

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 -

Tammy Wood
(" Mrs. Wood ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/028

DATE OF HEARING: April 18, 2000

DATE OF DECISION: May 2, 2000

DECISION

APPEARANCES

for the individual	in person
for Robin Wold	in person
	Evelyn Wold

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Tammy Wood (“Mrs. Wood”) of a Determination that was issued on December 24, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination addressed a complaint that had been filed by Mrs. Wood against Robin Wold (“Mr. Wold”) for vacation pay. The Determination concluded that Mrs. Wood was employed by Mr. Wold as a sitter, as that term is defined in the *Employment Standards Regulations* (the “Regulations”) and, applying Section 32 of the *Regulations*, the Act did not apply to her.

Mrs. Wood appeals that conclusion.

ISSUES TO BE DECIDED

The issue is whether the Director correctly concluded that Mrs. Wood was a sitter and, as a result, was a person to whom the Act did not apply.

FACTS

All of the persons attending the appeal hearing, and particularly the principal parties in this appeal, Mrs. Wood and Mr. Wold, were extremely pleasant and cooperative and I commend them for that.

To put this appeal in perspective, the Determination contains the following background information:

Robin Wold (Wold) is a quadriplegic individual who employs staff to care for him. Excluding training days, Wood worked from February 1, 1999 to August 31, 1999 as a Caregiver/Sitter at the rate of \$100.00 per shift.

Both parties agreed, with two exceptions, that the respective positions of the parties and the findings of fact set out in the Determination were correct. Both disagreed with two statements

set out in the Determination under “Employer’s Position”. The first related to Mrs. Wood’s days of work:

Wold stated Wood worked 7:00 am to 7:00 pm, Monday to Thursday each week and was paid \$100.00 per shift.

The statement should have read “Monday to *Friday* each week”.

The second statement related to what Mrs. Wood was told at the time of hiring. The Director stated:

Wold stated Wood was advised when she was hired that she was a sitter and Vacation Pay was not required to be paid.

The parties agreed that what was stated at the time of hiring was not as specific as noted in the Determination. In respect of the subject matter being addressed in that sentence, Mrs. Wood was told that her job would be to look after Mr. Wold and that all he could pay her was \$100.00 a day. Mrs. Wood testified that another employee came to her about a week after she started and asked her to sign a document saying she would not take vacation pay, but she did not sign it.

The only other area of concern raised with the facts related to the description of the duties performed by Mrs. Wood. Both parties agreed that her duties included all those outlined in the Determination. They also agreed that she performed other duties that were not included in the Determination. Those other duties, and their frequency, were as follows:

- changing dressings and medicating bedsores on a daily basis,
- removing and cleaning Mr. Wold’s trachea tube on a daily basis and changing the tube approximately once a month,
- cleaning the ventilator and ventilator hoses approximately once a month;
- changing Mr. Wold’s catheter approximately once a month,
- assisting Mr. Wold with his physiotherapy for about ½ hour each day,
- on two occasions, Mrs. Wood took Mr. Wold’s vital signs (pulse, blood pressure and temperature), and
- on one occasion, she removed a urine sample from the catheter.

Mrs. Wood had no training or experience as a caregiver before she took this job.

ANALYSIS

The *Regulations* defines sitter:

“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.*

Under Section 32(1)(c) of the *Regulations*, the *Act* does not apply to a sitter.

Mrs. Wood argues that if all of her duties and responsibilities were taken into account, the Director should have concluded that she was a personal care, or nurse, aide, not a sitter.

I accept that the duties performed by Mrs. Wood involved and included typical caregiver functions. However, that conclusion does not alter the basic question that must be addressed, which is whether her employment fell within the definition of “sitter” in the *Regulations*.

The Tribunal has already considered whether a person performing caregiver functions was eliminated from the definition of “sitter”, see *Mike Renaud*, BC EST #D436/99. The duties of the individual were described in that case 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.

The Tribunal concluded that Ms. Spivey’s employment fell within the definition of “sitter” and, applying Section 32(1)(c) of the *Regulation*, that the *Act* did not apply to her. A significant aspect of the decision turned on the conclusion that the ordinary meaning of “attending”, which is the term used in the definition of “sitter”, includes “the work of caring for or attending to someone or something”.

As well, an earlier decision of the Tribunal, *J. Raechel Dolfi*, BC EST #D524/97, considered whether the legislature intended to include persons such as Mrs. Wood, who are not simply babysitters but provide 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”.

Similarly, I am compelled to follow the plain language of the definition. There is always a reluctance in finding that a person is excluded from the minimum employment standards provided by the *Act*, but considering all the circumstances of this case against the plain language of the definition of “sitter” in the *Regulations*, I cannot avoid the conclusion that Mrs. Wood falls squarely within this language. She was employed in a private residence solely to provide the service of attending to Mr. Wold, a disabled person. She was not otherwise excluded from that definition. She was not a domestic or live-in home support worker as those terms are defined in the *Act* and *Regulations*. She was not an employee of either a business providing a home care service or a day care facility. She was neither a nurse nor a therapist.

The Director was not wrong to conclude that Mrs. Wood was a sitter as defined in the *Regulation* and that the *Act* did not apply to her employment.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 24, 1999 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal