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 -

Troy Nelson and Colleen Nelson
("The Nelsons")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE No:	97/591
DATE OF HEARING:	October 23, 1997
DATE OF DECISION:	November 13, 1997

DECISION

APPEARANCES:

Troy Nelson and Colleen Nelson	For Themselves
Jacqueline M. Doherty	For Herself (by Conference Call)

OVERVIEW

This is an appeal by Troy Nelson and Colleen Nelson ("the Nelsons") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination (File No. 077-468) dated July 14, 1997 by the Director of Employment Standards (the "Director").

The Determination found that the Nelsons employed Jacqueline Doherty ("Doherty") as a domestic "nanny" from September 6, 1995 through May 2, 1996 but failed to pay the proper regular wages, overtime, and holiday pay as required by the *Act*. The Nelsons have appealed on the basis that the Director's delegate based the calculations on an incorrect monthly rate of pay, that overtime was paid separately as babysitting, and that Doherty had not completed 12 months of employment and therefore was not entitled to holiday pay.

ISSUE TO BE DECIDED

The issues to be decided in this case are:

1. What was the applicable rate of pay and whether the Determination calculated such rate incorrectly;

2. Whether holiday pay is payable in the first 12 months of employment even though there is no entitlement to holiday time.

FACTS

The Nelsons employed Doherty to come to Victoria from Australia as a domestic "nanny" from September 6, 1995 through May 2, 1996. The Nelsons used the services of a Nanny Agency and relied on the Agency to ensure that the terms of employment and rates of pay were in accordance with all the proper Federal and Provincial laws and regulations. The Nelsons did not themselves

review the *Act* although they were aware that there were minimum wage regulations in place in British Columbia.

The evidence relating to the hours of work expected and the rate of pay is most confusing on the part of both the Nelsons and Ms Doherty as no formal written contract was given by the Nelsons to Ms Doherty. A letter was provided to aid in Ms Doherty's entry into Canada which stipulated that her gross salary would be "$1200/month - which will include room and board". Ms Doherty says that she understood that she would receive $850.00 per month net pay after all deductions and would, in addition, receive free room and board. Ms Doherty testified that this $850.00 net pay was based on working an 8.5 hour day. Mrs Nelson testified that the $1200.00 figure was just a rough estimate based on the $850.00 net that was agreed but she testified that it was based on a 10.5 hour day. The Nelsons both testified and it was not denied by Ms Doherty that extra money was paid for special babysitting assignments. Mrs Nelson felt that Ms Doherty should not be paid through lunch and other break times because, although Ms Doherty was in charge during those times she could take a break while the children were watching T.V or taking naps.

The Nelsons did not keep accurate and contemporary records of the hours and dates worked but Ms Doherty kept a daily journal of all her hours. Mr Nelson provided the Tribunal with a very detailed (although re-created) set of monthly calculations setting out all the days and hours worked. He set out a pay schedule and included all deduction and actual amounts paid. He submitted that these calculations showed that Ms Doherty had actually been overpaid.

The Nelsons did not pay holiday pay because Ms Doherty terminated her employment before the expiration of her first year of employment and therefore, they believed, she was not entitled to holidays or holiday pay.

ANALYSIS

In evaluating the evidence of both the number of hours worked and the rate of pay entitlement I bear in mind that the onus under the legislation is on the employer to keep accurate and contemporary records. Under Section 14 of the *Act* the employer is required to provide a "domestic" with a written contract which must clearly set out the duties, hours, wages and charges for room and board. Ms Doherty was a domestic as defined in the *Act* but was not provided with such a document. It is unfortunate, and of course illustrates the reasons for such a requirement, that it was not done in this case as a great deal of misunderstanding and emotional upset could have been avoided.

I also take into account that this Tribunal has placed the burden of persuasion on the appellants to demonstrate that the Determination should be varied or cancelled.

The Nelsons felt very much betrayed by Ms Doherty as she had broken her contract of employment which was to be for a whole year and she only stayed for 8 months. In addition they had treated her very well and had even provided her with a car for her own exclusive use at their expense. They had treated her as one of the family and included her in family events such as birthday parties. When Ms Doherty broke her contract and then demanded extra pay for hours worked for which she felt she had not been paid the Nelson's were understandably upset. Ms Doherty had not raised any complaint about her hours of work or her rate of pay prior to terminating her employment. However, regardless of this betrayal, the question for this Tribunal is whether the *Act* was properly complied with and whether Ms Doherty is owed any wages.

I listened carefully to Ms Nelson's version of the terms of employment which was that Ms Doherty was expected to work 10.5 hours per day, 5 days per week, for a gross pay of $850.00 per month plus room and board. By my calculation the cash portion of this arrangement would have resulted in an hourly rate of $3.73 - about half the legal minimum wage. Even if the room and board were to be added and a gross figure of $1200.00 per month is used (as referred to in the letter) the hourly rate is only $4.89. I can not accept Ms Nelson's version of these hours or rates. They can not be made to fit into any rational format which would comply with the minimum wage requirements for the Province of British Columbia.

Ms Doherty's evidence of the hours worked must be preferred because she kept a daily journal noting start and finish times everyday. She also recorded fairly those times for which she was paid extra babysitting monies. In the absence of any employer records this Tribunal has held in the past that the employee's records should be accepted.

Mr Nelson provided a detailed set of records, which he had created for the purpose of this hearing and not contemporaneously, that set out the monthly hours worked, gross pay based on the legal minimum hourly rate, deductions and net pay. These records show that the actual gross amount paid was $1412.19 for the first 4 months and $1437.19 thereafter. He worked this out to a net of $850.00 after room and board. He then calculated the actual hours worked @$7.00 (the minimum wage) plus overtime at 1.5 times the rate to arrive at the legal minimum entitlement. He found that he had in fact, on this basis, overpaid Ms Doherty by close to $1200.00.

Mr Nelson's calculations however omit one significant factor and that is that both of the Nelson's testified that Ms Doherty was to be paid minimum wage PLUS room and board. If the $300.00 or $325.00 room and board is added back to the net calculations done by Mr Nelson it turns out that Ms Doherty is owed, by my calculation, $1280.11 plus holiday pay (if any) which would in fact be greater than the amount calculated by the Director's delegate.

As Mr Nelson's schedule of hours worked differs somewhat from those recorded by Ms Doherty there is some small difference in the final calculations but the end result is very consistent with the findings of the Director's delegate. I prefer the evidence of Ms Doherty because her records were kept at the time and because the employer failed to keep records as required by the *Act*.

In regard to the holiday pay issue the Nelson's were incorrect in withholding holiday pay during the first 12 months. The *Act* does provide that an employee is entitled to an annual vacation of at least 2 weeks after 12 consecutive months of employment but holiday pay starts accumulating after 5 calendar days of employment. In other words the employee is not entitled to time-off for vacation until after completing 12 months employment but the vacation pay still accumulates during that time and is payable on termination.

In light of all of the above it is my opinion that the Determination is accurate in the calculation of wages owing and holiday pay.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.

JOHN M. ORR
ADJUDICATOR
EMPLOYMENT STANDARDS TRIBUNAL