

An application for suspension

- by -

Right Choice Products Inc. carrying on business as Satya Asha Veggie Food World
("RCP")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE NO.: 2018A/16

DATE OF DECISION: May 8, 2018

DECISION

SUBMISSIONS

Harry Virk	counsel for Right Choice Products Inc. carrying on business as Satya Asha Veggie Food World
Kara Crawford	delegate of the Director of Employment Standards

OVERVIEW

1. On December 28, 2017, the Director of Employment Standards (the “Director”), through his delegate (the “delegate”), issued a determination against Right Choice Products Inc. carrying on business as Satya Asha Veggie Food World (“RCP”) under the *Employment Standards Act* (the “ESA”) in favour of Brijesh Mohan (“Mr. Mohan”) in the total amount of \$35,702.43, representing unpaid regular wages, overtime, statutory holiday pay and annual vacation pay, compensation for false representation, interest and administrative penalties (the “Determination”).
2. RCP has appealed the Determination on all of the available grounds of appeal in section 112(1) of the *ESA*: the Director erred in law; the Director failed to observe principles of natural justice; and evidence has become available that was not available when the Determination was being made.
3. RCP seeks an order pursuant to section 113 of the *ESA* suspending the effect of the Determination.
4. These reasons for decision only address the section 113 request. A decision on the merits of the appeal will be addressed in a separate decision.

THE SUSPENSION APPLICATION

5. Section 113 of the *ESA* states:
 - 113 (1) *A person who appeals a determination may request the tribunal to suspend the effect of the determination.*
 - (2) *The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either*
 - (a) *the total amount, if any, required to be paid under the determination, or*
 - (b) *a smaller amount that the tribunal considers adequate in the circumstances of the appeal.*
6. RCP has requested a suspension of the effect of the Determination. In support of the request, RCP has deposited an amount of \$4,022.23 with the Director, representing a portion of the amount required to be paid under the Determination and a payment to Mr. Mohan for his last pay period. RCP has filed an affidavit from Shailendra Bitton (“Mr. Bitton”), a director and officer of RCP, dated January 31, 2018, in

which he states, among other things, that RCP is unable to arrange for full payment of the amount by the date imposed by the Director, February 5, 2018, and that RCP would need time to arrange funds to pay the full amount of the Determination.

7. The delegate for the Director has filed a response to the request, stating the Director would take no position on the request if the full amount of the Determination were deposited, but objects to the request based on the amount deposited with the Director. The delegate has expressed a concern about the ongoing viability of the business, but in the absence of some evidence supporting that concern, I am unable to consider on it.
8. RCP has filed no reply to the position of the Director.
9. In *Johnathan Miller, a Director or Officer of Abraxis Security Inc.*, BC EST # D090/10, the Tribunal summarized the principles that apply to a section 113 application:
 - The Tribunal has the discretionary authority to issue a suspension order and no party is absolutely entitled to a suspension order on any particular terms and conditions.
 - Section 113 suspension applications should be addressed through a two-stage analysis. At the first stage, the Tribunal should determine whether it should suspend the Determination. If the Tribunal decides that a suspension is warranted, it should then consider what terms and conditions are appropriate.
 - The applicant bears the burden of satisfying the Tribunal that a suspension order is warranted.
 - Suspensions are not granted as a matter of course and, in general, a suspension will not be granted on any terms unless there is some *prima facie* merit to the appeal. In addressing this latter question, the Tribunal must not engage in a detailed analysis of the merits but, rather, should consider whether the grounds of appeal, as advanced, appear to raise a “justiciable issue” in light of the Tribunal’s statutory powers. The Tribunal is not empowered to conduct a hearing *de novo* and thus the Tribunal should not suspend a determination if the appellant’s appeal documents fail to raise, on their face, at least an arguable case that the appeal might succeed on one or more of the three statutory grounds of appeal. Thus, a bare and unparticularized allegation that the delegate failed to observe the principles of natural justice in making the determination does not pass muster.
 - In determining if a suspension should be ordered, the Tribunal may also consider whether the applicant will likely endure unreasonable financial hardship if a suspension order is not issued and whether one or more of the respondent parties will be unreasonably prejudiced if a suspension order is granted.
 - If the Tribunal is satisfied that a suspension order is warranted, the “default” condition is that the full amount of the determination be deposited with the Director of Employment Standards to be held in trust pending the adjudication of the appeal. If the applicant seeks an order that some lesser sum to be deposited, the applicant must demonstrate why that would be appropriate given all the relevant circumstances.

10. I accept the appeal raises, on its face, at least an arguable case that might succeed on one or more of the statutory grounds of appeal.
11. I do not accept, however, that RCP has demonstrated the totality of their appeal is so compelling that the lesser amount proposed to be deposited would be appropriate. I am not persuaded that depositing any amount other than the full amount of the Determination is appropriate. Even accepting what was stated by Mr. Britton in his affidavit, almost three months has passed since it was sworn. In my view, that is ample time to have arranged funds for payment of the amounts ordered to be paid in the Determination.
12. I find any potential financial hardship to RCP by requiring payment of the full amount at this point is offset by the prejudice to Mr. Mohan from a continued uncertainty of obtaining amounts ordered to be paid to him if the lesser amount is accepted.
13. For the above reasons, I am prepared to make an order in the terms set out below.

ORDER

14. Pursuant to section 113(2)(a) of the *ESA*, the Determination is suspended provided RCP, within ten business days after the date of these reasons for decision, deposits with the Director of Employment Standards the full amount of the balance owing under the Determination (\$35,702.43) to be held by the Director of Employment Standards while either, or both, parties are actively pursuing avenues of appeal under the *ESA*.
15. This Order is subject to further order by this Tribunal, by another tribunal acting within jurisdiction respecting the amount being held or by a court of competent jurisdiction.
16. If RCP fails to deposit the monies within ten business days as directed by this Order, the Director of Employment Standards shall be at liberty to enforce the Determination in accordance with the provisions of Part 11 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal