

An appeal

- by -

Mega Wraps BC Inc.

- 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: Ian Lawson

FILE No.: 2005A/169

DATE OF DECISION: December 19, 2005

DECISION

SUBMISSIONS

Mega Wraps BC Inc.	On their own behalf
Chantal Martel	On behalf of the Director of Employment Standards
Swaraj Bakshi	On his own behalf
Michele Stubbs	On her own behalf

OVERVIEW

1. Determination #133-539 was issued against Mega Wraps BC Inc. (“Mega Wraps”) on August 9, 2005. The Determination was issued by Chantal Martel, a delegate of the Director, and required Mega Wraps to pay regular wages, annual vacation pay and interest to its former employees Swaraj Bakshi (“Bakshi”) and Michele Stubbs (“Stubbs”) in the total amount of \$1,682.61. Administrative penalties in the amount of \$1,500.00 were imposed for Mega Wraps’ contravention of sections 18, 58 and 46 of the *Act*.
2. On September 16, 2005, Mega Wraps delivered an Appeal Form respecting this Determination to the Tribunal pursuant to section 112 of the *Act*. The Determination warned Mega Wraps that any appeal must be delivered to the Tribunal by “4:30 PM on September 16, 2005.” As the Appeal Form was delivered on a Friday evening, it was not acknowledged by the Tribunal until Monday, September 19, 2005, and Mega Wraps has requested an extension of time to file its appeal, pursuant to section 109 of the *Act*. This request is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

3. As found in the Determination, Swaraj Bakshi and Michele Stubbs quit their employment at the Port Coquitlam Mega Wraps restaurant after not being paid wages for the previous two pay periods, and after the telephone had been disconnected and the doors locked on March 17, 2005. These employees believed Mega Wraps was in serious financial difficulty and filed complaints with the Director respecting their unpaid wages. The complaints were investigated by the delegate, who heard from Ali Pouladi, Director of Business Development for Mega Wraps, that he did not dispute that wages and vacation pay were owing to each employee. Mr. Pouladi provided some payroll records and explained that the failure to pay wages was due to the recent move of the head office. After the delegate faxed details of the complaints to Mr. Pouladi, he called the delegate on June 14, 2005 and advised cheques for both employees were in the mail to the delegate’s attention. The following day, the delegate received a fax from Mr. Pouladi, to which was attached copies of two cheques payable to Bakshi and Stubbs and drawn on an account held by Mega Wraps. The cheques, however, were never received by the delegate.
4. The delegate could not reach Mr. Pouladi again by telephone, and her further faxes and registered letters were not responded to. The delegate was then advised by Stubbs, however, that she did receive payment for her regular wages by a money order dated May 5, 2005, but her vacation pay was still outstanding.

Bakshi did not receive any payment from Mega Wraps. The delegate proceeded to issue the Determination.

5. The Appeal Form delivered to the Tribunal by Mega Wraps bears a fax header from “MWBC” dated September 16, 2005, indicating that the first of 25 pages was faxed at 19:36 hours. A further page containing the grounds for appeal was faxed on the same date at 19:58 hours, and bears the handwritten note: “could you please add this page to my Appeal – I faxed it earlier today – thank you.” It therefore appears Mega Wraps missed the appeal deadline by slightly more than three hours following the close of the Tribunal’s registry at 4:30 PM.

ISSUE

6. Whether the time limit for filing Mega Wraps’ appeal ought to be extended.

SUBMISSIONS

7. The entirety of Mega Wraps’ submission on the timeliness issue is as follows:

The appellant brought the appeal in the most expedited and prompt manner. The appeal documents were faxed before the expiry of the deadline. A one page attachment was faxed later on after the deadline. This might have caused a misunderstanding as to the time of delivery. Mega Wraps BC Inc. always intended to appeal the decision. A copy of the Appeal was delivered to the Director of Employment Standards. Extending the appeal deadline will not harm or prejudice the respondent’s case, because the appeal only asks the respondents to deal with the correct party. It wouldn’t be an exaggeration to say that the appeal will succeed if the deadline is extended.

8. Mega Wraps’ Appeal Form claims the Director erred in law, and that Bakshi and Stubbs were not employees of Mega Wraps BC Inc. It is further claimed that Mega Wraps BC Inc. does not fall within the jurisdiction of the *Act*. The grounds for appeal are stated as follows:

1. The director erred in finding the following:

“Mega Wraps BC Inc. operates a number of franchise restaurants throughout the Lower Mainland.”

2. The company against whom the determination was found, (Mega Wraps B.C. Inc.) does not operate a number of franchise restaurants through out the Lower Mainland, and more specifically it is not the owner and did not operate the location subject of this appeal. (2850 Shaughnessey St, Port Coquitlam, BC V3B 4L5).
3. Attached to this page is a Supreme Court reasons for decision that states in paragraph 3 that Mega Wraps BC Inc. has restricted its business to finding persons to whom franchises will be granted.
4. The act defines an “employer” as a person
 - (a) who has or had control or direction of an employee, or
 - (b) who is or was responsible, directly or indirectly, for the employment of an employee;
5. This does not apply to Mega Wraps B.C. Inc.
6. Attached to this page are copies of payroll cheques made to Swaraj Bakshi. They are not issued by Mega Wraps BC Inc.

9. Attached to the Appeal Form is a decision of the Ontario Superior Court of Justice dated October 10, 2004, in an action between Mega Wraps B.C. Inc. and Mega Wraps Holdings Inc. That decision grants an injunction against the latter party, restraining it from breaching its obligations under a Master Agreement between the parties and from interfering with the business of Mega Wraps B.C. Inc. In the decision, Mega Wraps B.C. Inc. is described as an “Area Franchisor” for British Columbia, and Ali Pouladi is identified as one of the company’s principals. The decision further records that “BC Inc. has restricted its business to finding persons to whom franchises will be granted.” The decision notes, however, that due to the poor reputation of Mega Wraps Holdings Inc., Mega Wraps B.C. Inc. was forced to take head leases of restaurant properties because landlords refused to grant leases to Mega Wraps Holdings Inc.
10. Also attached to the Appeal Form are copies of a cheque payable to Bakshi dated November 23, 2004, and a cheque payable to Stubbs dated October 31, 2004. Both cheques are drawn on an account held by “Mega Wraps B.C. Restaurants Inc.” which uses the same mailing address as Mega Wraps.
11. The delegate, Stubbs and Baksi have all filed submissions to the effect that Mega Wraps is the correct party, no better proof of which is Mr. Pouladi’s acknowledgement that wages were owing and subsequent payment to Stubbs. Stubbs attached to her submission some of her pay stubs: one stub issued on December 15, 2004 was indeed from “Mega Wraps BC Restaurants Inc.”, but her pay stubs dated January 15, 2005, January 31, 2005 and February 28, 2005 were all from “Mega Wraps BC Inc.”. As indicated, both Mega Wraps BC Restaurants Inc. and Mega Wraps BC Inc. have the same mailing address. Stubbs also attached her 2004 T4, which again indicates her employer was “Mega Wraps BC Inc.”
12. The delegate submits Mega Wraps has failed to provide a reasonable and credible explanation for failing to file its appeal within the statutory time limit. She also states:
- In the early stages of my investigation, I had numerous telephone conversations with Nema Ferdosi, Director of Operations for Mega Wrap BC Restaurants. Ferdosi advised that he was not the employer. However, because he knew the complainants and knew Pouladi with Mega Wraps BC Inc. he would intervene to try to have these complaints settled.
13. Bakshi submits that he was working for Ali Pouladi, but he identifies “Nema” as the person only in charge of the Port Coquitlam location. Bakshi submits he was not employed by Nema. Bakshi submits Mega Wraps is trying to extend time to file its appeal to avoid paying his wages and then declare bankruptcy. The delegate also submits the further delay by allowing an extension of time to appeal “may significantly prejudice the complainants if Mega Wraps BC Inc. declares bankruptcy.”

ANALYSIS

14. The basis upon which this Tribunal will exercise its discretion under s. 109(1)(b) of the *Act* to extend the time for filing an appeal has been well-developed in decisions issued over the past decade. The chief considerations are as follows (as set out in *Re Niemisto*, BCEST #D099/96 and *Re 4 Seasons Electrical Mechanical Contractors of B.C. Ltd.*, BCEST #D471/98):
1. Whether there is a reasonable and credible explanation for failing to request an appeal within the statutory limit.
 2. Whether there has been an ongoing *bona fide* intention to appeal the determination.
 3. Whether the Director and responding parties have been made aware of this intention.
 4. Whether the responding parties would suffer prejudice if an extension is granted.

5. Whether there is a strong *prima facie* case in favour of the appellant.

15. I am satisfied that Mega Wraps had the requisite intention to appeal, given the delay in delivering its Appeal Form is just a few hours beyond the Tribunal's close of business. Mega Wraps does not give any explanation for this oversight. Where an Appeal Form is delivered so quickly after the appeal deadline, however, I am not prepared to refuse a request for extension of time solely because no explanation is given for the short delay. I find the question of merit to Mega Wraps' intended appeal, and the possible prejudice suffered by the respondents, to be the most important considerations in this case.
16. During the delegate's investigation, Mega Wraps obviously did not deny it owed wages to Bakshi and Stubbs, and it has now paid most of what was owed to Stubbs. Mega Wraps made no argument before the delegate that it was not the correct employer or that the *Act* had no jurisdiction over it. Further, I have difficulty seeing how Mega Wraps could successfully argue it is not the correct employee, when it issued T4s and pay stubs for each employee. Should an extension of time to file its appeal be granted, it seems to me Mega Wraps will have difficulty advancing at the appeal facts and argument that it did not put to the delegate. It is well-established in Tribunal decisions that an appellant may not "sit in the weeds" and present an argument or evidence first to the Tribunal which it ought to have presented to the delegate: *Re Tri-West Tractor Ltd.*, BCEST #D268/96, *Re Kaiser Stables Ltd.*, BCEST #D058/97, *Re J.P. Metal Masters 2000 Inc.*, BCEST #D057/05.
17. Bakshi and Stubbs quit their employment because it appeared to them Mega Wraps was in serious financial difficulty. The telephone to the business was disconnected and its doors were locked during business hours. Neither employee had been paid for approximately one month. Their concern that Mega Wraps was on the verge of bankruptcy seems to me to be legitimate. In these circumstances, it is my view that these former employees face considerable prejudice should the Determination in their favour now be appealed and should many more months go by before the appeal is decided. The discretion to extend time to file an appeal should be exercised sparingly when respondents to the intended appeal may suffer prejudice in the time it takes to resolve the appeal. When this factor is considered together with the lack of merit to Mega Wraps' appeal, I conclude an extension of time to appeal should not be granted in this case.

ORDER

18. Pursuant to section 109(1)(b) of the *Act*, Mega Wraps' request for an extension of time to file this appeal is denied.

Ian Lawson
Member
Employment Standards Tribunal