Employment Standards TRIBUNAL

An appeal

- by -

Marilyn Noyes

- 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: Carol L. Roberts

FILE No.: 2003A/15

DATE OF DECISION: March 4, 2003

DECISION

This decision is based on written submissions by Marilyn Noyes, an unidentified individual on behalf of Vancare Health Resources Ltd., and by Bernie Gifford, a delegate of the Director of Employment Standards.

OVERVIEW

This is an appeal by Ms. Noyes, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued December 6, 2002. Ms. Noyes alleged that Vancare Health Resources Ltd. ("Vancare") owed her statutory pay, wages, and compensation for length of service. The parties resolved the issues of statutory pay and compensation for length of service, leaving the delegate to determine the claim for wages. The Director's delegate concluded that Vancare owed Ms. Noyes $200.07 in respect of wages, vacation pay and interest.

GROUNDS OF APPEAL

Ms. Noyes' appeal alleges

1. that the delegate erred in law in failing to classify her position correctly, thus arriving at an inaccurate amount for wages owing;

2. that the delegate failed to observe principles of natural justice by misquoting her, and by preferring the employer's evidence over hers; and

3. that evidence has become available that was not available at the time the Determination was made.

In my view, the submissions do not disclose any basis for the second and third grounds of appeal.

Whether or not the delegate misquoted Ms. Noyes or preferred Vancare's evidence over Ms. Noyes' does not constitute a breach of natural justice. Nevertheless, I have addressed these allegations in the process of dealing with the first ground of appeal.

Ms. Noyes refers to time sheets that she says she did not submit to the delegate at the first instance. This evidence was clearly available to Ms. Noyes at the time she filed her complaint and at the time the Determination was made. Had Ms. Noyes felt it important for the delegate to consider this evidence during the investigation, she ought to have provided it to him. The fact she did not does not now give rise to a right of appeal.

Therefore, this decision addresses only the first ground of appeal.

ISSUE TO BE DECIDED

Whether the Director's delegate erred in failing to correctly determine Ms. Noyes' status under the Act, and, as a consequence, err in calculating her wage entitlement.

FACTS

Vancare is a company in the business of providing personal care for clients. Ms. Noyes was hired by Vancare on October 29, 1999, to provide care for one of its clients. Ms. Noyes was paid $100.00 per day from October until February 10, 2000. On February 11, 2000, the parties entered into a written agreement which provided, in part, as follows:

> I agree that my rate of pay as a 24 hour live-in caretaker will be $125.00 per day. No overtime will be paid during this period of employment. (emphasis in original)

Ms. Noyes' position was variously described by Vancare as a "24 hour live-in caregiver", (as noted above), "home support worker" or "nurses aid" (the job application Ms. Noyes completed), "residential care worker", (Ms. Noyes' Record of Employment) and "home support worker" (Vancare's submission to the delegate).

The evidence is that Ms. Noyes lived at the home of Vancares' client in Vancouver for three days each week. Vancare contended that Ms. Noyes did so for her convenience because she lived in Abbotsford, and it saved her driving back and forth to work each day. Ms. Noyes contended that she did so because the client required 24 hour care. Ms. Noyes asserted that she was entitled to compensation for working a 24 hour day, or, in the alternative, a 16 hour day. Vancare contended the client did not require 24 hour care until December 2001, when her health became more fragile. It also contended that that Ms. Noyes was entitled to be paid for only 12 hours per day based on the contract and on other non-written agreements between the parties.

After reviewing the evidence, the *Act* and the *Regulations*, the delegate concluded that Ms. Noyes did not fall within the definitions of "live-in home support worker", "night attendant" "residential care worker" or "sitter", and thus was not excluded from the operation of Part 4 of the *Act* (that part that relates to hours of work and overtime).

The delegate accepted Vancare's assertion that, although Ms. Noyes was at the client's home for a three day period, she only worked 12 hours of each day. The delegate found that the time Ms. Noyes spent at the client's home was not as a result of Vancare's requirement that she do so, rather, as I infer, because of her own convenience in not traveling back to Abbotsford after each shift. The delegate found no evidence that Ms. Noyes had calls outside a specific 12 hour period, and that, even if the client required full time care, it would only be between the hours of 8:00 a.m. and 10:00 p.m.

The delegate calculated Ms. Noyes' wage entitlement based on the prescribed minimum wage and corresponding overtime.

ARGUMENT

Ms. Noyes argues that she is not exempt from overtime because she is not a live-in worker, residential care worker, or night attendant. On this point, her position does not differ from the delegate's conclusion, as he found that she was not exempt from the overtime provisions of the *Act*. Ms. Noyes contends that she was originally hired by Vancare to provide three day relief care for the client when another employee hired directly by the client's family wanted time off. She says she was required to remain on the premises for a three day period, and work, or be available for work, 24 hours each day. She says this was so not only because it suited her not to drive back and forth from Abbotsford to Vancouver, but because it suited

the client's family because they did not want "several ladies coming and going night and day to provide care" and upsetting the client. She says she sought a raise shortly after commencing work, in part because the client was awake often during the night and needing assistance. She contends that although Vancare increased her daily pay, it insisted she sign a letter acknowledging that she could not expect to be paid for a 24 hour shift. She says that in April, 2000, the private employee quit, and Vancare was contracted to provide 24 hour care for the client. She says that one employee worked a 12 hour day shift, the other a 12 hour night shift, for the four days she was not working.

Ms. Noyes asserts that Vancare was engaged to provide 24 hour care for the client, and that, because she was the only Vancare employee at the client's premises for the three day period, she is entitled to compensation for all the hours she worked in that time period. She contends that she was awake many nights caring for the client, and that the client could not be left alone. She further contends that a proper review of the logs would demonstrate that she regularly provided care to the client in the middle of the night until "the last many months", and that her pay should not be calculated on the basis of a 12 hour day.

The delegate's response to the appeal consisted of his entire file, including notes, submissions from the parties, and attempts at settlement. It is impossible to discern what the Director's position is from this package of material.

Vancare argues that Ms. Noyes asked to sleep at the client's residence and use a room at her house to save her travel time, and that she was never required to stay on the premises. It asserts that the written agreement entered into between the parties on February 11, 2000, specifically states that no overtime pay was to be paid because it wanted to ensure that Ms. Noyes knew she was not hired to work 24 hours per day. It says that any work done beyond her regular shift was "purely gratuitous".

Vancare also contends that the time logs, which were all provided to the delegate, indicate that the client slept through each night without interruption, falling asleep at 10:30 – 11:00 p.m. nightly, and waking between 9:15 and 9:30 each morning.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the delegate erred.

Ms. Noyes does not take issue with the delegate's determination that she should not be excluded from the overtime provisions of the *Act*. Therefore, I find no basis for her argument that the delegate erred in wrongly categorizing her employment status. As she did not fall within any of the classifications set out in the regulations, she is entitled to be paid overtime for the hours she worked in excess of an 8 hour day or a 40 hour week, according to s. 35 of the *Act*.

I accept that Ms. Noyes was to be available for a 24 hour period. Although Vancare asserted that Ms. Noyes did not work for that period of time, the contract, which I infer was drafted by Vancare, expressly stated that she was a 24 hour caregiver (my emphasis).

Furthermore, there does not appear to be any dispute to Ms. Noyes' assertions that, commencing December 2001, after Ms. Noyes' three days shift had ended, Vancare employed two employees for each 24 hour shift.

Furthermore, Vancare set out duties of the client's workers in two documents, the first for the day shift, which was from 8:00 a.m. to 20:00, the second for the night shift from 20:00 to 8:00 a.m. The duties of the night shift worker included the following:

- check and assist [client] during the night as required. Leave the intercom on.
- Ensure bedding of [client] is clean at all times during the night
- Keep environment clean and safe

It is clear that the client's family, and thus Vancare, expected the client to have 24 hour attention.

Having arrived at this conclusion however, there is no evidence Ms. Noyes worked 3 consecutive 24 hour periods; indeed, it would be virtually impossible for her to do so.

The delegate concluded that Ms. Noyes worked, on average, 12 hour days. I accept that, from time to time, Ms. Noyes was required to attend to the client in the middle of the night. However, I am not persuaded this was a regular occurrence. By her own admission, Ms. Noyes slept at least 8 hours of each 24 hour period. She also acknowledges that, in "the last several months", the client was a "good sleeper", and that she would not have to wake in the night to attend to her. Furthermore, while some logs appear to suggest that she performed some duties past a regular 12 hour shift, I am not persuaded that this was a regular occurrence. The delegate accepted Ms. Noyes' admission that she slept at the client's place, in part, because it was convenient for her to do so. Ms. Noyes stated that she stayed at the client's place, in part, because the family wanted her to have the same caregiver.

I accept that the delegate reviewed the relevant material before him, including the job duties, time logs and call sheets, and on balance, concluded that Ms. Noyes worked 12 hours per day. I am unable to find any error in the delegate's determination.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated December 6, 2002, be confirmed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal