

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-

Thomas William Rogers

(“Rogers”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	1999/212
DATE OF HEARING:	June 28th, 1999
DATE OF DECISION:	August 13th, 1999

DECISION

APPEARANCES

Thomas W. Rogers	on his own behalf
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 Thomas William Rogers (“Rogers”), 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”).

Rogers, who claims to have been the “office manager” of Seasons Memorial Park Inc. (“Seasons”)--a company now in receivership--says that he was not paid his \$5,000 monthly salary for the period from October 1st, 1997 until February 28th, 1998 and that, accordingly, he is owed some \$27,700 in unpaid wages including vacation pay.

On March 19th, 1999, after conducting certain investigations, the Director’s delegate determined that Rogers’ 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--Malti Varma, William Arthur Hall and 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

Rogers says that the delegate erred in dismissing his complaint and asks the Tribunal to vary the Determination to reflect the unpaid wages he claims are due and payable to him by Seasons.

FACTS AND ANALYSIS

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 (*i.e.*, the appellant)--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 addressed 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 (which Rogers apparently adopts) 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 Rogers] 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 Rogers has any wage claim at all, his claim lies against Alvin Mitchell, not against Seasons, as he worked solely at the behest and on behalf of Mitchell after September 30th, 1997.

The Determination

The delegate, as noted above, dismissed Rogers’ complaint on two separate bases: first, that his 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)].

At page 4 of the Determination, the delegate, stated:

“There is no evidence that the employees [including Rogers] 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 Mr. Rogers, ‘contacting mortgage and finance companies, venture capitalists, brokers, public companies, etc., preparing customized presentations for each prospect, making appointments, doing presentations, negotiating with brokers and prospective financiers.’

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).

Rogers' evidence

Rogers testified that his association with Seasons commenced in September 1996 and that his association with Alvin Mitchell predated September 1996. He says that he was hired to “raise funds” and that some \$30 million was required in order to bring the project to fruition. In September 1996 a suitable site for the cemetery operation was located in North Vancouver at a cost of \$4.3 million; it has never been made clear to me whether Seasons purchased the property outright or merely held an option to purchase.

In any event, up until September 1997, Rogers drew a regular \$5,000 (gross) monthly salary; apparently his salary was paid from some \$100,000 in funds that were being advanced on a monthly basis by Eron. Rogers acknowledges that he was a director of Seasons from September 1996 until he resigned on October 15th, 1997. Rogers has not satisfactorily, indeed at all, explained why he decided to resign his directorship after the flow of Eron funds dried up although it appears that he may have done so in order to shore up his position that he was an employee of Seasons and thereby entitled to file a claim under the *Act*.

Rogers testified that although he was not an officer of Seasons he did own shares in a company that, in turn, owned the majority of Seasons' shares. Rogers owns 15% of the shares of a company known as 483841 B.C. Ltd. which numbered company owns 60% of Seasons' shares; the other 40% is owned by a company only identified before me as “Cedaridge”. Rogers was unsure if he was also an officer or director of the numbered company.

During the period covered by his unpaid wage claim (*i.e.*, after the flow of funds from Eron ceased and Rogers resigned his directorship), Rogers says that he busied himself with trying to find “investors” who would be willing to commit funds to the cemetery project. According to Rogers: “I was contacting financial institutions, private companies; I turned over a lot of rocks” and that he was “constantly trying to raise money to keep the company afloat”.

As previously noted, Rogers' unpaid wage claim spans the period October 1st, 1997 to February 28th, 1998, a period of time during which the only real activity being undertaken appears to have been Alvin Mitchell's and Rogers' supposed ongoing, and wholly unsuccessful, attempts to secure some other source of funding for the cemetery project. When questioned as to why he would continue his efforts to secure funds for Seasons for several months without receiving any compensation, Rogers referred to a \$860,000 deposit and noted that he reported to work each day knowing that “the \$860,000 was there if need be, it was always there as a backup”.

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.

In any event, Rogers maintains that he was, at all relevant times, an “employee” of Seasons and that his unpaid wage claim ought not have been dismissed for want of *bona fides*. Rogers seeks to have his unpaid wages paid out from the \$860,000 cash deposit.

In cross-examination, Rogers stated that after September 1997, his energies focused on two options: first, finding what he termed a “joint-venture partner” and second, obtaining a construction loan. When I queried Rogers as to what sort of security might be given to either a joint-venture partner or a lender, Rogers replied that Seasons would issue a “debenture” in favour of the third party. This evidence is problematic from several perspectives.

First, such a debenture could not, by law, have taken the form of an encumbrance against the subject property by reason of section 24 of the *Cemetery and Funeral Services Act*. Second, according to Rogers, the building permit was held in the name of an entirely different company and at the relevant time Seasons--a company by then in receivership--did not have any other significant tangible or intangible assets to pledge as security. Third, Seasons’ outstanding shares were held, as noted above, by a numbered company (60%) and by Cedaridge (40%). Thus, an investor would have had to acquire shares from either the numbered company or Cedaridge, assuming treasury shares were not to be issued. At one point during his testimony Rogers acknowledged that the proposed security for any construction loan would have been a pledge of the Seasons’ shares held by one or both of the numbered company and/or Cedaridge. As Rogers put the matter: “I was in real terms making a deal on behalf of 483” [*i.e.*, the numbered company]. However, at a later point in his evidence, Rogers also stated that the numbered company’s shares in Seasons *had already been pledged to Eron* and thus, it would seem, could not have been lawfully transferred to any new investor. In addition, Rogers also testified that Eron, up until its operations were suspended, had been selling what he termed “preferred shares” in Seasons (all such purchasers lost their investment) thereby further diluting whatever security might have been offered by Seasons to any “joint venture partner” or “construction lender”.

Analysis

One of the principal concerns of the Director is the fear that Rogers 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 of Seasons. In fact, Alvin Mitchell asserts as much in his aforementioned January 11th, 1999 letter: “These funds [*i.e.*, the \$860,000 deposit refund] should be used to pay back wages and other debts.” Rogers also says that this latter fund should be used to pay his claim--“The money is owed to me and I understand that the company (receiver) has had \$860,000 cash from which to pay me” (see Rogers’ letter to the Tribunal dated April 12th, 1999).

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 Alvin Mitchell asserts in his January 11th, 1999 letter (submitted by Rogers in support of his appeal), Seasons is in fact a company worth tens of millions of dollars, it is a simple matter for Rogers to pursue his unpaid wage claim by way of an ordinary civil action--see section 118 of the *Act*.

I, too, share the delegate's concern that after September 30th, 1997, Seasons did not maintain any record of hours worked by Rogers and did not even issue him a record of employment when his employment purportedly ended in late February 1998. I might also observe that there is a disturbing lack of detail, and corroborating documentation, with respect to Rogers' alleged activities on behalf of Seasons in the period as and from October 1st, 1997.

I am satisfied, on a balance of probabilities, that to the extent Rogers was actively seeking out "investors" after September 30th, 1997, such activities were carried out on behalf of Seasons' shareholders rather than Seasons itself and, to a large extent, Rogers' activities can best be explained as an attempt by him to salvage his own actual or nominal investment in Seasons (which he held via a holding company). In other words, in seeking out potential "investors", Rogers was not acting as a Season's employee but rather, on his own behalf, as a principal party. I am not satisfied that Rogers 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 Thomas William Rogers.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal