

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 -

Ken Sookero
(" Sookero ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/329

DATE OF DECISION: July 13, 2000

DECISION

OVERVIEW

This is an appeal brought by Ken Sookero (“Sookero”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 17th, 2000 under file number ER 88918 (the “Determination”).

The Director’s delegate determined that Sookero was not an “employee” as defined in section 1 of the *Act* and, accordingly, was not entitled to file an unpaid wage complaint. Sookero’s complaint alleged that Labyrinth Lumber Ltd. (“Labyrinth”) owed him certain unpaid vacation pay (see section 58 of the *Act*).

REASON FOR APPEAL

Sookero says that the Director’s delegate erred in concluding that he (Sookero) was not a Labyrinth employee and, further, Sookero says that he is entitled to be paid his outstanding vacation pay.

FACTS AND ANALYSIS

According to the material before me, Sookero was listed with the B.C. Registrar of Companies as one of four directors of Labyrinth; Sookero was also listed as an officer (secretary). Sookero resigned his directorship on February 2nd, 2000, however, it is not clear when, if ever, he resigned his office although his actual participation in the company’s affairs ended on February 15th, 2000 when he resigned from his employment with Labyrinth.

Sookero has never owned any shares in Labyrinth. Pursuant to a July 1997 “Management Agreement and Stock Option”, to which Sookero was not a party, a company called Fjords Timber Corporation (“Fjords”) acquired 50% of Labyrinth’s issued shares from a former Labyrinth shareholder. I understand that Labyrinth’s shares are now owned by Fjords and by Dayna Bell (each owns 50% of the firm’s outstanding share capital). Dayna Bell is listed as a director of Labyrinth; Fjords’ shares, in turn, are owned by other principals of Labyrinth including Labyrinth’s president/director, Michael Gerstenberger.

Pursuant to the terms of the “Management Agreement”, Fjords agreed to “assume all management responsibilities for the operation of the Labyrinth facility including but not limited to the designation and employment of Chairman of the Board, President and Manager of the plant...”. Article 5 of the “Management Agreement states that:

“...the number of the members of the Board of Labyrinth shall be four (4). The Chairman and one other shall be appointed by Fjords and two shall be appointed by Bell. Each Director shall have one vote on all matters. In the event of a tie, this matter will be submitted to arbitration...”

Shortly after the execution of the “Management Agreement”, Sookero was hired to be Labyrinth’s controller. The uncontradicted evidence before me is that Sookero, during the period from mid-August 1997 to mid-February 2000, served as Labyrinth’s “controller” and in that capacity was primarily responsible for administering Labyrinth’s financial affairs including accounts receivable and payable, payroll and preparation of financial statements.

According to Sookero, he was approached by Dayna Bell to act as one of the two “Bell-appointed” directors and he agreed to serve as a director of Labyrinth, however (and this appears to be uncontradicted), Sookero says that he never attended a director’s meeting nor did he ever make a decision on behalf of Labyrinth *qua* director. Sookero never received any director’s fees.

During the time that Sookero was Labyrinth’s controller he was paid a monthly salary from which were deducted the usual statutory remittances for income tax, employment insurance and Canada Pension.

In concluding that Sookero was not an employee of Labyrinth, the delegate appears to have been influenced by the fact that Sookero was “involved” and provided “input” into operational decisions and that Sookero executed certain documents on behalf of the company.

I have reviewed the documents, referred to in the Determination, that were executed by Sookero.

In my opinion, the mere fact that an individual has “signing authority” on behalf of a corporate entity does not, by itself, take that individual outside the ambit of the *Act*. It must be remembered that a corporation is, in essence, a legal construct designed to facilitate commercial enterprise. *Corporations can only act through natural persons including the employees of the corporation.* I think it a most novel (and legally unsound) proposition to suggest that an individual cannot be characterized as an employee under the *Act* merely because they have certain decision-making input or authority (including signing authority).

As observed by the Tribunal in *Annable* (B.C.E.S.T. Reconsideration Decision No. 559/98) and *Austin* (B.C.E.S.T. Reconsideration Decision No. 560/98) a director or officer is not, *by reason of that status alone*, disentitled from filing an unpaid wage complaint. *The evidence before me clearly shows that Sookero worked for Labyrinth under a contract of employment.* While Sookero was listed in Labyrinth’s corporate records as both an officer and a director, the uncontradicted evidence before me is that Sookero never attended a Labyrinth board meeting nor, indeed, was he ever a signatory to a director’s resolution. He never received any director’s fees and all compensation paid to him was with respect to services rendered as Labyrinth’s controller.

The evidence before me is consistent with Sookero’s assertions that he agreed to serve as a Labyrinth officer and director at the request of Dayna Bell who was one of the “controlling minds” of the corporation (along with the principals of Fjords). Dayna Bell has provided a letter to the Tribunal, dated May 8th, 2000, which confirms that Sookero’s appointment as an Labyrinth officer/director was more in the nature of a nominal than an actual appointment. While there is a wholly uncorroborated assertion, there is absolutely no *evidence* before me from the principals of Fjords to indicate that Sookero was a “controlling mind” in the affairs of Labyrinth. In sum, Sookero appears to have been not much more than a Bell “nominee” as contemplated by Article 5 of the “Management Agreement”, *supra*.

In my view, the delegate erred in finding that Sookero was not an “employee” for purposes of the *Act* and, on that basis alone, the Determination cannot stand in its present form.

I also understand that Campbell Saunders Ltd., a licenced bankruptcy trustee, has made a proposal, on behalf of Labyrinth, to Labyrinth’s creditors. In the event that this proposal fails, Labyrinth will be in bankruptcy and Sookero will then have to pursue his unpaid wage claim in accordance with the provisions of the federal *Bankruptcy and Insolvency Act*.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled. Given that the merits of Sookero’s unpaid wage complaint have never been addressed, and in the absence of sufficient evidence before the Tribunal relating to that matter, the question of the amount, if any, of unpaid wages that are owed by Labyrinth to Sookero is hereby remitted to the Director for further investigation and, if appropriate, determination.

This latter order may, of course, may be superseded by the provisions of the *Bankruptcy and Insolvency Act* should Labyrinth enter bankruptcy.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal