

**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-

Malti Varma (a.k.a. Malti Mitchell)

(“Varma”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 1999/213

**DATE OF HEARING:** June 28th, 1999

**DATE OF DECISION:** August 13th, 1999

**DECISION**

**APPEARANCES**

Alvin Mitchell	Malti Varma (a.k.a. Malti Mitchell)
Patricia Thiel	Legal Counsel for Campbell Saunders Ltd. (Receiver for Seasons Memorial Park Inc.)
Adele Adamic	Legal Counsel for the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by Malti Varma, also known as Malti Mitchell (“Varma”), 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 March 19th, 1999 under file number ER083-632 (the “Determination”).

Varma, who claims to have been the office manager of Seasons Memorial Park Inc. (“Seasons”)--a company now in receivership--seeks some \$58,500 in unpaid wages (including vacation pay) based on her reported monthly salary of \$10,000. On July 29th, 1998, Varma filed a complaint with the Employment Standards Branch in which she alleged:

“I worked from Oct 1st 97 to Feb 24 98 without pay because the company was for sale and a sale was imminent any day. On Feb 24th 98 Active Bailiffs took all of the office furnishings including the computer & telephones & desks. Therefore I was terminated. Seasons is in receivership with Campbell Saunders...Seasons has unencumbered land worth millions of dollars. I deserve to be paid.”

On March 19th, 1999, after conducting certain investigations, the Director’s delegate determined that Varma’s complaint ought to be dismissed pursuant to subsections 76(2)(c) and (d) of the *Act*. These latter subsections provide that “the director...may stop or postpone investigating a complaint if (c) the complaint is frivolous, vexatious or trivial or is not made in good faith” or “(d) there is not enough evidence to prove the complaint”. The delegate concluded that “I am satisfied that the requirements of [the *Act*] and the *Regulation* have not been contravened and dismiss the complaints”.

I should note that a single determination was issued with respect to the separate complaints filed by three individuals--Varma, William Arthur Hall and Thomas W. Rogers. All three complaints were dismissed on the same two grounds. All three complainants filed appeals with the Tribunal and all three appeals were heard consecutively on June 28th, 1999.

**ISSUE TO BE DECIDED**

Varma says that the delegate erred in dismissing her complaint and asks the Tribunal to vary the Determination to reflect the unpaid wages she claims are due and payable to her by Seasons.

## FACTS AND ANALYSIS

Varma is married to Alvin Mitchell who in turn was, at all material times (and I understand remains), the sole officer and director of Seasons. Seasons was incorporated pursuant to federal legislation as Paradise Memorial Park Ltd. on October 26th, 1995; the corporate name was changed to Seasons Memorial Park Inc. on January 9th, 1997. Seasons was extra-provincially registered in B.C. on November 20th, 1995 and according to a B.C. On-Line search conducted on March 17th, 1999, Seasons' last annual report was filed on November 20th, 1996. The search report shows that the company is not in receivership, however, that is clearly not so. Campbell Saunders Ltd. was appointed to be the receiver for Seasons on June 16th, 1998.

On October 15th, 1997, Seasons' four directors--David Nairne, Frank Biller, Brian Slobogian and Thomas W. Rogers--resigned and Alvin Mitchell was appointed as the company's sole director. Both Brian Slobogian and Frank Biller were principals of the now defunct Eron Mortgage Corporation ("Eron").

Seasons was attempting to develop a cemetery in North Vancouver. To that end, I understand that it obtained, via an intermediary known as "Cedaridge", some \$6.9 million in mortgage financing from Eron although not all of the monies were actually advanced by Eron (through Cedaridge) to Seasons. In any event, the flow of funds from Eron ceased on October 3rd, 1997 when Eron was placed into receivership as a result of its numerous contraventions of B.C.'s securities and mortgage broker legislation. So far as I can gather, other than in some fashion acquiring a site in North Vancouver, the cemetery project has never substantively progressed beyond the "concept" stage.

Although Alvin Mitchell asserts, in a letter dated January 11th, 1999 to the Director's delegate, that Seasons' assets total "more than \$55 million dollars" and that its "outstanding amount of debt...is far less than \$10 million", I am not satisfied that Seasons' value is anywhere near that suggested by Mr. Mitchell; indeed, I find Mitchell's suggestion that Seasons' net value runs into the tens of millions of dollars to be ludicrous.

According to that same January 11th, 1999 letter from Alvin Mitchell to the delegate, after the flow of funds from Eron ceased, Alvin Mitchell was hoping to secure alternative financing and accordingly:

*"...personally asked the three employees [including Varma] to remain on staff and I agreed personally to see that they were paid. The offer we were expecting to receive did not come until March 15th, 1998. In the interim the owner of the leased premises gave us notice to vacate, and the leaseholder of the furniture repossessed the equipment. We are now in receivership with a court order receiver (Campbell Saunders)...All three employees where [sic] encouraged to stay with Seasons in its time of financial difficulties and continue to work."* (*italics added*).

One could certainly argue from the above italicized comment that, to the extent that Varma has any wage claim at all, her claim lies against her husband, not against Seasons, as she worked solely at the behest and on behalf of her husband after September 30th, 1997.

*The Determination*

The delegate, as noted above, dismissed Varma's complaint on two separate bases: first, that her complaint was "frivolous, vexatious or trivial or is not made in good faith" [section 76(2)(c)]; second, that there was "not enough evidence to prove the complaint" [section 76(2)(d)].

In the Determination, the delegate, after noting that Varma was Alvin Mitchell's spouse, stated:

"There is no evidence that the employees [including Varma] worked the period in question other than the statements made by Alvin Mitchell and the complainants. There are no employer records for the period in question, no record of daily hours worked, no evidence of any daily tasks performed. The complainants and Mr. Mitchell provide some general information...

In the case of Ms. Varma, 'presenting a professionally run office to all potential investors who met in the boardroom, organizing the defense material and documentation for four major lawsuits, and the Accounts Receivable, payable, payroll, accounting, market research, minutes of business meetings, procedure manual, cemetery compliance, banking, GST & PST took more time because of lack of funding and uncertainty of Seasons' future'.

No evidence has been put forward that any of these tasks were in fact performed...

There are discrepancies as to the last day worked by all employees.

There is a very close relationship between the president, Alvin Mitchell (sole officer) and the complainants. (friendship and in one case marriage)...

The last payroll record is for **September 12, 1997**. (see copy attached). No records were maintained for the complainants after that date and no records have been put forward by the complainants. The last submission to Revenue Canada is dated October 15, 1997 for the pay period ending **September 15, 1997**.

No Records of Employment were issued to these complainants.

I am satisfied that no employer/employee relationship existed between the Complainants and Seasons after September 30, 1999." [sic, this is obviously an error and should read 1997).

*Varma's evidence*

Varma testified that she commenced employment as Seasons' office manager, at a monthly salary of \$10,000, in September 1996, and continued in that capacity until her employment ended on February 28th, 1998. She was regularly paid until September 1997. She filed tax returns for 1996 and 1997 and the latter return was submitted to the Tribunal--it shows her having been paid \$80,000 in calendar year 1997, more or less consistent with her assertion regarding her monthly salary. She testified that she received a single payment each month, net of deductions.

In a written submission to the Tribunal dated May 20th, 1999, Varma explained that payroll cheques were issued on the authority of one David Nairne, whom she described as the principal operator of a company called "Cedaridge". Varma stated that Cedaridge was a "division" of Eron and a 40% shareholder in Seasons. I understand that the payroll cheques were actually prepared, and that Seasons' payroll record-keeping function was undertaken, by a third party, "ADP Canada". In any event, payroll cheques were drawn on a Cedaridge account and were signed by both David Nairne and Alvin Mitchell.

I note that Mr. Nairne did not testify before me, nor was any written sworn statement from Mr. Nairne submitted into evidence; I would have been interested to hear from Mr. Nairne as why Mr. Mitchell's wife was receiving such a substantial salary for undertaking what might, to be charitable, be characterized as minor clerical duties whereas Seasons' principal, Mr. Mitchell, apparently did not draw one dime from the company in wages during the relevant period. Given the critical role of Mr. Nairne in all of this, and Varma's insistence throughout the appeal hearing that Mr. Nairne could corroborate her position that she was indeed a *bona fide* employee of Seasons during the period both before and after September 30th, 1997, I draw an adverse inference from the appellant's failure to call Nairne as a witness.

Varma commenced an intimate personal relationship with Alvin Mitchell in approximately October 1995 and married him some two years later. Alvin Mitchell hired her as Seasons' "office manager" in September 1996--she described her duties as having responsibility for banking, payroll, coordinating meetings with potential Seasons' investors, attending to correspondence, supervising the office staff and the like. In October 1997, when the flow of Eron monies ceased, the receptionist was let go and only Varma, her husband and the other two complainants continued with Seasons. After October 1997 Varma continued on, without pay, as the "office manager" but it is not entirely clear what duties she could have undertaken during this period. Varma claims to have been gathering documents related to four separate lawsuits that had been filed against Seasons and she also says that she was part of the entire ongoing effort to secure alternative sources of funds for Seasons. Varma testified:

"I was still hoping the project would be financed. I provided my services free of charge but I expected to be paid from the funding once Alvin Mitchell negotiated a deal; he made it clear that I'd be looked after somehow".

As previously noted, Varma's unpaid wage claim spans the period October 1st, 1997 to February 24th, 1998, a period of time during which the only real activity of the company appears to have

been Alvin Mitchell's and Thomas Rogers' ongoing and wholly unsuccessful attempts to secure some other source of funding for the cemetery project.

Although Varma claims never to have been an officer, director or shareholder of Seasons (or of any company holding shares in Seasons), one cannot help but note the close personal relationship--a spousal relationship after October 1997--that subsisted between Varma and Alvin Mitchell during the material time period. In answer to my questions, and those of Ms. Thiel (counsel for the receiver) and Ms. Adamic (counsel for the Director), Varma appeared to have, at best, only a superficial understanding of the business affairs of Seasons. Certainly, based on the evidence before me, one would be hardpressed to argue that her annual salary of some \$120,000 represented a fair market value for her services.

#### *Other evidence*

Varma's husband, Alvin Mitchell (who acted as her agent before me) is the principal of Seasons. On June 16th, 1998 Price Waterhouse Limited, Eron's receiver and trustee, obtained judgment against, *inter alia*, Seasons and Alvin Mitchell in a B.C. Supreme Court action filed under Vancouver Registry No. C980543. In an examination in aid of execution conducted on August 10th, 1999--the transcript of that examination was put into evidence before me--Alvin Mitchell acknowledged that he did not have a bank account (and had not had a bank account since 1992) and that he subsisted on an "allowance" paid to him by Varma. I also note that in the examination in aid of execution Alvin Mitchell testified that Varma never worked "Not since I've known her" and that she is "independently wealthy".

#### *Analysis*

As noted in the Determination, the only substantial liquid asset held by, on or behalf of, Seasons is an \$860,000 cash deposit--originally paid as a condition of the issuance of a building permit relating to the cemetery project--that has been refunded by the District of North Vancouver. I understand that the deposit is now being held in an account controlled by Season's receiver, Campbell Saunders Ltd. One of the principal concerns of the Director is the fear that Varma is attempting to use the *Act* and, in particular, the lien provisions of section 87, to secure some sort of claim to the cash deposit in priority to other *bona fide* creditors. In fact, Alvin Mitchell asserts as much in his aforementioned January 11th letter: "These funds [*i.e.*, the \$860,000 deposit refund] should be used to pay back wages and other debts."

I am of the view that the Director's concern is well-founded and that this particular complaint was not filed in good faith [see section 76(2)(c) of the *Act*]. If, as Mitchell asserts, Seasons is in fact a company worth tens of millions of dollars, it is a simple matter for Varma to pursue her unpaid wage claim by way of an ordinary civil action--see section 118 of the *Act*.

However, it appears to me that Alvin Mitchell arranged for monies to be paid directly to Varma so that it would appear that he was not drawing any funds from Seasons; the purported effect of such a subterfuge would be to insulate such payments from Mitchell's creditors, including Eron's trustee. Mitchell apparently maintains that he did not earn any income in either 1996 or 1997. Of course,

Mitchell could have chosen to testify before me about such matters (and, in turn, be cross-examined about his evidence) but he chose not to do so.

I, too, share the delegate's concern that after September 30th, 1997, Seasons did not maintain any record of hours worked by Varma and did not even issue her a record of employment when her employment purportedly ended in late February 1998.

I am satisfied, on a balance of probabilities, that to the extent Varma undertook any activities after September 30th, 1997, those activities were in the nature of assisting her husband--who was intimately involved in the affairs of Seasons both before and after September 30th, 1997--to locate potential purchasers of some or all of his shares in Seasons; I am not satisfied that Varma was undertaking compensable "work", as that term is defined in the *Act, on behalf of Seasons* after September 30th, 1997.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued as it relates to the complainant Malti Varma.

**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**