

An appeal

- by -

ProBed Medical Technologies Inc.
("ProBed")

- 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: Lorne D. Collingwood

FILE No.: 2002/305

DATE OF HEARING: September 11, 2002

DATE OF DECISION: October 16, 2002

DECISION

APPEARANCES:

Peter Short	On behalf of ProBed
Roger Mawdsley	On his own behalf

OVERVIEW

ProBed Medical Technologies Inc. (I will use “ProBed” and “the Appellant” for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the *Act*”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 7, 2002. The Determination is that Roger Mawdsley is entitled to \$31,026.90 in regular wages, vacation pay and interest.

The appeal is that ProBed did not employ Mr. Mawdsley and that he is not owed wages as set out in the Determination. Mawdsley worked for Probed but the Appellant claims that Mawdsley agreed to work for free until such time as the company gained certain funding. It is acknowledged by the Appellant that it was to start paying Mawdsley a salary and that he was to receive six weeks’ annual vacation if and when the funding was obtained. The Appellant claims, however, that it was unsuccessful in gaining the funding and that the Determination is therefore wrong.

I have found that the delegate is correct in deciding that Mr. Mawdsley is an employee who is covered by the *Act* but I am satisfied that this Determination must be varied. Probed offered a salary, shares and six weeks’ annual vacation but the offer was made subject to the acquisition of funding and ProBed did not obtain that funding. The employer must, however, pay Mawdsley the minimum wage and 4 percent vacation pay.

An oral hearing was held in this case.

ISSUES

Was Mr. Mawdsley an employee? According to ProBed, he was not: There was never a formal offer of employment.

Should it be decided that Mr. Mawdsley is an employee, I must then decide terms and conditions of the employment. The Determination is that Mawdsley is entitled to \$3,000 a month for the first three months of his work and \$5,000 a month thereafter plus 6 weeks’ vacation. The Appellant claims that Mawdsley, knowing that the company was in dire straits, agreed to work for free until such time as the company managed to gain funding and it claims that, as the company never gained that funding, Mawdsley is not entitled to be paid as set out in the Determination. Mr. Mawdsley agrees that ProBed’s offer to pay salary was subject to the acquisition of funding but he claims that Community Futures funding was approved in late February or early March, 2001. He also claims that it was understood that if Community Futures funding was not granted, ProBed was then to “work out another plan” with him.

What I must ultimately decide is whether it is or is not shown that the Determination ought to be varied or cancelled, or a matter or matters referred back to the Director, for reason of an error or errors in fact or law.

FACTS

ProBed is developing and attempting to bring to market an innovative form of medical bed that is designed for the immobilised. It has on occasion managed to make a little money through sales of prototype versions of its bed. ProBed received in excess of \$100,000 in Scientific Research Tax Credit moneys after Mawdsley quit. I am told that ProBed does not at this time have any working capital to speak of and that it has been insolvent for years.

Roger Mawdsley learned of ProBed in the spring of 2000. He did some work for ProBed in the year 2000 but that work ended and Mawdsley returned to Ontario. (This year 2000 work is of no particular importance to the appeal.)

Mawdsley kept in touch with Peter Short, ProBed's President. Mawdsley had experience with the Ontario version of a federal program called "Community Futures". It seemed to Mawdsley that ProBed had a bright future and that it should have no trouble obtaining further research and development funds through the Community Futures program or some other program.

Mawdsley moved back to B.C. and on the 15th of January, 2001, he started work as ProBed's Chief Executive Officer.

In the Determination it is suggested that it is for reason of a fax that Mawdsley was led to rejoin ProBed as an employee. "Mawdsley received a fax from Short (Mr. Peter Short, President of ProBed) dated December 14, 2000 that appears to be an offer of employment." This is disputed by the Appellant. Short tells me that he never finished the document which is dated December 14, 2000 and that he did not fax the document to Mawdsley: He claims that it was not until several weeks after Mawdsley started working for ProBed that Mawdsley was given a copy of the document. The Appellant also claims that it did not send Mawdsley a written offer of employment of any sort.

I am not provided with evidence of the fax of which the delegate speaks. Mawdsley tells me that it may have been an email that he received and not a fax. I find that he is also uncertain as to when he obtained a copy of the document dated December 14, 2000. As I see it, it likely that is for reason of certain verbal assurances that Mawdsley was coaxed into working for ProBed for a second time.

The Determination is that Mawdsley is entitled to \$3,000 a month for the first three months of his employment, \$5,000 a month for the remainder of the employment and 12 percent vacation pay. According to the delegate, the salary figures "were confirmed by Short in a telephone conversation", Short acknowledged "that ProBed owed Mawdsley wages" and he said that "payments would be made when money became available". ProBed claims to have been misunderstood. It claims that its position has always been that Mawdsley volunteered to work for free until such time as ProBed gained funding from Community Futures, or a similar amount, and that, if and when that funding was obtained, it was then to start paying him \$3,000 a month for the next three months and \$5,000 a month thereafter, "performance shares" and six weeks' annual vacation. I am prepared to accept that it has been misunderstood, no clear evidence to the contrary. ProBed's position on appeal is the same as it was at the outset of the investigation and subsequent correspondence, the last of its letters to the delegate included

(letter dated February 25, 2002). I find that the Appellant has also consistently claimed that, as it was unsuccessful in its quest for funding, Mawdsley is not entitled to a salary or six weeks' annual vacation.

Turning to the matter of what is likely to have been the agreement on pay and working conditions, I find that Mawdsley did agree to work for free but that he did not expect to be doing that for long. ProBed had promised him that it would start paying him a salary and he would start earning six weeks' annual vacation, just as soon as the company managed to secure certain funding. And Mawdsley believed that ProBed would soon have that funding.

Mawdsley himself tells me that he was offered certain pay and working conditions and that terms of the offer are just as Short has set out in the document dated December 14, 2000. At the outset of that document it is stated that "With the loan application still under review and with no firm commitment from Community Futures likely until the early part of January this offer has, of necessity, to be subject to that approval, or to the raising of a similar amount to allow the company to honour any commitments entered into by way of this offer" (See paragraph 2 of the letter which is dated December 14, 2000 and marked "DRAFT"). Mawdsley, in a written submission, has also said that they "spoke at length about the 'draft' and its contents, especially about the caveat regarding the success of the application for funding from Community Futures" (p. 4 of his written submission dated June 20, 2002). He knew that ProBed's offer was conditional on funding.

That Mawdsley knew and understood that he would not immediately start earning a salary is clear from the minutes of the February 1, 2001 meeting of ProBed's Board of Directors. According to the minutes, Gary Neetz drew attention to the fact that ProBed did not have the ability to pay him a salary at that point. Mawdsley's response is that he "had some personal reasons for wanting to get involved in such a worthwhile project" and that "he was prepared to accept stock in lieu of salary until such time as the company's cash flow situation improved".

Except for ten days off, Mawdsley worked an 8 hour day and five days a week for ProBed. As the months wore on, Mawdsley came to the realisation that he might never start earning the salary that he hoped to earn and he became rather disillusioned with the company. On the 15th of September, 2001, he resigned.

Mawdsley claims that the Community Futures funding was approved and that he is therefore entitled to wages as awarded by the delegate. I find that it was 'approved' only in the sense that people who worked for the Community Futures program believed that ProBed appeared to be an excellent candidate for funding and that they encouraged ProBed to apply for funding. There is not evidence to show that ProBed was granted Community Futures funding or any other funding prior to the point when Mawdsley quit. I am told that Probed discovered that it was not eligible for Community Futures funding because its principals were unable to give loan guarantees which were required for such funding.

Mawdsley was paid something in recognition of his work. The total amount that Mawdsley was paid is \$10,607.24, however, \$2,664.07 of that is for expenses (leaving a remainder of \$7,943.17). Mawdsley has also received 125,000 shares.

ANALYSIS

ProBed claims that Mawdsley did not become an employee because he was not “formally offered a job”. The employer also argues that, even if Mawdsley can be considered to be an employee, it cannot be that he is entitled to be paid as set out in the Determination because he agreed to work for free.

I am satisfied that Mawdsley is entitled to the benefits and protections of the *Act* because he is an “employee” as that term is defined in the *Act* (section 1). An employee is a person that is allowed to perform work which is normally performed by an employee.

“employee” includes

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

Mawdsley was allowed to perform the work of Chief Executive Officer, work that is normally performed by an employee.

Mawdsley was quite taken with the idea of working for ProBed and that led him to agree to work for free until such time as ProBed gained certain funding. “An employee may not, however, accept less than the minimum standards of the *Act*. Such an agreement is null and void.

- 4 The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

Sections 43, 49, 61 and 69 apply to union employees. They have no application in this case.

The Determination is that Mr. Mawdsley is entitled to \$3,000 a month for first three months of his work, \$5,000 a month for the remainder of the employment and 12 percent vacation pay, that being the monetary equivalent of six weeks’ annual vacation. He is not. It was agreed that ProBed would start paying Mawdsley a salary and provide him with six weeks’ annual vacation if and when ProBed was successful in gaining Community Futures funding or it raised a similar amount from another source. That is all. Mawdsley is not entitled to be paid as set out in the Determination because ProBed did not gain the funding and the agreement to pay a salary was never triggered.

Mr. Mawdsley claims that he was to be provided with a new compensation package if ProBed failed in its quest for Community Futures funding. Even if this were so, an agreement of that sort is simply unenforceable. It is to require the successful negotiation of a new agreement and that is not something which may be compelled.

In summary, I am satisfied that there is not evidence to support the conclusion that Mr. Mawdsley is entitled to be paid as set out in the Determination. The Determination must be varied. Mr. Mawdsley is entitled to the minimum wage, 4 percent vacation pay and interest pursuant to section 88 of the *Act*.

Mr. Mawdsley worked an 8 hour day and 5 days a week throughout the employment. He took ten days off. He was paid \$7,943.17. I will leave it to the delegate to recalculate the amount that ProBed must pay Mawdsley.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which is against ProBed Medical Technologies Inc., dated May 7, 2002, and in favour of Roger Mawdsley, be varied. It is not \$31,026.90 that Mr. Mawdsley is owed but the minimum wage for all hours worked and 4 percent vacation pay plus interest pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal