

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 -

J. Raechel Dolfi
("Dolfi")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson
FILE NO.: 97/536
DATE OF DECISION: November 13, 1997

DECISION

OVERVIEW

This is an appeal by J. Raechel Dolfi pursuant to s. 112 of the *Act*. The appeal is from a Determination issued by Terry Hughes, a delegate of the Director of Employment Standards, on June 24, 1997. The Determination held that Ms. Dolfi was not entitled to overtime pay because her employment was excluded from the overtime provisions of the Act.

Ms. Dolfi filed an appeal on July 17, 1997. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Ms. Dolfi was employed as a home support worker to care for Mrs. Young, an elderly woman who requires daily care. Ms. Dolfi was hired on March 24, 1997 by Laurence D.T. Johnson, a lawyer who looks after Mrs. Young's affairs. According to Ms. Dolfi's written submission, she was hired after responding to a newspaper advertisement placed by Mr. Johnson, calling for a Certified Home Support Worker. Ms. Dolfi graduated from Camosun College's Homemaker/Home Support Worker program in 1989.

Ms. Dolfi was required to go into Mrs. Young's home to provide care, and she typically worked four shifts each week for a total of 40 hours. On Fridays and Mondays she worked 7-hour shifts; on Saturdays and Sundays the shifts were 13 hours in length. There appear to have been several other home support workers providing care to Mrs. Young on other shifts each week.

Mr. Johnson dismissed Ms. Dolfi on June 13, 1997 with pay in lieu of two weeks notice. The dismissal was apparently at Mrs. Young's request, who appears to have been somewhat of a challenge to care for. Mr. Johnson explained to Ms. Dolfi that there were no problems with her work, and provided a letter of reference. According to the Determination, Ms. Dolfi spoke with a member of the Employment Standards Branch and was told that while she had no remedy for the dismissal, she should have received overtime wages regarding the 13-hour shifts. She filed a complaint with the Employment Standards Branch, claiming overtime wages in the amount of \$1,050.00 and vacation pay in the amount of \$42.00. The complaint was ultimately dismissed because Ms. Dolfi was found to have been a "sitter" under the *Employment Standards Regulation* ("the *Regulation*") and so was not eligible for overtime pay.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Ms. Dolfi is a "sitter" as defined in the *Regulation*.

ANALYSIS

Section 1 of the *Regulation* contains the following definition:

"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.

Section 32 of the *Regulation* then states that the *Act* does not apply to sitters, together with co-op students, newspaper carriers, persons receiving income assistance who are in training or work experience programs, and persons receiving unemployment insurance benefits who are in job creation projects.

The Director's delegate concluded that Ms. Dolfi fell into the definition of a "sitter" and decided that section 32 of the *Regulation* excluded her from the *Act*.

The *Regulation* contains three other definitions that are of interest:

"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 room and board;

"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.

Section 34(1) of the *Regulation* excludes all three of the above forms of employment from the overtime requirements of the *Act*. This is not particularly surprising, as all three forms of employment require the employee to have some degree of residency in the home. However, these forms of employment are subject to all of the *Act's* other protections and minimum requirements, with only a few exceptions. As well, live-in home support workers receive a special minimum wage and residential care workers are given special rest periods, sometimes with pay. Ms. Dolfi's work has one important similarity to these three forms of employment: all involve some degree of specialized care given to persons living in a home.

I note that "live-in home support workers" are excluded from the definition of "sitter," as are home support workers who are employed by a business providing home support services. Does this mean that other home support workers must be "sitters"? I am not comfortable with the proposition that the work performed by home support workers like Ms. Dolfi should be excluded from the *Act's* minimum requirements in the same way as are newspaper carriers and persons on job creation or work experience programs. I am also uncomfortable concluding that Ms. Dolfi's work is no more deserving of the *Act's* protection than the work performed by the occasional babysitter of a child.

The greatest difficulty arises from the proposition that Ms. Dolfi's work would have been covered by the *Act* if she had been a home support worker employed by a business providing that service. Why would Ms. Dolfi not receive overtime pay, when her Camosun College classmate would be paid overtime just for being associated with a home support business? The reason her classmate is paid overtime is that her classmate is clearly an employee. I see no difference whatsoever between this hypothetical classmate's employment relationship and the employment relationship between Ms. Dolfi and Mr. Johnson. I see no reason why Ms. Dolfi should be a "sitter" excluded from the *Act*, when her classmate performing identical work would receive the benefit of all of the *Act's* provisions.

If this situation is to prevail, it will be because of clear language in the *Regulation* which requires it. In my view, the definition of "sitter" in the *Regulation* is somewhat ambiguous when it comes to home support workers such as Ms. Dolfi. Home support workers who "live-in" or who are employees of a business are not "sitters," and there is no specific language which would include other types of home support workers in the definition. "Sitters" receive none of the *Act's* protections, yet residential care workers, night attendants and live-in home support workers are covered by the *Act* in most respects apart from the overtime provisions. I find the work done by these forms of employment to be similar in many ways to the work done by Ms. Dolfi.

Live-in home support workers are defined as providing "home support services for anyone with an acute or chronic illness or disability not requiring admission to hospital." Would a home support worker providing identical services be a "sitter" merely because such services are not provided through a "government funded program" and so fall outside the definition of live-in home support worker?

It would have been a simple matter for the legislature to include "home support worker" in the definition of "sitter, if that was the intention. The legislature does exclude from this definition workers who perform tasks identical to those performed by Ms. Dolfi, but who are employed in a business or who live in the home.

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."

I hope the regret I have expressed above will be noted by the Director and in future reviews of the *Act*, an effort will be made to clarify whether the legislature continues to wish that skilled workers such as Ms. Dolfi must be completely excluded from its provisions.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Terry Hughes on June 24, 1997 is correct and the appeal should be dismissed. Pursuant to s. 115 of the *Act*, I order that the Determination is confirmed.

Ian Lawson
Adjudicator
Employment Standards Tribunal