Employment Standards TRIBUNAL

An appeal

- by -

Leree D. Seward
("Seward" or "employee"

- 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.: 2001/144

DATE OF DECISION: May 4, 2001

DECISION

OVERVIEW

This is an appeal by the Leree D. Seward ("Seward" or "employee") of a Determination dated January 26, 2001, 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 overtime pay. The Delegate found that Ms. Seward was exempt from the overtime provisions of the *Act*, pursuant to s. 32 as a sitter, or alternatively as a person employed by a charity assist in program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons. While Ms. Seward was a personal care assistant she fit within the definition of a sitter and as a person who assisted in a program of therapy, treatment or rehabilitation, as a counsellor, instructor or therapist and therefore was excluded from the operation of the *Act*. The employer had secured a variance from the overtime provisions of the *Act*, providing for the weekly scheduling of three twelve hour shifts, followed by four days of rest. The appellant showed no error in the Determination and therefore I confirmed the Determination.

ISSUE TO BE DECIDED

Did the Delegate err in finding that Ms. Seward was excluded from the operation of the *Act* as a sitter or as a person employed by a charity to assist in a program of therapy treatment or rehabilitation of a physically, mentally, or otherwise disabled person as a counsellor, instructor or therapist?

FACTS

This case is decided upon written submissions of Ms. Seward, and the employer who is represented by the Community Social Services Employers Association, and the Delegate.

Ms. Seward was employed by the Nicole's Network of Friends Society, in Port Alberni, to provide provide care, supervision, therapy and support to Nicole Waddington and her family. The employer is a registered charitable society. Ms. Waddington is disabled. Ms. Waddington occupies a basement suite in her parents home. Ms. Waddington had 24 hour care. The society dispenses funds which are obtained from government sources. I note that services to Ms. Waddington were provided originally through the Patricia Schifflers and Friends Society, however, nothing appears to turn on this point.

There is a medical opinion in the material of the employer from Dr. T.A. Hurwitz, a neurologist and psychiatrist. In his opinion, he sets out that Ms. Waddington has moderate mental retardation secondary to a deletion of the short arm of chromosome 18. He indicates that this is complicated by depressive psychosis, and involuntary movement disorder. She has significant pain, significant management problems, and requires a one - to -one support worker to assist in

activities of daily living, personal care, implement behavioural programs, administer medications, maintain observational records, administer medications, provide supervision and support. This is necessary in order to maintain an optimal quality of life within constraints of changing medical status. There is no doubt in this case that Ms. Waddington is a disabled person who needs ongoing therapy, rehabilitation and medication. As a personal care attendant, Ms. Seward worked with Ms. Waddington and her family to assure her safety, implement behavioural management techniques, record and administer prescription medication, assist in therapy and rehabilitation, attend relevant workshops, encourage Ms. Waddington to maintain and build relationships with others. A detailed care plan was filed in the materials by the employer's representative.

Ms. Seward provided services to Ms. Waddington for the period August 4, 1998 to May 25, 2000. Her rate of pay was $15.30 per hour. She was scheduled to work 12 hour shifts. Ms. Seward was paid at a straight time rate for 12 hour days. Ms. Seward had a room set up in her own home to provide respite care to Ms. Waddington on weekends. She would provide respite for a 24 hour time period in her home. Employees, including Ms. Seward, would take turns providing transportation to Ms. Waddington's medical appointments in Vancouver. Ms. Waddington was unable to travel for long periods of time and visits to specialists required an overnight stay in Vancouver. Ms. Waddington's mother also attended on these trips, which occurred approximately once per month.

Ms. Seward filed a complaint under the *Act*, alleging an entitlement to overtime wages based on an eight hour working day, and a 40 hour work week. The overtime claim is for the period of October 1999 to May of 2000. Ms. Seward also seeks compensation for medical trips.

The Delegate in this case found that Ms. Seward was excluded from the overtime provisions of the *Act*, and that exclusions under s. 34(1)(r) of the *Act* as a counsellor, instructor or therapist employed by a charity to assist in a program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons, and alternatively under s. 32(c) of the *Act* as a sitter. The Delegate also found that the employer had secured a variance from the Director, which references Ms. Seward as one of the home support workers. The employees were consulted and were in favour of a 12 hour shift. The variances is dated November 1, 1999 and was effective until January 1, 2001. The variance grants a weekly schedule of 3 12 hour shifts, followed by 4 days of rest. The Delegate found that Ms. Seward was not a live in home support worker as she was not employed ordinarily to provide her services on a 24 hour per day live in basis. The Delegate found that Ms. Seward was not a residential care worker, as her principal place of residence was not the employers home.

The Delegate relied upon the opinion of Dr. Hurwitz dated October 17, 2000 as well as a copy of Ms. Seward's job description, pre-employment expectations policy and general expectations policy.

Employee's Argument:

The employee argues that she was a personal care attendant and not a sitter. She argues that a variance would not have been necessary if she was covered by the *Act*. She notes that the issue in dispute is her job title, and the employer doesn't know what the title was because they have listed three in an attempt to exclude her from an overtime entitlement under the *Act*. The employee says that she worked 12 hour shifts from 9:00 am to 9:00 pm, plus 13 overnight shifts per month commencing at 9:00 pm to 9:00 am. Ms. Seward says that she was a personal care attendant and not a counsellor, instructor or therapist.

Employer's Argument:

The employer argued that Ms. Seward was excluded from the overtime provisions of the *Act*, and could be characterized as a sitter (under s. 32(1)(c) of the *Regulation)*, or a live-in home support worker (under 34(1)(q)of the *Regulation*) or a residential care worker (under 34(1)(x) of the *Regulation*). The employer also said that Ms. Seward was a person employed by a charity to assist in a program of therapy, treatment or rehabilitation of a disabled person as a counsellor, instructor and therapist.

I note particularly, that the employer in this case, is not an employer who appears to be seeking to evade the provisions of the *Act*, but appears to have taken steps to obtain certainty so that it could make best of the limited funds available for the care of Ms. Waddington. I note that Ms. Seward was aware of the 12 hour shifts when she took the job. She must have been aware of the overtime requirements for providing care to Ms. Waddington. She was consulted prior to the issuance of the variance by the Director.

ANALYSIS

The burden is on the appellant, in this case the employee, to demonstrate an error in the Determination such that I should cancel or vary the Determination. Generally, as the purpose of the *Act* is to protect employees through minimum standards. If the provisions of the *Act* are unclear, I should prefer an interpretation which extends the protection and benefits of the *Act* to an employee: *Machtinger v. HOJ Industries Ltd, [1992] 1 S.C.R. 986, Re Rizzo & Rizzo Shoes Ltd, [1998] 1 S.C.R. 27.* The onus of proving that a person falls within an exclusion is on the person asserting the exclusion: *Northland Properties Ltd., BCEST #D004/97 (Stevenson).* In an employment standards context, exclusions ought to be rigorously construed because an exclusion takes away a right that a "non-excluded employee" would be otherwise entitled. In this case a person who falls within either the sitter or the s. 34(1)(r) category is excluded from the overtime provisions of the *Act*.

Section 34(1) provides as follows:

> (1) Part 4 of the Act does not apply to any of the following:
>
> (r) any of the following who are employed by a charity to assist in a program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons:
>
> (i) a counsellor;
>
> (ii) an instructor;
>
> (iii) a therapist;

There is no doubt that the employer was a "charity" as defined in section 1 of the *Regulation.* The source of funding for the charity is government funding through the Ministry of Children and Families. The society does not appear to have any other business other than the business of taking care of Nicole Waddington, using government funds, and non-government workers.

Ms. Waddington required therapy, treatment and rehabilitation for physical and mental disabilities. I use the word "disability" as this is the word used in section 34(1)(r) of the *Act*. It is not necessary for me in this case to make a detailed analysis of "disability" in s. 34(1)(r) of the *Regulation*. On any meaning of the word "disability", Ms. Waddington falls into that category. The more appropriate characterization currently in vogue is "challenged". Ms. Waddington has a number of challenges in her life which are being met by a personalized care program. Ms. Seward has been an integral part of that program as a personal care assistant. There is no doubt that Ms. Seward assisted in the therapy, treatment and rehabilitation of Ms. Waddington. Assist, is a very broad word, with an ordinary meaning.

Ms. Seward's job title was not one of counsellor, instructor or therapist. I must, however, look at the substance of the duties performed by Ms. Seward, and not just the title the employer has given to the duties. While personal care assistant is not an occupational definition set out in the *Act*, on a functional analysis of Ms. Seward's position it involves counselling, instructing and providing therapy to Ms. Waddington. It also involves sitting with or caring for Ms. Waddington. While Ms. Seward does not appear to hold any counselling, instruction or therapist credentials, in my view she could be characterized as a counsellor or an instructor on the plain and ordinary meaning of those words. She trains and gives instructions, advises and assists Ms. Waddington. Ms. Seward participates in a bundle of services which are necessary to provide for the care, therapy, treatment, rehabilitation and socialization of Ms. Waddington.

I appreciate Ms. Seward's point that the employer has characterized her in a number of different ways in order to obtain exclusion from the overtime provisions of the *Act*. I note in particular that a variance was obtained, so that the Director was aware of the needs of this employer for certainty with regard to shift scheduling. No doubt certainty is important given the limited funds available to this charity to provide service to Ms. Waddington. I do not draw any adverse inference from the fact that the employer has characterized the job title of the employee in a

number of different ways for the purposes of engaging Ms. Seward, applying for a variance, or in these proceedings.

In my view, it is important to engage in a functional analysis of the tasks performed by Ms. Seward, and in interpreting the *Act* and *Regulations* I should look beyond the job title of the employee. Particularly in looking at s. 38(1)(r) of the *Regulation* there are certain listed occupations such as counsellor, instructor, therapist and child care worker, who assist in program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons. In my view persons who work with disabled persons may perform a bundle of services. The services provided by an employee may not fall into just one neat category. In my view, if a service performed by a person employed by a charity, assists in the program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons falls into one of the listed categories of service, the person is excluded under the *Regulation*. This is an approach which is consistent with tribunal decisions in *Renaud, BCEST #D436/99 (Jamieson), Webb, BCEST #D274/00 (Petersen).* While a job title may be of some assistance, it is not necessarily the determinative factor, and it is more important to engage in a functional analysis to determine the actual services performed by the employee which the employer seeks to exclude from the operation of the *Act*.

The legislature has provided that persons engaging in tasks as sitters or providing care under s. 38(1)(r) are excluded from the operation of the *Act*. In *Renaud, BCEST #D436/99 (Jamieson),* the Adjudicator considered that the sitter included the work of caring for or attending to someone or something. The fact that the worker engaged in tasks other than sitting did not exclude that person from the definition of "sitter". Applying the approach in Renaud, it is also clear that Ms. Seward was a sitter, or a portion of her duties were "sitting", "caring" and "attending" to Ms. Waddington.

Ms. Seward's job function was complex, and while she was given the title of personal care attendant there were significant aspects of those duties which can be characterized as counselling, therapy, instruction and sitting for a disabled person, while in the employment of a charity. A number of exclusions do apply to Ms. Seward, as well as the variance, which was obtained from the Director. I see no error in the Determination. For the above reasons, I dismiss the appeal.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated January 26, 2001 is confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal