

An appeal

- by -

Super 96 Hotel and Camp Ltd.  
(“Super 96”)

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2014A/137

**DATE OF DECISION:** December 2, 2014

## DECISION

### SUBMISSIONS

Olga Schaefer

on behalf of Super 96 Hotel and Camp Ltd.

### INTRODUCTION

1. Super 96 Hotel and Camp Ltd. (“Super 96”) appeals, pursuant to section 112(1) of the *Employment Standards Act* (the “*Act*”), a Determination that was issued on August 29, 2014, by a delegate of the Director of Employment Standards (the “delegate”). By way of the Determination, Super 96 was ordered to pay its former employee, Tetyana Megeden (“Megeden”), the sum of \$8,358.70 on account of unpaid wages and section 88 interest. Further, and also by way of the Determination, the delegate levied five separate \$500 monetary penalties against Super 96 under section 98 of the *Act* based on its contraventions of sections 17 (regular payment of wages), 28 (keeping payroll records), 40 (overtime pay), 45 (statutory holiday pay) and 63 (compensation for length of service) of the *Act*. Accordingly, the total amount payable under the Determination is \$10,858.70.
2. At this juncture, I am considering whether this appeal should be summarily dismissed, either in whole or in part, on the basis that it has no reasonable prospect of succeeding (subsection 114(1)(f)). The material before me includes the Determination, the delegate’s “Reasons for the Determination” (the “delegate’s reasons”), and the subsection 112(5) “record” that was before the delegate when he issued the Determination.

### BACKGROUND FACTS

3. Super 96 operates a motel and boarding facility in Wonowon, B.C., a small community located at Mile 101 (hence the community name) on Highway 97 (the “Alaska Highway”) northwest of Fort St. John. According to its website, Super 96 has “120 regular rooms and 32 executive rooms, 60 new VIP rooms, plus consultant’s [*sic*] cabins and wellsites”. Ms. Megeden was formerly employed by Super 96 as a housekeeper from October 21, 2013, to February 26, 2014, when she was dismissed. Her wage was fixed at \$170 per day.
4. Ms. Megeden filed an unpaid wage complaint asserting that she had worked many hours for which she had not been paid. Her complaint was the subject of an electronic hearing conducted by the delegate on August 14, 2014, that appears to have been beset by some difficulties of language that were further exacerbated by the fact that it was not a face to face hearing (see delegate’s reasons, pages R2-R3).
5. In any event, the delegate conducted what would appear to be a fair hearing and ultimately was required to issue a decision based on an evidentiary record that was, at least to a degree, rather unsatisfactory. In the end result, the delegate appears to have done the best he could with the evidence he had before him.
6. The delegate made several findings. First, he determined that Ms. Megeden typically worked 10 hours each day – neither Ms. Megeden nor Super 96 had proper time records (and, insofar as Super 96 is concerned, this failing constitutes a breach of its statutory obligations under section 28) – but had only been paid for 8 hours’ work each day (save for her last day of employment). Second, he determined that Ms. Megeden was entitled to be paid for certain statutory holidays. Third, he concluded that Ms. Megeden has not been terminated for cause (and Super 96 never argued that it had just cause) and thus she was entitled to compensation for length of service. Although Super 96 provided 10 days’ working notice, this was given verbally whereas subsection 63(3) requires *written* notice and, accordingly, any verbal notice actually given did not operate to partially

discharge Super 96's obligation to pay Ms. Megeden compensation for length of service (see e.g., *Zaretski*, BC EST # D214/97).

## REASONS FOR APPEAL & FINDINGS

7. Super 96 filed a timely appeal. None of the three grounds of appeal was checked off on its Appeal Form. There is a 1 ¼ page handwritten note appended to the Appeal Form prepared by Ms. Schaefer (who is Super 96's sole director and officer and appeared on its behalf at the complaint hearing). Unfortunately, this memorandum is rather awkwardly, and in places unintelligibly, worded and on its face does not raise a credible ground of appeal.
8. Giving Ms. Schaefer's memorandum the most liberal and generous interpretation, and consistent with the Tribunal's decision in *Triple S Transmission Inc.*, BC EST # D141/03, it would seem that Super 96 relies on two grounds of appeal – “error of law” and “new evidence” (see subsections 112(1)(a) and(c)). I shall briefly address each ground.
9. Super 96 states that it “disagrees” with the delegate's conclusion that Ms. Megeden worked about 10 hours each day. However, mere disagreement with a finding of fact does not constitute a valid legal basis for challenging that finding as an “error of law”. To rise to the level of an “error of law”, the finding must be one that could not have been reasonably reached in light of the evidence before the factfinder. In this case, however, there was sufficient evidence before the delegate supporting his finding that Ms. Megeden worked about 10 hours each day including evidence from Ms. Schaefer herself, Ms. Gina Schaefer (Ms. Megeden's direct supervisor), as well as another former employee (see delegate's reasons, page R8).
10. To a large degree, Super 96 could have avoided all controversy about Ms. Megeden's actual working hours each day had it maintained a proper time-keeping system and adequate payroll records (the latter being an employer's obligation under the *Act*). The delegate did not simply accept Ms. Megeden's evidence as to her working hours (indeed, he discounted her evidence to a degree) but considered all of the relevant evidence (including the employer's evidence) and, as I said at the outset of these reasons, did the best he could with the evidence he had.
11. Ms. Schaefer, in her memorandum, also raised the “new evidence” ground of appeal. She stated that a certain person who did not testify at the hearing would now be a witness who could confirm that Ms. Megeden only worked 8 hours each day. She also referred to other unnamed witnesses who would, apparently, testify that Ms. Megeden took a number of “breaks” during her workday when she was attending to her own personal affairs rather than her work-related duties. I might note that the first person identified by Ms. Schaefer was a witness that Ms. Megeden attempted to call at the hearing but she was unable to reach her (I assume by telephone) and so she never testified (delegate's reasons, page R4). Given that this witness was going to testify for Ms. Megeden rather than Super 96, I wonder whether her evidence would assist Super 96 – in any event, there is nothing in the material before me from this witness (such as a sworn statement) regarding what her evidence would have been had she testified at the hearing.
12. These witnesses' evidence could have been (and perhaps should have been) presented to the delegate at the complaint hearing. This evidence is not admissible in accordance with the Tribunal's decision in *Davies et al.*, BC EST # D171/03. There is nothing in the material before explaining why these witnesses were not called to testify at the complaint hearing; their “will say” evidence is presented in such a vague and haphazard manner that I cannot say it is cogent and credible; and, most importantly, it appears that this evidence was available when the complaint hearing was conducted.

13. Given the foregoing, I am of the view that this appeal has no reasonable prospect of succeeding and thus must be summarily dismissed.

**ORDER**

14. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed and, in accordance with subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of \$10,858.70 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**