

An appeal

- by -

Badiyah Chater
("Chater")

- 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

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2001/721

DATE OF DECISION: January 14, 2002

DECISION

OVERVIEW

The appeal is by Badiah Chater (referred to as both “Chater” and “the Appellant” in this decision) and pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Appealed is a Determination issued by a delegate of the Director of Employment Standards (“the Director”) on October 1, 2001. The Determination is that Chater’s employment was as a “live-in home support worker” and that, as such, she is not entitled to overtime wages.

Chater, on appeal, argues that she is entitled to overtime wages because she did not work as a live-in home support worker but as a “sitter”. In that regard, she claims that she was not employed by a government funded program or agency and that it was her job to provide personal care, not cooking and looking after the employer’s home.

I have decided to confirm the Determination. In my view, it can be said that Chater worked as a live-in home support worker. And it does not follow that if Chater worked as a sitter that she is entitled to overtime wages. Sitters have been excluded from the *Act*.

This case has been decided on the basis of written submissions.

ISSUES TO BE DECIDED

The issue is the matter of whether Chater is or is not entitled to overtime under the *Act*. Underlying that issue is the matter of whether Chater’s employment is or is not what can be considered to be that of live-in home support worker.

What I must ultimately decide is whether the employee does or does not show that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS

Badiah Chater was employed by Vicky Heywood.

Heywood suffers from multiple sclerosis. She lives in her own home but she requires personal care on a round the clock, though intermittent, basis.

The Capital Health Region pays for Heywood’s care under a program called the “Choice in Supports for Independent Living Program” (“CSIL program”). Under this program, persons who need personal care have the option of hiring their own caregivers, directly. Should a person choose that option, the Capital Health Region then provides them with funds which are designed to cover the cost of the caregiver(s). It is by means of this program that Heywood hired Chater.

It was Chater's job to provide Heywood with personal care. She did no cooking. She did some laundry and a certain amount of house cleaning but that was only done as a favour to Heywood.

ARGUMENT & ANALYSIS

Chater is seeking overtime pay from her former employer. In response to the delegate who denies her that pay, the appellant makes the argument that she is not a live-in home support worker but a "sitter" without realising that sitters are also not entitled to overtime wages. Sitters are in fact not entitled to any of the *Act's* protections. They are excluded from the *Act* in section 32 of the *Employment Standards Regulation* (the "*Regulation*").

32 (1) The Act does not apply to any of the following:

...
(c) a sitter; ...

The delegate has decided that Chater's employment was as a live-in home support worker. The term "live-in home support worker" is defined in section 1 of the *Regulation* as follows:

"live-in home support worker" means a person who

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

The hours of work and overtime provisions of the *Act* are contained in Part 4 of the *Act*. Live-in home support workers are not entitled to overtime wages, however. That is because of section 34 of the *Regulation*.

34 (1) Part 4 of the Act does not apply to any of the following:

...
(q) a live-in home support worker;

Night attendants and residential care workers are two other types of care workers that are not entitled to overtime for reason of section 34 of the *Act*. Their work is similar to that of live-in home support workers. All three classes of workers reside at the place of employment to a degree. They are all on duty for a long period of time, 12 hours if not 24, yet all perform the specific duties for which they are hired on what is largely an intermittent basis and the determination of what is truly overtime work is difficult, if not impossible.

Chater, on appeal, argues that she is not a live-in home support worker. If she is not a live-in home support worker, it would then have to be decided whether she is a "domestic" or the common garden variety of employee. They are entitled to overtime pay.

According to Chater, she is not a live-in home support worker because

1. she was employed by Vicky Heywood directly, not a government funded program;
2. she was paid by Heywood; and
3. it was her job to provide personal care, not home support. In Chater's view, "home support" is cooking, doing laundry, cleaning and caring for the employer's home.

I have considered the matter of whether Chater's employment can or cannot be considered to be that of live-in home support worker and it is my conclusion that the delegate's decision is reasonable. As the term "live-in home support worker" is defined, it refers to any employer that provides home support services, through a government funded program, to anyone with an acute or chronic illness or disability that does not require admission to a hospital. The *Regulation* does not require that the worker actually be employed by a government program or an agency, or paid by a government program or agency. The definition is broader than that. The employer can be an agency, a business or some other kind of employer, indeed, any kind of employer that provides home support services through a government funded program to a person or persons with an acute or chronic illness or disability that is such that they do not require admission to a hospital.

Heywood is clearly a person with an acute or chronic illness that does not require admission to hospital.

In my view, it can be said that Chater provided home support services through a government program. Common meanings of the word "through" include "because of" and "by the agency, means, or fault of" [See *Concise Oxford Dictionary*, ninth edition, also *Canadian Dictionary of the English Language*, ITP Nelson, 1997 ed.]. Chater provided Heywood with home support services through a government funded program in the sense that her employment was by means of funding which was provided, and because of a program offered, by the Capital Health Region, the CSIL program.

The recipient of the care in this case is the employer but nothing turns on that. As the term "live-in home support worker" is defined, home support services can be provided to "anyone with an acute or chronic illness or disability not requiring admission to a hospital". Use of the word "anyone" is sufficient to include the employer where the employer is the person who requires home support services because they have an acute or chronic illness or disability yet do not require hospitalisation.

Chater argues that the term "live-in home support worker" refers only to persons who provide support services for the home. That is a very good argument but, in my view, it is to put too fine a point on the reference to home support services that is contained in the definition of "live-in home support worker". In my view the reference to home support services in the definition is a reference to support services which are provided in the home, not for the home. I am led to that

conclusion because of the definition itself. It speaks of the provision of “home support services for anyone with an acute and chronic illnesses or disability not requiring admission to a hospital” and “on a 24 hour per day live-in basis”. It is not laundry, cooking, cleaning and/or caring for the home that persons with acute and chronic illnesses or disabilities require on a 24 hour basis. It is personal care that is required on that basis.

I am satisfied that it is reasonable for the delegate to have concluded that Chater’s employment was that of live-in home support worker. It follows that Chater is not entitled to be paid overtimes wages.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 1, 2001 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal