

An application for suspension

- by -

11155844 B.C. Ltd. carrying on business as Chicken World
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

PANEL: Maia Tsurumi

FILE No.: 2021/088

DATE OF DECISION: December 21, 2021

DECISION

SUBMISSIONS

Dallan Poulin	on behalf of 1115844 B.C. Ltd. c.o.b. Chicken World
Premjot Choongh	on her own behalf

OVERVIEW

1. Under sub-section 113(1) of the *Employment Standards Act* (the “ESA”), the appellant 1115844 B.C. Ltd. carrying on business as Chicken World (the “Appellant”) requests suspension of a Determination (the “Determination”) issued by Ramona Muljar, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on September 3, 2021, until its appeal to the Employment Standards Tribunal (the “Tribunal”) is decided. If the suspension is granted, under sub-section 113(2)(b), the Appellant asks to provide the Director with a deposit of \$14,189 instead of \$81,365.85, which is the total amount payable under the Determination.
2. In the Determination, the delegate (the “Delegate”) found the Appellant breached sections 17 (paydays), 18 (payment of wages after termination), 40 (overtime), 45 (statutory holiday pay), 46 (work on a statutory holiday), and 58 (annual vacation pay). There was also accrued interest and three mandatory administrative penalties of \$500 each for the contraventions of sections 17, 40 and 46.
3. These reasons only deal with the Appellant’s suspension application. The merits of the appeal will be dealt with in a separate decision.

ISSUE(S)

4. The first question is whether the suspension be granted. If I grant the suspension, then the question is whether the Appellant must deposit the entire amount to be paid under the Determination or a lesser amount, be that \$14,189, as requested by the Appellant or some other amount.

ARGUMENT(S)

5. The Appellant says the principles in *Johnathan Miller, a Director or Officer of Abraxis Security Inc.*, BCEST #D090/10 apply to suspension applications under section 113:
 - a. the Tribunal has discretionary authority to issue a suspension order and the terms and conditions of such an order;
 - b. there is a two-stage analysis, with the first stage being a decision whether to suspend the Determination and if it does, then deciding the appropriate terms and conditions of the suspension;
 - c. the applicant for a suspension must satisfy the Tribunal that a suspension is warranted;

- d. suspensions are only granted if there is some *prima facie* merit to the appeal, which is not determined by a detailed analysis of the merits but rather whether the grounds of appeal appear to raise at least an arguable case that the appeal might succeed on one of the three statutory grounds of appeal;
 - e. a bare and unparticularized allegation that a delegate failed to observe principles of natural justice does not meet the *prima facie* merit requirement;
 - f. the Tribunal may consider whether the applicant will likely endure unreasonable financial hardship if a suspension order is not granted and whether the respondent will be unreasonably prejudiced if the order is granted; and
 - g. if the Tribunal grants the suspension, the default condition is deposit of the full amount of the Determination with the Director in trust pending adjudication of the appeal but it is open to an applicant to show why deposit of a lesser amount would be appropriate in the circumstances.
6. The Appellant says it has provided particulars of its allegations about whether the Delegate breached principles of natural justice during her investigation and these particulars show there is some *prima facie* merit to its appeal. The Appellant addresses the unreasonable financial hardship factor in relation to the amount it says it should have to deposit with the Director if a suspension is granted.
7. As the Appellant says depositing the full amount payable under the Determination will cause it to suffer unreasonable financial hardship and the only way to not pay the full amount immediately is a suspension, I extrapolate from this that the Appellant is saying it will suffer unreasonable financial hardship if the suspension is not granted.
8. The Appellant further says there is no prejudice to the complainant (the “Respondent”) if the suspension is granted because the delay arising from the appeal is relatively short compared to how long she has been waiting for the Determination. It also submits that because there is no evidence of a risk that the full amount of the Determination will not be paid if confirmed on appeal, there is no prejudice to the Respondent from an inability to pay. These arguments also apply to the Appellant’s request to deposit less than the total payable under the Determination.
9. Regarding monies to be deposited with the Director, the Appellant says it will be prejudiced if it must pay the entire amount to the Director because it will not have access to funds it needs to operate its restaurant business, which has razor thin margins and has been negatively affected by Covid-19. Further, the Appellant submits some financial hardship can be inferred where a small company is subject to a relatively large award, which here is more than five times the Appellant’s average net income over the past two years.
10. The Complainant says she does not think a suspension is needed.
11. The Director did not make any submissions on the suspension application.

ANALYSIS

12. I agree with the Appellant that the relevant principles for deciding a s. 113 suspension application are as described in *Johnathan Miller, a Director or Officer of Abraxis Security Inc.*, BCEST #D090/10 at para. 7.
13. The Appellant's appeal submissions provide particulars of alleged breaches of natural justice and, on their face, the grounds of appeal appear to raise at least an arguable case that the appeal could succeed.
14. I find there would likely be prejudice to the Appellant if a suspension is not granted because requiring it to pay the full amount of the Determination before the appeal is decided likely would negatively impact its business operations, which could be an unnecessary, and therefore unreasonable, financial hardship if it succeeds on appeal. I discuss the specifics of the likely impact on its business further below in relation to my decision on the amount the Appellant must deposit with the Director, pending the outcome of the appeal.
15. I disagree with the Appellant that there can be no prejudice to the Respondent from further delay because the Respondent has already waited so long to have her complaint (the "Complaint") determined. This fact leads to the opposite conclusion. The length of time it has taken to come to a Determination about the Complaint means there would be prejudice, to ask the Complainant to wait any longer for what she is owed. However, I understand the Branch's practice on appeals to the Tribunal is to hold any amounts it receives from payees in trust pending the outcome of the appeal. Therefore, the Respondent would not get paid any sooner were the suspension application dismissed.
16. Regarding a possible inability of the Appellant to pay the Determination, the Respondent will not be unreasonably prejudiced by a suspension itself as the default position is for the payee to deposit the total amount owing under the Determination with the Director. However, the Appellant has asked to deposit a lesser amount. It submits this would not prejudice the Respondent because there is no evidence of an inability to pay. Based on the Appellant's own submissions though I find there is some risk of an inability to pay as the Appellant acknowledges it operates a business with "*razor thin margins that has been negatively affected by and during the COVID-19 pandemic*" (Appeal Form, p. 22, para. 6; see also the witness statement of Adeel Jahangir, Appeal Form, pp. 55-56). Despite this, on balance, I find the Respondent will not be unreasonably prejudiced if I order a smaller deposit than the total owing under the Determination. The Appellant has provided its financial statements for Year End March 2021, which shows it is solvent and has some assets.
17. I conclude a suspension of the Determination is warranted and I grant the suspension. I now turn to the second stage of the analysis under sub-section 113(2) and determine how much the Appellant should pay to the Director pending the outcome of the appeal.
18. While the default position is full payment of the monies owing to the Respondent, the Appellant says it will be prejudiced because of the amount of the Determination relative to its business circumstances. It provided a witness statement and a financial statement for Year End to March 31, 2021, to support its request to deposit only \$14,189. The essence of the Appellant's argument is that immediate payment of the full amount owing under the Determination would use up a substantial portion of business assets required for its operational expenses.

19. Based on Mr. Jahangir's statement and the Appellant's unaudited financial statements for Year End March 31, 2021, I find the Appellant will likely suffer some unreasonable financial hardship if it must pay the total amount of the Determination before the appeal is decided. However, I also find there would be unreasonable prejudice to the Respondent if the Appellant is not required to deposit a significant portion of the monies owing with the Director. I find there is some risk the Appellant will be unable to pay if payment is delayed. This risk arises because of the Appellant's thin margins, competitive business environment, business impacts from COVID-19 and small net income.
20. Given the foregoing, I find a deposit of \$53,510 adequate in the circumstances of this appeal. The Appellant's Year End to March 2021, unaudited financial statements indicate as of March 31, 2021, it had about \$100,000 in cash and over the course of this year should have had \$77,000 in amounts "*Due from related parties*" coming in. Current liabilities as of March 31, 2021 were \$168,244 (without the Canada Emergency Business Account). However, listed under current liabilities was \$77,959 of an amount "*Due to shareholders,*" which I do not consider a business operating expense. Therefore, the business had cash and amounts due from related parties of \$177,328 and current liabilities of \$90,285, as of March 31, 2021, which means there is about \$87,000 of available capital. The deposit of \$53,510 is about 62% of this capital, about 67% of the total amount owing to the Respondent under the Determination and about 66% of the total amount. I conclude this is an appropriate amount to mitigate the risk to the Respondent of the Appellant becoming unable to pay before the appeal is decided, while acknowledging the risk of unreasonable financial hardship to the Appellant if it must deposit the total amount of the Determination with the Director in this same period.

ORDER

21. Pursuant to sub-section 113(2) of the *ESA*, I grant the application to suspend the Determination and pursuant to sub-section 113(2)(b) of the *ESA*, I order the Appellant to deposit \$53,510, with the Director within five business days after the date of these reasons for decision or another date agreed to by the Director. The monies will be held in trust by the Director until this appeal is decided. If the Appellant fails to deposit the monies within five business days as directed by this Order, the Director is at liberty to enforce the Determination in accordance with Part 11 of the *ESA*.

Maia Tsurumi
Member
Employment Standards Tribunal