Employment Standards TRIBUNAL

An appeal

- by -

Mark Conn
(the “Employee”)

- 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: Ib S. Petersen

FILE No.: 2000/722

DATE OF HEARING: February 23, 2001

DATE OF DECISION: March 23, 2001

DECISION

APPEARANCES:

Mr. Theo Warkentin	on behalf of the Advantage Plus Food Services Inc.
Mr. Mark Conn	on behalf of himself

OVERVIEW

This is 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 October 5, 2000. According to the Determination, Conn alleged that he was an employee of Advantage Plus Food Services Inc. ("Advantage Plus") from November 15, 1999 to April 30, 2000. Ultimately, the delegate concluded that Conn was not an employee for the purposes of the Act.

FACTS AND ANALYSIS

The lengthy and detailed Determination sets out the legal and factual basis for that conclusion. The following is a brief summary of the material facts:

- Advantage Plus commenced operations in 1998. It was located in Prince George, B.C.
- CP Quality Foods Ltd. ("CP") was its supplier of meat products. It operated out of the Vancouver area.
- CP had financial difficulties and the principals of Advantage Plus and CP agreed to "merge" the two companies.
- Three shareholders in CP, including Conn, each received 33 shares in Advantage Plus. In the result, CP shareholders had 99 out of 256 shares of Advantage Plus.
- Conn became a director of Advantage Plus and, as well, the executive vice-president of operations, primarily responsible for the Vancouver operation. Paul Sievewright, from the Advantage Plus side, became president.
- Conn was registered director of CP and was its productions manager. After the "merger," he fulfilled the same duties..
- While Conn was named as a director of Advantage Plus, he was not registered as such because the "paperwork" was returned by the Registrar of Companies due to errors.

- Conn participated in shareholder and directors meetings.

- Conn participated in meetings concerning Advantage, including the meeting where it was decided to end the "merger."

- Conn was to receive $750 every two weeks, if the profits permitted it.

- The "merger" came to an end effective at the end of March 2000.

The delegate decided that Conn was a *de facto* director and controlling mind of Advantage Plus and that he, therefore, was not an employee for the purposes of the *Act*. In general, I agree with the delegate's thoughtful analysis which is based on the facts and the Tribunal's case law (including *Okrainetz*, BCEST #D354/97 and *Barry McPhee*, BCEST #D183/97).

A hearing was held at the Tribunal's offices on February 23, 2001. Conn attended in person. Warkentin participated via telephone. At the hearing, Conn conceded that he was not an employee for the purposes of the *Act* until the end of March. He says, however, that he continued to work for Advantage Plus for one month after the merger had fallen through. Advantage Plus says that he did not work for it but for CP from the end of March. The delegate was aware that much of the "paperwork" with respect to the "merger" was not completed--because the parties could not afford the legal fees associated with this--and that it, in any event, only lasted between November 1999 and the end of March 2000. Conn says that a Record of Employment issued by Advantage Plus stated that his last day of employment was April 30, 2000. Though Conn had made reference to this document in one of his submissions to the Tribunal, this document was not before me and the circumstances surrounding the issuance of the ROE was not explained to me. Another matter brought up by Conn, in support of his argument that Advantage Plus continued to operate the lower mainland operation into April, were invoices from one customer for orders in early to mid April for shipment to Advantage Plus, Coquitlam and billed to Advantage Plus, Prince George. Warkentin's explanation was that Advantage plus allowed CP to use its name for orders to it (but not for other customers). The circumstances of the "dissolution" of the "merger" were--to say the least--murky. It is unclear to me what exactly the "dissolution" accomplished. It is, in my view, more likely that the "merger" simply resulted in a situation where the two companies--Advantage Plus and CP--went back to carry on their own respective businesses more or less as before the "merger." Warkentin explained, and this was not contradicted by Conn at the hearing, that conflicts arose in March because the "merged" company "was not making money" and the decision was made--by Conn, his father and Sievewright--to end the "merger." In those circumstances, I find it difficult to accept that Advantage Plus would--or, indeed, could--carry on the business of CP after the "merger" had fallen apart. In my view, this was a business venture and relationship that went sour, and not an employer-employee relationship. On balance, I am not prepared to accept Conn's argument that he became a "mere" employee of Advantage Plus after the "merger" of the two companies fell apart. In other words, I am not prepared to accept that he was an employee of

Advantage Plus for the purposes of the *Act* in April 2000 and, as such, entitled to wages from that company.

In short, I am of the view that Conn has not met the burden on appeal to satisfy me that the delegate erred such that the Determination should be set aside.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated October 5, 2000, be confirmed.

IB S. PETERSEN

Ib S. Petersen
Adjudicator
Employment Standards Tribunal