

An appeal

- by -

Dale Hampshire
("Dale")

- 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: April D. Katz

FILE No.: 2000/737

DATE OF DECISION: January 23, 2001

DECISION

SUBMISSIONS:

E. Hampshire, Dale Hampshire, K. Hampshire	on behalf Dale Hampshire
Pamela C. Chase	on behalf of Pamela Chase
Karyn Luttmner	on behalf of the Director

OVERVIEW

The Employer, Dale Hampshire, (“Dale”) has appealed a Determination which found that he owed his personal care giver, Pamela Chase (“Pamela”) \$229.85 in wages, overtime and vacation pay. The issue is whether or how the *Employment Standards Act* (“Act”) applies to this type of employment.

ISSUE

1. Did the Director err in concluding that Pamela was not a sitter within the meaning of the *Act* and Regulations?
2. Did the Director error in applying Part 4 of the *Act* to Pamela’s employment with Dale?
3. Did the Director error in finding Pamela was owed wages, overtime and vacation pay?

ARGUMENT

The Employer, Dale, is a quadriplegic who employs staff to assist him to live independently in an apartment under the government’s Choice in Supports for Independent Living (“CSIL”) program. If Dale is found to be responsible for overtime there will not be enough money under the program for him to live independently. Dale wants the definition of the job to be clarified so that the same mistakes will not be made in future employment.

Pamela submits that she was ‘on call’ at Dale’s home all the time she worked. She did not have a 1/2 hour meal break or a flexible work schedule that allowed her two four hour breaks in a 24 hour shift. She worked from 3 PM May 11, 2000 until 2PM on May 12, 2000 without a break. She slept for 4 hours but was on call throughout this period.

Dale did not pay her for the 4 hours she slept or the overtime earned.

FACTS AND ANALYSIS

Pamela was hired under a contract to provide personal care needs defined as toileting, bathing, transferring, washing, dressing, grooming, putting on and adjusting ventilator mask and cleaning the ventilator. The contract provided that Pamela was expected to do general housekeeping duties which included, laundry, ironing/mending, vacuuming, dusting, dishes, grocery shopping, cleaning fridge and stove, garbage/recycling, general apartment maintenance and other related duties.

Dale had government funds under the CSIL program to pay for staff. The issue is whether the type of employment is exempted under sections 32 or 34 of the Regulations B.C. Reg. 396/95. Section 32 exempts “sitter” from the application of the *Act* and section 34 exempts live-in home support worker”, “night attendant” and “residential care worker” from the application of the minimum wage and overtime provisions contained in Part 4 of the *Act*.

In similar situations the Tribunal has rejected the definition of “live-in home support worker” because the employee does not live with the employer. The Tribunal has rejected the definition of “residential care worker” because the employee is not required to reside on the premises of the employer. The Tribunal has rejected the definition of “night attendant” because the person’s work is not done exclusively at night. The Determination also concluded that these types of employment defined in the Regulation are not applicable.

In previous decisions of the Tribunal, *Wood* BCEST #D176/00, *Renaud*, BC EST #D436/99 and *Dolfi*, BC EST #D524/97, the Tribunal has held that the definition of “sitter” under the *Act* applies to the work related to personal care of someone living independently in similar circumstances.

The Determination rejected the definition of “sitter” in this situation because the job included a number of housekeeping duties normally associated with a domestic worker. The *Act* applies to domestic workers.

The Regulation defines sitter as follows.

"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 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.

In concluding that the employee was a ‘sitter’ in Mike Renaud, BC EST #D436/99 the duties of the employee were described as follows:

The duties performed by Ms. Spivey included typical care giver functions such as bathing, dressing, feeding, lifting from bed to chair, chair to bed, tidying up and generally being there to help if an emergency arose. Other daily duties involved trachea care, suctioning, bowel care and changing the condom catheter. Ms. Spivey also accompanied Mr. Renaud on outings, doing the driving in his specially equipped vehicle to places like movies, shopping and to restaurants and bars.

General housekeeping is not included in this description, however, the Tribunal paid considerable attention to the significance of the ordinary meaning of the word “attending” in the definition. The Tribunal held that ‘attending’ included “the work of caring for or attending to someone or something”.

In *Dolfi*, BC EST #D524/97, the Tribunal considered whether the legislature intended to include persons such as Mrs. Wood, who were not simply babysitters but provided broad based in-home personal care for the disabled and elderly, in the definition of "sitter". The following comments from that decision have relevance to this appeal:

Having said all this, however, I am bound to follow the plain language of the definition of "sitter", which is intended to exclude from the Act workers who provide in-home care to a child or the elderly. Further, it is difficult for me to conclude that the legislature failed to consider home support workers in drafting this definition: some types of home support workers are dealt with specifically in the text of the definition. Despite the result that home support workers must be completely excluded from any of the Act's protections and minimum standards, I am compelled to follow the plain language of the definition and find that Ms. Dolfi is a "sitter".

Pamela was employed in a private residence solely to provide the services of attending to Dale, a disabled person. If her duties were restricted to his personal needs the employment would be exempt from the *Act*.

Dale expected Pamela to do laundry, ironing/mending, vacuuming, dusting, dishes, grocery shopping, cleaning fridge and stove, garbage/recycling, general apartment maintenance and other related duties. If Dale hired someone else to do the general cleaning of the apartment and restricted his expectations of Pamela to do only the aspects of these duties that were directly related to his care the *Act* would not apply.

The facts are, however, that Dale expected Pamela to do the domestic tasks of cleaning and maintaining his apartment which takes the employment outside the definition of “sitter”.

Based on these findings I find that the Director did not err in concluding that Pamela was not a sitter within the meaning of the *Act* and Regulations.

The only facts in dispute are whether the time Pamela spent sleeping on May 11, 2000 until May 12, 2000 was time she was working. When an employee is sleeping in the employer's residence so that they may be called to perform work the employee is working within the meaning of the *Act*. I find that the Director did not err in finding that Part 4 applies to this employment. Pamela is owed wages, overtime and vacation pay for May 11, 2000 and May 12, 2000.

CONCLUSION

Based on the evidence before me I do not find any error in the Determination. I deny the appeal.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated October 3, 2000 be confirmed.

APRIL D. KATZ

April D. Katz
Adjudicator
Employment Standards Tribunal