Employment Standards TRIBUNAL

An appeal

- by -

Shawn Clarke

- 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: Wayne R. Carkner

FILE No.: 2001/234

DATE OF HEARING: June 15, 2001

DATE OF DECISION: July 5, 2001

DECISION

OVERVIEW

This is an appeal by Shawn Clarke pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"). The appeal is of a Determination issued on February 23, 2001 by a Delegate of the Director of Employment Standards (the "Director"). The Determination addressed a complaint that had been submitted by Mr. Clarke against the "The Friends of Hillary and Sheldon Society" (the "Employer") that alleged that Mr. Clarke had not been paid all wages and annual vacation earned for work performed. The Determination concluded that:

(a) Mr. Clarke was employed as a sitter pursuant to Section 32(1)(c) as defined in the *Employment Standards Regulation* (the "*Regulation*") and therefore excluded from the provisions of the *Act* and*;*

(b) That the Employer was a "charity" pursuant to Section 1, of the *Regulation*.

Accordingly, the Director ceased the investigation pursuant to Section 76(2)(b) of the *Act* and determined that there had been no contravention of the *Act*.

APPEARANCES

For Shawn Clarke	in person Ken Brownridge
For The Friends of Hillary and Sheldon Society	no appearance
For the Director	Adele J. Adamic – Counsel Hans Suhr – Delegate Georgina Nelson – Observer Karin Doucette – Observer

ISSUES TO BE DECIDED

There are two issues to be decided in this case:

1) Did the Director error in finding that the Employer was not a business that is engaged in providing the service of attending to individuals with mental and physical disabilities.

2) Did the Director error in finding that Mr. Clarke met the definition of "sitter" pursuant to Section 1 of the *Regulation* and was excluded from the provisions of the *Act*.

FACTS

The Determination contained the following background, which was not disputed by any of the parties:

> "The Friends of Hillary and Sheldon Society (the "society" was created to provide personal care to 2 individuals with mental and physical disabilities. Clarke worked from December 20, 1996 to October 11, 2000 as a caregiver at the rate of $85.00 per day. Clarke normally worked Monday to Friday but did occasionally provide relief for the day program or on weekends for which Clarke was paid extra.
>
> The complaint was filed in the time period allowed under the *Act*.
>
> When Clarke was hired he resided full time at the house along with his spouse. At some point in 1998, Clarke and his spouse moved into their own accommodations and thereafter Clarke only resided in the house overnight while at work. The society hired "day program" staff to look after Hillary and Sheldon during the day. Clarke was normally required to be available when the day program staff was finished for the day."

The Employer is incorporated as a society under the *Society Act*, R.S.B.C. 1996, c.433.

No oral evidence was presented at the hearing however written submissions were provided prior to the hearing as well as extensive argument at the hearing.

ARGUMENTS

Appellant's Argument

Mr. Brownridge argued this case on behalf of Mr. Clarke. The Appellant's position was that a society is not exempt from being a business. The Employer has a business license and therefore is a business. The Employer is also recognized as a business by Revenue Canada and therefore is excluded from employing a "sitter" as defined under Section 1 of the *Regulation.* Accordingly, Mr. Clarke meets the definition of an employee under the *Act*.

Mr. Brownridge further stated that this case is different from the *Mike Renaud* decision (BC EST #D435/99) in that that case involved a single employee providing care in the employer's private

residence and this issue dealt with multiple employees providing care in a residence provided by the Employer, not the recipients of the care.

The Appellant further argued that the Ministry of Children & Families provided funding for these types of programs to provide income levels up to $185.00 per twelve hour shift and that the Community Social Services Employer Association has been working for some time to alleviate the poor wages for non union employees working as care givers. Mr. Brownridge compared Mr. Clarke's work to that of AIMHI, the non-profit organization that provides care for persons with disabilities albeit under a union certification and a collective agreement.

In summation Mr. Brownridge requests that the Determination be cancelled and that Mr. Smith be paid all wages and vacation owed in accordance with the provisions of the *Act*.

Director's Argument

Counsel for the Director argued that the Director only has the jurisdiction to uphold the decisions of the Tribunal which have been consistently applied to the interpretation of the designation of "sitter" under Section 1 of the *Regulation.* Prior to BC EST #D524/97 *J. Raechel Dolfi,* the Director applied a narrower standard to the definition of "sitter" as defined under the *Regulation.* Subsequent to this decision a series of decisions including, but not limited to, BC EST #D022/98 *Karen Barnacle*, BC EST #D436/99 *Mike Renaud*, BC EST #D176/00 *Tammy Wood*, have expanded on the interpretation and the duties of a "sitter". This term seems to be a catchall for persons that do not fit other categories in the care giving field. Counsel argued that the Director is bound by the interpretations of the Tribunal and cannot reach any other conclusions until there is a legislative change to the *Regulation*. Citing all the aforementioned decisions Counsel argues that the Tribunal must confirm the Director's determination on the finding that Mr. Clarke is a "sitter" under the *Regulation.*

Turning to the issue of whether or not the Employer is a "business" under the *Regulation,* Counsel refers to the definition of "charity" under the *Regulation:*

> "charity" means
>
> (a) a charity as defined in the *Income Tax Act* (Canada), or
>
> (b) a society incorporated under the *Society Act*

Counsel asserted that there was no dispute that the Employer met the status of a charity based on the facts. Counsel then referred to Section 2 (1) of the *Society Act* which includes Section 2 (1) (f) which prohibits the society from "any purpose of carrying on a business, trade, industry or profession for profit or gain." Counsel referred to the distinction of businesses under the *Company Act* R.S.B.C.1996, c. 62 and societies under the *Society Act* R.S.B.C. 1996, c. 433. Societies are transparent in their purposes, activities and finances. Businesses under the

Company Act have confidential dealings and are not subject to the transparencies required under the *Society Act*. The Employer further meets the criteria under (b) above.

Turning to the comparison of the Employer to AIMHI, counsel pointed out that the employees and AIMHI were governed by the *Labour Relations Code* R.S.B.C. 1996 c.244 which includes a grievance procedure which is finalized by the decision of an Arbitrator.

In summation Counsel for the Director emphasized that the Director had no desire to exclude Mr. Clarke from the provisions of the *Act* but due to the ongoing decisions of the Tribunal and in light of the powers vested in the Tribunal pursuant to Sections 108 and 110 of the *Act* the Director had no recourse but to determine that Mr. Clarke met the definition of "sitter" under the *Regulation* and therefore, pursuant to Section 32 (1) (c) of the *Act*, was excluded from the provisions of the *Act*.

ANALYSIS

Section 1 of the *Regulation* (Definitions) reads in part:

> "**charity**" means
>
> (c) a charity as defined in the *Income Tax Act* (Canada), or
>
> (d) a society incorporated under the *Society Act*
>
> **"sitter"** means 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;

The Director's Determination revealed the following:

> "There is no dispute that the employer in this case is incorporated under the *Society Act*, R.S.B.C. 1996, c.433."
>
> "The constitution of the friends of Hillary and Sheldon Society complies in all respects with the requirements set out in the *Society Act*. The purposes of the Society are set out as follows:
>
> > "To foster an ongoing family presence in the lives of Hillary Diane Walls and Sheldon Mark Hinchliff and to provide financial and

> support to assist in maintaining and enhancing the quality of their lives including:
>
> (a) encouraging people to become involved in their lives;
>
> (b) negotiating with government agencies and others for the provision of personal, residential, recreational, vocational and other services…"

Paragraph 3 of the Constitution goes on to note that:

> "The purposes of the Society shall be carried out without the purpose of gain for its members and any income profits or accretion to the Society shall be used for the purposes of promoting the Society"

None of the parties took exception to the foregoing.

Based on this detail there is no doubt that the Society meets the definition of "charity" under the *Regulation.*

Turning to the appellant's argument that a "business is a business", then what is the Employer's business? The funding is provided through a government agency to support and care for Hillary and Sheldon. Based on the constitution all funds are utilized for this purpose. The only business that could be construed here would be the business of caring for and being supportive of Hillary and Sheldon.

As noted by the Director in the determination, neither the *Act* nor the *Regulation* contains a definition of "business". After reviewing the *Company Act* R.S.B.C. 1996 c. 62, I found that there was no definition of "business" contained there either. Section 1 of the *Society Act* does contain the following definition:

> **"business"** means an activity that produces taxable Income under the *Income Tax Act*

Clearly the Employer fails to meet this definition.

The Canadian Oxford Dictionary defines a "business" as "one's regular occupation, profession or trade". Again this is not the criterion present in this case.

I must therefore conclude that the "Friends of Hillary and Sheldon Society" does not constitute a business engaged in providing the service of attending to a child or to the disabled, infirm or other persons. Mr. Brownridge argued that *Mike Renaud* was distinguishable as only a single employee was involved and the Employer employed multiple employees in this case. With respect to that issue a close review revealed that there were more than one employee employed

by Mr. Renaud and in any event I fail to see how this would significantly alter the circumstances of the case.

Turning to the issue of whether of not Mr. Clarke properly falls under the definition "sitter" pursuant to the *Regulation,* Counsel for the Director referred to a series of decisions by the Tribunal that have dealt with the definition of "sitter" and these decisions have shown a consistent application of this definition. In BC EST #D176/00 *Tammy Wood* the Tribunal outlined the approach dealing with this issue:

> "As well, an earlier decision of the Tribunal, *J. Raechel Dolfi,* BC EST #D524/97, considered whether the legislature intended to include persons such as Mrs. Wood, who are not simply babysitters but provide broad based in-home personal care for the disabled and elderly, in the definition of "sitter". The following comments from that decision have relevance to this appeal:
>
> > "Having said all this, however, I am bound to follow the plain language of the definition of "sitter", which is intended to exclude from the *Act* workers who provide in-home care to a child or the elderly. Further, it is difficult for me to conclude that the legislature failed to consider home support workers in drafting this definition: some types of home support workers are dealt with specifically in the text of the definition. Despite the result that home support workers must be completely excluded from any of the *Act's* protections and minimum standards, I am compelled to follow the plain language of the definition and find that Mrs. Dolfi is a "sitter".
>
> Similarly, I am compelled to follow the plain language of the definition. There is always a reluctance in finding that a person is excluded from the minimum employment standards provided by the *Act,* but considering all the circumstances of this case against the plain language of the definition of "sitter" in the *Regulations,* I cannot avoid the conclusion that Mrs. Wood falls squarely within this language. She was employed in a private residence solely to provide the service of attending to Mr. Wold, a disabled person. She was not otherwise excluded from the definition. She was not a domestic or a live-in home support worker as those terms are defined in the *Act* and *Regulations.* She was not an employee of either a business providing a home care service or a day care facility. She was neither a nurse or a therapist."

As outlined in the two decisions cited above, I am also bound by the plain language of the definition of "sitter" in the *Regulation.* Mr. Clarke meets all the criteria of a "sitter" and, pursuant to Sec. 32(1)(c) of the *Regulation,* the Director properly excluded him from the provisions of the *Act*.

Mr. Brownridge also referred to employees of AIMHI as performing similar tasks and making significantly higher wages. Those employees are unionized and their Union is signatory to a negotiated collective agreement which is enforceable under another statute and includes a grievance/arbitration procedure to resolve disputes.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated February 23, 2001 be confirmed.

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal