Employment Standards TRIBUNAL

An appeal

- by -

Seasons Memorial Park Inc.
(Appeal by Campbell Saunders Ltd.)
("Seasons")

- 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

ADJUDICATOR: Alison H. Narod

FILE No.: 2000/874

DATE OF HEARING: April 9, 2001

DATE OF DECISION: August 7, 2001

DECISION

This is an appeal of a Determination dated November 28, 2000 in which a Delegate of the Director ordered Seasons Memorial Park Inc. ("Seasons") to cease contravening Sections 17(1), 18(1), 45, 58(1), (2) and (3), and 63(1) of the *Employment Standards Act* (the "*Act*") and to comply with all requirements of the *Act* and *Employment Standards Regulation* ("*Regulation*"). He further ordered Seasons to pay wages to William Hall in the amount of $22,992.95.

Seasons has gone into receivership. The Receiver appeals the Determination because it believes that Mr. Hall, who was originally a contractor of Seasons operating through Chrislin Contracting Ltd., became an employee as part of a plan by Seasons and Mr. Hall to allow him to take funds in priority to *bona fide* creditors. In short, it is alleged that the conversion of Mr. Hall's status from "contractor" to "employee" was a kind of fraud on Seasons' creditors. Accordingly, Mr. Hall should not be considered to be an employee.

An oral hearing was held with respect to this matter. I have considered the documentary evidence provided to me as well as the evidence adduced in that hearing.

The issue is whether or not Mr. Hall was a *bona fide* employee for the period of October 1, 1997 to February 28, 1998.

The matter came to the Delegate in a somewhat circuitous route. Originally, Mr. Hall and two other putative employees filed complaints of non-payment of outstanding wages against Seasons. On March 19, 1999, a Delegate of the Director dismissed the complaints. Among other things, she found that there was insufficient evidence that work had been performed by the complainants during the period in question. She concluded that the requirements of the *Act* and the *Regulation* had not been contravened. All three complainants appealed that Determination. On August 13, 1999, an Adjudicator appointed by the Employment Standards Tribunal dismissed the appeals of all complainants except for Mr. Hall's.

In short, the Adjudicator found that Mr. Hall was not one of the directing minds of Seasons, despite having a minority share interest in a numbered company which controlled Seasons. He found there was uncontradicted evidence that Mr. Hall performed various work tasks on Seasons' behalf during the period at issue and that he was induced to stay, despite not being paid, on the basis of representations made by Seasons' principals.

The Adjudicator expressly refrained from concluding that Mr. Hall's complaint was filed in bad faith or that it lacked merit. He observed, without deciding, that there appeared to be an employment relationship between Mr. Hall and Seasons, although his suspicions were raised respecting the "change-over" when Mr. Hall's services, formerly provided through Chrislin Contracting Ltd., were thereafter provided by Mr. Hall, personally. He noted there were other possible characterizations of the relationship.

Consequently, the Adjudicator decided that the Delegate had erred in dismissing Mr. Hall's original complaint outright without undertaking a full and complete investigation and he cancelled the Determination appealed by Mr. Hall.

Mr. Hall's complaint was then assigned to a senior Delegate of the Director who conducted a thorough investigation and issued the Determination dated November 28, 2000 which is now appealed by Seasons.

Relevant findings in that Determination confirm that Seasons engaged Mr. Hall as a consultant in or about August, 1996 to act as its construction manager. Seasons was working on a project to build a mausoleum. Seasons was being funded by Eron Mortgage Corporation ("Eron"). Eron experienced financial problems and went into receivership. As a result, the funding for Seasons ended on or about September 30, 1997.

According to the Determination, at the time the funding from Eron ceased, Mr. Hall approached the sole remaining Director, Alvin Mitchell, and asked to become an employee. Mr. Mitchell agreed to this arrangement. He told Mr. Hall that he would have a salary of $5,000 per month and that deductions for income tax, etc., would be made. As there was no money coming in to pay salaries to staff, Mr. Mitchell told Mr. Hall that he would not be paid until financing was secured. The agreement between Mr. Mitchell and Mr. Hall was verbal. No records of hours or work were kept. All records that existed were with the Receiver.

Seasons needed Mr. Hall during the period in issue as it was trying to raise further financing. Mr. Hall did budgets for prospective clients, worked with the architects and was in contact with the City of North Vancouver. Although there was no building on site, there was activity insofar as the surface fill was being removed and Mr. Hall was involved with the contractors. This was important because lack of activity could result in the City's cancelling the building permit.

As noted, the Delegate concluded that work was performed by Mr. Hall for Seasons. Although there were no hours of work records provided by the Employer, the Delegate examined records kept by the Complainant and took statements from Seasons' principals. He relied on this evidence in the absence of employer hours of work records in calculating Mr. Hall's hours of work for the purposes of ordering Seasons to pay wages and termination pay to Mr. Hall.

There is no dispute in the present appeal that Mr. Hall performed work for Seasons. Accordingly, I will not refer further to the Delegate's findings with respect to that issue except as set out below. The Receiver says Eron went into receivership in October, 1997. Seasons went into receivership in March, 1998.

The Receiver says that Mr. Hall was originally engaged as a contractor and was paid $5,000 per month. He contends that at all relevant times Mr. Hall remained a contractor and never became an employee. The Receiver says he was unable to find any documentation that substantiated that there was an employment relationship. For instance, there was no written employment contract between Seasons and Mr. Hall, or any other employee. None of the typical employee

documentation such as TD-1 forms (income tax documents) was issued in respect of Mr. Hall. There was no evidence of deduction of taxes from earnings at source.

The Receiver observes that the only evidence of employment was comprised of two letters drafted by Alvin Mitchell, a principal of the Employer, on September 11, 1998 and January 11, 1999. He notes these were produced many months after the fact and, in his view, can be explained away as an afterthought and part of the fraud.

The Receiver says that Mr. Hall's assertion that he continued to work without remuneration for 2 months as a contractor before he became an employee and then work without remuneration for a further 5 months as an employee, is not credible. There was little hope that any further money would come in to pay Mr. Hall. From October to September, there was little or no construction activity at Season's work site. Rather, most of the activity was directed towards seeking funds to allow the construction project to continue. Accordingly, Mr. Hall's conversion to employee status was merely a scheme to leap frog and be paid fees in priority to *bona fide* creditors.

The Receiver contends that Mr. Hall continued to work without pay because he had a financial interest in the project. More particularly, the Receiver says that Mr. Hall invested in a numbered company which, in turn, owned a portion of and invested in Seasons. Therefore, Mr. Hall continued to work in order to obtain some return on his investment.

There is on file a contract between Chrislin Contracting Ltd. and a numbered company indicating that in 1994 Chrislin bought 5% of the shares of the numbered company at a price of $100,000. It appears that the numbered company, at a subsequent date invested money in Seasons.

Additionally, the Receiver says that the timing of Mr. Hall's complaint adds to its suspicions. The Complaint was not made until 6 months after Seasons went into receivership. Moreover, it was not until a prospective purchaser of Seasons surfaced that Mr. Hall first asserted that he was an employee and made a claim to the Employment Standards Branch.

In response, Mr. Hall admits that he invested in the numbered company in 1994, but says he did not control it or Seasons. The numbered company planned to invest in a hotel project in North Vancouver and a marina in Pitt Meadows. At the time, the numbered company was not involved in Seasons and the mausoleum project had not yet been conceived. Mr. Hall acknowledged that some of the monies he invested in the numbered company may have found their way into the mausoleum project, in which case, he hoped that he would get a return on his investment. However, he wielded no power over Seasons. Rather, it had all the power because it had his money.

Mr. Hall also says that he has not always been a construction contractor. He used to work as an employee for Safeway, but left that employment when the industry went into an economic downturn. He got into residential construction through Chrislin Construction Ltd. He acknowledges he was engaged by Seasons to perform work on the mausoleum project. When its financing became uncertain, shortly before Eron went into receivership, one of the principals of

Seasons, Mr. Mitchell, came to him and explained Seasons' financial circumstances and that it hoped to obtain additional investment to finance a continuation of the project. He wanted him to continue working for Seasons.

Mr. Hall said he did not have any prospects at the time and felt the mausoleum was a good project. Mr. Hall saw some difficulties for himself if he continued as a contractor. He was aware of the implications for him if he continued as a contractor as opposed to being an employee. He understood that he would have better protection if he was an employee than a contractor. He believed Seasons had a good possibility of finding another investor. A lot of people looked into investing in it. In light of these circumstances, Mr. Hall decided to continue working on the project, but only as an employee. He said he would not have continued to work on it otherwise.

Consequently, Mr. Hall asked and Mr. Mitchell agreed that he would become an employee, that his salary would be $5,000 per month. He understood that he would likely have to wait until financing was secured before he received that pay. He acknowledged that he did not sign any contract when he converted from a contractor to an employee.

In answer to the Receiver's comments regarding his tax treatment, Mr. Hall says that he did not pay income tax on his earnings while he was an employee because he did not get paid anything during that period.

In response to the Receiver's assertions that he only became an employee to get an advantage over unsecured creditors by getting priority with respect to his wages, Mr. Hall said it was his intention to obtain additional certainty over his remuneration by converting his status from that of a contractor to that of an employee.

Submissions were made by counsel on behalf of the Director. Among other things, the counsel for the Director says that during the course of his very thorough investigation, the Delegate was unable to uncover any evidence which would have allowed him to refuse to investigate Mr. Hall's complaint pursuant to Section 76(2)(c) of the *Act* on the basis that it was "frivolous, vexatious or trivial or (was) not made in good faith". She says that if the Receiver is able to present new evidence which was not before the Delegate or the prior adjudicator, which independently establishes bad faith sufficient to attack the basis of the Complainant's claim, it should be produced to the Tribunal.

Counsel for the Director says there was no evidence before the Delegate which would indicate that Mr. Hall was not an employee for the period at issue. The manner in which Mr. Hall paid taxes may be irrelevant to the determination of his employment status under the *Act*. Persons previously described as independent contractors make complaints under the *Act* and are found to be employees. Mr. Hall's tax status and records do not provide sufficient information to defeat the finding that he was an employee.

Counsel for the Director notes that the appeal raises questions respecting the credibility of letters produced by Mr. Mitchell. However, the Delegate had no material that would effectively challenge the veracity of Mr. Mitchell's letters in support of Mr. Hall. She notes that Mr. Mitchell, as a director/officer, may be liable for up to two months of the wages ordered to be paid to Mr. Hall.

She says that Mr. Hall's minority shareholdings in particular corporations were known to both Delegates previously involved in this matter as well as to the previous Adjudicator. Such arrangements between employers and employees are not unusual. Absent evidence of Mr. Hall being the controlling mind in the relevant ventures and an individual with significantly more decision-making authority than the Delegate had discovered, a 5% shareholding would not prevent a finding of employee status.

With respect to the timeliness of Mr. Hall's complaint, she says an employee has up to six months following the date of termination to file a complaint. There is no inference under the *Act* that the later the date of the filing the less the *bona fides* of the complainant. Complainants may often hope for an amicable resolution to their complaints and therefore delay filing pending that event.

Counsel argues that the Director did not have evidence establishing a lack of *bona fides* on the part of Mr. Hall. The Delegate made an exhaustive and thorough examination of the facts in evidence available, which is reflected in his Determination. His finding must stand, unless there is new previously undiscovered evidence, which would impact significantly on the Delegate's findings.

ANALYSIS

The burden is on the Appellant to show that the Determination is in error. I find that the appellant Receiver has not met that burden.

The appellant Receiver argues, in effect, that the alleged conversion of Mr. Hall's status from that of an independent contractor to that of an employee was a fraudulent scheme designed to give him priority over other unsecured creditors. However, the Receiver fails to produce any new evidence beyond that which was obtained by and relied on by the Delegate in making his November 28, 2001 Determination.

I note that the Tribunal will be concerned with the integrity of the administration of the *Employment Standards Act* in matters coming before it under appeal. There is a *bona fide* concern that persons who are truly independent contractors may attempt to use the *Act* when the entity which engages them goes into receivership or bankruptcy in order to gain priority over unsecured creditors for debts owed for contracted services. Accordingly, the Tribunal will be willing to examine the evidence to determine whether or not a complainant was pursuing that kind of scheme. For example, such a scheme might be proven by evidence of an agreement

between an individual who was an independent contractor and the entity that engaged him or her to pose as being in an employee–employer relationship in order to use the *Act* to secure priority over unsecured creditors. Alternatively, it might be proven by evidence of an agreement reached after-the-fact to, essentially, fabricate an agreement between the individual and the putative employer to convert the status of the individual from an independent contractor to an employee. This is not an exhaustive list.

However, balanced against the possibility of a "fraud" is the consideration that the conversion of an independent contractor to an employee is *bona fide*. An entity on the brink of receivership or bankruptcy may well wish to preserve its asset as best as possible in the hope of obtaining additional financing and carrying on in business or in the hope of maximizing the value of the asset if it must be liquidated in order to satisfy creditors. In such circumstances, the entity may find in good faith that it must hire employees in order to preserve its asset for those purposes.

I reviewed the documentary evidence and I have heard *viva voce* evidence, including testimony given by Mr. Hall. Mr. Hall was forthright and honest in giving his testimony. He was not challenged in cross examination in any way that undermined his credibility. I accept that there were valid reasons why Seasons would want to continue to have Mr. Hall performing the work he performed for it in order to preserve its asset when it was faced with receivership. I accept that Mr. Hall was willing to continue performing work for Seasons, but only on the condition that he be hired as an employee, so that he would enhance his chances of being paid for that work in priority to other unsecured creditors, in the event that Seasons was unable to find additional financing. Additionally, I accept that Mr. Hall was willing to continue to perform work for Seasons, despite not being paid, because he believed that Seasons would indeed find the financing or, if it was liquidated, he would be paid his outstanding wages in priority to other creditors.

In the peculiar circumstances, I find that Seasons had a *bona fide* need for someone to perform the services provided by Mr. Hall. Its only alternative, if it wished to continue to use Mr. Hall, was to agree to hire him as an employee. In the circumstances, it was not unreasonable for Seasons to hire Mr. Hall as an employee to perform those services. Additionally, in the circumstances, it was not unreasonable for Mr. Hall to seek to protect himself in advance by having his status converted to that of an employee. Although the circumstances raise suspicions, there is no evidence that Mr. Hall and Seasons reached this arrangement after the fact and fabricated evidence to make it appear as though the arrangement had been reached prior to the receivership.

Moreover, on the evidence, I find Mr. Hall was an employee within the meaning of the *Act* during the period at issue. The evidence does not substantiate that he was, in fact, an independent contractor during this period. He performed work for Seasons. There is no evidence he worked for anyone else. There is no evidence that he worked other than under the control and direction of Seasons, although as construction manager he worked with independence. There was no evidence that he took a share of the profit or had the risk of loss of

an independent business during this period. There is no evidence that he utilized tools which he owned in the same manner as would an independent contractor. The evidence indicates that he was integrated into Seasons operations in the same manner as a managerial employee.

In short, on the whole of the evidence, I find that Mr. Hall was an employee within the meaning of the *Act* during the relevant period.

None of the other issues raised by the appellant Receiver alters this conclusion. The manner in which Mr. Hall's earnings are treated for tax purposes is not determinative of whether or not he is an employee under the *Act*. The absence of employee records is similarly not determinative. Mr. Hall's own records and Seasons' statements support his employment status. The fact that Mr. Hall held a minority interest (5%) in the numbered company which invested in Seasons and may have even controlled it is similarly not determinative. As noted by the Director, it is not unusual for employees to have minority shareholding interests in their employer. In the absence of evidence that Mr. Hall was one of the directing or controlling minds of Seasons, or otherwise acted as a director or officer, a mere minority interest is of little assistance in determining whether or not he is an employee within the meaning of the *Act*.

Finally, as noted above, the fact that Mr. Hall continued to work for a number of months without pay has a reasonable explanation.

Accordingly, I dismiss the appeal.

ORDER

Pursuant to Section 115 of the Act, I Order that the Determination be confirmed.

Alison H. Narod
Adjudicator
Employment Standards Tribunal