Employment Standards TRIBUNAL

Citation: Alexander McCormack Client Support Group Society, Anilyn Baylon and Caroline Gallego (Re) 2021 BCEST 97

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

Alexander McCormack Client Support Group Society

("The Employer")

- and by -

Anilyn Baylon and Caroline Gallego

("The Employees")

- 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:** Carol L. Roberts

**FILE NOS.:** 2021/030, 2021/031, 2021/032

**DATE OF DECISION:** December 10, 2021

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Jonathon Braun | counsel for Anilyn Baylon and Caroline Gallego |
| Susan McCormack | on behalf of the directors of the Alexander McCormack Client Support Group Society |
| Jordan Hogeweide | delegate of the Director of Employment Standards |

## OVERVIEW

1. This decision is with respect to separate appeals by Alexander McCormack Client Support Group Society (the "Employer" or "Society") and by Anilyn Baylon and Caroline Gallego (the "Employees") of a March 5, 2021 Determination issued by Jordan Hogeweide, a delegate (the "Adjudicative Delegate") of the Director of Employment Standards (the "Director").

2. The Employer is a British Columbia Society that was incorporated to oversee the care of Alexander McCormack, a young man living with disabilities. The Society's directors are Alexander McCormack's parents and three family friends.

3. On November 18, 2019, the Employees filed separate complaints with the Director alleging that the Employer had contravened the *Employment Standards Act* ("*ESA*") in failing to pay them regular and overtime wages and for charging them room and board.

4. The Director determined that the Employer had contravened sections 17/18, 45/46, 21, 58 and 63 of the *ESA* and section 22 of the *Employment Standards Regulation* (the "*Regulation*") in failing to pay the former employees wages and compensation for length of service, and in making unauthorized deductions from the Employees' wages.

5. The Director determined that the Employer owed wages and interest in the total amount of $60,438.04. The Director also imposed six $500.00 administrative penalties on the Employer for the contraventions, for a total amount payable of $63,438.04.

6. Both the Employees and the Employer argue that the Director erred in law and failed to observe the principles of natural justice. The Employer also contends that evidence has become available that was not available at the time the Determination was being made.

7. The Tribunal sought submissions from the parties on the completeness of the section 112(5) "record". The Employer made submissions regarding the completeness of the record. The Adjudicative Delegate filed a response to the Employer's submission. After reviewing both submissions on the completeness of the Record, I am satisfied the record is now complete.

8. I also sought submissions from the parties and the Director regarding the merits of the appeals.

9. This decision is based on the material that was before the Director at the time the Determination was made, the Reasons for the Determination (the "Reasons"), and the submissions of the parties on the appeal.

**ISSUE**

10. Whether one or all of the appellants have established grounds for interfering with the Director's Determination.

**FACTS**

11. Alexander McCormack ("Alexander") has Duchenne Muscular Dystrophy and requires 24-hour support. In particular, he requires monitoring throughout the day, trachea ventilation care and suctioning, bathing/showering, transfers, dressing and assistance with eating.

12. Alexander resides in a self-contained suite on the lower level of the McCormack home. Alexander's suite contains two bedrooms, one for him and the other for a care worker. Next to Alexander's suite is a shared family room and a third bedroom.

13. Ms. Gallego began working for the Employer on June 1, 2009 at which time three people cared for Alexander - Ms. Gallego, a second employee ("J.E."), and Alexander's sister. After Alexander's sister moved away, rather than hiring a third caregiver, J.E. and Ms. Gallego split the caregiving responsibilities and were each paid for 15 days every month. Both J.E. and Ms. Gallego lived in the McCormack residence and each paid the McCormacks a monthly rent.

14. In late 2018, J.E. decided to live outside the family home and work fewer shifts and Ms. Gallego assisted the Employer in securing a new caregiver. Ms. Gallego contacted Ms. Baylon, a friend in the Philippines, and explained the position to her. The Employer retained an employment agency to assist Ms. Baylon in obtaining the necessary immigration authorization to live and work in Canada. According to Ms. Baylon, Ms. Gallego did not describe the hours of work or compensation to her. Ms. Baylon said that she did not review or sign an employment agreement before starting work. Ms. Baylon did, however, receive a copy of the Labour Market Impact Assessment ("LMIA") issued to the Employer, which indicated that she was to be paid an hourly wage.

15. Before Ms. Baylon arrived, Ms. Gallego said that she cared for Alexander by herself for several days. The Employer paid her additional wages for the extra hours she worked. Shortly after Ms. Baylon began working for the Employer, J.E. stopped working, and Ms. Gallego and Ms. Baylon worked together to care for Alexander.

16. Ms. Baylon was paid less than Ms. Gallego because, according to Ms. Gallego, Mrs. McCormack said Ms. Baylon was less experienced. Ms. Baylon was not left alone with Alexander until September 2019, when the parties decided to adopt a rotational schedule of work.

17. Ms. Gallego alleged that the Employer expected two caregivers to be with Alexander at all times and that the two caregivers preferred to work at the same time rather than being with Alexander on their own.

According to the Employer, the Employees only ever worked four days per week, and were paid a salary based on four ten-hour workdays.

18. The Employer presented Ms. Gallego with an employment agreement in November 2019 which she refused to sign. Ms. Gallego said that she felt insulted because she had been an employee for over 10 years without having the need for an employment agreement. Ms. Gallego's refusal to sign the agreement led to the end of the employment relationship. On November 17, 2019, Ms. Baylon's employment was terminated. The Employer paid both Employees their final pay, vacation pay and compensation for length of service.

19. Although Ms. Gallego agreed that she was paid accrued vacation pay and compensation for length of service, she contended she had not been paid what she was entitled to; however, she was unable to specify how much she was owed or on what basis.

20. Ms. Gallego asserted that she did housework that benefitted the entire household, as well as yard work, including chopping wood, as well as other tasks. She agreed that she occasionally worked at a nearby farm picking blueberries during harvest, but contended that she worked only in the mornings and was always home when Alexander woke up.

21. Ms. Baylon said that she did not understand how her monthly pay was calculated, but believed she was underpaid for working seven days per week. She said she did not raise her concerns with the Employer until her employment was terminated because she was concerned about her job. However, Ms. Baylon believed she was entitled to be paid an hourly wage and contended that she worked 13 ½ hours virtually every day between February 8 and September 21, 2019. After that time, Ms. Baylon said that she took some days off, but that many of her shifts were 24 hours in length. Ms. Baylon explained those shifts as being the ones where she slept in Alexander's room to ensure that she could attend to any issues during the night. Ms. Baylon estimated that Alexander required care during the night about 4-5 times per week.

22. Ms. Baylon said that the Employer presented no option to live outside the home, and that there was no opportunity to negotiate the amount of monthly rent.

Complaint investigation

23. The Director conducted an investigation into the Employees' complaints. In this case, the investigation followed a process whereby the first Director's delegate, Shane O'Grady (the "Investigative Delegate"), conducted an initial investigation, gathered evidence and information from the parties, and issued a "preliminary findings letter." Jordan Hogeweide, the Adjudicative Delegate, then assumed responsibility for reviewing submissions from the parties in response to the preliminary findings and issuing a final Determination.

24. On June 26, 2020, the Investigative Delegate issued a "preliminary findings letter" which made findings of fact, on a preliminary basis, regarding the Employees' hours of work and wage entitlement.

25. The Investigative Delegate indicated that he had preliminarily found as follows:

* the Employer did not maintain a record of hours of work for either Employee;

* The Employees worked seven days per week, from 10:30 a.m. until 12:00 a.m., from the commencement of their employment until September 21, 2019, after which they worked four days per week;
* The Employer did not pay overtime pay, statutory holiday pay or vacation pay to either Employee;
* The Employer improperly collected rent from the Employees; and
* The Employees had received their entitlements to compensation for length of service.

26. Although the Investigative Delegate did not expressly determine that the Employees were "domestics," given that other classifications of employees such as "sitters" and "residential care workers" are excluded from certain provisions of the *ESA*, it can be inferred that he also made that finding, as only domestics are entitled to overtime wages. Furthermore, the Investigative Delegate found that the *ESA* permitted an employer to charge domestics for room and board in certain circumstances. The preliminary findings letter also appeared to contain a finding that the Employees were domestics, as it referred to possible contraventions of the *ESA* related to the Employer's obligation to provide a domestic with a copy of the employment contract.

27. The preliminary findings letter invited the parties with a final opportunity to provide "all written argument and evidence" to the Investigative Delegate. The Society and the Employees made additional arguments and provided additional evidence to the Investigative Delegate.

28. On September 11, 2020, the Investigative Delegate separately advised the Society and the Employees that the Adjudicative Delegate would be taking over the file and that their reply submissions should be directed to the attention of the Adjudicative Delegate.

29. The Society and the Employees filed their reply submissions to the attention of the Adjudicative Delegate.

30. In the Determination, the Adjudicative Delegate states that the issue before him was whether the Employees were "sitters," "domestics," "live-in home support workers" or "residential care workers" as defined by the *ESA* and *Regulation*, and whether they were owed wages.

31. Although the Investigative Delegate made a preliminary determination that the Employees were "domestics," the Adjudicative Delegate concluded that, notwithstanding the fact that Ms. Baylon was registered as a domestic with the Employment Standards Branch (the "Branch") under section 15 of the *ESA*, the Employees "were employed solely to provide the service of attending to Alexander" in his residence and were thus not domestics:

> In the case at hand, I am satisfied that [the Employees] were employed solely to provide the service of attending to Alexander. By their own accounts, almost all their time each day was occupied caring for Alexander. Although I accept that [the Employees] performed some tasks, such as general housekeeping, which were not incidental to Alexander's care, I find that these tasks were more related to their relationships as members of the household than as employees of the Society…. I am not convinced that they contributed anything more than their fair share of cooking and cleaning. To put it another way, [the Employees] were not "domestics." They were

> not employed by the Society to provide cooking, cleaning, or childcare. They were specifically employed to care for Alexander and I am satisfied that is what they did. (Reasons at R.12)

32. The Adjudicative Delegate found that the Employees were not employed by a business, as the Society existed solely for the purpose of Alexander's care and well-being. The Adjudicative Delegate found that, because the Society did not constitute a business, the employees did not fall within the definition of "sitter":

> As [the Employees] were not domestics and were employed "solely" to care for Alexander in his private residence, they would fall within the plain language of the definition of sitter if they were not employed by a "business" or were not employed as another type of caregiver protected under the Act and Regulation.
>
> I find [the Employees] were not employed by a business. The Society is not a profit seeking venture. Its entire purpose is the care and wellbeing of Alexander.
>
> Although the Act does not define what "business" means, I am not persuaded the ordinary understanding of the term would include the circumstances of the Society. (Reasons at R.12 – R.13)

33. The Adjudicative Delegate also appeared to find that the Employees also fell within the definition of "sitter" before ultimately concluding that the employees were "residential care workers":

> I am satisfied that [the Employees] supervised and cared for Alexander in a family type residential dwelling. A plain reading of definition (sic) does not restrict the definition to group care settings. The McCormack home was a typical family home which had been slightly modified to meet Alexander's care needs. Accordingly, [the Employees] meet the criteria defining residential care workers.
>
> The definition of sitter in the Regulation does not expressly exclude residential care workers from also being sitters, even though they seem to be mutually exclusive occupations. The definitions in the Regulation should be interpreted and applied in a way that favours extending the Act's protection over restricting its protection. The Regulation restricts the Act's protection for both sitters and residential care workers. But the restriction on sitters is much more sever (sic), excluding them entirely from any protection under the Act. In such circumstances, when an employee appears to equally meet the definition of two conflicting provisions in the Regulation, the provision that extends the Act's protection should be preferred over one that restricts it.
>
> I am satisfied that [the Employees] fell within the definition of residential care workers and are entitled to the protection of the Act. Pursuant to section 34(x) of the Regulation, as residential care workers, [the Employees] were excluded from Part 4 of the Act (hours of work and overtime). (Reasons at R. 15)

34. Having found that the Employees were not entitled to overtime wages, the Adjudicative Delegate determined that the Employees were nevertheless entitled to regular wages for the work they performed as well as to rest periods as set out in section 22 of the *Regulation*.

35. There was no dispute that the Employer failed to maintain records of the Employees' hours of work as required under section 28 of the *ESA*. In the absence of proper records, the Adjudicative Delegate considered the evidence of the parties regarding the Employees' hours.

36. The Adjudicative Delegate determined that, while he was satisfied that the Employer scheduled rest periods for the Employees of eight or more consecutive hours, the Employer contravened the *Regulation* by failing to pay them additional wages for interruptions to their rest periods when they attended to Alexander during the night.

37. The Adjudicative Delegate noted that the parties disagreed about how frequently Alexander required assistance. In the absence of any records, the Adjudicative Delegate found it "more likely than not" that Alexander regularly required attention, as that is why a care worker slept next to him each night. He rejected the Employer's assertion that Alexander rarely required assistance. In the absence of any records, the Adjudicative Delegate found one interruption during the week was a reasonable estimation of how often a caretaker woke up to care for Alexander. He accepted the Employees' evidence that they worked less than two hours each time their sleep was interrupted.

38. The Adjudicative Delegate found that the Employees' wage rates were unclear, as neither had an employment contract. He noted that Ms. Baylon had never signed the LMIA contract or even saw it until the end of her employment. He further noted that while Ms. Baylon did receive the "Employment Details" document attached to the LMIA, she was paid $18.75 per hour according to her pay stubs, which was higher than the $17.50 per hour rate identified in the LMIA letter.

39. The Adjudicative Delegate accepted the Employees' evidence that from the start of Ms. Baylon's employment in February 2019 until September 20, 2019, the Employees worked every day with few exceptions. He determined that they did so because caring for Alexander was a demanding job, particularly for one person. He also noted J.E.'s evidence that the Employer preferred that there be two caregivers with Alexander at all times. The Adjudicative Delegate found that the Employer had failed to ensure that the Employees did not work in excess of the 40 hours per week for which they were paid, and also failed to maintain records of their hours of work.

40. The Adjudicative Delegate found, on a balance of probabilities, that although the Employees worked more than 40 hours per week, they did not work the excessive hours they claimed. Ultimately, the Adjudicative Delegate concluded that the Employees worked an average of 60 hours per week until September 20, 2019. He found that the estimate was "consistent with the evidence that Alexander had previously been cared for by three full-time, 40-hour week care workers," concluding that it was reasonable to assume that two care workers performing the same work previously performed by three would need to perform proportionately more work. The Adjudicative Delegate determined that the Employees were entitled to regular wages for the additional unpaid work in addition to the two hours owed on account of their work being interrupted during their breaks.

41. The Adjudicative Delegate noted that, beginning September 21, 2019 until their employment ended, only one of the employees would care for Alexander each shift, while the other took time off, with the exception of Saturday, when they worked together. Despite the change in schedule, the Employees were paid the same amount in wages. The Adjudicative Delegate wrote:

> …it does appear [from September 21, 2019] the parties adhered to a 4-day work week. But at the same time the work of caring for Alexander alone become more difficult and undoubtedly required more hours of work than when two care workers were with him…. given Alexander's waking hours and his extensive care needs, I believe a single person would not spend less than 12

> hours a day seeing to his care. Based on a 12-hour work shift, and the finding above that when two care workers cared for Alexander together they each worked an approximately eight and a half hour day, I calculate that [the Employees] worked an average of 45 hours each week, which was fewer than the excessive hours they worked before September 21, but was still more work each week than the 40 hours they were paid for. They are entitled to these additional regular wages… (Reasons at R.19)

42. The Adjudicative Delegate found that Ms. Balyon was entitled to statutory holiday pay, but that Ms. Gallego had been paid all the statutory holiday pay she was entitled to.

43. The Adjudicative Delegate also found that the Employees were entitled to additional compensation for length of service based on the additional wages he determined they were owed.

44. The Adjudicative Delegate further determined that the Employer contravened section 21 of the *ESA* in charging rent to the Employees, noting that living in the McCormack residence was a requirement of their employment and their rent was linked to their wages.

45. The Adjudicative Delegate further determined that the Employer was prohibited from requiring Ms. Baylon to pay for transportation costs from Dubai and found that this fee was recoverable from the Society. Although the Employer contended that this expense was found to be a business expense and that as a not-for-profit society it does not have business expenses, it does not appear that this finding is disputed. In any event, under the terms of the LMIA under which Ms. Baylon was hired, the Employer was responsible for Ms. Baylon's transportation costs.

46. The Adjudicative Delegate concluded that the Employer had not contravened section 8 of the *ESA* by misrepresenting the type of work, wages or conditions of employment. This aspect of the Determination is also not under appeal.

## ARGUMENTS AND ANALYSIS

47. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

48. Both the Employer and the Employees contend that the Director erred in law by misinterpreting and misapplying the definitions of "sitter," "domestic" and "residential care worker." The Employees contend they are properly classified as "domestics" and entitled to the overtime provisions of the *ESA*. The Employer argues that the Director erred in concluding that the Employees were more appropriately classified as "residential care workers" rather than "sitters."

49. The Employees also say that the Director failed to observe the principles of natural justice in failing to provide adequate reasons for his conclusion that they were not domestics.

50. The Director declined to make submissions on the issue of whether the Employees were "sitters," "domestics," "residential care workers," or some other classification "to avoid repeating arguments already made."

Error of Law

51. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam*), [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the Assessment Act];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

Did the Director err in finding that the Employees were "residential care workers"?

52. Section 1 of the *Regulatio*n defines sitter, live-in support work and residential care worker 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;
>
> "residential care worker" means 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;
>
> "sitter" means a person employed in a private residence solely to provide the service of attending to a child, or to a disabled, infirm or other person, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of
>
> (a) a business that is engaged in providing that service, or
>
> (b) a day care facility

53. Section 1 of the *ESA* defines "domestic" as a person who

(a) is employed at an employer's private residence to provide cooking, cleaning, child care or other prescribed services, and

(b) resides at the employer's private residence

54. While I agree that the legislative scheme presents classification challenges, I find that the Adjudicative Delegate erred in his conclusion that the Employees were residential care workers.

*Were the Employees "domestics"?*

55. I dismiss the Employees' assertion that the Adjudicative Delegate failed to observe principles of natural justice by not adequately explaining his reasons for his conclusion that they were not domestics. The Adjudicative Delegate's analysis was primarily an exercise in statutory interpretation based on the facts. Unless the Adjudicative Delegate acted on no facts or a view of the facts that cannot reasonably be entertained (and neither party makes this argument), I find that the Adjudicative Delegate's reasons were comprehensible.

56. The Employees were hired to care for Alexander in his own home, which is a private residence. There was no evidence that the Employees were hired to provide cooking or cleaning services. They were hired to care for an adult male living with disabilities. Although the Employees may have done some cooking and cleaning, the Adjudicative Delegate found that those services were incidental to their primary work of caring for Alexander.

57. The evidence before the Adjudicative Delegate was that although Ms. Gallego said that she did some housework which benefitted the entire family, she agreed that part of the housework was her personal responsibility as a member of the household rather than as an employee of the family. I find no error in the Adjudicative Delegate's conclusion in this respect.

58. Furthermore, given that Alexander is an adult living with physical, not mental, disabilities, the Employees cannot be found to be providing child-care services. The Employees suggest that because child-care is not defined in the legislation, the work performed by the Employees in caring for the Employer's child, who, by reason of his disability, is dependent upon his parents' support, should be considered child-care.

59. The phrase "or other prescribed services" is not defined in either the *ESA* or the *Regulation*. The Employees argue that this term should be given a broad interpretation and contend that the phrase "could apply to a range of activities, including those performed by the [Employees]."

60. While it is well established that protections of the *ESA* must be interpreted in a broad, generous and purposive manner (see for example, *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27), in my view, the phrase "or other prescribed services" cannot be interpreted in the manner contended by the Employees.

61. The *ejusdem generis* principle of statutory language specifies that when general language follows a series of more specific terms, the class of things referred to by the general language may be read down to refer to a narrower class of things to which the specific terms all belong.

62. The types of activities performed by the Employees were primarily designed to attend to Alexander's health and welfare, rather than cooking, cleaning or child-care. I agree with the Adjudicative Delegate's conclusion that the Employees were not domestics.

63. The *Regulation* sets out a number of categories of workers who are excluded from certain minimum protections of the *ESA*. As the Tribunal has said, any provisions that adversely impact on employees' benefit entitlements must be narrowly construed, and any uncertainties or ambiguities should be interpreted in a manner most consistent with the overall purpose of the *ESA*. (see *Machtinger v. HOJ Industries Ltd.,* [1992] 1 SCR 986, and *Helping Hands Agency Ltd. v. Director of Employment Standards* (1995) 131 DLR (4th) 336)

*Were the Employees "residential care workers"?*

64. The Employees argue that the Director erred in concluding that the Employer's private residence was a "family type residential dwelling" because the definitions of "sitter," "domestic" and "night attendant" all include the phrase "private residence."

65. The Employees say that because "family type residential dwelling" is "unique and separate language," the term refers to unique and separate circumstances. They contend that if the legislature intended "residential care worker" to include work performed at a private residence, it would have so stated. The Employees argue that if a "family type residential dwelling" is a private residence, then a residential care worker is someone who works and resides at a private residence and whose duties involve caregiving work. The Employees say that it is illogical for the *ESA* to contain two definitions for effectively the same type of work.

66. I agree with the Employees that the Adjudicative Delegate erred in concluding that the lower suite in which Alexander resided was a "family type residential dwelling." The suite was a part of the McCormack's private residence, not a workplace that was akin to a group home.

67. In *Renaud* (BC EST # D436/99), a case in which the facts are very similar to those before me, the Tribunal considered the Director's interpretation of a number of definitions contained in the *Regulation* including "live-in support worker," "sitter" and "residential care worker." The Tribunal member referred to the following comments made by Commissioner Mark Thompson in his February 1994 report "*Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia*" which formed the basis for the 1995 restructuring of the *ESA*:

> There are several bases for the distinctions among these workers. "Live-in home makers" are employed by agencies or businesses that provide homemaking services. These employees provide homemaking services on a 24-hour per day live-in basis. "Night companions" [attendants] are employed in a private residence where they have access to sleeping accommodation and provide care and attention to a "disabled person" no more than 12 hours out of 24. "Residential care workers" supervise or care for persons in a group home or "family type residential dwelling" and are required to reside on the premises during their employment. They house clients with mental, physical and social problems requiring care in small group settings. "Sitters" are employed in a private residence solely to care for a child or a disabled person. These persons may not be employed by an agency.

68. The Tribunal member in *Renaud* agreed with the Director's conclusion that the employee did not fall within the definition of a live-in support worker, night attendant, or residential care worker, finding that "family type residential dwelling" was akin to group care settings rather than an individual in a private residence.

69. I disagree with the Adjudicative Delegate's conclusion that the Employees were residential care workers. That leaves two remaining categories for consideration. The definition of sitter specifically excludes a "live-in home support worker" from being a sitter.

*Were the Employees "live-in home support workers"?*

70. As the Tribunal noted in *LMSCL Lower Mainland Society for Community Living,* 2020 BCEST 42, the definition of "live-in home support worker" includes five criteria.

71. The Employees clearly met three of those: they were employed by a not-for-profit society, that society provided home support services through a government funded program, and although Alexander was disabled, he did not require admission to a hospital.

72. The parties disagreed about whether the Employees provided services on a 24-hour live in basis, with the Adjudicative Delegate ultimately concluding that they did. J.E.'s evidence supported that finding and the Employer did not dispute that the Employees were required to work 24-hour shifts in rotation.

73. The Adjudicative Delegate determined that the Employees were not "live-in home support workers" because they were charged room and board: "I find that the monthly rent Ms. Baylon and Ms. Gallego paid to Mr. and Mrs. McCormack prevents the Society from relying on the live-in home support exclusion in the legislation." (Reasons at R. 13)

74. The Employer did not charge the Employees room and board; rather, the Employees paid room and board to the McCormacks. The room and board charged to the Employees was distinct from their employment agreement. Consequently, I find that the Adjudicative Delegate erred in finding that the Employees did not meet the criteria and that the Employees could be considered "live-in home support workers."

*Were the Employees "sitters"?*

75. The definition of sitter specifically excludes a "live-in home support worker."

76. The Employees were required to reside at Alexander's private residence during their 24-hour shift in order to provide care to him. The evidence is that they were employed "solely to provide the service of attending to a …disabled... person" and the Adjudicative Delegate concluded that, despite performing other tasks, that is what the Employees did. The Employees argue that the Adjudicative Delegate in fact found that they did work which went beyond caring for Alexander and, as a consequence, erred in his conclusion by interpreting the word "solely" as meaning "almost all." This interpretation has not been endorsed by the Tribunal (see also *Tanumihardjo* (BC EST # D241/02)). The Tribunal has consistently agreed that performing tasks incidental to the service of caring for a person did not exclude an employee from the definition of "sitter."

77. In *Kopchuk* (BC EST # D049/05, upheld on Reconsideration), the Tribunal wrote:

> The Tribunal has considered the scope of the definition of "sitter", but there remains some uncertainty about the extent to which an employee can also perform household duties, without thereby ceasing to be a sitter. In cases involving caregivers for disabled adults, the Tribunal has held that the performance of incidental tasks of caring for a dependent person, such as some cleaning and feeding, do not prevent that person from being a sitter, because they are included in "attending" to the dependent person: *Dolfi*, BC EST #D524/97; *Renaud,* BC EST #D436/99 (Reconsideration denied, BC EST #D373/00); *Wood*, BC EST #D176/00.
>
> However, if an employer requires the employee to perform other tasks of a housekeeping nature that are not directly linked to the care of a person, then the employee is not a sitter, and is protected by the *Act*: *Hampshire*, BC EST #D044/01; *McLellan,* BC EST #D438/98. Further, the Tribunal adopted a narrow interpretation of the definition in *Tikkanen*, BC EST #D433/02, on facts similar to those in this case, in that it involved the issues of whether a live-in caregiver for children…performed sufficient other household tasks to take her out of the definition of sitter. The Tribunal held as follows:
>
> …[T]he Tribunal is bound to interpret language excluding persons from the protections of the *Act* narrowly...

78. The Adjudicative Delegate found that while the Employees performed some tasks such as general housekeeping which were not incidental to Alexander's care:

> …these tasks were more related to their relationships as members of the household than as employees of the Society. [The Employees] resided full-time in the household and shared common areas and meals with the rest of the family. I am not convinced that they contributed anything more than their fair share of cooking and cleaning.

79. Factual findings are within the purview of a delegate and are not subject to appeal unless I find that a delegate acted on a view of the facts that cannot reasonably be entertained or acted without any evidence. I find that that there was evidence before the Adjudicative Delegate upon which he could rely for this conclusion.

80. There is no dispute that the Employees were not nurses, therapists, domestics or live-in home support workers. The Employees were also not employees of a business engaged in providing services to Alexander; rather, they were employees of the Society, a not-for-profit entity created solely to provide care for Alexander.

81. In conclusion, I find that the Adjudicative Delegate erred in finding that the Employees were residential care workers, since that classification is designed for employees in a group home or institutional setting. As the Employees worked in a private home, I find that they are better classified as "sitters."

82. As the Adjudicative Delegate noted, where an employee appears to fall within two possible classifications, the legislative scheme should be interpreted in a way which favours extending the protections of the *ESA*. Section 32 (1)(c) of the *Regulation* excludes protections of the *ESA* entirely for "sitters," while section 34 (q) of the *Regulation* excludes "live-in home support workers" only from Part 4 of the *ESA*.

83. Consequently, I would vary the Determination and remit the matter back to the Director to determine the Employees' wage entitlement, if any, accordingly.

Did the Director fail to observe the principles of natural justice?

84. Both parties advance arguments that the Adjudicative Delegate failed to observe the principles of natural justice in significantly departing from the Investigative Delegate's preliminary finding that the Employees were "domestics."

85. The Employees contend that the Director failed to properly investigate the issue of Ms. Gallego's wages from mid-November 2018 until January 31, 2019, while the Employer argues that the Adjudicative Delegate failed to disclose that the Employees were advancing a complaint about rest interruptions, denying it the opportunity to meaningfully respond.

86. The Employer also submits that the Investigative Delegate agreed that the Employees were only occasionally required to assist Alexander during the night and therefore understood that this aspect of the claim was being dismissed only to have the Adjudicative Delegate reach a different conclusion. The Employer contends that they were obliged to respond to what it characterizes as an "evolving claim" and that it was not given sufficient opportunity to respond to the conclusions of the second Adjudicative Delegate. Specifically, the Employer argues that it was not given the opportunity to submit information regarding the schedule when three caregivers were employed, the hours required to complete Alexander's care routine each day and the reasons a caregiver was required to sleep in Alexander's room. The Employer submits that this information would have affected the Adjudicative Delegate's conclusions. Similarly, the Employer contends that it was unaware that it had to respond to the issue of rest interruptions, as the Investigative Delegate "appeared to agree that the [Employees] were only occasionally required to assist Alexander during the night." The Employer submits that the Investigative Delegate's findings led it to believe that the claim for rest interruptions was being dismissed.

87. The Employer attached new evidence to its appeal submission on this issue. As I have concluded that the Adjudicative Delegate erred in finding that the Employees were "residential care workers," I find that the Adjudicative Delegate's finding in this respect is now no longer an issue.

88. The Employer also contends that because it was unaware that the Employees had asserted that there had previously been three full-time caregivers who worked 40-hour weeks, that it was not able to present evidence contradicting this assertion, denying them a full opportunity to respond.

89. The Adjudicative Delegate submits that the Investigative Delegate's preliminary findings letter was not a "Determination" under the *ESA* and that it did not award wages, enforce provisions of the *ESA*, impose penalties or dismiss the complaints. The Adjudicative Delegate notes that the Investigative Delegate notified the parties that it would be the Adjudicative Delegate who would be issuing the Determination after reviewing the parties' responses to the preliminary findings letter and acknowledges that the parties "would have reasonably expected that the subsequent determination would largely reflect the findings in the investigation report." However, the Director submits that "there is nothing in the report that promised [the investigating delegate] would not have changed his mind should he have issued a determination." The Adjudicative Delegate submits that after he was assigned to "the file," while he was

bound to consider the investigating delegate's preliminary findings and the evidence the findings were based on, he was "not bound to follow his findings." The Adjudicative Delegate submits that:

> To bind the decision-making officer to the preliminary findings of the investigating officer would defeat the major benefit of separating the roles of investigation and decision-making in the first place, which is to give the evidence and arguments a fresh assessment that is a step removed from the earlier investigation.

90. Noting the Employer's argument that the Director failed to observe principles of natural justice because the Investigative Delegate found that the Employees were "domestics" while the Adjudicative Delegate found that the Employees were "residential care workers," the Director submits that separating the investigative role from the adjudicative role is beneficial to procedural fairness.

91. The assigning of investigation responsibilities to one delegate and the adjudicative function to another is not a denial of natural justice. Indeed, in its December 2018 *Report on the Employment Standards Act,* the British Columbia Law Institute (the "Law Institute") found that the Branch's practice for one delegate to both investigate and adjudicate was "objectionable from the standpoint of procedural fairness in administrative law" because it gave rise to "a reasonable apprehension of bias at an institutional level." (at p. 260). The Law Institute recommended that a determination of the Director should be made by a delegate other than the delegate who conducted the investigation.

92. However, I do not understand either the Employer or the Employees to be arguing that the differentiation of the roles is, in itself, a denial of natural justice. Rather, they contend that it was unfair for the first delegate to make certain factual findings and a second delegate to make fundamentally different findings without either giving reasons for doing so, or giving the parties an opportunity to respond to the issues that potentially flowed from the Adjudicative Delegate's findings, where those differed from the Investigative Delegate's preliminary findings. Furthermore, although the Director contends that the Investigative Delegate "made no specific finding" as to the Employees' job categorization, the Investigative Delegate did outline preliminary findings about what sections of the *ESA* had been contravened as well as wages that were likely owed. The Investigative Delegate's factual findings, whether preliminary or not, cannot be made without an underlying conclusion about whether or not the Employees were "domestics" and thus entitled to, for example, overtime protections of the *ESA*, or some other classification.

93. While the parties were given the opportunity to respond to the preliminary findings, they were not given an opportunity to respond to the Adjudicative Delegate's conclusions which differed from those made by the Investigative Delegate. Given that the altered conclusions had significant consequences for the parties, I find that the parties ought to have been given a second opportunity to respond.

94. The Investigative Delegate, in the preliminary findings letter, further wrote that, following further submissions, he would be making a formal determination (my emphasis). As the Director notes, there are many reasons a new delegate may assume the conduct of either an investigation or an adjudication. However, if significant information has been submitted to the Director on complex issues, as it occurred in this case, parties have a reasonable expectation that a second delegate will not alter factual findings without affording the parties a reasonable opportunity to respond. The Employer asserts that after the Adjudicative Delegate assumed conduct of the file, he assured them he would contact the Society once

he completed his review of the case, leaving the Employer to believe that there would be a final opportunity to provide information. On appeal, the Society has submitted additional information, as new evidence, which it contends would have been presented to the Adjudicative Delegate had it been given the opportunity to do so.

95. I also note that after the file was transferred from the Investigative Delegate to the Adjudicative Delegate, the Adjudicative Delegate spoke to six individuals, presumably gathering additional evidence, contrary to his statement that he was "bound to consider [the Investigative Delegate's] preliminary findings and the evidence these findings were based on." In my view, far from achieving what was recommended by the Law Institute, each of the delegates performed both adjudicative and investigative functions, leading the parties to some uncertainty about what they were to respond to.

96. Furthermore, the first (or investigative) delegate found that while there was some evidence the Employees "would occasionally perform work between 12:00am and 10:30am, I find there is insufficient (sic) to determine what hours they may have worked between those hours." Despite this preliminary finding, the Adjudicative Delegate arrived at a contrary conclusion, making findings about the number of hours the Employees worked during the night:

> I find it more likely than not that Alexander regularly required attention during the night. That is why a care worker slept next to him every night. By sleeping next to him, a care worker would be awoken by his irregular breathing or by alarms from his medical equipment and be able to attend to him. I disbelieve the Society that this was a rare occurrence. The Society would not require that someone sleep next to Alexander if it was very unlikely he would require care during the night.

97. The findings of the Investigative Delegate led the Employer to tailor its subsequent submissions in a way that addressed the issues as they understood them to be. For example, upon receiving the preliminary findings letter, it fairly would have understood that it was no longer required to provide evidence about the hours the Employees worked between 12:00 am and 10:30 am. I agree with the Employer that fairness required the Adjudicative Delegate to inform the parties that he was not in agreement with the preliminary findings letter and had arrived at a different conclusion on that point, and offered the parties a further opportunity to respond before issuing a final Determination. Absent that information, parties will understand that findings of fact as expressed in the preliminary findings letter will be confirmed by the adjudicative decision maker, or at least form the basis for the adjudication.

98. I note, in this respect, recent amendments to the *ESA* in effect "codify" this requirement. Section 78.1 provides that, after completing the investigation of a complaint, the Director must provide a written summary of the Director's findings to the person who made the complaint as well as the person against whom the complaint was made and offer them an opportunity to respond. The Director must consider any responses in making the determination.

99. In support of its appeal, the Employer submitted additional documentation it says it would have presented to the Adjudicative Delegate had it fully understood both the issues as well as the fact it would not have any further opportunity to respond.

100. While I appreciate that the process adopted by the Director in these appeals was confusing, I find that the parties had many opportunities to present their arguments and any evidence in support of those

arguments. I also find that any failure to observe the principles of natural justice has been cured on appeal as the parties have had full opportunity to present their arguments.

101. In light of my conclusions above, I find it unnecessary to address the other grounds of appeal.

102. Section 78(1)(a) provides that the Director may assist in settling a matter investigated under section 73.1 or a complaint made under section 74. Section 114 (2)(b) of the *ESA* provides that, after an appeal is requested but before considering that appeal, the Tribunal may recommend that an attempt be made to settle this matter. I appreciate that addressing these complaints has been both challenging and time-consuming for all parties, both at the initial complaint stage as well as during the appeal. In keeping with the spirit and intent of sections 78(1)(a) and 114(2)(b) of the *ESA*, I would recommend that the parties attempt to resolve the outstanding issues between themselves, either with or without Branch or Tribunal assistance.

## ORDER

103. Pursuant to section 115 of the *ESA*, I allow the appeals, in part as noted in my reasons above, and refer the matter back to the Director.

**Carol L. Roberts**
**Member**
**Employment Standards Tribunal**