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 -

Karen Eakin

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO.: 2000/249

DATE OF HEARING: August 23, 2000 & September 12, 2000

DATE OF DECISION: November 9, 2000

DECISION

APPEARANCES:

Sandra Sarsfield	Counsel for Kim Wilkinson (formerly Geluk)
Karen Love (formerly Eakin)	On her own behalf
David Oliver	On behalf of the Director

OVERVIEW

This is an appeal by Karen Love (formerly Eakin) pursuant to section 112 of the *Employment Standards Act ("the Act")* from a determination dated March 8th 2000 (#ER 075168) by the Director of Employment Standards ("the Director").

In the determination the Director found that Kim Geluk (now Wilkinson) was employed by Karen Eakin to look after Ms Eakin's child after-school and to perform certain domestic duties at Ms Eakin's home. The Director found that Ms Geluk was owed $13,656.18 in unpaid wages including overtime, minimum wages, statutory holiday pay and vacation pay.

Ms Love (formerly Eakin) has appealed on the basis that Ms Wilkinson (formerly Geluk) was a "sitter" and therefore excluded from the *Act.*

As both parties have changed their names since the time of the investigation and the determination I intend, for the purpose of this decision, to refer to them by their names used in the determination. Hereinafter I will refer to Karen Love as "Eakin" and to Kim Wilkinson as "Geluk" so that this decision will be consistent with the determination.

FACTS

Prior to the problems that have given rise to the determination and this appeal, Ms Eakin and Ms Geluk were very good friends. In 1995 and the first half of 1996 Geluk worked as a housecleaner. She did this as an independent contractor working for a number of clients, both in private homes and for businesses. She cleaned Ms Eakin's home approximately once per week. She was paid for this by Eakin on an hourly basis in cash and without any source deductions. There is no dispute over the nature of the relationship or for payments owing during this period.

In 1996 Eakin purchased a new home that had a self-contained downstairs suite. Eakin suggested to Geluk that she move into the downstairs suite and that she could have free room and board if she would babysit Eakin's child after-school until Eakin returned from work. Eakin proposed that the approximate value of the rent for the suite would be the same as paying for babysitting and the housecleaning that Geluk had been doing for her. Geluk agreed to this proposal and in the summer of 1996 she moved into the basement suite of Ms Eakin's new home. The

babysitting arrangement did not commence until September of 1996 when the school year started.

As part of the agreement Geluk continued to work as Eakin's housecleaner until approximately February or March of 1997. In the spring of 1997 Geluk decided that doing the housecleaning and the babysitting was too much for her and Eakin hired a separate cleaner. Geluk continued with the arrangement of doing the babysitting for the free rent. There is some disagreement as to whether Geluk did further cleaning after March of 1997 and I will refer to this later in this decision.

Ms Geluk said that the arrangement was that the value of the rent was agreed at $450 per month including utilities and that this amount would be covered if she picked up Eakin's son from school each day and watched him until 5:30 PM doing light housekeeping when necessary and housecleaning two hours twice weekly. She said that, in addition she was to be paid hourly for any extra babysitting or additional housecleaning. She claims that the problem was that she ended up working far more hours then she expected and that Eakin never paid her for the extra hours.

There was a substantial amount of evidence at the hearing relating to the hours worked by Geluk and there was considerable dispute about these matters but as a result of my decision I find that I do not have to address these in detail.

ISSUES

The fundamental issue in this case is whether Geluk was a "sitter" and therefore excluded from the provisions of the *Act.*

ANALYSIS

Part 7 of the *Regulation* to the *Employment Standards Act* provides for certain variances or exclusions from the provisions or application of the *Act.* Some employees, like managers for example, are excluded from certain provisions such as payment for overtime worked. Other employees are excluded altogether. Section 31 of the *Regulation* for example excludes many of the licensed professionals in the workplace. Section 32 has particular reference to this case.

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

The term "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;

In this case it was agreed by the parties that Geluk was not a domestic and did not fall within any of the other exceptions in the above definition. It was clear that Geluk did work in a private residence and that she was employed "to provide the service of attending to a child". The crucial word in the definition is "solely".

It may well be that a person can be employed in a private residence for a number of duties amongst which is some incidental childcare. In such cases it would be clear that the person was not "solely" employed to provide the service of attending to a child and would not be excluded. On the other hand a person could be employed for the primary purpose of attending to a child. This person might clearly be employed as a babysitter but does her status change if she performs other duties in addition to attending to the child?

The definition does not refer to the "primary" services performed but requires that providing the service of attending to a child must be the "sole" basis of the employment if the worker is to be excluded from the benefits and protections of the legislation.

In this case the Director's delegate found that Geluk was not a sitter because, in addition to attending to the child, she performed housecleaning duties. He found that Geluk was not employed "solely" to attend to the child.

In my opinion, however, the delegate was wrong to consider together two separate employment obligations. It was clear to me that Ms Geluk had her own separate cleaning business. She worked as a cleaner in commercial premises and for other private individuals in their homes. There is no doubt in my mind that when she was performing these services she was doing so as an independent contractor. She was in business for herself and all the profit or loss from that business was hers and hers alone. She did not work under the direction or control of anyone when she was performing her housecleaning work.

Ms Geluk had worked as a contracted housecleaner for Eakin for some considerable time before she took on the additional job of attending to Eakin's child. In my opinion the housecleaning duties performed by Geluk were a continuation of her contracted services and should not have been blended with the childcare services to create a new job description combining both tasks. In other words, it is not unusual for people to have more than one job and it is important to analyze the nature of each job individually.

The disputed issue about how much housecleaning was done by Ms Geluk and for how long becomes irrelevant if the housecleaning was a separate contract. On the preponderance of the evidence before me I find that indeed it was a separate contract.

If the housecleaning services are treated separately from the childcare services it becomes apparent that, in relation to the childcare services, Ms Geluk was hired solely to provide the service of attending to Eakin's child. I find that it is proper to treat these two jobs as separate entities. In regard to the housecleaning I find that Geluk was an independent contractor and not an employee. In regard to the childcare I find that Geluk was a sitter and excluded pursuant to section 32 of the *Regulation.*

I am satisfied that the appellant has met the onus of persuading me that the Determination was wrong for the reasons set-out above and as a result I must conclude that the Determination should be cancelled.

ORDER

Pursuant to section 115 of the *Act* I order that the determination is cancelled.

John M. Orr

John M. Orr
Adjudicator
Employment Standards Tribunal