

Citation: Alexander McCormack Client Support Group Society,
Anilyn Baylon and Caroline Gallego (Re)
2023 BCEST 33

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Alexander McCormack Client Support Group Society
(the “Employer”)

- and by -

Caroline Gallego and Anilyn Baylon
(the “Employees”)

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

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

DATE OF DECISION: May 23, 2023

DECISION

SUBMISSIONS

Jonathon Braun	counsel for Caroline Gallego and Anilyn Baylon
Susan McCormack et al	directors on behalf of Alexander McCormack Client Support Group Society
Michael Thompson	delegate of the Director of Employment Standards

OVERVIEW

1. On December 10, 2021, I issued a decision allowing, in part, appeals by both the Employees and the Employer of a March 5, 2021, Determination issued by a delegate of the Director of Employment Standards (the “Director”) (*Alexander McCormack Client Support Group Society, Anilyn Baylon and Caroline Gallegos*), 2021 BCEST 97 (the “Appeal Decision”).
2. In the Appeal Decision, I found that the Director had erred in concluding that the Employees were “residential care workers” under the *Employment Standard Regulation* (the “Regulation”). I concluded that the Employees were best classified as “live-in support workers.” I also found that the Director had failed to observe the principles of natural justice in purporting to follow a two-step decision making process and referred the matter back to the Director to determine the Employees’ wage entitlement.
3. The Employees sought reconsideration of the Appeal Decision. The Reconsideration Panel confirmed the Appeal Decision. (2022 BCEST 57, the “Reconsideration Decision”)
4. On January 30, 2023, the Director’s delegate (the “Delegate”) issued a five-page report (the “Referral Back Report”) following the Appeal Decision’s referral back. In the Referral Back Report, the Delegate determined that the Employees were employed as live-in support workers. The Delegate further determined that the factual findings in the Determination had not been varied on appeal. The Delegate concluded, among other things, that the Employees were paid a monthly salary based on a 40-hour work week and that they were entitled to be paid at their regular rate of pay for all hours worked.
5. Based on these findings, the Delegate determined that the Employees were, together, entitled to a total of \$164,987.33 in wages and interest.
6. The Tribunal sought submissions from the parties and from the Director on the Referral Back Report.

THE REFERRAL BACK REPORT

7. As part of the referral back process, the Delegate sought submissions from the parties on the issues to be determined. Following the submissions, the Delegate issued the Referral Back Report which found, in part, that “the remaining factual findings in the original Determination had not been varied by the appeal decision and so remained valid.” The Delegate further noted that “[t]he parties to the appeal did not agree with this position, but I am unpersuaded that a different approach is possible.” (para. 3)

8. Relying on what he determined were undisturbed factual findings, the Delegate calculated the Employees' hours of work and wage entitlement.
9. The Employees seek confirmation of the Referral Back Report. They agree with the Director's determination that they were paid a salary based on a 40-hour work week rather than a fixed monthly salary and that they were entitled to compensation for the time they spent in Alexander's room at night.
10. The Employer contends that the Director should enforce the wage rate between the parties. Alternatively, the Employer contended, if the wage rate could not be determined, the Director should enforce the minimum wage established by *Regulation*. The Employer argues that the employment agreement provided for a fixed monthly salary to provide 24-hour care, and that the rate agreed upon exceeded the prescribed minimum daily rate.

ANALYSIS

11. I find that, in concluding that the Appeal Decision had not disturbed the factual findings in the Determination, the Delegate misapprehended the Appeal Decision.
12. In the Appeal Decision, I found that the process followed by the Director had led to a denial of natural justice. I based my decision on the fact that the Investigative Delegate had made some factual findings that the Adjudicative Delegate did not agree with:

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.

...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....

(paras. 93-94)

13. I further noted the different conclusions arrived at by the Investigative Delegate and the Adjudicative Delegate specifically on the hours of work performed by the Employees (Appeal Decision, paras. 96-97), and that the parties had been deprived of the opportunity to respond to the different conclusions of the Adjudicative Delegate.
14. In light of my conclusions in the Appeal Decision, it is difficult to understand the Delegate's statement that the factual findings in the Determination had not been varied, particularly when the parties appeared to disagree with his understanding in their submissions during the referral back process. The Delegate's sole explanation for making this finding in light of objections from both parties was that he was "unpersuaded that a different approach is possible."

15. I explicitly found a denial of natural justice based on the differences between the factual findings of the Investigative Delegate and the Adjudicative Delegate without affording the parties an opportunity to make submissions on the factual findings of the Adjudicative Delegate. Therefore, the Delegate cannot conclude that the factual findings of the Adjudicative Delegate were in any way confirmed in the Appeal Decision, or indeed, by the Reconsideration Decision. As the Panel noted in the Reconsideration decision:
- The Appeal Panel did not fail to consider this [their entitlement to wages for time spent at night “on call”] 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. (para. 99)
16. I find that the submissions of the parties on appeal ought to have been considered by the Delegate in light of my conclusions and that all of the submissions of the parties before both the Investigative Delegate and the Adjudicative Delegate, as well as on appeal, must be considered in making new factual findings.
17. I confirm the Delegate’s finding that the Employees were “live-in support workers” as I found in the Appeal Decision. However, the issue of hours of work and wages must be fully reconsidered in light of my decision on the proper classification of the employees.
18. For clarity, the Delegate must consider the evidence and submissions made during both the investigation and adjudicative processes as well as on appeal, and arrive at a reasoned conclusion on, among other things, the Employees’ hours of work and wage rate.

ORDER

19. Pursuant to section 115(1)(b) of the *ESA*, I refer the matter back to the Director and order that the Director reconsider the wage entitlements of the Employees in accordance with the Appeal Decision.

Carol L. Roberts
Member
Employment Standards Tribunal