is the same whether they work in a vertically [sic] structure, or a horizontal structure" and that the delegate erred in ascribing a "literal" rather than a "reasonable" interpretation to the status of resident caretaker.

The adjudicator, after considering the parties' various written submissions, dismissed the Employer's appeal and confirmed the Determination. The adjudicator, at page 4 of his reasons for decision, rejected a "functional" interpretative approach; in other words, the adjudicator was not prepared to decide the issue based on the alleged similarity of the work performed by caretakers in a multi-unit single building compared to townhouse complexes:

> I do not think that this case falls to be determined be [sic] engaging in a functional analysis of the "work" engaged by the employee. The work performed by caretakers in a setting involving residential tenants would be similar substantially whether it is work performed in a townhouse or an apartment setting. There may be a difference in the conditions of work with more tenants and a larger geographic spread in the complex causing more work for a resident caretaker. The fact that more demands are placed on a resident caretaker, would not alter the fact that the person is a resident caretaker.

The adjudicator then turned his mind to the precise wording of the definition of resident caretaker, particularly the phrase "apartment building", and concluded that the delegate

correctly determined that a townhouse complex was not an "apartment building" (at pages 5-6) for purposes of the regulatory definition:

> The focus of the analysis, in this case, is on what is meant by the words "apartment building". Does it mean any multi-unit, multi-building residential premises as contended by the employer, or is it something else? Does it apply to all persons who live and work on a property that deals with residential tenants? It is apparent, from the manner in which I have framed the questions that it would have been possible for the legislature to give a very broad definition to workers who live on site and who work on or manage a residential tenancy property for an employer. The legislature has, however, chosen the words "apartment building". While it may not make business sense to have the words "apartment building" confine the relationship, an apartment building is different than a the [sic] employer's cluster of townhouses spread over a 20 acre parcel. The employer seeks to define residential caretaker in a broader way than that chosen by the legislature. My job as an adjudicator is, however, to interpret the words in the statute.
>
> The Director's distinction between townhouses and apartments is well founded...
>
> In my view, the facility in which the employees were engaged cannot be considered to be an apartment building. In my view, an apartment building is a building or structure which contains multiple residential accommodation units, with common areas for exterior entrance, hallways, and often common facilities for mail, laundry, parking. An apartment building is usually a vertical structure and may have one or more elevators. A townhouse complex usually has a linear or horizontal structure and the buildings have common sidewalls or party walls. I, therefore, find that the employer has not shown any error in the Determination.

THE APPLICATION FOR RECONSIDERATION

The Employer's request for reconsideration is contained in a letter to the Tribunal dated May 31st, 2001. The Employer bases its application on two grounds, namely:

- "...the Adjudicator made a serious mistake of law by determining that the words *"apartment building"* found in the definition of *"resident caretaker"* in Section 1 of the Regulation are limited to highrise apartment buildings, and do not include townhouse buildings"; and

- "...the Adjudicator failed to comply with the principles of natural justice when he used the Employment Standards Branch *"Facts Sheet"* as support for the Director's position on the proper definition of *"apartment building"* in the Regulation.

ANALYSIS

The Employer's application is timely (see *Unisource Canada Inc.,* B.C.E.S.T. Decision No. D122/98 and *MacMillan Bloedel,* B.C.E.S.T. Decision No. D279/00) and the Employer's first ground raises a serious question of law [*Director of Employment Standards (Milan Holdings Inc.)*, B.C.E.S.T. Decision No. 313/98] that has not been previously addressed by the Tribunal, other than, of course, by way of the decision now being reconsidered.

We do not find the Employer's second ground to be worthy of further analysis.

We do not conceive that the adjudicator deferred to the Director's published "Fact Sheet" in rendering his decision--in other words, we are unable to conclude that there was an improper delegation of, or a refusal to exercise, his adjudicative authority. Rather, the adjudicator's reference to the Fact Sheet--which sets out the Director's interpretation of the phrase "apartment building"--was made in response to the Employer's argument that the Determination, if allowed to stand, would create "chaos" in the industry because one group of caretakers (*i.e.*, those who managed "townhouse" complexes) would be placed on a separate footing under the *Act* compared to caretakers of other rental complexes. The adjudicator, in addressing that latter assertion, simply made the uncontroversial observation that the Director's position in this regard had been a matter of public record for some time.

The adjudicator did not accept the Director's interpretation merely because the Director had previously published its position; rather, the adjudicator accepted the Director's interpretation because the adjudicator believed it to be correct. Accordingly, a *bona fide* issue of natural justice does not arise in this case.

The correctness of the adjudicator's interpretation of "apartment building", however, does raise a serious question of statutory interpretation and, accordingly, we now turn to that issue.

What is an "apartment building"?

We agree with the adjudicator that the *Director of Employment Standards (Harrison and Lander)*, *supra.* reconsideration decision is of limited assistance. In the latter case, the Tribunal held that a person could be a resident caretaker of a high-rise apartment building even though they resided, not in that building, but rather in a closely proximate building within the same complex (see also *Gateway West Management Corp.*, B.C.E.S.T. Decision No. D356/97 to like effect). Neither the *Harrison and Lander*, nor the *Gateway West*

Management decisions address the narrower question of what constitutes an "apartment building".

The Tribunal's decision in *Pacifica Housing Advisory Association* (B.C.E.S.T. Decision No. D375/00), at least on its face, is less easily distinguished. In *Pacifica*, the complex in question contained 54 townhouse units and the adjudicator concluded that the two employees in question were resident caretakers. However, the principal dispute in that appeal centered on whether or not the various "groups of buildings" within the townhouse complex could be considered a single building for purposes of the regulatory definition of "resident caretaker". The adjudicator, accepting the reasoning in the *Harrison and Lander* and *Gateway* decisions, held that the resident caretaker's minimum wage should be based on the total number of units (in that case, 54) for which the caretaker was responsible. The Tribunal's decision in *Pacifica* did *not* turn on whether a townhouse complex was an "apartment building" for purposes of the regulatory definition of resident caretaker--that issue was simply not raised by any party and, accordingly, not adjudicated.

We accept the principle that regulatory provisions that limit or exclude an employee's entitlement to statutory benefits (such as, in this case, overtime and minimum daily pay) ought to be narrowly interpreted. However, if townhouse complexes can be properly characterized as "apartment buildings" then it follows that the Employees were "resident caretakers" and, thus, not entitled to overtime pay and minimum daily pay.

Unfortunately, the phrase "apartment building" is not defined in either the *Act* or the *Regulation.* Neither, for that matter, is the term "townhouse". Historically, a "town house" was the city residence of a person who primarily resided in a rural community (see the *Oxford Dictionary*). More recently, a townhouse has come to mean a type of row- or cluster-housing within a defined development (the units may be individually owned as strata lots or may be part of a larger rental complex owned by a property development/management firm such as the Employer).

The *Oxford Dictionary* defines "apartment" as a "suite of rooms" or a "flat" (a term commonly used in the United Kingdom). At one time, an apartment was nothing more than a single furnished room in a family residence that was occupied by a tenant who was independent from ("apart") from the family who resided in the house. The term "flat" is somewhat descriptive of the typical living arrangements in that the "suite of rooms" is usually located on a single floor. By contrast, many townhouses consist of two or more levels. However, it must be recognized that some so-called "townhouses" are single-level and some "apartments" are multi-level.

Black's Law Dictionary defines an "apartment house" as:

> A building arranged in several suites of connecting rooms, each suite designed for independent housekeeping, but with certain mechanical

> conveniences, such as heat, light, or elevator services, in common to all families occupying the building. Sometimes called a flat or flat house.

By contrast, the common defining characteristics of a "townhouse" appear to be individual entrances to units within a complex of several architecturally similar (if not identical) residential units; the style of residence adopts many aspects of a detached home (albeit a residence with one or more common walls) setting the townhouse apart from a residential unit within a single multiple-unit residential building where there are common walls, entrances and hallways. This latter notion is reflected in *Black's Law Dictionary* where a "town house" is defined as follows:

> Type of dwelling normally having two, but sometimes three, stories; usually connected to a similar structure by a common wall, and commonly (particularly in planned unit developments) sharing and owning in common the surrounding grounds.

Thus, it would appear that there is a recognized legal distinction between townhouses on the one hand, and "apartments" and "apartment buildings", on the other. The Director's interpretation of the phrase "apartment building", confirmed by the adjudicator, is largely consistent with both the *Oxford Dictionary* and *Black's Law Dictionary.* The key issue, of course, is whether or not the government intended for such a distinction to be drawn when it defined, by regulation, the term "resident caretaker"?

In this case, we are dealing with a definition contained in a regulation. Nevertheless, and recognizing that distinction, we note that the legislature has, in several other enactments, defined the type of residences that fall within the ambit of particular legislation in sufficiently wide terms so as to encompass both apartments and townhouses.

The *Residential Tenancy Act* does not define an "apartment building", however, the definitions of both "residential premises" and "residential property" are sufficiently wide to encompass a townhouse. Similarly, the *Strata Property Act* does not distinguish between "townhouses" and "apartments"; nevertheless, a townhouse could certainly fit within the only relevant defined term, namely, "residential strata lot".

We note that definitions of both "apartment" and "apartment building" are found in the *Home Owner Grant Act:*

> "**apartment**" means a self-contained residential accommodation unit that
>
> (a) has cooking, sleeping, bathroom and living room facilities, and
>
> (b) is located in an apartment building;

"**apartment building**" means land that

(a) is shown as a separate taxable parcel on a tax roll for the current year prepared by a collector, and

(b) has as a taxable improvement on it, a building containing at least 2 apartments;

In our view, the above *Home Owner Grant Act* definitions--and, as noted, the relevant definitions found in the *Residential Tenancy Act* and the *Strata Property Act*--are wide enough to include townhouses within their ambit.

Thus, we have before us several instances where the legislature has defined the form of residence sufficiently broadly so that many alternative forms of housing, including both apartments and townhouses, would fall within the purview of the particular legislation. However, the government chose to define "resident caretaker" somewhat more narrowly by restricting the term's scope through words of limitation such as "apartment building", "residential suites" and by requiring that the caretaker's services be rendered at "that building".

Summary

It may well be that the nature of the duties undertaken by a caretaker of a multi-unit townhouse complex are not materially different from those of a caretaker at an multi-unit apartment building. If that is so, the distinction in the respective caretakers' employment rights under the *Act* (attributable to the two different forms of housing for which they are responsible) may be difficult to justify. The entire matter becomes even more complicated if the caretaker is responsible for a single complex that includes--as some complexes do--one or more highrise apartment buildings and separate townhouse residences. However, out task is to interpret the regulation, not to question the policy choices that underlie the regulation.

The government has chosen, for whatever policy reasons it felt appropriate, to distinguish between different forms of housing in the regulatory definition of "resident caretaker". Had it wished, the government could have defined "resident caretaker" more broadly--we have several examples of such broader definitions before us. Bearing in mind that "resident caretakers" are not entitled to certain statutory benefits that other employees enjoy, we accept the principle that the definition (which, it should be noted, is intended to be an exhaustive rather than an inclusive one--note the use of the term "means" rather than "includes") ought to be narrowly, rather than generously, construed.

Finally, it must be acknowledged that the distinction between a townhouse and an apartment building is one that appears to be well-recognized as a matter of law. Thus, we do not accept that the legal effect of the language used in the regulatory definition was somehow lost on the government when it was drafting the definition of "resident caretaker" in the *Regulation*. Of course, to the extent that the government is of the view that the current regime is

inappropriate, it remains free to effect regulatory change. Such regulatory change, however, is a matter for the government, not the Tribunal.

ORDER

Having reconsidered the decision of the adjudicator in this matter, we are not persuaded that his decision to confirm the Determination was incorrect. The application to vary or cancel the decision of the adjudicator in this matter is **refused.**

Kenneth Wm. Thornicroft **Adjudicator** **Employment Standards Tribunal**	**Carol L. Roberts** **Adjudicator** **Employment Standards Tribunal**	**April D. Katz** **Adjudicator** **Employment Standards Tribunal**