

An appeal

- by -

David Tikkanen and Meribeth Tikkanen
(the "Tikkanens")

- 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: Mark Thompson

FILE No.: 2002/200

DATE OF DECISION: September 24, 2002

DECISION

OVERVIEW

This is an appeal by David and Meribeth Tikkanen (the “Tikkanens”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination issued by a delegate of the Director of Employment Standards on March 19, 2002. The Determination found that the Employer owed Athena Balogh (“Balogh”) a total of \$1, 219.85 for vacation pay and statutory holiday, plus interest. The Employer appealed the Determination on the grounds that Balogh was an independent contractor, not an employee under the *Act*. In the alternative, Balogh was a “sitter” and thus not covered by the *Act*.

This decision was based on written submissions from the Tikkanens, Balogh and the Director’s delegate.

ISSUES TO BE DECIDED

The issues to be decided in this case are whether Balogh was an employee, and if so was she a sitter.

FACTS

Balogh provided childcare services for Tikkanen from November 19, 1999 until December 14, 2000. The nature of the contract under which she provided those services is in dispute in this case. At the time of the appeal, the Tikkanen children were eight and six years old, respectively. The nature of her duties is in dispute, but both parties agreed that she cared for the children in the Tikkanens’ home, picked them up after school and took them to tai kwon do and dance classes and swimming lessons. Balogh stated that she did some cleaning, folded laundry, vacuumed occasionally and put a meal in the oven for the Tikkanens on about 10 occasions during her period of employment.

In the appeal Tikkanen denied telling the delegate that Balogh had done laundry or vacuumed or prepare any food. In her response to the appeal, Balogh stated that she did laundry for the Tikkanens, cleaned and tidied rooms in their home, cleaned up after the children, loaded and unloaded the dishwasher, vacuumed, cleaned the kitchen and bathroom and the like. She also stated that she put frozen foods in the oven and started cooking rice before the Tikkanens arrived at home in the evening. According to Balogh Meribeth Tikkanen asked Balogh to clean as much as she could on some days when the Tikkanens were having guests for dinner. Balogh provided letters from third parties who had seen her cleaning the house. Tikkanen attached letters from parents of other children who had paid Balogh to care for children or had arranged for visits to their homes or the Tikkanen residence so children from another family could play with the Tikkanen children. These arrangements, including payment on occasion, were arranged between Balogh and the other parents, without any involvement of the Tikkanens.

In July 2000, Balogh moved into a basement suite in the Tikkanen residence. Tikkanen stated in the appeal that Balogh asked to rent the suite to her and her boyfriend. They agreed on a monthly rent of \$850. Before Balogh moved in, she and her boyfriend separated, and she agreed with the Tikkanens to rent the suite for \$400 per month. In October or November 2000, Tikkanen notified Balogh that the rent would increase to \$650 for single occupancy. Balogh then gave notice that she would no longer be available to baby sit after December 18, 2000. She moved out of the apartment at the end of February 2001.

The delegate found in the Determination that Balogh's wages were \$10.00 per hour. Balogh told the delegate that the Tikkanens was to pay all taxes and deductions. In their appeal, the Tikkanens stated that they initially hired Balogh for the month of December 1999, for an agreed number of hours, for a lump sum of \$1,540.00, to be paid in cash. Balogh denied agreeing to a lump sum payment. Instead, she agreed to receive \$10.00 per hour "net" for approximately 35 hours per week. She did acknowledge that she was paid in cash, and she presented two letters, one from her former boyfriend, confirming her evidence. The Tikkanens also stated that they had explained to Balogh "the benefits of being a contract worker in terms of potential tax savings," and the possibility that Balogh could earn extra money by caring for other children while she was looking after the Tikkanen children. Again, Balogh denied that any conversation ever took place.

ANALYSIS

During the delegate's investigation, the Tikkanens maintained that Balogh was an independent contractor, not an employee. The delegate examined the *Act* and several previous decisions of the Tribunal before concluding that Balogh was an employee under the *Act*.

The Tikanens' appeal repeated the argument made to the delegate. They presented an extensive argument based on previous Tribunal decisions on the definition of an independent contractor. They argued that Balogh had control over her work. That she owned the only equipment necessary to complete her work, a car. Balogh had a chance for profit, at least in the period November 19-December 31, 1999, when she received a lump sum for working fewer hours than she and the Tikkanens had anticipated. Balogh also took advantage of the opportunity to care for other children while she was being paid by the Tikkanens. The Tikkanens, or at least Meribeth Tikkanen, adjusted their schedule around Balogh's classes at Capilano College. Balogh could and did make other arrangements to care for the Tikkanen children to suit her own schedule. Finally, according to the Tikkanens, Balogh's service for them was a series of temporary arrangements, dictated by Meribeth Tikkanen's contracts for her own business.

Both in the Determination and in his reply to the appeal, the delegate argued that Balogh had no control over her work. She was required to pick the children up from school, take them to classes and the like. Elements of flexibility in Balogh's work did not detract from the control the Tikkanens exercised over her work. Balogh was paid on an hourly basis for providing childcare services according to a mutually agreeable schedule, so she had no opportunity for a profit or risk of a loss. The delegate concluded that there was no specific result to Balogh's service. Rather she was providing a continuous service.

Balogh pointed out that the Tikkanens decided on the location of her work, set her hours which were driven by Meribeth Tikkanen's work schedule and gave her specific instructions about the nature of the care she provided. She drove the children to and from school, lessons and visits. Balogh adjusted her course load and schedule to accommodate Meribeth Tikkanen's work, i.e., Balogh worked when her employer worked. The Tikkanen chose the other people who cared for their children to supplement Balogh's work. The Tikkanens provided toys and other facilities in their home to amuse their children and reimbursed Balogh for any entrance fees or meals consumed outside of the home. With rare exceptions, Balogh did not receive extra income for caring for other children. Rather the children had "play days," i.e. visits to or from other children. Balogh was responsible for the Tikkanen children at all times.

Both the Tikkanens and Balogh presented evidence concerning the method for calculating her wage, payroll deductions that were or were not made. While these matters may be relevant to taxation

authorities, they are outside of my jurisdiction. The appeal did not challenge the delegate's conclusion that Balogh received \$10.00 per hour.

The first issue I must address is Balogh's employment status. If she was an independent contractor, then she is not entitled to the benefits contained in the Determination.

The Tribunal has faced the issue of determining the employment status of a complainant on many occasions. A number of principles have emerged from these cases. Section 1 of the *Act* states:

'employee' includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed by another.
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- (c) a person being trained by an employer for the employer's business
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall.

'employer' includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

Section 2 of the *Act* states the purposes of the legislation, the first of which is to:

- (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,

These definitions must be given a liberal interpretation according to the B. C. Court of Appeal (*Fenton v. Forensic Psychiatric Services Commission* (1992) 56 BCLR (2d) 170).

The Tribunal has developed a number of tests to distinguish between an employee and an independent contractor. In *Knight Piesold Ltd.* BC EST #D093/99, the adjudicator stated the central principle as follows:

The central question is whether the person who has been engaged to perform the services performs them as a person in business on his own account.

The first test is control, the degree to which the Tikkanens exercised control and direction over Balogh's work. The delegate concluded that the Tikkanens controlled Balogh's work. The Tikkanens pointed to the flexibility Balogh enjoyed in performing her duties. After reviewing the evidence, I conclude that the Tikkanens exercised substantial control over Balogh's work. The very nature of the work performed points to that conclusion. Balogh was hired to care for children. She was not free to determine when or how to carry out her duties. Her duties included picking up the children after school, taking them to lessons and the like. The Tikkanens had rules about the kind of recreation allowed to their children. Caring parents, certainly including the Tikkanens, would not delegate complete control of their children to a third party. Balogh and Meribeth Tikkanen agreed when Balogh would work, decisions driven by

Meribeth Tikkanen's own work and Balogh's class schedule. After a work schedule was established, Balogh was obligated to follow it, to assure the well being of the children.

The Tikkanens' appeal refers to ownership of tools. They rely on Balogh's use of her car to transport their children. Balogh pointed out that much of her work took place in the Tikkanens' home, using toys and other items for the amusement of the children. In this case, I do not believe that ownership of tools was significant to the decision.

An important test not mentioned by either test is economic reality. This principle requires the analysis of the entire relationship between the parties in order to determine whether an individual is carrying on business for herself or for someone else. (See *Canadian Council of the Blind, BC-Yukon Division*, BC EST #D483/97, confirmed by BC EST #D076/98). The application of this principle involves several criteria. One is risk. In other words did Balogh bear any risk of loss or possibility of profit? The answer in this case clearly is negative. There was a conflict in the evidence about the first payment Balogh received. But even after the initial 4-6 weeks of employment, both the Tikkanens and Balogh agreed that Balogh was paid by the hour. Apart from very occasional opportunities to care for other children, Balogh had no chance for a profit, and she certainly did not bear any risk of a loss. She did not invest in any equipment for this position. She used her car for a variety of purposes, one of which was to transport the Tikkanen children.

The parties disagreed about the existence of a permanent relationship between the Tikkanens and Balogh or a specific result. The Tikkanens described it as a series of short-term engagements based on Meribeth Tikkanen's own work. The point here is that Balogh was to provide care for the Tikkanen children. She was not engaged to carry out a specific task, complete a report, complete the construction of a facility or the like. She provided an ongoing service to the Tikkanens. The Tikkanens did not present any evidence of the completion of one task and the commencement of another by Balogh. A contract of employment normally requires a person to place her services at the disposal of another party. Usually an independent contractor's obligation is to complete an agreed upon task. It is not even necessary that the contractor perform the work. (*Canadian Council of the Blind, BC-Yukon Division, supra.*) Understandably, the Tikkanens exercised control over who cared for their children.

For these reasons, I conclude that Balogh was an employee as defined in the *Act*.

The second issue is whether Balogh was a "sitter" under the *Employment Standards Regulation* (the "*Regulation*"). Section 32(1)(c) of the *Regulation* excludes sitters from coverage under the *Act*. Section 1 of the *Regulation* defines a "sitter" 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, inform or other person, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of

- (b) a business that is engaged in providing that service, or
- (c) a day care facility;

In the Determination, the delegate reviewed two Tribunal decisions on this point. He found that each could be distinguished on the facts from the complaint before him. The Tikkanens based their appeal on the scope of Balogh's duties, i.e., that she only cared for their children and did not perform household tasks. As noted above, Balogh disputed that evidence.

Most of the previous decisions of the Tribunal on this point arose from circumstances in which a caregiver was engaged to attend to a disabled adult. (See *Mike Renaud*, BC EST #D436/99). These cases do conclude, however, that “attend” includes the incidental tasks of caring for a dependent person, including feeding, cleaning and the like.

As the Determination points out on p. 8, the Tribunal is bound to interpret language excluding persons from protections of the *Act* narrowly. In *Renaud*, the adjudicator was clearly uncomfortable with his decision to exclude a caregiver from the *Act*.

In this case, I conclude on the balance of probabilities that Balogh did perform some duties beyond the scope of simply caring for the Tikkanen children. The *Regulation* states that a sitter is employed “solely” to provide the service of attending. Given the evidence before me, it is unreasonable to expect that an employee caring for two young children did not carry out at least incidental cleaning activities in the household.

Moreover, the *Regulation* defines a sitter as a person “employed in a private residence.” In support of their argument that Balogh was an independent contractor, the Tikkanens stated that Balogh picked up their children after school took them to lessons and classes and the like. The definition of a sitter is intended to cover individuals who work in a private residence, not individuals with the responsibility and authority to transport children, meet appointments and the other duties Balogh carried out.

In any appeal to the Tribunal, the appellants have the burden of persuading the Tribunal that the original determination was incorrect. The Tikkanens have not met that burden.

ORDER

For these reasons, the Determination of March 19, 2002 is confirmed, pursuant to Section 115 of the *Act*. Balogh is to receive \$1,219.85, plus interest accruing under Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal