

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 -

Gordon Quock, by his Guardian ad Litem, Beverley Tevely and the Public
Trustee for the Province of British Columbia (co-committees)
("Quock")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 97/528

DATE OF HEARING: September 24, 1997

DATE OF DECISION: October 21, 1997

DECISION

APPEARANCES

Beverley Tevely on behalf of Gordon Quock

H. Bruce Kaun counsel for Gordon Quock

Lisolette Prosser on her own behalf

June Geisser on her own behalf

PRELIMINARY ISSUE

A preliminary issue was raised by counsel for Gordon Quock with respect to the style of cause of the Determination. The Determination was issued against “Beverley Tevely, the Co-Committee for Gordon Quock”. Counsel for Gordon Quock argues that pursuant to Section 22, *Patients Property Act*, R.S.B.C. 1979, the correct party to be named in the Determination should be “Gordon Quock, by his Guardian ad Litem, Beverly Tevely, and the Public Trustee for the Province of British Columbia (co-committees). Counsel for Gordon Quock further stated that the Public Trustee for the Province of British Columbia had been notified of this hearing.

The parties consented to change the style of cause for the Determination to be “Gordon Quock, by his Guardian ad Litem, Beverley Tevely, and the Public Trustee for the Province of British Columbia (co-committees). The parties further agreed that those persons appearing at this hearing were authorized to so consent. The parties finally agreed that the consent to change the style of cause on the Determination was without prejudice to their respective positions in regard to the substantive issues contained in the Determination.

Counsel for Quock requested that the record reflect that an adjournment was requested for the purpose of requiring Prosser provide Income Tax statements and to enable counsel for Quock to properly assess a submission from Prosser dated September 22, 1997. The Registrar of the Tribunal denied the request for an adjournment.

Counsel for Quock further requested that their concerns with respect to the time taken by the delegate of the Director of Employment Standards (the “Director”) to do the investigation and issue a Determination be noted on the record. The complaint was filed by Prosser in early March 1995 and a Determination was not issued until June 23, 1997. Counsel states that the inordinate amount of time taken by the Director in this matter has worked to the detriment of Quock in this matter. Counsel for Quock further stated that they have not abandoned their right to pursue this aspect of the appeal further.

OVERVIEW

This is an appeal by Gordon Quock, by his Guardian ad Litem, Beverley Tevely, and the Public Trustee for the Province of British Columbia (co-committees) (“Quock”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 23, 1997 issued by the Director. Quock alleges that the Director erred in the Determination by concluding that Lisolette Prosser (“Prosser”) was an employee and further erred in determining that Prosser was owed Statutory Holiday Pay, Annual Vacation Pay and compensation for length of service in the amount of \$4,748.80.

Counsel for Quock concedes that if Prosser is determined to be an employee, the calculations for the quantum of Statutory Holiday pay owed and Annual Vacation pay owed are correct.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Was Prosser an employee or an independent contractor ?
2. If Prosser is an employee, is she entitled to compensation for length of service.

FACTS

Prosser provided for the care of Quock for a period of 5 1/2 years. Prosser resided in the home of Quock, cooked, cleaned and provided personal care for Quock. Prosser was interviewed by Beverley Tevely (“Tevely”) prior to providing care for Quock. At the time the arrangement between Prosser and Tevely for the care of Quock ended, Prosser was being remunerated at the rate of \$1400.00 per month paid on a semi-monthly basis.

Tevely testified and stated that:

- she is the sister of Quock as well as “co-committee”;
- Prosser was hired on the clear understanding that Prosser would be responsible for any remittances for income tax to Revenue Canada or any other taxes owing on the earnings from Quock;
- Prosser was given a cheque on the 15th and 30th of each month which included Prosser’s remuneration and money for food / housekeeping expenses;
- except for an initial period of 6 months at the beginning, Prosser was not required to provide any accounting of the food / housekeeping monies provided;
- if Prosser did not spend all of the food / housekeeping monies provided, Prosser would have use of that money;
- she did not provide any supervision of Prosser;
- property taxes, mortgage payments, utilities were paid for from Quock’s funds.

- Prosser's was responsible to care for Quock in his own home and to provide care as needed;
- she did not have any control of when Prosser worked or took time off;
- she only attended Quock's home on average about 4 - 6 times per month for the purpose of visiting her brother, taking him out for lunch or dropping off Prosser's cheque;
- she was not notified of Prosser's comings or goings and that Prosser would make arrangements for someone else to provide care for Quock;
- she deducted \$50.00 on one occasion when Prosser was absent from Quock's home and also deducted \$30.00 when Prosser's grand-daughter was present in Quock's home;
- she was not notified that Prosser was going to provide care for her infant grand-daughter at Quock's home;
- she arranged for her daughter to provide care for Quock when Prosser took her grand-daughter to Vancouver in February 1995 as Tevely did not approve of the person who Prosser had arranged for;
- her daughter contacted Prosser in Vancouver on February 27, 1995 with regard to the shortage of food in Quock's home and was told by Prosser that there was adequate food prepared and to just eat what was there;
- she had a telephone conversation with Prosser which became quite heated and in which Prosser advised that she would not be returning from Vancouver at any time soon and that she quit;

In response to questions asked on cross examination, Tevely stated that:

- she had placed an advertisement in the paper seeking someone to provide care for Quock;
- she received a number of responses, read the resumes provided and spoke to a number of different people;
- she chose Prosser as she indicated she had previously cared for a quadriplegic person;
- she entered into an employment agreement which did not contain a rate of remuneration;
- the rate of remuneration paid to Prosser had changed from the original amount;
- if Prosser was going to be away from the home for an extended period of time, Prosser did notify her;
- she deducted amounts from Prosser's remuneration for periods when Prosser was not in the home or if Quock was away from the home visiting family, etc.;
- Quock always spent Christmas with family and on one occasion spent 11 days in Whitehorse;
- she made arrangements for her daughter to care for Quock in February 1995 when she learned that Prosser's handicapped daughter was going to be left to care for Quock;

- she does not recall who advised her that Prosser's handicapped daughter would be left in care of Quock;
- with respect to the telephone conversation in February with Prosser, she does not recall who initiated the call, but she does recall the content of the call;
- Prosser made her angry during the telephone conversation, but she did not scream or swear at Prosser;
- Prosser was already 2 days late in returning from Vancouver at that time;

Prosser testified and stated that:

- she responded to the advertisement in the paper for employment by providing a resume and references;
- she signed an employment agreement acknowledging that she would be responsible for all taxes etc. to Revenue Canada;
- she was not aware of what an independent contractor was until the issue arose in this appeal;
- she fully understood that she was an employee hired to provide care for Quock;
- she provided receipts for all expenditures for the first 6 months until Tevely informed her that receipts were no longer required;
- she provided all of her own personal effects as well as some general household goods;
- she took Quock on outings and maintained the home and yard;
- Tevely deducted monies from her pay when Quock was away from the home on a number of occasions;
- Tevely deducted monies from her pay when she had her infant grand-daughter living at Quock's home;
- she advised Tevely immediately when her infant grand-daughter came to live with her for a temporary period;
- she advised Tevely that the infant grand-daughter had to be taken to Vancouver for treatment at Children's Hospital February 8, 1995;
- she had made arrangements for her daughter Michelle to provide care for Quock in her absence, however, Tevely did not approve and had her own daughter Nina provide care for Quock;
- she advised Tevely that she had to travel to Vancouver on February 24, 1995 to receive some instructions from the staff of Children's Hospital prior to the infant grand-daughter being released;
- she advised Tevely that she did not know exactly when she would be able to return as it depended on when Children's Hospital would discharge the infant grand-daughter;

- she initiated the telephone call to Quock's home to see how Quock was doing and in response to Nina's concern about food, advised her that a number of meals had been pre-prepared and left in the fridge for them to eat. Prosser also advised Nina that she had inadvertently forgotten to remove the key for the deep freezer from her keychain prior to leaving Prince George;
- after the telephone conversation with Nina, Prosser decided to contact Tevely to discuss matters with her. During that discussion which became quite heated, Prosser told Tevely, "I will be coming home tomorrow so I am going to quit listening to you now" and then hung up;
- upon her return to Prince George on February 28, 1995, Prosser found that the doors to Quock's home had all been locked and she had to climb in through a window with her infant grand-daughter;
- at approximately 5 p.m. the following day, March 1, 1995, Prosser received a summons to appear in court the very next morning with regard to a request by Tevely to have her evicted from Quock's home;
- she was not represented in court and really did not understand the process except that the judge gave her 7 days to vacate the premises;
- she applied to Social Services for assistance to find new premises etc.

In response to questions asked on cross examination, Prosser stated:

- she was shocked to find that she had been locked out of the home on her return from Vancouver on February 28, 1995;
- she had expected to meet Nina and again take over providing care for Quock;
- she had made application to Social Services for funding to provide care for her infant grand-daughter and, if successful, she would have given Tevely 30 days notice;
- she made the application to Social Services for the funding because that had been suggested by the Doctors at Children's Hospital;
- she was advised by Social Services on March 6, 1995 that her application for funding to look after her infant grand-daughter had been denied;
- it was not possible to arrange for someone to relieve her on the weekends as Quock reacted strongly to strangers;
- the monies provided for food and household supplies were always spent on those items and never was there an occasion where money was left over;
- she asked Tevely for extra money to purchase clothing for Quock and when Tevely refused, Prosser went to the Salvation Army Thrift store and purchased some herself;
- she had told Tevely that she was not sure how long she would be required to stay in Vancouver, but it would be at least 4 days;
- she left the return portion of her flight open as she was not sure of what date she would be returning, it depended upon when Children's Hospital discharged her infant grand-daughter;

- she learned at about noon on February 27, 1995 that her infant grand-daughter would be discharged at noon the next day;
- she placed the telephone call to Quock's home at approximately 8 or 9 p.m. on the evening of February 27, 1995;
- she had to answer to Tevely for everything that was done with Quock or done around the home;
- she never discussed the issue of being self-employed with Tevely at any time during the 5 1/2 years she cared for Quock;
- Tevely informed her that her children should not be visiting her at Quock's home;
- she consulted with Tevely on occasions when Quock became aggressive in his behaviour;
- Tevely agreed to Prosser having her infant grand-daughter in Quock's home on a temporary basis;
- she agreed to Tevely's deducting \$30.00 per pay from her pay while her infant grand-daughter was staying at Quock's home;
- when she was going to be absent from Quock's home, she would inform Tevely of who had been arranged to provide care for Quock and Tevely would either say yes or no;
- she only contacted Tevely if she was going to be away from Quock's home for an overnight period.

ANALYSIS

The issue of whether a person is an employee or an independent contractor is often difficult to determine.

To differentiate between an employee/employer relationship as opposed to a contractual one, all elements of the relationship between the parties must be considered carefully. Being in harmony with any one element on its own doesn't necessarily mean a person is or is not an employee, rather, I would suggest, it is a matter of balance. If there are enough elements or factors suggesting there is an employee/employer relationship the decision would then, on the balance of probabilities, lean towards the person in question being considered an employee.

Professor P.C. Weiler, as chairman of the Labour Relations Board, stated in *Hospital Employees Union, Local 180 v. Cranbrook and District Hospital (1975)*, CLRBR 42, page 51;

“The difficulty is that there is no single element in the normal make-up of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go

together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee....”

When determining whether or not there is an employee/employer relationship I must consider the definitions and language of the *Act*, other relevant statutes and the applicable jurisprudence pertaining to this issue.

Statutory Considerations

The *Act* in Section 1 defines ‘employee’ and ‘employer’ as:

"employee" includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for 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;*

When considering these definitions, I note that they both contain the word “includes” which indicates that the items noted in the definitions are not exclusive of the ordinary meaning of the terms ‘employee’ and ‘employer’.

When considering the objectives of the *Act*, I must take note of Sections 2 and 4 which state:

Section 2, Purposes of this Act

The purposes of this Act are to

- (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,*
- (b) promote the fair treatment of employees and employers,*
- (c) encourage open communication between employers and employees,*
- (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*

*(e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and
(f) contribute in assisting employees to meet work and family responsibilities.*

Section 4, Requirements of this Act cannot be waived

4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

My reason for taking note of these Sections of the *Act* is to illustrate that a person may not, under the guise of a contractual relationship, waive the basic minimum standards of compensation as required by the *Act*.

Jurisprudence

To differentiate between an employee/employer and a contractual relationship, the courts have traditionally considered four factors.

- 1. Control** - is there a traditional master/servant relationship ?
- 2. Integration** - to what extent or degree is the individual involved in the operation or organization ?
- 3. Economic Reality** - is the individual in business for herself, or does she work for someone else ?
- 4. Specific Result** - is the individual required to perform general work or to only accomplish a specific job?

Analysis of the Jurisprudence

Control

Perhaps the most important factor in determining the status of a person is the nature or degree of direction and control exercised by one party over the other. The Control Test determines whether one person is in a position to order not only what is to be done, but also the manner in which it is to be done.

When reviewing the Control Test as it applies to the circumstances of this case, I have considered the characteristics of their relationship;

Selection - Quock, through his co-committee Tevely, placed an advertisement for a care giver and after reviewing resumes, offered the position to Prosser.

Dismissal - Quock, through his co-committee Tevely, caused Quock's home to be locked up prior to Prosser's return from Vancouver in order to deny her access to her place of employment as well as her place of residence.

Method of Work - Prosser was required to provide complete care for Quock and to maintain the residence.

Remuneration - There was no evidence provided that any negotiation with respect to rate of remuneration took place, rather Tevely provided a certain sum on a semi-monthly basis out of which Prosser was to be paid a set amount with the balance being for the purchase of food and household supplies .

Integration

The Integration Test examines the extent or degree to which an individual interacts with the organization or operation. This test looks at whether an individual is an integral part of the operation or is merely ancillary to the operation.

- 1. Integration** - is the work performed by Prosser integrated and done as part of the business of Quock or simply an accessory?
- 2. Part and Parcel** - is Prosser an integral part of the organization ?
- 3. Ordinary Man** - would an ordinary person view the relationship between Prosser and Quock as one of employee/employer ?

Clearly, in the case at hand, providing full time care for Quock and maintaining the residence was the only "business" Quock, through his co-committee was involved in. The perception of the "ordinary man" would be of the view the relationship was one of an employee/employer because Prosser lived in Quock's residence, provided care for Quock and took direction with respect to issues surrounding Quock.

Economic Reality

The Economic Reality Test requires the analysis of the entire relationship between the parties in order to determine whether a particular individual is carrying on business for herself or for someone else.

Reviewing the Economic Reality Test as it applies to this case involves the close analysis of the four criteria;

1. **Risk** - whether Prosser bears any risk of loss or possibility of profit ?
2. **Financial Investment** - does Prosser have an ownership of machinery and equipment and if so, is the investment substantial ?
3. **Lasting Relationship** - is there an ongoing permanent relationship between Prosser and Quock ?
4. **Diversity** - is Prosser permitted to provide the same or similar services to other parties and, if so, is Prosser actively involved in searching out other business opportunities ?

Prosser had no risk at all. In the case at hand Prosser supplied some of her own personal possessions, however she supplies no capital, takes no financial risk, has no liability regarding the business of Quock as all payments for mortgage, repairs, utilities (except personal telephone) were paid for by Quock and has an on-going, indefinite term relationship with Quock.

Prosser ventured no capital investment into the relationship with Quock and can expect no return for profit. There was no evidence that Prosser ever personally gained any monetary benefit other than her monthly remuneration.

With respect to “diversity”, the only evidence of Prosser performing the same or similar services for anyone else was when she provided care for her infant grand-daughter with the approval of Tevely. The evidence clearly indicates that Prosser received no remuneration for providing care for this family member, in fact, Social Services denied her request for funding. Prosser’s evidence was that if funding for the care of her infant grand-daughter was to be provided by Social Services, she would have provided Tevely with 30 days notice of resignation as it would not have been fair to Quock to have his care provider’s services diminished.

Specific Result

The Specific Result Test looks at the intent of the parties and whether a contract is to provide for a single service leading to a specific result or whether Prosser is simply required to provide general efforts on behalf of Quock through her care giving activities.

A review of the Specific Result Test as it relates to this case involves two criteria;

1. **Specific Work** - if Prosser is an independent contractor, it is agreed that certain specific work would be done for Quock. Conversely, in an employee/employer

relationship, Prosser agrees to provide labour and services required for the care of Quock and his residence.

- 2. Personal Service** - a contract of employment normally requires a specific person to place her own services at the disposal of the company. Usually an independent contractor's only obligation is to see that a certain agreed upon task is completed. In other words, it does not matter who actually performs the work.

In this case, Prosser personally provided all labour and services relating to the care of Quock except, when on occasion and with the approval of Tevely, someone else acceptable to Tevely was used to provide for the care in Prosser's absence.

If Prosser were an independent contractor, the contract should have been for a specific work in a specific period. In this case, there was an indefinite term for providing services and labour by Prosser for the benefit of Quock.

Counsel for Quock argues that Prosser was an independent contractor who was responsible for any remittances to Revenue Canada.

I conclude that Prosser was an employee of Quock for the following reasons:

1. Quock placed an advertisement in the paper, screened resumes and interviewed prior to offering the position to Prosser.
2. Quock and Prosser entered into an "employment agreement".
3. Quock set the rate of remuneration and retained the right, and in fact did, make unilateral deductions for periods when either Quock or Prosser were not in the residence.
4. Quock effectively "terminated" the relationship by "locking" Prosser out of her place of work and her place of residence.
5. Quock exercised final approval for any relief care givers arranged for by Prosser.
6. Prosser did not face the possibility of profit nor did she face the risk of loss.
7. Section 4 of the *Act* does not permit any agreement to waive the basic requirements of the *Act*, and the "employment agreement" in which Prosser agrees to pay her own remittances to Revenue Canada is such an agreement.

Based on the evidence provided and on the balance of probabilities, I conclude that Prosser's employment was terminated without cause by Quock. Prosser is therefore entitled to compensation for length of service.

I am further satisfied that the calculations performed by the delegate of the Director in regard to annual vacation pay, statutory holiday pay and compensation for length of service are correct.

Quock, as the employer, is responsible for ensuring that the appropriate statutory deductions, if required, have been made. Proof of payment of such statutory deductions to Revenue Canada on behalf of Prosser must be supplied.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 23, 1995 be varied to reflect that the person to be named as the employer is “Gordon Quock, by his Guardian ad Litem, Beverley Tevely, and the Public Trustee for the Province of British Columbia (co-committees). I further order that the Determination be confirmed in all other respects.

Hans Suhr
Adjudicator
Employment Standards Tribunal