

An appeal

- by -

Barcode Nightclub and Lounge Ltd.  
(“Barcode”)

- 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* (as amended)

**TRIBUNAL MEMBER:** John Savage

**FILE No.:** 2007A/134

**DATE OF DECISION:** January 31, 2008

## DECISION

### SUBMISSIONS

|                  |   |
|------------------|---|
| Mark Brkic       | on behalf of Barcode Nightclub and Lounge Ltd.    |
| Eurassia Adamson | on her own behalf                                 |
| Rod Bianchini    | delegate for the Director of Employment Standards |

### INTRODUCTION

1. Barcode Nightclub and Lounge Ltd. (“Barcode”) and Mark Brkic (“Brkic”), an officer and director of Barcode, seek to appeal a determination of the Director dated September 29, 2006 (the “Corporate Determination”).
2. In the Corporate Determination, the Director found that Barcode was Eurassia Adamson’s (“Adamson”) employer and liable to pay Adamson \$542.82 in unpaid wages and interest. As the Director found a breach of the Employment Standards Act a \$500 administrative penalty was also imposed.
3. Brkic also seeks to appeal a determination of the Director dated November 14, 2006 (the “Director Determination”) in which Brkic was found to be a director and officer at the time the wages owed Adamson should have been paid, and was personally liable to pay the above amounts.
4. In the Appeal Form the appeal is described as a late appeal.
5. Barcode seeks leave to file a late appeal from the Corporate Determination.
6. Brkic argues that his appeal is not late as he was never served with the Director Determination. Brkic, in the alternative, also seeks leave to file a late appeal of the Director Determination.
7. The Tribunal has determined to deal in the first instance with the timeliness issues.

### ISSUES

8. Should Barcode be granted leave to file a late appeal of the Corporate Determination?
9. Does Brkic require leave to file a late appeal of the Director Determination? If Brkic does require leave to file a late appeal of the Director Determination, should leave be granted?

## FACTS -- CORPORATE DETERMINATION

10. Adamson filed her complaint with the Employment Standards Branch alleging that she was owed wages. A Delegate of the Director wrote to the “Owner/Manager” of Barcode by certified mail to their registered and records office, a law firm, on March 7, 2006 as follows:

**Re: Employment Standards Complaint filed by Eurassia Adamson**

The above mentioned individual has filed a complaint pursuant to Section 74 of the *Employment Standards Act* (the Act). The Act sets out the minimum standards that apply in most workplaces in British Columbia. The Employment Standards Branch of the Ministry of Labour and Citizen’s Services administers the Act.

The above individual is alleging contraventions of the following areas of the Act:

**Regular Wages and Annual Vacation Pay.** The total alleged owed is \$515.84. This letter is being sent to inform you of the complaint and to request your participation in resolving these matters.

The Branch seeks to resolve issues with the use of Mediation or possible Adjudication where Mediation fails. On occasion the file will be dealt with through investigation.

Please contact the undersigned to discuss any questions or concerns regarding these matters.

Additional information regarding the Employment Standards Act and the Employment Standards Branch dispute resolution processes can be found at: [www.labour.gov.bc.ca/esb/](http://www.labour.gov.bc.ca/esb/) or by contacting the Information Line at 1-800-663-3316.

11. Attached to this correspondence is a Demand for Employer Records of even date. The Demand for Employer Records required that records be produced by March 23, 2006. There was no reply to this correspondence.
12. On April 11, 2006 the Delegate wrote to Brkic at 2153 East 46<sup>th</sup> Avenue, Vancouver, BC, V5P 1P3 with similar correspondence. The address is that given for Brkic in the BC Company Summary for Barcode. Brkic is shown as the sole Director of Barcode with that mailing and delivery address. The correspondence was returned unclaimed.
13. On April 11, 2006 the Delegate also wrote to Kevin St. Michel Lorage of Key Horizon Investments Ltd. (“Key Horizon”) and Orchid Caterers Ltd. (“Orchid”) as part of the investigation. Orchid was Barcode’s landlord and Key Horizon a possible associated company.
14. In September 2006, the Delegate completed his investigation and issued the Corporate Determination. The Corporate Determination was sent to Barcode by certified mail at its registered and records office. Included with the Corporate Determination was correspondence dated September 29, 2006. The correspondence included this paragraph:

“Under the Act, a Determination may be filed in the British Columbia Supreme Court and collection proceedings commenced. Directors and Officers of companies can also be required to pay wages owed to employees and the total administrative penalty amount. If payment is not received within 38 days of a Determination, additional interest will accrue. The amounts owing may be referred to a collection agency without further notice to you.”

15. Attached to the correspondence was a “Notice to Directors / Officers” as follows:

“A Director/Officer cannot argue the merits of the Determination against the company after its appeal period has expired. After that time, there are only three grounds for appeal:

- 1) whether you were a Director of the company at the time wages were earned; or should have been paid;
- 2) whether the calculation of your personal liability is correct, and;
- 3) whether you authorized, permitted or acquiesced in the contravention.

If you dispute any findings in the Determination against the company, the Company must appeal within the appeal period noted in the Determination accompanying this notice”.

## **FACTS -- DIRECTOR DETERMINATION**

16. As noted above, the Corporate Determination was served on the Registered and Records Office as were earlier requests for information concerning the issues. At the time these documents were served on the company, the sole director and officer of Barcode was Brkic.

17. The personal address for Brkic as a director and officer of Barcode in the records filed at the Company’s office is 2153 East 46<sup>th</sup> Avenue, Vancouver, BC, V5P 1P3. That is where the Corporate Determination and the earlier requests for information were sent. The request for information was returned as undelivered.

18. On November 14, 2006 the Director/Officer Determination against Brkic was mailed to him at 2153 East 46<sup>th</sup> Avenue, Vancouver, BC, V5P 1P3. It was signed for by Naanja Brkic.

19. In his own Affidavit Brkic acknowledges that 2153 East 46<sup>th</sup> Avenue, Vancouver, BC, is his mother’s address and that on January 24, 2007 he received a copy of the Writ of Seizure and Sale in Action No. L-103497, an action initiated by the Director to collect on the amounts owing under the Director Determination.

20. In his affidavit Brkic says that prior to receiving the Writ that had attached a copy of the Determination he “had no knowledge of the proceedings before the Branch in respect of the Company, nor was I ever served with any notice that there were proceedings before the Branch involving the Company”. Brkic says he was out of province prior to that time and until September 2007 although he returned to Vancouver on several occasions.

21. After having this knowledge through service of the Writ, which included the Determination, Brkic says he called the Branch, attended at the Vancouver Supreme Court Registry on two occasions in early 2007 and then returned to British Columbia in September 2007.

22. The Application to set aside the Determinations was made November 1, 2007.

23. Brkic says he was never served with the Director Determination.

## DISCUSSION & ANALYSIS

### *Service of Documents and Determination*

24. Section 122 of the Act applies to service of determinations and demands. It provides as follows:
122. (1) A determination or demand that is required to be served on a person under this Act is deemed to have been served if
- (a) served on the person, or
  - (b) sent by registered mail to the person's last known address.
- (2) If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.
- (3) At the request of a person on whom a determination or demand is required to be served, the determination or demand may be transmitted to the person electronically or by fax machine.
- (4) A determination or demand transmitted under subsection (3) is deemed to have been served when the director receives an acknowledgment of the transmission from the person served.
- 1995, c. 38, s. 122.
25. With respect to corporations, section 34 of the *Business Corporations Act*, S.B.C. 2002, Chap. 57, provides as follows:
34. (1) Subject to section 40, a company must maintain a registered office and a records office in British Columbia.
- (2) The registered office and the records office may be located at the same place.
- (3) A company recognized under this Act has as the mailing address and delivery address of its first registered office and the mailing address and delivery address of its first records office the mailing addresses and delivery addresses respectively shown for those offices on the notice of articles that applies to the company on its recognition.
26. Service of records on corporations is provided for by section 9(1):
9. (1) Without limiting any other enactment, a record may be served on a company
- (a) unless the company's registered office has been eliminated under section 40, by delivering the record to the delivery address, or by mailing it by registered mail to the mailing address, shown for the registered office of the company in the corporate register,
  - (b) if the company's registered office has been eliminated under section 40, in the manner ordered by the court under section 40(4)(b), or
  - (c) in any case, by serving any director, senior officer, liquidator or receiver manager of the company.

### *Service on Barcode*

27. In this case both the records office and registered office of the company show the mailing address and delivery address at #410 – 1333 West Broadway, Vancouver, BC, V6H 4C1.
28. In my opinion, both the letter which gave notice of the complaint and the Demand for Records was effectively delivered to Barcode by mailing both of these documents by certified mail to its mailing address on March 6, 2006.

29. The Corporate Determination was effectively served on Barcode by mailing the covering letter and Corporate Determination by certified mail to Barcode's mailing address on September 29, 2006.
30. With respect to the Corporate Determination and demand section 122(2) of the Act deems service to have occurred 8 days after deposit with Canada Post.

***Service on Brkic***

31. Section 122(1) of the Act deems a determination or demand to be served if "sent by registered mail to the person's last known address".
32. In this case both a demand for records and the accompanying letter giving notice of the complaint were sent to Brkic in his capacity as a director on April 11, 2006 by certified mail. These documents invited his response to the complaint. They were sent to him at 2153 East 46<sup>th</sup> Avenue, Vancouver, BC, V5P 1P3. No response to this was received and it was returned "unclaimed".
33. The Corporate Determination was apparently separately sent to Brkic in his capacity as a director. The letter accompanying the Corporate Determination was copied to

"Mark Brkic, Director/Officer of  
Barcode Nightclub and Lounge Ltd.  
2153 West 46<sup>th</sup> Avenue  
Vancouver, BC V5P 1P3".

34. The Director Determination was sent to Brkic at the same address by certified mail on November 14, 2006 with an accompanying letter of the same date. This material was signed for by Naanja Brkic who is acknowledged to be Brkic's mother in counsel's submission.
35. Part of the record in this proceeding is an extract from Barcode's company records showing the mailing and delivery address of the sole director, Brkic. Both the delivery and mailing address is the address shown above.
36. For the purposes of the *Business Corporations Act* a director must provide, as a prescribed address, a delivery and mailing address. Section 2 of the *Business Corporations Regulation*, B.C. Reg. 65/2004 provides as follows:
2. (1) In this section, "delivery address" means, for an office, the location of that office identified by an address that describes a unique and identifiable location that is accessible to the public during statutory business hours for the delivery of records, but does not include a post office box.
  - (2) For the purposes of the Act, the prescribed address for a director or officer of a company must be whichever of the following is selected by the director or officer:
    - (a) the delivery address and, if different, the mailing address for the office at which the individual can usually be served with records during statutory business hours;
    - (b) the delivery address and, if different, the mailing address of the individual's residence.
- B.C. Reg. 315/2004, Sch., s. 1.

37. Thus, a delivery address must not be a post office box and for an office must be a unique and identifiable location that is accessible to the public during statutory business hours for the delivery of records. A

director or officer must select either a delivery address that meets this description, or “the mailing address of the individual’s residence”.

38. In this case at the time of the investigation of the complaint the Delegate was faced with the closure of the business being investigated. The landlord indicated that Brkic had removed various assets from the business premises before closure of the business. The Delegate sought to communicate the demands and determinations to Brkic through his delivery and mailing addresses shown in the corporate records of the company at its registered and records office.
39. In my opinion, in these circumstances the delivery and mailing addresses shown for Brkic in the corporate records of the company at its registered and records office qualifies as the “last known address” of Brkic within the meaning of section 122(1) of the Act. It follows that Brkic is deemed to be served with those demands and the Director Determination.
40. Brkic argues that there was no actual service on him, and therefore there is no need to extend the time for filing his appeal, citing the decision of this Tribunal in *Re Charles Neil (Chuck’s Window Cleaning)*, BC EST # D122/00. I disagree. This decision was reconsidered and reversed by the Tribunal in BC EST #D330/00.
41. With respect to the Director Determination section 122(2) of the Act deems service to have occurred 8 days after deposit with Canada Post or in November, 2006.

***Should Leave be Granted Barcode to Extend the Time for Appealing the Corporate Determination?***

42. Section 109(1)(b) gives the Tribunal authority to extend the time for filing an appeal.
43. In general, extensions for the time for filing an appeal should only be granted for compelling reasons: *Re Wright (c.o.b. Advanced Carpet Cleaning)*, BCEST #D132/97.
44. In this case, by the operation of section 122 of the Act, the Corporate Determination was deemed to have been served in November, 2006 on Barcode. The application to extend time was received nearly a year later, on November 1, 2007. Brkic, the sole director of Barcode, acknowledges receiving the Corporate Determination on or about January 24, 2007 when he received the same attached to a Writ of Seizure and Sale. So Barcode’s application comes about 8 months after the company director admits to having actual notice of the Corporate Determination.
45. Brkic in his affidavit states that he moved to Alberta in late 2004 or early 2005, although “I would return to British Columbia for a few days every few months”. With respect to the period prior to January 24, 2007 Brkic gives no explanation of what efforts he made to keep in touch with the registered and records office of the company he incorporated, which was a law firm, or what efforts he made to have mail forwarded to him where he was located in Alberta, either from the corporate registered and records office, or from his prescribed delivery and mailing address.
46. As the Respondent, Adamson notes, she has traveled around the world and had her mail forwarded to her in many different places.
47. This Tribunal has established criteria which an appellant should satisfy in granting an extension of time to appeal as set out in section 109(1)(b). Those criteria include (1) there being a reasonable and credible

explanation for failing to request an appeal within the statutory time limit; (2) there being a genuine ongoing bona fide intention to appeal the determination; (3) the Respondent and the Director being made aware of this intention; (4) no undue prejudice to the Respondent; and (5) there being a strong prima facie case in favour of the Appellant: *Re Owolabi (c.o.b.) Just Beauty*), BCEST RD#193/04, *Re BNN Enterprises Ltd.*, BCEST #D165/04.

48. In my opinion Barcode has not satisfied the first of these criteria. In this case Barcode has not given a reasonable and credible explanation for failing to request an appeal within the statutory time limit. In my opinion, where a corporate appellant has had a determination sent by certified mail to its corporate mailing and delivery address it is incumbent on the appellant to provide an explanation of why the receipt of such went unanswered. In this case, that explanation should include what measures were taken by the sole director to ensure he was apprised of the receipt of documents by the corporate registered and records office, and to his own prescribed address, his mailing and delivery address.
49. This Tribunal has held that refusing to accept documents sent to a last known operating address is not a basis for extending the time to appeal a determination: *Re Country Farm Market Inc.*, BCEST #D063/04. To that I would add that an appellant who fails to provide a reasonable explanation of why receipts to statutorily prescribed offices go unanswered, does not satisfy the requirements for granting leave to extend time. This is particularly apposite in appeals under the Act where the amount involved, as here, may be relatively minor, and where it is incumbent that the procedures adopted serve the purposes of the Act.
50. In addition to these reasons, I find that the eight month delay in making this application after Brkic acknowledges receipt of the Corporate Determination is excessive. The Corporate Determination is attached to Brkic's affidavit as Ex. C. It was attached to a Writ of Seizure and Sale. It contains information regarding how to appeal the determination. By reviewing that information Brkic would or should have known that an appeal was late. Since Brkic is a director of Barcode it was incumbent on Barcode at that time to deal with this matter and I find the steps that were taken were inadequate in the circumstances.
51. In considering the other factors I also find this application wanting. There is nothing in the record before me to indicate that Barcode took any steps to notify Adamson of its intention to appeal the Corporate Determination. While Barcode has deposited funds in trust, that will not suffice to extend the deadline for appeal in these circumstances: *Re CSR Holdings Ltd. (c.o.b. The Office Bar and Grill)*, BCEST #D034/06. Moreover, in circumstances where the business is shut down, the effluxion of time will operate to prejudice the employee.
52. In the circumstances I would not grant Barcode leave to extend the time for appealing the Corporate Determination.

***Should Leave Be Granted Brkic to Extend the Time for Appealing the Director Determination?***

53. As indicated above, I have found that Brkic was served the Director Determination by application of the provisions of section 122 of the Act and the provisions of the *Business Corporations Act*. That took place in November 2006. As of January, 2007 he had actual notice that a determination against him as a director had been made. The Writ of Seizure and Sale was notice of that.



54. Brkic argues that if there was service the Tribunal should nevertheless extend the time for appealing the Director Determination.
55. Brkic says there is a reasonable and credible explanation for his failure to request an appeal within the statutory time limit. The explanation he gives is that he was in Alberta and did not receive notice of the hearing in respect of the determinations. In this case there was no hearing held. The Director conducted an investigation. Notice of that investigation and an invitation to respond to it was sent by certified mail to both the mailing and delivery office of Barcode and the mailing and delivery office of Brkic. The determinations followed.
56. In my opinion Brkic's simple denial that he actually received these documents is insufficient in these circumstances. If it were sufficient, then an extension would be granted in every case where there is not actual notice. Rather, in my opinion, it is incumbent on Brkic to provide an explanation of why he failed to receive notice when these documents were sent to statutorily prescribed addresses. Where someone leaves the jurisdiction that explanation should include the arrangements made to have mail forwarded, whether attempts were made to update addresses, why those efforts failed, etc.
57. As I read the submissions of the Director and Brkic there is agreement that, at least from the time he had actual notice, Brkic intended to appeal.
58. With respect to the Director Brkic says that the Director was aware of his intention to appeal. There is, however, no mention of what steps, if any, were take to advise Adamson of his intention to appeal. As I read the record before me, there is no evidence of any steps taken in that regard, nor does Brkic's submission suggest there were any steps taken to inform Adamson.
59. Brkic says that no-one will be unduly prejudiced if an extension is granted because funds are held in trust. In this case, however, considerable efforts had been made to notify Brkic of the issues, to serve both the Corporate and Director Determinations, a Writ of Seizure and Sale had been issued and served, nearly eight months had elapsed since that event, and, of course, Adamson has been without redress for some years since the work had been performed. Brkic says that weighed against the possibility of prejudice should be the interests of fairness and justice, and in that context neither Adamson nor the Director would be unduly prejudiced, since he has a strong prima facie case.
60. With respect to a Director Determination on liability for wages, in the absence of fraud, or new evidence that would be decisive and was not available previously through the exercise of reasonable diligence, under section 96 of the Act directors and officers are limited to arguing issues that arise directly from section 96, namely, whether they are a directors or officers of a corporation, and whether the amount of personal liability is properly limited to up to two months unpaid wages for each employee: *Re Penner*, BCEST #D371/96, *Re Steinemann*, BC EST#D180/96, *Evans v. British Columbia (Employment Standards Board)* (1983), 149 D.L.R. (3d) 1 (B.C.C.A.), *Stelmaschuk v. Dean* (1995) 13 C.C.E.L. (2d) 220; [1995] 9 W.W.R. 131.
61. In my view Brkic has not made a case that the evidence he seeks to introduce is new evidence that was not available previously through the exercise of reasonable diligence. Reasonable diligence on his part would have been designed to ensure that he actually received the various documents in a timely way. Given the absence of any explanation I find that this exception does not apply. Since Brkic is admittedly a director, indeed, the sole director, and no issue arises concerning the amount of wages there is, in my

opinion, no basis for appealing this aspect of the Director Determination. I would not extend the time for filing an appeal of the Director Determination based on these circumstances.

62. With respect to the administrative penalty imposed, the basis of such imposition requires an additional substantive determination by the Director beyond those found in the Corporate Determination, and those admitted, namely, whether the particular director “authorizes, permits or acquiesces in the contravention” pursuant to section 98 of the Act.
63. In the case before me neither party addressed this matter in the context of the application, nor whether *Stelmaschuk* and the cases that follow it are applicable to this finding as it relates to the administrative penalty aspect of the Director Determination.
64. In the circumstances, if the parties are unable to resolve the matter based on these reasons, I would ask that they address in additional written submissions as scheduled by the Tribunal, whether the imposition of liability under section 98 of the Act requires a variation in my conclusion as it relates to the application to extend time to appeal the Director Determination on that aspect alone.

### **SUMMARY & ORDER**

65. Pursuant to section 114(1)(b) of the *Act*, the appellant’s request to extend the time limit for appealing the Corporate Determination is refused.
66. Pursuant to section 114(2)(b) of the *Act*, the appellant’s request to extend the time limit for appealing the Director Determination is referred back to the parties to make further submissions as noted above in accordance with a schedule determined by the Tribunal, if the parties are unable to resolve the matter based on these reasons.



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**John Savage**  
**Member**  
**Employment Standards Tribunal**