

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Barry McPhee
("McPhee")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE No.: 96/733

DATE OF HEARING: April 4, 1997

DATE OF DECISION: April 19, 1997

DECISION

APPEARANCES

for the Appellant:	in person
for Matco Signs Ltd.	Bruce Bodlack
for the Director	Elizabeth Arnott

OVERVIEW

This is an appeal by Barry McPhee (“McPhee”) from a Determination, dated November 18, 1996, by a delegate of the Director of Employment Standards (the “Director”), refusing to investigate a complaint filed by McPhee because the delegate concluded McPhee was attempting to claim wages as an employee of a company, Matco Signs Ltd. (“Matco”) while he was an owner and director of that company. McPhee says he was not a director or officer of Matco during his time of employment, July 8, 1996 to July 31, 1996, as he had resigned as a director and officer of Matco on April 16, 1996.

ISSUE TO BE DECIDED

The issue is whether McPhee was an employee of Matco for the purpose of a wage claim under the *Act*.

FACTS

In 1994, McPhee and Bruce Bodlack (“Bodlack”) formed a partnership. The partners formed a limited company, Matco Signs Ltd., in which both were directors and officers. McPhee held a controlling interest in the shares in the company. About one year later Mr. Lynn Youngberg (“Youngberg”) became the third partner and the share structure was revised to give each partner a one-third interest in the shares of the company. Youngberg was added as a director and officer of Matco. Until July, 1996, Bodlack was the only director or officer of the company involved in its day to day operation. McPhee and Youngberg had other interests outside the company which occupied them full time.

In April, 1996 the structure of the company changed. While there may have been other reasons for the change, it is evident the strongest impetus was the poor financial performance of the business. The partners decided to reallocate the assets of the company. The shares of the company held by McPhee and Youngberg were transferred to Bodlack, while the warehouse property from which Matco operated at the time, was transferred to McPhee and Youngberg. On April 16, 1996, McPhee and Youngberg purported to resign as directors and officers of Matco and signed a resolution and resignations to that effect. Bodlack became, on the records of the company, the sole officer and director. However, on April 11, the three had agreed and signed what was identified in the hearing as a “secret deal”, which stated:

This agreement between the partners is that Barry McFee [sic] and Lynn Youngberg transfer their shares and ownership of Matco Signs Ltd. to Bruce Bodlack making him the sole owner. They, the partners, shall continue to own Matco Signs Ltd. operating under the previous rules being that two votes make a decision. There will be no changes in the banking, management, or operations of Matco Signs Ltd.

On the same day, the agreement to transfer the shop and real property of Matco to the names of McPhee and Youngberg was made. It contained a similar covenant: the property would be transferred to the names of McPhee and Youngberg, with Bodlack being promised a continuing one-third “ownership” in the shop and property.

The last matter of business to take place on April 11 was a decision, by majority vote, for Matco to employ McPhee in the capacity of Manager/Comptroller of the company and to pay him \$5,000.00 a month, which would be paid to him without deduction, statutory or otherwise. The decision to incur this additional financial responsibility was, at the time, quite inconsistent with the ability of the company to meet that additional operational cost. This decision was confirmed on at least one occasion after April 16. In mid-June, Bodlack, who had been opposed to the decision to hire McPhee, raised the matter with the other partners. His opposition to hiring McPhee was not based so much on McPhee taking a position with the company, but with the amount of money McPhee and Youngberg had decided McPhee would be paid.

I cannot conclude McPhee continued to be a director or officer of Matco after April 16, 1996 in any legal sense. However, on the evidence, I find McPhee, Youngberg and Bodlack to have continued to be associated as partners in the business of Matco to July 31, 1996. Most particularly, they were functioning in that association on April 11 and mid-June, when they made and reinforced the decision to hire McPhee as Manager/Comptroller of Matco.

McPhee started as Manager/Comptroller on July 8, 1996. He took a few days off shortly after he started and continued as Manager/Comptroller until July 31, 1996, when he was told by Bodlack, who had taken some legal advice, his services would no longer be required. He was given a cheque by Bodlack for \$2,500.00, representing half of the monthly amount McPhee was to be paid. Before McPhee could cash the cheque, payment was stopped by Bodlack. The stop payment was one aspect of a dispute that was developing between the partners.

McPhee filed a complaint with the Director on September 3, 1996. The Director refused to investigate the complaint, concluding the *Act* did not apply to McPhee.

ANALYSIS

If McPhee is to be successful in this appeal in asserting a right to make a wage claim on his own behalf under the *Act* he must establish he was an employee of Matco. From the Director's perspective, the difficulty with McPhee's position is he is an owner and manager of the purported employer, Matco. Section 1 of the *Act* defines "employee", "employer" and "work":

"employee" includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- (c) a person being trained by an employer for the employer's business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall;

"employer" includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

I make the following observations:

1. The definition of "employer" under the *Act* is not confined to traditional concepts identifying the master/servant relationship under the common law. It is cast in sufficiently broad terms to allow the purposes of the *Act* to be realized and should be given a liberal interpretation. The definition allows more than one "person" to be treated as an employer. In this case, McPhee, Youngberg and Bodlack, as well as the company, meet the definition.

2. The definition of “employee” is also stated in broad terms and indicates an intention by the legislature to cast the statutory net of the *Act* as far as the its purposes, governed by some rational limitations, will justify. We note in this context a key purpose of the *Act* is to ensure the basic standards of compensation and conditions of employment are received by employees.
3. There is nothing in the above definitions (nor in any other part of the *Act* or the *Regulations* to the *Act*) that precludes the conclusion an employer by definition cannot also be an employee by definition.
4. In spite of the above observations, the *Act* does not exclude the application of the normal concepts of the law of master and servant. In this context, Courts have stated partners cannot be employed by the partnership, any more than a person can be his own employee. This notion has also been extended to directors of companies, who, it has been decided, are not considered to be employees at common law unless they can prove an independent contract of employment.

These observations all have application to a consideration of this appeal.

During the relevant period of time, April 16 to July 31, 1996, McPhee continued to be one of the decision makers and managers of the business. He had ceased to be a director or officer of the company, but he retained a partnership interest in Matco and a significant element of control over the business of the partnership. He made the decision, along with Youngberg, to employ himself at a salary of \$5,000.00 a month. Even more than that, he and Youngberg decided the salary would be paid without deduction. At common law, McPhee would not be an employee.

Does the *Act* produce a different result?

The *Act* exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed. A key purpose is to ensure the application of minimum standards of compensation and conditions of employment, including hours of work, overtime pay, leaves of absence, annual and statutory holidays and holiday pay and length of service compensation for termination without notice, for those employees. Despite the broad language used to define who is an employee, it is not a reasonable interpretation of that language, taking into account the scope, purposes and the over-all objectives of the *Act*, to conclude it is intended to embrace the controlling minds of the company. The evidence shows McPhee one of the controlling minds of the company. He was largely responsible for his own terms of engagement with Matco. He and Youngberg decided he would be hired, decided when he would be hired, what his salary would be, including that it would be paid without deduction and decided his position. Once employed at Matco, McPhee decided what the scope of his authority would be, assumed control of the day to day operations, withheld payment of wages from employees and terminated the office manager. None of these comments are intended to denigrate the services McPhee performed for the company, they merely emphasize the degree to which McPhee had control over his relationship with the company.

For these reasons, I find McPhee is not an employee under the *Act*.

I do not wish to be taken as saying a person who is an employer could never be an employee under the *Act*. But in such a case (as it is in this one), the onus would be on the person asserting the status of employee to show a clearly worded agreement establishing the employer/employee relationship, the authority by which the company is able to establish the relationship with that person, the services to be performed for the “salary” to be paid and the capacity in which the person is performing the services. It will be seldom a controlling mind of a company will be found to be an employee under the *Act*. Additionally, Adjudicators for the Tribunal are not required to park their practical common sense and experience of business affairs at the door of the hearing room. The Tribunal must carefully consider the context in which a company

director, officer, owner or manager seeks to claim employee rights and to pay particular attention to the purposes and over-all objectives of the *Act*. For example, where the result of a claim would give the "employee" statutory priority over the claims of third parties, the Tribunal will be meticulous in ensuring the employment relationship is real and the wages were earned.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination of the delegate, dated November 18, 1996, be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal