Employment Standards TRIBUNAL

Citation: LMSCL Lower Mainland Society for Community Living (Re)
2020 BCEST 42

An appeal

- by -

LMSCL Lower Mainland Society for Community Living
(the "appellant")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2020/005

DATE OF DECISION: May 6, 2020

DECISION

SUBMISSIONS

Arondeep Mand	counsel for Lower Mainland Society for Community Living

INTRODUCTION

1. On December 2, 2019, Megan Roberts, a delegate of the Director of Employment Standards (the "delegate"), issued a determination (the "Determination") under section 79 of the *Employment Standards Act* (the "*ESA*"). By way of the Determination, the present appellant, LMSCL Lower Mainland Society for Community Living (the "appellant"), was ordered to pay $34,560.90 on account of unpaid wages and section 88 interest owed to four former employees (the "complainants"). The Determination reflects overtime pay (and concomitant vacation pay) payable under section 36 of the *ESA*.

2. Further, and also by way of the Determination, the delegate levied two separate $500 monetary penalties (see section 98) against the appellant. Accordingly, the total amount payable under the Determination is $35,560.90.

3. The appellant appeals the Determination on the ground that the delegate erred in law (section 112(1)(a) of the *ESA*). In particular, the appellant argues that the delegate failed to give effect to two overtime exemption provisions set out in the *Employment Standards Regulation* (the "*Regulation*").

THE DETERMINATION

4. The delegate issued "Reasons for the Determination" (the "delegate's reasons") concurrently with the Determination. As detailed in the delegate's reasons, the appellant is a non-profit society that provides community and residential support services for developmentally disabled children and adults. The appellant's care homes, funded through provincial government programs, are operated and staffed on 24/7 basis. As noted by the delegate (at page R3), the appellant's "services include short and long term residential placements in care settings (care homes), client care plan management, life and social skill building, and other specialised services".

5. Although the complainants claimed both compensation for length of service (section 63) and statutory holiday pay (section 46), the delegate determined that the complainants were paid their entitlements under sections 63 and 46 of the *ESA*. The delegate also rejected the complainants' assertion that they worked "excessive hours" contrary to section 39 of the *ESA*.

6. Before the delegate, the appellant argued that while one complainant might have been owed overtime wages, the other three complainants were not entitled to any overtime pay because they were "live-in home support workers" as defined in section 1(1) of the *Regulation*. Employees who meet this definition are excluded from the hours of work and overtime provisions of the *ESA* (section 34(q) of the *Regulation*). In addition, the appellant argued that one of the complainants, at least for some of his employment, was a "manager" as defined in the *Regulation*, and on that basis, was also exempted from the *ESA*'s overtime

pay provisions (see section 34(f) of the *Regulation*). The delegate rejected the appellant's position regarding these two overtime exemption provisions.

7. With respect to the matter of overtime pay, as noted above, the delegate determined that the three complainants the appellant alleged were "live-in home support workers" did not meet the regulatory definition and thus were not excluded from the overtime pay provisions of the *ESA*. As for the one complainant the appellant alleged was also a "manager" during some of his tenure (when he was working as a "case manager"), the delegate held that he did not meet the regulatory definition.

THE APPELLANT'S REASONS FOR APPEAL – ANALYSIS & FINDINGS

8. The appellant says that the delegate erred in law in awarding overtime pay to the complainants and, in particular, challenges the delegate's findings regarding the "live-in home support worker" and "manager" exemptions. I will address each exemption in turn.

The "manager" exemption

9. This argument concerned one of the complainants, Mr. Pragados, who worked as both a "support worker" and a "case manager". The appellant alleges that while working in this latter capacity, Mr. Pragados was a "manager" and thus not entitled to overtime pay.

10. Section 1(1) of the *Regulation* defines a "manager" as follows:

> "manager" means
>
> (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
>
> (b) a person employed in an executive capacity

11. Whether an individual meets this definition requires an assessment of the relevant evidence in light of the regulatory definition. The appellant says that the delegate applied "a more onerous definition of manager than what is found in the Regulation".

12. Over the course of the delegate's investigation, the appellant provided various information regarding Mr. Pragados' role. The appellant noted that Mr. Pragados was placed above support workers in the organizational hierarchy (as set out in an organizational chart) and was paid a higher rate when acting as a case manager. The appellant maintained that Mr. Pragados supervised, trained and provided orientation for staff members, and exercised autonomy and discretion in his case manager role. He evaluated employees and had general oversight functions at the care homes. Mr. Pragados conceded that while he had some supervisory responsibilities, completed reports regarding new probationary employees, and did some scheduling, his principal duties concerned managing about 15 clients, which included coordinating and attending meetings, dealing with family and service providers, and communicating with managers about problems that arose concerning clients' care plans.

13. The delegate concluded that Mr. Pragados had no final authority to discipline, hire, fire, or evaluate subordinate employees, and that there was no "convincing evidence…that he had independent spending authority, could decide employee compensation or even independently grant leave to employees"

(delegate's reasons, page R35). Although the delegate concluded that Mr. Pragados "had a role in training and orienting employees, reviewing reports and directing home care employees in client care plan adherence and [the appellant's] protocol" (page R35), she concluded that this flowed less from the case manager's role requirements, than from Mr. Pragados's "expertise and tenure which situated him in a clear position to guide workers, provide clarity on [the appellant's] existing policies, protocols and what needed to be done and identify processes and performance in need of improvement" (page R35).

14. Overall, the delegate determined that Mr. Pragados's principal duties as a case manager "were focused upon managing a caseload of high needs clients housed in various care homes throughout Metro Vancouver" (page R35) and that his duties largely consisted of interacting with various other agencies and professionals on behalf of the clients in his charge.

15. The appellant did not argue that Mr. Pragados was employed in an "executive capacity". Thus, the decision about his status turned on whether his *principal employment responsibilities* consisted of supervising and/or directing other staff, or the appellant's other resources. Although the delegate accepted that Mr. Pragados had some limited supervisory responsibilities, she concluded that the bulk of his duties related to attending to his clients' needs: "…his principal duties when working as a case manager were focused upon facilitating communication between client stakeholders and monitoring care plan adherence for [the appellant]" (delegate's reasons, page R33).

16. The appellant says that in determining that Mr. Pragados was not a manager, the delegate "overlooked" or "understated" factors that supported its position that he was a manager as defined in the *Regulation*.

17. The delegate's findings (and there was disputed evidence before her regarding the scope of Mr. Pragados's duties) and analysis are set out at pages R33 – R35 of her reasons. I consider the delegate's analysis to be reasoned, transparent, and intelligible.

18. I agree with the appellant's legal counsel that a determination regarding whether an individual is a "manager", as defined in section 1(1) of the *Regulation*, is a question of mixed fact and law. Accordingly, the delegate's decision should only be set aside on appeal if she made a "palpable and overriding error" (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). I am unable to conclude that the delegate's determination that Mr. Pragados was not a manager was clearly erroneous. Indeed, given her findings of fact (which were within her province to make), I am of the view that her decision on this point was not only reasonable, but entirely correct. The weight of the evidence before the delegate, at least in my view, showed that Mr. Pragados's duties as a "case manager" were principally administrative, rather than managerial, in nature.

19. The appellant's position appears to be that the delegate should have given greater weight to certain facts while, at the same time, giving lesser weight to other facts. In my view, the delegate properly weighed all of the relevant evidence, and arrived at a conclusion that was entirely defensible in light of the somewhat conflicting evidence before her. I reject the appellant's assertion that the delegate's determination that Mr. Pragados was not a "manager" was predicated on a "view of the facts which could not be reasonably entertained".

The "live-in home support worker" exemption

20. A "live-in home support worker" is defined in section 1(1) of the *Regulation* as follows:

> "live-in home support worker" means a person who
>
> (a) is employed by an agency, business or other employer providing, through a government funded program, home support services for anyone with an acute or chronic illness or disability not requiring admission to a hospital, and
>
> (b) provides those services on a 24 hour per day live-in basis without being charged for room and board

21. This definition includes several requisite criteria. First, the individual must be employed in an agency, business, or other organization. Second, this employer must provide government-funded home support services. Third, the services must be for individuals with an acute or chronic illness or disability that does not require the individual to be hospitalized. Fourth, the individual must provide the services on a 24-hour live-in basis. Fifth, the individual must not be charged for room and board.

22. The appellant argued that three of complainants (including Mr. Pragados when he was not working as a "case manager") met the above definition of "live-in home support worker" and, on that basis, were not entitled to overtime pay. The fourth complainant was employed as a "scheduler and worked from [the appellant's] head office and from her residence" (delegate's reasons, page R3), and thus clearly fell outside this particular overtime pay exemption. The delegate determined that the three complainants who worked as support workers "were not employed as live-in home support workers" (page R16).

23. With respect to this particular overtime exemption, the delegate made the following findings:

- the appellant's community care facilities require staffing on a 24-hour basis (page R13);
- the complainants were employed to provide services to individuals with acute or chronic illnesses or disabilities not requiring hospitalization (page R13); and
- the appellant's operations were funded through a government program (page R13).

Accordingly, the first, second, and third criteria were satisfied.

24. However, with respect to the fourth and fifth criteria, the delegate held:

- the shifts for two of the complainants were normally less than 24 hours' duration (page R13);
- "I accept that the clear intent of the live-in home support worker definition and the home support services referenced therein was to apply to employees working in private residences" but that "the residential resources operated by [the appellant] do not constitute private residences and therefore the criteria of live-in home support worker have not been met" (page R15);
- "I am also not convinced the Complainants provided their services on a 24-hour per day live-in basis or were received [*sic*] room and board as argued by [the appellant]"...There is no dispute that the Complainants resided in their own residences and were not charged room and board for shifts spent in the care homes" (page R15).

- " … [the appellant] relied upon their submissions and photographs to corroborate their position that workers provided their services on a live-in basis and received room and board … [the photographs] were generally described as accommodations used by staff for sleeping and rest during their work hours, including overnight shifts. However, I am not persuaded this was the case" (page R15) … I accept the staff areas pictured primarily functioned as workspaces shared by and accessible to all [the appellant's] workers on site at any given time. The fact clients had restricted access to the rooms or that they may have been furnished with a bed or pull out couch, does not obfuscate their primary function in allowing [the appellant] to meet its day to day operational needs and contractual requirements … I do not accept that 'board' was provided to the Complainants … [the evidence clearly indicates] employees were neither normally provided food nor allowed to use the amenities within the care home for personal use including for showering, laundry and cooking" (page R16).

25. The appellant says that the delegate "erred in law by importing a requirement into the definition … by inferring the services are required to be in the ill or disabled person's own home". The appellant says that the regulatory definition of a "live-in home support worker" does not include a requirement that the worker provide care services in the actual residence of the individual receiving the support services. I agree that the definition does not explicitly state that the worker's services must be provided in the individual client's ordinary residence, although one might infer from the phrases "live-in *home*" and "*home support* services" that a requirement to provide services in the individual's ordinary residence is necessarily implied in the definition.

26. The evidence in this case is that the individuals requiring care are housed in the appellant's facilities on a temporary basis, with the goal being to transition the individual either back to their residence, or to some other residential care facility. The delegate found, at page R14 of her reasons:

> …the placements in the residential resources were often temporary in nature. While the care homes operated by [the appellant] may have provided a "nurturing home environment," as included in the support worker job description, for at least some of the clients, the placement was made with the goal to transition them back to their homes or other resources. I also find it reasonable that regardless of the anticipated length of the individual placements, a client's 'residency' was dependent upon their ongoing eligibility for program funding and adherence to the house rules and policies set by [the appellant]."

27. The delegate noted that although the facilities may have provided a "home like setting", the clients did not pay rent or any other maintenance costs and were not protected by the *Residential Tenancy Act*. Further, "although the care homes reasonably afforded a degree of privacy to clients, [the appellant] had full access to the entirety of the premises, set the rules for who could be inside and their conduct within and was ultimately responsible for any incidents which occurred on site" (page R15).

28. The delegate relied on the Tribunal's decision in *Active Care Youth and Adult Services Ltd.*, BC EST # D064/17, in determining that the exemption only applied to "employees working in private residences". In *Active Care*, *supra*, the appellant operated facilities described as follows (at para. 9): "ACY&AS operates a business providing staffed residential resources for children, youth and adults with psychological and/or physical issues requiring care that cannot be met in their regular homes." The issue before the Tribunal

was whether an employee fell within the "live-in home support worker" exemption. At para. 37, the Tribunal held:

> In my view, the interpretation of the definition of live-in home support worker made by the Director is one the language can reasonably bear and is consistent with the characteristic of the position described by Prof. Thompson as being one performed "in private residences". I am not satisfied the definition can be read without recognizing, as the Director did, that it was intended to apply to persons working in a private residence. I also fine [*sic*] the rationale of the Director set out in the Determination for adopting the interpretation given to be correct and compelling. (my underlining)

29. In this appeal, the appellant argues that a "private residence" means only a "location other than a hospital" and further says:

> Be it a long or short-term placement, the [appellant] is providing a private home for the disabled persons that is sufficient to help the person transition back to family, foster family or independent living. By that very classification, the residences provided by [the appellant] to these individuals are indeed the homes of the persons they provide support …

30. I do not accept the appellant's argument on this score. In my view, the intent of the exemption definition is to capture only those workers who provide services in the individual client's residence, rather than at some other facility where the individual may be located for a period of time, whether on a relatively short- or long-term basis. Further, this is precisely the position espoused by the Tribunal in *Active Care*, as is clear from the above-quoted excerpt from that decision.

31. With respect to the "24 hour per day live-in basis" requirement, the appellant says:

> … the definition of live-in home support worker does not outline that the employee must be employed on a 24-hour per day basis, but rather that home support services be provided on a 24-hour per day basis. The Director has misinterpreted this aspect of the definition of live-in support worker [*sic*].

32. In my view, the appellant's argument on this matter is wholly misconceived. The clear and ordinary grammatical meaning of this exemption provision requires that "the *person*" (i.e., the worker) "provides those services on a 24 hour per day live in basis". It is absurd to suggest that an organization, such as a non-profit society, is able to provide *live-in* services; the services are provided by the organization's *employees*. And, of course, it is the worker, not the organization, who cannot be charged for "room and board".

33. Finally, the appellant challenges the delegate's finding regarding the "room and board" requirement. As noted above, the delegate made a specific finding of fact that none of the three complainants "provided their services on a 24-hour per day live-in basis or were received [*sic*] room and board". Further, the delegate held these workers were not "employed on a 24-hour per day live-in basis" and that "[t]here is no dispute that the Complainants resided in their own residences and were not charged room and board for shifts spent in the care homes" (page R15).

34. The appellant asserts "that it was open on the evidence before the Director to conclude the [appellant] met its evidentiary burden of showing that the room and board was sufficient". This challenge to the delegate's

finding is, essentially, an invitation to set aside the delegate's findings of fact. In my view, the delegate's findings regarding the length of the complainants' shifts, and the provision of room and board, were adequately grounded in the evidence and, absent a "palpable and overriding error" (see *Housen*, *supra*), should not be set aside on an appeal.

35. To summarize, I am not persuaded that the appellant has demonstrated the delegate erred in law as has been asserted. I note that the appellant does not contest the delegate's calculations regarding the complainants' overtime pay entitlements, assuming no overtime pay exemption applies. In my view, this appeal has no reasonable prospect of succeeding. After considering the appellant's various arguments, I am unable to conclude that the Determination should be varied or cancelled.

ORDER

36. Pursuant to section 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the total amount of $35,560.90 together with whatever further interest that has accrued, pursuant to section 88 of the *ESA*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal