EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act*

- by -

Health Employers Association of British Columbia
representing Comcare (Canada) Limited
(" H.E.A.B.C. ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 96/106

DATE OF DECISION: April 2, 1996

DECISION

OVERVIEW

This is an appeal by H.E.A.B.C. pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against Determination No. CDET 000799 issued by the Director on January 17, 1996. In this appeal H.E.A.B.C. contends that the Director should not have determined that the employee in this matter, Sharon McLellan ("McLellan"), was entitled to be paid overtime wages.

Consideration of this appeal falls under the transitional provisions of the *Act.* Section 128(3) of the *Act* states:

> *If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director, or an officer on a complaint made under that Act. the complaint is to be treated for all purposes, including Section 80 of this Act, as a complaint under this Act.*

I have completed my review of the written submission of H.E.A.B.C. and the information provided by the Director.

FACTS

McLellan was employed by Comcare (Canada) Limited ("Comcare") commencing January 28, 1994. In early September of 1994, McLellan began to provide care to a single client, L., on an overnight basis.

The payroll records provided by Comcare indicate that McLellan's shift commenced at either 6:00 p.m. or 6:30 p.m. and usually ended at 10:00 a.m. the next day. The payroll records also indicate that initially McLellan worked 4 shifts per week, Monday to Thursday, however, commencing the week of June 11, 1995, McLellan began to work only 3 shifts per week, Monday to Wednesday.

The payroll records further indicate that McLellan's last shift worked was on August 1, 1995.

The Director determined that McLellan was an employee whose occupation was not excluded by the Employment Standards Regulation ("*Regulation*") from the requirement to pay overtime wages and, subsequently, determination # CDET 000799 was issued.

ISSUE TO BE DECIDED

The issues to be decided in this appeal are:

1. In what occupation was McLellan employed ?
2. Was her occupation excluded by Regulation from the requirement to pay overtime wages pursuant to the provisions of the *Act* ?

ARGUMENTS

H.E.A.B.C. contends that:

- McLellan was hired as a "casual home support worker" in January of 1994; and
- further that she was 'hired' as a "night attendant" on September 1, 1994 until her last day of employment; and
- her client only required overnight service commencing at 10:00 p.m. ; and
- the shift start times of 6:00 p.m. and 6:30 p.m. were at McLellan's request for personal reasons; and
- she was permitted to sleep during the night but may be disturbed if the client needed assistance; and
- sleeping accommodations were provided at the client's home; and
- Comcare intended to, and did, at all material times, employ McLellan as a "night attendant" ; and
- the extended hours worked by McLellan did not remove her from the scope of Section 34 (w) of the *Regulation.*
- McLellan was aware of the conditions of her employment, including the rate of pay and accepted such conditions of employment.

The Director contends that as McLellan was scheduled for shifts longer than 12 hours, she was not a "night attendant" as defined by the *Regulation.* The Director further contends that overtime wages are payable to McLellan pursuant to the provisions of the *Act.*

ANALYSIS

The main issue in this matter is the determination of McLellan's employment category or classification. Upon reviewing the submissions and information provided, it is clear that the parties do not agree as to what category McLellan was employed as.

Comcare, in its response dated October 11, 1995, to the Employment Standards Branch ("Branch") categorized McLellan as a "live in homemaker". H.E.A.B.C., on behalf of Comcare, in its submission dated March 12,1996, to the registrar of the Tribunal categorized McLellan as being originally a "casual home support worker" and then as being a "night attendant" effective September 1, 1995.

McLellan categorized herself as a "support worker" in her complaint to the Branch.

The Director determined that McLellan was not a "night attendant" as defined by the regulations.

I must therefore, consider the categories which may seem to fit as defined by the *Act* and the *Regulation* to determine which category appropriately encompasses the functions performed by McLellan.

Section 1 of the *Act* defines work as:

*"**work** means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."*

Section 1 further states:

"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."

It is clear that the functions performed by McLellan for Comcare constitute work as defined by the *Act.*

Section 1 of the *Regulation* defines "live in home support worker", "night attendant" and "residential care worker" as:

***"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."*

***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.

***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."

It is clear that McLellan does not fall within the definition of either a "live-in home support worker" or a "residential care worker" as she did not live-in or reside on the premises during periods of employment.

The question then remaining is whether McLellan was a "night attendant". I conclude that McLellan was **not** a "night attendant" as defined in the *Regulation* for the following reasons:

a) H.E.A.B.C. did not provide any evidence of a job description for a night attendant which would encompass the duties performed by McLellan. The only job description provided by Comcare was for a Home Support Worker 1 which, as stated above, is not the category McLellan was employed in.

b) H.E.A.B.C. has not provided any evidence to support their contention that McLellan was hired as a "night attendant" and was aware of the terms and conditions of her employment, including the rate of pay. In fact, Comcare's response to the Branch dated October 11, 1995 clearly contradicts this contention as in that letter, Comcare categorizes McLellan as a "live in homemaker" who "was being paid in excess of the $65.00 minimum as per the Employment Standards Regulations".

c) H.E.A.B.C. has not provided any evidence to support their contention that it was at McLellan's request that her shift commenced at 6:00 p.m. or 6:30 p.m.

d) McLellan was at **work** for her entire shift as she was "at a location designated by the employer", even though she was permitted to sleep with the understanding that such sleep might be disturbed by the needs of the client.

e) The payroll records provided by Comcare clearly indicate that McLellan was **employed** for periods of **more than 12 hours** on a regular basis.

I further conclude that the hours in excess of 8 hours per day worked by McLellan are to be paid for at the appropriate overtime rates of pay pursuant to the provisions of the *Act*.

H.E.A.B.C on behalf of Comcare wished to reserve the right to make submissions on the calculations of the appropriate amount owing, however, as I have concluded that McLellan was not a "night attendant", the calculation of the wages owing is simply a matter of applying the appropriate provisions of the *Act* to the payroll records provided. I have reviewed the

calculations performed by the Branch and I am satisfied that the amount of $5104.56 is owing to McLellan.

ORDER

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 000799 be confirmed in the amount of $5104.56 .

April 2, 1996

Hans Suhr
Adjudicator
Employment Standards Tribunal

Date

:jel