### 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 -

Debra Hantula operating as Cambie Country Garden ("Hantula")

- of a Determination issued by -

The Director Of Employment Standards (the "Director")

**A**DJUDICATOR: David Stevenson

FILE No.: 97/45

DATE OF HEARING: June 9, 1997

 $\mathbf{D}_{\mathsf{ATE}}$  of  $\mathbf{D}_{\mathsf{ECISION}}$ : June 10, 1997

### **DECISION**

## **APPEARANCES**

Debra Hantula Debra Hantula operating as Cambie Country Gardens

Adriaan Nikken in person

#### **OVERVIEW**

Debra Hantula operating as Cambie Country Gardens ("Hantula") has filed an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") from Determination No. CDET 004945, dated December 10, 1996. The Determination found Hantula had contravened Sections 18(2), 27, 28, 58(1) and 58(3) of the Act in respect of the employment of Adriaan Nikken ("Nikken") and ordered Hantula to pay \$356.40. This money represented wages, annual vacation pay and interest.

There are many facets to the appeal, most unrelated to my jurisdiction under the Act, but the essence of it is that Nikken was not an employee and Hantula was not an employer during the period addressed by the Determination, March 16, 1996 to May 3, 1996.

#### ISSUE TO BE DECIDED

The issue raised by this appeal is whether an employment relationship existed between Nikken and Hantula in the period March 16, 1996 and May 3, 1996.

# **FACTS**

In March, 1996, Hantula contacted Nikken to invite him to work for Cambie Country Gardens for the 1996 season. Nikken, who was in Revelstoke at the time he was contacted by Hantula, accepted. He moved from Revelstoke to Sicamous, arriving on or about March 16, 1996. When he arrived Hantula described to him her plans for a market garden. She also told him she had no money at that time, but if her plans for the market garden were successful, it could work into a position for him. Nikken said he was happy to have a roof over his head and to have three meals a day. From the time he arrived, Nikken performed odd jobs and small tasks. He kept a daily diary, which included his activities. Hantula doesn't deny Nikken performed the tasks identified in the diary. In the context of the appeal, she says Nikken was doing the work as "casual work" and was doing no more than would be expected of any guest who "pitched in" with the daily chores in return for room and board.

Hantula takes the position that while Nikken was asked to come to the farm with the intention he would be employed in Cambie Country Gardens, it was not her intention to create an employment relationship until planting commenced. Nikken left before planting commenced and the employment relationship was never established.

## **ANALYSIS**

The burden of persuasion in this case is on Hantula to demonstrate the conclusion of the delegate of the Director was wrong. In all the circumstances of this case, Hantula has not satisfied that burden and I find that Nikken was an employee during the period March 16, 1996 to May 3, 1996.

The *Act* takes a broad and purposive approach to what is employment. The definition of "employee" under the *Act* includes:

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee

There are two significant conclusions that flow from that part of the definition for the purposes of deciding this appeal. First, 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 work was performed (and allowed to be performed), which is identifiable as work normally performed in an employment relationship. Second, on the facts, Nikken performed work which the Act recognizes as work that would normally be performed by a "domestic" or a "farm worker".

In addition to the above, the conclusion that Nikken was an employee is reinforced by other factors. First, he was asked to come to Sicamous for the specific purpose of working for Hantula in Cambie Country Gardens. Second, some of the work described in Nikken's journal can be directly related to the business of Cambie Country Gardens, including raking around the greenhouse and seed beds, cleanup around the seed house, work on the greenhouse, stoking the heater in the greenhouse, stacking firewood for the greenhouse, work at the fruit stand, planting garlic and constructing two raised beds for planting. Third, at one point during his employment, Nikken was given an outline of what he was expected to do during the day. I accept the outline was very basic, but it does convey the notion that certain performance expectations were placed on Nikken and removes the notion he was a "volunteer". Fourth, when he left, Nikken was paid \$109.00 by Hantula and during the period was paid another \$120.00 related to work he had performed.

As an employee Nikken was entitled to be paid for the work he performed. I sympathize with Hantula, who feels she has been betrayed by someone she sought to help, but as I explained during the hearing, my task is to review the decision of the delegate of the Director for error, either in applying the Act or in the factual conclusions necessary to make the Determination. I can find no error in either sense has been made by the delegate and there is no basis to change it.

# **ORDER**

Pursuant to Section 115 of the Act I order Determination No. CDET 00445, dated December 10, 1996, be confirmed.

Dave Stevenson Adjudicator Employment Standards Tribunal