Employment Standards TRIBUNAL

An appeal

- by -

Maximum Performance Fitness Corp.

("Maximum Performance")

– 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)

and

An application for suspension

- by –

Maximum Performance Fitness Corp.

("Maximum Performance")

– 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: Kenneth Wm. Thornicroft

FILE Nos.: 2014A/132 & 2014A/133

DATE OF DECISION: January 5, 2015

DECISION

SUBMISSIONS

Chris Robinson on behalf of Maximum Performance Fitness Corp.

INTRODUCTION

1. Maximum Performance Fitness Corp. ("Maximum Performance") appeals a Determination that was issued on August 12, 2014, pursuant to which it was ordered to pay $15,350.38 on account of unpaid wages and interest owed to five former employees (the "complainants"). The Determination was issued by a delegate of the Director of Employment Standards (the "delegate") under section 79 of the *Employment Standards Act* (the "*Act*"). Further, and also by way of the Determination, the delegate levied a $500 monetary penalty (see section 98) against Maximum Performance and, accordingly, the total amount payable under the Determination is $15,850.38.

2. In addition to appealing the Determination (BC EST Tribunal File No. 2014A/132), Maximum Performance has applied under section 113 of the *Act* for a suspension of the Determination pending the final adjudication of this appeal (BC EST Tribunal File No. 2013A/133). As I understand the situation, the Director of Employment Standards has garnished $3,300 from the personal account of Maximum Performance's sole director, Mr. Chris Robinson ("Robinson"), and Maximum Performance submits that the Determination should be suspended without any further funds being deposited with the Director.

3. On August 12, 2014, the delegate also issued a determination against Mr. Robinson in his personal capacity under subsection 96(1) of the *Act* (the "Section 96 Determination") in the identical amount as the Determination issued against Maximum Performance, namely, $15,850.38. Subsection 96(1) states that a corporate director "is personally liable for up to 2 months' unpaid wages for each employee" of the corporation. Mr. Robinson has filed an appeal – and has submitted virtually identical documents in support of that appeal – of the Section 96 Determination (and also a section 113 suspension application). I will address both the appeal of the Section 96 Determination and the concurrent application for a suspension of that determination in separate reasons for decision. These reasons address only the appeal and suspension application with respect to the Determination issued against Maximum Performance.

4. The deadline for appealing the Determination was September 19, 2014, and on that date Maximum Performance filed an Appeal Form (with attached reasons for its appeal and other supporting documents) with the Tribunal. Section 112(2)(a) of the *Act* states that an appellant must file not only a "written request specifying the grounds on which the appeal is based" (and the Tribunal has created an Appeal Form for this purpose) but also "a copy of the director's written reasons for the determination".

5. Typically, delegates issue "Reasons for the Determination" concurrently with the Determination; however, that did not occur in this case and no reasons were ever prepared at a later point in time. Although Maximum Performance indicated on its Appeal Form that it had attached the delegate's written reasons for the determination, there were no such reasons attached. Indeed, as previously noted, the delegate never prepared any written reasons. The Determination itself does not contain any information setting out the evidence and arguments that the delegate considered when making the Determination although separate detailed unpaid wage calculations relating to each of the five complainants are attached as schedules to the Determination.

6. Subsections 81(1.1)-(1.3) of the *Act* set out a protocol for a person to obtain written reasons for a determination. A person must make a written request to the Director of Employment Standards within 7 days of being served with the Determination (section 122 of the *Act* contains "deemed service" provisions) and, on receipt of the request, the Director "must provide the person named in the determination with written reasons for the determination".

7. The record before me shows that on October 1, 2014, Mr. Chris Robinson (who is Maximum Performance's sole director) sent an e-mail to the delegate who responded by e-mail dated October 2, 2014. The delegate referred to the following notice set out on the second page of the Determination:

> **A person named in a Determination may make a written request for reasons for the Determination.** Your request must be delivered to an office of the Employment Standards Branch **within seven days of being served** with this Determination. You are deemed to be served eight days after the Determination is mailed, so **your request must be delivered by August 27, 2014.** (**boldface** in original text)

8. The delegate also referred to the September 19, 2014, appeal deadline set out in the Determination (in a text box on the third page). The delegate's October 2 e-mail continued: "Consequently as your request for written reasons was not made within either of the specified dates, I am denying your request to provide you with written reasons for the determination."

9. An appellant is required to obtain from the Director, and file with the Tribunal within the appeal period, written reasons for the Determination (subsection 112(2)(a)(i.1)). Thus, this appeal was not – and still has not been – perfected within the statutory appeal period. While I could possibly extend the appeal period under subsection 109(1)(b) in order to allow further time for this appeal to be perfected, it seems clear that any such order would not produce the desired result since the delegate has clearly indicated that she has no intention of issuing reasons and I am not aware of any provision in the *Act* empowering me to order her to issue written reasons. Further, given that Maximum Performance did not diligently pursue its right to participate in the delegate's investigation – indeed, it appears from the record before me that it resolutely failed to do so – and was dilatory in seeking written reasons under subsection 81(1.1), I would not be inclined to make an order extending the appeal period even if I believed that might persuade the delegate to issue reasons for decision.

10. Although I do not have written reasons for the Determination, I do have unpaid wage calculations relating to each of the five complainants and, in addition, the subsection 112(5) record includes a detailed letter (6 ½ single-spaced pages) dated August 6, 2014, from the delegate to Maximum Performance that summarizes each of the complainant's evidence and unpaid wage claim (this letter was also filed as an attachment to Maximum Performance's Appeal Form).

11. At this juncture, I am considering whether this appeal should be summarily dismissed under one or more of the provisions of subsection 114(1) of the *Act*. In the event that the appeal is summarily dismissed, the Determination will stand. However, if I am of the view that the appeal should not be summarily dismissed, the respondent parties will be notified and asked to provide submissions (and Maximum Performance will be afforded a final right of reply) after which I will issue final reasons for decision.

REASONS FOR APPEAL

12. Maximum Performance operates a fitness gym and offers personal training services out of its facilities in Port Coquitlam and each of the five complainants worked at the gym and claimed they had not been paid in accordance with the *Act* for all of their working hours. The delegate investigated those complaints and, ultimately, determined that each of the five complainants had a valid claim for unpaid wages. The

complainants' various claims range from $900 to nearly $6,100. Maximum Performance appeals each of these awards although it also seemingly acknowledges that it owes some, if not all, of the complainants an unspecified sum of money on account of unpaid wages.

13. Maximum Performance indicated on its Appeal Form that it was appealing the Determination on the grounds that the delegate failed to observe the principles of natural justice in making the Determination and on the ground that evidence has become available that was not available at the time the Determination was being made (subsections 112(1)(b) and (c) of the *Act*). Maximum Performance says that the Determination should be cancelled.

14. Maximum Performance appended a hand printed 15-page memorandum, prepared by Mr. Robinson, to its Appeal Form setting out in detail its reasons for appeal. This memorandum contains a number of assertions in relation to Mr. Robinson's medical condition that do not touch on the issues raised by the unpaid wage complaints. The memorandum also mentions a small claims court action for "defamation" and "breach of contract" that Maximum Performance has apparently filed against one of the complainants. The memorandum asserts that one of the complainants did not "quit" but was fired; however, this entire issue is irrelevant since none of the complainants' unpaid wage claims includes any amount for compensation for length of service (section 63).

15. The memorandum also refers to some enforcement proceedings that have apparently been taken by the Director (see Part 11 of the *Act*). With respect to these enforcement proceedings that have apparently been taken by the Director pursuant to Part 11 of the *Act*, Maximum Performance asks the Tribunal to "set aside" these actions and order that any seized funds be returned to Maximum Performance or otherwise held in trust. The Tribunal does not have any authority to supervise the Director's enforcement proceedings (other than to rule on the validity of any underlying determination pursuant to which enforcement proceedings are taken and, in addition, by issuing a temporary stay of further enforcement proceedings via its authority to issue a section 113 suspension order).

FINDINGS AND ANALYSIS

16. I propose to review each of Maximum Performance's grounds of appeal with a view to determining whether any or all of them have any presumptive merit.

Error of Law

17. Mr. Robinson's memorandum is a somewhat disjointed and disorganized document but, having reviewed it and giving it a large and liberal interpretation, it would appear that Maximum Performance is alleging that the delegate erred in law in finding that all of the complainants were "employees" (and thus entitled to the benefit of the wage protection provisions of the *Act*) rather than, at least in one case, an independent contractor. I note that Maximum Performance did not specifically raise the "error of law" ground (subsection 112(1)(a)) in its Appeal Form but consistent with the Tribunal's decision in *Triple S Transmission Inc.*, BC EST # D141/03, I will nonetheless assess Maximum Performance's assertions on this issue.

18. As recounted in the delegate's August 6, 2014, letter – issued following a July 29, 2014, fact-finding session that Maximum Performance failed to attend – three of the five complainants were working under "independent contractor" arrangements but claimed they were, in fact, employees. The delegate detailed a large body of evidence that, in my view, conclusively showed that these complainants were employees. Among other things, they were subject to significant direction and control (including scheduling and working hours), utilized Maximum Performance's tools and equipment and provided services to its client base, wore

Maximum Performance uniforms and had Maximum Performance business cards, and worked for wages fixed by Maximum Performance. Maximum Performance has not provided any credible explanation, rationale or evidence to support its position that any of the complainants was an independent contractor. This ground of appeal, in my opinion, has no reasonable prospect of succeeding.

Natural Justice

19. This ground of appeal appears to have two components. First, Maximum Performance's principal, Mr. Robinson, says that due to his medical condition he was not in a position to properly address the complainants' unpaid wage claims or otherwise participate in the delegate's investigation. Second, Mr. Robinson says that he "never received any notice of a claim period nor was given any opportunity to respond" [*sic*] to the unpaid wage claim of one of the complainants. Mr. Robinson says that this complainant's "name just suddenly appeared on the August 6 Fact Finding paperwork, therefor Maximum Performance Fitness Corp. was given no opportunity to provide any evidence indisputing [*sic*] this claim again showing prejudice against MPF and unfair justice".

20. With respect to the first of these arguments, I note that Mr. Robinson submitted two very brief notes from personnel associated with the "Pacifica Treatment Centre" which, I understand, is an addiction treatment facility. The first, under the signature of a person identified as a "counsellor" with the Centre confirms that Mr. Robinson "was admitted into the program on August 15, 2014" and the second handwritten single page note, apparently under the signature of a physician, states that "during July 2014" Mr. Robinson "was experiencing severe symptoms and was impaired in terms of judgment and executive function".

21. The first note shows that Mr. Robinson was admitted to the treatment program only after the Determination was issued. The second very cursory note falls well short of the requirements relating to an expert report under section 10 of the *Evidence Act* and, in addition, I note that the physician does not indicate if he had examined Mr. Robinson in July 2014 in order to formulate his opinion. Indeed, the report, brief as it is, contains absolutely no factual recitation that would support the opinion expressed. I give this report little, if any, probative value.

22. The record before me includes several e-mails and other communications from Mr. Robinson during the relevant time frame and these communications show that he was lucid and attending to the business affairs of Maximum Performance. For example, Mr. Robinson prepared a detailed submission, dated March 25, 2014, relating to an employment insurance claim of one of the complainants. The record also includes several communications from Maximum Performance's legal counsel and, if Mr. Robinson was unable to attend to the issues relating to the delegate's investigation, he certainly could have arranged for legal counsel to do so. I note that in a letter dated June 11, 2014 (and in several other e-mail communications), Mr. Robinson indicated to the Employment Standards Branch that Maximum Performance would be represented by legal counsel. Overall, the record leaves me with the clear impression that Mr. Robinson was not incapacitated but, rather, was determined to refuse to participate in the delegate's investigative process and simply wanted to delay the matter indefinitely.

23. With respect to the second "natural justice" allegation relating to the "surprise complaint", I note that this complainant filed his complaint on July 30, 2014. Mr. Robinson must have known prior to this date that this complainant had an unpaid wage claim since Maximum Performance issued him at least one "NSF" cheque (under Mr. Robinson's signature). This complaint was discussed at the July 29, 2014, fact finding meeting that Mr. Robinson (or anyone else on behalf of Maximum Performance) refused to attend despite being given ample written notice of the meeting (about three weeks). On July 9, 2014, Mr. Robinson e-mailed the delegate confirming that Maximum Performance and its legal counsel would be attending the meeting with

substantial evidence to prove the complaints were "fraudulent". The record shows that two days before the meeting, Mr. Robinson sought an adjournment and on July 28, 2014, the delegate refused the adjournment. On July 30, 2014, and July 31, 2014, the delegate again wrote to Mr. Robinson and advised him to arrange for another person to deal with the matter if he was unable to do so. On August 6, 2014, the delegate sent out a detailed letter summarizing the evidence received from all five complainants at the fact finding meeting. The delegate specifically invited Maximum Performance to respond: "It is important that I hear your response to these allegations. Failure to respond will result in a decision being made based on the information already on file provided by you and the information collected at the fact finding meeting from the complainants." The delegate's August 6 letter included a detailed review of each of the complainant's individual unpaid wage claims and concluded with the following request:

> If you do not agree with the complainants' positions as stated above and wish to dispute the above allegations, please respond by **no later than 4:00 p.m. Monday [*sic*] August 12, 2014.**
>
> **Failure to respond will result in a determination being issued based on the information available in the file. If you are found to be in contravention of the Act, mandatory penalties will be assessed at $500 per contravention.**
>
> Your time and attention to this matter are appreciated. I look forward to hearing from you.
>
> (**boldface** and **underlining** in original text)

24. Maximum Performance did not provide any sort of response and, accordingly, the Determination was subsequently issued.

25. Thus, as can be seen from the immediately preceding paragraph, this one complaint should not have come as a complete surprise to Maximum Performance and, prior to the issuance of the Determination, Maximum Performance was afforded every reasonable opportunity (consistent with section 77 of the *Act*) to provide its evidence and argument to the delegate with respect to not only this complaint, but all five complaints. Maximum Performance chose not to avail itself of the opportunity it was given to provide a complete submission to the delegate with respect to the various complaints filed against it.

26. It follows from the foregoing discussion that I am not persuaded that Maximum Performance has a reasonable prospect of succeeding on its argument that the Determination should be cancelled because the delegate failed to observe the principles of natural justice in making it.

New Evidence

27. New evidence is admissible on appeal under subsection 112(1)(c) of the *Act* – the Tribunal can vary or set aside a determination on the basis of evidence that "has become available that was not available at the time the determination was being made". There are strict criteria governing this ground of appeal that were originally explicated in *Davies et al.*, BC EST # D171/03. The proffered evidence must meet the following benchmarks:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

28. Maximum Performance appended a large number of documents to its Appeal Form but did not, in its accompanying memorandum, attempt to identify these documents in anything other than a general way and certainly did not provide any rationale or explanation as to why any of the documents would be admissible in light of the above criteria. Virtually all of the documents (excepting to the two notes from the Pacifica Treatment Centre, discussed above) predate the issuance of the Determination (these documents consist of payroll documents, time records and copies of cheques) and could have been provided to the delegate had Maximum Performance chosen to participate in a meaningful way in the delegate's investigation. Further, Maximum Performance has not adequately explained how or why these documents are relevant in terms of the complainants' unpaid wage claims. Maximum Performance has not explained why these documents have significant probative value.

29. In my view, none of the documents submitted meet the criteria for admissibility set out in *Davies et al.*, *supra*. That being the case, this ground of appeal has no reasonable prospect of success.

Summary

30. This appeal was not perfected within the applicable appeal period inasmuch as written reasons for the Determination were not filed due to the fact that Maximum Performance failed to obtain the delegate's reasons in accordance with subsections 81(1.1)-(1.3). I am not inclined to extend the appeal period in order to allow Maximum Performance to perfect its appeal because, firstly, there are no legitimate grounds for extending the appeal period and, secondly, any such order would have little practical import. Under subsection 114(1)(h) of the *Act*, an appeal may be summarily dismissed if the appellant has not perfected its appeal within the applicable appeal period. The catalyst for this appeal appears to have been the fact that the Director took execution proceedings and, at least to a degree, this appeal appears to have been filed in an attempt to quash an executed garnishing order and to forestall any further execution proceedings. I note that the record shows that the delegate sent the Determination by registered mail to the registered and records office of Maximum Performance as well as to two separate addresses for Mr. Robinson and that all three envelopes were returned to the Employment Standards Branch as "unclaimed". The appeal is based on two grounds – "natural justice" and "new evidence" – and, in my view, neither ground has any presumptive merit. Further, if one were to take the view that Maximum Performance's appeal documents also raise an "error of law" issue, I find that ground to be similarly without any presumptive merit. In light of these considerations, I find that his appeal must be summarily dismissed under subsection 114(1) of the *Act*.

31. Since this appeal is being summarily dismissed, the section 113 application for a suspension of the Determination is moot.

ORDER

32. Pursuant to subsections 114(1)(b), (d), (e), (f) and (h) of the *Act*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of $15,850.38 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal