

An application for suspension

- by -

G.W. Cox & Sons Logging Ltd.
("Cox & Sons")

- 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: Shafik Bhalloo

FILE No.: 2011A/180

DATE OF DECISION: January 27, 2012

ANALYSIS

9. Section 113 of the *Act* provides as follows:

Director's determination may be suspended

- 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.

10. The Tribunal does not grant an application by a party for a suspension of a determination pending an appeal as a matter of course. The Tribunal will only grant such an application where the appeal may have some merit. Having said this, it is not the function of the Tribunal, on such an application, to conduct an in-depth or extensive analysis of the merits of the appeal. It is sufficient for the Tribunal to exercise its discretion under section 113 and grant a suspension where the Tribunal is satisfied that the appeal may have some merit. This was amply set out in the very instructive reasons of the Tribunal in *Re: Tricom Services Inc.*, BC EST # D420/97:

I am of the view that on a request for a suspension the Tribunal should not conduct an in-depth review of the merits of the appeal. To do so, in effect, creates a two-step appeal process on the merits and blends a 'preliminary issue' namely, the suspension request, with the substantive issues that, in my opinion, ought to be dealt with exclusively in the appeal itself. It is enough at the suspension request stage for the Tribunal to simply satisfy itself that the appeal might have some merit; to put the matter another way, the Tribunal should not suspend a Determination when the appeal is obviously frivolous or otherwise without merit.

11. In the case at hand, Cox & Sons, in its appeal, has adduced evidence on a material issue in the Delegate's investigation of Mr. Hill's complaint, namely, the status of Mr. Hill – that is, whether Mr. Hill was a manager. While this evidence may raise concerns with respect to the correctness of the Director's decision in the Determination, there is indubitably the issue of the timing of the evidence adduced by Cox & Sons and their participation or lack thereof in the investigation. Having said this, I am very mindful of my role at this stage in the suspension application. That is, it is not my role to conduct an in-depth review of the merits of the appeal. Having said this, based on the arguments and evidence of Cox & Sons adduced in the appeal, I am not prepared to conclude that Cox & Sons' appeal is without any merit or frivolous. In the circumstances, I find that there is a basis for granting a suspension of the Determination.
12. I also note that section 113(2) of the *Act* allows the Tribunal to suspend a determination where the applicant for suspension deposits with the Director either the full amount of the Determination or a smaller amount the Tribunal considers adequate. In this case, as indicated previously, counsel for Cox & Sons has confirmed that his client has paid into his trust account sufficient sums to pay the Determination in favour of Mr. Hill, and he has instructions from his client to make that payment to the Director in the event that Cox & Sons is unsuccessful in its appeal. I note that the Director finds this arrangement satisfactory and is not opposed to a suspension of the Determination. I also reiterate that Mr. Hill has not taken a position on the suspension application, and I am not persuaded that granting a suspension, in these circumstances, would be prejudicial to him. However, I do not want my decision to grant a suspension of the Determination pending the appeal,

at all, to be taken as predetermining the outcome of the appeal on its merits. That is for the Tribunal reviewing, in-depth, the merits of the appeal to decide.

ORDER

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

Shafik Bhalloo
Member
Employment Standards Tribunal