

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Benito Montagliani
("Montagliani")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Carol Roberts

FILE NO.: 96/543

DATE OF DECISION: November 26, 1996

DECISION

APPEARANCES

This appeal was by way of written submission by B. Montagliani on his own behalf, and a reply by the Director.

OVERVIEW

This is an appeal by Benito Montaglani ("Montagliani"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued on August 2, 1996. The Director declined to investigate the complaint pursuant to Section 76(2), as he found that the complaint did not fall within the jurisdiction of the *Act*.

ISSUE

At issue on appeal is whether the complainant is excluded from the provisions of the *Act*.

Montagliani claims that he was an employee, and seeks to have the determination cancelled.

Montagliani participated in a Therapeutic Volunteer Payment Program funded by the Ministry of Health under the Guaranteed Available Income for Need Act, commencing February 1, 1994. His activities included meal preparation and clean up, and involved four hours per day two weeks per month. On March 18, 1994, the hours were increased to four weeks per month.

Following a review of the complaint, the Director found that the program was funded by the Ministry of Health. Consequently, he concluded that the complainant was excluded from the provisions of the *Act* pursuant to Regulation 32(1)(d) and declined to investigate.

ARGUMENT

Montagliani claims that the work performed at the Canadian Mental Health Association (CMHA) was funded partially by CMHA and in part by the Ministry of Health. He alleges that the CMHA used Ministry funding to finance activities considered to be regular work situations, not a therapeutic program. He alleges that the job was in fact neither time limited nor was it a training program. He contends it was to provide a service to the CMHA. He states that he worked independently, worked regular hours, gradually assumed greater responsibility, and did not take breaks as he would while participating in a therapeutic program.

The Director argued that the program was part of a Care Plan with the CMHC and stated that the program was excluded from the *Act*.

ANALYSIS

I have reviewed the written submission from Montagliani, the Determination and the submission from Director. After considering the evidence and submissions, I am unable to conclude whether or not the Determination is in error.

Regulation 33(1)(d), excludes individuals participating in a training and support program funded by the Ministry of Social Services or by the Ministry of Health, under the Guaranteed Available Income for Need Act (GAIN Act), from the provisions of the *Employment Standards Act*.

That Section was amended in September 1996, after the claim was rejected.

Montagliani claims that he is no longer participating in a training program, but is an employee. The evidence in support of his appeal suggests this is so. Although the CMHA states that Montagliani is participating in a 'Care Plan', there is no evidence that this plan is part of the Therapeutic Volunteer Program, nor is there any evidence to suggest that the 'Care Plan' is funded by the Ministry of Health or Social Services.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the matter be referred back to the Director for further investigation.

Carol Roberts
Adjudicator
Employment Standards Tribunal