

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Sam D. Bell
("Bell")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 96/268

DATE OF DECISION: July 25, 1996

DECISION

OVERVIEW

This is an appeal by Sam D. Bell ("Bell") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination Letter issued by a delegate of the Director on April 16, 1996. In this appeal Bell claims the Director should not have concluded that his wage complaint had been resolved.

I have completed my review of the written submissions made by Bell, T.D.B. Forestry Services Ltd. ("TDB") and the information provided by the Director.

FACTS

Bell commenced employment with TDB on April 30, 1989 and last worked October 23, 1995.

Bell was a shareholder in TDB from April 1992 until his date of termination and was a party to a shareholder's agreement.

Pursuant to the terms of that shareholder agreement, other shareholders representing more than 85% of the shares of the Company instituted a compulsory purchase of Bell's shares.

By a written agreement dated November 1, 1995, Bell agreed to sell his shares to the remaining shareholders and in that agreement Bell acknowledged that there "*is no shareholder loan or other indebtedness, profit, wages, dividends, holiday pay, overtime, sick leave accruals, employee benefits or other monies owing by the Company to the Vendor.*"

Bell further acknowledged that he accepted the termination of his employment by the Company and agreed not to bring any action against the Company for wrongful dismissal.

Bell, in addition to being a shareholder, also performed work for the Company for which he received remuneration as an employee.

The delegate of the Director investigated Bell's complaint and concluded that his wage complaint had been resolved as a result of the November 1, 1995 agreement and subsequently, the Determination letter dated April 16, 1996 was issued.

ISSUES TO BE DECIDED

1. Was Bell an employee as defined by the *Act*?
2. Was the Director's conclusion that Bell's wage complaint had been resolved pursuant to section 76(2) of the *Act* correct?

ARGUMENTS

Bell alleges that he was forced to sign the November 1, 1995 agreement under duress and that in fact, TDB does owe him a substantial amount of wages for overtime work, termination pay and vacation pay.

Bell further alleges that TDB routinely violates the provisions of the *Act* with respect to not only his employment but also with respect to all their employees.

Bell further alleges that while he was a shareholder, he did not exercise any day to day management control of the Company and did not participate in the decision making process.

TDB alleges that the “separation agreement” dated November 1, 1995 was the subject of much negotiation between legal counsel for Bell and TDB.

TDB further alleges that pursuant to the separation agreement Bell acknowledged that he had received any and all outstanding monies owed to him.

TDB finally states that this complaint should be dismissed as “trivial, vexatious or frivolous” pursuant to section 76 (2)(c) of the *Act*.

The Director’s delegate contends that pursuant to section 76 (2) (g) of the *Act*, the dispute, that is the allegation that wages are owing, has been resolved as a result of the November 1, 1995 Separation agreement.

ANALYSIS

Given the nature of the documentary evidence provided in this matter and in order to consider this appeal in the proper context, I must first determine whether Bell was an employee of TDB as defined in the *Act*. The *Act* defines “employee” as:

“**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

The *Act* defines “employer” as:

“**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;

It is not uncommon for employees to also be shareholders of the Company that they work for, however, if the nature of the employee’s involvement goes beyond that of simply investing in the business and includes participation in the operational decisions of the Company, that employee in my view then ceases to be an employee as defined by the *Act*.

I must therefore examine the evidence provided to determine if Bell’s involvement in TDB was to the extent that he was not an “employee” as defined by the *Act*.

- The evidence in this matter is that Bell commenced employment with TDB as an employee in April 1989 and in March/April 1992 he became a shareholder in the Company.
- Bell signed a shareholder agreement at the time of becoming a shareholder.
- As a shareholder, Bell signed a personal guarantee with the Bank of Nova Scotia for the Company’s building purchase mortgage.
- As a shareholder Bell attended regular “shareholder” meetings where day to day operational issues and crew concerns were discussed and decisions made.

I conclude therefore, based on the information and evidence provided with respect to the nature of Bell’s involvement in TDB, that Bell was not an employee of TDB as defined by the *Act*.

As I have determined that Bell was not an employee as defined in the *Act*, therefore pursuant to section 76 (2) (b) “this *Act* does not apply to the complaint”. I therefore do not have jurisdiction to consider the matters raised by Bell in his complaint to the Employment Standards Branch.

ORDER

The appeal is therefore dismissed. I confirm the Determination letter of April 16, 1996.

Hans Suhr
Adjudicator
Employment Standards Tribunal

July 25, 1996

Date

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