Employment Standards TRIBUNAL

An appeal

- by -

Clifford Leblanc
("Leblanc")

- 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: John M. Orr

FILE No.: 2000/720

DATE OF DECISION: January 22, 2001

DECISION

OVERVIEW

This is an appeal by Clifford Leblanc ("Leblanc") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination (File No.079374) dated October 06, 2000 by the Director of Employment Standards (the "Director").

Leblanc was employed by Wendy Ann Wingerter operating as Darmax Enterprises ("Darmax") to provide support services to a physically challenged individual, "Charles", who needed assistance with most activities. Leblanc was employed to work one 24-hour shift per week commencing at 4 PM on Thursdays. Leblanc would sleep on a foldout couch in the living room when Charles was in bed.

Leblanc would be required to attend to Charles two or three times per night and it is these "interruptions" that give rise to this appeal. Leblanc claims that he was a **"residential care worker"** and therefore entitled to be paid for two hours for each interruption no matter how brief the interruption. In the determination the Director found that Leblanc was employed as a **"live-in home support worker"** and therefore not entitled to the minimum two hours pay per interruption.

Leblanc appeals this decision on the grounds that the Director has misinterpreted the definitions and asserts that he should have been classified as a residential care worker. He claims to be entitled to 138 interruptions of rest periods that should have been paid at 2 hours each at a rate of $12.00 per hour for a sum owing of $3,312.00.

ISSUE TO BE DECIDED

The issue to be decided on this appeal is whether Leblanc was a residential care worker.

FACTS

Leblanc was employed to care for Charles for one 24-hour period per week. Charles lived in two rooms in a house in Victoria but he required 24 hours per day supervision. There was no written job description but Leblanc says that he was to be paid $12 per hour for 16 hours and that he could sleep for eight hours. There was no specific agreement about payment for sleep interruptions. Leblanc slept on a foldout couch in the living room when Charles was in bed. Leblanc's principal residence was on Salt Spring Island.

Leblanc had other employment and I gather that on all other nights he slept at his own residence.

ANALYSIS

The primary issue in this case is whether Leblanc was a "residential care worker" as defined by the *Regulation:*

> *"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.*

The reason that this definition is important in this case is that section 22 of the *Regulation* provides that where a residential care worker is required to remain on the premises for a 24-hour period the employee must be given an eight-hour rest period. In addition the employer must pay the worker at the regular wage for a minimum of two hours for each interruption of his rest period.

If Leblanc was a "residential care worker" then the employer would be required to pay him at least 2 hours per interruption at his regular wage. If Leblanc was a “live-in the home support worker” he would be specifically exempted from this provision.

The key elements of the above definition are at that:

1. The employment must be in a group home or family type residential dwelling; and

2. The employee must be "required… to reside on the premises during periods of employment”.

The Director found that in Leblanc’s case he was not providing his services in a group home or family type residential dwelling. The Director found that: “Charles lived alone in a self-contained unit inside a larger house. He did not share his accommodations with anyone except the care-giver who was attending to him at any given time. He was certainly not a member of a group home where care-giver's are hired to supervise and care for the residents collectively”.

In analysing the first aspect of the definition I do not think that the Director's delegate gave sufficient meaning to the term "family type residential dwelling". In my opinion these words should be given a large and liberal interpretation and could include the type of premise in which Charles lived. However, I do not intend to specifically make a finding of fact on this issue as the evidence contained in the determination and in the appeal documentation is not clear enough for me to make such a finding adverse to the conclusion of the Director. It is not

necessary for me to decide this point in light of my finding on the second point as discussed below.

The key question is whether Leblanc was required to *"reside on the premises during periods of employment"* ("the phrase").

Leblanc submits that the phrase "reside on the premises during periods of employment" does not mean that the residence must be the employee's permanent home, sole residence, full time residence or principal residence. It simply means that the employee resides there, or 'remains" there while on shift i.e. during periods of employment. He submits that this is the clear, logical, and simple meaning of the phrase.

He submits that to interpret "reside" in this context as meaning to live full time or a principal residence or domicile is too restrictive. He submits that the term should be given a "fair, large and liberal construction" (*Interpretation Act* - RSBC Chapter 206, 1979). The present interpretation by the ministry is that "reside" must mean that the premise is the employee's home and principal domicile.

It has previously been argued that the phrase should be interpreted narrowly because it takes away benefits and protections conferred by the *Act*. When interpreting a remedial statute clear language is required to take away benefits otherwise conferred by the legislation. If there is any uncertainty in the language it should be interpreted in the manner most consistent with the overall intention of the Statute, which is to provide minimum standards and benefits for employees. The problem is that the definition gives benefits and removes others. It provides for rest periods and minimum pay for sleep interruptions but also removes the entitlements of Part 4 of the Act (overtime etc.).

Despite the submissions of the appellant herein, I must make it clear that in my opinion the titles given to a job description, job titles as filled-in on government forms, or even the language used by the parties to describe the position are not determining factors in the actual nature of the employment. For example, many employees are described as "managers" even though they do not supervise any other employees and are therefore not managers within the meaning of the *Act*. The use of the term "residential care worker" by the employer or any other party is not a determining factor in this case. Likewise, any opinions given by staff or other employees of the Director are not determining factors and cannot override the provisions of the legislation. The Director and this Tribunal must look carefully at the actual activities of the employer and employee and all the circumstances surrounding the employment to decide whether or not the criteria in the definition is met.

The key issue comes down to whether Leblanc was the required to "reside" on the premises during periods of his employment.

The decision of this Tribunal in *Re: Lowan (Corner House)* BCEST #D254/98 analyses this issue in some depth. It has been followed and applied in *Re: Knutson First Aid Services*

(1994) Ltd. BCEST #D300/00 and *Re: North Island Camp Ltd.* BCEST #D415/98. In *Lowan* the Adjudicator stated:

> 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.

In *Knutson* the adjudicator found that:

> It is obvious from the above excerpts that the Tribunal has accepted and incorporated the requirements of a degree of permanence or settlement into the meaning of residence for the purposes of the *Act.* I agree with that approach. It is a common sense approach to the notion of "residence" that is not inconsistent with common usage, but is sufficiently "strict" enough that it meets the purposes and objects of the act and is consistent with its remedial nature."

In this case Leblanc maintained his own residence away from his workplace. It was that personal residence as referred to above. This is not to say that a person could not have more than one residence. Certainly the language contemplates a person being required to reside at the work premises during periods of employment and not thereby having the work premise as their exclusive or even primary residence. Nevertheless, "reside" must mean more than simply "attend at" or "remain at". As described in the decisions noted above "reside on the premises" must have some more sense of permanence or settlement. Sleeping on a foldout

couch in the living room could not, under any interpretation, even the fairest, largest and most liberal, be considered a place of residence. It was shared with the client, who considered it his primary residence. It was no more than a place to rest his head while keeping vigil for the client. Leblanc slept there one night per week subject to the exigencies of the job. There is no evidence that he kept his clothes or personal belongings there or that it was his personal space in any manner whatsoever. In my opinion he did not "reside" there at any time, even "during periods of employment".

I note that in the appeal documentation Leblanc refers to sleeping in the second bedroom. It is not clear on the material before me to what extent Leblanc used this second bedroom as opposed to sleeping on the couch as described by the Director's delegate. However, the onus is on the appellant to provide sufficient evidence to persuade the Tribunal that the determination is wrong. There is not enough evidence to satisfy me that the use of the second room was of such an exclusive nature as to alter my finding that Leblanc did not reside at his place of employment.

I was asked find that "during periods of employment" could mean that an overnight shift is a period of employment. However, for the purpose of this decision I do not need to decide what might constitute a period of employment as I have found that Leblanc did not “reside” at Charles’s place at any time.

I do not need to decide whether Leblanc was a “live in the home support worker” as this issue was not raised on appeal. There was also no appeal of the issues involved in payment of wages or enforcement of the terms of the employment contract other than the minimum pay for interruptions in the rest periods.

I conclude that Leblanc was not a residential care worker and that therefore he was not entitled to the minimum two-hour wage for rest interruptions.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

JOHN M. ORR

John M. Orr
Adjudicator
Employment Standards Tribunal