Employment Standards TRIBUNAL

An appeal

- by -

Patricia Tanumihardjo
("Tanumihardjo" or "Employee")

- 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: Paul E. Love

FILE No.: 2002/186

DATE OF DECISION: June 6, 2002

DECISION

OVERVIEW

This is an appeal by an employee, Patricia Tanumihardjo ("Employee"), from a Determination dated March 20, 2002(the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act,* R.S.B.C. 1996, c. 113 (the "*Act*"). The Delegate found that Ms. Tanumihardjo was a sitter and therefore was excluded from the provisions of the *Act*, by virtue of the s. 32(1)(c) of the *Employment Standards Regulation*. The Employee did not appeal the finding that she was a sitter, and excluded from the operation of the *Act*. In a rebuttal submission she raised the issue that she was a domestic not a sitter. I am, however satisfied that any domestic duties were of an incidental nature, and as she did not "live in" the Employer's premises she did not fall within the definition of domestic set out in s. 1 of the *Act*. The Delegate correctly concluded that Ms. Tanumihardjo was a sitter excluded from the operation of the *Act*. I therefore confirmed the Determination.

ISSUE

Has the Employee raised any ground of appeal or demonstrated any error in the Determination?

FACTS

I decided this case after considering the written submission of Patricia Tanumihardjo, Mr. Fleming , and the Delegate.

Ms. Tanumihardjo was employed by Mr. Flemming and Ms. Carmen Sombrowski (the "Employers") to provide child care to their children. Ms. Tanumihardjo was not an employee of another agency. Ms. Tanumihardjo may have done some minor housekeeping work incidental to her primary function of child care. She did not live in the residence of her employers.

On August 1, 2001 she was given written notice by Ms. Sombrowski that her employment "*must terminate August 31, 2001*". The text of the notice letter indicates that the notice was given on August 1, 2001, rather than August 20, 2001, to give Ms. Tanumihardjo more time to find a new job. The notice was given just before the employers were leaving on a holiday. The termination letter indicates that the employers hoped that Ms. Tanumihardjo would be able to work August 20 to August 31, 2001 but indicated that the employer understood that Ms. Tanumihardjo may not be available if she found replacement work.

On August 3, 2001 Ms. Tanumihardjo responded with a letter asking the Employers to correct the record of employment showing the first day of work as February 4, 2001, and tendered the house and car keys.

The notice of appeal filed in this case is as follows:

> I am writing to inform you that I am appealing the Director of Employment Standards decision choosing not to return to work. It was my employer provided conflicting information to me and altered the ROE to read "quit during notice period". One employer stated in writing that I had quit

> of August 14, 2001. I did not. The other employer, who gave me my termination notice on August 31, 2001 was away and unavailable for me to contact to verify the situation.
>
> The agreement was with my employer to contact them, if I did not find a new employment before their return from vacation. I contacted them on 2 occasions, but they did not return my call.

Attached to the notice of appeal was a Board of Referees Decision of Ms. Tanumihardjo's employment insurance appeal, reversing her disqualification from benefits on an earlier finding that she quit voluntarily during the notice period.

The Delegate determined that Ms. Tanumihardjo was a sitter as defined in section 1 of the *Employment Standard Regulation*. The Delegate determined that by virtue of s. 32(1)(c) of the Regulation Ms. Tanumihardjo was not entitled to any provision of the *Act*. The Delegate found, in the alternative that Ms. Tanumihardjo was given proper notice under s. 63 of the *Act*.

Employer's Argument

The Employer provided a lengthy submission, some of which does not bear on the issue of error in the Determination, but which addresses remarks in Ms. Tanumihardjo's submission which are of an inflammatory nature, and do not bear repeating. The Employer also addresses the proceedings under the Employment Insurance legislation. The gist of the Employer's submission which bears on the issue before me is that Ms. Tanumihardjo was employed by Mr. Flemming and his wife, to care for their children, and that Ms. Tanumihardjo was a sitter, excluded from the operation of the Act. The Employer suggests that the appeal should be dismissed because Ms. Tanumihardjo has not appealed the finding of the Delegate that she was a sitter, and in any event, gave adequate notice.

Employee's Argument

The Employee's argument on the appeal appears to be that the Employer did not return her telephone calls for work during the later part of August, which fell within the notice period, and that the Employer altered the record of employment to show a quit, rather than a lay-off. In a rebuttal submission filed with the Tribunal on May 15, 2002, in response to submissions that she had failed to address the issue of the finding of the Delegate that she was excluded from the *Act*, Ms. Tanumihardjo raised instances where she performed duties ordinarily considered to be performed by a domestic such as meal preparation, serving of meals, laundry, and cleaning.

Delegate's Argument

The Delegate noted that Ms. Tanumihardjo had not appealed the portion of the Determination where he found that she was a sitter. The Delegate therefore suggests that this appeal should be dismissed.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the Employee, to show that there was an error in the Determination such that I should vary or cancel the Determination. The Employee has not appealed the finding of the Delegate that she was a sitter, and therefore excluded from the operation of the *Act*. In my view, Ms. Tanumihardjo failed to appeal the operative portion of the

Determination that she was a sitter and therefore excluded by the *Regulation*, from the application of the *Act*. Much of the information that she provided to the Tribunal in her appeal submission, is irrelevant to the issues that she is required to focus on, in order to succeed in this appeal. This appeal can be dismissed on this ground.

I note that Ms. Tanumihardjo did attempt in her reply submission received by the Tribunal May 15, 2002 to attempt to address some incidents of work that she did that fall outside of strictly sitters duties. This appears to be some attempt to argue that the Delegate erred in finding her a sitter.

Sitter is defined in s. 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;

Domestic is defined in s. 1 of the Act as meaning a person who

> (a) is employed at an employer's private residence to provide cooking, cleaning, personal care or other prescribed services, and
>
> (b) resides at the employer's private residence

I am not persuaded that Ms. Tanumihardjo has shown any error on the part of the Delegate. The Delegate considered the issue of whether Ms. Tanumihardjo was a sitter or a domestic. The Delegate concluded after considering the facts and the applicable law, that Ms. Tanumihardjo was a sitter. The Delegate applied the relevant cases of *Tammy Wood*, BC EST # D176/00, *Mike Renaud*, BC EST # D436/99. The operative findings of the Delegate are set out at page 7 of the Determination:

> Likewise, in the case at hand, the job activities of the Complainant were related to the care of the children, including serving them with packaged meals and cleaning after them or cleaning the kitchen after using it, loading the dishwasher with dishes used by the children or doing the children's laundry as attested to by Ms. Savari, or the ocasional taking out of the garbage and other incidental or secondary activities do not eliminate or exclude the Complaint from the definition of a sitter. Among the employees excluded from this definition and whose job activities domes close to that of a sitter is a domestic. As indicated in the preceeding pages, the Complainant's status as a live-out nanny excludes her from the definition of a domestic. There is also no evidence to indicate that he Employer was an agency or a business providing the services noted above or a day care facility.
>
> **Conclusion:**
>
> Considering all the circumstances in this case and based on a balance of probabilities , I am of the view that the complaint was a sitter to whom the Act does not apply.

I note that the effect of the Tribunal decisions in *Tammy Wood*, BC EST # D176/00, *Mike Renaud*, BC EST # D436/99 is that an employee cannot be eliminated from the definition of a sitter simply because

that employee performs incidental tasks, provided that person provides the service of attending to a person. "Attending" was defined in Mike Renaud as including the work of caring for or attending to someone or something.

Ms. Tanumihardjo has adduced no cogent evidence bearing on this point, that persuades me that the Delegate erred. For all the above reasons I dismiss this appeal.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated March 20, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal