

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 -

Fair Commercial Sales Ltd.
(" Fair Commercial ")

-and-

Sharab Developments
(" Sharab ")

-and-

A.F. Carpet Services Ltd.
(" A.F. Carpet ")

-and-

Charlene Fairclough

-and-

Albert Fairclough

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/214

DATE OF DECISION: May 25, 2000

DECISION

OVERVIEW

This is an appeal filed on March 27th, 2000 by legal counsel on behalf of Fair Commercial Sales Ltd. (“Fair Commercial”), Sharab Developments Ltd. (“Sharab”), A.F. Carpet Services Ltd. (“A.F. Carpet”), Charlene Fairclough and Albert Fairclough. The appellants appeal, pursuant to section 112 of the *Employment Standards Act* (the “Act”), a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on March 2nd, 2000 under employer file number 000-563 (the “Determination”).

At the outset I should note that neither Charlene Fairclough nor Albert Fairclough are personally liable under the Determination. It may be that, at some future point, the Director may choose to issue a determination against one of both of them pursuant to section 96 of the *Act* (which provides for personal liability for corporate directors and officers) given that both of them were officers and/or directors of one or more of the appellant corporations when the complainant employees’ unpaid wage claims crystallized. However, the instant Determination does not impose any personal liability on either individual appellant and thus neither one has the capacity to appeal the Determination *in their own right*.

Accordingly, pursuant to section 114 of the *Act*, the appeals filed on behalf of Charlene and Albert Fairclough, in their personal capacity, are dismissed inasmuch as neither is a proper party to this appeal.

THE DETERMINATION

According to the material set out in the Determination, the three corporate appellants operated jointly under the firm name the “Fair Group” as a carpet cleaning sub-contractor for the now defunct Eaton’s department store chain. All three corporate appellants went into receivership on December 16th, 1999 (the firm Deloitte & Touche Inc. was appointed receiver) and, subsequently, all three corporations entered into bankruptcy on February 8th, 2000. I understand that Deloitte & Touche Inc. has now been appointed as the bankruptcy trustee for all three corporate appellants. The Trustee is aware of these proceedings and, indeed, cooperated with, and provided certain information to, the delegate during her investigation.

The delegate addressed two broad issues in the Determination, namely, the unpaid wage claims of four complainant employees and whether or not the three corporate appellants should be declared to be “associated corporations” as defined in section 95 of the *Act*.

Unpaid Wages

The Determination addresses the unpaid wage complaints (including claims for compensation for length of service under section 63 of the *Act*) of Stanley Woo, Rolando Francisco (“Francisco”), and David Smith (“Smith”), and Hamid Mirtabatabaee (“Mirtabatabaee”). The delegate awarded the complainants the following amounts (including interest payable pursuant to section 88 of the *Act*):

• Woo:	\$ 2,844.16
• Smith:	\$10,976.90
• Francisco:	\$ 2,033.00
• Mirtabatabaee	<u>\$ 421.80</u>
Total Payable =	<u>\$16,275.86</u>

It should be noted that the above awards all include an amount payable as compensation for length of service except in the case of Mirtabatabaee (whose section 63 claim was dismissed for lack of evidence).

Associated Corporations

The delegate concluded, *inter alia*, that the three corporate appellants were involved in a common enterprise (“with complete integration of assets, financing and day to day operation”) and were under common direction and control (exercised by Charlene and Albert Fairclough) and, accordingly, made a section 95 declaration with respect to all three firms.

ISSUES ON APPEAL

Counsel for the appellant corporations raises two grounds of appeal:

- The delegate erred in making a section 95 declaration; and
- Woo is not entitled to any compensation for length of service because he was terminated for cause.

Counsel for the Director takes the position that this appeal is not properly before the Tribunal and, as will be seen, I agree.

ANALYSIS

As noted above, all three corporate appellants entered into bankruptcy on February 8th, 2000. This appeal was filed on March 27th, 2000; *i.e.*, subsequent to the corporate bankruptcies.

In *Fyfe and Canadian Neon Ltd.* (BC EST #D080/00) I observed:

Section 71(2) of the federal *Bankruptcy and Insolvency Act* states that “on an assignment [into bankruptcy], a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the...assignment...”. The trustee, in turn, is given wide authority to deal with the bankrupt’s property. For example, the trustee may, with the permission of the inspectors, “bring, institute or defend any action or other legal proceedings relating to the property of the bankrupt” [see section 30(1)(d)]. Thus, on

bankruptcy, the bankrupt's property (subject to certain exceptions that have no application in this case) vests in the trustee who is given, for the most part, exclusive authority to deal with that property.

Accordingly Canadian Neon does not have the legal authority to appeal the Determination as that right lies solely with Canadian Neon's licensed trustee – in this case, KPMG Inc. Whether this appeal was filed by Fyfe in his personal capacity, or as an agent of Canadian Neon, the same result holds: the appeal is simply not properly before the Tribunal and thus this appeal must be dismissed. The matter of the complainant employees' wage entitlements will have to be addressed in the course of the bankruptcy proceeding itself.

The facts relating to this appeal are not meaningfully distinguishable from those in *Fyfe, supra*. The Trustee for the three firms is well aware of these proceedings and has not expressed any desire that this appeal proceed. Neither Charlene nor Albert Fairclough had the legal authority, as of March 27th, 2000 when this appeal was filed with the Tribunal, to appeal the Determination on behalf of any of the three (by then bankrupt) corporate appellants. Presumably, the Trustee is satisfied (as am I, I might add) that the delegate correctly held that the three appellant firms were properly declared to the "associated corporations" and that the four complainants' unpaid wage claims were correctly determined.

ORDER

Pursuant to subsections 114(1)(b) and (c) of the *Act*, this appeal is dismissed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal