EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Karen Barnacle operating as
Karen's Home Help Service
("Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Geoffrey Crampton
FILE NO.:	97/724
DATE OF HEARING:	December 18, 1997
DATE OF DECISION:	January 14, 1998

DECISION

APPEARANCES

Karen Barnacle	)
Tricia Barnacle	)
Susan Collier	) On behalf of the Employer
Diane Cushner	**)**
Lynda Hamilton	**)**
Hilda Nielsen	**)**

OVERVIEW

This is an appeal by Karen Barnacle operating as Karen's Home Help Service (the "Employer"), under Section 112 of the *Employment Standards Act* (the *"Act*"), against a Determination which was issued on September 9, 1997 by a delegate of the Director of Employment Standards

The Director's delegate determined that the Employer had contravened various Sections of the *Act* and ordered that payment of $3,4495.18 be made to Karen Moore, a former employee. On October 3, 1997 the Director's delegate advised the Tribunal that he had re-calculated the amount of wages owing after consultation with the Employer. As a result, the amount owing was determined to be $3,314.22 on account of the Employer's contravention of:

Section 16	Minimum Wage;
Section 34	Minimum Daily Hours
Section 40	Overtime Wages;
Section 45	Statutory Holiday Pay; and
Section 58	Vacation Pay

The Employer's appeal is concerned primarily with the interpretation of the *Act* and *Regulations*, particularly with respect to the definition of "live-in home support worker," "night attendant," " residential care worker" and "sitter" as those classes of persons are defined in the *Employment Standards Regulations* [BC Reg 396/95].

A hearing was held in Nelson, BC on December 18, 1997

FACTS

The Employer operates a business which offers a variety of services (nursing care; personal care; housekeeping; respite care; meal preparation) to clients. It's business objectives include:

1) To assist people in their homes so that they can maintain their independence and indivdually by having choices in meeting their daily living needs;
2) To provide an affordable service to the community and a choice for those not wishing to accept or are not eligible for governement subsidy; and
3) To provide work in the community with an organized group of people wanting to help others while having a direct say in the structure of how they carry out the work.

This service is offered on a "fee-for service" basis and the Employer does not receive any of its revenues from governement funding sources.

At page 2 of the Determination, the Director's delegate set out the Employer's position as follows:

> "(The Employer) believes her service, and others like it, are becoming increasingly necessary in society as health care is devolving from institutional care to community care. Many elderly people who are unable to care for themselves require this service, but have little or no money with which to purchase it. Barnacle believes her employees perform many, if not all, of the same functions as live-in home support workers except that her services are not provided through a government funded program. The *Employment Standards Act* provides live-in home support workers with a minimum wage of $70 per day or part of a day worked. Her policy is to pay employees $25 for a 12-hour night shift, during which the employee is usually sleeping. Barnacle believes her wage of $25 for a 12 hour shift is roughly comparable to $70 for a 24 hour shift.

Jennifer Moore was employed under the terms of a written Employment Agreement which became effective November 7, 1996. Her first day of work was November 30, 1996 and her last day of work was February 28, 1997 according to the Record of Employment (ROE) which was issued by the Employer on March 31, 1997.

According to the Employment Agreement, Ms. Moore's job duties included "Respite Care" and Housekeeping," with wages to be paid as follows:

> WAGES
>
> The Employee will work for the following wages:
> _x_ a) Respite $7.00 - $7.50 / hr (unless a contract established with a client for an amount acceptable to both parties is agreed upon which could be less than the hourly rate and for extended periods of time)
> _x_ b) Housekeeping $8.50 / hr
> ___ c) Personal Care $9.50 / hr
> ___ d) Nursing Care $14.00 / hr
> Wages will be paid on a bi-weekly basis. The pay period will be every other Friday and paydays will be the alternate Fridays.

At page 2 of the Determination, the Director's delegate sets out an explanation of how he calculated the wages owing to Ms. Moore by relying on the Employer's daily hours of work records as well as the payroll records and hours of work records which were provided to him by Ms. Moore. These records are the basis on which he prepared the "Calculation Sheet" to detemine the amount of wages owed to Ms. Moore.

In her written reply (dated October 20, 1997) to the Empoyer's appeal, Ms. Moore confirmed that she was scheduled initially to work "12-hour shifts" (9:00 p.m. - 9:00 a.m.) for 2 days each weeks with a 92-year old client to "... help with the daily activities of living and providing companionship." Ms. Moore's hours of work were increased during the month of December, 1996 and she was scheduled to work with other clients. These hours of waking and varing assignment are set out in full detail in the "Calculation Sheet" dated October 3, 1997.

The Employer submitted to the Tribunal statements signed by various clients which state that Ms. Moore did not perform work assigned to her as follows:

DATE	CLIENT	HOURS SCHEDULED
January 2, 1997	K. Wollan	6 Hours
January 6, 1997	L.Griffin	2 Hours
January 10, 1997	M. Brewster	2 Hours
January 15, 1997	M. Murray	2 Hours
Feruary 28, 1997	D. Rawling	2 Hours
March 3, 1997	D. Lashmar	1 Hours

These Documents were disclosed to Ms. Moore on December 8, 1997.

Ms. Moore did not respond in writing and did not appear at the hearing to rebut these signed statements.

ANALYSIS

The Determination contained a thoughtful and thorough analysis of how the *Employment Standards Regulation* [BC Reg 396/95] (the "*Regulation*") and the *Act* should be applied to the facts of this particular case. That analysis is reproduced below:

> *"**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;*

If the complainant were considered a sitter, she would be excluded from the entire *Act* as per Section 32 of the *Regulation*:

> *32. The Act does not apply to any of the following:*
>
> *(c) a sitter;*

The evidence clearly indicates the complainant was in fact employed by a business providing the service of "of attending to a child, or to a disabled, infirm or other person." Therefore the complainant cannot be considered a sitter.

> *"**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;*

If the complainant were a live-in home support worker she would be subject to a special minimum wage as per Section 16 of the *Regulation*:

> ***Section 16, Live-in home support workers***
>
> *16. The minimum wage for a live-in home support worker is $70.00 for each day or part of a day worked.*

Additionally, she would also be excluded from Part 4 of the *Act* as follows in the *Regulation*:

> ***Section 34, Exclusions from hours of work and overtime requirements***
>
> *34. (1) Part 4 of the Act does not apply to any of the following:*
> *(q) a live-in home support worker;*
> *(w) a night attendant;*
> *(x) a residential care worker.*

It can be stated that the complainant provided "home support services" for persons with "an acute or chronic illness or disability not requiring admission to a hospital." However, the complainant cannot be considered a live-in home support worker because she did not provide those services through a government funded program, nor did she provide those services on a 24 hour per day live-in basis.

> *"**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**;*

As a residential care worker the complainant would have been excluded from the hours of work and overtime provisions in Part 4 of the *Act* as noted above.

The complainant surely provided services in a "family-type residential dwelling." But was the complainant required to reside on the premises during periods of employment? The Employment Standards Branch has, since March 27, 1996, interpreted "reside" to mean the employee's principal domicile. The complainant states the place where she lived was not at the home of the clients of the employer.

*"**night attendant**" means a person who*

> *(a) is provided with sleeping accommodation in a private residence owned or leased or otherwise occupied by a disabled person or by a member of the disabled person's family, and*
> *(b) is employed in the private residence, for periods of 12 hours or less in any 24 hour period, primarily to provide the disabled person with care and attention during the night,*
>
> *but does not include a person employed in a hospital or nursing home or in a facility designated as a community care facility under the Community Care Facility Act or as a Provincial mental health facility under the Mental Health Act or in a facility operated under the Continuing Care Act;*

Again, as noted above, Section 32 of the *Regulation* excludes night attendants from Part 4 of the *Act.*

The complainant could qualify under both the first and second part of the above definition. She was in fact provided with a place to sleep in the client's residence. On a number of occasions, she worked for periods of 12 hours or fewer in a given 24 hour period with the purpose of providing a disabled person with care and attention during the night. On those occasions, she would clearly fall under the definition of night attendant.

On other occasions she worked a 12-hour shift, and then provided the same person with a further hour or two of personal care, or went on to another location to provide another person with an hour or two of personal care. Usually these other periods of personal care occurred at noon or around supper time and were compensated at a higher rate than the 12-hour work. During those days when the complainant's shifts exceeded 12 hours in any 24-hour period, her employment category would be that of "employee" and as such would receive the full protection of the Act defined as follows:

*"**employee**" includes*

> *(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,*
> *(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,*

> *(c) a person being trained by an employer for the employer's business,*
> *(d) a person on leave from an employer, and*
> *(e) a person who has a right of recall;*

All persons working for another in an employment relationship are employees for the purposes of the *Act*, regardless of whether they are employed on a part-time, full-time, temporary, or permanent basis. The definition of employee *includes everyone who is not specifically excluded by the Act or Regulation*.

For the purposes of this Determination, the complainant is considered an employee (subject to the full protection of the *Act* and *Regulation*) unless she meets the definition of night attendant, which she is considered to have accomplished when she works for periods of 12 hours or fewer in a given 24 hour period with the purpose of providing a disabled person with care and attention during the night.

> The calculation sheet indicates the complainant earned more than one rate of pay on most days. Overtime calculation is based on the rate the complainant was earning when the overtime rate was triggered by working more than eight hours in a day and forty hours in a week.

I note that the definition of "residential care worker" relies, in part, on the meaning given to the word "resides". The Director's delegate referred in the Detemination to a policy dated March 27, 1996. That policy contains the following statement:

> The "residential care worker" will have to meet both (a) and (b) of the definition in order to be excluded from the provisions of Part 4, hours of work and overtime, of the ESA.
>
> All other employees who are employed to supervise or care for anyone in a group home or family type residential dwelling, but **DO NOT** reside on the premises (as their primary domicile) will be entitled to full coverage under the **ESA** and Regulation, Including Part 4, hours of work and overtime.

When I review the analysis which the Director's delegate set out in the Determination, I find that I concur with it in all aspects.

One of the grounds for the Employer's appeal is that its employees are given considerable flexability and discretion in whether to accept an assigement to a particular client and to determine the number of hours which they wish to work each day or each week. This flexability and discretion is reflected in the Employment Agreement and, in the Employer's submission, supports a finding that Section 34 of the *Act* (Minimum Daily Hours) does not apply to its employees. With repect, I disagree with that submission. My disagreement is based on the provisions of Section 4 of the *Act* which states:

Requirments of this Act cannot be waived

> 4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

A second ground for the Employer's appeal is that Ms. Moore was employed to provide respite care and, therefore, met the definition of "sitter" in the *Regulation*. However, the appeal also contains the following statement:

> "Current Legislation does not provide an affordable means for the average person to undertake this aspect of care."

It became clear at the hearing that the primary focus of the Employer's appeal was a desire to amend the exsisitng provisions of the *Act* and *Regulation*. To that end, the Employer had prepared a petition to the Minister of Health and the Minister of Labour and had begun to collect signatures in support of the petition. I drew the Employer's attention then, and do so again now, to the destinction between an appeal under Section 112 of the *Act* and the Tribunal's powers to recommend the exclusion of classes of persons pursuant to Section 109 of the *Act.*

This appeal raises some of the same concerns as those described in a recent decision of the Tribunal (*J. Raechel Dolfi*, BC EST #D524/97). Like the adjudicator in that Decision, I am required to follow the plain language of the *Act* and *Regulation* in deciding this appeal. It is clear from the definitions in the *Regulation* that the Legislature included government funding as one of the criteria in the definition of "live-in home support worker" and expressly exculded employees of a business from the definition of "sitter". While I can understand the Employer's objective to provide a cost effective service to tis clients, I cannot ignore the requirments of the *Act* and the *Regulation* in deciding this appeal.

I am satified that the Employer's submission concering Ms. Moore's hours of work should result in an order to vary the Determination. In the absence of any response from Ms. Moore I am persuaded, on the balance of probabilities, that she did not work the assignements (15 hours in total) as descirbed at page 4 above.

For all of these reasons I find that while I concur with the anaylsis which is set out in the Determination I must vary the amount of wages to which Ms. Moore is entitled.

ORDER

I order, under Section 115 of the *Act*, that the Determiantion be varied to reflect my finding that Ms. Moore did not work a total of 15 hours for which she had been scheduled between January 2, 1997 and March 3, 1997 inclusive.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/sr