

An application for suspension

- by -

Kootenai Community Centre Society  
("KCCS")

- 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)

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2011A/170

**DATE OF DECISION:** January 4, 2012

## DECISION

### SUBMISSIONS

Susan Sangha	counsel for Kootenai Community Centre Society
Shari Leyte	on her own behalf
Amanda Clark Welder	on behalf of the Director of Employment Standards

### OVERVIEW

1. Kootenai Community Centre Society (“KCCS”) has appealed a Determination of the Director of Employment Standards (the “Director”) issued October 7, 2011, ordering it to pay \$18,171.73, representing wages and accrued interest owed to a former employee and an administrative penalty in the amount of \$500.00 for a contravention of section 63 of the *Employment Standards Act* (the “*Act*”).
2. KCCS appealed the Determination on November 14, 2011, contending that evidence had become available that was not available at the time the Determination was being made. KCCS also sought a suspension of the Determination pursuant to Section 113 of the *Act* pending the outcome of its appeal.
3. This decision addresses only the suspension request.

### FACTS AND ARGUMENT

4. Ms. Leyte filed a complaint alleging KCCS contravened the *Act* by failing to return her to work following the expiration of her parental leave. The Director’s delegate ultimately concluded that KCCS had contravened section 54 of the *Act*. Although KCCS disagrees with this conclusion, it has appealed only the remedy awarded by the delegate. The delegate concluded that, despite making diligent and reasonable efforts to secure employment, Ms. Leyte had been unable to find a suitable job to apply for. The delegate calculated her award based on her conclusion that it would be reasonable that it would take Ms. Leyte 28 weeks to secure employment.
5. KCCS contends that Ms. Leyte obtained replacement employment in July 2011, after the hearing date but before the Determination was issued. KCCS submits that, based on the assumption that Ms. Leyte obtained replacement employment on July 1, 2011, the calculation of her compensation entitlement would be 16 weeks rather than the 28 weeks found by the delegate, bringing Ms. Leyte’s compensation entitlement from \$18,671.73 to \$10,705.64. In a subsequent submission, KCCS’s counsel indicated that she had erroneously calculated the number of weeks at 16, rather than the actual 15, but nevertheless, deposited the originally calculated amount with the Tribunal.
6. KCCS deposited the amount of \$7,359.75 with the Tribunal, representing a partial amount required to be paid under the Determination, with its appeal. This amount represents what KCCS submits is Ms. Leyte’s entitlement (based on 16 weeks entitlement rather than what it submits should be 15) less statutory deductions.
7. KCCS is a not for profit society. It submits that its funding is limited and that to deposit a greater amount, which it contends is more than necessary to reasonably compensate Ms. Leyte, would create an injustice for it

and the children and families that use its services. KCCS says that given it is unable to obtain the details of Ms. Leyte's current employment, including her actual start date and remuneration, this figure represents KCCS's best efforts to calculate what the compensation award should have been. KCCS says that if the Tribunal concludes that it is required to pay more than that amount, it will make the necessary arrangements to satisfy the Determination.

8. Apart from indicating that the Director did not oppose the suspension request, the Director made no submissions.
9. Ms. Leyte made no submissions, stating that she would wait for the Tribunal's decision on KCCS' appeal.

### ANALYSIS

10. Section 113 of the *Act* provides as follows:
  - (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.
11. The Tribunal will not suspend the effect of a Determination in circumstances where the grounds of appeal are frivolous or have no apparent merit; however it may suspend where the appeal may have some merit. (*Tricom Services Inc.*, BC EST # D420/97; *TNL Paving Ltd.*, BC EST # D397/99)
12. While it is not my function, on a suspension application, to conduct an extensive analysis of the merits of the appeal, I am satisfied that KCCS' appeal has some merit. Clearly, if Ms. Leyte was successful in securing alternative employment by July 2011, the Tribunal may find that the Director's award ought to be calculated differently.
13. Given that neither Ms. Leyte nor the Director has taken a position on the suspension application, I am not persuaded that granting the suspension will be prejudicial to either of them.
14. I have also considered the financial hardship on the parties. KCCS has deposited what it considers to be an accurate calculation of Ms. Leyte's compensation with the Tribunal pending the outcome of the appeal. Given that KCCS is a not for profit society and has given, in effect, an undertaking to deposit any outstanding balance following the Tribunal's decision on the merits, I conclude that a suspension order should be granted.

**ORDER**

15. Pursuant to section 113 of the *Act*, I allow the application to suspend the Determination.

---

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