

An appeal

- by -

MAS Capital Inc.  
("MAS")

- 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.:** 2005A/190

**DATE OF DECISION:** December 19, 2005

## DECISION

### SUBMISSIONS

Marie Shields	on behalf of MAS Capital Inc.
Ted Mitchell	on behalf of the Director of Employment Standards
Margarida Nascimiento	on her own behalf

### OVERVIEW

1. This is an appeal by MAS Capital Inc. (“MAS”) pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”).
2. Margarida C. Nascimiento filed a complaint with the Employment Standards Branch alleging that MAS had contravened the *Act* by failing to pay her wages and expenses.
3. A delegate of Director of Employment Standards (“the Director”) held a hearing into the complaint on August 16, 2005. The delegate concluded that Ms. Nascimiento was owed wages, annual vacation pay, statutory holiday pay and compensation for length of service. The delegate determined that Ms. Nascimiento was owed \$2,478.62, including interest. The delegate also imposed four administrative penalties for MAS’s contraventions of the *Act*.
4. The Determination was issued August 26, 2005. The deadline for filing an appeal of the Determination was October 3, 2005. The Tribunal received MAS’s appeal on November 1, 2005.
5. MAS’s grounds of appeal are that the delegate failed to observe the principles of natural justice in making the Determination.

### ISSUE

6. 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.

### THE FACTS AND ARGUMENT

7. As found by the delegate, the facts are as follows. MAS is in the business of providing venture capital to private and public companies. Its sole Director/Officer is Marie Shields. Ms. Nascimiento was previously acquainted with Ms. Shields, and worked for MAS in late 2003.
8. At issue before the delegate was whether Ms. Nascimiento was an employee or an independent contractor, and whether she was owed regular wages and expenses, statutory holiday pay and compensation for length of service.

9. At the August 16, 2005 hearing, the delegate heard evidence from both parties. He concluded, on the evidence, that Ms. Nascimento was an employee. He further determined that she was entitled to wages. He found insufficient evidence to conclude she had not been reimbursed for expenses she had incurred on behalf of the company. The delegate further concluded that Ms. Nascimento was entitled to statutory holiday pay and compensation for length of service, as set out above.
10. MAS's submission consists of handwritten comments on the appeal form and, in essence, is presented in the form of questions and responses to the delegate's conclusions. Ms. Shields, on MAS's behalf, has also written comments and questions in the margins of the Determination which appear to dispute the delegate's findings. There is nothing in the appeal form or in the handwritten comments on the Determination that sets out how the delegate failed to observe the principles of natural justice.
11. Although it is somewhat difficult to discern, it appears that Ms. Shields contends that the Determination was not postmarked until October 21, 2005, and thus, that she could not submit her appeal within the time frame provided. It appears from the documents that MAS is no longer in business. Ms. Shields says she was forced to move out of the premises in August as the building was sold, and that she did not receive any mail until October 26, 2005. In support of the appeal Ms. Shield submitted a photocopy of an envelope which suggests that the Branch mailed Ms. Shields some documents on October 21, 2005. The address on the envelope is not the business address identified in the documents forming the record, but what appears to be a residential address.
12. The delegate takes no position on MAS's request for an extension of time to file the appeal. However, the delegate says that the Determination was mailed by certified mail on August 26, 2005 to the address on the envelope, and that a Morgan Shields signed the acknowledgement receipt on August 29, 2005.
13. Ms. Nascimento contends that the Determination was mailed to Ms. Shield's residence, so the fact that she moved offices is of no consequence.

## ANALYSIS AND DECISION

14. 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
15. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
16. In *Niemisto* (ESTD#099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are 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.

17. These criteria are not exhaustive.
18. I am not persuaded that an extension of time should be granted.
19. Although Ms. Shields says that she never received the Determination until October 25, 2005, Branch records show that the Determination, which was sent by certified mail, was signed for by a Morgan Shields on August 29, 2005. Mr. Shields lives at the same address as Ms. Shields, and has identified himself in appeal documents as taking a senior role in the business development department for MAS.
20. It is unclear what mail Ms. Shields refers to as arriving on October 25, 2005. However, I am unable to conclude that she did not receive the Determination until October 25, 2005.
21. Therefore, I find that Ms. Shields, the sole Director/Officer of MAS, received the Determination on August 29, 2005. MAS filed its appeal almost one month after the date for filing such an appeal had passed. MAS has not provided a reasonable explanation for the delay, other than denying that it was received before the deadline for the appeal, which I do not accept. There is no evidence the Director or Ms. Nascimento were aware of MAS's intention to file such an appeal.
22. Furthermore, I am unable to find that MAS has a strong *prima facie* case even if an extension were allowed.
23. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. MAS was represented at the hearing by Ms. Shields. The record discloses that she had full knowledge of the particulars of Ms. Nascimento's claim before the hearing, and that she had full opportunity to ask questions of Ms. Nascimento and to respond to her claim at the hearing. Based on the comments written in the margins of the Determination, it appears that Ms. Shields disagrees with that Determination, and seeks an opportunity to re-argue her position. The Tribunal has repeatedly stated that an appeal is not an opportunity to have a new hearing.
24. In conclusion, I find that MAS has not met the Tribunal's criteria for extending the time for filing an appeal.

## **ORDER**

25. I decline to grant the application for an extension of time to file an appeal.

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