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 -

Rhonda Bennett
(the "Employee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 2000/410

DATE OF DECISION: November 9, 2000

DECISION

SUBMISSIONS/APPEARANCES

Ms. Rhonda Bennett	on behalf of herself
Mr. Helene Beauchesne	on behalf of the Director

OVERVIEW

This matter arises out of an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on September 21, 1999. The Determination concluded that Bennett was not owed any wages on account of having used her home as her office. According to the Determination, Bennett was employed by the Employer, Consumer Direct Contact (CDC) Ltd. between August 1993 and October 4, 1998. She alleged that the Employer had rented office space from her and had failed to pay rent. This amount, she claimed, was due to her as "wages."

In a decision dated January 24, 2000, *Rhonda Bennett*, BC EST #D044/00 (the "Decision"), the Tribunal considered her appeal and referred the matter back to the Director. On appeal, she relied on two grounds:

1. The Employer had promised to pay rent but reneged; and

2. The Employer closed its office and forced her to set up an office in her home. As such, the Employer had her pay part of its cost of doing business.

The Adjudicator found that Bennett, indeed, worked out of her home for 16 months, between June 1995 and October 1996. He accepted that, when the Employer closed its offices, Bennett did not really have a choice if she wanted to keep her job due to the cost of separate office space. The Adjudicator also accepted that the Employer likely lead her to expect that some sort of financial assistance in consideration but that there never was an agreement on the amount to be paid.

The Adjudicator found that the delegate had failed to consider whether the Employer had contravened Section 8 of the *Act* (misrepresenting the terms and conditions of employment). The Adjudicator noted:

> "It may be that it was not for the reason of promised help with the rent that Bennett was persuaded to work out of her home: That she was in fact swayed by the prospect of just working from home, home office tax deductions and/or something else again. ..."

He referred this issue back to the Director.

As well, the Adjudicator was of the view that the "big issue" in the case was whether or not Bennett was required to pay any of her Employer's business costs (Section 21). He noted:

> "In rejecting Bennett's claim for compensation, the delegate notes that Bennett did not pay anything extra and states that what is claimed is not wages which are recoverable under the *Act*. That is to sidestep the issue. It is not important whether Bennett paid anything extra or not. What the delegate had to decide is only whether or not CDC did or did not require the employee to pay any of its business costs. If it did, the amount paid is, contrary to what the delegate seems to say, clearly recoverable as if it were wages by virtue of Section 21(3) of the *Act* and/or Section 79(3)(b). And, of course, "money required to be paid by an employer to an employee under this Act" and also "money required to be paid in accordance with a determination" is "wages" as the term is defined at (c) and (d) of the definition (see above)."

FACTS AND ANALYSIS

As noted, the issues were referred back to the Director.

A. Section 8--Misrepresentations

Section 8 of the *Act* provides:

> *8. An employer must not induce, influence or persuade a person to become an employee, or to work or be available for work, by misrepresenting any of the following:*
>
> *(a) the availability of the position;*
>
> *(b) the type of work;*
>
> *(c) the wages;*
>
> *(d) the conditions of employment.*

The delegate's report indicates that she contacted the both of the parties–the Employer and the Employee.

With respect to the issue of whether or not Section 8 of the *Act* was contravened, the delegate states the parties' positions which, not surprisingly, are that the Employer agreed to pay rent (Bennett) and that no agreement was reached (the Employer). The delegate concludes:

> "The Employer's argument that CDC did not lead Bennett to believe that rent would be paid is not a position that I can consider as the Adjudicator has made a finding to the contrary. However, I cannot find that the Employer's suggestion that it would pay an undetermined amount toward rent would have any influence on the Employee's decision to make herself available for work. As no amount

> was ever agreed upon, the amount could be $1.00 per month or $100.00 per month. The fact that Bennett did not clarify the amount with her Employer before deciding on whether to remain an employee under this new arrangement is significant in showing that it was not a factor in her accepting this new arrangement."

The delegate found that Section 8 was not contravened.

Bennett takes issue with the delegate's conclusions. She does not dispute that there was no agreement with respect to the amount to be paid. She states that she was influenced by the Employer's promise to compensate her. That may well be the case. However, I agree with the delegate that, in the circumstances, the Employer did not misrepresent the wages to be paid or any other term or condition of employment. The Adjudicator found that the Employer likely may have lead Bennett to expect that she would be compensated for the use of her home as an office, she cannot point to any specific pre-contractual representation. Cheshire and Fifoot's *Law of Contract* (London: Butterworth, 1981) defines misrepresentation as follows (p. 237):

> "A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, yet is one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that is untrue...."

In this case there is no representation of fact. At most, there is a promise. As I understand the law, the person who takes action on a promise "must show that this promise forms part of a valid contract." In my view, as there is no agreement with respect to the amount to be paid, or a formula to calculate such an amount, there was no meeting of the minds and there was no contract with respect to the payment of a share of the rent. I do not consider that either of the parties to this arrangement would have agreed to pay–or indeed–receive an undetermined amount. In any event, even if the Employer's statement (referred to by Bennett) that the Employer would pay her share of the rent can be considered a representation of fact, I find it unlikely that a statement that the Employer would agree to pay an undetermined amount would have induced her to enter this arrangement.

B. Section 21--Business costs

Section 21(2) of the *Act* provides:

> *21. (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*

The delegate set out the positions of the parties. Bennett argued that it was a requirement of her job to have an office at home. The Employer's position was that she incurred no new costs when she began working at home and that her rent did not increase. The Employer also explained that all business costs associated with Bennet working from home were paid by it, including fax, telephone, courier and office supplies.

The delegate found that "[a]ccording to both parties, the employer required the office be in Bennett's home." He continued, however:

> "Employers and employees frequently enter into arrangements where employees work at home. Such an arrangement benefits both parties since the employer does not have to provide office space and the employee does not have to spend time and incur the costs associated with a commute into the office. In some cases, it may allow an employee live farther away from the city and thus incur lower housing costs.
>
> Section 2 of the Act outlines the basic purposes of the Act. These include ensuring that employees receive at least basic standards of compensation and conditions of employment, promoting fair treatment of employees and employers, encouraging open communication between employers and employees, and assisting employees to meet work and family responsibilities.
>
> Keeping in mind the purposes of the Act, I do not feel that the intention of Section 21(2) is to require that employers pay employees rent when the employee works from home. Based on the above reasons, I find that there has been no violation of Section 21(2) of the Act."

Bennett argues that while her rent did not increase, the relative costs of her "personal space" did. I agree. While the proportion is arguable, in principle, at least, the cost of Bennett's "personal space" increased because she had the Employer's office in her home. Having an office in Bennett's home represents a saving to the Employer. In other words, the employer does not have to rent separate office space and incur the cost associated with that. In that sense, it cannot be argued that the Employee does not cover part of the Employer's business costs. In other words, Bennett participated in the Employer's business costs. Bennett states that the Employer "did instruct me to move the office into my home, in fact, she made it a requirement of my continued employment." Elsewhere in her submission she states that she had "no choice but to accept this arrangement or lose my job." The Adjudicator in the original decision in this matter found that:

> "CDC at one time had its own office but it closed that office. It was at that point that Bennett began to work out of her home, a rented, one bedroom apartment. From what I can see, Bennett was open to the idea of working out of a home office but she really had no choice if she wanted to keep her job. The cost of renting separate office space was prohibitive."

In my opinion, this case turns on the meaning of "require" in Section 21(2) of the *Act*. In *Park Hotel (Edmonton) Ltd. (c.o.b. Dominion Hotel)*, BCEST #D257/99, reconsideration of D539/00 and D557/98, the panel noted, with respect to Section 21(2):

> "We agree with the adjudicator that the touchstone of the term "require" implies some form of coercion. However, if the adjudicator has concluded that the term is limited to forms of coercion demonstrated by insistence or compelling, an order, a command, or an authoritative demand, to the exclusion of other more subtle, forms of coercion, and must be accompanied by consequences for non

> compliance, we do not agree. The Tribunal must be conscious of the fact that employee dependence on the employer and the opportunity this gives the employer to unduly influence an employee. What might seem like an innocuous request in most situations may, in an employer/employee context, take on a very different hue. Whether such a request contravenes the prohibition found in Section 21 of the Act will be a question of fact to be decided in all the circumstances. Additionally, the presence or absence of consequences for non compliance is not determinative of whether an employee has been "required" to pay all or part of an employer's business costs, but it is a factor which, along with others, must be considered when deciding that question.

We do not accept the Director's position that any participation by an employee to an employer's cost of doing business is prohibited by Subsection 21(2). Purely voluntary payments to the employer's business costs would not be prohibited by Subsection 21(2). As above, issues about the "voluntariness" of such payments will be questions of fact to be decided in all the circumstances."

In all of the circumstances of this case, I am of the view that the Employer did not "require"--within the meaning of Section 21(2)–Bennett to pay its business costs. I do not see any element of coercion. In the circumstances, I do not find that the fact that Bennett may have lost her job had the Employer closed down its business here completely constitutes coercion. What happened here was that the Employer closed down its office for *bona fide* business reasons and the parties agreed to carry on the business on the basis that the office would be located in Bennett's home. That arrangement benefited both parties: the Employer could carry on business and Bennett would keep her job. In my view, at the time the arrangement was entered into, it was a voluntary arrangement. That conclusion is supported by Bennett's own submissions. She states that the Employer led her to believe that it would pay a share of the rent, though no specific amount was agreed to. She also states that the Employer would not allow her to use the portion of her home for income tax purposes. This does not indicate coercion. Rather it indicates that subsequently disagreement between the parties developed with respect to what the Employer had promised.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated September 21, 1999, and the delegate's report, dated June 12, 2000, be confirmed.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal