Employment Standards TRIBUNAL

An appeal

- by -

Luisito J. Arguelles

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: Robert Groves

FILE No.: 2008A/117

DATE OF DECISION: January 6, 2009

DECISION

SUBMISSIONS

Luisito J. Arguelles	for himself
Paul Fairweather	counsel for Bodwell Student Services Ltd.
Glen Smale	for the Director of Employment Standards

OVERVIEW

1. Luisito J. Arguelles ("Arguelles") appeals a determination dated August 29, 2008 (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") in which the Delegate decided that a complaint in respect of unpaid overtime filed by Mr. Arguelles should be dismissed as it disclosed no contravention of the *Employment Standards Act* (the "*Act*") by Mr. Arguelles' former employer, Bodwell Student Services Ltd. ("Bodwell").

2. I have before me Mr. Arguelles' Appeal Form and attached submission, the Determination and the Reasons for the Determination, the record the Director says was before the Delegate at the time the Determination was being made, a submission from counsel for Bodwell, as well as a final submission from Mr. Arguelles.

3. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. I have concluded that this appeal shall be decided having regard to the written materials I have received, without an oral hearing.

FACTS

4. Bodwell operates a student residence for a high school a related entity runs, which accommodates students in its educational programs from around the world at its North Vancouver campus. The school is registered as an independent school with the province's Ministry of Education.

5. Prior to January 16, 2007, Mr. Arguelles had worked for Bodwell in an on-call relief capacity as a Hall Advisor. On that date he commenced working full-time in that position under a three-month employment contract. Notwithstanding that his contract ended on April 14, 2007, Mr. Arguelles continued to be employed as a Hall Advisor until May 1, 2007, when he was appointed to the position of Residence Supervisor, under a further three-month contract which lasted until July 31, 2007. With the exception of the transition period in April 2007, when he was paid an hourly rate, Mr. Arguelles received a monthly salary and was expected to work eight hours per day and forty hours per week while under contract.

6. Mr. Arguelles' three-month contracts appear to have been documented in letter form, dated January 1, 2007 and May 10, 2007 respectively. Both of these letters stipulated that he was being employed in "full-time Live-in" positions, and that "[f]or fulfillment of your duties, you are provided with a private room with shower bath (heat and light included), and three meals in the school cafeteria." The job description

provided to him stated that "dormitory supervisory staff will live in residence" at one of the two dormitories operated by Bodwell.

7. During the term of his first three-month contract, no dormitory space was available to accommodate Mr. Arguelles, so Bodwell secured a separate room for him at another student residence operated by the Canadian International College ("CIC"), about ten minutes away from the Bodwell campus. Mr. Arguelles subsequently had a room made available to him at the Bodwell residence in April 2007, which remained available to him until his contract came to an end on July 31, 2007.

8. The representatives of Bodwell with whom the Delegate communicated during his investigation were Cathy Lee, the Director of Admissions ("Lee"), and Kevin Kubish, the Director of Residence ("Kubish"). They informed the Delegate that Mr. Arguelles had asked for a place to stay on campus as a complement to his being employed full-time, and that Bodwell had decided to accommodate him in this way in order to assist him in performing his work, and to obviate the necessity of his having to travel home after completing an evening shift. Bodwell employed dormitory staff who lived both on and off-site. There were no extra duties imposed on those staff members who were designated to live in, with the excerption that they were periodically assigned on a rotating basis to act as emergency contacts for students during the night. Staff members assigned to emergency duty were required to be present overnight on-site. If the staff member assigned was required to respond to a student during the night, the staff member was remunerated for the time spent. Such emergencies occurred infrequently.

9. Mr. Arguelles submitted to the Delegate that nowhere in his job description (and for that matter, in his letter contracts) did it stipulate that he would be obliged to make himself available overnight for emergency purposes, either on a rotating basis or at all. Nevertheless, it appears that Mr. Arguelles was advised of, and he accepted, this responsibility as part of his employment duties, at least for a time. When he was assigned emergency contact duty while at CIC, Mr. Arguelles was expected to respond via the cellphone Bodwell provided to him. While at the Bodwell campus, he was to be contacted by means of the telephone in his room. Mr. Arguelles believed he was required to sleep on-site during the nights he was the designated emergency contact, in order to properly respond should the need arise.

10. Mr. Arguelles also told the Delegate that when he entered into his first full-time contract with Bodwell he told Ms. Lee and Mr. Kubish that he had a home of his own located elsewhere. As proof that he did so, Mr. Arguelles offered evidence that all his pay stubs were addressed to that residential premises, and forwarded there until his employment came to an end on July 31, 2007. In his view, it was not logical that he would waste money paying rent for his own apartment if he had a permanent residence through Bodwell. Mr. Arguelles asserted that he never moved out of his home during his tenure with Bodwell, and his belongings, in the main, remained there, notwithstanding that he had rooms and board provided for him by his employer. One of the reasons for this, he said, was that Bodwell had strict rules about the uses to which their accommodations for staff could be put. In particular, Bodwell disapproved of live-in supervisors inviting guests, including significant others, into their rooms, especially overnight.

11. While Ms. Lee and Mr. Kubish acknowledged that Mr. Arguelles' paycheques were forwarded to another address, they informed the Delegate that Mr. Arguelles never advised them that he had another place to live off-site, at least until the issue of Mr. Arguelles' being scheduled for emergency duty came to the fore in early July 2007. They also stated that if Mr. Arguelles had informed them that he had an off-site residence he preferred to use they would not have required him to stay overnight at all.

12. Ms. Lee believed that during the period of his full-time employment he lived the entire time in the accommodations provided to him by Bodwell, except for some short absences and vacation days. In his Determination, the Delegate said this evidence was "uncontested." Ms. Lee also told the Delegate that Mr. Arguelles was free to bring in his own electronic equipment and other personal possessions into the accommodations provided for him through Bodwell, and that he could entertain his friends as he wished. While the CIC premises appears to have been more spartan, at Bodwell at least he had a private room with bathroom, a bed, desk and chair, either a closet or dresser, or both, and a telephone. He also had access to the campus lounge with its televisions, the kitchen, computers, the campus gymnasium and pool.

13. During the investigation, Mr. Arguelles advised the Delegate that his sleeping schedule at CIC was "intermittent," but that when he moved to the Bodwell campus in April 2007 he commenced to sleep there every night because it was "required." Mr. Arguelles thought it unfair that he was being designated emergency contact every night following his regular shift, and it was for this reason that in early July 2007 Mr. Arguelles approached Mr. Kubish and informed him that he no longer wished to sleep over as he had a place of his own, which information Mr. Arguelles reminded Mr. Kubish he had already communicated to him. Mr. Kubish disagreed with Mr. Arguelles on this point, and informed him that since Mr. Arguelles had failed to provide reasonable notice of his desire not to stay overnight, there was insufficient time for Bodwell to make alternate arrangements before Mr. Arguelles' contract came to an end later that month, with the result that Mr. Arguelles would be required to remain as a live-in supervisor and accept assignments as emergency contact for the duration of the term of his employment.

14. Mr. Arguelles filed a complaint under section 74 of the *Act*, claiming overtime wages pursuant to Part 4 in respect of the relevant hours he was required to sleep over at CIC and Bodwell when assigned as emergency contact.

15. During the course of his investigation the Delegate considered whether the Part 4 provisions of the *Act* in respect of overtime were inapplicable to Mr. Arguelles because of the operation of section 34(d)(ii) of the *Employment Standards Regulation*. That provision exempts employers from paying overtime wages to persons employed as noon hour supervisors, teacher's aides, or supervision aides by an authority as defined in the *Independent School Act*. In his Determination, the Delegate decided that Mr. Arguelles' employment did not fall within the scope of this provision. Neither party has taken issue with that conclusion in the appeal.

16. In order to address Mr. Arguelles' complaint, it then became clear to the Delegate that he would have to consider the application of the definition of "work" in section 1 of the *Act*, which reads:

> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

17. Mr. Arguelles' claim for overtime was based on the argument that since he had a permanent residence elsewhere, his time spent sleeping over at CIC and Bodwell as emergency contact, after his normal day's work had been completed, was essentially time on call at a location designated by Bodwell that was not his residence, and so it constituted work for which he should be remunerated under the *Act*.

18. The Delegate declined to accede to Mr. Arguelles' argument, and determined that the accommodations provided to Mr. Arguelles at CIC and Bodwell fell within the meaning of the words "employee's residence" for the purposes of the definition of "work" in section 1. It followed that the time required to be spent by Mr. Arguelles on-call in the accommodations provided to him by Bodwell on-site, pursuant to an assignment as emergency contact, did not constitute "work" for the purposes of the *Act*. In coming to this conclusion the Delegate relied in part on a definition of "domicile" in *Black's Law Dictionary*, Seventh Edition:

> The place at which a person is physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.

19. The Delegate distinguished this meaning from the meanings of "residence" set out in *Black's*, and also in *Webster's New Collegiate Dictionary*, which read, respectively:

> 1. The act or fact of living in a given place for some time. 2. The place where one actually lives as distinguished from a domicile. Residence usually just means bodily presence as an inhabitant in one place; *domicile* usually requires bodily presence plus an intention to make the place one's home. A person thus may have more than one residence at a time but only one domicile.

> 1.a. the act or fact of dwelling in a place for some time. b. the act or fact of living or regularly staying at or in some place for the discharge of some duty or the enjoyment of some benefit. 2.a. the place where one actually lives as distinguished from his domicile or place of temporary sojourn.

20. Taking into account the particular circumstances of Mr. Arguelles' case, including the degree to which the accommodations provided by Bodwell were permanent and private, and the various recreational and meal amenities to which Mr. Arguelles had access while staying on-site, as well as Tribunal authority to the effect that in order to be an "employee's residence" for the purposes of the definition of "work" in section 1 of the *Act* the residence must be something more than merely intermittent or temporary, the Delegate concluded that the accommodations provided to Mr. Arguelles by Bodwell were residences of his during the periods in question, and that his off-site dwelling was more in the nature of a domicile. For the Delegate, this conclusion emanated more from the character of the accommodations in question, having regard to the nature of the parties' employment relationship, than specific tabulations of the number of nights Mr. Arguelles actually stayed in them overnight. The Delegate's approach also rendered moot the resolution of the question whether Mr. Arguelles had told Ms. Lee and Mr. Kubish at the outset that he had another dwelling located off-site.

ISSUES

21. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

22. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

> 112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

23. Section 115(1) of the *Act* should also be noted. It says this:

> 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

24. In his Appeal Form, Mr. Arguelles notes that he challenges the Determination on the basis that there was a failure to observe the principles of natural justice. It is clear from the submission he has appended to his Appeal Form, however, that his challenge is not limited to this ground. Indeed, in his final submission delivered to the Tribunal he expressly avers that the Delegate also erred in law in his analysis of the meaning of the word "residence" in the Determination. Moreover, the lengthy submissions of Mr. Arguelles on this appeal include references to evidence that it does not appear from the record were presented to the Delegate during the course of his investigation.

25. In order to do justice to the parties to an appeal, most of whom will be unrepresented by legal counsel, it is the practice of the Tribunal to seek to discern the true basis for a challenge to a determination, regardless of the particular box an appellant may have checked off on an Appeal Form (see *Triple S Transmission Inc.* BC EST #D141/03). Since Mr. Arguelles raised the substance of matters more properly characterized as alleged errors of law, and new evidence, in the submissions he appended to his Appeal Form, to which counsel for Bodwell has had an opportunity to respond, I believe I should consider them for the purposes of disposing of his appeal on the merits.

26. I propose to deal with the section 112 grounds of appeal raised by Mr. Arguelles in reverse order.

Section 112(1)c): Evidence has become available that was not available at the time the Determination was being made.

27. Mr. Arguelles argues that the Determination was "written and based on incorrect facts." He refers in particular to the Delegate's conclusion that Mr. Arguelles lived at the Bowell accommodations during the time which concerns us, and in particular, during the hiatus period between his first and second three-month contracts in April 2007. Mr. Arguelles offers evidence of a flight itinerary which, he says, places him outside of the province for at least a portion of this period, and a statement from another former

employee of Bodwell, Bryan Chu, which contains material designed, I infer, to support Mr. Arguelles' position that the Bodwell accommodations were not his abode at any relevant time.

28. The Tribunal's right to allow an appeal based on fresh evidence incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence could not, with the exercise of due diligence, have been discovered and presented to the delegate during the investigation or adjudication of the complaint and prior to the determination being made. In other words, was the evidence really unavailable to the party seeking to tender it? At the same time, even if the evidence was not unavailable in this sense, the Tribunal may nevertheless consider it if the appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars* BC EST #D570/98).

29. It is clear from a review of the materials before me that the nature and frequency of Mr. Arguelles' occupancy of the accommodations made available to him at Bodwell were significant issues for the Delegate, that Mr. Arguelles was aware of this, and that he took several opportunities during the investigation to apprise the Delegate of his positions regarding them. It is not obvious to me, therefore, why Mr. Arguelles would have waited until he launched this appeal to present evidence that he was out of the province for a time in April 2007, or to produce the statement of Mr. Chu. Nor is it apparent to me from Mr. Arguelles' submissions that this evidence was somehow unavailable to him before the Determination was made.

30. Nor am I convinced that the evidence Mr. Arguelles seeks to present now is probative to the degree that would be necessary to persuade me that it should be admitted now, notwithstanding that it might have been available for presentation to the Delegate at the time the Determination was being made. That Mr. Arguelles might have been absent from the province for a brief period of time in April 2007 must have but little, if any, bearing on where he resided when he was present in Vancouver. Regarding Mr. Chu's statement, it is couched in language that to me appears equivocal. He talks of his "understanding" as to Mr. Arguelles' living arrangements, and not to what he may have learned through his own experience. This leads me to at least suspect that many, if not all, of the important assertions in Mr. Chu's statement are based on information and belief, rather than personal knowledge.

31. For these reasons, I cannot conclude that Mr. Arguelles has established that his appeal must succeed on the grounds set out in section 112(1)(c).

Section 112(1)(b): The Delegate failed to observe the principles of natural justice in making the Determination.

32. A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by the Director and his delegates was unfair. The principles of natural justice mandate that a party must have an opportunity to know the case he is required to meet, and an opportunity to be heard in reply. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond. Another aspect of natural justice is that the determination that is made be made by an independent decision-maker, free from bias.

33. One of Mr. Arguelles' concerns under this heading is captured in this excerpt from his submission:

> Long before he wrote the determination, [the Delegate] did not remain neutral to this case. In an email sent to me on December 6, 2007, he stated, "*The apparent absurdity, if I found in your favour, is how can you justify overtime rates of pay for someone who is sleeping?*" At this time I felt [the Delegate] was being biased.

34. An allegation of bias is a serious matter. It should not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the case (see *Re Zadehmoghadami (cob E-Hot Wired Computers)* BCEST #D171/05).

35. In my opinion, the Delegate's reference to the absurdity of a finding that an employee might be entitled to wages for time spent sleeping, while unfortunate, does not demonstrate a bias on his part, either against Mr. Arguelles personally, or against the validity of his complaint. I prefer to construe the Delegate's question as rhetorical. Given that Mr. Arguelles was, in fact, claiming wages for time spent at work that would include many hours of sleep while assigned as emergency contact the Delegate was merely pointing out that there might be reasonable persons who would find such a suggestion absurd. I do not discern that one is compelled to conclude that the Delegate himself was disposed to believe that the claim was absurd, or that he would be disinclined to apply the provisions of the *Act* so as to effect precisely that result, should the circumstances warrant. Indeed, it is clear from the Delegate's analysis in the Determination that if he had concluded that the Bodwell accommodations were Mr. Arguelles' residence at the relevant times he would have ordered that Bodwell pay overtime wages, notwithstanding that much of the time spent by Mr. Arguelles on-call was time that he had spent sleeping.

36. Mr. Arguelles also expresses concern that the Delegate declined to meet with him, despite Mr. Arguelles' specific request for a face-to-face discussion. He supports his assertion by saying that his ability to write concisely is weak, and that a meeting in person would have provided to him a better opportunity to articulate the details of his position more clearly.

37. In considering this submission, it is important to remember that section 77 requires that a delegate make *reasonable* efforts when it comes to offering opportunities to respond to matters arising during an investigation. It follows that persons involved in investigations have no absolute right to require face-to-face meetings with a delegate in every case. Whether a delegate should meet with a party in person in order to avoid a failure to observe the principles of natural justice will depend on the facts at play in the particular case at hand.

38. In the circumstances of this case, I discern no important information that it was necessary for Mr. Arguelles to present in person, rather than in writing, in order for the delegate to fulfill his obligation under section 77. The record discloses that Mr. Arguelles took advantage of several opportunities to provide lengthy and detailed responses in writing to all the questions posed to him by the Delegate in respect of the salient facts, and to make further submissions on the other aspects of his case that he deemed important. The Delegate referred Mr. Arguelles to previous decisions of the Tribunal which the Delegate considered to be relevant to a resolution of the question whether Mr. Arguelles' accommodations at Bodwell were his "residence" for the purposes of the definition of "work" contained in section 1 of the *Act*, and Mr. Arguelles responded with submissions thereon in writing. All of those submissions disclose that Mr. Arguelles enjoys no lack of facility in the written word.

39. It appears from the record that Mr. Arguelles did meet at least once with the Delegate, on May 22, 2008. Thereafter, Mr. Arguelles did request a further opportunity to meet with the Delegate face-to-face. In the event, that subsequent meeting does not appear to have occurred. Mr. Arguelles then forwarded an email to the Delegate on June 27, 2008 in which he provided further arguments in support of his position. He then said this:

> Given the face to face time I requested, I would have told you all this...
>
> I would still like to meet face to face. I also would like a group meeting with Bodwell to help speed things up.

40. There appear to have been settlement discussions that were proceeding concurrently. The Delegate replied to Mr. Arguelles' email of June 27, 2008 on the same day. He said this:

> Thank you Jeff. I'll ask the employer whether they wish to meet. If not, I'll return their latest cheque and write a Determination.

41. After consulting with Bodwell, the Delegate again emailed Mr. Arguelles, this time on July 9, 2008, as follows:

> Jeff, further to my email of June 27th, I heard from the employer this afternoon and their last position is the best they will offer and they don't believe a meeting will assist a resolution to this matter. Should I not receive a response from you on or before July 18th I will return their latest cheque and write a Determination in due course.

42. Mr. Arguelles responded to the Delegate by email dated July 16, 2008. That email said this:

> I do not accept their offer and await for your Determination using all the facts provided. Thank you. Jeff.

43. As Mr. Arguelles did not request a further meeting in person at this point, I am not persuaded that the Delegate can be faulted for proceeding to issue his Determination without one.

Section 112(1)(a): Did the Delegate err in law?

44. In my opinion, the question whether the Bodwell accommodations were Mr. Arguelles' residence for the purposes of the definition of "work" in section 1 is a question of mixed law and fact. Questions of mixed law and fact are questions about whether the facts in a case satisfy the relevant legal tests. A question of mixed law and fact involves an error of law where an extricable error on a question of law can be identified in the legal analysis under review (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* [1996] SCJ No.116; *Britco Structures Ltd.* BC EST #D260/03). By way of example, an extricable error on a question of law would occur if the decision-maker has applied an incorrect legal standard to the facts as found.

45. Questions of fact, *simpliciter*, are questions about what actually took place between the parties. They are only reviewable by the Tribunal as errors of law in situations where it is shown that a delegate has committed a palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the

finding, and so it is perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's finding of fact if he establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to 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).

46. In my view, there is one aspect of this case in which I must conclude that the Delegate committed an error of fact which amounts to an error of law. In the Determination, the Delegate stated that it was Bodwell's uncontested evidence that Mr. Arguelles spent one hundred percent of his time in the Bodwell accommodations other than for short time absences or vacations. It is clear from a review of the materials that appear to have been before the Delegate at the time of his issuing the Determination, however, that Mr. Arguelles' expressed position was that he did not sleep over in the Bodwell accommodations apart from the occasions on which he was assigned as emergency contact. Moreover, the Bodwell evidence on this point was more in the nature of a belief concerning Mr. Arguelles' habits, rather than a categoric statement of fact. The Delegate's mischaracterization of the evidence on this point is significant because it supported his conclusion, expressed in the Determination, that Mr. Arguelles was, in fact, "living" on-site at Bodwell and enjoying the meal and recreation amenities there, during the periods of time when he was not at "work." Having come to this conclusion, the Delegate then decided that Mr. Arguelles' many periods of on-call time should be non-compensable because he could truly and clearly be said to be otherwise "compensated" by being at his residence.

47. I am also of the view that the Delegate misconstrued the legal test for determining whether the Bodwell accommodations constituted Mr. Arguelles' residence. When describing the meaning to be ascribed to that word, the Delegate placed his emphasis on the nature of the accommodations themselves, and whether they satisfied the tests of permanence and settlement referred to in the authorities. For the Delegate, the character and quality of Mr. Arguelles' actual use of the Bodwell accommodations was much less significant. Since the accommodations themselves, together with their attendant meal and recreational amenities, were of a permanent and settled type, and were made available to Mr. Arguelles over a period of months, the Delegate concluded that they constituted a residence for Mr. Arguelles regardless of how often he was required to sleep over as emergency contact, whether he had another residence elsewhere, and whether he had informed his superiors at Bodwell that he had another place to stay. The Delegate's approach is captured in the following excerpt from the Determination where, after referring to Tribunal authority, he said this:

> ...The adjudicator refers to a residence being something more than temporary or intermittent not the duties manifest in the position itself such as sleeping over as an emergency contact person and the schedule attendant thereto
>
> After all of these factors are taken into consideration, I find that the accommodations provided by Bodwell, requested by Arguelles and lived in by him constitute an "employee's residence" for the purpose of the interpretation and application of the "work" provisions stated in Section 1 of the Act. I also find that the wording of this definition does not bar an employer's lodgings from being designated as such because there is no language in the Act that restricts such an interpretation and also that the evidence presented clearly aligns itself with the definitions of "residence" quoted above. Whether the evidence stands alone or is used in a comparative sense, Arguelles' employee residence had a degree of permanence or settlement that was more than just a visit or short stay as exhibited in the above paragraph. Therefore, any minor difference in the parties' evidence such as whether or not Arguelles told his employer about his other place now becomes moot. I also find that the other place or his home address was his domicile and not his residence.

48. While I have no doubt that the nature of the premises alleged to be a residence will play a role in determining the elusive meaning to be attributed to the word, it was, I believe, an error for the Delegate to rely so heavily on this aspect of the discussion, and to minimize the importance of the type of use to which Mr. Arguelles actually appears to have put the Boswell accommodations during the relevant times.

49. The legal authorities on which the Delegate relied do not prioritize the factors to be considered in that way. In the Tribunal decision of *Corner House* BC EST #D254/98, to which the Delegate referred in his Determination, the Adjudicator viewed as helpful the following excerpt from the decision of the Supreme Court of Canada in *Thompson v. M.N.R.* [1946] SCR 209 regarding the meaning of the terms "resident" and "ordinarily resident":

> A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally, or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question.

50. In *Corner House*, *supra*, the Adjudicator went on to discuss, in the context of a case involving an assertion that an employee was a residential care worker under the *Act*, the meaning of the word "residence," as follows:

> Residence seems to be a notion which the courts and legislatures have rarely clearly defined. It seems to be a notion which is accepted in a common sense way. Residence then is something short of domicile, i.e. the intention to remain in that place permanently, but something more than temporary or intermittent. It has some degree of permanence; it is the person's settled abode; it is the place they carry on the settled routines of life. It would be the place one hangs one's hat, keeps one's clothes, stores treasures and family memories; a place of privacy protected in law from state intrusions; and a place of retreat from the turmoil of the workplace. It would be a place to entertain one's friends. It would be an address of one's own, a phone number, and a place to receive mail.
>
> This is not to say that there are not situations where an employee gives up some of the benefits of a private residence to live communally or at a place of work. For a workplace to also be considered a residence the place of work must assume some of the qualities of a residence. There must be some degree of privacy; a space, all be it limited, to call one's own. There must be some degree of settlement to carry on as much of those everyday things as possible, subject only to the minimum necessary intrusions of the requirements of the employment. There must be some element of permanence as opposed to the intermittent or temporary.

51. It is clear from the language in these authorities that all relevant factors must be considered in order to determine whether a particular premises qualifies as a residence, including the nature of the premises, the amenities associated with it, and the character and quality of the employee's time spent in connection with that place.

52. There is a further consideration that must be weighed when deciding this question which is discussed in the Tribunal authorities to which the Delegate referred, but to which he did not allude in his

Determination. In *Knutson First Aid Services (1994) Ltd.* BC EST #D300/00, the Member said this concerning the manner in which the provisions of the *Act* should be interpreted:

> The *Act* is remedial legislation and one of its primary purposes is to ensure that employees in the province receive at least the basic standards of compensation and conditions of employment...The *Act*, including the *Regulation*, should be interpreted in a manner that is consistent with its remedial nature...
>
> ...subsection 1(2) derogates from the minimum standards of the *Act* because it denies an employee entitlement to wages for "work" when that employee is on call at a location designated by the employer if the designated location is that employee's residence. At any other location designated by an employer, that employee would be entitled to be paid wages for being on call. a strict interpretation of provisions that derogate from minimum standards is consistent with the remedial nature of the *Act* and with its purposes. I adopt and apply the following comment from *Machtinger v. HOJ Industries Ltd.* (1992) 91 DLR (4th) 491 (SCC) that:
>
> > ...an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

53. The Member's decision in *Knutson* was subsequently confirmed by a reconsideration panel of the Tribunal (see BC EST #RD095/01). In that decision the panel said this concerning the approach that should be taken when considering the definition of "work" in section 1:

> There is good reason under the *Act* not to take an overly expansive view of the term "employee's residence" in s.1. The *Act* itself creates the presumption that "on call" employees are deemed to be at work while on call. In expressly addressing the "on call" scenario, the Legislature must be taken to have understood the reality that workers are often "on call" for many hours beyond the regular workday. The Legislature, not the Director or the Tribunal, has made the policy decision that the only exception to counting all "on call" hours as work is when the "designated location" to be on call is the "employee's residence."

54. The *Corner House* decision to which I referred earlier, while admittedly dealing with the situation of a residential care worker, nevertheless makes the point that "employees should only be excluded from the protections of Part 4 of the *Act* in the clearest of cases."

55. It is my opinion that if the Delegate had considered more carefully these aspects of the legal test to be applied, he would have been driven to the conclusion that notwithstanding Mr. Arguelles could have employed the Bodwell accommodations as a residence during the times when he was not on call, the reality was they were premises that he made use of in order to comply with his employer's frequent directions that he remain on-site as emergency contact, and not as an abode or dwelling where he was otherwise carrying on the settled routines of his life. The Delegate's failure to do so amounts, in my view, to an error of law.

56. There is one further matter to which I must refer before I conclude. It appears to me that the record provided to the Tribunal by the Director is deficient. The Delegate refers in his Determination to a recorded discussion involving Mr. Arguelles and Mr. Kubish, which the Delegate states he considered when resolving the issues in this case. No copy of the recorded discussion, or transcript of it, was provided for the purposes of this appeal. Moreover, there are several documents appended to Mr. Arguelles' initial submission on the appeal which appear to be copies of submissions he made to the

Delegate during the course of the investigation, but which do not appear in the record delivered by the Director to the Tribunal pursuant to its statutory obligation under section 112(5).

57. It is important to recall that section 112(5) requires the Director to provide the Tribunal with any document that was considered for the purposes of a determination. Even documents that are not relied upon by the Director in making the determination, but are reviewed and discarded during the determination process, should be delivered. This is so because they will have to be "considered" in order to be discarded. The onus on the Director in this regard is arguably greater in a case, as here, where the Delegate conducted an investigation, but not a hearing.

ORDER

58. Pursuant to section 115 of the *Act* I order that the Determination dated August 29, 2008 be cancelled and that the matter be referred back to the Director for the purpose of calculating the amount of wages payable to Mr. Arguelles for the time he spent on call as emergency contact during the relevant period of his employment with Bodwell.

Robert Groves
Member
Employment Standards Tribunal