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 -

Wildflower Productions Inc.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 1999/591

DATE OF HEARING: January 13, 2000

DATE OF DECISION: February 11, 2000

DECISION

APPEARANCES:

James Elderton	on behalf of Wildflower Productions Inc.
Beverly Nicole Cain	On her own behalf
David Hechenberger	On his own behalf
Durwin Partridge	On his own behalf
David Oliver	Delegate of the Director

OVERVIEW

This is an appeal by Wildflower Productions Inc. ("Wildflower" or "the company") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination (No. 095549) dated September 09, 1999 by the Director of Employment Standards (the "Director").

Wildflower is a corporation set-up to do business in the making of movies and videos. The officers of the corporation are Stephanie and James Elderton. I understand that they are the sole shareholders and directors of the company. In the spring of 1999 Wildflower employed Beverly Nicole (Nicky) Cain ("Cain") and Durwin Partridge ("Partridge") to work for the company in various aspects of the movie/video making business.

David Hechenberger ("Hechenberger") had been employed for some time with Wildflower and his employment ended about the time that Cain and Partridge joined the company. Hechenberger complained that he did not receive his wages for the last 10 days of his employment. Wildflower says that Hechenberger owed the company 10 days work and therefore he was not entitled to the last 10 days pay.

Cain and Partridge worked for Wildflower from early April until late July 1999. During that whole time period Wildflower only paid them the sum of $200.00 in total. Wildflower submits that Cain and Partridge were independent contractors and as such were not entitled to wages. Their earnings would have flowed from the profits from completed projects.

ISSUES TO BE DECIDED

The issues to be decided in this case are:

1. Whether Wildflower is entitled to set-off time owed by Hechenberger to Wildflower against wages worked-for and earned by Hechenberger;
2. Whether Cain and Partridge were contractors rather than employees.

PRELIMINARY ISSUE

Adjournment Application

The Determination against Wildflower was issued on September 09, 1999 and the appeal filed on October 04, 1999. The deadline for response to the appeal was set by the Tribunal for October 25, 1999. Submissions were received and a hearing of the appeal was scheduled to be heard on January 13, 2000. The first hearing date was adjourned at the request of the Director. This hearing date, of February 01, 2000, was scheduled to be convenient and available to all parties including legal counsel for Wildflower.

Wildflower was represented by counsel who filed the appeal on behalf of the company. All the arrangements for convenient dates were made with the company's counsel. It was suggested by Wildflower at this hearing that they had not received timely notice of the hearing dates but I am satisfied on reviewing the file that their counsel was well informed and had adequate notice.

James Elderton is a director and officer and appeared on behalf of the company. At the commencement of the hearing he requested an adjournment. He had applied for the adjournment to the Tribunal's office on the day before the hearing and was told to make his application to the adjudicator. He stated that the company was no longer represented by counsel and that his wife Stephanie Elderton was ill and could not attend the hearing. On questioning Mr Elderton was unable to say when counsel had withdrawn from the case but it was more than a week ago. He had only picked-up the file from the lawyer's office on Friday, January 28, 2000. He submitted that he had not had sufficient time to prepare for the hearing.

Mr Elderton also submitted that his wife was an essential witness for the company but she was ill and could not attend. A doctor's letter was submitted which confirmed that as of January 28 Ms Elderton had a kidney infection and had a high fever. Mr Elderton stated that she had not improved and was still running a fever.

Mr Elderton conceded that there was no evidence that Ms Elderton could give that would be different from his own but that her evidence would support his.

Mr Elderton also pointed-out that his wife was considered disabled because of scoliosis and some spinal fractures. However he confirmed that her non-appearance was not related to her handicap but was a result solely of her current infection.

The Director's delegate pointed-out that Ms Elderton had recently attended a number of other related hearings. The other parties objected to any further adjournments pointing-out the many months that the company had to prepare and that while it was unfortunate that Ms Elderton was unwell, her illness was chronic and there was no guarantee that she could attend at any future date. Mr Elderton confirmed that his wife did suffer from these infections on a chronic basis and he could not say when she would be available for the hearing.

I declined to grant the adjournment at the commencement of the hearing. While I certainly accept that Ms Elderton was unable to attend I was not satisfied that she was an essential witness unless

her "essentialness" became apparent during the course of the hearing. I was also not prepared to grant an adjournment on the basis of lack of preparation. Wildflower has had since October 4, 1999 to be prepared for the hearing. Wildflower is the appellant and as such has some onus to know why it is appealing and to be prepared to argue the appeal.

I was also most concerned that Wildflower had made no efforts to be ready for the appeal. There was very little evidence of any diligence on Mr Elderton's part to make sure that the hearing could proceed as scheduled. He knew his wife was ill over a week prior to the hearing and knew that counsel had withdrawn but made no application for adjournment until the day before the hearing was scheduled.

A further point requires comment. Ms Elderton submitted a letter stating that there was a discrimination issue under the *Human Rights Act.* I sought clarification from Mr Elderton who stated that his wife's view was that if I declined to grant an adjournment I was discriminating against her on the basis of her disability. I can only say that this is not the case. Mr Elderton assured me that his wife's inability to attend was unrelated to her disability. She was ill from an infection not associated with her physical disability. In any case the reasons for not granting the adjournment are as set-out above. These include the lack of diligence by Wildflower, the short notice of the application, the length of time that Wildflower had to prepare its case, the prejudice to the other parties, the uncertainty of any reasonable return date, and the fact that Mr Elderton is able to represent the company and to present its case adequately at the hearing.

THE FACTS AND ANALYSIS

David Hechenberger

There was no dispute on the basic facts in Hechenberger's case. Hechenberger had been employed by Wildflower from August 1998 until April 12, 1999. There is no dispute by Wildflower about his status as an employee. He was paid his wages minus the proper deductions throughout his employment except for the last 10 days. Wildflower agrees the Hechenberger was not paid for his last 10 days wages and there is no dispute as to the delegate's calculation of the amount owing.

Wildflower has appealed because Hechenberger had received, during his employment a number of days-off with pay. It is not disputed that he did have days-off with pay. Wildflower submits that these days-off were like a time bank and that Hechenberger owed them an equivalent number of days worked without pay.

A "time bank" is defined in the *Act* as meaning a time bank established under section 42 *"at the request of an employee"*. However, Section 42 deals with the banking of *overtime* wages only. Section 42 provides for a system of banking overtime to be taken as time-off instead of the overtime wages. There is nothing in the section which would allow the employer to give days-off with pay and then expect the employee to work an equivalent number of days without pay at a later date. In fact, other sections of the *Act* would be in contradiction to such a scheme:

> **17**.(1) At least semi-monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.
>
> **18**.(1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
>
> (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.
>
> **21**.(1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

Bearing in mind that the burden of persuasion at an appeal is on the appellant, I am not persuaded that the scheme alleged by the employer in this case complies with the above noted provisions of the *Act*. While it is acknowledged that the employee did receive some time-off with pay there is no provision which would allow the employer to set-off this time against wages actually earned at a subsequent time.

In this case Hechenberger worked the last 10 days of his employment and was therefore entitled to be paid those wages within 6 days after he terminated the employment. Wildflower had no legal authority to set-off days owing against those wages or to thereby make a deduction from the wages owing. This was done in contravention of Section 21 of the *Act.*

I note that I have accepted Mr Elderton's evidence as far as the Hechenberger issue is concerned and therefore the non-attendance of Ms Elderton was not a factor. Even accepting the facts as provided by the company they were not legally entitled to do as they did.

I conclude that the appeal of the Determination in so far as it applies to Hechenberger must be dismissed and therefore to such extent the Determination will be confirmed.

Durwin Partridge

Partridge was hired as the Director of Photography for Wildflower but his job description contained many other general tasks many of which had previously been within Hechenberger's job description. Partridge's employment is confirmed in a letter dated January 12, 1999 in which Wildflower sets-out the job description, weekly rate of pay, overtime provisions, paid holidays, and the statutory deductions.

Elderton agreed on behalf of Wildflower that Partridge was an "employee" as that is defined in the *Act* when he commenced work in April. However, Elderton claims that Partridge's status changed after the first few weeks.

Elderton agreed that there was no dispute as to the amount of wages owing in the event wages are found owing.

Mr Elderton testified that shortly after Partridge was hired a major project on which the company had been depending failed to materialize. There was no money to pay wages. Elderton says that he told the employees that there was no money to keep them employed but that Partridge elected to stay-on as form of joint-venturer. He pointed-out that Partridge worked on a number of projects and that Partridge claimed ownership of one of them.

On cross-examination Elderton confirmed that there was no written joint-venture contract and no industry standard "Deal Memo" signed by the parties. He agreed that it was not uncommon for a Director of Photography to be an employee although often they are hired on a per-project basis. He agreed that Partridge's work was integral to the company's operations and that Partridge could not sub-contract his work. He further confirmed that Partridge's day-to-day work did not change in any manner after the alleged change in status. Partridge had no financial investment in Wildflower and would not share in its profit or loss.

Elderton conceded that Wildflower had never raised the issue about contractor status with the delegate during the investigation and that the first time this was put forward was in the appeal documents. He agreed that he had told the delegate that it was "his wish that all employees would get paid" and did not ever suggest that they were independent contractors.

Partridge testified that there was never any discussion about any form of joint-venture arrangement. He was hired as an employee and worked diligently at his job as required until late in July 1999. He says that he stayed in the job because of frequent promises by Mr and Ms Elderton that their wages would be paid. He worked at many general duties as directed or requested by the Eldertons. His hours of work were scheduled by the employer; his remuneration was set by the employer; and he had no financial interest in the business.

The question of whether a person is an employee is one based on an assessment of the relationship between the parties and not on the unilateral intention of one of them. In this case Partridge performed work normally performed by an employee. Much of his work had previously been done by Hechenberger who was an employee. The employer controlled the work to be done and the means of performing the work. Partridge was integrated into the day-to-day running of the business. Partridge had no financial interest in the company and no chance of sharing in the profits or loss of the company. There was certainly no meeting of the minds on any change of employment status.

I conclude that Partridge was employed as an "employee" of the company in April and there was no change in his working relationship with the company until his employment was terminated in July. I am not satisfied that the appellant has met the burden of persuading me that Partridge was an independent contractor. The credibility of such assertion is also diminished by the fact that it was raised for the first time on appeal.

I conclude that wages are owed by the company to Partridge and as there is no dispute with the delegate's calculation of quantum the Determination will be confirmed in so far as it relates to Partridge.

Beverley Nicole (Nicky) Cain

Much of the evidence as set-out above applies equally to Ms Cain. She was hired as an "employee" with a written contract of employment in the same format as Partridge. She was hired before Partridge and her letter of appointment is dated April 06, 1999. It sets out the terms of employment including wages, overtime, and paid holidays. It does not refer to the statutory deductions. She was employed as a writer and production supervisor. Her job description also included many support and general duties. She did whatever work was required by the company ranging from receptionist to secretary to producer/director. The employer directed the work to be done although it is clear that Ms Cain actually brought projects to the company. The hours of work were scheduled by the company, remuneration set by the employer, and she had no financial interest in the business.

The company asserts that Cain also became an independent contractor subsequent to her initial hiring as an employee. Elderton acknowledged that she was definitely, at the start, an employee. When it became clear that there was no money for wages the company says that Cain stayed-on as a joint-venturer hoping to get paid when a project became successful. Elderton testified that the change in status occurred at the end of April or early May. There was no written contract and no evidence of what she was to be paid eventually. Elderton testified that she would have been paid "Telefilm" and "Writers' Guild" rates but this was clearly news to Ms Cain.

Ms Cain testified that her job did not change and that she only stayed in her employment because of the many promises held-out to her by the employer that she would be paid. She says that there was never any discussion about her becoming a joint venturer or being paid from the proceeds on Telefilm or Writers' Guild rates.

The company's position that Ms Cain became an independent contractor at the end of April or early May is in direct contradiction to an application by the company for a Federal Government wage subsidy grant. The grant application is dated May 07, 1999 and is only available to subsidise employees. The grant was actually approved but never implemented because it required matching funds from the employer which were never forthcoming. However the grant was not actually de-activated until July 23, 1999.

There was also evidence led that the company had approved that research be conducted into an employee benefit and insurance package which was done by Ms Cain but again never implemented because of the impecuniosity of the company. The work done on this package together with the federal grant application are evidence which is inconsistent with the company's position that Cain was an independent contractor.

Mr Alderton submitted that Ms Cain had claimed certain intellectual property rights in regard to certain projects and that these claims were inconsistent with her employment status. However, in

my opinion, such property rights exist independently of employment status and are not relevant to the application of the statutory definition of employer and employee under the *Act*.

Mr Elderton also pointed-out that Cain worked on her own projects independently from Wildflower. While I accept that this may have been true, and it is not denied by Ms Cain, it is not necessarily determinative of her employment status.

As stated above in relation to Partridge, the question of whether a person is an employee is one based on an assessment of the relationship between the parties and not on the unilateral intention of one of them. In this case Cain performed the work normally performed by an employee. She answered the phones, acted as a receptionist, performed secretarial duties, and generally worked as directed by the Eldertons. She was fully integrated into the day-to-day operations of the company. She had no financial interest in the company and no opportunity to share in the profits or loss of the company.

I conclude that Cain was employed as an "employee" of the company in April and there was no change in her working relationship with the company until her employment was terminated in July. I am not satisfied that the appellant has met the burden of persuading me that Cain was an independent contractor. I point out again that the credibility of such assertion is diminished by the fact that it was raised for the first time on appeal.

I conclude that wages are owing to Ms Cain.

The appellant does not dispute the amount of wages owing to Cain as found in the Determination. However, Ms Cain pointed-out a miscalculation in that the Director had not included the last three days of employment when Ms Cain was instructed to stay at home and before her employment was terminated. The Director's delegate then re-examined his calculations and found some errors in favour of the employer.

While I do not have jurisdiction to alter the Determination in favour of the respondent who did not appeal the Determination at the time, I find that I can correct the quantum where there is a clear error. In this case the delegate reviewed errors in the calculations and I am satisfied that the correct amount owing to Ms Cain is $10,783.00 plus interest calculated according to section 88 of the *Act*.

ORDER

Pursuant to Section 115 of the *Act* I order that:

1. In so far as the Determination relates to **David Hechenberger** it is confirmed;

2. In so far as the Determination relates to **Durwin Partridge** it is confirmed:

3. In so far as the Determination relates to **Beverly Nicole Cain** it is varied to change the amount owing from $10,645.80 to $10,783.00 payable together with section 88 interest.

John M. Orr
Adjudicator
Employment Standards Tribunal