

An appeal

- by -

Campoverde Enterprises Ltd. carrying on business as Campoverde Social Club
(“Campoverde”)

- 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.: 2007A/118

DATE OF DECISION: November 20, 2007

DECISION

SUBMISSIONS

Rachel Greenfeld	on behalf of Campoverde Enterprises Ltd.
Ted Mitchell	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Campoverde Enterprises Ltd. carrying on business as Campoverde Social Club (“Campoverde”) pursuant to Section 112 of the *Employment Standards Act (Act)*, against a Determination of the Director of Employment Standards (“the Director”) issued July 25, 2007.
2. Laura Selman filed a complaint against Campoverde claiming unpaid wages. After several attempts to reach Ms. Greenfeld, one of Campoverde’s officers/directors, by telephone, a delegate of the Director sent her a letter by regular and registered mail on April 10, 2007. In the letter, the delegate asked Ms. Greenfeld to contact him by telephone by April 20, 2007, failing which he would schedule a hearing into the complaint. In a telephone conversation with Ms. Greenfeld on May 9, 2007, a Branch officer informed Ms. Greenfeld of the complaint and attempted to mediate the dispute. Ms. Greenfeld stated that she would not pay Ms. Selman and that she could not continue the conversation.
3. On May 10, 2007, the delegate set the hearing into Ms. Selman’s complaint for July 4, 2007 and sent the notice of hearing to Campoverde by registered mail. The delegate also issued a Demand for Employer Records which were to be provided by June 13, 2007. No payroll records or any other documentation were provided at any time. Ms. Greenfeld was also provided with Ms. Selman’s documentation by regular mail. This mail was returned to the Branch with a handwritten notation “return to sender”. Later, after further direct contact between Ms. Greenfeld and a Branch officer, Ms. Greenfeld agreed to forward a cheque payable to Ms. Selman to the Branch in an amount agreed upon by the parties.
4. When the cheque arrived, the Branch officer discovered that Ms. Greenfeld had written a highly offensive notation on the face of the cheque directed at Ms. Selman. On June 21, 2007, the officer returned the cheque to Ms. Greenfeld and asked that she replace it with a bank draft, failing which the hearing would proceed as scheduled. The officer also telephoned Ms. Greenfeld and explained the need for a replacement cheque. The conversation ended when Ms. Greenfeld abruptly hung up the telephone. Ms. Greenfeld did not provide a replacement cheque.
5. At the July 4 hearing, Ms. Selman appeared on her own behalf. When Ms. Greenfeld did not show, a Branch officer contacted her office and advised one of the staff that the hearing would be delayed for one half hour. The officer also advised the staff that Ms. Greenfeld could appear by telephone. Ms. Greenfeld’s office was unable to contact her and the hearing proceeded in her absence. Ms. Greenfeld did not contact the Branch at any time.
6. After considering all the evidence, the delegate issued a Determination in Ms. Selman’s favour. He concluded that she was credible and that her evidence was reliable. In the absence of any evidence from the employer, he determined that she was entitled to wages, vacation pay and interest in the total amount of \$70.30. The delegate also imposed three administrative penalties in the total amount of \$1,500.00, one

for the employer's contravention of section 18(2) (failure to pay all wages owing within 6 days), section 27 (Failure to provide a written wage statement for each pay period) and section 46 of the Regulations (failure to produce proper payroll records).

7. Ms. Greenfeld filed an appeal with the Tribunal on September 28, 2007 alleging that the delegate failed to observe the principles of natural justice in making the Determination.
8. Pursuant to section 112 of the Act, the appeal was to have been filed within 15 days of the date of service (if served by registered mail) or within 8 days of being personally served. Campoverde's appeal period expired September 4, 2007.
9. These reasons address only the timeliness of Campoverde's appeal, and are based on the written submissions of the parties.

ISSUE

10. 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

11. Campoverde's appeal was received by the Tribunal on September 28, 2007. In the appeal documents, Ms. Greenfeld complains about Ms. Selman and says that, after learning that Ms. Selman was pursuing a claim for wages, she delivered a cheque in Ms. Selman's name to the Branch. She says that having not heard back from the Branch, she "considered the matter closed". She contends that it was only in mid September that she received documents in the mail advising her that the appeal period had expired and "that there had been a tribunal". Ms. Greenfeld continues:

To my shock, it appears that the Employment Standards Branch had sent registered mail to Campoverde, knew that we had not received them but waited until it was too late to send regular mail. The piece of mail sent in the regular post was received at the club and resulted in me contacting Employment Standards and issuing this response. Employment Standards then directed me to write to you regarding this issue.

Therefore, it is not an appeal that I would be making had Employment Standards accepted the cheque in the first place or acknowledged the fact that Ms. Selman was not an employee of Campoverde to begin with, merely a contractor.

12. Although the submission is unclear, I infer that Ms. Greenfeld received the Determination at some point in mid September. She does not identify the date she received it, or by what method. In a reply submission dated November 7, 2007, Ms. Greenfeld submits that neither she nor Campoverde received Post Canada delivery notification cards. However, she acknowledged receiving regular mail at a Cypress Avenue address which she indicated was the Campoverde office location until an unspecified date in August, 2007.

13. Ms. Greenfeld also stated that she is the sole remaining Director and that she has not lived at the address identified in the corporate records disclosure since 2004. She submits that, had the delegate sent the information to Campoverde's current address, which did not open until an unspecified date in August 2007, she would have received the information. In summary, she contended that the delegate was sending "notifications" to a closed venue with no post-box, the home address of a person who is no longer a director of Campoverde and an incorrect address of the current director. She says that the only mail Campoverde received was that sent by regular mail to the correct office address. She also says that Campoverde offices moved twice in the summer of 2007.
14. The delegate provided the section 112(5) "record", the registered mail trace sheets and Canada Post "track package" records.
15. The delegate submits that the Determination was served on Campoverde on July 26, 2007, 40 days before the appeal deadline. He says that there is nothing in the appeal documentation that discloses grounds to support the success of any appeal.

THE FACTS AND ANALYSIS

16. 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.
17. 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*.
18. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
19. 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.

These criteria are not exhaustive.

20. I decline to grant Campoverde's request for an extension for the following reasons.
21. I am not persuaded that there is a reasonable and credible explanation for Campoverde's failure to request an appeal within the statutory time limit. The record indicates that the Determination was sent to 1660 Cypress Street on July 26, 2007. That is the address specified as Campoverde's business address in a June 20, 2007 email from Ms. Greenfeld to the Branch. It was also sent to the addresses of the two Officers/Directors of Campoverde and the Registered and Records Office as disclosed in a March 21, 2007 Company Search. The Determination sent to the Registered and Records office was successfully delivered on July 26, 2007. The others were returned to the Branch as unclaimed. The Determination was served on July 26, 2007. Ms. Greenfeld's appeal does not say when the Registered and Records office notified her of the Determination, if at all, or how or when she received the Determination.
22. Even though Ms. Greenfeld asserts that Campoverde moved twice in August, she does not say when either move occurred, or what arrangements she had made for mail to be forwarded. There is also no explanation why, although she was aware Ms. Selman had made a claim for wages and had discussions with a Branch officer regarding the cheque being inadequate, she made no effort to keep the Branch apprised of her current address or that of Campoverde's office. Furthermore, even though the Branch officer had discussions with her staff the morning of the scheduled hearing, Ms. Greenfeld took no steps to either participate in the hearing or inform herself of the outcome of it. In my view, the Determination should not have come as a surprise.
23. Many of Ms. Greenfeld's statements relate to the Determination proper rather than the timeliness of the appeal. While they are not directly relevant to the issue of why the appeal was not filed on time, they are relevant to an assessment of whether Campoverde has a *prima facie* case.
24. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made
25. Campoverde's grounds of appeal are that the delegate failed to observe the principles of natural justice. There is nothing in the appeal submission that supports this ground and in my view, it has absolutely no merit. There is no dispute that Ms. Greenfeld was aware of the complaint and that she had the opportunity to respond to it. She had discussions with officers at the Branch and appeared to have settled it. However, the settlement cheque she provided to the Branch was defamatory and Ms. Selman would not have been able to cash it. Astoundingly, Ms. Greenfeld suggested that she considered the matter "closed" once she sent the cheque. Although the Branch verbally advised her that the cheque, as written, was unacceptable, she took no steps to replace it. She was advised, by telephone and by mail, that the hearing would proceed as scheduled. She failed to provide any documentation in response to a demand for employer records. She did not appear at the hearing even though the hearing was delayed and she was given the opportunity to appear by telephone.
26. I find no *prima facie* case in Campoverde's favor.

ORDER

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

Carol L. Roberts
Member
Employment Standards Tribunal