

An appeal

- by -

Blackhawk Custom Motorsports Inc. and Steven Hadikin Jr.

- 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:** Carol Roberts

**FILE No.:** 2009A/009, 2009A/010, 2009A/030

**DATE OF DECISION:** April 21, 2009

## DECISION

### SUBMISSIONS

Steven Hadikin Jr.	on his own behalf, and on behalf of Blackhawk Custom Motorsports Inc.
Theresa Robertson	on behalf of the Director of Employment Standards
Mitchell Van Iderstine	on his own behalf

### OVERVIEW

1. This is an appeal by Blackhawk Custom Motorsports Inc. (“Blackhawk”) and by Steven Hadikin Jr. pursuant to Section 112 of the *Employment Standards Act (Act)*, against two Determinations of the Director of Employment Standards (“the Director”) issued December 12, 2008.
2. Blackhawk was incorporated February 25, 2008. Mr. Hadikin and his spouse, Katie Anne Bisaro, were Director/Officers of Blackhawk. Blackhawk operated a custom motorcycle shop at which Mitchell Van Iderstine worked. On August 18, 2008, Mr. Van Iderstine filed a complaint alleging that Blackhawk had contravened the *Act* in failing to pay him wages.
3. The delegate held a hearing into Mr. Van Iderstine’s complaint on November 25, 2008. Blackhawk was unrepresented.
4. Following the hearing, the delegate determined that Blackhawk had contravened section 18 of the *Employment Standards Act* in failing to pay Mr. Van Iderstine wages and vacation pay. She determined that he was entitled to wages, vacation pay, and interest in the total amount of \$4,452.13. The delegate also imposed a \$500 penalty on Blackhawk for the contravention of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. As Blackhawk had ceased to operate, the delegate simultaneously issued corporate officer Determinations against Mr. Hadikin and Ms. Bisaro.
6. The time period for filing appeals of the Determinations expired January 19, 2009. On January 29, 2009, a delegate of the Director wrote to Mr. Hadikin advising him that the Director would register the Determination in the Supreme Court and commence enforcement proceedings if the funds were not paid by February 9, 2009.
7. Mr. Hadikin filed appeals against both the corporate Determination as well as the Officer/Director Determination on February 10, 2009. The grounds of appeal are that the delegate failed to comply with the principles of natural justice in making the Determination and that new evidence has become available that was not available at the time the Determination was being made. Mr. Hadikin also sought an extension of time in which to file the appeals.

8. Mr. Hadikin applied for a suspension of the Blackhawk Determination pursuant to section 113 of the *Act* pending the outcome of the appeal. On February 13, 2009, the Tribunal Vice Chair advised Mr. Hadikin that a suspension request would be considered if the total amount required to be paid under the Determination was deposited with the Director, noting that under section 113 the Tribunal could decide if a smaller amount could be deposited. She asked Mr. Hadikin to confirm that he had deposited the full amount with the Director or provide reasons why the Tribunal should consider a specified lesser amount.
9. These reasons address only the timeliness of the two appeals and the suspension request.
10. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

## ISSUES

11. Whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.
12. Whether the Tribunal should suspend the Determinations pending the disposition of the appeals.

## FACTS AND ARGUMENT

13. According to the Determination, when the Branch contacted Mr. Hadikin about Mr. Van Iderstine’s complaint, Mr. Hadikin initially stated that the business was not up and running. He advised a delegate of the Director that he only had two employees on contract and anyone else at his shop was there because they wanted to be. After this initial contact, Mr. Hadikin declined to discuss the complaint or participate in any attempts to resolve the dispute. Telephone calls went unreturned and registered mail was returned as “unclaimed” or “refused”. Mr. Hadikin also declined to attend a mediation session.
14. The delegate held a hearing into Mr. Van Iderstine’s complaint on November 25, 2008. The hearing was initially set to be heard on October 21, 2008 at which time both parties were to appear by telephone. Several attempts were made to contact Mr. Hadikin but were unsuccessful. Mr. Van Iderstine sought an adjournment to obtain additional witnesses and the hearing was rescheduled to November 25, 2008. Notices of the rescheduled hearing were sent by registered mail to a number of addresses. One of the notices, sent to a Trail, B.C. address, was acknowledged delivered.
15. The delegate found Mr. Van Iderstine’s unchallenged evidence to be credible and reasonable and issued a Determination in his favour, as noted above. The delegate found that as Mr. Hadikin was an Officer and Director at the time Mr. Van Iderstine’s wages were earned, he was personally liable for up to two months wages. The delegate further determined that because Mr. Hadikin was involved in the day to day operations of the company and present at the time the contraventions of the *Act* occurred, he was also personally liable to pay the administrative penalty.

16. The delegate says that all of the Determinations were mailed to the operating address of the company at an Old Waneta Road address in Trail, B.C., the Registered and Records office and home address of Mr. Hadikin and Ms. Bisaro at a Davidson Road, Castlegar address as well as a Fruitvale address, which is the home of Ms. Bisaro's parents. All mail sent to the Old Waneta Road address was returned to the Director as "moved", while all the rest were returned "unclaimed" or "return to sender". The delegate says that none of the correspondence sent by regular mail was returned.
17. Mr. Hadikin says that the delay in filing the appeals arose from the registered mail being sent to his parents' address and his parents in laws, neither of whom had the "authority" to collect mail for him. He also stated that his "involvement with the military and police force agencies across Canada" did not give him the opportunity to act any sooner than he did.
18. Mr. Hadikin also states that the reason he did not participate in the process leading up to the Determination was because he was "participating in a military event in Ontario" and that he explained this to the delegate. He further asserts that when the delegate asked how he could be contacted in Ontario, he advised her he could not be contacted except in the event of a family emergency.
19. Mr. Hadikin denies that either he or his wife, the other company director, signed for the registered mail and contends the signature is a fraud.
20. The delegate says that the first contact the Director had from Mr. Hadikin after the Determinations were issued was on February 3, 2009 in response to collections letters sent to him at addresses on Old Waneta Trail in Trail and Davidson Road in Castlegar. At that time, Mr. Hadikin advised a delegate of the director that he was considering bankruptcy and moving to Ontario. In a telephone call on February 11, 2009, he advised the delegate that he had sought legal counsel and would be filing appeals.
21. The delegate submits that although Mr. Hadikin says that the reason he did not file his appeals on time was because he was not properly served with the Determinations and that his parents and in laws were not authorized to accept mail on his behalf, the Determinations were sent to the Davidson Road address Mr. Hadikin used when filing the appeal. She further notes that the Davidson Road address is the Registered and Records address for the company as well as the home address for Mr. Hadikin and Ms. Bisaro.
22. The delegate says that section 112 of the *Act* deems service where a Determination is sent by registered mail to the person's last known address. She contends that even if Mr. Hadikin refused to accept the registered mail, the Determinations were deemed served.
23. The delegate notes that the other reason Mr. Hadikin puts forward for not filing an appeal on time was that he was too busy. She says that Mr. Hadikin did not request either an extension of deadlines given to him or an adjournment of the hearing at any time during the complaint resolution process.
24. Finally, the delegate notes that Mr. Hadikin has not put forward any basis for an extension of time to file his appeals, and requests that the application for an extension of time to file the appeals be denied.
25. Mr. Van Iderstine also opposes Mr. Hadikin's application for an extension of time in which to file the appeals, and for the same reasons as the delegate.
26. Mr. Hadikin seeks a suspension of the Determinations pending a disposition of the appeals because the amounts are not "within his personal financial needs".

27. The delegate opposes Mr. Hadikin's application for a suspension of the Determinations. She says that Mr. Hadikin has detailed his precarious financial situation, creating a concern that the Director's ability to collect wages will be seriously impacted. The delegate further notes that Mr. Hadikin stated an intention of moving to Ontario, which would also impact the Director's ability to collect wages.

## ANALYSIS

28. Section 112 of the Act provides that a person served with a Determination may appeal the Determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 15 days of service, if served by registered mail, or 8 days after service, if served personally.
29. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
30. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
31. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
  - (3) the respondent party as well as the director has been made aware of this intention;
  - (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - (5) there is a strong *prima facie* case in favour of the appellant.
32. These criteria are not exhaustive.
33. I am not persuaded that there is a reasonable and credible explanation for Mr. Hadikin's failure to request an appeal within the statutory time limit.
34. Mr. Hadikin does not say when he received the Determination. However, he acknowledged that he received a copy of his corporate officer Determination by regular mail. The record indicates that several registered letters were sent to various addresses the Branch had for Mr. Hadikin, including the Registered and Records office. The Canada Post tracking information indicates that much of it was returned as unclaimed. Other correspondence was sent by regular mail and not returned to the Employment Standards Branch. The collections letter was sent, by regular mail, to the Davidson Road address used by Mr. Hadikin in the filing of the appeals. I find that Mr. Hadikin was served with the Determination before the expiry of the appeal period.

35. I am not persuaded that Mr. Hadikin's preoccupation with other work constitutes a reasonable and credible explanation for his failure to request an appeal within the statutory time limit. Mr. Hadikin had a number of conversations with a delegate and was aware the hearing would be proceeding without him. However, he made no effort to participate, seek an adjournment so he could respond, or follow up with the delegate in any way.
36. There is no evidence that Mr. Hadikin had a genuine, ongoing intention to file an appeal of the Determination until he was notified of the Director's intent to collect on the Determination.
37. I also find that Mr. Van Iderstine and the Director would be prejudiced if an extension were granted. Although the amount owed is not significant, Mr. Hadikin contends that he is contemplating bankruptcy and has filed a suspension application concurrently with his extension application without paying any money into trust pending the disposition of the appeals. The Director is likely to have difficulty collecting on the Determinations, which will only be compounded with further delay.
38. Finally, I am unable to find that there is a *prima facie* case in Mr. Hadikin's favour.
39. Mr. Hadikin's grounds of appeal are that the delegate failed to observe the principles of natural justice, and that evidence has become available that was not available at the time the Determination was being made.
40. Principles of natural justice ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. There appears to be no dispute that Mr. Hadikin was aware of the complaint and given every opportunity to participate in the Director's efforts to resolve it. By his own admission, Mr. Hadikin spoke to a delegate of the Director in Nelson to discuss the complaint. He had many opportunities to resolve the complaint before the hearing. He acknowledged that the delegate called him at the outset of the hearing. I accept that he refused to participate in that hearing. Although Mr. Hadikin asserts that the delegate was biased, he provides absolutely no evidence to support that assertion. I find no *prima facie* basis for this ground of appeal.
41. Mr. Hadikin also asserts that evidence has become available that was not available at the time the Determination was made.
42. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - the evidence must be relevant to a material issue arising from the complaint;
  - the evidence must be credible in the sense that it is reasonably capable of belief; and
  - the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

43. Neither Mr. Hadikin nor Ms Bisaro participated in the hearing, either on their own behalf or on behalf of Blackhawk, despite being given numerous opportunities to do so. The Tribunal has a well established principle that it will not consider new evidence that could have been provided by the employer during the hearing or at the investigation stage (see *Tri-west Tractor Ltd.* BC EST # D268/96 and *Kaiser Stables Ltd.* BC EST # D058/97). Apart from containing unsubstantiated character attacks on Mr. Van Iderstine, the appeal does not disclose what the “new” evidence was or why that evidence was not provided to the delegate before or at the hearing. I am not persuaded that there is a *prima facie* case in support of this ground of appeal.
44. In conclusion, I deny Blackhawk and Mr. Hadikin’s applications to extend the time in which to file the appeals.
45. In light of my decision, I also deny Mr. Hadikin’s application to suspend the Determinations.

### **ORDER**

46. Pursuant to section 109(1)(a) of the *Act*, I deny Mr. Hadikin and Blackhawk’s applications to extend the time for filing their appeals.

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**Carol Roberts**  
**Member**  
**Employment Standards Tribunal**