Employment Standards TRIBUNAL

An appeal

- by -

Double 'R' Safety Ltd.
("Double R" or the "employer")

- 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: Paul E. Love

FILE No.: 2000/807

DATE OF DECISION: April 26, 2001

DECISION

OVERVIEW

This is an appeal by the employer of a Determination dated November 2, 2000, issued by a Delegate of the Director of Employment Standards pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the *"Act"*), concerning payment of overtime adjustments for Diahann Potrebenko, a first aid worker employed in a remote oil field location with Double "R" Safety Ltd. ("Double R"). The employee was on call for 24 hours per day, and was paid for 12 hours of work. The employer claimed that a first aid trailer, which also had living quarters, was an employee's residence, within the meaning of s. 1(2) of the *Act*, and therefore the employees were not deemed to be at work. The Tribunal has recently decided this issue in *Knutson First Aid Services, BCEST #D300/00*, reconsidered *BCEST #RD095/01*, a case which is indistinguishable on its facts from the present case. The Delegate did not err in his interpretation of the words in s. 1(2) of the *Act*, "employee's residence", and therefore the employee was deemed to be at work while in call in the first aid trailer.

ISSUE TO BE DECIDED

Did the Delegate err in finding that first aid employee in a remote camp setting is entitled to be paid overtime wages, based on being on call for a further 12 hours per day after working a 12 hour shift?

FACTS

This case is decided upon written submissions of the employer, employees and counsel for the Director of Employment Standards. I note that this case is substantially similar to another Tribunal Decision decided by me involving the employer and Stewart Wilson and Larry Pringle. My reasons for disposing of this case are identical to my earlier decision. In both the Double R cases I rely upon the reasoning in *Knutson First Aid Services, BCEST #D300/00*, reconsidered *BCEST #RD095/01*, a case which was reconsidered by the Tribunal and indistinguishable from the facts in this appeal.

Diahann Potrebenko was employed by Double "R" Safety Ltd., as a first aid attendant at three remote oil drilling rig settings in northeastern British Columbia. She was hired in Fort St. John, she lives in Chetwynd, and all the work she performed was within British Columbia. She worked for the employer between August 29, 1999 and December 27, 1999. Workers Compensation Board Regulations require a first aid attendant to be present during periods of operation. The employee occupied an atco trailer on skids, which is delivered to the work site by truck. The trailer consisted of a bedroom, a bathroom, a kitchen area without a table and a sitting room with a first aid bed. In one of the units the first aid bed was in a separate small room. The trailer functioned as a first aid station, and as a place for Ms. Potrebenko to live while she was on site. Ms. Potrebenko was required to remain on the site for 24 hours per day and was expected

to respond to emergency situations after her scheduled shift. She indicates in her written submission of December 19, 2000 that during her work, she had small first aid incidents, but no deaths, major injuries, and was not required to transport anyone to the hospital. She would, however, be "up and down" during the night for small tasks such as handing out band-aids or Tylenol.

The officer applied the definition of residence set out *in Knutson First Aid Services, BCEST #D 300/00*, and found that the employee was deemed to be at work during her time off shift. The Delegate then found that the employees were entitled to wage adjustments to reflect work in excess of 12 hours per day. The Delegate determined that the employer had contravened s. 17 of the *Act*, and found that Ms. Potrebenko was entitled to the sum of $13,368.60 and interest in the amount of $791.41. The calculations were not in issue in these proceedings. The calculation was based on the hourly rate of $10.50 per hour.

Employer's Argument:

The employer asserted that the employee agreed to be paid for 12 hour days, and did not discuss with it any pay for the further "12 hour on call period" during the course of the employment relationship. The employer believes that it was in compliance with all contracts, WCB regulations, and submits that the employees were paid in full. The employer claims that the Delegate erred in finding that the employees were not on call for a further 12 hour period after their shift, and that the Delegate erred in finding that the trailer was not a residence. The employer says that since a portion of work was performed in Alberta, the B.C. *Act* does not apply. The employer says that the employee was paid in full.

I note that the employer does not appear to dispute that the employee was hired on a 24 hour basis on call. In its written submission of January 24, 2001, the employer referred to s. 1(2) and then said:

> Ms. Potrebenko was hired to be on-call for 24 hours each day, and did very little work during that period of time. Not to take away from First Aid Attendants, they are important person and are necessary to be on a worksite to assist any employee or worker who is injured on the job. In this case, Double "R" Safety Ltd. paid her for 12 hours each day, which we think is a reasonable wage for a week.

I am satisfied in this case, that the employer knew that the employee was on call 24 hours per day.

I take this passage to amount to an admission that the employee was on call. There is other evidence which amply supports the fact that the employee was on call for 24 hours per day.

The employer submits that this is a matter for an oral hearing. The Delegate indicates that an oral hearing is not necessary.

ANALYSIS

The burden rests with the appellant, in this case the employer, to establish an error in the Determination such that I should vary or cancel the Determination.

Hearing or Written Submissions:

This case was decided upon written submissions, and the appellant submitted a detailed written submission with its appeal dated November 27, 2000 and supplemental written submissions on December 11, 2000, January 24, 2001. In my view this case is resolved appropriately by way of written submissions, particularly since the facts are not in issue substantially, and the case deals primarily with the interpretation of the provisions of the *Act* , and the application of *Knutson First Aid Services, BCEST #D300/00*, reconsidered *BCEST #RD095/01*. *Knutson First Aid Services* is a case issued recently by the Tribunal on a set of facts very similar to the present case. The appellant has done a very good job of setting forth its position in its written submissions, and little if anything would be added, in my view, if this case were to be the subject of an oral hearing.

The principle issue in this case deals with the definition of work under s. 1(1) and 1(2) of the *Act*. Work is defined as meaning

> the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> 1(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

The particular issue is whether the trailer in a remote camp is "the employee's residence". If it is not the employee's residence, the employee is deemed to be at work because she is on call at a location designated by the employer.

The employer has raised a number of arguments, which I find convenient to deal with before the main point.

Section 4:

The employer says that the employee contracted for 12 hours pay, knew of the workplace arrangements and did not complain to Kurt Roblin, or the employer, during the course of the employment relationship. The employer says that an employee has an onus to discuss discrepancies with the employer. An employer has an obligation to comply with the *Act*. Even if one can say that an employees agreed to the terms of employment which involved pay for only 12 hours of a 24 hour working day, these facts are of course immaterial, because s. 4 of the *Act* provides the parties cannot contract out of the minimum provisions of the *Act*. The Tribunal has considered s. 4 on numerous occasions, and it is apparent from an analysis of those cases that

an employee cannot waive the minimum standards set out in the *Act*. I note that an employer must comply with s. 34 of the *Act*. The employer is required to pay wages for the ... "the entire period the employee is required to be at the workplace". Certain workers are excluded from Part 4 of the Act by virtue of s. 34 of the *Employment Standards Regulation*. First Aid attendants are not persons who fall into that category of workers.

Other Legislation:

The appellant has referred to legislation in Ontario, Manitoba and Alberta. Full copies of that legislation have not been provided to me. It is apparent from the information provided that the legislation from other parts of Canada is of no assistance in interpreting s. 1(2) of the *Act*.

Competition:

The employer states that the employee has started a competing company, and therefore her complaint should be dismissed as a frivolous complaint. The employee states that she started her company after she ceased her employment relationship with Double R. In my view the employer's argument is without merit, as the facts in this matter are indisputed. The issue is the proper interpretation of the Act.

Employee's Residence:

The employer argues that it is not obliged to pay the employee during the "time off" (between 7:00 pm and 7:00 am), because she was in a residence. The *Act* provides in s. 14 that work means "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere". An employee can provide services from her accommodation. In section 1(2) of the *Act*, the employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence. The question in this case is whether the accommodation provided by the employer to the employee is an employee's residence within the meaning of the *Act*.

I note that the word "residence" is a somewhat elastic concept. The employer argues that residence simply means bodily presence as an inhabitant in a place, and that a person can have more than one residence. The employer suggests that the word residence should be given a large and liberal interpretation. The employer distinguishes residence from domicile - domicile being a permanent intention to reside in a place. In the employer's written argument the employer makes reference to the Thorndike and Barnhart Dictionary as well as Black's law dictionary and a number of American cases, but does not supply the text of the cases. Definitions given in a particular factual or jurisdictional context and particular cases from outside British Columbia may or may not be helpful, when one interprets a statute.

The case of *Machtinger v. HOJ Industries Ltd., [1992] SCR 986* provides that employment standards legislation should be construed to extend the *Act's* protection to as many employees as possible. In any event, the *Interpretation Act*, provides for remedial construction of statutes (s.

8). The words should not be strained, however, to provide for an unreasonable result. The Director argues that portions of the *Act* which restrict benefits should be strictly construed in order to preserve the intent of the *Act*: *Kosick Holdings Ltd, BCEST #D362/96.*

While employment standards legislation is to be given a remedial interpretation, in the context of s. 1, the use of the words "employee's residence" takes away the employee's right to payment for work. The legislature must have intended all employees to have the benefit of pay, unless the employer can show there is a reason why the benefit should be taken away. In *Awassis Home Society, BC EST #D019/97* the Adjudicator for the Tribunal concluded that:

> ...however, exceptions to those minimum requirements such as the exclusions under Section 34 of the Regulations must be interpreted in the most narrow manner in order to preserve the intent and purposes of the Act.

I note that the legislature did not use the words "onsite" to modify residence, or the word accommodation alone. These would be broader methods of framing the exclusion from the definition of work. I note that the word residence is qualified by the word "employee". The residence must "belong" to the employee.

The concepts of residence, domicile and sojourning, have been considered by the Supreme Court of Canada, in connection with the Income Tax Act, *Thompson v. M.N.R. [1946] S.C.R. 209.*

> There is no definition in the Act of "resident" or "ordinarily resident" but they should receive the meaning ascribed to them by common usage... The Shorter Oxford English Dictionary gives the meaning of "reside" as being "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place". A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is"ordinarily resident" in the place where in the settled routine of his life he regularly, normally, or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question.

I note that if one were to chose from the concepts of residence, domicile or sojourning to describe the employee's accommodation at the camp, the most appropriate definition would be sojourning not residing, as the nature of the presence in the camp is temporary.

In my view the appellant's arguments are unhelpful, as the employees is domiciled and resident within British Columbia, and Canada. The concepts of "domicile" and "residence" are concepts which courts apply on a regular basis to take jurisdiction, to apply choices of law where there is a conflict of law, to determine whether the state is entitled to tax a person in the jurisdiction. While

the concepts of "domicile and residence" may be helpful to determine whether a person has a connection with a place, sufficient to be subject to the taxing authority of a state or jurisdiction of its courts, the concept is of little help in determining this dispute, which is not a conflict of laws or jurisdictional problem. The domicile/residence distinction is not helpful in determining entitlement to "on call pay".

In *Corner House, BCEST #D 254/98*, the meaning of the word "residence" was considered in the context of the definition of a "residential care worker". The Tribunal held that "For a workplace to be considered as a residence ... there must be some element of permanence as opposed to the intermittent or temporary" nature. In *Corner Brook* the Adjudicator was of the view that

> Residence seems to be a notion which the courts and legislatures have rarely clearly defined. It seems to be a notion which is accepted in a common sense way. Residence then is something short of domicile, i.e. the intention to remain in that place permanently, but something more than temporary or intermittent. It has some degree of permanence; it is the person's settled abode; it is the place they carry on the settled routines of life. It would be the place one hangs one's hat, keeps one's clothes, stores treasures and family memories; a place of privacy protected in law from state intrusions; and a place of retreat from the turmoil of the workplace. It would be a place to entertain one's friends. It would be an address of one's own, a phone number, and a place to receive mail.
>
> This is not to say that there are not situations where an employee gives up some of the benefits of a private residence to live communally or at a place of work. For a workplace to also be considered a residence the place of work must assume some of the qualities of a residence. There must be some degree of privacy; a space, all be it limited, to call one's own. There must be some degree of settlement to carry on as much of those everyday things as possible, subject only to the minimum necessary intrusions of the requirements of the employment. There must be some element of permanence as opposed to the intermittent or temporary.

I agree with the Director that a temporary abode, such as the one occupied by the employees at the camp cannot be considered to be a residence, as there is no element of permanency. Each of these employees did have a permanent residence elsewhere in the province.

The employer prepared its submission before the Tribunal released the reconsideration decision in *Knutson First Aid Services*. The employer was of the view that the Knutson decision was erroneous.

Knutson was reconsidered by a three adjudicator panel in *BCEST #RD095/01* with a decision issued on February 7,2001. In my view the facts in *Knutson* are indistinguishable from the case before me in that both cases deal with first aid workers, in remote camp settings, living in temporary accommodation with a requirement to work 12 hours and be on call for a further 12 hours. The issues and facts are identical. In *Knutson First Aid Services* the panel said:

The employee was only present in the first aid trailer full time because he had to be. He had no choice in the matter. He was on call 24 hours per day. It was a "location designated by the employer" and thus falls squarely within the deeming provision for "work" in section 2(2). He was "staying " there temporarily and for a limited purpose: Corner House, supra, at p. 9. The trailer was not the employee's residence. To suggest that it was the employee's residence would in our view require a degree of permanence or settlement not shown here.

The issue is whether the trailer provided by the employer and situated on a remote worksite can be considered an employee's residence, such that a person otherwise entitled to on call pay, should be excluded from on call pay. In my view an employee's residence is something which is distinct from temporary living quarters supplied by an employer while an employee, for logistical or other employer requirements, cannot leave a job site. In the circumstances of this case, it was impractical for the employer to transport the employee to the job site on a daily basis. The drilling site required 24 hour on site first aid attendant. An employee in a remote camp, who is required to be present, and who cannot leave, and must provide service when requested, is on call in a place designated by the employer. While the employee may occupy a trailer, which is also the first aid trailer, while in a camp setting, the occupancy is of such a transient nature that it could not be said to be an employee's residence, such to exclude the employee from the definition of work and the deeming provisions of s. 1(2) of the *Act*.

There can be no doubt that the employees in this case where required to be at the workplace, which was also a temporary abode. I note that the employer has commented in its submission that a decision of the Tribunal to ensure payment at minimum wage or at the contracted hourly rate for 24 hours a day would "break most First Aid employers". I note that it is open to the employer through a variance, or the first aid employers, as a sector, to seek an exclusion from the *Act*. As an adjudicator, however, I do not have any power to exclude Double R from the operation of the *Act*. I am also concerned that the submission of the employer, if accepted, would require me to depart from the ruling of the Tribunal in *Knutson First Aid Services*, which is a decision indistinguishable on its facts, from the present case.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated November 2, 2000 is confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal