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 -

Robert Brand
(" Brand ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Carol Roberts

FILE No.: 1999/785

DATE OF DECISION: April 20, 2000

DECISION

This decision is based on the written submissions of Robert Brand, Laura Weileby, articled student at McCullough Parsons, and Margaret Aanders.

OVERVIEW

This is an appeal by Robert Brand ("Brand"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued December 7, 1999. The Director's delegate found that Brand contravened Sections 16, 17(1), 18(2) and 58(1)(a) of the *Act*, and ordered that he pay $786.84 to the Director on behalf of Margaret Aanders ("Aanders") for wages and vacation pay.

Brand filed an appeal against the decision on December 23, 1999. A hearing was set for February 21, 2000.

Brand is a quadriplegic with Lou Gehrig's disease, and relies on a life supporting ventilator. On February 7, he contacted counsel for assistance for the first time, and advised the Tribunal that he could not be moved, and could not, therefore, attend a hearing. He also indicated that his voice had deteriorated to the point that he could not participate in a conference call hearing. Following discussions with the Tribunal's settlement officer, Ed Hameluk, the appeal was changed to one based on written submissions. Brand was given until March 24, 2000 to make his submission, and Aanders given until April 7 to reply.

ISSUE TO BE DECIDED

At issue on appeal is whether the Director erred in determining that Anders was an employee. Brand also argues that the hourly wage award is arbitrary.

FACTS

On July 16, 1999, Aanders filed a complaint with the Director claiming she had worked for Brand without compensation from June 25, 1999 to July 13, 1999. She claimed that she responded to a newspaper advertisement for an employment opportunity placed by Brand, and was interviewed by him at the Victoria General Hospital on or about March 17, 1999. Her duties were to work as Brand's personal home-care nurse when he was released from the hospital. As a condition of that employment, she was required to attend training at Victoria General Hospital ("VGH") in the use of equipment necessary for his daily care commencing June 25, 1999.

Brand argued that he did not hire Aanders. He contended that Aanders took a training course offered by the VGH and that upon completion, she would be free to accept employment with any employer. He did not keep daily records.

Following an investigation, the Director's delegate determined that Aanders was Brand's employee during the training period. She found that Aanders responded to an advertisement placed in the newspaper by Brand, not VGH, and was required to take a training course in order to fulfil her duties. The delegate held that, since the legislation provided that training for a position was considered work for the purposes of the *Act*, Aanders was owed for hours worked while she attended the training course.

The delegate further determined that, in accordance with section 34 of the *Act*, Aanders was owed minimum daily pay for four hours each day she reported for work. She calculated regular wages of $642.00, minimum daily pay for those days in which Aanders worked for less than 4 hours per day, and calculated vacation pay on this amount.

ARGUMENT

Brand contends that he never hired Aanders. His position is that offered free training, and that she voluntarily accepted training with no expectation of being paid or considered employed. In support of this argument, Brand provided affidavits from three individuals, Anna Churchill, Fred Simpson, and Adrian Kremler, and a letter from Carol Curran. Counsel for Brand suggests that, in the absence of viva voce evidence, these affidavits ought to "tip the scales" in favour of Brand in assessing his credibility against that of Aanders.

Further, counsel for Brand contends that Aanders could have no reasonable expectation of payment for the training. They contend that the newspaper advertisement to which Aanders replied clearly stated that applicants for the position were to be experienced in home ventilator systems, which Aanders was not.

Counsel for Brand further argues that Aanders could not have a reasonable expectation of payment, and that to allow Aanders' claim would be illogical, discriminatory and patently unfair.

Brand further contends that the hourly rate of $12.00 is arbitrary and without foundation.

Brand further argues that he is unable to pay any award in any event, since he receives a set amount of money from CRD for his daily care, and is unable to pay anything more.

Aanders contends that on June 24, 1999, Brand dictated a letter for her confirming that she had been offered the position of home-care nurse commencing not later than July 15th, 1999. Brand denies dictating this letter, stating that his letters always carry his photo in lieu of a signature, which this did not.

Aanders acknowledged that when she went to the interview, Brand made it clear there would be no pay for training, and urged her to apply for a training allowance. She contended that Brand was required to offer her employment before she could qualify for the training allowance, which he did by the letter of June 24. Aanders also confirmed that Brand told her that she would not be reimbursed for time spent training after the training allowance ended.

DECISION

Section 1 of the *Act* sets out the following definitions:

> *Employer is defined to include a person*
>
> > *(a) who has or had control or direction of an employee, or*
> >
> > *(b) was responsible, directly or indirectly, of the employment of an employee.*
>
> *Employee is defined to include*
>
> > *(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee; and*
> >
> > *(c) a person being trained by an employer for the employer's business*

Work is defined to mean the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

Kremler and Simpson's affidavits are very similar. They indicate that they received training provided by Brand for six weeks during the summer of 1999 at the Victoria General Hospital, along with Aanders. Both Kremler and Simpson state that they took the training voluntarily, on their own time, with no expectation of being paid, or of a guarantee of employment from Brand upon completion of the training. They say that they believed the training was valuable, and would assist them in obtaining employment in the field of high level care. The balance of the information in the affidavits was a personal attack upon Aanders, and irrelevant to the issue on appeal.

The affidavit from Churchill indicates that she is a care-giver for Brand, and received training from him in January and February, 2000 along with a number of other people, and did so with no expectation of employment or being paid for it.

The letter from Curran indicates that she was a person who took part in the training offered by Brand at the hospital along with Aanders. Her evidence indicates that at the session, Brand advised all of the parties that they would not be paid for the training, and they would also not be obliged to pay for it. Curran's letter also contains pejorative comments about Aanders, which I have disregarded, as they are irrelevant to the issue on appeal.

Brand's counsel also contends that the ability to assess the credibility of the parties is important to arriving at a fair decision. In the circumstances, I do not find it necessary to make a determination on credibility.

There has never been a dispute that Brand offered "free training", and that Aanders participated in that training, as did the witnesses. However, the fact that all of those people agreed to be trained by Brand for no compensation is irrelevant to my determination. Section 4 of the *Act*

provides that the requirements of the *Act* are minimum requirements and an agreement to waive the requirements is of no effect. In other words, the parties cannot, by agreement, contract out of the *Act*. In *Hantula v. British Columbia*, BC EST #D277/97, the Tribunal found that the existence of an employment relationship is not dependent on the intention of one or both of the parties, but can be established by showing that work of some kind was performed which is identifiable as work normally performed in an employment relationship.

The newspaper advertisement to which Aanders responded was not looking for volunteers, nor did it offer a free training opportunity. It was, according to Aander's undisputed evidence, under the "Employment Opportunities" column of the newspaper. The training was offered by Brand, not by staff at VGH. Consequently, although Brand does not operate a "business," I find that he was an employer providing training for his own benefit, and thus falls within the definition of employer. (see also *Dosanjh v. British Columbia* BC EST #D487/97 and *Alexander v. British Columbia* BC EST #D574/97) Whether Aanders also benefited from the training is irrelevant.

I am unable to conclude that the Director's delegate erred in finding that Aanders was an employee under the *Act*.

Aanders' evidence is that Brand offered to pay her $12.00 per hour. Although Brand argued the delegate's determination on this point was arbitrary, there was no evidence that it was in error.

I deny the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated December 7, 1999 be confirmed, together with any interest accruing since the date of the Determination.

Carol Roberts
Adjudicator
Employment Standards Tribunal