Employment Standards TRIBUNAL

Citation: Cariboo Action Training Society (Re)
2020 BCEST 32

An appeal

- by -

Cariboo Action Training Society carrying on business as Camp Trapping
(the "Appellant")

- 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 (as amended)

PANEL: Carol L. Roberts

FILE NO.: 2019/194

DATE OF DECISION: April 8, 2020

DECISION

SUBMISSIONS

Lawrence Robinson	counsel for Cariboo Action Training Society
Sarah Vander Veen	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Cariboo Action Training Society carrying on business as Camp Trapping (the "Appellant" or the "Employer") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on October 18, 2019 (the "Determination").

2. The Director found that the Appellant had contravened sections 17 and 58 of the *ESA* in failing to pay a former Employee wages and vacation pay. The Director determined that wages and interest were owed in the total amount of $20,976.05. The Director imposed a $500 administrative penalty on the Employer for a contravention of section 17 of the *ESA* for a total amount payable of $21,476.05.

3. The Appellant appeals the Director's Determination contending that the Director erred in law in making the Determination.

4. Section 114 of the *ESA* provides that the Employment Standards Tribunal (the "Tribunal") may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.

5. After receiving the Appellant's written submissions, I invited submissions from the Director and the Respondent Employee. Although the Director made submissions, the Respondent Employee did not. I also received reply submissions from the Appellant.

6. This decision is based on the section 112(5) "record" that was before the delegate at the time the Determination was made, the submissions of the Appellant and the Director, and the Reasons for the Determination.

FACTS

7. The facts are undisputed.

8. The Appellant is a non-profit society and a registered charity. It operates a rehabilitation facility called Camp Trapping (the "Camp") for young male offenders on probation. Many of the youth, in addition to being involved in the criminal justice system, suffered from a range of psychological issues including Fetal Alcohol Spectrum Disorder ("FASD") and Attention Deficit Hyperactivity Disorder ("ADHD"). The Camp is located 50 kilometers outside of Prince George, B.C. The Camp has shared living arrangements, with the staff and youth sharing cooking, dining, recreation, and washroom facilities.

9. Kimberly Willows (the "Employee") was employed as a childcare counselor at the Camp from March 2016 to April 3, 2019. Although her job title was that of a counselor, the Employee had no formal therapeutic training as a counselor and her job duties were largely supervisory in nature. She worked a one week on, one week off schedule at the Camp, with her workweek commencing Monday at noon. She stayed at the Camp until the following Monday at which time she returned to her home in Prince George. The employment agreement provided that the Employee was required to supervise the youths' activities at the Camp from 6:00 a.m. to 10:00 p.m. each day. The childcare counselors slept in the same room as the youth from 10:00 p.m. to 6:00 a.m. The Employee was not required or expected to work during that time except in emergent situations. The counselors received an hourly wage for the hours they worked between 6:00 a.m. and 10:00 p.m. and an additional $12 for each night they spent at the Camp.

10. In her complaint, the Employee alleged she had not been paid all of the wages she was entitled to, statutory holiday pay and compensation for length of service. The Employee's claims for compensation for length of service and statutory holiday pay were resolved before the end of the hearing. Remaining at issue before the delegate were whether the Employee was owed wages, and if so, the amount of those wages.

11. The Employee testified that she woke up during the night approximately 10 times per week to deal with minor incidents such as youth requiring Tylenol as well as more serious incidents. However, she was unable to provide any details about the number of major incidents she had to respond to. On one occasion, the Employee included an extra hour on her timesheet for work performed between 10:00 p.m. and 6:00 a.m., but that hour was deleted from her timesheet by Employer's office manager. The Employer's executive director, who appeared at the hearing on the Appellant's behalf, testified that on occasion, other counselors claimed for additional work performed during the night and that they were paid their regular wages for that work. He did not recall the Employee ever making such a claim.

12. The delegate considered whether the Employee was excluded from the overtime provisions of the *ESA*.

13. The delegate first analyzed whether the Employee was a "residential care worker" as defined in the *ESA* as well as the application of section 34(x) of the *Employment Standard Regulation* (the "*Regulation*").

14. The delegate considered the Director's position that, to be excluded from overtime pay, a residential care employee must reside in a group home or other family type dwelling for the entire duration of their employment, not just for their shifts:

> The Director of Employment Standards … takes the position that a person "resides" in their usual and normal domicile, not where they stay while working. In other words, to fit into the definition of residential care worker, an employee must reside in the group home or family type dwelling for the whole duration of their employment, not just during a series of work shifts.

15. The delegate noted that the parties agreed that the Employee was required to sleep in the same room as the youth, that she kept no personal belongings at the Camp on a long-term basis, and that she shared all the facilities with the youth.

16. The delegate also considered Tribunal decisions in *Corner House*, BC EST # D254/98, and *Leblanc*, BC EST # D023/01, and determined that she was bound to apply the Director's interpretation. Applying that interpretation, the delegate concluded that the employee did not reside at the Camp during her

employment, and thus was not a residential care worker and exempt from the overtime provisions. It is this conclusion that is at issue in this appeal.

17. The delegate then considered whether the Employee was excluded from the overtime provisions of the *ESA* by virtue of section 34(r) of the *Regulation*, which sets out a class of persons who are employed by a charity "to assist in a program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons." The delegate found that the Employer was a charity. She further determined that despite the Employee's job title, she was in fact a childcare worker who merely "assisted" with the Camp's program of therapy, treatment, or rehabilitation.

18. The delegate then noted that a substantial portion of the youth at the Camp had been diagnosed with an array of psychological issues and, relying on Tribunal decision Re *Webb* (BC EST # D274/00), deemed the entire group to be "otherwise disabled." The delegate concluded that the Employee was exempt from the overtime provisions of the *ESA* pursuant to section 34(r) of the *Regulation*.

19. The delegate then considered whether the Employee had been properly compensated for the hours she worked. She noted that the Employer agreed that the Employee was required to stay with the youth at night to attend to their needs and was thus "on call at a location designated by the employer" according to the *ESA* definition of "work."

20. The delegate relied on the Tribunal reconsideration decisions *Re Hills* (BC EST # RD094/11) and *Knutson First Aid Services* (BC EST # RD095/01), as well as Tribunal decision *Double R Safety Ltd.* (BC EST # D192/01) (upheld on reconsideration BC EST # RD529/01) in finding that the Employee was indeed on call during the night.

21. The delegate found the Employee's testimony that she worried for her safety to be reasonable given that many of the youth had FASD and/or ADHD and had been charged with violating the law and that she was required as a condition of her employment to have self-defense training.

22. The delegate concluded that the Employee was not free to pursue her own interests between 10:00 p.m. and 6:00 a.m., that her accommodation was shared with the youth rather than private, and that her freedom of movement was limited.

23. The delegate determined that the Employee was under the Employer's control and direction during the night and that she was entitled to be paid her regular wage for her on call hours. The delegate calculated the Employee's wages and vacation pay as set out above.

ARGUMENT

24. The Employer argues that the delegate erred in law in misinterpreting the definition of "residential care worker" and in not applying section 34(x) of the *Regulation*. The Employer also contends that the delegate erred in relying on two Tribunal decisions in support of her conclusions, arguing that both cases are distinguishable on their facts. The Employer also submits that the delegate erred in not considering section 22, which provides for "intermittent residency", in her analysis. The Employer argues that residency, for the purposes of section 34(x) does not require permanent residency.

25. The Employer argues that the Employee was not required or expected to administer medication or to perform duties between 10:00 p.m. and 6:00 a.m. except in emergency situations and, although the Employee testified that she had from time to time woken up to administer medication, she could not recall any dates on which that had occurred.

26. Furthermore, the Employer says that if the Employee did perform work after 10:00 p.m., she was entitled to be paid for at least 2 hours work, or more if she worked more than 2 hours. The Employer noted the evidence of the Camp director who testified that other counselors did receive additional remuneration for work performed during the night.

27. The Employer further contended that the Employee testified to the accuracy of her work records, and that she was paid for all hours she worked.

28. The Director argues that, contrary to the Employer's submissions, the delegate found as a fact, based on the agreement of the parties at the hearing, that the Employer required the Employee to stay with the youth during the night and attend to any who required assistance. The Employer contends that there was no evidence that the Employee was required to or expected to perform duties between the hours of 10:00 p.m. and 6:00 p.m. except in emergent situations. The Employer argues that these eight hours constituted the Employee's "time to rest" and was consistent with her "residing" at the workplace for the purposes of section 34(x).

29. The Director submits that there is no grounds for an appeal based on factual findings and that the Employer is simply rearguing the merits of the Determination.

30. The Employer contended that a factual finding unsupported by the evidence was grounds for an appeal on the basis that it constituted an error of law.

ANALYSIS

31. The relevant provisions of the *ESA* and the *Regulation* are as follows.

32. Section 1(1) of the *ESA* defines "work" to mean the labour or services an employee performs for an employer whether in the employee's workplace or elsewhere. Section 1(2) provides that an employee is deemed to be at work while on call at a location designated by the employer unless the designated location is at the employee's residence.

33. Part 4 of the *ESA* establishes statutory requirements for hours of work and overtime.

34. Section 34 of the *Regulation* outlines classes of workers exempt from Part 4 and includes residential care workers (section 34(x)) and employees employed by a charity to assist in a program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons (section 34(r)).

35. Section 1(1) of the *Regulation* defines a "residential care worker" to mean a person who

> (a) is employed to supervise or care for anyone in a group home or family type residential dwelling, and

(b) is required by the employer to reside on the premises during periods of employment,

but does not include a foster parent, live-in home support worker, domestic or night attendant;

36. Section 22 of the *Regulation* provides that

(1) If a residential care worker is required by an employer to remain on the premises for a 24 hour period, the employer must schedule a rest period of 8 or more consecutive hours for the worker during the 24 hour period.

(2) For each interruption of a rest period to which a residential care worker is entitled under subsection (1), the employer must pay the worker at the regular wage for the longer of

(a) 2 hours, or

(b) the number of hours of work caused by interruption of the rest period.

37. The Tribunal has long relied on *Rizzo and Rizzo Shoes Ltd.* ([1998] 1 S.C. R. 27) to support a broad and liberal interpretation of the *ESA*. An interpretation of the legislation which favours an employee is to be preferred over one that does not, and exemptions from the benefits conferring provisions are to be narrowly interpreted. While the Employer explicitly agrees with this interpretive principle, it argues that the rule "does not contemplate interpretations which would lead to absurdities or inconsistencies." It argues that "the foregoing compels a contextual approach to statutory interpretation which necessitates a consideration of s. 22 when ascribing meaning to subsection 34(x)."

38. The record establishes that the Employee was contracted to supervise young offenders in a facility that was akin to a group home or family type residential dwelling. There is no dispute that the staff and youth shared all of the facilities, including sleeping facilities and washrooms. Under the terms of her employment agreement, the Employee was required to stay on the premises of that facility. The record also establishes that while the Employee was not "required or expected" to work between 10:00 p.m. and 6:00 a.m. except in cases of emergencies, she also slept in the same room as the youth and attended to issues not amounting to emergencies during that period.

39. Although the Employer argues that the facts establish that the Employee resided at the Camp during her period of employment and that the legislation does not require permanent residency, there is long line of Tribunal authority interpreting residency narrowly.

40. In *Corner House* (which was upheld on Reconsideration (BC EST # RD254/98)), after considering submissions from a number of parties regarding the proper approach to interpreting the word "reside" in circumstances very similar to those before the delegate in this instance (that there is no requirement that residency, for the purposes of the regulation, be permanent), the Tribunal found that a residence was

> …something short of domicile, i.e. the intention to remain in that place permanently, but something more than temporary or intermittent. It has some degree of permanence; it is the person's settled abode; it is the place they carry on the settled routines of life. It would be the place one hangs one's hat, keeps one's clothes, stores treasures and family memories; a place of privacy protected in law from state intrusions; and a place of retreat from the turmoil of the workplace. It would be a place to entertain one's friends. It would be an address of one's own, a phone number, and a place to receive mail.

> This is not to say there are not situations where an employee gives up some of the benefits of a private residence to live communally or at a place of work. For a workplace to also be considered a residence the place of work must assume some qualities of a residence. There must be some degree of privacy; a space, all be it (sic) limited, to call one's own. There must be some degree of settlement to carry on as much of those everyday things as possible, subject only to the minimum necessary intrusions of the requirements of the employment. There must be some element of permanence as opposed to intermittent or temporary.

41. *Corner House* has been followed in many subsequent Tribunal decisions. In *Knutson First Aid Services (1994) Ltd.*, BC EST # D300/00, the Tribunal relied on *Corner House* in finding that a first aid trailer that an employee stayed at while working at a remote oil drill site was not a residence for the purposes of the *ESA* as it lacked any sense of permanency and privacy. That decision was also upheld on reconsideration. (BC EST # RD095/01)

42. I find no error in the delegate's factual findings or legal analysis.

43. The appeal is dismissed.

ORDER

44. Pursuant to section 114(1)(f) of the *ESA*, I deny the appeal. Pursuant to section 115 of the *ESA*, the Determination, dated October 18, 2019, is confirmed, together with whatever interest has accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal