

An application for suspension

- by -

The Piping Industry Apprenticeship Board
(“PIAB”)

- 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.: 2012A/151

DATE OF DECISION: January 30, 2013

PIAB no longer operates under its legal name of The Piping Industry Apprenticeship Board and in support of this contention, he sets out the following reasons which I have reproduced verbatim:

1. Firstly, the PIAB is and continues to be, the legal employer of all of its employees employed for the purposes of operating its Training Schools. The PIAB operates two schools in British Columbia. One on Annacis Island where the Complainant, Mr. Marshall, was employed as an instructor and the other in Kitimat, B.C. The PIAB employs a total of 15 instructors at its two Schools and also employs an additional 11 office/administrative personnel and management.
2. The PIAB is incorporated as a Society under the *Society Act* of British Columbia. We attach a current search of the PIAB of the B.C. Registry Services as **Appendix 1**, showing that the PIAB is active and in good standing as a Society. The PIAB was incorporated as a Society on September 3, 1988 and has its origin based upon the Collective Agreement language negotiated between the United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 170 and Construction Labour Relations Association contained in the Standard Industrial Commercial Institutional Collective Agreement (the “Collective Agreement”). The PIAB must operate as a Society as this legal structure has been agreed to as a contractual term between the UA Local 170 and the CLRA. The Society Board of Directors is also mandated by the Collective Agreement to be a joint Board of Union and Employer Directors.
3. The PIAB is funded by hourly contributions remitted on behalf of thousands of employees working for industry employers and the Collective Agreement and has a substantial operating budget. Its financial statements are confidential pursuant to the provisions of the *Society Act*, however, if the Employment Standards Tribunal wishes to obtain verification of the PIAB’s financial standing, we would be pleased to provide same by affidavit of a Director filed on a confidential basis.
4. The PIAB makes all Canada Revenue Agency remittances on behalf of its employees under CRA Payroll Acct No. 10784-7048-RP001.
5. All the PIAB’s employment contracts with its instructors are between the PIAB as a registered and incorporated society and the individual Instructor. The PIAB was Mr. Marshall’s employer prior to his termination.
6. The PIAB, as an employer, is bound to a separate Collective Agreement covering its office and clerical employees with the Canadian Office and Professional Employees Union (“COPE”).
7. The PIAB has substantial assets, which, if necessary, can be verified by an affidavit of a Director filed on a confidential basis.
8. On November 21, 2011, the PIAB registered the operating business name: ‘UA Piping Industry College of B.C.’, as a proprietorship under BC Registry Services, name approval number NR3059889. A true copy of the filed and registered statement of registration of the PIAB to this effect is attached as **Appendix 2**. The registration of the business name UA Piping Industry College of B.C. has had no legal effect on the status of the PIAB as an incorporated Society under the *Society Act*, or as the employer, of its employees.
9. The PIAB is continuing to carry on business as a Society and continues to be the legal employer of all its employees employed in its line of business.

ANALYSIS

7. Section 113 of the *Act* and Rule 31 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) delineate the authority of the Tribunal to consider suspension requests and the governing requirements in such applications.

8. Section 113 of the *Act* provides:

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.

9. Rule 31 of the *Rules* provides:

Rule 31 Request to Suspend a Determination

Requirements for application to suspend a determination

- (1) In order to request a suspension under s. 113 of the *Act* an appellant or applicant must, in writing, at the same time as filing the appeal or application for reconsideration:
- (a) state the reasons for the request to suspend the determination;
 - (b) state the amount to be deposited with the Director; and
 - (c) if that amount is less than the amount required to be paid by the Director, state the reasons why depositing a lesser amount would be adequate in the circumstances.

Notice of suspension request

- (2) The Tribunal may notify the other parties of the request to suspend the determination and set a time limit for responding to the request.

Suspension decision

- (3) If the request is not otherwise resolved, the Tribunal will advise the parties in writing of its decision on the request.

10. As indicated by the Tribunal in *Patara Holdings Ltd. carrying on business as Canadian Lodge* (BC EST # D093/09), when considering an application for a suspension under section 113 of the *Act* (and I would add Rule 31 of the *Rules*), the Tribunal examines two questions, namely, whether the Tribunal should suspend the effect of the determination, and if so, on what terms should it grant the suspension.
11. With respect to the first question, it should be noted that the Tribunal does not grant a suspension of a determination pending an appeal as a matter of course. Instead, it will only grant such an application when the Tribunal is satisfied that 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. This was made clear in the following instructive comments of the Tribunal in *Re: Tricom Services Inc.*, BC EST # D420/97:

I am of the view that on a request for 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.

12. In addition, in considering the suspension request, the Tribunal may also consider other factors, including 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 employee in denying or granting the requested suspension.
13. With respect to the second question, as indicated by the Tribunal in *Patara Holdings Ltd., supra*, the Tribunal is limited in its authority under section 113 by the conditions set out in subsection 2 (a) and (b) and, I would add to that, Rule 31 of the *Rules*. That is, 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 to suspend the determination under section 113 of the *Act* or Rule 31 of the *Rules*.
14. It should also be noted that the Tribunal in *Patara, supra*, stated, and I agree, that the default position is to require the entire amount of the Determination to be deposited with the Director. However, if the deposit of a smaller amount is sought then there is a concomitant burden on the applicant to establish the circumstances that would justify the proposed smaller amount. The Tribunal in *Patara* also added that some of the factors considered on the first question, such as financial ability and prejudice, also bear on the second question.
15. Having said this, I note the appeal of PIAB is grounded in the error of law, as well as the new evidence, grounds of appeal in sections 112(1)(a) and (c) of the *Act*. With respect to the error of law ground of appeal, PIAB argues that the delegate erred in law in interpreting and applying the test for just cause for dismissal under section 63(3)(c) of the *Act* to the evidence before her. PIAB also contends under the same appeal ground that the delegate erred in law in failing to find Mr. Marshall was dismissed by PIAB for just cause, as a result of his own wilful misconduct and breach of the Last Chance Agreement dated October 28, 2011, between PIAB and himself.
16. With respect to the new evidence ground of appeal, PIAB contends that the Tribunal should consider the decision of the Board of Referees, Employment Insurance issued on November 6, 2012, which found Mr. Marshall lost his employment by reason of his own misconduct under section 30(2) of the *Employment Insurance Act*, S.C. 1996, c. 23.
17. Having reviewed PIAB's submissions on both the error of law and the new evidence grounds of appeal, I find that the appeal raises a number of questions relating to the Determination and its correctness. While I am not intending to predetermine the outcome of the appeal, I am not prepared to conclude that *all* of the arguments made by PIAB are devoid of merit. Having said this, and taking into consideration that neither the Director nor Mr. Marshall opposes a suspension of the Determination, I find that there is a basis for granting a suspension in this case.
18. However, I note that the Director is seeking PIAB to deposit about one-half of the total amount of the Determination with the Director as a precondition to a suspension. PIAB, on the other hand, seeks leave to deposit the sum of \$500.00 as adequate security pending the adjudication of the appeal. PIAB has not made any submissions suggesting financial hardship. To the contrary, PIAB submits that it is "a stable educational institution" and there is "no risk" that it will be "unable to financially meet the requirements of the Determination if its appeal is dismissed". I note that the Director's precondition for suspension is based on the Director's view that PIAB no longer operates under its legal name, and the Director has no record of any assets of PIAB.

Against that I note the submissions of PIAB's counsel (set out verbatim earlier in this decision), which I find convincing and lead me to conclude that the Director may be mistaken in taking the position that PIAB no longer operates under the legal name of The Piping Industry Apprenticeship Board. Further, with respect to the Director's expressed concern about not finding a record of assets for PIAB, counsel for PIAB indicates that PIAB is amenable to filing an affidavit of a director verifying that it has substantial assets.

19. Having said this, pursuant to section 113(2)(b) of the *Act* and Rule 31(1)(c) of the *Rules*, the onus is on the applicant, PIAB here, seeking to deposit an amount less than the amount required to be paid by the Director to state the reasons why depositing a lesser amount would be adequate in these circumstances. In this case, while I am satisfied PIAB has established a basis to convince this Tribunal to grant a suspension, I am not satisfied that PIAB has demonstrated why a payment of 5% of the amount of the Determination in trust pending the adjudication of the appeal is justified in this case. I note that there is no evidence suggesting financial hardship on the part of PIAB or any prejudice in depositing the amount proposed by the Director. To the contrary, PIAB indicates that it is financially very stable and if it loses its appeal, there is no risk that it will be unable to financially meet the requirements of the Determination. In the circumstances I find that the Director's precondition to a suspension, namely, that PIAB deposit in trust with the Director \$5,000 as a precondition to a suspension, is reasonable in the circumstances and I so order.

ORDER

20. Pursuant to section 113 of the *Act* and Rule 31 of the *Rules*, I allow the application to suspend the Determination. Pursuant to section 113(2)(b) of the *Act* and Rule 31(1)(c) of the *Rules*, the Determination under appeal is suspended provided The Piping Industry Apprenticeship Board deposits with the Director, by February 6, 2013, or such longer period as may be agreed to in writing by the Director, the sum of \$5,000.00. In the event that the said amount is not deposited 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*.

Shafik Bhalloo
Member
Employment Standards Tribunal