

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 -

Rhonda D. McLellan

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr
FILE No: 98/445
DATE OF HEARING: September 28, 1998
DATE OF DECISION: October 5, 1998

DECISION

APPEARANCES:

Rhonda McLellan	On her own behalf
Darcie Graff	On her own behalf

OVERVIEW

This is an appeal by Rhonda McLellan ("McLellan") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination (File No. 087-365) dated June 23, 1998 by the Director of Employment Standards (the "Director").

McLellan was employed by Darcie Graff ("Graff") for approximately two months as an after school caregiver for Graff's two children aged 9 and 11 between September 03, 1997 and October 27, 1997 (this final date was a matter of dispute). Caregiving was provided 5 days per week (Monday to Friday) 3.5 to 4.5 hours per day for \$500.00 per month. When McLellan terminated the employment she alleges that Graff did not pay her all the wages owing including holiday pay and that Graff made an illegal deduction from her pay. The Director's Delegate found that McLellan was a "sitter" as defined in the *Employment Standards Regulation* (the "*Regulation*") and therefore the *Act* did not apply.

McLellan appeals on the grounds that the Director's Delegate was in error in finding that she was a "sitter" as she performed work over and beyond the services of attending to a child. If she was not a sitter then she says she is entitled to wages (at least at minimum wage), holiday pay and return of the amount deducted from her final paycheque.

ISSUE TO BE DECIDED

There are two issues to be decided in this case. The first issue is whether McLellan was a sitter within the definition of the *Regulation*. If McLellan was not a sitter, then the second issue relates to what hours were worked and what was the termination date of the employment.

FACTS

Ms McLellan testified at the hearing that she was hired as a caregiver and not a "sitter". The advertisement and all documentation referring to her employment describes her as a caregiver. She testified that indeed a large portion of her work was the attending to the two children but in addition to those services she was expected to provide housekeeping duties such as laundry, cleaning of bathrooms, vacuuming of sitting room and bedrooms, preparing dinner, and driving of the children to and from after school activities. She was

required to provide her own car and pay for her own gas. She also had the supervision of an older child from time to time although he was not included in her described duties. Ms McLellan was not happy with being required to provide these extra services over and above her services of attending to the children. She testified that she gave two weeks notice and quit on October 27, 1997.

Ms Graff testified that, while Ms McLellan was asked to do some of the things described, her primary duties were to attend to the children and involve them in structured activities. Ms Graff was not satisfied with the quality of the service she received from Ms McLellan. She felt that McLellan did not involve the children in enough positive structured activities and complained about her coming to work in a short skirt. Graff testified that McLellan did not give notice and that she deducted money from the final paycheque because she had to leave work early to be home for her children after school on October 20, 1997. Graff did not keep any records of days or hours worked by McLellan and had no records to confirm when the date she left her own work early.

ANALYSIS

The *Act* provides for minimum employment standards for employees and there is no doubt that Ms McLellan would fall within the definition of employee and Ms Graff within the definition of employer. However, the *Regulation* provides that the *Act* does not apply to "a sitter". Section 32 of the *Regulation* states:

32. (1) The Act does not apply to any of the following:
(c) a sitter;

Sitter is defined in section 1 of the *Regulation* as follows:

"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; (emphasis added)

In this case, it is clear that McLellan's primary duties were "to provide the service of attending to a child" or children and this occurred in a private residence. She was not an employee of an agency and she did not operate a child care facility. However, the *Regulation* does not refer to "primary" duty; it stipulates that the exemption from the *Act* applies when the person is employed "solely" to provide such duties.

While the minimum requirements of the *Act* should be interpreted in a manner that is "fair, large and liberal" as best ensures the attainment of its objects, in my opinion exceptions or

exclusions from such requirements should be interpreted narrowly. In *Awassis Home Society*, BCEST #D019/97 the Adjudicator for the Tribunal concluded that:

...however, exceptions to those minimum requirements such as exclusions under Section 34 of the Regulation must be interpreted in the most narrow manner in order to preserve the intent and purposes of the Act.

This approach was also adopted and applied in *Lowan* BCEST #D254/98.

The purposes of the *Act* are set out in section 2 and include the purpose to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. Therefore, in my opinion, section 32 of the *Regulation* which excludes certain classes of employees from such basic standards of compensation and conditions of employment should be interpreted in the most narrow manner.

I conclude, on the evidence before me, that while McLellan's primary duties were to look after the children, these were not her sole duties and, using the analysis above, she was not a "sitter". The second issue then is what amounts, if any, are owed to McLellan. As I have concluded that she was not exempted from the *Act* then it is the obligation of the employer to keep accurate records of the hours and days worked. In the absence of those records or satisfactory other evidence from the employer, the evidence of the employee, if credible, will be preferred. I heard evidence from both parties and in assessing that evidence found that both gave evidence which they believed to be true as best they could recall as to hours and days worked and about the final termination date. However, absent any records or convincing evidence from the employer, I accept the evidence given by McLellan.

McLellan testified that she was to be paid \$500.00 for the month but did not work the last 4 days of the month and had one day off sick for a total of 5 days @ \$25.00 per day. This means that she should have been paid \$375.00 but she was only paid \$232.00 for a balance owing of \$143.00. She did not work overtime or statutory holidays. As McLellan did not work on the October 13th, 1997, statutory holiday but had worked at least 15 of the last 30 days before the holiday she is entitled to that day's pay at the regular rate. This increases the amount owing to \$168.00 plus holiday pay of \$6.72 for a total of \$174.72 and interest.

As McLellan did not work for more than three months no compensation for length of employment is required.

Graff took a deduction from McLellan's pay which is prohibited under the provisions of section 21 of the *Act* and I have made no such deduction in these calculations.

ORDER

I order, under Section 115 of the *Act*, that the Determination is varied to order Darcie Graff to pay to Rhonda McLellan the sum of \$174.72 together with interest pursuant to section 88 of the *Act*.

JOHN M. ORR
ADJUDICATOR,
EMPLOYMENT STANDARDS TRIBUNAL