

An appeal

- by -

Country Farm Market Inc. and Sterling Northwest Properties Ltd.
("Sterling")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/23

DATE OF DECISION: April 29, 2004

DECISION

SUBMISSIONS

Alvin Mitchell:	On behalf of Sterling Northwest Properties
Jim Dunne:	On behalf of the Director
Mike Antoine:	On his own behalf
Wayne Minnabarriet:	On his own behalf
Keith Kathrien:	On his own behalf
Geronimo Adams:	On his own behalf

OVERVIEW

This is an appeal by Alvin Mitchell on behalf of Sterling Northwest Properties Ltd. (Sterling) pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued September 18, 2003.

Nine individual complaints were filed with the Employment Standards Branch alleging that Sterling and Country Farm Market Inc. (Country Farm) had contravened the Act in failing to pay them regular wages and vacation pay.

A delegate of Director of Employment Standards ("the Director") investigated the complaints. He found as follows.

The complainants worked on the renovation of a strata apartment complex. They were hired by the project manager, Robert Lequiere. Mr. Mitchell is the sole director and officer of Country Farm and of Sterling. Country Farm owned approximately 30 out of the 42 suites and Mr. Mitchell was the chair of the strata council.

Mr. Mitchell advised the delegate that he contracted Mr. Lequiere to perform the renovations on the project. He stated that, although Mr. Lequiere spent all the money, the work was not completed, and that he fired Mr. Lequiere on November 10, 2002. Mr. Mitchell asked the delegate to provide him with a list of the names of the complainants and the amounts they were claiming. Although the delegate did so, Mr. Mitchell did not respond to the allegations. Some time later, Mr. Mitchell told the delegate that his lawyer, Gary Wong, advised him that he did not owe the complainants any money because he was not the employer.

The delegate contacted Mr. Wong. Mr. Wong advised him that he did not act for Mr. Mitchell, Sterling or Country Farm, but rather the mortgage lenders on the property.

The delegate attempted to contact Mr. Mitchell to discuss this information, but was unsuccessful in doing so. The delegate wrote to Mr. Mitchell on March 28, 2003 requesting a copy of the contract between him and Mr. Lequiere. Mr. Mitchell again did not respond.

On May 15, 2003, the delegate again wrote to Mr. Mitchell seeking information and the copy of any contract with Mr. Lequiere. The letter also indicated that this would be Mr. Mitchell's final opportunity to respond. Mr. Mitchell did not do so.

On July 23, 2003, the delegate left a telephone message with Mr. Mitchell advising him that he would be issuing a Determination against Country Farm and Sterling, and that, if he wanted to respond, he had until July 25, 2003 to do so. Mr. Mitchell did not respond.

On November 2, 2002, the complainants received cheques from the resident caretaker of the property, Pamela Ainge. She indicated that the money was for “Country Farm Contract Labour”. The cheques did not represent all the amounts owed to them. Ms. Ainge advised the delegate that she was instructed by Mr. Mitchell to pay money to the employees with money he transferred into her personal account.

The complainants met with Mr. Mitchell on November 14, 2002. He provided the complainants with “Sterling Northwest Properties Ltd.” business cards and assured them they would be paid.

The delegate determined that Sterling and Country Farm were associated companies pursuant to s. 95 of the Act.

The delegate concluded that Sterling and Country Farm were the employers. The delegate also found that, even if Mr. Lequiere had been the employer, once Mr. Lequiere’s employment was terminated, Mr. Mitchell became the employer and assumed the liabilities.

The delegate found that the nine employees were entitled to wages, vacation pay and interest in the total amount of \$8,521.09.

The Determination noted that an appeal of the Determination was to be delivered to the Employment Standards Tribunal by 4:30 p.m., October 27, 2003.

The Director filed the Determination in Supreme Court in November, 2003 and commenced enforcement proceedings.

Mr. Mitchell filed the appeal on February 11, 2004. The grounds of the appeal are that the delegate failed to observe the principles of natural justice in making the appeal and that new evidence has become available at the time the Determination was being made.

ISSUE TO BE DECIDED

Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

ARGUMENT

In his letter of appeal, Mr. Mitchell contends that he was never provided with a copy of a Determination and was never informed that he was required to provide information. Mr. Mitchell also wrote that

It is annoying to me that Jim Dunne called me many times at [telephone number] and discussed the whole process, he also mailed many letters to my office, when he sent registered letter to a home I hadn’t lived in for two years, and got the letter back from my office, why did Jim Dunne not pick up the phone and call me and ask for our new address.... Jim Dunne deliberately avoided serving the documents on me in hope that the time for appeal would elapse.

Mr. Mitchell contended that the Determination was sent to Sterling's old office and that it was refused.

Mr. Mitchell further contended that Country Farm and Sterling are not associated companies in that they do not share a common address, telephone numbers, bank accounts or staff.

Mr. Mitchell further contends that neither he nor Sterling paid any of the complainants any money because the complainants were contracted to Robert Lequiere Consultants. He further states that Sterling never responded to the delegate's requests because Sterling was not involved in any way with the project. He contends that, while Country Farm contracted with Robert Lequiere Consultants to carry out certain duties, Sterling was in no way involved with the project.

Mr. Mitchell also provided a statement from Robert Lequiere in support of his appeal. In this statement, Mr. Lequiere states that he contracted with Country Farms to renovate an apartment building, and that, to carry out that contract, he engaged trades people. He contended that the trades people were paid partially from funds from Country Farm.

The Director's delegate says that a corporate registry search was conducted July 23, 2003 for Country Farm and Sterling and that the Determination was sent by registered mail to the registered records office for both companies and to the home address of Mr. Mitchell, the sole director of both companies. The delegate also says that a copy of the Determination was sent to the last known operating address for the company, confirmation of which was obtained in a telephone conversation with Mr. Mitchell on May 15, 2003. He says none of the Determinations sent to the registered records offices were returned.

The delegate says that he made several telephone calls to Mr. Mitchell and sent him several letters requesting information and that he received no response.

The delegate further contends that Mr. Mitchell has failed to advance arguments that would support his ground of appeal. He notes that Mr. Mitchell has never disputed the amounts of the claims, but took the position that he was not the employer. The delegate contends that Mr. Mitchell submitted some information that he considered during the investigation, and that Mr. Mitchell presents no new information on appeal.

Mr. Minnabarriet, Mr. Antoine, Mr. Adams and Mr. Kathrien also contended that the Tribunal should not consider the late appeal.

ANALYSIS

Section 122(1) of the Act provides that a Determination that is required to be served on a person is deemed to have been served if it is sent by registered mail to the person's last known address. Section 122(2) provides that if service is by registered mail, the Determination is deemed to be served 8 days after it is deposited in a Canada Post Office.

Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 15 days of service, if served by registered mail, or 8 days after service, if served personally.

These time limits are in keeping with one of the purposes of the Act. Section 2(d) provides that one of the purposes of the Act is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the Act.

Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

In *Niemisto* (BC EST #D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:

- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
- (3) the respondent party as well as the director has been made aware of this intention;
- (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
- (5) there is a strong *prima facie* case in favour of the appellant.

These criteria are not exhaustive. (see also *Pacholak* (BC EST #D526/97))

Furthermore, extensions will only be granted where there are compelling reasons present (*Moen and Sagh Contracting Ltd.*) BC EST #D298/96)

I am not persuaded that Mr. Mitchell has demonstrated reasons for extending the time in which he may file an appeal.

I find that the Determination was served in accordance with the Act. The delegate indicated it was sent to the registered and records office of both Sterling and Country Farm. Neither of the Determinations were returned as undeliverable. Therefore, they are deemed served.

Mr. Mitchell's refusal to accept documents sent to Sterling's last known operating address is not a basis for extending time to appeal a decision.

The delegate made several attempts to contact Mr. Mitchell through the investigation process. Mr. Mitchell acknowledged as much in his appeal documentation. Mr. Mitchell was aware the delegate was investigating complaints that potentially involved his liability for unpaid wages. Although Mr. Mitchell took the position that he was not responsible for those wages, he provided no evidence in support of his position, and at some point, refused to respond to the delegate's inquiries.

The delegate also advised Mr. Mitchell that he would be issuing a Determination finding Sterling and Country Farms as the employer, and gave him a final opportunity to respond. Mr. Mitchell did not do so, and thereafter, avoided service of any further documents from the Branch.

Mr. Mitchell did not file the appeal until a writ of seizure and sale was issued against Sterling.

I find no basis to conclude that Sterling has a reasonable and credible explanation for the failure to request an appeal within the statutory time limit or that there has been a genuine, ongoing *bona fide* intention to appeal the Determination.

Furthermore, I find no strong *prima facie* case in Sterling's favour.

Mr. Mitchell submits an unsworn statement from Mr. Lequiere in support of his appeal.

The Tribunal has a well established principle that it will not consider new evidence that could have been provided by the employer at the investigation stage (see *Tri-west Tractor Ltd.* BC ESTD# 268/96 and *Kaiser Stables Ltd.* BC EST #D058/97).

This evidence was clearly available at the time of the investigation. However, while the statement would not normally be considered on appeal, I have reviewed it for the purpose of determining whether it provides a *prima facie* basis for the appeal. I conclude that it does not.

If Mr. Lequiere was indeed the original employer, he paid the complainants in part from Country Farm funds.

Mr. Mitchell does not dispute going to the project in November 2002 after Mr. Lequiere was unable to continue the project, given the complainants Sterling business cards and promising them that they would be paid. He also did not dispute that the complainants were in fact paid by Country Farm.

Finally, although Mr. Mitchell contends that Sterling and Country Farms are not associated companies, he does not dispute the finding that he was the sole director and officer of both companies at the material times.

In *Invicta Security Systems Corp.* (BC EST #D349/96), the Tribunal found that the purpose of s. 95 was to allow the director to

pierce the corporate veil and look behind the legal structure, or form, of a business to the relationships of various entities that in reality comprise the substance of the business. There are four preconditions to an application of Section 95 to the circumstances of any matter before the director:

1. There must be more than one corporation, individual, firm, syndicate or association;
2. Each of these entities must be carrying on a business, trade or undertaking;
3. There must be common control or direction; and
4. There must be some statutory purpose for treating the entities as one employer

I find that all four preconditions have been met.

I decline to grant Mr. Mitchell's application to extend the time for filing an appeal.

Carol L. Roberts
Member
Employment Standards Tribunal