

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act S.B.C. 1995, C. 38*

- by -

Rose Garden Senior Care Home  
(“Rose Garden”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

<b>ADJUDICATOR:</b>	David Stevenson
<b>FILE No.:</b>	97/88
<b>DATE OF HEARING:</b>	April 7, 1997
<b>DATE OF DECISION:</b>	April 17, 1997

**DECISION**

**APPEARANCES**

for the Appellant:	Lee Haas Harold Henderson
for the Complainant:	in person
for the Director:	no one appearing

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Lee Haas operating Rose Garden Senior Care Home ("Rose Garden") from a Determination of a delegate of the Director of Employment Standards (the "Director") dated January 24, 1997. The Director found the Rose Garden had contravened Section 16 and subsection 58(3) of the *Act* and ordered the payment of \$7,366.32 to the complainant, Dawn Wyatt ("Wyatt"). The amount was based on a conclusion by the Director that Wyatt had worked sixteen hours a day five days a week and thirty two hours on five weekends during her employment with the Rose Garden. The appellant challenges this finding and asserts Wyatt worked no more than three to five hours a day while employed by the Rose Garden.

**ISSUE TO BE DECIDED**

The issue is whether the Rose Garden has established, on a balance of probabilities, the conclusion of the Director about how many hours were worked by Wyatt is wrong.

**FACTS**

The facts presented to me in the hearing did not differ substantially from the facts relied upon by the delegate of the Director in reaching her conclusions about the number of hours worked by Wyatt. There were some factual errors in the Determination, but they are not significantly relevant to the conclusions reached by the delegate. It is accepted there were six, not seven, residents in Rose Garden while Wyatt was employed and the use of the term "feeding" in the Determination was meant to identify the task of preparing and serving meals, not actually feeding the food to the resident.

Rose Garden is a private residential seniors' care home owned by Lee Haas ("Haas") and her husband, Harold Henderson ("Henderson"). It offers a family type residential atmosphere for seniors who either no longer want to live alone or are unable to live alone. During the relevant time period there were six residents at Rose Garden.

Wyatt began worked part-time at Rose Garden until January 26, 1996 when she became a full time employee of Rose Garden. She was provided with a room, into which she moved, and was given general run of the house. Her tasks included preparing lunch, dinner and a snack for the residents daily, except Tuesday, when no lunch was required. Lunch was served at noon, dinner at 5:00 pm and the snack at 8:00 pm. She was required to clean areas of the house: the kitchen, living room, dining room and hall/entry. She also did some shopping when necessary, although this task was normally performed by Haas or Henderson. Her employment ended May 15, 1996. When she was hired she was told one of the basic requirements of the job was that she be available to the residents of the care home twenty-four hours a day.

While the residents of Rose Garden did not require full time care, they were not independent, as asserted by Haas. While I accept some of the residents were capable of performing many of their own everyday responsibilities, such as dressing and grooming, I also find some of the residents required assistance with dressing, grooming, washing and cleaning and Wyatt assisted those residents. She also did laundry for the residents between visits by Kelowna Home Support Society, which came to the home four hours each week to change bedding, do some laundry and ironing, clean bathrooms and residents' bedrooms, and took residents to appointments. More to the point, all the residents needed daily supervision and Wyatt was hired to, and did, perform that supervision. From time to time Wyatt was required to attend to a resident during the night.

No records of hours worked was kept by the employer or the employee.

## ANALYSIS

Section 1 of the *Regulations to the Act* defines a residential care worker:

*"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;*

Wyatt was employed to supervise the residents of Rose Garden. She meets the criteria defining a residential care worker. The supervision of the residents provided by Wyatt for her employer is work, which is defined as: *"the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."*

An employer is required by subsection 22(1) of the *Regulations to the Act* to ensure a residential care worker who is required to remain on the premises for a 24 hour period has a scheduled rest period of 8 hours. Any interruption of work during the scheduled rest period must be paid in the manner described in subsection 22(2) of the *Regulations*.

Residential care workers are excluded from Part 4, Hours of Work and Overtime, of the *Act*.

Rose Garden says Wyatt performed no more than 3 - 5 hours of work a day. That assertion is unreasonable when tested against the requirements of the job. The delegate of the Director determined Wyatt was entitled to payment for 16 hours a day of work. That determination was made in the absence of any record of hours worked and on substantially the same evidence as I had before me. What is the scope of review of the delegate in this case?

In my opinion, unless the evidence established the conclusion of the delegate of the director was unfair and unreasonable, I would not disturb it. In *Harrison and Lander -and- Director of Employment Standards*, BC EST #D224/96, (Reconsideration dismissed, BC EST #D344/96), the Tribunal indicated a delegate of the Director, in the face of an established contravention of the *Act* and in order to address the purposes of the *Act*, should not allow the absence of a record of hours worked to interfere with a fair and reasonable judgement about the remedy to be given an employee.

The evidence does not show the judgement of the delegate was unfair and unreasonable. While there may be a temptation on occasion to mollify an appellant with a small adjustment to the Determination, it is not the role of the Tribunal to second guess the conclusions of a delegate of the Director without basis in fact or law for doing so. There is no such basis in this case and the appeal is dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination, dated January 24, 1997, ordering Rose Garden to pay the amount of \$7,366.32 be confirmed.

**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**