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 -

BEA Per Capita Consulting Corporation
(" BEA ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No: 1999/690

DATE OF HEARING: February 15, 2000

DATE OF DECISION: March 17, 2000

DECISION

APPEARANCES:

Gregory N. Harney	Counsel for BEA
Errol Abramson	BEA

OVERVIEW

BEA Per Capita Consulting Corporation ("BEA"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), has appealed a Determination by a delegate of the Director of Employment Standards (the "Director"). The Determination is dated October 20, 1999 and it orders BEA to pay Henry T. (Hank) Berkenpas $686.52 in wages, mainly overtime, and interest.

Underlying the Determination are two conclusions. The first is that Berkenpas is an employee as the term is defined by the *Act* and, therefore, entitled to the protection and benefits of the *Act*. The second is that he worked for BEA in the period August 29, 1998 to September 7, 1998 ("work at the P.N.E."). The total amount of regular and overtime wages for the work at the P.N.E. is greater than the amount of the Determination.

BEA claimed at the investigative stage that Berkenpas was engaged as an independent contractor, not an employee, and it again makes that claim on appeal. It also claims that Berkenpas was not working for it at the P.N.E. but was running his own business out BEA's booth, selling books and other wares, and was supposed to pay BEA rent. According to BEA, the Determination should be cancelled, if not for reason of factual errors and the delegate's failure to recognise that it was the clear and obvious intention of both parties to enter into a short term business arrangement, then for the reason that it greatly overstates the number of hours worked.

ISSUES TO BE DECIDED

The matter of whether Berkenpas is or is not an employee is at issue. There are various factual matters to resolve, the matter of work at the P.N.E. included. I must ultimately decide whether the employer has or has not shown that the Determination ought to be varied or cancelled for reason of an error in fact or in law.

FACTS AND ANALYSIS

BEA is in the vitamin business. In 1998, Berkenpas worked in BEA's stores as a vitamin consultant for what is almost 3 months.

BEA and Berkenpas presented the delegate with two rather different versions of events and the circumstances of their relationship. But they did not disagree on everything. The following was clear:

- Berkenpas learned of BEA through an ad that it placed in a newspaper.

- Berkenpas owned and operated a sole proprietorship called DBA HealthQuest Consulting ("HealthQuest"). Through that business, Berkenpas provided nutritional counselling, charging $35 to $55 a visit, and sold books and other wares.

- BEA has employees, several of them. Berkenpas was paid more than any of the persons who sold vitamins in its stores as employees of BEA. BEA in paying Berkenpas neither deducted taxes, E.I. or C.P.P.

- Berkenpas presented BEA with an invoice each month under the name of "Henry Berkenpas, CNC, DBA HealthQuest Consulting". He charged BEA G.S.T..

- BEA did not give Berkenpas any training.

- BEA did not provide tools or any other item used by Berkenpas in his work.

the delegate reaches a number of other factual conclusions and then decides that Berkenpas is an employee under the *Act*. In her view, "there can be no conclusion reached other than that the relationship between Berkenpas and BEA was that of a contract <u>of</u> service and the Berkenpas was an employee under the *Act*." She gives the following reasons:

> "The undisputed evidence is that Berkenpas came to work for BEA as a result of an ad they placed in the papers. The work he was to do had to be performed by him. The invoices prepared by Berkenpas were required to be forwarded by him to the company on pay dates set by BEA. The rate of pay was set by van Ziffle; Berkenpas had no chance of profit or risk of loss and most of his income came from BEA. His term of employment was indefinite for as long as it lasted and BEA reserved the right to terminate him. He wore a nametag like all other employees, his hours of work were scheduled by Taylor and/or Chung, and he was supervised by Taylor, who said that she also discussed with him complaints from other employees about him. The work performed by Berkenpas was integral to the work of the company as a whole."

I find the above paragraph to be troubling in that the evidence, as it is reported to be in the Determination, does not support the conclusions that van Ziffle alone set the rate of pay, that Berkenpas had neither any chance of profit, nor loss, that it was BEA that decided what hours Berkenpas would work, that it provided supervision, or that he was an integral part of BEA. And Berkenpas did not, from what I can see from the Determination, claim that he wore a BEA nametag. He spoke of wearing a nametag that showed he was with "The Bay". BEA has outlets in some Hudson's Bay company stores.

I also find, in reading the Determination, that it is never made clear what Berkenpas had in the way of earnings. He is rather hazy on his numbers. As the delegate points out, a claim for

P.N.E. commissions just did not add up. I note that he told the delegate that 99 percent of his income was from BEA but that he also advised her that he charged upwards of $35 a visit for nutritional counselling and said that, at the most, he earned $100 a week from his work outside of BEA. Those statements appear contradictory in that 1 percent of $3,000 a month (what BEA was paying him) is a mere $6.92 a week.

BEA, on appeal, claims that the delegate is wrong on some facts and that she overlooks other important facts. According to BEA, the following is true:

- Berkenpas was engaged as an independent contractor for the purpose of specific tasks and, while not for a specific period exactly, not an indefinite period either. Berkenpas was engaged as a vitamin consultant who was to train its employees through example, as vitamin consultants, and develop a manual that would be of aid to them in their work. Abramson of BEA tells me that it was always the understanding of the parties that once that was done, they would go their separate ways. And I am told that it was when Berkenpas told Abramson that he was not going to produce a manual, unless he was paid extra, that BEA acted to sever the relationship.

- Berkenpas clearly presented himself as self-employed, perceived himself as a consultant, and told everyone he was a consultant to BEA.

- He worked without supervision.

- He set his own hours.

- He had an active business as a nutritional consultant outside of BEA and selling his books and various other products. He was very busy with that, in part, because of all the extra business he was getting from BEA's customers.

- BEA had a booth at the P.N.E. in the period August 29, 1998 to September 7, 1998. BEA decided that it would allow Berkenpas to work out of its booth, not for the purpose selling BEA's products, but for the sole purpose of operating as HealthQuest and selling his own books and other wares.

As matters are presented to me, I am given no reason to disbelieve BEA on any of the above points. I have heard nothing from Berkenpas and I have not been presented with evidence which shows that the facts are not as BEA outlines.

As I have recently noted [*Flash Courier Services*, BCEST No. 094/00], the primary purpose of the *Act* is to ensure that employees receive at least basic standards of compensation and working conditions (the *Act*, section 2) and the definition of employee, employer, and work is to be given a liberal interpretation. Yet while the Tribunal must act to ensure that any person that is an employee receives the protection and benefit of the *Act*, it must do so without the absurd result that calls for an employer to pay wages (vacation pay, statutory holiday pay, overtime pay, and

the like) to a person who, while paid wages and/or performed work normally performed by an employee, is genuinely and quite obviously self-employed. That point was made by Mr. Justice Josephson of the Supreme Court of British Columbia in *Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341 when he quoted Paul Weiler, then Chair of the Labour Relations Board [*Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital*, (1975) 1 Can. LRBR. 42 at 50]:

> "The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee ... But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer."

The Tribunal has through *Larry Leuven*, (1996) BCEST No. D136/96, and other decisions, has said that it will consider any factor which is relevant. The factors which I have decided to consider in this case are in essence those which have been set out in a recent decision of the Tribunal, *Cove Yachts(1979) Ltd.*, BCEST D421/99. BEA has not suggested that there is another factor or factors to add to that list. I would list the factors as follows:

- The actual language of the contract;
- control by the employer over the "what and how" of the work;
- ownership of the means of performing the work (e.g. tools);
- chance of profit/risk of loss;
- remuneration of staff;
- right to delegate;
- the power to discipline, dismiss, and hire;
- the parties' perception of their relationship;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is a specific task or term.

This is not a case where an employer acts so as to make it appear that its entire workforce is comprised of independent contractors rather than employees, in a bid to circumvent the *Act*. The company has employees.

When BEA engaged Berkenpas, Berkenpas was operating his own business and he continued to operate his business while performing work for BEA. The fees that he charged for nutritional counselling are substantial. Berkenpas presented BEA with invoices and charged G.S.T.. BEA did not deduct income tax, E.I. or C.P.P.. All of that points to a business relationship and that it was the perception of the parties that they had entered into a business arrangement, but it is not conclusive. The delegate is correct on that. Berkenpas may still be an employee under the *Act*.

But I am not satisfied, as noted above, with the stated reasons for deciding that Berkenpas is an employee. And, as matters have been presented to me on appeal, it is Berkenpas that controls the what and how of the work performed; the parties clearly perceived of their relationship as one between two independent contractors; there is reason to believe that Berkenpas earned a considerable portion of his income through work outside of BEA; and the work was for a specific purpose and not of an ongoing nature. Neither the Determination, nor Berkenpas give me reason to disbelieve BEA. And from what I can see of the relationship, Berkenpas stood to profit from the relationship in that in BEA he found an important new source of people wanting nutritional counselling. And while I am somewhat inclined to believe that BEA needed to have a knowledgeable vitamin consultant, I find that from the standpoint of Berkenpas, BEA was a potentially important but by no means essential, integral part of his business. All of that considered, I find that the relationship between BEA and Berkenpas was not that of employer/employee but a business arrangement between two independent contractors. Berkenpas was engaged under a contract for services, they being training and production of the manual.

I should say that even if I am wrong in the above conclusion, I would still cancel the Determination. The order to pay wages stems entirely from the delegate's decision that the work at the P.N.E. was for BEA. As BEA has presented matters to me, the work at the P.N.E. was not for BEA. I am told that Berkenpas, under an arrangement with BEA which allowed him to use its booth, was operating as HealthQuest. Neither the Determination, nor Berkenpas give me any reason to disbelieve BEA.

As matters have been presented to me, I am led to the conclusion that Berkenpas is not an employee under the *Act* and that no wages are owed for work at the P.N.E.. The Determination is accordingly cancelled.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 20, 1999 be cancelled.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal