

**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 -

The Grand Lodge of British Columbia  
Independent Order of Odd Fellows and  
The Rebekah Assembly of British Columbia  
of Independent Order of Odd Fellows  
operating as Newton I.O.O.F. Residence  
(the "I.O.O.F.")

-of a Determination issued by

The Director of Employment Standards  
(the "Director")

ADJUDICATOR: Barry Goff

FILE NO.: 1999/49

DATE OF HEARING: April 28, 1999

DATE OF DECISION: July 23, 1999

## DECISION

### APPEARANCES

Burga Black  
Arthur Welke

100F Volunteer Treasurer  
Chairman 100F Residence Board

### OVERVIEW

This is an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by The Grand Lodge of British Columbia Independent Order of Odd Fellows and the Rebekah Assembly of British Columbia of Independent Order of Odd Fellows operating as Newton I.O.O.F. Residence (the “IOOF”) of a determination (the “Determination”) of a delegate of the Director of Employment Standards (the “Director”) dated January 20, 1999.

The Determination found the IOOF had contravened Section 16 of the Act and ordered the IOOF to pay an amount of \$1,544.62 in respect of the contravention.

The IOOF says the Determination finding it had contravened Section 16 of the Act and requiring them to pay \$1,544.62 is wrong. The IOOF says the Director’s delegate (the “delegate”) should have found Betty Poss to have been employed as a residential care worker and therefore not covered by Part 4 of the Act.

### FACTS

The Newton IOOF residence is a non-profit low income seniors’ facility operated and funded solely by the Odd Fellows and Rebekah’s of B.C. Betty Poss (“Poss”) was hired to be Matron for the IOOF facility but was unable to fulfill the requirements of the job. She was employed from March 13, 1998 to July 26, 1998. Her three-month probation period was extended twice, and Poss was advised in writing of her inadequate performance before termination.

The Directors delegate found that the IOOF had acted correctly in the process it adopted before dismissing her and found Poss was not entitled to compensation for length of service.

The Directors delegate conducted a very thorough investigation of the Poss complaint and summarised her findings in a letter to Black’s attention on December 16, 1998. The letter sets out clearly the applicable provision of the Act and its application to Poss. The letter provides in part:

*“The section 1 of the Employment Standards Act (Act) states:*

*“work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.*

- *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."*

*Work is:*

- *all labour or services performed by an employee*
- *being on call for an employer at a place designated by the employer, except the employee's residence*

*Time spent by an employee performing labour or service for an employer is time worked and time for which wages are payable.*

*If employees are on call and must remain at a specific location, the employees must be paid wages because they are still under the employer's direction and not free to pursue their own interests. In general, employee's time that is controlled by the employer is paid time. The only exception to this rule is when employees are required to remain on call at home.*

*Sleep is classified as an on site break but when the person is required to perform a service during the sleep break the clock starts ticking.*

*According to Poss and other employees, the matron got a 1½ hour break in the morning and a 1½ hour break in the afternoon during the week (no break in the afternoon on weekends). All other times the matron is required to remain on site.*

*Section 32 of the Act states*

- (1) An employer must ensure
- (1) that no employee works more than 5 consecutive hours without a meal break, and
- (2) that each meal break lasts at least ½ hour.
- (2) An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.

*Poss must remain on site during the meal break thus is entitled to be paid wages for the meal breaks.*

*Section 16 of the Act states:*

*An employer must pay an employee at least the minimum wage as prescribed in the regulations."*

Black submitted an appeal on February 2, 1999 which raised two new issues. The Director's delegate responded in a memorandum to the Registrar of the Employment Standards Tribunal on February 22, 1999 as follows:

*“Black argues that a meal allowance was part of her daily pay. This argument was not raised in the investigation. Payroll records provided by the employer do not show a deduction for a meal allowance or did they provide any evidence of written authority to deduct the meal allowance from her wages or that they were part of her wages. The payroll records show Poss was paid \$90.00 per day not \$115.00 per day. The manner in which an employer can pay an employee is restricted. Section 20 of the Employment Standards Act describes how wages must be paid. Regardless of the method, the payment must be negotiable in Canadian currency. Although meals may be a taxable portion of Poss' income, they are not wages.*

*It appears from the submission that the employer is arguing that Poss was a manager and not entitled to overtime. The employer did not raise the argument that Poss was a manager during investigation and not entitled to overtime wages. According to the information provided during the investigation I do not believe that Poss was a manager under the Employment Standards Act.*

*Poss duties did not include:*

- hiring or firing employees*
- disciplining or evaluating the performance of employees*
- budgeting*
- regularly and frequently scheduling work*
- directing the work of other employees*

*Poss' position was not of executive capacity. Her duties did not include:*

- the exercise of substantial authority in decisions affecting the business*
- duties that involve active participation in the control, supervision, and administration of business affairs*

*The employer argues that Poss did not work all the hours that she was required to be on site and that she had meal breaks that were not deducted. Poss was on call and had to remain at the work site during all hours except the specified breaks that she was allowed to leave the building, this was verified by several employees and the schedule that June Gemmill provided to Poss during her training. Part of the matron's responsibility was checking on sick residents, showing visitors through the building and answering all phone calls. When an employee is on call and must*

*remain at a specific location, the employees must be paid wages because they are still under the employer's direction and not free to pursue their own interests.*

*An appeal of a Determination pursuant to Section 112 of the Act does not proceed as a trial de novo. The burden of proof in an appeal is on the appellant. The employer has provided no new evidence that would influence my determination that monies were owing to Poss. It is recommended that her appeal be dismissed."*

Black, in a further submission dated February 27, 1999, concedes that Poss did not perform management functions. She states in part:

*"Re: Betty Poss in Management Position. True she was unable to perform these functions, but as Matron had she been able to perform as required she would have been expected:*

- 1. to hire relief employees*
- 2. been required to discipline and evaluate the performance of employee..."*

Black argued at the hearing that as Poss could not perform the duties required of a matron and had been terminated for that reason, she should be designated as a residential care worker.

In support of this argument, Black referred to the section of the Act and regulations which refer to and define residential care worker.

Black also argued that the twenty-five dollar meal allowance should be included for the purpose of calculating the wages paid Poss. Eighteen-hundred dollars for meals was included on the Statement of Remuneration (T4SUP) to Poss, a copy of which was produced at the hearing.

Black maintained that the minimum wage had been paid to Poss.

## **ISSUES TO BE DECIDED**

1. Was Poss employed as a residential care worker?
2. Should the meal allowance be included as part of the wages paid to Poss for the purpose of determining whether she received the minimum wage?

## **ANALYSIS**

The *Employment Standards Regulation* defines residential care worker as:

*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*

The provisions of Part 4 of the Act which include the hours of work, meal breaks and overtime provisions, do not apply to residential care workers, which means in this case that Poss would not be entitled to any additional wages.

The employer relied solely on a reiteration of the definition referred to above in support of the argument that Poss was employed as a residential care worker. The information on file concerning Poss only refers to her working four days on and four days off and that she slept in a room provided at the facility during her work periods.

The onus is on the Appellant to provide evidence and argument in support of its position. The evidence provided is not sufficient to support a conclusion that Poss was employed as a residential care worker.

The second issue, whether the twenty-five dollar charge for meals should be included in the wage calculation, was properly answered by the Directors delegate which is repeated in part below.

*“Although meals may be a taxable portion of Poss’ income, they are not wages.”*

## **ORDER**

I order under Section 115 of the Act that the Determination is confirmed.

Barry Goff  
Adjudicator  
Employment Standards Tribunal