# ONTARIO LABOUR RELATIONS BOARD

**2048-11-ES Timothy Leys and Kristen Thesberg**, Applicants v. Agripina Likhanga and Director of Employment Standards, Responding Parties.

Employment Practices Branch File No. **70091913-3**

**BEFORE:** James Hayes, Vice-Chair

**APPEARANCES:** Timothy Leys and Kirsten Thesberg appeared on behalf of the applicant; Rathika Vasavithasan, Meagan Johnston appeared on behalf of the employee responding party; no one appeared for the Director of Employment Standards.

**DECISION OF THE BOARD:** May 29, 2012

1. This is an application for review pursuant to section 116 of the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended (the "Act").

2. The applicants, Timothy Leys and Kristen Thesberg (collectively, the "Applicants"), dispute an Order to Pay issued by an Employment Standards Officer who found numerous contraventions of the Act in relation to the employment of the respondent, Agripina Likhanga (the "Respondent"), as the Applicants' live-in caregiver.

3. Specifically, the Employment Standards Officer issued an Order to Pay for $7,706.13 inclusive of the 10% statutory administrative fee, comprised of the following amounts:

- $1,804.00 in unpaid wages;
- $497.82 in unauthorized deductions;
- $1,514.43 in overtime;
- $1,379.70 in public holiday pay;
- $1,703.54 in vacation pay;
- $106.08 in termination pay; and
- $700.56 in administrative costs.

4. A hearing was held on April 30, 2012. Testimony was given by both applicants and the Respondent, and numerous exhibits were filed on consent. The Applicants were self-represented. The Respondent was represented by Rathika Vasavithasan, an articling student with Parkdale Community Legal Services Inc. To avoid the case being held over to a second day, written argument was submitted by both parties.

5. Based on my findings of fact and the reasons that follow, I find that the Respondent is entitled to recovery beyond that ordered by the Employment Standards Officer.



**The Facts**

6. The Applicants employed the Respondent as a live-in caregiver from September 6, 2009 until her termination on April 14, 2011 (though, as noted below, the Respondent's start date is disputed). The Applicants have two young children. In light of their active lifestyles, the Applicants decided to hire a live-in caregiver to assist with household chores, cleaning, and caring for their children. To this end, the Applicants began construction of a furnished 'nanny suite' in the basement of their home.

7. The Respondent is a Sri Lankan national who arrived in Canada pursuant to the federal government's Foreign Worker Program. The Applicants testified that when they first met the Respondent in June 2009, she was "living on the couch" of a cleaning client and obligated to a monthly agency fee from "Nannies 4 U". The Applicants explained that they had been sympathetic to the Respondent's plight. Accordingly, they hired the Respondent and expedited work on the nanny suite. The Respondent began living with the Applicants in July 2009, although because their children were away at camp during the summer, she did not "officially" start work until September 6, 2009.

8. On July 28, 2009, the Respondent signed an employment contract which, among other things, stipulated a 40 hour work week, wages of $400.00 per week (minus room and board), and two weeks vacation per year. The duration of the contract was two years from that date, subject to notice of termination. This was all confirmed in the federal government's Labour Market Opinion. In the contract, the Respondent's job duties were described as:

> Walk children to and from school, help with homework, play age appropriate games, supervise children, ensure safety, etc. … Laundry, light housekeeping, meal preparation.

9. Notably, even though the parties had allegedly agreed to a start date of September 6, 2009, this is not reflected in the Respondent's employment contract. The Respondent testified that she began performing light duties for the Applicants in June 2009, even though her work permit was not received until September 2009.

10. Also not reflected in the employment contract is the parties' alleged understanding that the Respondent would work a "reduced" work week of 15 hours per week during the occasions that the Applicants and their children were out of town. This was said to occur six or seven weeks per year. The Applicants testified that these trips typically consisted of summer stays at their cottage, skiing in the winter, and vacations out of the country. The Applicants' position was that because the Respondent's $400.00 per week salary did not change during these "reduced" work weeks, there was, in effect, an averaging agreement of sorts between the parties.

11. The Applicants testified that a sample schedule was used for hiring purposes, but was not adhered to as it became apparent that the Respondent lacked cooking and driving among other skills. The sample schedule contemplated a 48.5 hour work week, comprised of 10-hour days Monday to Thursday (8 a.m. to 6 p.m.), and an 8.5 hour day on Friday (8 a.m. to 4:30 p.m.). Instead, the Applicants prepared a cue-card schedule of tasks the Respondent was to perform each day. Considerable evidence was led on the exact time it should have taken to perform each task, with the Applicants contending that the Respondent should not have needed to work more than 38 hours in a regular work week. Further, the Applicants insisted that the Respondent received every statutory holiday off, and took two weeks vacation each year.

12. In contrast, the Respondent claimed she worked at least 12-13 hours per day. This claim was based on her contention that her day had to start at 6:00 a.m. in order to supervise the children when the Applicants left for the gym, and did not finish until at least 7:00 p.m. in light of the task load assigned to her. The Respondent also claimed that she invariably had to work weekends as well, either as a result of cleaning up after the Applicants' casual entertaining on Friday nights, or because of overflow tasks that were not completed during the week. Further, the Respondent insisted that she worked every statutory holiday, and was never able to take her two weeks of vacation. Also complicating matters was that the Respondent claimed to have been left with a litany of onerous tasks while the family was away that were impossible to complete within a 15-hour "reduced" work week. Even when this did not occur, the Respondent alleged that work still had to be performed because she was left with responsibility for the family dog and cat.

13. To put it charitably, the parties were some distance apart in terms of their perception of the factual matters in dispute.

**Relevant Law**

14. Before delving into further facts and details, it is important to appreciate the law which ultimately governs this matter. It would certainly be desirable if employers, and certainly employers of live-in caregivers, were aware of the legislated provisions which set out when work is deemed to have been performed. Whether or not these applicants might disagree with the public policy choices reflected in the legislation, it is that legislation which the Board is required to apply. S. 6 of O. Reg. 285/01 states:

> **6.** (1) Subject to subsection (2), work shall be deemed to be performed by an employee for the employer,
>
> (a) where work is,
>
> (i) permitted or suffered to be done by the employer, or
>
> (ii) in fact performed by an employee although a term of the contract of employment expressly forbids or limits hours of work or requires the employer to authorize hours of work in advance;

> (b) where the employee is not performing work and is required to remain at the place of employment,
>
> > (i) waiting or holding himself or herself ready for call to work, or
> >
> > (ii) on a rest or break-time other than an eating period. O. Reg. 285/01, s. 6 (1).

The Regulation also goes on to provide when work is deemed *not* to have been performed:

> **6.** (2) Work shall not be deemed to be performed for an employer during the time the employee,
>
> > (a) is entitled to,
> >
> > > (i) take time off work for an eating period,
> > >
> > > (ii) take at least six hours or such longer period as is established by contract, custom or practice for sleeping and the employer furnishes sleeping facilities, or
> > >
> > > (iii) take time off work in order to engage in the employee's own private affairs or pursuits as is established by contract, custom or practice;
> >
> > (b) is not at the place of employment and is waiting or holding himself or herself ready for call to work. O. Reg. 285/01, s. 6 (2).

15. Employers may be surprised to learn that their employees may be working within the meaning of the Act when there is actually no product of their labour. It is important however to understand why this is the case. Wages do not guarantee purchase of an actual service or product from an employee. Rather, wages purchase an employee's time during which productivity may be expected. This may be explicit, as in workplaces with settled work schedules, 9:00 a.m. to 5:00 p.m. for example, or it may be implicit, such as when the amount of work assigned indicates a need to perform overtime. Complications arise, however, when there is incongruity between the employer's expectation about the time required to complete a set of tasks and the employee's individual ability to do so. In light of its broad remedial purpose, however, the Act's provisions favour the employee in such circumstances. Further, even when no work has been assigned but an employee is not free to leave the workplace and pursue personal endeavours without regard for his or her employer's interest, generally speaking, that employee is "working" for the purposes of the Act, even in the absence of any productivity or benefit for the employer.

16. While they are not binding on the Board, the following passages from the Ministry of Labour's *Employment Standards Act, 2000*: Policy and Interpretation Manual describe the issue well:

> "Section 6(1)(a)(i) states that work is deemed to be performed where work is done and the employer has permitted or suffered the work to

> be done. The purpose is to indicate that it is not necessary that the employer have explicitly agreed to or approved of the employee doing the work. The employer is considered to have permitted work to be done where it fails actively to prevent the employee from performing work. …
>
> Section 6(1)(a)(ii)…establishes that work is deemed to be performed when it is in fact performed, *even though* the employment contract prohibited the performance of the work or the contract required the employee to obtain approval of the employer to perform the work and such approval was not obtained. …
>
> For example, work was deemed to be performed where the employee's actual hours of work exceeded those for which the employee was scheduled (*Re Weiche-Huttenkofer Corp. Ltd.*), and where the employee performed work that was not authorized in advance as required by the employer (*Re 469754 Ontario Ltd.*). The fact that the work performed by the employee was unnecessary (i.e., it was not required to be done) does not render s. 6(1) inapplicable (see *Re Keyes Supply Co. Ltd.*); nor does the fact that the work was unsatisfactory (see *Re Living Institute* and *Re Elgin Lumber & Packaging Corp. Ltd*.)."
>
> Section 6(1)(b)(i) establishes that work is deemed to be performed where an employee is not in fact performing work but is *required* to be *at* the place of employment waiting to be called to work.
>
> Section 6(1)(b)(ii) establishes that work is deemed to be performed where an employee is not in fact performing work but is *required to be* at *the place of employment* on a break or rest period other than an eating period.
>
> If the employee is allowed to leave or is required to leave the place of employment during a break, work will not be deemed to be performed."

17. With these principles in mind, a review of the evidence and parties' positions may now follow.

**Evidence**

18. The Applicants filed voluminous evidence seeking to identify precisely what tasks the Respondent performed, and when she performed them. The Applicants hold the view that the Respondent ought only to be compensated for work actually performed, in the time it should have taken her to perform it. The Applicants also submitted many cell phone bills for the stated purpose of identifying instances when the Respondent was not working.

19. As should now be clear, the legislation does not contemplate a docketing method for wage calculation. That said, the documents submitted do paint a compelling picture of the employment environment in question. For example, having regard to a

family medical circumstance, and in addition to typical caregiver and cleaning duties, the various task lists also required the Respondent to perform work which included wiping down all walls/shelves/drawers/furniture, cleaning and vacuuming air vents, washing out the fireplace, and so forth.

20. Based on my perception of the documents they produced, and the submissions they filed, I conclude that the Applicants run a highly efficient, meticulously organized family. Based on their description of the Respondent, it also appears that she may not have been able to keep up with the active pace they keep or to meet their expectations. It also appears that the Applicants harbour a sense of resentment about the Respondent's employment standards claim given all the support which they believe they have given her. While none of this is offered as a finding of fact, it is the contextual backdrop against which I considered material evidentiary disputes.



**Decision**

***a) Regular Work Week***

21. The Applicants' position is that the Respondent was paid all of her required wages, and more, during her 20 month period of employment. The Respondent, however, submits that she typically worked a full 44-hour work week and incurred additional overtime as well (discussed further below). The Employment Standards Officer used the employment contract's 40 hour work week as a base, and then assessed an additional 4 hours per week to arrive at the original Order to Pay.

22. There was conflicting testimony as to when, exactly, the Respondent's normal day began. The Respondent was emphatic that she rose at 6:00 a.m. every day to look after the children while the Applicants went to the gym. The Applicants, on the other hand, contended that the Respondent did not appear from her basement apartment until 8.00 a.m. Further, in the course of their final reply written argument, it was submitted for the first time that the Applicants only went to the gym 2-3 times per week and, even then, alternated their time of departure in order to ensure that their children were supervised at all times by themselves.

23. With respect, I did not find either party particularly convincing with respect to the details. However, I am prepared to find that the Respondent supervised the children some mornings, and that the Applicants organized their schedules in order to do the same as well. This makes sense in light of the Applicants' highly active lifestyles, the Respondent's primary role as caregiver, and the mutual reliance each party placed upon the other. For this reason, I have assessed the Respondent's hours of work as if she started at 7:00 a.m. each day. This is not far from the Applicants' own documentary evidence which indicated an ideal 7:30 a.m. start time in order to help their children get ready for school.

24. There was further dispute over when the Respondent's day would typically end. Although considerable evidence was led on the time needed to complete each assigned task, I do not think it is necessary to consider these submissions for two reasons. First, the Respondent demonstrated questionable credibility when pressed on when her

day would finish, and second, the "deemed work" provisions noted above render the point moot. That is, the present exercise does not involve adding up instances of productivity (akin to docketing), but rather examines the period in which the Respondent was deemed by the legislation to have worked. For this reason, the family's typical dinner time appears to be a more consistent and credible gauge for when the Respondent's day typically finished. In light of the various evening activities, it appears that the family ate dinner between 5:30 p.m. and 6:00 p.m. Allowing time for clean up, I find that for the purposes of calculating hours of work, the Respondent's day finished at 6:30 p.m. Monday to Thursday. Because all parties agreed that the Respondent's work day was shortest on Fridays, I find that she finished that day at 5:30 p.m.

25. Based on the foregoing, for the purpose of calculating wages (both regular and overtime), I find that the Respondent worked 56.5 hours on unreduced work weeks. This consists of 11.5 hours Monday to Thursday, and 10.5 hours on Friday.

26. In terms of the "reduced" 15-hour work week alleged to offset excess hours worked during the rest of the year, I note that the Applicants have not produced any written agreement to this effect. The Act strictly requires that any averaging agreement, or agreement for time off in lieu, be in writing. See subsections 1(3), 15(9), 22(2), and 22(7) of the Act.

27. Because no written agreement exists, I cannot give effect to the purported "reduced" work week. However, because the Respondent is a caregiver, it is implausible to suppose that she worked the same excess hours while the Applicants were away than while they were at home. Consequently, for the periods of time the Applicants were out of town, I find that the Respondent is entitled to be paid 40 hours per week, as stipulated in her employment contract.

***b) Overtime on Evenings and Weekends***

28. The Act provides that overtime is owed at a rate of time and a half for each hour worked past 44 hours per week. Having already found that the Respondent is entitled to overtime pay for the excess 12.5 hours worked Monday to Friday, the issue of work on evenings and weekends must now be considered.

29. Based on the Applicants' own evidence, it is clear that the Respondent was required to work on some evenings in excess of her standard work week. What is more difficult for present purposes, however, is to determine how often that occurred. Because of the limitation period in s. 111 of the Act, the Respondent may only recover wages owing from June 2010 onwards (12 months before her claim was filed). Based on the limited samples of schedules put before me, it is indisputable that the Respondent was required to look after the Applicants' daughter for an hour on Monday nights in January and February of 2011. This amounts to 13.5 hours of weekly overtime for the weeks of January 3 to February 21, 2011. Unfortunately the remaining samples of schedules are inconclusive as to overtime required in the evenings, and I decline to draw any inferences for other times based on this admitted overtime in January and February, 2011.

30. With respect to weekends, the Applicants suggested that the Respondent volunteered to take care of the family dog and cat when they were away. Simply put, it is unacceptable in these circumstances to characterize pet care as something that constitutes voluntary rather than actual work. First, the Respondent and persons similarly situated are particularly vulnerable given their reliance upon Canadian work permits. Any suggestion of voluntary work should be met with the highest degree of scrutiny by the Board. Second, apart from cleaning and house chores which may or may not have been required on any given weekend, it is indisputable that at certain times the Respondent was required to look after the Applicants' pets (i.e. during the 2011 ski season). The jurisprudence does not recognize the concept of *de minimus* work; rather, pursuant to s. 6 of O. Reg. 285/01, an employee is either working or not working. The family's cat and dog, certainly the dog, were entirely dependent on the Respondent's commitment to look after them. Because of this commitment, the Applicant was not able to pursue her personal endeavours outside of the workplace on those weekends. Therefore, as contemplated by the deemed work provision in O. Reg. 285/01, I find that the Respondent performed work within the meaning of the Act on certain weekends when the Applicants were away.

31. With respect to quantum of hours on those weekends, the Employment Standards Officer assessed one hour per day for pet supervision. I do not accept that approach. While the Respondent should not be paid for every hour she actually claimed for these weekends in my opinion, I do accept that she was required to perform some overflow tasks on weekends in addition to the time spent actually performing pet-related activities. Furthermore, I am required to avoid the docketing trap that s. 6 of O. Reg. 285/01 is designed to prevent. The fact is that the Respondent was required to be present on those weekends. For this reason, I assess 7.5 hours for each Saturday and Sunday that the Respondent was charged with pet supervision and performed other tasks. I base this on the 40-hour work week set out in the Respondent's employment contract, with a half hour deducted for meal breaks pursuant to ss. 20(1) of the Act. For the additional time that the Respondent was allegedly on call, for potential emergency pet care (i.e. Saturday and Sunday nights), I find that she was likely not present in the workplace but in her apartment instead. She is therefore deemed not to have been working during those periods of time by virtue of ss. 6(2)(b) of O. Reg. 285/01.

***c) Meal Breaks***

32. The Act requires that employers provide a half hour meal break to employees working more than five hours per day. Although the Respondent states that she was unable to take meal breaks, I do not find this credible once the Applicants' children commenced school in September, 2010. A half hour has been deducted for meal breaks commencing from this time.

33. The Applicants submitted cell phone records in an attempt to prove that the Respondent did indeed take breaks throughout the day. Although I have considered this evidence, I do not think it is conclusive for two reasons. First, ss. 20(1) requires that meal breaks be provided, not simply breaks. Second, the fact that the Respondent may have been talking on the phone does not prove that she did, in fact, receive a meal break.

***d) Minimum Wage***

34. The Applicants did not pay the Respondent the minimum wage required by law. The Respondent was paid $400.00 per week. $400.00 per week divided by either 40 or 44 hours falls short of the minimum wage requirement of $10.25 which came into effect on March 31, 2010.

***e) Public Holiday Pay***

35. The Applicants insist that the Respondent did not work on any statutory holiday during her employment, while the Respondent insists the opposite. The Respondent agrees that she did not work on New Year's Day 2011 and Boxing Day 2010.

36. On this point I prefer the evidence of the Respondent. The Applicants initially claimed to be away on certain public holidays, but when presented with contrary evidence, later did admit their mistake with respect, for example, Thanksgiving and Christmas Day. The Applicants also suggested that the Respondent was a guest at these gatherings, and as such was not required to work. If she cleared the plates and helped clean up, she did so as a guest. For reasons stated above, I reject this characterization of events. Even if it is customary for guests to help clear plates, this does not obviate the Applicants from the Act's deemed work provisions. With respect to those public holidays where the Applicants were out of town, the same analysis regarding weekend pet supervision and overflow task performance applies. In the absence of evidence showing that the Applicants actively prevented the Respondent from performing work on these days as contemplated by s. 6 of O. Reg. 288/01, I find that the Respondent is entitled to public holiday pay for Canada Day 2010, Labour Day 2010, Thanksgiving Day 2010, Christmas Day 2010, and Family Day 2011.

***d) Vacation Time / Vacation Pay***

37. The Act requires that employers provide 4% vacation pay in lieu of vacation time off. The Applicants claim that the Respondent took her vacation under the terms of her employment contract, while the Respondent claims she was required to work during this time.

38. The Applicants contend, essentially they deem, that the Respondent was "off" (for vacation purposes) during certain times during the relevant period because the family was away for one reason or another. For the reasons reiterated throughout this decision, I reject that characterization. Based on the evidence before me, it is clear that the Respondent had some level of work to perform while the family was away. Similarly, because no evidence was presented to indicate that the Applicants actively prevented the Respondent from working (quite the contrary), I am persuaded that the Respondent performed work during the times in question. As a result, pursuant to s. 35.2 of the Act she is entitled to 4% of on her earnings for the relevant period of employment.

***e) Deduction from Wages***

39. In an intended generous gesture, the Applicants opened a cell phone account for the Respondent under their family plan. However, the Applicants deducted the monthly payments for this account from the Respondent's wages. They claim that this was understood and accepted. It was clear that they regard the Respondent as ungrateful in complaining about this issue.

40. Conflicting evidence was led as to whether there was a verbal agreement to authorize this deduction, or at a minimum, whether the Respondent understood the nature of the deductions. In my view it is unnecessary to resolve this factual dispute. Section 13 of the Act requires that any deductions from an employee's wages must be agreed to in writing. During the hearing, it became apparent that there was no written agreement authorizing the deductions, and in their closing submissions the Applicants admit that it was a verbal, not written, agreement. As a result, the Respondent is entitled to reimbursement for all unauthorized deductions made during the relevant period.

***f) Termination Pay***

41. The Respondent was paid two weeks termination pay as required by the Act, but at the rate noted which fell below the minimum wage requirement, and further, based on a 40 hour work week. As I have found that the Respondent's regularly worked the maximum of 44 hours per week (before overtime), her termination pay must be adjusted to account for this and for the proper minimum wage rate.

**Calculation of Order**

42. Section 111 of the Act provides that wages are only recoverable for the six month period preceding the complaint, unless the employer is guilty of repeated contraventions, in which case a twelve month limitation period applies. As I have found this to be the case, the Respondent is entitled to recover wages owing from the period of June 3, 2011 to June 3, 2011, the date on which her complaint was filed.

43. Based on the foregoing reasons, I order the Applicants to pay the Respondents the following amounts:

***a) Regular Wages***

44. The Applicants are ordered to pay the Respondent $2,125.88 in respect of unpaid regular wages for the relevant period. This calculation is based on the 44 hour regular work week which I have found to apply, and the proper minimum wage of $10.25 per hour.

***b) Overtime Wages***

45. The Applicants are ordered to pay the Respondent $7,787.44 in respect of unpaid overtime for the relevant period. This calculation is based on the excess hours

regularly worked by the Respondent during a typical work week and, in addition, time spent for pet care and other work done on weekends while the family was away as discussed previously.

***c) Public Holiday Pay***

46. I have found that the Respondent is entitled to public holiday pay (and premium pay) for Canada Day 2010, Labour Day 2010, Thanksgiving Day 2010, Christmas Day 2010, and Family Day 2011. The Applicants are ordered to pay the Respondent $1,045.80 in this respect.

***d) Termination Pay***

47. Because the Applicants paid the Respondent termination pay based on a 40 hour, rather than 44 hour work week, an additional $106.08 is ordered to be paid.

***e) Vacation Pay***

48. The Applicants are ordered to pay the Respondent $1,195.89 in vacation pay. This is based on 4% of all gross earnings, including overtime, public holiday pay, and termination pay, in the twelve months preceding her claim.

***f) Unauthorized Deductions***

49. The Applicants are ordered to pay the Respondent $497.82 in respect of the unauthorized deductions made between June 3, 2010 and June 3, 2011.

**Conclusion**

50. For all the foregoing reasons, the Order to Pay is varied. I find the Applicants' owe the Respondent $13,092.29 in unpaid wages and entitlements under the Act. As the Act limits the maximum amount payable under the Act to $10,000.00, the Applicants are hereby directed to pay the difference between $10,000.00 and the existing monies held in trust, namely $2,293.87, to the Director of Employment Standards, so that the full amount owing of $10,000.00 may be disbursed forthwith to the Respondent.

"James Hayes"
for the Board