Citation: Anilyn Baylon and Caroline Gallego (Re)
2022 BCEST 57

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by –

Anilyn Baylon and Caroline Gallego
("The Employees")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL: Robert E. Groves

FILE NOS.: 2022/002 and 2022/003

DATE OF DECISION: September 9, 2022

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. Anilyn Baylon and Caroline Gallego (the "Employees") have applied for a reconsideration (the "Application") of a decision of the Employment Standards Tribunal (the "Appeal Panel") dated December 10, 2021 (the "Appeal Decision"), referenced as 2021 BCEST 97. The Application is brought pursuant to section 116 of the *Employment Standards Act* (the "*ESA*").

2. The matter arose following complaints (the "Complaints") delivered to the Director of Employment Standards (the "Director") by the Employees alleging that their former employer, Alexander McCormack Client Support Group Society (the "Employer"), had failed to pay them wages and compensation for length of service that were owed, improperly charged them for some of its business costs, and misrepresented terms of employment.

3. In a determination issued on March 5, 2021 (the "Determination"), a delegate of the Director (the "Adjudicative Delegate") found that the Employer had contravened the *ESA* and ordered that it was required to pay wages and other compensation, interest, and penalties in an amount totalling $63,438.04.

4. The Employees and the Employer filed appeals of the Determination.

5. The Appeal Decision allows the appeals, in part. The Appeal Panel found that the Determination revealed an error when it held that the Employees had performed a type of employment for the Employer defined in the *Employment Standards Regulation* (the "*ESR*") that was inapplicable in the circumstances. Accordingly, the Appeal Panel varied the Determination, and referred the matter back to the Director to determine the Employees' wage entitlements, if any.

6. I have before me the Employees' appeal form and their Application, their submissions in support of both, submissions from the parties in the appeal proceedings and on the Application, the Determination, and its accompanying Reasons (the "Reasons"), the Appeal Decision, and the record the Director was obliged to deliver to the Tribunal pursuant to section 112(5) of the *ESA*.

FACTS

7. Unless stated otherwise, I accept the facts as set out in the Adjudicative Delegate's Reasons, and in the Appeal Decision. What follows is a necessary summary.

8. The Employees are caregivers. They were hired by the Employer to provide essential 24-hour monitoring and personal care for Alexander McCormack ("Alexander"), who suffers from Duchenne Muscular Dystrophy.

9. Alexander's parents (the "McCormacks") own and occupy a home where Alexander resides in a self-contained suite. The McCormacks are two of the five directors of the Employer. The Vancouver Coastal Health Authority funds the Employer in support of Alexander's care through a Ministry of Health program called Choice in Support of Independent Living ("CSIL").

10. Ms. Gallego commenced her work for the Employer in 2009. Ms. Baylon was hired early in 2019. Together, they cared for Alexander until they were both dismissed in November 2019.

11. During their tenure the Employees resided in the McCormacks' home, and it was to the McCormacks that the Employees paid a monthly rent for their accommodations.

12. The principal legal issue confronting the Adjudicative Delegate was the proper characterization of the Employees' work for the purposes of the *ESA* and the *ESR*. More specifically, the Adjudicative Delegate was required to determine whether the Employees were "sitters", "live-in home support workers", "residential care workers", "domestics", or general employees.

13. An accurate characterization of the work the Employees performed was important. If the Employees were "sitters" they would be entirely excluded from the protections provided in the legislation. If they were "live-in home support workers" or "residential care workers" then Part 4 of the *ESA* containing protections relating to hours of work and overtime would have been inapplicable. If the Employees were characterized as "domestics" they would have been entitled to all the minimum protections set forth in the statutory scheme. A similar result would have occurred if it were to be determined that the Employees' work fell within no such special category, and they simply worked as general employees.

14. At all relevant times, the definitions of the term's "sitter", "live-in home support worker", and "residential care worker" appeared in section 1 of the *ESR*, and they read as follows:

> **"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
>
> **"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

15. Section 1 of the *ESA* defines the term "domestic". The definition reads:

> **"domestic"** means 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

16. The Employees claimed that they were "domestics" for the purposes of the legislation. The Employer asserted that the Employees were "sitters", but if they were not, then they were, in the alternative, either "live-in home support workers" or "residential care workers".

17. The Adjudicative Delegate decided that the Employees were not "domestics" because they were not employed to provide cooking, cleaning, or childcare. Instead, they were employed to care for Alexander, an adult. The Adjudicative Delegate expressly found that while the Employees did perform some general housekeeping, cooking, and cleaning in the McCormacks' home, these tasks were "more related to their relationships as members of the household than as employees…". The Adjudicative Delegate reached this conclusion because the Employees "resided full-time in the household and shared common areas and meals with the rest of the family." Accordingly, the Adjudicative Delegate was "not convinced that they contributed anything more than their fair share of cooking and cleaning" (R12).

18. Having decided that the Employees were employed "solely" to care for Alexander, the Adjudicative Delegate concluded that they were "sitters" for the purposes of the statute, and exempted from its protections, unless the Employer was shown to be conducting a "business", or the work the Employees performed could also be characterized as being of a type protected by another defined category within the legislative scheme (R12).

19. The Adjudicative Delegate found that the Employer was not a "business" for the purposes of the definition of "sitter", as it was not "a profit seeking venture." Rather, its entire purpose was to provide for the care and wellbeing of Alexander (R12).

20. The Adjudicative Delegate also determined that the Employees were not "live-in home support workers" because they paid rent to the McCormacks. The analysis of the Adjudicative Delegate in support of this conclusion is captured in the following excerpt from his Reasons (R13):

> 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 worker exclusion in the legislation. The McCormacks are directors of the Society and are Alexander's parents. The entire McCormack house is used for Alexander's care. The documents in the record, including the LMIA, the

> "employee contract" attached to the Society's LMIA application, and the Society's application it provided to Able Nannies, establish that the Society intended for the caregivers to reside at the McCormack household. It was an integral part of the job. The Society wanted the caregivers to be part of the family. Ms. Baylon and Ms. Gallego provided their services on a 24 hour per day live-in basis, but they were charged rent for doing so.

21. However, the Adjudicative Delegate decided, in the alternative, that the work the Employees performed did render each of them a "residential care worker" according to the definition for that type of work appearing in section 1 of the *ESR*. The point of contention concerning this category of work involved the correct answer to the question whether the McCormacks' home was a "family type residential dwelling" as required by that definition. The Adjudicative Delegate concluded that it did. He said this (R15):

> I am satisfied that Ms. Baylon and Ms. Gallego supervised and cared for Alexander in a family type residential dwelling. A plain reading of [sic] definition 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, Ms. Baylon and Ms. Gallego meet the criteria defining residential care workers.

22. As the Adjudicative Delegate decided that the work of each of the Employees could properly fall within the definitions of both "sitter" and "residential care worker" he needed to make a choice regarding which employment category should apply, because a "sitter" was exempted entirely from the protections in the statute, while a "residential care worker" was merely exempted from enjoying the protections relating to hours of work and overtime.

23. The Adjudicative Delegate determined that the Employees' status as "residential care workers" should be applied for the purpose of resolving the Complaints, and not according to his finding that the Employees were also "sitters". The Adjudicative Delegate said this (R15):

> 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.

24. Having found that the Complaints should be decided on the basis that the Employees were "residential care workers", and therefore disentitled to wages for overtime hours, the Adjudicative Delegate considered the evidence tendered and calculated the other regular wages owed to the Employees accordingly. In so doing, the Adjudicative Delegate determined that the Employer had failed to pay the Employees for all the work they had performed, for interrupted rest periods, for aspects of statutory holiday pay, and for all the compensation for length of service to which they were entitled. In addition, the Adjudicative Delegate concluded that the Employees should recover the amounts the Employer had improperly charged the Employees for rent, and that the cost of a plane ticket Ms. Baylon was required to absorb to enter Canada to commence her employment should be reimbursed to her, pursuant to section 21 of the *ESA*.

25. The Employees and the Employer appealed the Determination pursuant to section 112 of the *ESA*. Each of these parties argued that the Determination revealed errors of law.

26. The Employees contended that they should have been determined to be "domestics". The Employees also claimed that the Adjudicative Delegate failed to observe the principles of natural justice because he neglected to provide adequate reasons for his conclusion that the Employees' work did not satisfy the requirements defined for this employment category.

27. The Employer asserted that the Adjudicative Delegate erred in concluding that the Complaints should be resolved on the basis that the Employees were "residential care workers" rather than "sitters".

28. Each of the parties also claimed that the investigation of the Complaints was flawed, and principles of natural justice were breached, because the Adjudicative Delegate reached different conclusions in the Determination than the parties believed would follow from preliminary findings issued by another delegate (the "Investigative Delegate") who had initially been appointed to have conduct of the matter.

29. The Appeal Panel affirmed that the Employees were not "domestics" because, as the Adjudicative Delegate had decided, "[t]he 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" (Appeal Decision, paragraph 62).

30. The Appeal Panel did state that "[a]lthough the Employees may have done some cooking and cleaning, the Adjudicative Delegate found those services were incidental to their primary work of caring for Alexander" (Appeal Decision, paragraph 56). The Appeal Panel noted, too, that while the Adjudicative Delegate found the Employees performed other tasks, such as general housekeeping, that were not incidental to Alexander's care, these tasks were "more related to their relationships as members of the household than as employees…" (Appeal Decision, paragraph 78). The Appeal Panel discerned no reviewable error in these findings of fact made by the Adjudicative Delegate (Appeal Decision, paragraphs 57 and 79).

31. The Appeal Panel also stated that the "domestic" definition did not apply because Alexander was an adult living with physical, not mental, disabilities, and so the services provided by the Employees could not reasonably be construed as "child care" (Appeal Decision, paragraph 58).

32. The Appeal Panel observed further that the phrase "or other prescribed services" appearing in the definition was undefined, but that the application of the *ejusdem generis* principle of statutory interpretation meant that such general language must be circumscribed so as to refer to a narrower class of duties to which the more specific terms "cooking", "cleaning", and "child care" belonged, and not some broader, more expansive class of responsibilities which might facilitate a conclusion that the Employees were indeed "domestics" (Appeal Decision, paragraphs 59-61).

33. The Appeal Panel declined to accept the Employees' submission that the Adjudicative Delegate failed to provide adequate reasons for his conclusion that the Employees were not "domestics". The Appeal Panel found that the Adjudicative Delegate's reasons were comprehensible (Appeal Decision, paragraph 55).

34. The Appeal Panel determined that the Adjudicative Delegate erred in concluding that the Employees were "residential care workers" (Appeal Decision, paragraph 69). The Appeal Panel agreed with the submission of the Employees that the use of the term "family type residential dwelling" as a location where a "residential care worker" performs work is unique to that definition, and so it must therefore be a different type of workplace than the "private residence" venues for work that are identified in the definitions of the work performed by "sitters" and "domestics" (Appeal Decision, paragraphs 64 and 65). The Appeal Panel concluded that a "family type residential dwelling" must refer to a work location that was more akin to a "group home" or "group care setting", rather than a "private residence" like the McCormacks' home housing a single individual needing care like Alexander (Appeal Decision, paragraphs 66-68).

35. The Appeal Panel also decided that the Adjudicative Delegate erred in concluding that the Employees were not "live-in home support workers". The reason the Adjudicative Delegate gave for his finding was that the Employees paid rent. The Appeal Panel noted, however, that the Employees did not pay rent to the Employer. Instead, they paid rent to the McCormacks. The Appeal Panel also observed that "[t]he room and board charged to the Employees was distinct from their employment agreement". Accordingly, the Appeal Panel determined that the Adjudicative Delegate erred in finding that the terms of employment for the work performed by the Employees did not meet the criteria establishing that they were "live-in home support workers" (Appeal Decision, paragraphs 73-74).

36. The Appeal Panel concluded, as had the Adjudicative Delegate, that the Employees could also be characterized as "sitters". In doing so, the Appeal Panel followed Tribunal authority holding that the performance of tasks incidental to the service of caring for a disabled person may not disqualify an employee from being characterized as a "sitter" if the tasks can be justified as necessary "to provide the service of attending to" that person (see *Tanumihardjo*, BC EST #D241/02, and *Kopchuk*, BC EST #D049/05). As for the other general housekeeping tasks the Employees performed, the Appeal Panel affirmed the Adjudicative Delegate's finding of fact, based on evidence on which he could properly rely, that because these tasks were performed as members of the McCormack household, and not as employees of the Employer, and constituted no more than the Employees' "fair share of cooking and cleaning", they were insufficient to oust a conclusion that the Employees were "sitters" (Appeal Decision, paragraphs 76-81).

37. Given that the Appeal Panel decided, as had the Adjudicative Delegate, that the work the Employees performed could be characterized as the work of "sitters", which precluded a remedial claim under the *ESA*, and also the work of another category of employee, in this case the work of "live-in home support workers" which, like the work of "residential care workers", only disentitled the Employees from seeking benefits under Part 4 of the statute, it was also necessary for the Appeal Panel to decide which employee classification to apply in the circumstances. Here, the Appeal Panel noted the identification of the proper classification was facilitated by the fact that the definition of "sitter" expressly excludes from its ambit employees who are determined to be "live-in home support workers" (Appeal Decision, paragraph 75). In addition, like the Adjudicative Delegate, the Appeal Panel determined that "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*" (Appeal Decision, paragraph 82). By inference, this meant that the Employees' wage entitlement, if any, should be calculated on the basis that they had performed work as "live-in home support workers". Accordingly, the Appeal Panel ordered that the

matter be referred back to the Director so that this calculation might occur (Appeal Decision, paragraphs 83 and 103).

38. Regarding the alleged differences between the preliminary findings delivered by the Investigative Delegate, and factual findings leading to other legal conclusions in the Determination issued by the Adjudicative Delegate, the Appeal Panel acknowledged that the Adjudicative Delegate ought to have given the parties a further opportunity to respond if, as it happened, he determined to conduct a further investigation and to reach different conclusions than those contained in the Investigative Delegate's preliminary findings (Appeal Decision, paragraph 93). However, the Appeal Panel also said this (Appeal Decision, paragraph 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.

ISSUES

39. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

(a) Does the request meet the threshold established by the Tribunal for reconsidering a decision?

(b) If so, should the decision be confirmed, cancelled, varied, or referred back to the original panel or another panel of the Tribunal?

ARGUMENTS

40. The Employees submit that the Appeal Decision should be varied. They argue that the Appeal Panel erred when it:

(a) affirmed the Adjudicative Delegate's conclusion that the Employees could be classified as "sitters";

(b) affirmed the Adjudicative Delegate's conclusion that the Employees were not "domestics";

(c) determined that the Employees should be classified as "live-in home support workers";

(d) did not consider the Employees' submission that they should be entitled to wages for time spent at night "on call" while sleeping in Alexander's bedroom; and

(e) did not consider the submission made on behalf of Ms. Gallego that she was entitled to wages for work performed from mid-November 2018 until January 31, 2019.

41. Regarding the "sitter" issue, the Employees assert that since the Adjudicative Delegate found there was some employment work performed by the Employees that was neither incidental to Alexander's care, nor related to their relationship as members of the McCormack household, it cannot be said that the Employees were employed "solely" to attend to Alexander. The Employees base the argument they performed employment work that was not incidental to attending to Alexander on the wording chosen by the Adjudicative Delegate in the Reasons (R12) that the non-incidental work was "more related" to the

Employees' position as members of the McCormack household than as employees. The Employees submit that since the words "more related" are not the same as "exclusively related", it means the Adjudicative Delegate should not have concluded, nor should the Appeal Panel have affirmed, that the Employees were "sitters".

42. The Employees acknowledge that since the Appeal Panel decided the Employees' claims should be determined on the basis they were "live-in home support workers", and not as "sitters", the Appeal Panel's affirming that the Employees could be classified as "sitters" may be irrelevant to the financial award made in this case. However, the Employees argue that the correct interpretation of the wording of the definition of "sitter" in the *ESR* raises an important question of law which should be resolved by the Tribunal in this Application.

43. Regarding the Appeal Panel's decision to affirm the Adjudicative Delegate's determination that the Employees were not "domestics", the Employees argue that the Appeal Panel's interpretation of the phrase "other prescribed services" in the definition in a way that precludes care services for adults is too narrow. The Employees contend that the intent of the legislature in revising the definition of "domestic", following the 1994 Report of Commissioner Mark Thompson reviewing employment standards provisions in British Columbia, was to include within the ambit of the term persons who provide care for people with disabilities, so long as the other criteria within the definition are met. The Employees ground this claim on a reference in the Report to requirements imposed by Canadian immigration authorities that work permits for foreign live-in domestics might be issued to employers who have children under the age of 15 years, or elderly or disabled persons residing with them. The Employees say that since the legislature adopted the Commissioner's recommendations regarding the term "domestic", it must be deemed to have understood the term to refer to individuals caring for young children, but also to persons who provide care for elderly or disabled persons.

44. The Employees bolster their argument on this point by observing that Ms. Baylon's contract of employment indicated she would receive overtime wages after 40 hours of work, which is consistent with an intention that she was to be employed as a "domestic" or, if not, as a general employee, and not in a classification that would restrict her entitlement to benefits provided for in the *ESA*.

45. Regarding the Employees' submission that the Appeal Panel erred in deciding that the Employees were "live-in home support workers", the Employees say that no party appealed the Adjudicative Delegate's determination to the contrary, and while the Employer did begin to assert that the Employees were "live-in home support workers" in a subsequent submission within the appeal proceedings, the Employees contend that the issue was not properly before the Appeal Panel and so the Adjudicative Delegate's determination on the point should not be disturbed.

46. On the merits concerning this issue, the Employees argue that evidence before the Adjudicative Delegate tied the issue of rent to their employment arrangements, rendering the "live-in home support worker" definition inapplicable. They say, too, that the Appeal Panel's decision the Employees were "live-in home support workers" because their rent was paid to the McCormacks, and not to the Employer, emphasizes the form of the rental arrangements made with the Employees, rather than their substance. Like the Adjudicative Delegate, whose rationale for his determination on this point is excerpted above, the Employees say that while the Employer is a separate legal entity from the McCormacks, it was the McCormacks who, as directors of the Employer, "had exertive control" over the Employer's decisions, and

it was the McCormacks who gave instructions to the Employees regarding their employment. The Employees say, therefore, that "[f]or all intents and purposes, the McCormacks to which they paid rent, were Ms. Baylon and Ms. Gallego's true Employers."

47. The Employees say that the issue of the identity of the legal recipient of rent paid by foreign workers like them raises important public policy concerns. They assert that if individuals like the McCormacks, who the Employees say were their employer in substance in this case, can create rental arrangements separate and distinct from the employment relationships entered into with the persons providing services on a "live-in" basis, it augments the risk that foreign workers like the Employees, being persons who are already in a vulnerable position, may be exploited and abused.

48. The Employees assert further that the Appeal Panel neglected to address an issue raised by them in their appeal. They say they argued that the Adjudicative Delegate fell into error when he did not award them wages for time spent by them sleeping at night "on call" in Alexander's bedroom. The Employees contend that time spent in this way constitutes work, because they were "on duty", and it is not, therefore, properly characterized as time spent "on call" at all. Alternatively, the Employees argue that if that time is, indeed, time spent "on call", it is compensable under the *ESA* because the definition of "work" in section 1 of the statute includes a provision which makes it clear an employee is at work while on call at a location designated by an employer unless the designated location is the employee's residence. Here, the Employees submitted that sleeping in Alexander's bedroom, to be available to attend to him should he require care at night, was work for which they should be paid wages, because that location was not a part of the McCormack home which was their "residence". The reason given by the Employees in the appeal proceedings was they had no expectation of privacy or control in Alexander's room. Instead, they argued the only truly private spaces over which the Employees exercised personal control in the McCormack home, which they asserted should be designated as their "residences" for the purposes of analysis of this issue, were the private bedrooms individually assigned to them.

49. The Employees say the Appeal Panel should have addressed this issue in the Appeal Decision, but it did not do so.

50. In the appeal proceeding the Employees also challenged the Adjudicative Delegate's determination that Ms. Gallego's claim for wages for the period from mid-November 2018 until January 31, 2019, should be dismissed for lack of evidence, and because Ms. Gallego did not advance a claim for unpaid wages earned by her during this period. The Employees argued that the Adjudicative Delegate's statement that Ms. Gallego did not advance a claim for wages for this period is incorrect. The Employees argued further that the Adjudicative Delegate's conclusion that further evidence was required to substantiate a claim "was inconsistent with his other findings and also demonstrated a failure on his part to properly investigate the matter."

51. Here, too, the Employees submit that the Appeal Panel should have addressed this issue, but it neglected to do so.

52. The Employees have not challenged the determinations made in the Appeal Decision regarding alleged failures to observe the principles of natural justice in the proceedings leading to the issuance of the Determination.

53. The Employer argues that several of the submissions included in the Application simply repeat positions taken, and rejected, in the appeal proceedings.

54. The Employer challenges the Employees' submission that the Employees should not have been found to be "sitters". The Employer takes issue with the Employees' assertion that the Adjudicative Delegate determined some of the employment work performed by the Employees was neither incidental to attending to Alexander nor household duties to be expected from anyone residing in the McCormacks' home. Rather, the Employer asserts the Adjudicative Delegate stated explicitly that the Employees were employed solely to care for Alexander, and that is what they did.

55. The Employer submits that any "light housekeeping and laundry" duties referred to in Ms. Baylon's job description described work that was incidental to the "daily care of a disabled man". It notes that the Tribunal has held more than once that the performance of incidental tasks of this sort may not disqualify a person from being found to be a "sitter".

56. The Employer notes the fear expressed by the Employees that the Adjudicative Delegate's finding, affirmed by the Appeal Panel, that the performance of non-incidental household tasks may also fail to disqualify a person from being found to be a "sitter", if the tasks are found to operate outside the scope of an employment relationship, will encourage employers to structure their dealings with employees in this way to avoid paying wages for this work. The Employer submits that such a fear cannot be reasonably entertained, at least on the facts as found by the Adjudicative Delegate in this case. The Employer also points to the fact that both the Adjudicative Delegate and the Appeal Panel acknowledged they were bound to interpret narrowly provisions in the legislative scheme excluding persons from its protections.

57. The Employer refutes the Employees' submission that a finding the Employees were "sitters" expands the scope of the type of work which might fall within the definition, thereby depriving a further class of employees from the protections set out in the *ESA*. The Employer argues that this assertion rests on a flawed perception that some of the vital work tasks the Employees performed, including, for example, steps taken to protect Alexander from infection, were not "incidental" to his care.

58. The Employer contends that the Employees' claim they worked as "domestics" is flawed because it is based on the incorrect premise Alexander resides with the Employer. The Employer says it is a non-profit entity without a residence. It asserts that Alexander is an adult male who is able, via the funding provided by CSIL, to reside independently in a self-contained in-law suite located in a home owned by his parents.

59. The Employer does not specifically state that it supports the Appeal Panel's decision the Employees were "live-in home support workers". However, I infer that this is its position based on the arguments it presents in opposition to the Employees' submissions they should not be so classified.

60. Regarding this issue the Employer says there was no requirement specifying where the Employees must reside. All the Temporary Foreign Worker Program required for the Employer to hire the Employees was that affordable and suitable accommodation was made available to them.

61. The Employer asserts there was no evidence submitted establishing that the McCormacks constituted the Employees' "true Employers", or that section 95 of the *ESA* regarding the liability of associated employers was applicable in the circumstances. The Employer submits the evidence revealed that the McCormacks

are but two of five of the Employer's directors, that the board of the Employer meets frequently, that all the directors participate in its affairs, and that many of the decisions relating to Alexander are the result of consultation with, the participation of, and directions from, his team of healthcare professionals, independent payroll services, and CSIL.

62. Regarding the issue whether the Employees should have been paid wages for time spent at night "on call" while sleeping in Alexander's bedroom, the Employer submits that if, as the Appeal Panel determined, the Employees were "live-in home support workers", by definition they were to provide services on a 24 hour per day basis, in return for which they would receive a fixed rate of pay, regardless of the hours worked. In such circumstances, it would be unreasonable for the Employees to expect that extra wages should be paid for any hours within the 24 hours when they were sleeping. The Employer also queries how it could be construed to be unfair, or an unreasonable exercise of control, for an employer to provide sleeping accommodation to a "live-in home support worker".

63. In addition, the Employer submits that since the Appeal Panel also found the Employees could be classified as "sitters", to whom the protections of the *ESA* are entirely inapplicable, there would be no need for the Appeal Panel to address a concern relating to "on call" work on this ground either.

64. Regarding the Employee's contention that the Appeal Panel should have addressed the issue whether Ms. Gallego was entitled to wages for work performed from November 2018 until January 31, 2019, the Employer states that if the referral back order in the Appeal Decision is affirmed it would request an opportunity to provide evidence that Ms. Gallego was adequately compensated during this period.

65. The Adjudicative Delegate has delivered a submission stating that the Director is in agreement with the Appeal Decision, and declines to provide a comprehensive reply to the arguments presented by the parties to the Application. The Adjudicative Delegate suggests, however, that recent amendments to the *ESR* have diminished the probability that any decision in this matter may establish "a dangerous precedent" for future cases involving at least some of the categories of work presently under consideration.

66. The Employees have delivered a submission in final reply. It acknowledges that it relies largely on submissions previously delivered in the appeal proceedings, and in this Application.

67. Regarding the "sitter" issue, the Employees again argue that the household chores they performed were integral to their employment, and since many of those chores were not incidental to attending to Alexander's care, the "sitter" definition was inapplicable to them. They disagree with the Adjudicative Delegate's comment that changes to the *ESR* may have negated the precedent value of any decision made on this Application regarding the language of the definition of "sitter". Instead, they submit that despite the amendments, there will continue to be situations where existing precedents will apply.

68. The Employees repeat their argument the Adjudicative Delegate's finding, affirmed by the Appeal Panel, that the Employees' household work was separate and distinct from their employment as Alexander's caregivers is "alarming" because it will encourage employers to assign unpaid household duties and yet continue to permit them to maintain that the employee so affected is working as a "sitter" without access to the protections of the *ESA*. Apart from the fact the Employees say this constitutes a "dangerous precedent", they also submit it was a conclusion the Adjudicative Delegate reached that cannot be reasonably entertained, on the evidence.

69. The Employees supplement their argument they were "domestics" by asserting that the definition is satisfied because the Employees resided in the same residence as Alexander, and Alexander had decision-making control over his care. The Employees contend, therefore, that Alexander should be considered their employer or, alternatively, as an agent of the employer.

70. The Employees repeat their submission that the Employees were not "live-in home support workers". They again assert that the McCormacks, or perhaps only Mrs. McCormack, should be construed to be their employer. They argue that there was evidence supporting a finding that such a relationship was what the parties intended. They say, too, that since the Adjudicative Delegate found that "living in" was an "integral part of the job" for the Employees, and the entire McCormack house was used for Alexander's care, it cannot be accepted, as the Employer has asserted, that there was no requirement the Employees reside in the McCormack residence, or that there was a separation between the Employees' living quarters and their employment. On this view of the facts, the Employees say they were paying rent to live in the same location where they were providing care for Alexander. If this was not the case, the Employees argue it cannot be said they were "living in", as the definition for "live-in home support worker" requires. They say, therefore, it was incorrect for the Appeal Panel to decide that the rent the Employees paid was distinct from their employment relationship.

71. The Employees dispute the Employer's submission that since they were found to be "live-in home support workers" by the Appeal Panel, they cannot be entitled to extra wages for "on call" work at night because the work was provided on a 24 hour live-in basis. The flaw in this submission, the Employees contend, is that it is inconsistent with the Adjudicative Delegate's finding the Employees were hired on the basis they would be paid an hourly, rather than a daily, rate. They point out that the statute provides for a minimum daily wage for live-in home support workers, but no maximum wage. This means that the Employees should be compensated for all the hours they worked, including hours worked while "on call".

72. The Employees argue that time spent by them "on duty" to attend to Alexander's needs, should they arise during the night, is not the same as "time off" from work during which they were free to do as they pleased.

73. Regarding the Employer's request that it be permitted to adduce further evidence on a referral back concerning Ms. Gallego's wages from the mid-November 2018 to January 31, 2019, period, the Employees say the Employer had several opportunities to do so earlier, but failed to act.

ANALYSIS

74. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

75. As the Tribunal has stated repeatedly, the reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

76. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.

77. With these principles in mind, the Tribunal has adopted a two-stage analysis when considering applications for reconsideration (see *Re Milan Holdings*, BC EST #D313/98). In the first stage, the Tribunal considers an applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant wishes to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. A "yes" answer means that the applicant has raised questions of fact, law, principle, or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

78. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an appeal decision of the Tribunal (see *Re Middleton*, BC EST #RD126/06).

79. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

80. While several of the submissions delivered by the Employees repeat arguments that were unsuccessful in the appeal proceedings, I am nevertheless persuaded that a reconsideration of the Appeal Decision is warranted because matters the Employees have addressed in their submissions raise important matters of law and procedure relating not only to the Complaints, but also regarding the application of provisions of the *ESA* in proceedings involving the Director more generally.

81. I will deal with the issues raised by the Employees in the order they are presented in the Application.

Did the Appeal Panel err when it affirmed the Adjudicative Delegate's conclusion that the Employees could be classified as "sitters"?

82. I have decided that on this point the position taken by the Appeal Panel in the Appeal Decision should be confirmed. I am not persuaded the Employees have established that the Appeal Panel's conclusion the Adjudicative Delegate was correct to find that the Employees could be classified as "sitters" was in error.

83. I disagree the Adjudicative Delegate decided there were some tasks that were non-incidental to Alexander's care the Employees were employed to perform. A fair reading of the whole of the Reasons reveals that the Adjudicative Delegate concluded the Employees were hired solely to care for Alexander, and that any non-incidental household work they performed was unrelated to their employment. This

conclusion was made plain in the Reasons, when the Adjudicative Delegate noted that the Employees spent "almost all their time each day…occupied caring for Alexander" (R12). In the same paragraph in the Reasons the Adjudicative Delegate stated that the Employees "were specifically employed to care for Alexander and I am satisfied that is what they did."

84. Given this analytical emphasis, the Adjudicative Delegate's comment the other household work the Employees performed was "more related" to their relationship as members of the household than as employees means that the Adjudicative Delegate was intending to convey that it had been established, on balance, the work was related to the former, and not to a third category of work that was related to the Employees' employment, but non-incidental to their work attending to the care of Alexander. That this was the Adjudicative Delegate's meaning is also made clear in his statement in the Reasons (R12) that he was not convinced the household work the Employees performed was "anything more than their fair share of cooking and cleaning."

85. Having said this, I acknowledge the concern the Employees have expressed that since "sitters" are excluded from the protections found in the *ESA* the criteria for determining that an employee is a "sitter" should be construed narrowly, lest employers structure arrangements with vulnerable employees in a way that enables them to characterize duties the employees must perform as falling outside the employment relationship. As the Employer has noted, however, both the Adjudicative Delegate and the Appeal Panel made statements demonstrating they understood that provisions in the *ESA* and *ESR* which limited benefits entitlements should be construed narrowly.

86. As the Appeal Decision states (at paragraph 79), the factual findings in this case were within the purview of the Adjudicative Delegate. It is trite to say that the *ESA* provides no opportunity for the Tribunal to correct a delegate's errors of fact unless those errors can be said to constitute errors of law. Errors of fact do not amount to errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Put another way, a party will only succeed in challenging a delegate's findings of fact if it can be established that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusions set out in the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

87. A corollary to this formulation is that the weight to be attributed to various aspects of the factual matrix in a particular instance is a matter for the delegate to decide, and the Tribunal must not disturb rational findings of fact supporting a determination even if there is evidence that was presented on which the delegate might have relied to reach another result.

88. In this case, the Appeal Panel decided, and I agree, that there was some evidence on which the Adjudicative Delegate, acting rationally, could rely to determine that the various tasks performed by the Employees meant they should be classified as "sitters". That being so, it matters not that there may, as the Employees have argued, been an approach to the analysis of the evidence which may have yielded a different outcome.

Did the Appeal Panel err when it affirmed the Adjudicative Delegate's conclusion that the Employees were not "domestics"?

89. I disagree that the Appeal Panel's interpretation of the phrase "other prescribed services" was too narrow. The Appeal Panel did not err in its statement of the *ejusdem generis* principle of statutory interpretation, or in its application in the circumstances. Given that the *ESA* and the *ESR* provide specific definitions for different types of work a person might perform in a residential setting, care should be taken to ensure that general words in a definition are not interpreted so expansively as to expand their reach into the territory occupied by another defined occupation.

90. In my view, the class of work defined by the words "cooking, cleaning, or child care" in the definition of "domestic" refers to duties an employee would perform to assist in the daily management of a household, generally, and it is within this analytical lens that the meaning of the phrase "other prescribed services" must be determined. The Adjudicative Delegate found as a fact that the Employees were not employed by the Employer to provide cooking, cleaning, or childcare. Instead, he determined they were hired solely to provide the service of attending to Alexander, a disabled adult. That being so, it was entirely reasonable for the Adjudicative Delegate to decide, and for the Appeal Panel to confirm, that the Employees were not "domestics".

91. I note further, regarding this point, that while the phrase "other prescribed services" is not defined in the *ESA* or the *ESR*, the term "prescribed" is defined in section 29 of the *Interpretation Act*, R.S.B.C., c. 238 as "prescribed by regulation." The *ESR* does not prescribe any additional services which a "domestic" may be employed to provide.

92. The argument presented by the Employees that when the legislature amended the definition of "domestic" following the 1994 Thompson Report it must have intended to include within the scope of the meaning of the word a person employed not only to perform duties relating to cooking, cleaning, and childcare but also the care of elderly or disabled persons is, with respect, speculative. One may assume, indeed, that since the legislature excluded these latter words from the definition, and provided for a separate category of work, that of a "live-in home support worker", where the care of individuals with "acute or chronic illness or disability" was expressly contemplated, that a "domestic" was not intended to perform that type of work.

93. The Employees' submission in reply that they satisfied other elements of the work of "domestics" because they lived in the same residence as Alexander, who had a degree of decision-making authority over his care, and so he must be construed as the Employees' employer, or its agent, is imaginative but unconvincing. The Employees did not reside in their Employer's private residence, there was overwhelming evidence it was the Employer that was responsible for Alexander's care, and managed it along with the relevant third parties, and there was no evidence of substance before the Adjudicative Delegate establishing that Alexander should be construed, in law, as an agent of the Employer in its dealings with the Employees.

94. It is true that a document signed by Mrs. McCormack, which the Adjudicative Delegate identified as a "contract" forming part of an application to the federal immigration authorities for a Labour Market Impact Assessment did indicate that Ms. Baylon would be paid overtime after 40 hours of work in a week. However, the Adjudicative Delegate also found that Ms. Baylon did not see or sign any employment

contracts with the Employer before commencing work. She understood she was to be paid hourly, but she did not understand how her monthly paycheque was being calculated (R5). Given these facts, it is unsurprising the Adjudicative Delegate did not find there was a binding agreement between the Employer and Ms. Baylon regarding overtime wages.

Did the Appeal Panel err when it determined that the Employees should be classified as "live-in home support workers"?

95. I decline to accept the Employees' argument that since no one appealed the Adjudicative Delegate's decision the Employees were not "live-in home support workers" it was not an issue that was properly before the Appeal Panel. Rather, from the outset the issue before the Appeal Panel was the proper classification of the work of the Employees for the purposes of the *ESA*. That issue included within its scope the potential for a determination that the Employees were "live-in home support workers". The fact that a more perfectly defined focus on this particular category of employment might not have emerged until later in the appeal process does not, in the circumstances of this case, alter this overriding fact.

96. I also decline to accept the Employees' submission that the McCormacks were their "true" employers and, because it was to the McCormacks that the Employees paid rent for their room accommodations, the "live-in home support worker" definition cannot be applied to them. I accept the finding of the Appeal Panel that the Adjudicative Delegate erred when he determined the Employees did not meet the criteria necessary to establish them as employees falling with the definition for this type of work. There was no evidence of substance the Employees tendered which should have led the Adjudicative Delegate to conclude that the employment bargains they had struck were with the McCormacks as individuals, and not with the Employer as a separate legal entity. The funding for Alexander's care was paid to the Employer, and not to the McCormacks. Similarly, it was the Employer that paid the Employees their wages. There was no compelling evidence before the Adjudicative Delegate suggesting that the Employer was a sham vehicle controlled by the McCormacks and operated by them in a manner designed to avoid certain prescriptions relating to the payment of wages in the *ESA*.

97. I note further the Adjudicative Delegate made a finding the Employer contravened section 21 of the *ESA* when it required the Employees to pay rent from their wages (R20 and R22). Section 21 stipulates that an employer must not "directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose." It also prohibits an employer from requiring employees to pay for any of its business costs. Here, the Adjudicative Delegate decided that living in the McCormacks' household was a requirement of the Employees' employment, the Employer benefitted from this arrangement as it facilitated care for Alexander on a 24 hours per day 7 days week basis, no formal rent agreements were ever entered into with the Employees, and the rent they paid was linked to their wages and to the work they performed caring for Alexander. The parties have not challenged any of these findings. Whether the Employees paid rent to the Employer or the McCormacks, the Employees should not have been charged rent at all.

98. For these reasons, I am of the view that the Appeal Panel did not err in deciding that the Employees satisfied the criteria for establishing them as "live-in home support workers".

Did the Appeal Panel err when it did not consider the Employees' submission that they should be entitled to wages for time spent at night "on call" while sleeping in Alexander's bedroom?

99. The Appeal Panel did not fail to consider this issue. Instead, it decided that since the Employees were to be characterized as "live-in home support workers", rather than "residential care workers" as the Adjudicative Delegate had determined, it was proper to refer the matter of the appropriate wage calculation back to the Director for consideration afresh.

100. I infer a reason the Appeal Panel elected to refer back was that the Adjudicative Delegate had examined the question whether the Employees should be entitled to wages for periods at night while they slept but remained obliged to attend to Alexander should he require care, through a lens based on the Adjudicative Delegate's determination that the Employees were "residential care workers". That classification carries with it a requirement of an employer, pursuant to section 22 of the *ESR*, that if the worker must remain on site for a 24-hour period, rest periods of at least 8 consecutive hours must be scheduled, and the worker must be paid regular wages for the longer of 2 hours or the actual number of hours during which the rest period is interrupted.

101. Given this specific provision relating to the payment of wages to "residential care workers", the question whether the Employees should have been paid for other hours during rest periods when they were not attending to the needs of Alexander was moot.

102. No provision equivalent to section 22 exists in relation to the work of "live-in home support workers". Accordingly, different considerations may apply, and different evidence may perhaps be tendered if, as the Appeal Panel decided, the Employees worked as "live-in home support workers".

103. The calculation of wages owed is in large measure a fact-finding exercise. The enforcement mechanisms set out in the *ESA* make it clear that it is the Director in whose hands the primary responsibility for finding facts rests.

104. For these reasons, I see no error in the Appeal Panel's decision that the matter of the wages owed to the Employees working as "live-in home support workers", if any, should be referred back to the Director for consideration afresh.

Did the Appeal Panel err when it did not consider the submission made on behalf of Ms. Gallego that she was entitled to wages for work performed from mid-November 2018 until January 31, 2019?

105. In my view, this issue must be dealt with on the same basis as the Employees' claim, in the section previous, that the Appeal Panel should have considered the Employees' submission they were entitled to wages while working "on call".

106. The Appeal Decision determines that the Employees were entitled to be paid wages pursuant to a classification of work that was different from the classification identified by the Adjudicative Delegate. Since the wage calculation the Adjudicative Delegate performed was based on an erroneous conclusion regarding the proper classification of the Employees' work, and since a calculation of the wages owed is primarily a fact-finding exercise, I see no error in the Appeal Panel's decision to refer the matter of any

wages owed back to the Director for consideration afresh, including any wages which might be owed to Ms. Gallego for the period in question.

ORDER

107. Pursuant to section 116 of the *ESA*, the Tribunal's Appeal Decision, referenced as 2021 BCEST 97, is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal