

An appeal

- by -

Kasden Ventures Ltd. carrying on business as Diner on 93rd  
(“Kasden”)

- 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 L. Roberts

**FILE No.:** 2011A/41

**DATE OF DECISION:** June 10, 2011

## DECISION

### SUBMISSIONS

Steven D. Cope, Barrister	counsel for Kasden Ventures Ltd. carrying on business as Diner on 93rd
Justine Lane	on her own behalf
Robert Joyce	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Kasden Ventures carrying on business as Diner on 93rd (“Kasden”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued December 17, 2010.
2. On March 8, 2010, Justine Lane began working full time as a waitress at a restaurant called ‘Ship to Shore’. Kasden purchased the restaurant in mid-August 2010 and operated it under the name “Diner on 93rd”. Ms. Lane worked until August 16, 2010, and filed a complaint alleging that Kasden contravened the *Act* by terminating her employment because of her pregnancy.
3. Following an investigation by a delegate of the Director, the delegate issued a Determination finding that Kasden had contravened s. 54 of the *Act* in terminating Ms. Lane’s employment because of her pregnancy. The delegate determined that Ms. Lane was entitled to wages and interest in the amount of \$1,611.79. The delegate also imposed a \$500 penalty on Kasden for the contravention, pursuant to s. 29 of the *Regulation*.
4. Kasden argues that the delegate erred in law and that new evidence has become available that was not available at the time the Determination was being made. Kasden also sought a suspension of the Determination.
5. Kasden’s appeal period expired January 24, 2011. Kasden filed its appeal on April 12, 2011, and sought an extension of time in which to do so.
6. These reasons address only the timeliness of Kasden’s appeal and are based on the written submissions of the parties.

### ISSUE

7. 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.

### FACTS AND ARGUMENT

8. The facts are not disputed. After purchasing the restaurant, Kasden’s owner, Mr. Travis, held a staff meeting on August 12, 2010. He advised the employees that he would be closing the restaurant for one week and asked the employees to return to work for him. The restaurant was actually closed until September 16, 2010. Ms. Lane performed some work calculating tips during that time but did not keep track of her time.

9. Ms. Lane was asked to come to work on September 16, 2010. She asked whether or not she could wear something other than her normal white shirt because, as a result of her pregnancy, she had outgrown the one she had. Ms. Lane had a discussion with one of the employees regarding her due date and was told that the manager would be in contact with her. The manager called Ms. Lane about two hours later and told her that she would be issued a Record of Employment (ROE) because Kasden did not need her any longer. When contacted by the delegate, Mr. Travis took the position that Ms. Lane's employment had never been terminated, and that when the manager later called Ms. Lane back again to offer her job back, Ms. Lane declined. Ms. Lane agreed that she had been offered her job back but declined because she felt the relationship had been damaged. She also agreed that she did not seek work elsewhere because she was, at that point, approximately five months pregnant.
10. The delegate found no evidence Ms. Lane had quit her employment. He also found that Kasden had not established that Ms. Lane's pregnancy had nothing to do with the termination of her employment. The delegate therefore determined that Kasden had contravened section 54 of the *Act*.
11. The delegate determined that the date of Ms. Lane's termination was September 16, 2010. The delegate considered the fact that Ms. Lane refused Kasden's offer of employment. He also considered that Ms. Lane felt that the employment relationship was damaged and that she did not seek further employment. He found that even though it was logical for Ms. Lane to believe that she was not employable because of her pregnancy, he noted that she took no steps to mitigate her losses and seek employment.
12. The delegate concluded, in all of the circumstances, that compensation in an amount equal to eight weeks wages, or \$1,600 plus interest, was appropriate.
13. As noted above, the time period for filing an appeal of the Determination expired January 24, 2011.
14. The appeal documents were faxed to the Tribunal on April 12, 2011. Counsel for Kasden says that the employer approached him within the appeal period and that he swore an affidavit in support of the appeal within the time period. He says that, due to an administrative error in his office, the appeal was not filed within the statutory time period. Counsel argues that to "punish" Kasden by not allowing the appeal would be a violation of natural justice.
15. Attached to the appeal documents is an appeal form dated April 12, 2011, a completed Reconsideration Application form dated January 19, 2011, and an affidavit of Sonja Jorgensen, one of Kasden's employees, dated January 11, 2011. In the affidavit, Ms. Jorgensen says that the "reasonable compensation" awarded by the delegate  

does not reflect the fact that the Diner on 93<sup>rd</sup> opened for a rest night on September 23, 2010 and shut down operations on September 29, 2010. It was not open to the public again until October 27, 2010.
16. Kasden submits that Ms. Lane would not have been employed during this period of time in any event and the amount awarded in the Determination does not reflect this fact.
17. On May 9, 2011, Kasden's counsel wrote to the Tribunal seeking an extension of time in which to file an appeal, "if such was not already clear from the appeal documents already filed". Mr. Cope also indicated that he "accepted full responsibility for missing the appeal deadline", stating that the appeal was not filed in time because of an "administrative error in his office". He submits that his client should not suffer "for the prejudice of an error in this office". He contends that the evidence provided on appeal "should have been

before a trier of fact at first instance because it is determinative of the issue in question” and that “natural justice would dictate that the process proceed accordingly notwithstanding the error from this office”.

18. The delegate says that the Director contacted Kasden on February 21, 2011, and was advised that an appeal had been filed. The Director took no action to enforce the Determination at that time. On March 8, 2011, after confirming that no appeal had been filed, the Director commenced collection proceedings and on March 18, 2011, Kasden’s bank submitted full payment.
19. Kasden contacted the Employment Standards Office on March 21, 2011, requesting the Branch’s fax number.
20. The delegate says that the Branch received a fax from Mr. Cope on April 4, 2011, consisting of Ms. Jorgenson’s affidavit and the Reconsideration Application, along with a letter stating “This was previously delivered January 12, 2011, to the best of our knowledge”. The delegate says that he contacted Mr. Cope and advised him that the Tribunal had not received an appeal. The delegate referred Mr. Cope to the Tribunal site as well as the correct appeal form. The delegate says that Mr. Cope advised him that he would contact the Branch no later than April 5, 2011, as to whether an appeal would be filed. The Director did not disburse the funds in anticipation of the late appeal. On April 11, 2011, the Branch advised Mr. Cope that disbursement of the funds held in trust would be paid out the following day. Mr. Cope advised the Branch that he would be filing an appeal.
21. The delegate submits that Kasden not only failed to file an appeal within the required time period, but also failed to take any steps to file an appeal until they were advised that funds would be disbursed. Although the funds had been obtained from Kasden’s account on March 18, 2011, no steps were taken to file the appeal until April 12, 2011.
22. The delegate contends that Kasden has not provided any valid reason why the appeal was not filed on time. Further, he submits, the further delay between the date of garnishment and the date the appeal was actually filed is both unexplained and unreasonable.
23. Finally, the delegate submits that given that Ms. Lane’s employment was terminated September 16, 2010, Kasden’s decision to close the restaurant from September 29, 2010 to October 27, 2010 has no bearing on the amount of compensation awarded. The delegate further submits that this information was available at the time the Determination was being made and does not constitute new evidence.
24. In response, Mr. Cope contends that the Branch was aware of Kasden’s intention to file an appeal by April 4, 2011 when he faxed the Reconsideration Application and affidavit to him. Mr. Cope argues that the delegate’s submission is false and that it demonstrates bias and prejudice towards Kasden. In his reply submission Mr. Cope states that he seeks to “amend (our) appeal to reflect the apparent and real bias on behalf of the delegate of the Director of Employment Standards.”
25. Ms. Lane contends that the “new evidence” is irrelevant to her claim, since Kasden did not know it would be closing at the time it terminated her employment. She opposes the application for an extension of time.

## **ANALYSIS**

26. 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 30 days of service, if served by registered mail, or 21 days after service, if served personally.

27. These time limits are in keeping with section 2(d) of the *Act* which provides that the legislation is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
28. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
29. 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.
30. These criteria are not exhaustive.
31. The appeal was not submitted to the Tribunal until approximately 2.5 months after the statutory appeal deadline.
32. I accept that Kasden had a genuine and *bona fide* intention to file an appeal of the Determination. I accept that Mr. Cope drafted and swore Ms. Jorgenson's affidavit on January 11, 2011, and that he completed a Reconsideration Application form on January 19, 2011. However, I am not persuaded that either Ms. Lane or the Director were made aware of this intention. There is no information that Ms. Lane was ever made aware of Kasden's appeal until she received a copy from the Tribunal. The record indicates that the delegate only became aware of the possibility that Kasden would file an appeal when the delegate initiated contact with Mr. Travis on February 21, 2011, after the appeal deadline had expired.
33. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the time limit. Mr. Cope attributes the late filing to an "administrative error" in his office. However, he offers no explanation as to why the proper form was not filed with the Tribunal shortly after February 21, 2011, when the delegate made contact with Kasden prior to enforcing the Determination, or on March 8, 2011, after Kasden's bank submitted payment pursuant to enforcement proceedings. In my view, if Kasden had a genuine intent to appeal the Determination, either of these two actions ought to have prompted Mr. Cope or Mr. Travis to ascertain the status of the appeal.
34. On April 4, 2011, the delegate gave Mr. Cope advice on where to file the appeal as well as the proper form to use. Despite this advice, Mr. Cope did not submit the correct form to the Tribunal until April 12, 2011. Mr. Cope provides no reasons whatsoever for this additional eight day delay.
35. I find that both the Director and Ms. Lane would be prejudiced if an extension were granted. The Director has taken enforcement proceedings on the Determination and incurred costs associated with doing so. I further note that the Director only took this step after confirming that no appeal of the Determination had been filed, well after the appeal deadline had passed.
36. Finally, I am unable to find that there is a strong *prima facie* case in Kasden's favour. The grounds for appeal are that the Director erred in law and that evidence has become available that was not available at the time the

Determination was being made. Neither of these grounds are met on the appeal submissions. Kasden submits that the delegate did not correctly calculate Ms. Lane's compensation. There is nothing in the appeal submission that suggests that the delegate erred in his interpretation of s. 79(2)(c).

37. Furthermore, while Kasden contends that new evidence has become available, that "new evidence" does not meet the Tribunal's test for new evidence. That new evidence is alleged to be that the restaurant was closed for a period of time after Ms. Lane's employment was terminated.

38. 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.

39. The Tribunal has a well established principle that it will not consider new evidence that could have been provided at the investigation or hearing stage (see *Tri-west Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97).

40. Given that this information was clearly available during the delegate's investigation, it does not constitute "new evidence". Furthermore, it is not clear what bearing this information has on the delegate's determination of Ms. Lane's compensation. I do not find a strong *prima facie* case in Kasden's favor.

41. In his reply submissions, Mr. Copes seeks to "amend" his appeal to include bias as a ground of appeal based on the delegate's response to the appeal. Mr. Cope takes issue with the delegate's comments regarding their interaction on April 4, 2011. The delegate states that he contacted Mr. Cope on April 4, 2011, to advise him that no appeal had been filed with the Tribunal. The delegate says that he referred Mr. Cope to the Tribunal website and the proper appeal form. The delegate further says that Mr. Cope advised him that he would contact the branch no later than April 5, 2011, on whether an appeal would be filed, and the Director stopped disbursement of funds in anticipation of a late appeal.

42. Mr. Cope alleges that these comments demonstrate the delegate's "bias and prejudice" against Kasden. Mr. Cope attached a facsimile from his office to the delegate dated April 4, 2011, and submits that the delegate was aware of Kasden's intention to appeal on that date. He argues that the delegate's submissions are false and that they show "blatant bias and prejudice" towards Kasden. Mr. Cope further submits that the delegate's

bias permeates and pervades the entire fact finding aspect of the hearing. It also calls into question his credibility and as such, his determination is wholly unreliable. That is, a proper appeal cannot be grounded upon tainted facts and determinations.

The basis for this real prejudice to my client is that [the delegate] has made a false submission to the Employment Standards Tribunal on this appeal. This matter should be litigated again *ab initio*. That is, a new hearing *de novo*.

43. I find Mr. Cope's submissions entirely without merit.
44. Kasden did not dispute any of the delegate's factual findings. The sole issue raised in the appeal submissions was the quantum of the award. It is entirely inappropriate to allege the delegate's factual findings are "inappropriate" in reply submissions. In *Renshaw Travel* (BC EST # D050/08), the Tribunal held that it was a contravention of the appeal provisions of the *Act*, the Tribunal's *Rules of Practice and Procedure* as well as the objectives of the *Act* for a party to raise a new issue on appeal for the first time in reply submissions. The Tribunal found that:
- A reply submission is meant to address arguments raised in the submissions of respondents delivered in response to the materials filed by an appellant in support of its appeal. It is not meant to raise new issues which the respondents have not had an opportunity to address in their submissions, and which were not identified as issues on appeal in the material an appellant has filed with the Tribunal in order to perfect its appeal.
45. Mr. Cope alleges that the delegate is "biased" and "prejudiced" against Kasden. Allegations of bias against a decision maker are serious and should not be made speculatively:
- An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound bias for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.))
- To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia (Securities Commission)* (B.C.C.A.) September 28, 1999.)
46. The delegate's submission accurately set out the substance of Mr. Cope's facsimile to him of April 4, 2011. There is nothing whatsoever in the delegate's submission that contradicts this. In my view, the delegate's response to the question of the timeliness of the appeal fell within the proper role of the Director as set out by the Tribunal in *BWI Business World Incorporated* (BC EST # D050/96).
47. There is nothing in the record that supports Mr. Cope's allegations of bias or prejudice. Rather, the record shows that the delegate initiated contact with Kasden after the appeal deadline to inquire into the possibility of an appeal. The Director did not take enforcement proceedings against Kasden after the appeal deadline had expired, as it was entitled to do. Even after Mr. Cope faxed in a wrong appeal form to the Branch, rather than the Tribunal, the Director did not disburse the funds, anticipating the late appeal. In my view, these are not actions of a biased or prejudiced party.
48. I deny Kasden's application.

**ORDER**

49. Pursuant to section 109(1)(a) of the *Act*, I deny Kasden's application to extend the time for filing an appeal.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**