

**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 -

TDB Forestry Services Ltd.  
(" TDB ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 2000/179

**DATE OF HEARING:** June 6, 2000

**DATE OF DECISION:** July 20, 2000

**DECISION**

**APPEARANCES**

for the appellant: Bruce Kaun, Esq.  
Robert Kragt

for the individual in person

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by TDB Forestry Services Ltd. (“TDB”) of a Determination that was issued on February 23, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that TDB had contravened the *Act* in respect of the employment of Jeffrey Murdock (“Murdock”) and ordered TDB to cease contravening and to comply with the *Act* and to pay an amount of \$15,005.95. The Director also assessed TDB a zero dollar (\$0.00) penalty.

TDB says that Murdock was not an employee of TDB for the purposes of the *Act*, or, if he was an employee under the *Act*, he was a manager as that term is defined in the *Employment Standards Regulations* (the “*Regulations*”) and would be excluded from the statutory benefits contained in Part 4 of the *Act*. TDB also says the conclusion by the Director that Murdock worked November 15, 16, 17, 18, 20 and 21, 1997 is wrong. Finally, TDB says that if Murdock was entitled to be paid overtime wages, the overtime entitlement calculation by the Director is wrong.

**ISSUES TO BE DECIDED**

There are four issues that arise in this appeal. They are framed in the above paragraph: was Murdock an employee under the *Act*; if so, was Murdock a manager as that term is defined in the *Regulations*; has TDB shown the conclusion that Murdock worked on November 15, 16, 17, 18, 20 and 21, 1997 is wrong; and has TDB shown that the Director erred in calculating overtime entitlement.

**FACTS**

As noted in the Determination, TDB performs forestry consulting, timber development, multiphase work in the forest industry with a specialization in road development and block layout. Most of the employees of TDB have forestry technical and/or practical experience. Murdock commenced his employment with TDB on April 2, 1992 and terminated his employment on or about November 24, 1997. He was employed as a forestry worker and mainly worked in bush camps performing work related to road development and block layout. He also had responsibility for developing a GPS (Global Positioning System) Department for TDB and spearheaded several bid proposals for inventory audit and field data collection near Kamloops, Prince George and Prince Rupert in 1997.

In 1995, he was invited to become a shareholder in the company and on April 10, 1995 signed an agreement under which he took 5000 Class A shares in TDB. In this agreement, Murdock agreed to be “bound by . . . and uphold and honour” of the provisions of the original Shareholder’s Agreement. The original Shareholder’s Agreement include “Schedule “B” Management which contained wording relating to some rights and obligations held by shareholders in the company. There was no evidence that Murdock’s job responsibilities changed significantly after becoming a shareholder. I heard evidence from Tim Nowe, who became a shareholder of TDB at the same time as Murdock, that he also had pretty much the same job responsibilities with TDB before becoming a shareholder as after. The main difference for him between the two periods was that as a shareholder he felt more responsibility toward his job and felt there was more expected of him from the other shareholders.

TDB provided evidence that, after becoming a shareholder, Murdock attended one annual general meeting, July 1<sup>st</sup>, 1996, which was the only formal meeting of shareholders during the period Murdock held his shares. Steve Nycholat, the General Manager for TDB and another shareholder, indicated that TDB did not hold regular formal meetings of the shareholders, but that many shareholders meetings occurred on an “ad hoc” basis. Mr. Nycholat described these meetings as reflecting the “holistic” and “dynamic” structure of the company generally, where operational decision making was often done by whatever shareholders were available at any particular time. However, no minutes or notes of such meetings exist, so it is impossible to say what business was conducted at these meetings or assess Murdock’s involvement in whatever decision making did take place.

In January, 1997, Murdock received a memorandum from the Board of Directors concerning “expectations as a partner in TDB”. The memorandum was apparently developed at the Murdock’s request. Both TDB and Murdock rely on this document in support of their respective positions. It is worthwhile setting out the contents of this memorandum in full:

The following details the expectations of the TDB Board of Directors and partners have as it relates to individual partners. This write-up will be used as the frame work of a listing of expectations that will be developed for all partners in TDB.

The following relates to Jeff Murdock specifically and was developed at his request:

- 1) When you in town you are expected to show up at the TDB offices at the start of the work day which for partners is 6:00 AM til (A) their crews get back or (B) sometime between 5 and 6:00 PM. There is some flexibility to this however any deviation from this should not impact on the operation of crews or on your fellow partners by making them look after your crews in town. If there is any question whether there is an impact at a specific time or not consult with Scott [Dulmage] or Steve [Nycholat].
- 2) Follow the policies set out for the employees and ensure the employees are following them.
- 3) Lead by example. Keep your truck and office clean. Do top quality work etc.

- 4) Always be conscious of cost. Track productivity, billings and problems. Make other partners aware of them and ensure everything is invoiced for any job you were involved on. This extends to the reporting of Work in Progress (WIP). The correct calculation and reporting of WIP is as important as invoicing. Make sure it is accurate and not double entered by two sups or missed altogether. Invoicing is more important than posting a job to work in progress.
- 5) Attend all meetings on time as scheduled. If you are unsure if your presence is required consult with a director.
- 6) Develop a GPS department with a target of having 8 functional field units and the associated manpower to operate them for our busy season. Correlate training of personnel with Mark Leroux (cert. GPS trainer out of Kamloops) and ensure GPS crew are well trained and equipped.
- 7) Ensure you are 100% up to date with cruising policy so you may act as a resource person for the company and may also conduct quality checks as needed. Encourage cruisers to discuss their problems with you. It is far more effective company time and dollars to have you reviewing cruise problems rather than Steve or Scott for example.
- 8) Follow all guidelines and covenants as set out in the TDB shareholder agreement.

Your duties are not just limited to the above. As previously mentioned this is a framework and should be considered as such. Additions will be added or will come apparent in the future.

TDB presented evidence showing that Murdock was involved in providing information that resulted in two employees being spoken to by Mr. Nycholat about perceived employee misconduct, in recommending that TDB dismiss a probationary employee and in removing an employee from a camp job for “excessive drinking and smoking pot”. There was also considerable evidence describing Murdock’s involvement in bidding and supervising the inventory projects.

Murdock received a substantial amount of money that was paid out by TDB as bonuses to the shareholders.

## **ANALYSIS**

The principle matter at issue here is whether Murdock was entitled to the basic minimum overtime standards found in Part 4 of the *Act*. Counsel for TDB says he was not entitled to overtime pay.

The argument by counsel for TDB in respect of Murdock is framed in terms of Murdock being an “owner/manager” of TDB, which in the context of the *Act* involves two considerations. The first

is whether Murdock should have been considered an employee under the *Act* at all after he became a shareholder of TDB. Counsel for TDB concedes that there is nothing inconsistent with a shareholder being an employee under the *Act*, but adds that, taking into account the scope, purposes and objectives of the *Act*, it is not a reasonable interpretation or application of the *Act* to find it was intended to include persons such as Murdock. He says Murdock should not have been found to be an employee because he was an “owner/manager” of TDB, a “partner” in an entrepreneurial venture who, as a shareholder, was empowered to make or participate in significant operational decisions affecting the venture, including a spending authority, participation in budgeting and an authority to hire and fire.

The second consideration is whether, even if Murdock was an employee for the purposes of the *Act*, he was excluded from Parts 4 and 5 of the *Act* because he was a manager as that term is defined in the *Regulations*.

### **Was Murdock an Employee Under the Act?**

The *Act* is remedial legislation. As such, it must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. The following comments from the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 confirms this interpretive approach to the *Act*:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.  
(para. 21)

Section 2 of the *Act* sets out its purposes. Without taking away from the importance of other purposes stated in Section 2, the overwhelming policy consideration in this matter is that employees are entitled to receive at least basic standards of compensation and conditions of employment from their employer. That is a statement of policy that the legislation says must direct the application and interpretation of the *Act*. I note the following comment from *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.), that:

. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

The term “employee” is defined in Section 1 of the *Act*:

*“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;*

There is no doubt that Murdock's relationship with TDB brought him within the definition of employee under the *Act*. He performed work for TDB. TDB directed him in that work and paid him wages for that work. No other conclusion is possible in light of the evidence, considered against the objects, purposes and the policy objectives of the *Act*. There is no basis for excluding him from the general protection the *Act* provides to all employees.

Section 3 of the *Act* says:

- 3. *This Act applies to all employees, other than those excluded by regulation, regardless of the number of hours worked.*

The *Act* contains no provision or clear statement for the exclusion of persons who are shareholders, or who might be considered or characterized as "owner-managers" and "partners" in an entrepreneurial enterprise, from the definition of "employee" in the *Act*. If Murdock is to be excluded from the protection of all or parts of the *Act*, such exclusion must be found in the legislation. I adopt the words of the Tribunal in *Re Annable*, BC EST #D559/98 (Reconsideration of BC EST #D342/98):

Tribunal is a creature of statute. Its powers are defined and limited by the Employment Standards Act. The legislation does not give the Tribunal power to decide fundamental issues such as who is entitled to pursue a claim for wages.

The only basis upon which Murdock might be excluded from the protection of Part 4 of the *Act* is under section 34.

### **Was Murdock a "Manager" under the Act?**

Paragraph 34(1)(f) of the *Regulations* excludes a manager from Part 4 of the *Act*. Manager is defined in the *Regulations* to mean:

- (a) *a person whose primary employment duties consist of supervising and directing other employees; or*
- (b) *a person employed in an executive capacity.*

There was no suggestion, and no basis for suggesting, that Murdock was employed in an executive capacity. There was nothing to indicate Murdock had the kind of independent action, authority and discretion of a person employed in such a capacity. There was no evidence that he either made or was involved in any key decisions relating to the conduct of the business. Counsel for TDB pointed to the Shareholder's Agreement as evidence of the kind of authority that could be exercised by Murdock as a shareholder. However, as later noted in the *Amelia Street Bistro* case, *infra*, it is not sufficient to say an employee has this authority, it must be

shown to have been exercised by that person. To do otherwise would simply be putting form over substance. As well, I do not accept that Murdock was a person whose primary employment duties consisted of supervising and directing other employees. That part of the definition of “manager” was discussed at length in *Re 429485 B.C. Ltd. operating the Amelia Street Bistro*, BC EST #D479/97 (Reconsideration of BC EST #D170/97), which included the following comment:

Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make **final decisions**, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making **final judgments** about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.  
(emphasis added)

While there was some evidence that attempted to show Murdock, on occasion, exercised power and authority typical of a manager, the evidence failed to demonstrate the degree of independent action, autonomy and discretion necessary to meet the definition. Murdock was involved in providing information that resulted in two employees being spoken to by Mr. Nycholat about perceived employee misconduct, in recommending that TDB dismiss a probationary employee and in removing an employee from a camp job for “excessive drinking and smoking pot”. It is noteworthy, however, that the final “discipline” of the two employees was carried out by Mr. Nycholat; that Murdock’s recommendation to dismiss the probationary employee was not accepted; and that the ultimate fate of the employee removed from camp was referred to Mr. Nycholat. There is no way of knowing what Mr. Nycholat would have done as the employee failed to show up for the meeting scheduled by Mr. Nycholat to discuss the events reported by Murdock.

Counsel also referred to Murdock’s bidding on and supervising the inventory audit projects. The evidence, however, was that Murdock was assigned the bidding work, as other employees were assigned that work, because of his experience and expertise and that he was assigned the responsibility to supervise the contracts for the same reason. There was no evidence to affect the finding of fact made in the Determination that Murdock’s primary employment responsibility was performing field work and that involved functions identified as “cruising, GPS mapping, inventory mapping, beetle inventory, road traversing, scaling and GPS maintenance”. There was no evidence of duties related to “*supervising and directing other employees*” as that phrase has been interpreted.

Counsel for TDB argued that the task of establishing a GPS Department had been delegated to Murdock because of his status as a shareholder and was indicative of the stake Murdock had in

the development of the business of TDB. That may be so, but it is not relevant to whether Murdock was a manager under the *Act* and none of the evidence relating to his development of rules and operating procedures for the GPS leads me to conclude he was a “manager” as that term is defined in the *Regulations*.

Even when all these matters are taken together, I am not persuaded that Murdock should be excluded from the protection of the minimum standards of the *Act*. This aspect of the appeal is dismissed.

**Did Murdock Work November 15, 16, 17, 18, 20 and 21, 1997?**

The Determination concluded there was sufficient evidence that Murdock worked November 15, 16, 17, 18, 20 and 21, 1997. The Determination sets out the reasons for that conclusion. The onus to show that conclusion was wrong, unreasonable, in a legal sense, or unfair (in the context of the procedural requirements of the *Act*) is on TDB. The only evidence provided by TDB on this point was given by Mark Lindstrom, the Controller for TDB. In his evidence in chief, he said only that after November 14, 1997 he never got a time sheet from Murdock. In cross-examination, Murdock asked him whether he was taking the position that he had not worked after November 14. Mr. Lindstrom replied that he “didn’t doubt [Murdock] worked after November 14, but [he had] no record of it”. TDB has failed to demonstrate any error in the Determination in respect of its conclusion that Murdock worked November 15, 16, 17, 18, 20 and 21, 1997.

**The Overtime Calculation**

TDB says that the calculation of overtime entitlement is wrong. TDB points to two areas where it contends the calculations are wrong. The key area of dispute in this aspect of the appeal concerns the calculation by the Director of the wages paid to Murdock by TDB from November, 1995 to November, 1997. The second area of dispute relates to the conclusion in the Determination that the length of Murdock’s work day was 11 hours. TDB does not dispute that conclusion. Their appeal in this area is that the Director credited him with 11 hours worked on those days when, in fact, he had not worked at all on those days.

On the first area of dispute, the Determination contains the following information:



Wages Paid	
November - December 1995	\$5,446.11
1996 wages	47,199.82
1996 vacation	2,045.52
1997 wages	38,122.77
1997 vacation	<u>2,257.14</u>
Total Wages Paid	<b>95,071.36</b>

Mr. Lindstrom testified that, in his opinion, this summary was wrong. He had prepared a payroll summary analysis of what Murdock had been paid over the two year period preceding his last day of employment:

	<u>1997</u>	<u>1996</u>	<u>Nov 21 - Dec 31/95</u>
Regular	\$26,154.00	\$58,129.00	
Salary	\$41,904.84	\$47,199.62	\$3,432.89
Overtime	\$0.00	\$5,715.65	
Vacation Paid	<u>\$508.27</u>	<u>\$2,045.52</u>	
	\$88,587.11	\$113,089.79	<u>\$3,432.89</u>
Less Bonus	<u>\$26,154.00)</u>	<u>(\$58,129.00)</u>	
	\$42,413.11	\$54,950.79	\$3,432.89
Total Wages Paid			<b>\$100,806.59</b>

The difference between the calculations done by the Director and that done by Mr. Lindstrom was \$5,735.23. The difference between Mr. Lindstrom's analysis and the Director's calculation approximates the amount of "overtime" TDB recorded as having been paid to Murdock in 1996. A review of the payroll remittances for 1996, which were provided to the Director, and to me in evidence, does reveal that TDB issued three cheques to Murdock in 1996, August 27, October 10 and December 9, for overtime<sup>1</sup>. These cheques totaled \$3746.14. On the face of the Determination no amounts were included in the calculations for overtime paid in 1996 and no reason has been given in the Determination for not including them. TDB has demonstrated an error in the Determination. The error is either in not taking the overtime payments into account when determining wages paid or in not providing a reason for not taking those payments into account.

On the second area of dispute, TDB provided evidence that Murdock was not working during the periods May 26 - 30, 1997, August 25 - 29, 1997 and on November 7 and 10, 1997, days on which the Director credited him with 11 hours worked. This evidence was not disputed by Murdock. The Determination provides no reason why the calculation of hours worked and wages earned should have included days Murdock did not perform any work. There is merit to

---

<sup>1</sup>This amount is less than the amount of \$5,715.65 set out in the T4 summary provided by TDB in evidence. It is possible that my review of the 1996 payroll material missed the cheque or cheques covering the difference or possibly they were not included in the material provided. I do not suggest this is a complete or accurate figure; the Director should review the material provided.

the position of TDB that Murdock should not be entitled to receive overtime pay for days where he did not work at all.

The appeal succeeds in respect of the above two matters. The Determination will be referred back to the Director to review the calculation of wages owing in light of the conclusions reached and comments made in this Determination. It may be that the two matters have been overlooked by the Director. If so, a simple recalculation of the amounts owed, taking into account the material relating to the above matters, is all that will be required. It might also be that there were some reasons, not apparent on the face of the material nor included in the Determination, for not including the overtime earnings in the calculation and for crediting Murdock with 11 hours worked on days where he was not working. If so, the recalculation by the Director should include those reasons.

Finally, TDB complained about the issuance of the zero dollar (\$0.00) penalty. In the appeal, counsel for TDB said the penalty was “unconscionable” as the previous Determination referred to in the penalty decision was disputed by TDB and had been settled, at least from their perspective, on a “cost of litigation” basis. There is no indication in their submission that the Director agreed TDB had not contravened the *Act*.

Notwithstanding the view of TDB, subsection 79(3) is quite clear. It is apparent from the penalty decision that the Director had found a contravention of the *Act* arising in a previous complaint in respect of which a Determination had been issued. The complaint was settled, but there is no indication, and no allegation, that the Director ever agreed that TDB had not contravened a provision of the *Act*. Accordingly, there is no basis for suggesting there was no basis for issuing the penalty or that it was “unconscionable” to do so. While the decision to issue a penalty is discretionary, I can see no basis for interfering with the exercise of that discretion in this case.

## **ORDER**

Pursuant to Section 115 of the *Act*, the Determination is referred back to the Director. All other aspects of the Determination are confirmed.

---

**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**