Employment Standards TRIBUNAL

An appeal

- by -

Fraser Irvine
(the "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: Ib S. Petersen

FILE No.: 2002/183

DATE OF DECISION: September 19, 2002

DECISION

OVERVIEW

This decision arises out of a referral back to the Director following my decision in *Fraser Irvine*, BCEST #D427/00.

I intend to briefly set out the history of this matter. Mr. Irvine appealed, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), a Determination of the Director of Employment Standards (the "Director") issued on January 18, 2000. Mr. Irvine was employed as an overnight shift supervisor with Covenant House, a non-profit community service society and that he was employed from September 22, 1997 to September 2, 1999 as an overnight team leader. In the last few days of his employment, from September 2 to 7, 1999, he had the title overnight shift supervisor.

The issues before the Delegate (not the Delegate who issued the referral back report) was, first, whether Mr. Irvine was entitled to overtime wages and, second, whether he was dismissed without cause and, therefore, entitled to compensation for length of service. With respect to the overtime wages, the Delegate found that Section 34(1)(r) of the *Employment Standards Regulation* (the "*Regulation*") applied and, in the result, Part 4 of the *Act*, hours of work and overtime, did not apply. A second issue, constructive dismissal, was disposed of on the basis that the Employer had given notice to Irvine of certain changes to the terms and conditions of his employment in June 1999 and, therefore, he was not entitled to compensation for length of service. The Determination on this issue was upheld by the Tribunal in *Fraser Irvine*, BCEST #D005/01.

Before proceeding to deal with the merits of this matter, I would like to apologize to the parties for the time it has taken for this decision to be issued.

ISSUES

From my review of the material, there are a number of issues before me. Principally, the issue is whether or not Mr. Irvine fell within the exclusion in Section 34(1)(r) of the *Regulation*. The parties, obviously, have opposing positions on this question. If I agree that the exclusion applies, that is the end of the matter. If I do not, the Respondent, Covenant House, also says that, in the alternative, Mr. Irvine was a manager. As well, there is the question of quantum. The Director and the Appellant agree on quantum; the Respondent says that this should be referred back.

ANALYSIS

I agree with the Respondent that the burden to show that the Report, dated March 22, 2002 (the "Determination"), is wrong rests with the appellant, Mr. Irvine.

Section 34(1)(r) of the *Regulation* provides, *inter alia*:

> 34. (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;
> (iv) a child care worker;

Both parties, and the Delegate, rely, extensively, on an earlier decision of this Adjudicator: *Webb*, BCEST D#274/00. In that decision, some basic principles are set out as follows:

> "I start my analysis of the exclusion from the hours of work and overtime provisions under *Regulation* 34(1)(r) from the following propositions: First, an interpretation of the *Act* and *Regulation* that extends the protection is preferable to one that does not. It is well established that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of employment and, accordingly, an interpretation which extends that protection is to be preferred over one which does not (*Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986, *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Second, I agree with the principles enunciated in *Awassis Home Society*, BCEST #D019/97, upheld on reconsideration in BCEST #D155/97. In other words, exceptions to the minimum requirements, such as Section 34 of the *Regulation*, "must be interpreted in the most narrow manner in order to preserve the intent and purposes of the *Act*." In the reconsideration decision, the Adjudicator specifically agreed with those principles. In any event, there is dispute between the parties with respect to these basic principles."

That being said, in my opinion, an analysis of *Regulation* 34(1)(r) includes consideration of the following (*Webb*):

1. whether the employee is employed by a charity;
2. to assist in a program of therapy, treatment or rehabilitation;
3. of mentally, physically or otherwise disabled persons; and
4. as a counsellor, an instructor, a therapist or a childcare worker.

I now turn to the individual aspects of the test referred to above.

1. Charitable Status

There is no dispute among the parties that Covenant House is such an entity and, therefore, that the first criteria has been met.

2. Assist in a program of therapy, treatment or rehabilitation

The Delegate concluded, based on the evidence before him, that Covenant House, a catholic-based institution, has in place "a structured and well-defined program." Covenant House literature indicated

that residents received individual support, vocational and educational guidance. The programs offered included outreach, crisis shelter and community support services and were based on a core philosophy. Extensive records were kept on clients. The Delegate relied on dictionary definitions of "program" and "rehabilitation." The Delegate accepted the following definition of "program": "a plan or system under which action may be taken toward a goal." "Rehabilitation" is defined as "restoring or bringing street youth to a condition of health or useful or constructive activity." In the result, in his view, this criteria was also met. Covenant House agrees with the Delegate's conclusions.

Mr. Irvine, not surprisingly, does not agree. He argues, first, that the "Tribunal would have to be satisfied beyond a doubt that CHV offered a program of therapy, treatment or rehabilitation." Covenant House offers shelter, food and temporary sanctuary from street life. The only counselling provided is in "life skills," and that is provided by youth workers, not Mr. Irvine, who was employed as an overnight team leader in the crisis shelter. He was not, therefore, employed "to assist" in a program of therapy, treatment or rehabilitation. Second, while it "is possible" to describe the "program" at Covenant House as "rehabilitation," this stretches the "ordinary meaning" of the word and ought to be interpreted in favour of Mr. Irvine in accordance with the principles enunciated by the courts in such cases as *Machtinger v. HOJ Industries Ltd*., *above*.

I do not agree with the assertion that the Tribunal, nor, indeed, the Delegate, would have to be "satisfied beyond a doubt" that Covenant House met this criteria. I do not agree, as suggested, that the definitions applied by the Delegate stretches the ordinary meaning of the word "rehabilitation."

I accept that the employer in *Webb*, *above*, had more elaborate and extensive programs in place. All the same, I am of the view that Mr. Irvine has not shown on the balance of probabilities that the Delegate erred in his conclusions on this point. The programs offered are described in the material attached to the Determination indicates to me that, indeed, there is a program of rehabilitation of street youth: The following from a "fact sheet" about Covenant House is instructive:

- Covenant House has a 12-bed residential facility offering crisis and transitional shelter 24 hours a day, seven days a week for youth 19 to 22 years of age.

- Covenant House operates an Outreach program to make contact with street youth between the ages of 13 to 24 ....

- Covenant House runs a Community Support service program that offers youth all the services that Covenant House has to offer, without the residential component. This includes food, shower facilities, clothes from our clothing room, toiletries counselling, and support.

The program and its components is described in the material attached to the Determination, and in the evidence before the Delegate. It includes life-skills, educational and vocational programs--some offered by Covenant House, some by referral to outside agencies and individuals. For example, day programs offered include: life-skills, assistance to job preparedness, literacy and educational programming, and short-term crisis counselling.

While I accept that the programs are offered in the day time by youth workers, there is little doubt in my mind that Mr. Irvine, as an overnight team leader, was employed to assist in the delivery of those programs.

3. Mentally, physically or otherwise disabled persons

The Delegate considered evidence provided by the Employer, including the opinions of Drs. Whynot, Rieb and Corneil. The evidence of Dr. Whynot was relied upon by the Tribunal in *Webb*, above, for, among others, the following description of the "target group."

> "....I believe this population can reasonably be classified as "disabled" on the basis of a variety of predisposing and chronic factors, including post-traumatic stress disorders (secondary to physical and sexual abuse), substance abuse, chronic infectious diseases such as HIV and Hepatitis, and emotional and psychiatric symptoms."

Later in the same decision:

> "Whynot's testimony was that the population "street youth" faces a number of medical problems and a significant presence of:
> - HIV/AIDS and hepatitis (10-30%);
> - drug and alcohol abuse and addiction (60%);
> - fetal alcohol syndrome;
> - post-traumatic stress disorder (80-85%);
> - mental health issues;
> - personality disorders; and
> - learning disabilities."

He also relied, it would appear, on the following extract from *Webb*:

> Given the evidence, particularly Dr. Whynot's testimony regarding the high incidence of PTS, substance abuse, HIV/AIDS and hepatitis, fetal alcohol syndrome, and mental health problems, I am inclined to accept the Employer's argument that the target group can reasonably be characterized as physically or mentally disabled. The services and programs offered by the Employer caters to those needs. In my opinion, it is sufficient that a substantial majority of the target group--or a statistically significant portion of the group--is afflicted by one or more of the disabling conditions to characterize the group as disabled for the purposes of the *Regulation*. Whether that is the case is a matter of evidence in each particular case. ...

At the outset of his analysis, the Delegate acknowledged the somewhat tentative nature of his conclusions. The reason was that Mr. Irvine had not had full opportunity to comment on the Employer's evidence. In any event, the Delegate concluded that "a consideration of all of the evidence suggests that, on the balance of probabilities, CHV's client group as a whole meets the criterion of being physically, mentally or otherwise disabled."

The Delegate raises a further issue in his Determination, originally raised by Mr. Irvine, and referred to in his submissions, namely whether there is a "disconnect" in the sense that even if Covenant House's clients are considered disabled, its program is not specifically designed to deal with the disabled. It deals both with the disabled and those who are not. From this, he develops the notion that the connection between program and the targeted group should be given a narrow construction.

Mr. Irvine argues that the panel in *Webb*, above, failed to consider this aspect of the test according to the principles set out by the courts (see, for example, *Rizzo*, *above*). The question, from Mr. Irvine's point of view, is "whether there is any doubt, or any difficulty arising out of the language." Any such doubt

should be resolved in favour of Mr. Irvine. From his standpoint, street youth are not "disabled"--rather, they are "disadvantaged." Mr. Irvine's counsel comments on the evidence relied upon by the Delegate:

> "With respect to the attachment relied upon by [the Delegate], we submit that they are not helpful. We have Dr. Rieb's and Dr. Corneil's letter ... for example, but we have no clue what percentage of CHV's clients who would stay at the crisis shelter are referred to these addiction specialists. It could be 3%, it could be 20%. We just do not know. We have Dr. Whynot's letter ..., which is untested by cross-examination and which was prepared for a different employer with a different clientele. ... Dr. whynot opines that some of the clientele have certain conditions, including ptsd; substance abuse; chronic infectious diseases; and "emotional and psychiatric symptoms (whatever that means). We do not know what percentage of CHV's crisis shelter have these symptoms...."

On the issue of the "disconnect," Mr. Irvine agrees with the Delegate.

The Respondent disagrees with the "new" issue raised by the Delegate and submits that there is no "disconnect" between the program offered by Covenant House and its clients. First, the program was specifically developed for street youth, determined to be physically, mentally or otherwise disabled, focussing on issues encountered by that group: HIV/AIDS, fetal alcohol syndrome, and various mental illnesses. The program offers a variety of services: emotional support, crisis counselling, advocacy and behaviour management, utilizing in-house and external resources. In any event, says the Employer, the Tribunal decided in *Webb*, *above*, that not all street youth were required to be disabled, it was sufficient that a "statistically significant portion" meet the definition. Second, the fact that Covenant House refers some of the treatment to outside resources is not a "disconnect." There is no requirement in the *Regulation* that the that the treatment must be provided on site. Rather, the requirement is that the charity must have a program of therapy, treatment or rehabilitation. Covenant House says that the exclusion in *Regulation* 34(1)(r) should be given a broad construction, considering the language of the exclusion, "physically, mentally or otherwise disabled." The language is sufficiently broad to include social disadvantage.

The Appellant, Mr. Irvine has the burden to persuade me that the Determination is wrong in law, or fact, or both. I am not satisfied that he has demonstrated that the Delegate erred in his view of the target group. The following comments from *Webb* are apposite:

> "However, she has the onus of proving the Determination wrong and, in my view, she did not in any meaningful sense contradict the evidence brought out by the Employer. Given her experience with the target group, I would have expected that she would have been in a position to question whether or not a "majority" of street youth, as stated in the Determination, are afflicted by the conditions suggested by the Employer."

With respect to whether there is an issue of "disconnect" between the program and the target group, I am of the view that there is not. I agree that the program offered by Covenant House would appear to be offered to street youth generally, in other words, from those who may well be considered disabled in a narrower, clinical sense to those who are not. I do not accept that distinction. However, while I am not prepared to go as far as suggested by the Employer, namely that the "socially disadvantaged" may be considered disabled, it is, all the same, clear that the language of the exclusion in Regulation 34(1)(r) is broad--"or otherwise disabled"--and must be given meaning. As noted in *Webb*, *above*, the test, is that the group as a whole must display the required characteristics. It follows that there may well be individual members of the group who do not possess these characteristics. For the reasons referred to

above, there is little doubt in my mind that the group--street youth--can be considered disabled as a whole.

In short, I conclude that the third criteria has also been met.

4. Counsellor, an instructor, a therapist or a childcare worker

The Delegate concluded that Mr. Irvine performed services as both a "childcare worker" and as a "counsellor." The Delegate set out his understanding as follows:

> "Irvine's job duties need not be solely occupied with one or more of being a counsellor, an instructor, a therapist or a childcare worker so long as his functions necessarily entailed that he *function on an ongoing basis in [one] or more of these capacities*." (Emphasis added)

While the residency program was limited to ages 19 to 22, the "front end" was open to youth in general. One of the functions of the front end staff was to address the needs of youth who did not meet the residency requirements, *i.e.*, age. Many of these youths would be children under the *Age of Majority Act*. According to the job description, the interactions occupied only about 12% of the Team Leader's time, but, in the Delegate's view, this was a significant aspect of his position. The Delegate noted: "To the extent these interactions involved children, his job function could certainly be described as childcare."

The Delegate also concluded that being a counsellor was a required and significant qualification for Mr. Irvine's position. There was some evidence that Mr. Irvine functioned as a counsellor in the incident reports and in the job description. The Delegate also noted Mr. Irvine's comment that most counselling took place during the day and that most of the residents were sleeping during the night when he was on duty.

First, Mr. Irvine argues that it is the Delegate misinterpreted *Regulation* 34(1)(r). In his submission, a person must be employed in one of the capacities--counsellor, an instructor, a therapist or a childcare worker--set out. Second, it is "ridiculous," in view of the fact that residents are all over age 19 to conclude that he was a "childcare worker." His interactions with youth, who did not meet the residency requirements, was to provide them with food, drink, a place to sleep or a referral. Third, he argues that there is very little evidence that he functioned as a counsellor. He worked during the night when the clients were asleep.

I note that *Webb*, *above*, provides little assistance on this point. In that case there was no dispute between the parties that this criteria was met.

In my view, the Delegate erred in his Determination on this point. I agree that the exclusion applies to persons who carry out these functions--as a counsellor, an instructor, a therapist or a childcare worker--on an "ongoing" basis. However, in my view, this is not sufficient. In order to qualify, the function of being a counsellor or a childcare worker must be at the core of the person's job duties rather than incidental.

I am not satisfied that Mr. Irvine met this criteria. In my view there was little evidence to support that "childcare" was a core function of Mr. Irvine's position. While it is likely that Mr. Irvine, as an overnight team leader, regularly interacted with children as a part of his duties, I am of the view that, in the main, his position was, first, in relation to the shelter for persons aged 19 to 22, and, second, more related to the functioning of the shelter: taking over the shift at night, getting those staying into bed by 10:00 p.m.,

paper work, maintenance work with other staff members, preparing breakfast and preparing the youth for the day's activities. There is simply, in my view, little evidence to support that "childcare" was a core function of his position. I find the Delegate's, somewhat tentative, conclusion telling: namely "to the extent" the interactions involved children, Mr. Irvine's position could be described as childcare.

Turning to the Delegate's conclusion that Mr. Irvine functioned in a counselling capacity, I am similarly not satisfied that this criteria has been met. From the evidence set out in the referral back report, it seems to me that the counselling function was not a core function. It was limited to "crisis counselling" which, from the documentation, did not happen frequently. In my view, this is not sufficient.

I conclude that the fourth criteria has not been satisfied.

In the result, the exclusion in *Regulation* 34(1)(r) does not apply and, therefore, the issues of management status and quantum need to be addressed.

5. Management Status and Quantum

In the alternative, the Respondent argues that Mr. Irvine was a manager and, thus, not entitled to overtime. This issue was not dealt with in the referral back report. All the same, in my view, there is little to support an argument that Mr. Irvine was a manager under the *Act*. It appears to be based simply on Mr. Irvine's assertions that his responsibilities were "supervisory" in nature. There is little in the way of particulars to support an argument that he was a manager.

As well, the Respondent asserts that the issue of quantum should be referred back. The Appellant and the Director oppose this. The Director argues that the issue of quantum was raised in the appeal and that there has been ample opportunity for the Employer to address this issue with submissions and evidence of its own. I agree. I do not refer this issue back to the Director and find that Mr. Irvine is entitled to the amount set out in the referral back report.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated January 18, 2000, be varied to reflect that the exclusion does not apply to Mr. Irvine and that the employer pay the amount set out in the report dated March 22, 2002 of $15,298.67 together with whatever additional interest may have accrued, pursuant to section 88 of the *Act*, since that date.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal