EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act

-by-

North Shore Association for the Mentally Handicapped

(the "Employer")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/586

DATE OF DECISION: December 6th, 1996

DECISION

OVERVIEW AND REASON FOR APPEAL

This is an appeal brought by the North Shore Association for the Mentally Handicapped (the "Employer") pursuant to section 112 of the Employment Standards Act (the "Act") from Determination No. CDET 003873 issued by the Director of Employment Standards (the "Director") on September 17th, 1996.

The Director determined that the Employer owed its former employee, Julia Bambrough ("Bambrough"), the sum of $756.22 representing unpaid overtime pay and interest.

The Employer's sole ground of appeal is set out in a letter dated August 12th, 1996 addressed to the Director's delegate who issued the Determination (this letter was appended to the Employer's appeal form). The ground of appeal is as follows:

> The basis of our appeal is centered on the interpretation of the meaning of "residential care worker" and the timing of the change in this interpretation by the Employment Standards Branch.
>
> As you are aware, residential care workers are exempt under the overtime provisions of the Employment Standards Act. Historically, our industry relied on this provision in work scheduling and this became a standard industry practice.
>
> We were informed in March 1996 that the Employment Standards Branch had reviewed the definition of residential care worker, more specifically the meaning of "reside" and we could no longer depend on the overtime exemption provisions of the Act.
>
> We take no issue with the change or clarification in the meaning of reside. Our appeal is based on the fact that [the complainant employee] worked for the [Employer] prior to notification of this change in meaning.

I understand that the "change" in definition referred to in the Employer's letter was set out in a letter dated March 27th, 1996 from the Director to the Community Social Services Employers' Association. In this letter the Director stated:

> Since November 1, 1995, the Branch has interpreted the word "resides" in the definition of "residential care worker" to mean the employee must reside on the premises for periods of at least 24 hours.
>
> The interpretation is too restrictive and will be interpreted from [March 27, 1996] onwards to reflect the plain meaning of the word "reside". In other words, a residential care worker will be viewed as residing on the premises when the group home or family type residential dwelling is the employee's home and principal domicile.
>
> The "residential care worker" will have to meet both (a) and (b) of the definition in order to be excluded from the provisions of Part 4, hours of work and overtime, of the *ESA*.

FACTS AND RELEVANT STATUTORY PROVISIONS

Bambrough's complaint, alleging various claims for unpaid wages (including overtime, statutory holiday and termination pay) was filed with the Employment Standards Branch on October 24th, 1995. Prior to the issuance of the Determination, Bambrough withdrew her claim for termination pay. Accordingly, the Director only proceeded on the claims for overtime and other wage claims.

Although Bambrough's employment terminated prior to the enactment, on November 1st, 1995, of the current Act (her period of employment ran from November 19th, 1994 to August 21st, 1995), her complaint must assessed under the current Act by reason of section 128(3) of the Act (the transition provision) because the Determination was not issued until September 17th, 1996.

Part 4 of the Act (the hours of work and overtime provisions) do not apply to a person who is a:

> • "counsellor", "instructor", "therapist" or "childcare worker" employed at a charitable institution to assist in the therapy, treatment or rehabilitation of a mentally disabled person [section 34(1)(r) of the ESA Regulations];

- "night attendant" [section 34(1)(w) of the ESA Regulations]; or

- "residential care worker" [section 34(1)(x) of the ESA Regulations].

These regulatory exclusions were also contained in the Regulations to the "old" Employment Standards Act, S.B.C. 1980 [see sections 9(1)(t), (x) and (z) of the Regulations to the "old" Act].

The Director held that Bambrough was *not* a counsellor, instructor, therapist, childcare worker, night companion or residential care worker. The Employer has only appealed the Determination that Bambrough was not a "residential care worker" and, as indicated above, says that it should not have to bear a financial obligation simply because the Director decided, in March 1996, to widen the scope of the term "reside" as it appears in the regulatory definition of "residential care worker".

ISSUE TO BE DECIDED

Is the Employer liable to pay Bambrough overtime pay under the Act?

ANALYSIS

One cannot help but express some sympathy for the plight of the employer in this case. It would appear that the Employer was acting in good faith when it purported to contract with Bambrough to avoid its liability for overtime pay.

On the other hand, in the Determination the Director has only given the term "reside" its plain and ordinary meaning and, by any reasonable measure, it is clear that Bambrough does not fall within the definition of "residential care worker", either under the current Act, or, indeed, under the old Act.

As I conceive the situation, the Director's previous view as to the meaning of "reside" was incorrect as a matter of law and could have been successfully challenged by any employee who wished to do so. The fact that this Employer (and, apparently, other employers as well) relied on a favourable interpretation by the Director in order to avoid its (and their) legal obligation to pay overtime is, in my view, irrelevant to the question of whether or not Bambrough was entitled to overtime pay under the Act.

Bambrough was entitled to be paid overtime wages and any contract that she may have entered into in which she waived her entitlement to overtime pay is void--and this would be so both under the "old" Act (section 2) and under the present Act (section 4). Bambrough did not "reside" at her place of employment and was, therefore, entitled to overtime pay, both under the "old" and current legislation--that follows from a fair and reasonable interpretation of the definition of "residential care worker". I might parenthetically note that both the Supreme Court of Canada and our own Court of Appeal have stated that employment standards legislation ought to be given "a fair, large and liberal construction and interpretation" [see *Machtinger v. HOJ Industries* (1992) 91 D.L.R. (4th) 491; *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. 4th 336].

In these circumstances, I am satisfied that the Employer's appeal ought to be dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 003873 be confirmed in the amount of $765.22 together with whatever further interest that may have accrued pursuant to section 88 since the date of issuance.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal