

An appeal

- by -

Mickey Transport Ltd.
("MTL")

- 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: David B. Stevenson

FILE No.: 2009A/143

DATE OF DECISION: January 5, 2010

DECISION

SUBMISSIONS

Gerhard A. Pyper	Counsel for Mickey Transport Ltd.
Jagtar S. Sandhu	on his own behalf
Jim Dunne	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses a request by Mickey Transport Ltd. (“MTL”) under section 113 of the *Employment Standards Act* (the “*Act*”) to suspend the effect of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 16, 2009 by depositing the amount of \$2000.00.
2. The Determination was made by the Director on a complaint filed by Jagtar S. Sandhu (“Mr. Sandhu”), who alleged MTL had contravened the *Act* by failing to pay wages. The Determination found that MTL had contravened Part 3, sections 17 and 18 and Part 7, section 58 of the *Act* and ordered MTL to pay Mr. Sandhu an amount of \$5,049.48, an amount which included wages and interest.
3. The Director also imposed administrative penalties on MTL under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00.
4. The total amount of the Determination is \$6,049.48. MTL has appealed the Determination. The request to pay a reduced amount is contained in the appeal submission and states:

With reference to paragraph three of the Employment Standards Appeal Form, the Appellant is unable to attain all of the funds at this time and requests a reduction of the amount to be deposited with the Director to \$2000.00.

5. MTL delivered a cheque in that amount to the Tribunal, which the Tribunal has passed on to the Director to hold pending a decision on the appeal.
6. The Director and Mr. Sandhu oppose the section 113 application. The Director says the full amount of the Determination should be deposited “if the employer wishes to appeal”. I note at this point that there is no requirement on a person filing an appeal under section 112 to deposit any amount of the Determination as a precondition to making an appeal. The Director says, alternatively, that the amount of wages owing should be deposited with the Director in order to “suspend the collection proceedings under the *Act*”. Mr. Sandhu generally opposes the request.

ANALYSIS

7. Section 113 of the *Act* reads:

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 full 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.*

8. There are two questions involved in a request under section 113. The first question is whether the Tribunal should suspend the effect of the Determination. The applicant has the burden of showing a suspension is warranted. The second question is whether, if a suspension is appropriate, on what terms it should be granted.
9. On the first question, the Tribunal will not suspend a Determination pending appeal as a matter of course. The Tribunal has indicated it is prepared to order a suspension of the Determination where the appeal “might have some merit”: *Tricom Services Inc.* BC EST # D420/97; *TNL Paving Ltd.*, BC EST # D397/99. It is not, however, a function of the Tribunal considering a request under Section 113 to conduct an extensive analysis of the merits of the appeal. It is sufficient that the Tribunal satisfies itself that the appeal, or even parts of it, may have some merit.
10. In considering the suspension request, the Tribunal has also considered other factors, such as the financial hardship on the applicant of allowing the Director to enforce the amount of the Determination and the potential prejudice to both the applicant and the employees in denying or granting the requested suspension.
11. The suspension request is grounded in the assertion that MTL “has been unable to attain all the funds at this time”. That assertion would not, on its own, justify ignoring the clear legislative preference that an order suspending the effect of a Determination will not be granted as a matter of course. The assertion implies that payment of the full amount of the Determination would impose some financial hardship on MTL, but if that is the implication, there is no evidence to support it. The appeal does, however, raise a considerable number of questions relating to its correctness and, while not predetermining the outcome of the appeal, I am not at this stage prepared to conclude all of the arguments raised are without merit.
12. Accordingly, there is a basis for granting a suspension. The second question will now be addressed.
13. On the second question, the Tribunal is limited in its authority under section 113 by the conditions set out in subsection 2 (a) and (b); unless the full amount of the Determination has been deposited with the Director, or circumstances are established that would justify the Tribunal accepting some lesser amount may be deposited, the Tribunal may not exercise its discretion under Section 113.
14. The default position is to require the entire amount of the Determination to be deposited with the Director. If the deposit of a smaller amount is sought, there is a burden on the applicant to establish the circumstances that would justify that result.
15. Some of the factors considered on the first question, such as financial ability and prejudice, also bear on the second. As indicated above, MTL has not demonstrated there are any factors involved in a consideration of the second question that would justify paying only \$2000.00 of the amount of the Determination and there is otherwise no basis for deviating from the default position expressed in subsection 113(2)(a). The full amount of the Determination is required to be paid by MTL.

ORDER

16. The suspension request under section 113 of the *Act* is allowed. Pursuant to section 113(2)(a) of the *Act*, the Determination now under appeal is suspended provided the appellant deposits with the Director, within one week of receipt of this decision, or such longer period as may be agreed to in writing by the Director, the sum of \$6,049.48 (six thousand, forty-nine dollars and forty-eight cents). In the event that the monies are not posted as ordered, the Director shall be at liberty to seek to enforce the Determination in accordance with the provisions of Part 11 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal