

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-

William Arthur Hall

(“Hall”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1999/211

DATE OF HEARING: June 28th, 1999

DATE OF DECISION: August 13th, 1999

DECISION

APPEARANCES

William Arthur Hall 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 William Arthur Hall (“Hall”), 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”).

According to his complaint filed with the Employment Standards Branch on August 10th, 1998, Hall claims that he was employed by Seasons Memorial Park Inc. (“Seasons”)--a company now in receivership--as its “construction manager” from October 1st, 1997 until February 20th, 1998 and is owed some \$30,000 in unpaid wages. Hall claims that he was not paid his \$6,000 monthly salary for some five months spanning the period October 1997 to February 1998 inclusive.

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

Hall says that the delegate erred in dismissing his complaint.

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--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.

According to a letter dated January 11th, 1999 from Alvin Mitchell to the Director's 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 Hall] 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 Hall has any wage claim at all, his claim lies against Alvin Mitchell in his personal capacity, not as against Seasons, as Hall worked solely at the behest of Alvin Mitchell after September 30th, 1997.

In addition, by way of a letter to the Director's delegate dated January 14th, 1999 (tendered by Hall in support of his appeal), Mr. Mitchell further particularized Hall's activities vis-à-vis Seasons as follows:

“Seasons Memorial Park contracted Chrislin Contracting Ltd. from September 1st, 1996 until September 30th, 1997. The contract between Seasons and Chrislin was on the understanding that Bill Hall was to work approximately 50% of his time for Seasons.

In September 1997, Seasons had not paid Chrislin the \$5000 per month owing for August and September. The only way Seasons could persuade Bill Hall (President of Chrislin) to continue working for Seasons was to cancel the contract with Chrislin and hire Bill Hall as an employee. Bill Hall agreed to these conditions...

When Eron Mortgage Corporation went into receivership, all of the work previously performed by Cedaridge Management (A consulting firm hired by Eron to supervise construction in order to protect Eron's investment) was now delegated to Bill Hall.”

The Determination

The delegate, as noted above, dismissed Hall's 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 3 of the Determination, the delegate made note of Hall's position as follows:

“Mr. Hall states that he knew the principals involved, was close to the building project. He states it was in his best interest for his company to work under a contract because of the tax benefits. He states that when Seasons became financially uncertain, it was better to become an employee as he would have a stronger claim. He states he was hired at \$6,000.00 per month and that he ‘somehow’ became an employee but cannot remember the details as it was quite some time ago. He states that he worked full time, that his company was basically a ‘holding land or development’ company and became inactive subsequent to the break with Seasons.”

In dismissing Hall's complaint--as well as that of the other two complainants--the delegate observed (at page 4 of the Determination):

“There is no evidence that the employees 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. Hall 'responsible for Construction Budget, Supervision of Construction, Negotiation with Municipality, Budgetary Reports to Board of Directors, Offsite Services, Coordination of Architects, etc.'..

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).

Hall's evidence

Hall is a draftsman by trade and prior to his involvement with Seasons had for many years worked in commercial construction. Hall testified that he first became involved with Seasons in the fall of 1996 when his company, Chrislin Contracting Ltd., was apparently contracted to be the "project manager" for some office renovations being undertaken at Seasons' offices in Burnaby and in downtown Vancouver. Chrislin was under contract to Seasons until October 1997. I quote from my note of Hall's evidence:

"I was to be the project manager. Chrislin was under contract to October 1997 when there were payroll problems. I could be more vested if I worked as an individual; my function did not change only my status. I am not sure if documents were filled out [in October 1997]. The uncertainty in the company caused me to change to employment as an individual. I was acting as a consultant for project management".

Hall testified that this "change in status" did not involve any change in "any formal sense" and that his duties as a "project manager" did not change in any material way after October 1st, 1997. Hall detailed in his testimony the various activities he carried out during the period after October 1st, 1997 until February 1998. During this time he reported to, and took direction from, Alvin Mitchell and, for the most part, worked out of Seasons' downtown office. He continued without being paid

during this period because he received constant assurances from Mr. Mitchell that the project would be successful and monies would soon be in hand so that he could be paid all that he was owed.

Analysis

Although Hall held a minor share interest (5%) in a numbered company that, in turn, owned 60% of Seasons' shares, in my opinion, Hall stands in a markedly different position vis-à-vis Seasons as compared to the other two complainants. Malti Varma is Alvin Mitchell's spouse and I have already found that her claim appears to be a cloak designed to obscure the fact that she was used a conduit to siphon monies from Seasons to Alvin Mitchell (Alvin Mitchell, who did not apparently draw a salary from Seasons, nevertheless did receive what he termed an "allowance" from Varma). Unlike Thomas Rogers, Hall never was an officer or director of Seasons. Seasons appears to have been controlled by Alvin Mitchell and Rogers who were the company's "operating minds". Hall, on the other hand, did not in any fashion direct the affairs of Seasons; to the contrary, Hall took direction.

I have before me uncontradicted evidence about the various tasks that were undertaken by Hall in the period from October 1st, 1997 to the end of February 1998 on Seasons' behalf. Further, it appears that Hall was induced to stay with Seasons, despite not being paid, on the basis of representations made by senior Seasons officers, in particular, Alvin Mitchell. I find that Hall was a comparatively minor party in the overall Seasons project and I do not believe that Hall could be fairly characterized as one of the "promoters" of the project.

I am not satisfied that Hall's complaint was filed in bad faith or that it is obviously lacking merit. On the basis of the evidence before me it does appear that there was an employment relationship in place between Hall and Seasons--although I am not expressing any firm opinion on that matter--during the period spanned by his complaint although one cannot help be be suspicious regarding the the "changeover" when Hall's services, formerly provided to Seasons through Chrislin Contracting Ltd., were henceforth provided by Hall personally. On the other hand, it may well be that even during the time when Hall's services were rendered through Chrislin, Hall was nevertheless a Seasons' employee. Further, it may be that one or more of the corporations involved in this entire scheme may be "associated corporations" (see section 95) or that Hall has a valid unpaid wage claim as against Alvin Mitchell

In my view, the delegate erred in dismissing Hall's complaint outright without undertaking a full and complete investigation (which would have included obtaining complete particulars from Hall with respect to his claim, something the delegate apparently did not do).

ORDER

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be cancelled as it relates to the complainant William Arthur Hall. In accordance with section 115(1)(b) of the *Act*, I am

referring Hall's complaint back to the Director for further investigation. In my view, it would not be appropriate for any further investigation to be conducted by the same delegate who issued the Determination.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal