

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-

Shayne Mills
("Mills")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	C. L. Roberts
FILE NO.:	97/17
DATE OF HEARING :	April 30, 1997
DATE OF DECISION:	May 6, 1997

DECISION

APPEARANCES

W. Eggleston, Law Centre	For the Appellant
Rick Percival	Witness for the Appellant
No one appeared	For the Director of Employment Standards
Joseph Wong	Representing himself

OVERVIEW

This is an appeal by Shayne Mills ("Mills"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards (the "Director").

On November 25, 1996, following an investigation of a complaint by Joseph Wong ("Wong"), the Director found that Wong was employed as 'sitter' as defined in the *Employment Standards Regulations*. The Director concluded that he had no jurisdiction to investigate the complaint, as the position was exempt from the provisions of the *Act*.

On December 3, 1996, that Determination was cancelled by the Employment Standards Branch, without reasons.

On December 12, 1996, the Director found that Wong was employed as a night attendant, and determined that Mills had contravened Section 15 of the *Employment Standards Regulations*. Mills was ordered to pay \$3,350.46 to the Director in respect of wages.

ISSUES TO BE DECIDED

Two issues arise on appeal;

- 1) Whether Wong was employed as a 'sitter' or as a 'night attendant' as defined in the *Regulations*; and
- 2) if Wong is a night attendant, whether the Director correctly determined the wages owing.

FACTS

On February 28, 1996, Mills advertised in the Times Colonist for a 'caregiver', Monday to Friday evenings at a rate of \$700.00 per month. As a result of that advertisement, several persons applied and were interviewed. Mills eventually employed Wong. Although no written employment contract was entered into, Wong attended at Mills' home from 8 p.m. to 7 a.m. each weekday, obtained small food and beverage items at Mills' request and prepared him for bed. Wong also assisted Mills in bodily functions, including furnishing him with a liquid waste receptacle, which had to be emptied at least once during the evening. In addition, Wong assisted Mills in a variety of other matters, ranging from answering the telephone to minor housekeeping.

ARGUMENT

Mills contends that Wong was not a 'night attendant' as determined by the Director, as his duties fell short of "...providing care and attention...". Mills argued that the minimal tasks required of Wong placed him in the category of a sitter, who is required only to "attend".

Mills also contends that even if Wong was a night attendant, his wages should be \$7.00 per hour rather than the \$8.80 determined by the Director. Mills contends that it was made clear to Wong that his wages would be \$700.00 net per month.

Wong contended that he did some of Mills' banking, massaged him, and did some filing, as well as assisted him with some shopping, duties which involved more than merely "attending" Mills, and fell into the category of night attendant.

DECISION

Section 1 of the *Employment Standards Regulation* defines "sitter" as

"a person employed in a private residence solely to provide the service of attending to a child, or to a disabled, infirm or other 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".

A "night attendant" is defined as

"a person who

(a) is provided with sleeping accommodations 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...."

"Attend" is not defined in either the *Regulations* or the *Act*. The Concise Oxford Dictionary (Seventh Ed.) defines attend as including "to wait on, escort, accompany...".

I find that Wong was a night attendant for the following reasons:

- * He was provided with sleeping accommodations in Mills' residence, as the position was to be a "live in" position. Wong was unable to avail himself of that benefit because he had pets which were not permitted in the premises.
- * He was employed for periods of less than 12 hours in a 24 hour period.
- * His duties were to provide Mills with care and attention during the night.

I am unable to conclude that Wong's duties were merely to accompany Mills. He transferred Mills from his chair to the toilet and to his bed, sometimes twice or more each night. He assisted Mills in getting an evening snack, and catered to other personal needs. He was present through the night to provide Mills with whatever needs he might have had. Although I accept that Wong's duties were not onerous, it is clear that Mills, because of his disability, was dependent on his caregiver for a number of things. Had Mills been in an emergency situation, he would have found it necessary to rely upon Wong for assistance.

According to Mills' own evidence, all the women who applied for the position were rejected as suitable candidates because they lacked the strength requirements necessary to transfer him from his chair onto the toilet or into his bed. Even though Mills enjoys a degree of independence, he does require assistance with those functions. I do not find those duties to be merely a 'convenience' to Mills, as contended by his advocate.

While Wong was not required to provide anything over and above those functions, I accept that he may have performed extra duties on his own accord, no doubt adding to Mills' quality of life. Although the extent of those duties was disputed by Mills, I do not find it necessary to make

findings of fact on this issue, as I find that they constituted minor duties, and were not required by Mills.

Having determined that Wong was a night attendant for the purposes of the *Act*, I must now determine whether the Director's determination in respect of wages was correctly determined.

The Director determined, on a review of the evidence, that Wong was entitled to a rate of \$8.80 per hour. There was no evidence presented which substantiates Mills' position that the rate offered was a net rate. The evidence put forward by Mills as to the correct rate of pay was confusing. Mills provided no payroll records to either the Director or to me, whereas Wong maintained a system of record keeping which was relied upon by the Director. On the basis of the evidence presented, I am not satisfied that the Director's determination is incorrect.

ORDER

I order, pursuant to Section 115 of the *Act*, Determination # CDET 78652 be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal