

**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 -

Richard Trus  
("Trus or employee")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Paul E. Love

**FILE No:** 1999/579

**DATE OF HEARING:** November 22, 1999

**DATE OF DECISION:** January 13, 2000

**DECISION**

**APPEARANCES:**

Richard Trus

Barbara Jaremko and Grant Lindsey for Prospero Imaging Inc.

Shirley Kay for the Director of Employment Standards

**OVERVIEW**

This is an appeal by Richard Trus from a Determination dated September 2, 1999, where the Delegate determined that Mr. Trus was not an employee of Prospero Imaging Inc. The Delegate held that Mr. Trus was an operating mind of Prospero, and therefore was not an employee within the meaning of the *Act*. As well as being a shareholder, Mr. Trus attended meetings and participated as part of the management team in making decisions, signing documents related to the financing of the business including guarantees and loan agreements. Mr. Trus was not registered as a director of the company with the Registrar of Companies, but was a shareholder of the company. With regard to the facts of this case, it was clear that Mr. Trus was an operating mind of the company, and therefore had no right to obtain a remedy under the *Act*. Further, it was clear that there were a number of outstanding disputes between Mr. Trus and the other directors and shareholders of the company, which were not within the jurisdiction of the Adjudicator.

**ISSUES TO BE DECIDED**

Was Mr. Trus an employee within the meaning of the *Act*?

**Procedural Matters**

In this case, Mr. Trus testified on his own behalf and Ms. Jaremko testified for Prospero. All parties were given an opportunity to make an opening statement, give evidence and cross-examine the opposing parties, and make closing argument. I reserved my decision following the hearing.

At the outset of this case, counsel acting for the Director indicated that she objected to Mr. Trus providing information at this hearing which was not disclosed to the Delegate. No reason was advanced by Mr. Trus for his failure to provide this information to the Delegate. I do not rely on any of this material in making my decision. The nature of the hearing at this stage is to determine whether the Delegate made an error based on the information she had at her disposal. With unrepresented defendants it is often difficult for the Tribunal to determine initially whether the material is new material or whether the material was before the Delegate. It became apparent to me during the course of Mr. Trus's evidence that much of his presentation was based on material which was not before the Delegate. I have followed the approach set out in the cases of D.J.M. Holdings Ltd (c.o.b. Romeo's Place), BC EST#D 461/97 and Re: Horizon Fibreglass Products

Ltd. BC EST#D444/97, and place no weight on the new material tendered by Mr. Trus or by Prospero.

In the course of this hearing I made two rulings which limited the information which was before me. At the hearing Mr. Trus sought to introduce a tape (of two hours in length) or a compact disk ("CD") extract of the tape of a meeting. This information had not been disclosed to the employer, the Delegate, or the Tribunal. I therefore did not admit this evidence. Admission of the evidence would have necessitated an adjournment of the hearing for the purpose of authenticating and possibly transcribing the tape or CD.

In the course of this hearing the employer sought to tender a packet of materials which was provided to the Tribunal on or about November 17, 1999 and provided to me on the morning of the hearing. Mr. Trus objected to the admissibility of this evidence. I upheld his objection as this was evidence that was in the hands of the employer, and the employer failed to disclose this information to the Delegate or to any party. It was not fresh evidence.

## FACTS

Prospero Imaging Ltd. ("Prospero") is a company that is involved in providing visual affects to the film industry. It was formed by Christopher Chen and Grant Lindsey. Mr. Trus joined the company in about December of 1996. Mr. Trus left the company in June of 1998. He claims regular wages for the period December 3, 1996 to June 19, 1998, as well as vacation pay, compensation for length of service, reimbursement for expenses and contact lenses, and shares in the employer. The Delegate determined that Mr. Trus was not an employee but a director of the company and was not entitled to use the *Act* for the recovery of the amounts claimed as wages.

Mr. Trus joined Prospero on the basis of a written employment contract. Mr. Trus claimed that this was drafted by Mr. Chen, or that he took dictation from Mr. Chen regarding the terms of the contract. The contract is, however, drafted in the first person. I quote from a portion of the contract as follows:

3. My title will be Executive Producer, Vice President Sales & Marketing and my duties during the term of my employment will include:

- Sales - all aspects
- Marketing - all aspects of public relations work
- Planning - all aspects
- Producing - supervising, scheduling, budgeting the production of animation and computer generated effects for motion pictures, television, commercials, music video's and web sites
- Administration - all aspects

....

If the above terms are acceptable to you, please sign the form of acknowledgment in the designated space below on both copies of this letter and return one to Rick Trus.

I welcome and look forward to a mutually beneficial relationship.

Sincerely,

(Signed November 27, 1996)

Rick Trus

I have been given a copy of this letter. I have read, understood and hereby accept its terms and conditions. I acknowledge that the terms and conditions set out in this letter constitute my entire agreement with Rick Trus.

(Signed November 27, 1996, signature illegible)

Prospero did not produce Mr. Chen, the person who engaged Mr. Trus on behalf of Prospero. From a reading of the words of the contract it appears to be a document drafted by Mr. Trus. I reject Mr. Trus's evidence, that it was Mr. Chen who drafted the contract, and find that the document was prepared by Mr. Trus.

Part of the terms of Mr. Trus's contract were that he was to receive shares of the company, one share per month for each month during the first year of employment. His contract was of indefinite term, terminable on the giving of three weeks notice. The contracts of other directors and shareholders were 5 to 10 years in duration.

Mr. Trus entered into a salary deferral agreement with the company as did the other shareholders/directors of Prospero. Mr. Trus claims that this was a sabbatical type deferral of his income, however, it is clear given the timing of the execution of this document that it was a deferral because the company did not have the ability to pay money to its directors. There was no evidence presented by him at this hearing that the document was for an income deferral with regard to a sabbatical.

Mr. Trus is an articulate and sophisticated individual. I, however, have considered his evidence and considered the case of Farayna v. Chorney, [1952] 2 D.L.R. 354 (B.C.C.A.). I do not find that his evidence was credible or trustworthy. Where his evidence is contradicted by the evidence of Ms. Jaremko, I accept her version of Mr. Trus's relationship with Prospero.

Mr. Trus's position was that he was an employee of the company. He indicated that he did not fulfil the functions of a director. He indicated that he was not registered as a director of Prospero with the Registrar of Companies. He indicated that he was merely a salesman for the company. Mr. Trus appears to take the view that he either does not recall placing his signature on some of the financing documents, or alternatively that his signatures were in some way forged by Prospero. He does not elaborate on this theory, but merely states that they have the capacity to create forged signatures. Relying again on Farayna, I do not accept his evidence on this point.

Mr. Trus's principle argument is that the Delegate made an error in the finding of facts, and that the effect of these errors are to permit the "employer" to commit offences under the *Company Act*, in

particular s. 112 which requires a consent in writing to become a director, and section 163 with regard to record keeping.

Mr. Trus offered new documentary evidence on September 25, 1999 (appendices C to J), supplementary to his notice of appeal dated September 5, 1999. This information was not tendered by him to the Delegate, or considered by the Delegate and included:

- (a) a letter from the solicitor for Prospero;
- (b) a letter from an employee of Ton Faulk which gives an opinion on the major issue in the case;
- (c) information related to proxy holdings by a director Chris Chen
- (d) application for Employment Insurance Benefits
- (e) advertisement for a Digital FX supervisor
- (f) information from immigration

Most of the information Mr. Trus sought to tender is hearsay in nature, and in any event was of little assistance in determining the main issue in this case.

Mr. Trus argues that there was a statement at a meeting that “the only guarantee the Bank considered to be meaningful was Ms. Jaremko’s guarantee”. Whether a guarantee may be meaningful to a Bank probably turns on who has assets and who does not. This statement does not assist me in determining whether Mr. Trus was an employee.

Both parties submitted information in the form of letters from third parties, which supported the position taken at the hearing. None of these parties were produced at the hearing. While hearsay is admissible in a hearing, the weight to be accorded to this information is for the adjudicator to decide. On the central issue of whether Mr. Trus was an employee, I accord such information very little weight as it is the major issue.

The employer submitted further information in its submission of October 18, 1999, which included further documents of a financial nature signed by Mr. Trus. The signing of these documents would be inconsistent with Mr. Trus’s submission that he was an employee only.

## **ANALYSIS**

In this appeal the burden is on Mr. Trus to persuade me that the Director’s delegate erred in her determination that Mr. Trus was not an employee.

It is obvious to me that this was a company which likely failed to comply with the provisions of the *Company Act* by failing to file resolutions and notices of directors. It is also clear that separate and apart from any employment standards complaint, Mr. Trus claims that he is owed money by Prospero. This claim appears to have been acknowledged by Prospero, but Prospero is unable to pay this claim at this time. Mr. Trus remains a minority shareholder of the company. It is also clear that the Prospero has claims against Mr. Trus for use of company resources for his own personal projects, for use of the corporate name and resources to promote his own software, for

taking a client of Prospero when he left the relationship. All of these are claims which I do not have jurisdiction to decide in the context of this complaint.

Suffice it to say that if I were to find that Mr. Trus was an employee, in the context of these claim, he would receive a preferential treatment over the other directors and shareholders of Prospero all of whom have monetary claims against the company which have been deferred by them. The company also has monetary claims against Mr. Trus. I see no reason to give Mr. Trus any preference over other shareholders and directors who also worked in the business.

There are some indications in the material that Mr. Trus was part of the directing mind of the employer, and there were some indications that Mr. Trus was an employee. I am not satisfied Mr. Trus has demonstrated any error, during the course of the hearing of this matter. The more evidence that I heard of his relationship with the company the more I became convinced that he was part of the management team and not an employee. It is clear that he did not have the sole authority to hire and fire employees, to authorize or purchase significant capital assets. This company had a consultative management style. Each member of the team had input into the decisions that were made. It may be that some members of the team were able to exert a greater degree of suasion over decisions taken, for example, Mr. Chen, but this does not derogate from the fact that Mr. Trus was part of the directing mind of Prospero.

The Delegate relied on the following information in addition to interviewing all parties;

Attachment 1 - a continuing guarantee with the Toronto Dominion Bank;

Attachment 2 - a continuing guarantee with the Toronto Dominion MainStreet, in the amount of \$35,000

Attachment 3 - a letter from Rick Trus dated March 26, 1999

Attachment 4 - letter from Prospero dated May 4, 1999

Attachment 5 - Memorandum of Understanding deferring monies owed

Attachment 6 - Resolution of Directors

Attachment 7 - Responsibility and Authority

Attachment 8 - Definitions under the *Act*

Attachment 9 - Employment agreement

Attachment 10 - Letter from Prospero to Rick Trus dated July 7, 1998

In my view this information fully supports the Delegate's determination that Mr. Trus was not an employee within the meaning of the *Act*.

Counsel for the Director filed authorities with me which were helpful.

In *Sam D. Bell BCEST D# 96/268 (Suhr)*, the Adjudicator considered the definitions of employee and employer under the *Act*, and noted:

“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*”

In *Bell* the Adjudicator found that a shareholder agreement, a personal guarantee and regular shareholder’s meetings where day to day operational decisions were discussed was sufficient to render *Bell* not an employee for the purposes of the *Act*.

In *Barry McPhee BCEST #D183/97 (Stevenson)*, the Adjudicator held that;

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 over-all objectives of the *Act*, to conclude that it is intended to embrace the controlling minds of the company. The evidence show *McPhee* one of the controlling minds of the company. He was largely responsible for his own terms of engagement with *Matco*.

The Adjudicator further stated:

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 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 experiences of business affairs at the door of the hearing room. The Tribunal must clearly consider the context in which a company director/officer or owner manager seeks to claim employee rights and to pay particular attention to the purposes and over-all objectives of the *Act*.

The critical factors which distinguish the situation of *Mr. Trus* from an employee in this case are:

- (a) He was a shareholder;
- (b) He signed personal guarantees and loan applications with a Bank;
- (c) He attended regular meetings where day to day issues were discussed and decisions were made;
- (d) He drafted his own “employment contract” and therefore was largely responsible for his own terms of engagement;

(e) He agreed to defer his salary, and the agreement in which he agreed to defer his salary refers to him as a managing partner;

(f) Documentary and oral evidence from other members of the management team that Mr. Trus was part of the management team.

While Mr. Trus was not the sole controlling mind, he was part of the controlling mind of Prospero, and as such he is not an employee within the meaning of the *Act*. He therefore cannot use the provisions of the *Act*, to resolve his business dispute with the other directors and shareholders of Prospero.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated September 2, 1999 be confirmed.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**