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-

Mike Renaud,

-of a Determination issued by-

The Director of Employment Standards
(the Director)

ADJUDICATOR:	Hugh R. Jamieson
FILE NO.:	1999/391
DATE OF HEARING:	September 29, 1999
DATE OF DECISION:	October 28, 1999

DECISION

OVERVIEW

This decision deals with an appeal brought against a Determination issued on June 3, 1999, wherein the Director found that Mike Renaud owed $27,566.07 being overtime wages, statutory holiday pay and compensation for length of service to Ms. Candice Spivey whom he had hired as a personal care attendant. The grounds for the appeal which is dated June 23, 1999, is basically that the Director erred in finding that Ms. Spivey was not a " live-in home support worker " or a " sitter " as defined in the *Employment Standards Act Regulation (the Regulation)* and thereby excluded from *Employment Standards Act (the Act),* or at least from the entitlement to overtime pay.

Mr. Renaud also took issue to the statutory holiday pay and compensation for length of service found due to Ms. Spivey however, these issues were later withdrawn.

Furthermore, Mr. Renaud also brought attention to some discrepancies in the calculation of the amount of wages found due by the Director. These were acknowledged by the parties at the outset of the hearing and a revised calculation sheet was submitted resulting in a reduced amount owing of $23,852.39

APPEARANCES

Dr. L.A. (Lee) Cowley, Counsel for the Employer

Mr. R. Keith Oliver, Counsel for the Employee

Ms. Adele J. Adamic, Counsel for the Director

ISSUES TO BE DECIDED

The issues are whether the duties and functions carried out by Ms. Spivey bring her within the definition of a " live-in support worker" or a " sitter ".

FACTS

Mike Renaud is a ventilator dependent complete quadriplegic who requires personal care attendance on a 24 hour basis. His condition came about as a result of a motor vehicle accident.

Ms. Spivey was hired and paid directly by Mr. Renaud as a personal care attendant and she

worked from September 30, 1998 to February 28, 1999. Ms. Spivey held no qualifications for this type of work and was trained on the job during the first two or three weeks she was there by Mrs. Nancy Renaud, Mike Renaud's mother.

Ms. Spivey worked at Mr. Renaud's residence three days per week, Sunday, Wednesday and Friday. The daily hours were 24 hours from 8.00 a.m. on the reporting day until 8.00 a.m. the following morning. Ms. Spivey was paid on the basis of a 13 hour day at the hourly rate of $16.00 per hour. The other 11 hours were considered to be her rest period. However, she was on call during the night to attend Mr. Renaud's needs. To facilitate this, Ms. Spivey slept on a couch in the living room at night and, in the event this becomes a consideration later, she was not charged for board and room.

The duties performed by Ms. Spivey included typical care giver functions such as bathing, dressing, feeding, lifting from bed to chair, chair to bed, tidying up and generally being there to help if an emergency arose. Other daily duties involved trachea care, suctioning, bowel care and changing the condom catheter. Ms. Spivey also accompanied Mr. Renaud on outings, doing the driving in his specially equipped vehicle to places like movies, shopping and to restaurants and bars.

In the Determination under review, the Director's Delegate concluded that on the basis of the foregoing facts, Ms. Spivey was not a " live-in home support worker " a "night attendant " or, a " residential care worker " , which are all excluded by the *Regulation* from the hours of work and overtime provisions of *the Act*.

The Delegate then went to address the definition of work:

> " One other definition under the Act needs to be examined in making a determination in this matter and that is the definition of "work". The complainant has alleged that she was required to be at the employer's place of residence for a 24 hour basis for which she received only 13 hours of pay. The employer states that although she was required to be there for 24 hours per day she wasn't required to perform work during the entire 24 hour period, in other words there was lots of down time that the complainant was not providing services for the employer. The Act defines "work" as follows:
>
> **"work"** means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> (2) 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.
>
> The complainant is required to remain at a specific location, that is, the employer's residence. She is required to be at the employer's residence to attend to his needs should they be required. As the complainant is still under the employer's direction

and control and not free to pursue her own interests and is at a place designated by the employer she is entitled to be paid for the full 24 hours that she is at the employer's residence.

I find that the complainant is entitled to be paid wages for 24 hours per day while on shift and that she is entitled to overtime wages pursuant to section 40 for all hours in excess of 8 in a day. As the complainant has been paid straight time for 13 hours each day the adjustment will be a half time adjustment for the hours of work between 8 and 11 hours per day and straight time for the hours between 11 and 13 hours. All hours in excess of 13 hours are owing at double time."

THE APPEAL

In the appeal, Mike Renaud submits through Counsel, that the Director erred in law and in fact in finding that Candice Spivey was not a live-in home support worker as defined in *the Regulation:*

> " **Live-in home support worker "** means a person who
>
> (a) is employed by an agency, business or other employer providing, through a government funded program, home support services for anyone with an acute or chronic illness or disability not requiring admission to a hospital, and
>
> (b) provides those services on a 24 hour per day live-in basis without being charged for board and room. "

In this regard, the Director had found that Ms. Spivey does not fit into this definition because payment for the services provided comes directly from Mike Renaud and not through a government funded program.

It is Mr. Renaud's position in appeal that the prevailing circumstances do indeed fall within this definition of live-in home support worker as the funding from which Candice Spivey was paid comes from a settlement received from the Insurance Corporation of British Columbia (ICBC).

With ICBC being an agent of the government, the services provided are therefore government funded. Mr. Renaud adds that to hold otherwise, would create inequality between classes of disabled people. Those who are funded directly by government being exempt, and those who are funded indirectly are not.

In the alternative, Mr. Renaud submits that Ms. Spivey was a sitter as defined in *the Regulation*, and thus excluded from *the 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; "

In support of this position Mr. Renaud points out that Ms. Spivey does not fit into any of the exclusions in the definition, not being a nurse, therapist etc., and that she was employed in a private residence solely for the purpose of attending to the needs of a disabled or infirm person.

In response dated July 9, 1999, Candice Spivey, through Counsel, denies that the relationship between the Government and ICBC makes ICBC an agency funded by the government and insists that the services provided in the circumstances here cannot be construed as being government funded. She also denies she was a sitter within the meaning of *the Regulation*. In this respect, Ms. Spivey emphasizes that she was a full-time employee who was required to stay at the Renaud home 24 hours per day during which she provided much more than sitting services.

The Director, through Counsel, also takes exception to the contention that Candice Spivey was a live-in home support worker or a sitter. By submissions dated July 14, 1999, the Director goes into quite some detail about the supposed flaws in the position taken on Mr. Renaud's behalf regarding government funding. The Director also speaks about the social policy behind the definition of a sitter and basically suggests that a sitter normally works on a more casual basis and that it is unlikely that this definition was ever intended to include persons in Ms. Spivey's situation who work full time. In short, the Director defends the findings in the Determination and asks that it be confirmed in its entirety.

At the hearing, evidence was adduced by Mike Renaud, his mother Ms. Nancy Renaud and by Ms. Tracy Rook who was Ms. Spivey 's counterpart, doing the same job three other days in the week. This testimony went mostly to the duties, functions and time spent on the job and these witnesses naturally emphasized the amount of down time there was where the care attendants watched TV, read or napped. They also down played the number of times during the night that Mike Renaud needed attention.

On the other hand, Candice Spivey testified that she was busy pretty well all the time caring for Mr. Renaud's needs. She estimated that on an average she only got two to three hours sleep at night as a result of answering calls when Mr. Renaud required attention.

In argument, the parties dwelt mainly on these differences in the testimony between the parties respecting the specific work done by Ms. Spivey and the hours she actually put in. They also basically repeated what had been submitted in writing vis-a-vis the interpretation to be given to

live-in home support worker and sitter.

A major theme of the argument on Mr. Renaud's behalf goes to the amount Candice Spivey would earn if the Determination is upheld. This works out to about $600.00 per day, which is absurd according to Mr. Renaud, considering that the minimum daily wage for live-in home support workers under the Act is $70.00 per day. He submits that the money he has been allowed for this type of care would last only a few years instead of a lifetime if he is forced to pay these kinds of wages. This would result in him having to rely on government assistance programs which in his opinion could mean a loss of dignity and independence.

In response to this, Counsel for Ms. Spivey suggests that it is an option for Mr. Renaud to employ three care attendants for eight hour shifts and thus avoid paying overtime rates. Counsel also referred to several previous decisions rendered by the Tribunal dealing with the definition of a sitter. These were, *Shayne Mills*, BC EST# D190/97*; J. Raechel Dolfi*, BC EST# D 524/97; *Barnacle (c.o.b. Karen's Home Help Service*, BC EST# D022/98; and, *Rhonda D. McLellan*, BC EST#D438/98.

ANALYSIS

Despite the differences in the evidence regarding the duties and functions Ms. Spivey actually performed and the number of hours worked, the summary of duties set out earlier in this decision will suffice for my purposes. While she may or may not have performed some of these duties on a regular basis, it fairly represents what the job generally required. Moreover, the fact that Ms. Spivey was required to be there for a full twenty-four hour shift, three times per week, for which she was paid thirteen hours at a straight-time rate of $16.00 per hour is undisputed.

While the central issues here are clearly whether Candice Spivey was a live-in home support worker or a sitter, I believe that it would be helpful in this case to take a brief look at where all of these differently defined classes of employees in the care attendant field fit into the overall statutory scheme of *the Act* and *the Regulation*.

> **" night attendant"** means a person who,
>
> (a) is provided with sleeping accommodation in a private residence owned or leased or otherwise occupied by a disabled person or by a member of the disabled person's family, and
>
> (b) is employed in the private residence, for periods of 12 hours or less in any 24 hour period, primarily to provide the disabled person with care and attention during the night,
>
> but does not include a person employed in a hospital or nursing home or in a facility designated as a community care facility under the *Community Care Facility*

Act or as a Provincial mental health facility under the *Mental Health Act* or in a facility operated under the *Continuing Care Act;*

"residential care worker" means 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;

Under Section 34 of the *Regulation*, live-in home support workers, night attendants and residential care workers are excluded from the hours of work and overtime requirements of Part 4 of *the Act.*

The basis for these exclusions would appear to be the common requirement for some degree of residency at the place of employment in these jobs, coupled with the long hours that employees in this field are considered to be on duty, while they may only be required to perform specific duties periodically. This makes it extremely difficult to distinguish actual working hours from down time.

Accordingly, Section 16 (1) of the *Regulation* sets a daily minimum wage of $70.00 for live-in home support workers and Section 22 of the *Regulation* requires that residential care workers be allowed eight (8) consecutive hours as a rest period. For each interruption of this rest period, residential care workers must receive the greater of two (2) hours at the regular rate of pay or pay for the actual hours of work caused by the interruption.

Sitters are of course, excluded from *the Act* itself, by virtue of Section 32 (1) (c) of *the Regulation.*

To help put these care attendant jobs into some sort of focus, there is a useful summary at page 70 of Professor Mark Thompson's Report of February 3, 1994, *Rights & Responsibilities in a Changing Workplace, a Review of the Employment Standards in British Columbia,* which contains the recommendations that formed the base for the restructuring of *the Act* in 1995:

> " There are several bases for the distinctions among these workers. "Live-in home makers"are employed by agencies or businesses that provide homemaking services. These employees provide homemaking services on a 24-hour per day live-in basis. "Night companions" [attendants] are employed in a private residence where they have access to sleeping accommodation and provide care and attention to a "disabled person" no more than 12 hours out of 24. "Residential care workers" supervise or care for persons in a group home or "family type residential dwelling"

> and are required to reside on the premises during their employment. They house clients with mental, physical and social problems requiring care in small group settings. "Sitters" are employed in a private residence solely to care for a child or a disabled person. These persons may not be employed by an agency."

Turning now to how the Tribunal has dealt with issues involving sitters in the past, there appears to be few cases on point. However, two of the precedents referred to by Counsel for Ms. Spivey do have some relevance.

In *Shayne Mills supra*., the Adjudicator based his finding that the complainant there was a night attendant rather than a sitter on an interesting distinction made between the service provided, i.e.,

"care and attention" as defined in night attendant or, merely "attending" as used in the definition of sitter.

Relying on the Concise Oxford Dictionary definition of "attend" which is to " wait on, escort or accompany", the Adjudicator concluded that the services being provided in that case were much more than merely attending:

> " I am unable to conclude that Wong's duties were merely to accompany Mills. He transferred Mills from his chair to the toilet and to his bed, sometimes twice or more each night. He assisted Mills in getting an evening snack, and catered to other personal needs. Although I accept that Wong's duties were not onerous, it is clear that Mills, because of his disability, was dependent on his care giver for a number of things. Had Mills been in an emergency situation, he would have found it necessary to rely on Wong for assistance. "
>
> (para 13 - page 3)

In *Dolfi supra*., which appears to be the closest to what we have here by way of factual content, the Tribunal confirmed the Director's finding that the complainant was a sitter. In that case, the complainant was a trained home support worker, working four (4) days per week for seven (7) hours per day in a private residence, providing care services to an elderly person on a "live-out basis".

Concluding that the complainant was a sitter and thereby excluded from *the Act*, the Adjudicator says the following, at page 5:

> 17 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 Ms. Dolfi is a "sitter." "

Looking at the Determination under review against that background, I must agree with the Delegate's conclusion that Ms. Spivey does not fall within the definitions of a live-in home support worker, a night attendant or, a residential care worker.

Dealing first with the last two categories as these findings are not really at issue here, I need only say that the one area where any doubt arises in the analysis of the Delegate is at page 4 of the Determination where the definition of residential care worker is dealt with. There, the Delegate observes that Ms. Spivey " *appears to provide services in a family type residence.*" On this point, it seems to me that these comments may not be well founded as it appears that family type residence in this context, leans more to group care settings rather than providing care to an individual in a private residence. At least, this is what Professor Thompson indicates in the passage that was reproduced earlier from his Report.

Be that as it may, the issue arising in the appeal going to the definition of live-in home support worker, is the Delegate's finding that the services provided by Ms. Spivey were not through a government funded program.

Given the circumstances, I agree with the Delegate's finding on this point. The evidence here is clear that Ms. Spivey was hired directly by Mr. Renaud and that she was paid from what are now his private funds. Regardless of the fact that the source of these funds was a settlement from ICBC, who might in some ways be construed to be an agent of the government, these monies are now Mr. Renaud's to do with as he pleases. They are not public funds. To give credence to the argument made on Mr. Renaud's behalf that this could somehow entail a government funded program as contemplated by *the Regulation* is in my view, asking to stretch the language of the definition beyond what it can reasonably stand.

Dealing now with whether Ms. Spivey was a sitter and thereby excluded from *the Act*, I note that nowhere in the Determination does the Delegate entertain the possibility that the arrangements between Mr. Renaud and Ms. Spivey could fall within the definition of a " sitter ". I will not speculate as to why not.

In any event, in light of the argument here about Ms. Spivey providing services beyond those contemplated by the definition of a sitter, and what was said in Mills supra., regarding the meaning of "attend", this aspect of the definition has to be revisited to determine if there really is a meaningful distinction between providing "care and attention" and "attending".

Using Webster's Revised Unabridged Dictionary, (1998, Micra Inc.) and Websters New World Thesaurus, it is readily apparent that the full meaning of attend goes well beyond waiting on, escorting or accompanying, especially when used in the context of health care attendants.

Attending, which is the actual term used in the definition of sitter, includes, " the work of caring for or attending to someone or something ". Conversely, care also includes " the work of caring for or attending to someone or something ". Clearly, for the purposes of giving the words in the definition their plain and ordinary meaning, these terms must be taken to be synonymous.

Consequently, Ms. Spivey cannot be eliminated from being a sitter on the basis of the argument that she did more than simply attend to Mr. Renaud's needs as interpreted in the Mills case. In fact, taking the evidence as a whole, sketched against the plain language of the text in the definition of a sitter in *the Regulation*, it is difficult to avoid the reality that Ms. Spivey falls squarely within this definition, i.e., she was hired to work in a *private residence, solely* to provide the service of *attending* to Mr. Renaud, who is *a disabled or infirm person*.

Granted, Ms. Spivey worked on more than a casual basis, which the Director says should be a persuasive factor against her being found to be a sitter. However, if we look back to Professor Thompson's Report at pages 73 & 74, where sitters are discussed, it can be seen that this concern was specifically addressed:

> " A sitter is defined as 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, therapist, domestic, homemaker or an employee of a business providing that service or a day care facility. The Commission heard that the intent of this section was to exclude the occupation traditionally known as "babysitter" provided by school age children and adults.
>
> The Commission also learned that some live out domestics think that they are not covered by the *Act* because they or their employers believe that they are sitters as defined in the *Act*. Recommendations in this Report concerning domestics raised the matter of the relationship of their work with sitters. The intent of these recommendations is to ensure that they cannot be converted to the status of "sitters" at the end of the regular working day. The Report does not intend to extend coverage to persons providing services for children, parents or immediate family members on a casual basis. Minimum standards of employment should be available for employees who provide personal care services on more than casual basis. The same distinction used for newspaper carriers and part-time employees, i.e., 15 hours per week, is appropriate to separate casual and regular work.
>
> (Emphasis added)

The Commission then went on to recommend that a person who provides personal care services for 15 hours or less per week should be excluded from *the Act.*

Obviously, had this recommendation been adopted, the distinction that the Director asks me to imply between casual care givers and people who work more than on a casual basis, would appear in *the Regulation*. However, for whatever reasons, the recommendation was not adopted

and I cannot read into *the Regulation* what is not there.

Consequently, I find myself in the same position as the Adjudicator in Dolfi. Being every bit as bound by the plain language of the definition of sitter, I must find albeit reluctantly, in the given circumstances that Ms. Spivey was indeed a sitter as defined in *the Regulation* and thus excluded from the minimum standards of employment prescribed by *the Act*.

Accordingly, the appeal must succeed.

ORDER

Pursuant to Section 115 of *the Act*, the Determination in question is hereby cancelled in its entirety.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal