Employment Standards TRIBUNAL

An appeal

- by -

Burnaby Mental Wealth Society
("BMWS" or the "Appellant")

- 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: Ib S. Petersen

FILE No.: 2003A/267

DATE OF DECISION: February 10, 2004

DECISION

SUBMISSIONS

Mr. Rodney Baker	on behalf of the Appellant
Ms. Pamela Black	on behalf of herself
Ms. Sharon Cott	on behalf of the Director

OVERVIEW

This is an appeal by the Appellant, BMWS, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination (and reasons) of the Director's Delegate issued on September 2, 2003 (the "Determination").

In the Determination, the Delegate concluded that Ms. Pamela Black, who had worked as a fundraising co-ordinator from May 2001 to February 28, 2002, was an employee--not an independent contractor--of BMWS, a non-profit society assisting persons with emotional or mental illness, and was owed $1,975.41 on account of wages, vacation pay, compensation for length of service and interest.

ISSUES

While the appeal is framed as a denial of natural justice, the main issue raised by the Appellant is whether Ms. Black was an employee or an independent contractor? BMWS argues that she was and, therefore, the Determination should be set aside. In the event I uphold the conclusion that Ms. Black was an employee, the Appellant also seeks a reduction in the amount owed based on (alleged) overpayments for an absence due to illness and expenses. Not surprisingly, the Delegate and Ms. Black argue that the Determination should be upheld.

FACTS AND ANALYSIS

As has been noted in many decisions of this Tribunal, the onus is on the Appellant to satisfy the Tribunal that the Delegate erred. I have carefully considered the material on file, including the submissions and documents filed earlier. I am of the view that the appeal must be dismissed.

The *Act* defines an "employee" broadly (Section 1).

> *"employee" includes*
>
> *(a) a 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,*
>
> *An "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;*

> *"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere;*

As often stated by this Tribunal, the application of the statutory definitions of "employee" and "employer" is not as easy as one might expect in the context of employment standards. It is well established that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (*Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986).

Section 2 provides (in part):

> *2. The purposes of this Act are as follows:*
>
> > *(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;*

With those principles in mind, a useful summary (in my view) is set out in my decision in *Knight Piesold Ltd.*, BCEST #D093/99:

> "Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it"."

I intend to deal with the grounds of appeal in the order they appear.

1. Fundraising is not integral to BMWS.

The Appellant argues that fundraising is minimal. Most of its funding comes from government. Fundraising is undertaken to give members "a sense of contribution and self worth." While fundraising is often a necessary component of a charitable organization, I accept the Appellant's argument that fundraising, *per se*, is not integral to the society. Whether it is integral or not depends on a consideration of facts and circumstances. All the same, even if the Delegate erred on this narrow point, that is only one of many factors to consider in order to determine employee status.

In *Cambie Roofing Contractors Ltd.*, BCEST #551/02, the Tribunal stated:

> While I may have concerns about specific tests, and their application to specific fact patterns, I am not persuaded that there is any merit to this general argument that the Delegate applied the "wrong test" generally. Even if it can be shown that there is an error in the application of a particular aspect of a particular test, that may not be fatal to the Determination. It depends on the seriousness of the mistake.

2. BMWS intended the work to be done by Ms. Black personally.

BMWS is of the view that both parties intended the relationship to be a "contractual" one, meaning that Ms. Black--a former director when she was engaged--was an independent contractor and that it was deceived.

As noted in *International Paper Industries Ltd.,* BCEST #271/03:

> Finally, not surprisingly, the Appellant attacks the "genuineness" of Mr. Tcherkas' claim to employee status. It says that it would have exercised more control, pay etc. would have been different. While that is regrettable, my jurisdiction is the *Act* and, while intention may well be a factor to be considered, it does not determine the issue of status. In the decision of the Supreme Court of British Columbia, *Straume v. Point Grey Holdings Ltd.*, [1990] B.C.J. No. 365, the court noted that "the declared intention and classification of the contract parties may not bind statutory or third parties not party to the contract as against its true nature."

BMWS argues that the parties used the term "contract" between them. "Contract" is not a term of art. In any event, in my view, even if the parties had expressly agreed that Ms. Black provide services as an independent contractor, such an agreement would not in itself carry much weight under the *Act*.

The issue before me is whether the relationship was an employment relationship for the purposes of the *Act*. Section 4 provides expressly that the requirements of the *Act* and *Regulations* are minimum and "an agreement to waive any of those requirements ... has no effect." In short, the parties are not capable of contracting out of the statutory requirements. I appreciate the Appellant's position. Regrettably, from the standpoint of a party, which, to its detriment apparently has relied on a certain arrangement, these determinations are often made after the fact. If she is an employee--as she, in my view, was at the material time--she is entitled to the protections provided by the *Act*.

It is clear from the "contract"--among other evidence--that BMS intended the work--coordinating volunteers--to be done by Ms. Black personally. Frequently, independent contractors employ others to perform the work the contractor has agreed to perform (see for example, England et al., *Employment Law in Canada*, Markham Ont.: Butterworths 1998-, Ch. 2).

3. Donors were approached by Ms. Black as a representative of BMWS.

4. BMWS allowed Ms. Black to perform work normally performed by an employee.

I agree with the Appellant that these two aspects may not be significant *per se*. Often fundraisers approach potential donors in the name of the charity they represent. Fundraising may be done by employees or not. In this case, fundraising was the responsibility of an employee prior to the hiring of Ms. Black. That, in itself, does not determine status. The determination of status involves a consideration of all of the facts in light of the relevant legal principles.

5. On the Balance of Probabilities Ms. Black was an Employee as Defined in the Act.

BMWS says it does not understand this finding as its position (in its view) is supported by the guidelines issued by the Employment Standards Branch. I take that to mean that it disagrees with the Delegate's conclusions. It says that considering such factors as control, ownership of equipment, and chance of

profit/risk of loss, Ms. Black was an independent contractor. Obviously, not understanding the determination is not a ground of appeal.

While the Determination, in my view, falls somewhat short on the analysis--and, in places, arguably leaps to conclusions--it sets out the evidence of the parties in great detail. In many cases, the determination of status is not a matter of "black and white," rather there will be facts tending to support a conclusion that a person is an employee, as well as facts tending to support a conclusion that the person is an independent contractor.

Ms. Black was paid $2,000 per month for her full-time fundraising activities plus mileage and expenses. She coordinated volunteers from the society. She was entitled to a 10% bonus for amounts raised over $20,000. BMWS paid Ms. Black's membership fees for the Association of Professional Fundraisers. Ms. Black generally worked in her home office, using her own computer. However, BMWS paid office supplies and travel. BMWS also made a desk and boardroom available to her when she worked at its office. It is common ground that Ms. Black mostly worked out of her home office.

Ms. Black invoiced the society twice monthly and no deductions were made. The mutual expectation was that she worked a 40 hour week. From mid-September though October she worked--at her request and the board's approval--part-time (20 hours per week) at an hourly rate. When Ms. Black was ill and in hospital--and there is dispute over the exact number of days--BMWS continued to pay her, despite the fact that she did not work.

The Delegate accepted that Ms. Black worked for one or two other charitable organizations, at least briefly.

Considering the law and the fact, in the circumstances, I am of the view that the Delegate did not err in her conclusion that Ms. Black was an employee.

6. The Delegate accepted that Ms. Black was in hospital for three days only and not two weeks.

I agree that here is no apparent reason in the Determination for this finding. The Delegate does note that neither Ms. Black nor the society provided contemporaneous records of hours worked. Perhaps, and I am speculating, the Delegate accepted the evidence of Ms. Black over that provided by the society. While I might be inclined to agree with the Appellant and refer this back to the Director, there is nothing in the appeal other than the "board's opinion" that she was away for two weeks and was (in the Delegate's view) overpaid for three days only, not 10 working days. I dismiss this ground of appeal.

As well, I think the fact that the Appellant was paid for sick time at all, tends to support the conclusion that Ms. Black was an employee.

7. The Employer is Required to Pay for Work Performed.

The Appellant questions this statement in the Determination on the basis that this, in its view, is a reciprocal obligation and says that, assuming it is an employer, the *Act* discriminates against it contrary to Section 15 of the *Charter of Rights*. BMWS withheld money from her final cheque because Ms. Black failed to return certain items, including stationary and a database used in her work.

While I have some sympathy for the society's position with respect to Ms. Black's failure to return certain items, there is nothing to support that its position that she did not perform the work and therefore is entitled to be paid. Obviously, that does not mean that I condone Ms. Black's failure to return the items in question.

The Appellant's *Charter* argument is entirely without merit. However, it may be worth re-iterating that the purpose of employment standards legislation is to provide minimum standards of employment.

8. Black was terminated without notice.

The initial contract between Ms. Black and BMWS was for a six month term, ending October 31, 2001. However, in mid-December the Board of BMWS extended the term "to March 02." On February 28, 2002, BMWS brought the relationship to an end. In its view, the contract had runs its natural course and was at an end. Ms. Black was of the view that it did not end until the end of the month. The Delegate agreed that Ms. Black had been terminated without statutory notice awarded compensation for length of service.

I disagree with the Appellant's argument. I am not satisfied that the Delegate erred in this conclusion. If there was any uncertainty with respect to the term of the employment relationship, the Appellant had the ability to clarify it.

9. Certain Expenses are not Covered by the Definition of Wages under the Act.

The Appellant's position is that if Ms. Black is found to be an employee, she would have to refund some $2,700 worth of expenses.

With respect I disagree, these are expenses incurred in the Appellant/Employer's business, whether she was an employee or not.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination, dated September 2, 2003, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal