Employment Standards TRIBUNAL

An appeal

- by -

Jamie Coltart
("Coltart")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2001/550

DATE OF DECISION: November 7, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Jamie Coltart ("Coltart") of a Determination that was issued on July 3, 2001 by a delegate of the Director of Employment Standards (the "delegate"). The Determination concluded that Coltart had contravened Part 2, Section 8, Part 3, Sections 16, 17, 18, 19, 20, 27 and 28, Part 4, Sections 35, 38 and 40 and Part 7, Sections 57 and 58 of the *Act* in respect of the employment of Irene Laird, Shelley Brown, Kathryn Bauer, Nadar Ghanbari, Victoria Okubote, Mark Ollerton and Stephen Teepell and ordered Coltart to cease contravening and to comply with the *Act* and to pay an amount of $9,396.46.

The appeal sets out the following as the reasons for appealing the Determination:

> We have been denied the live in home support worked for no apparent reason and most of the facts in the determination are incorrect. All monies have been paid and I, Jamie Coltart, have never ben contacted by any complainant in this Determination with the exception of Mark Ollerton, whom I explained the facts to him as they were given to me by the accountant of the Jamie Coltart Support Group Society.

Coltart has requested the matter be returned to the Director for further investigation.

ISSUE

The issue in this appeal is whether Coltart has shown any error in the Determination sufficient to justify the Tribunal referring the matter back to the Director for further investigation.

FACTS

The Determination noted that Coltart is a man who was injured and who requires a certain amount of personal care and companionship, as well as management of his domicile and daily activities. the care is provided in his private residence. The services upon which the complaints were based was not provided by any business operating for that purpose. During the time period relevant to the Determination, Coltart directly hired employees to care for him and attend his needs. The care provided was not limited to personal care, such as bathing, eating, peri-care and outings, but also commonly and regularly included such tasks as shopping for him, running errands, paying bills, doing yard work, car care and house work, managing his files and training other staff.

In his submission, Coltart says he is a quadriplegic and a type one diabetic. He requires 24 hour care.

The Determination detailed the circumstances of each complainant. All of the complaints had been filed within the time allowed under the *Act*. The determination commented on the consistency to the grounds of complaint - failure to pay wages, followed by a change in the pay rate agreed upon at the time of hire, and failure to pay for training shifts. The following issues were identified:

> First, whether the complainants can be construed as employees, covered in all respects by the Act. All other issues have their departure point in this first question: are the complainants providing services to Coltart employees under the Act or are they attendants, flowing from the definition of "sitter" in the Employment Standards Regulation (the "Regulation") and therefore excluded from all aspects of the Act? Further if the complainants are not sitters, did their work fall under any of the other Regulatory exclusions? Also, since the complainants and Coltart agree that at some points the complainants were allowed to sleep, whether this 'sleep time' falls into the definition of work will also be considered.

The Determination concluded that the complainants were not sitters, night attendants, live-in home support workers, residential care workers or domestics for the purposes of the *Act*. Having found that the complainants were not captured by any specific exclusion from the minimum requirements of the *Act*, the Determination addressed the complaints from the perspective that the complainants were employees entitled according to the provisions of the *Act*.

The Determination noted that a number of Demands For Records had been served on Coltart and, except for the employee Irene Laird, no records were provided. The calculations were based on information provided by the complainants and accepted by the Director as being reliable.

Coltart submitted copies of cancelled cheques with the appeal indicating payments to Mark Ollerton of an amount of $600.00 and to Stephen Teepell of an amount of $1381.80 (gross), $1021.24 (net). Neither of these amounts appear to have been taken into account when calculating the wages owed to these employees. Mark Ollerton has confirmed that after filing the complaint, he did receive partial payment of $600.00 and Stephen Teepell has also confirmed receipt of the amount of $1.021.24.

ARGUMENT AND ANALYSIS

The Director has raised a preliminary objection to the form of the appeal, which indicates it is being brought by Jamie Coltart Client Support Group Society (the "Society"). The Director says that entity is not a party to the Determination and there is no indication in the appeal that the Society has been authorized to file the appeal on behalf of Coltart or that it is being filed on

behalf of Coltart. The Director argues that Section 123 of the *Act*, which protects proceedings under the *Act* from being invalidated for a technical irregularity, does not apply as the identity of the appellant is specifically identified as a "business" and the Society is named. In my view, the naming of the Society as the appellant is a technical irregularity. It is otherwise apparent on the face of the appeal form that the appeal is being brought by Coltart, personally.

On the other hand, there is no indication from the material filed with the appeal that there is any error in the conclusion that Coltart was the employer of the complainants.

Coltart says he is at a loss to understand why the complainants should not be considered anything other than live-in support workers or residential care workers. Both of those terms are defined in the *Regulation*:

> *"**live-in 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.*
> >
> > *(b) provides those services on a 24 hour per day live-in basis without being charged for room and board.*
> >
> > . . .
>
> *"**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.*

The complainants do not fall within the definition of "live-in support worker", as none of them were employed by *"an agency, business or other employer providing, through a government funded program, home support services"*. The complainants are not "residential care workers" because none of them resided at Coltart's private residence. The Determination referred to the decision of the Tribunal, *Anne Elizabeth Lowan and Timothy James Lowan operating as Corner House*, BC EST#D254/98, which addressed the concept of residence in the definition of "residential care worker". I can find no error in the application of that decision to the circumstances of the complainants.

Most of the remainder of the appeal denies or challenges findings of fact made in the Determination. There is a burden on Coltart when challenging findings of fact to show those findings of fact were either based on wrong information, were manifestly unfair or were made without any objectively rational basis (see *Re Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98). In this appeal, I find that, with one exception, Coltart has not met this burden.

Some evidence has been provided showing two of the complainants, Mark Ollerton and Stephen Teepell, received some of the monies owed to them. Both acknowledge receipt of the amounts shown in the appeal. There is, then, some evidentiary foundation that shows the conclusion about the amounts owed to those complainants was based on wrong information. The Director acknowledges that Coltart has established a basis for adjusting the Determination to the extent of those payments. The appeal succeeds to that extent and the amounts paid to Mark Ollerton and Stephen Teepell should be deducted from the total amount of the Determination and the appropriate adjustments to vacation pay and interest should be made.

Otherwise, there is nothing in the appeal that could remotely support a finding that the Determination was wrong in its conclusions about the entitlement of the other complainants under the *Act*. I agree with the submission of the Director that the letter from Mrs. Patrick on behalf of Coltart does no more than confirm the conclusion the complainants referred to were, for the purposes of the *Act*, at work and entitled to be paid wages on the days referred to in her letter.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 3, 2001 be varied to deduct the amounts paid to Mark Ollerton and Stephen Teepell, $600.00 and $1381.80, respectively, from the Determination.

David B. Stevenson
Adjudicator
Employment Standards Tribunal