

An appeal

- by -

Robert Allan Cummings a Director or Officer of Imagika Ink Corporation

- 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/54

DATE OF DECISION: June 29, 2011

DECISION

SUBMISSIONS

Robert Allan Cummings	on his own behalf
Ahmad Zamani	on his own behalf
Karin Doucette	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Robert Allan Cummings a Director or Officer of Imagika Ink Corporation pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued March 4, 2011.
2. Alexandra Nicoara and Ahmad Zamani (“the complainants”) filed complaints against Imagika Ink Corporation (“Imagika”), claiming, in Ms. Nicoara’s case, unpaid vacation pay, and in Mr. Zamani’s case, unpaid wages and unpaid vacation pay.
3. The Director’s delegate investigated the complaints, and on September 15, 2010, issued a Determination in favour of the complainants in the total amount of \$5,228.63. The delegate also imposed administrative penalties on Imagika in the amount of \$1,500.00.
4. The Determination was sent to Imagika, with copies to the registered and records office, and to the directors and officers of Imagika. That Determination was not appealed.
5. On June 16, 2010, and again on August 26, 2010, the delegate conducted a search of Imagika’s corporate records and found that Mr. Cummings was listed as an officer (President). The records indicated that Mr. Cummings had ceased being a director as of November 12, 2008. The delegate concluded that as Mr. Cummings was an officer between June 5, 2009, and December 23, 2009, when the complainants’ wages were earned or should have been paid, he was personally liable for up to two months’ unpaid wages for each of the employees and issued a Determination in the total amount of \$5,299.34. As the delegate found no evidence that Mr. Cummings authorized, permitted or acquiesced in Imagika’s contraventions, she concluded that he was not personally liable for the administrative penalty.
6. The date for filing an appeal of the corporate officer/director Determination was 4:30 pm on April 11, 2011. On April 28, 2011, Mr. Cummings filed an appeal of the Determination, contending that the delegate erred in law. Mr. Cummings also sought an extension of time in which to file an appeal.
7. These reasons address only the timeliness of Mr. Cummings’ appeal, and are based on the written submissions of the parties.

ISSUE

8. 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.

ARGUMENT

9. Mr. Cummings submits that the delegate erred in finding him personally responsible for the complainants' unpaid wages. He says that he and a partner established a printing company, Westcoast Imaging Ltd., and built the company over a 6 year period. On November 12, 2008, Mr. Cummings sold his shares in the company and as part of the share purchase agreement, resigned as a Director. Mr. Cummings contends that the new owners, who changed the name of the company to Imagika in March 2009, were responsible for updating the information in the corporate registry. Mr. Cummings says that he did not provide the company with permission to be listed as a Director or an Officer during the time period in question and performed no duties for the corporation during this period.
10. Mr. Cummings says that he did not receive the Determinations that were sent by registered mail on September 15, 2010, and March 4, 2011, and, as such, had no knowledge of the appeal process or appeal expiry dates. He acknowledges receiving copies by regular mail on April 26, 2011, and says that he acted on those "immediately".
11. The Director's delegate says that Mr. Cummings refused delivery of the Determination and responded only after he received correspondence, sent by regular mail, advising him that the Director would be taking steps to enforce the Determination. The delegate notes that the appeal was filed almost three weeks after the appeal deadline had passed and submits that Mr. Cummings has provided no good reason he could not meet the deadline.
12. The delegate says that Mr. Cummings did not communicate his intention to appeal the Determination at any time until he telephoned her on April 20, 2011, after receiving a letter regarding collection action. At that time, the delegate says, Mr. Cummings advised her that it was his policy not to accept registered mail.
13. In a reply submission, Mr. Cummings acknowledges that he refused registered mail delivery of the Determination, as he did not know who the mail was from. He further notes that the appeal was filed closer to two weeks after the appeal period had expired than three.
14. Mr. Cummings contends that he advised the delegate that he was not an officer, shareholder or director of Imagika in an email on March 27, 2010, and in an email dated April 21, 2010, told her that he was not liable for the unpaid wages, statements he repeated in a subsequent telephone call. Mr. Cummings says that he spoke with the delegate on June 21, 2010, regarding his status as an officer and director and that in a June 27, 2010, letter to the delegate, he requested that she advise him by return email "in the event there are any legal proceedings being contemplated by your department". Mr. Cummings asks whether these statements "would cause any conjecture" about his intent to appeal.
15. The delegate acknowledged the Director would suffer no prejudice if the appeal deadline was extended.
16. The delegate submits that Mr. Cummings does not have a strong *prima facie* case on appeal. She says that the corporate registry indicated that he was President of Imagika and that Mr. Cummings has provided no information that he was not an officer during the period in which the wages were earned.
17. In a reply submission, Mr. Cummings asserts that under the Share Purchase Agreement, the new owners of Imagika had a fiduciary duty to update the Corporate Records, a duty they failed to discharge. He submits that there was never any intent on his part or on the part of the new owners that he continue in any capacity other than as a consultant for a period of three to six months after the sale of his shares.

18. In his submission, Mr. Zamani does not appear to suggest that the deadline should not be extended or state how he might be prejudiced by any extension, but expresses concern over the length of time his complaint is taking to be resolved.

ANALYSIS

19. 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.
20. 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*.
21. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
22. 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.
23. These criteria are not exhaustive.
24. There is no dispute that Mr. Cummings filed his appeal 17 days after the appeal period expired.
25. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit.
26. Although Mr. Cummings was in regular contact with the delegate during the investigation, at which time he repeatedly denied any association with Imagika, he did not communicate his intention to appeal the Determination within the appeal period. The fact that Mr. Cummings repeatedly denied liability for the wages does not constitute a genuine, ongoing intention to file an appeal of the Determination. Indeed, Mr. Cummings did not take any steps to appeal the Determination until he was notified of the Director's intent to initiate collection proceedings.
27. Mr. Cummings does not deny that a copy of the Determination was sent to him by registered mail but says that he refused to accept it because he did not know who it was from. I am not persuaded that Mr. Cummings' refusal to accept delivery of the Determination by registered mail constitutes a reasonable and credible explanation for his failure to request an appeal within the statutory time limit. Mr. Cummings had many conversations and email exchanges with the delegate and was aware the investigation was proceeding. There is no evidence he made any effort to follow up with the delegate. Although he asked the

delegate to “advise him” if legal proceedings were contemplated, he nevertheless refused delivery of a package that clearly identified the Employment Standards Branch as the sender.

28. I am unable to find that any of the parties would be prejudiced if an extension were granted. None of the parties suggested they would be prejudiced and I am unable to infer such prejudice on the basis of the record.
29. I find that there is a strong *prima facie* case in Mr. Cummings’ favour.
30. The evidence before the delegate was that Mr. Cummings had sold his shares in Imagika’s predecessor company as of November 12, 2008. Although Mr. Cummings says that he remained involved as a consultant for up to six months thereafter, there was no evidence he was involved with the company in any way when the wages were earned. Mr. Cummings’ resignation as a Director was effective March 3, 2009. Mr. Cummings also provided the delegate with evidence that he had revoked his consent “to act as director or officer of [Westcoast Imaging Ltd.] as of [November 12, 2008].” There was clear evidence before the delegate demonstrating Mr. Cummings’ intention to cease his involvement in the company, although the evidence is less clear as to the extent and duration of his involvement after the company was sold. Mr. Cummings contended that the company was delinquent in filing its corporate records with the Registrar of Companies. Although his name continued to appear in the corporate registry as an officer [President] of Imagika, as the Tribunal has held in previous decisions (see particularly *Michalkovich* (BC EST # D047/01)), corporate searches only raise a rebuttable presumption regarding an individual’s status. The delegate failed to analyze this evidence in light of either the provisions of the *Business Corporations Act* or any of the Tribunal’s decisions regarding the liability of officers and directors under s. 96 of the *Act*.
31. In consideration of all of the factors, I find it appropriate to grant Mr. Cummings’ application to extend the time in which to file an appeal.

ORDER

32. Pursuant to section 109(1)(a) of the *Act*, I allow Mr. Cummings’ application to extend the time for filing an appeal to April 28, 2011.

Carol L. Roberts
Member
Employment Standards Tribunal