

An application for suspension

- by -

North Delta Real Hot Yoga Ltd. carrying on business as Bikram Yoga Delta
("Hot Yoga")

- 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/190

DATE OF DECISION: February 13, 2012

DECISION

SUBMISSIONS

Fred Wynne	counsel for North Delta Real Hot Yoga Ltd. carrying on business as Bikram Yoga Delta
Sukhdev Pangalia	on his own behalf
Chantal Martel	on behalf of the Director of Employment Standards

OVERVIEW

1. North Delta Real Hot Yoga Ltd. carrying on business as Bikram Yoga Delta (“Hot Yoga”) has appealed a Determination of the Director of Employment Standards (the “Director”) issued November 16, 2011, ordering it to pay \$13,112.36, representing wages and accrued interest owed to Sukhdev Pangalia and three administrative penalties in the amount of \$500.00 each for contraventions of sections 17, 18 and 21 of the *Employment Standards Act* (the “Act”).
2. Hot Yoga seeks a suspension of the Determination pursuant to Section 113 of the *Act* pending the outcome of its appeal and has forwarded a cheque in the amount of \$5,147.90, representing a partial amount required to be paid under the Determination, with its appeal. The amount deposited represents the amount of the Determination less statutory deductions and tax withholding.
3. This decision addresses only the suspension request.

FACTS AND ARGUMENT

4. Hot Yoga contends that the Director erred in law in finding that Mr. Pangalia was entitled to wages as set out above and seeks to have the Determination cancelled or varied. Hot Yoga contends that the Director made three errors of law in the Determination; specifically, finding that Mr. Pangalia was an employee rather than a self-employed contractor; in concluding that Mr. Pangalia, if he was an employee not a contractor, was not a manager; and in concluding that Mr. Pangalia was not given proper notice of termination. Hot Yoga also sought a suspension of the Determination pending the conclusion of the appeal on the basis that the issues appealed may either result in the total cancellation of the Determination or a significant reduction in the amount of the Determination payable to Mr. Pangalia.
5. Hot Yoga further submits that it is a small business and will suffer considerable prejudice if the amount of the Determination is paid out to Mr. Pangalia and the Determination is subsequently varied or cancelled, requiring Hot Yoga to seek recovery of that amount. Hot Yoga also says that Mr. Pangalia’s wages are subject to a Requirement to Pay issued by the Canada Revenue Agency (CRA) which will further prejudice the employer in the event the Determination is cancelled or varied.
6. The Director does not oppose the suspension request pending the outcome of the appeal.
7. Mr. Pangalia contends that the appeal does not have merit and that he will suffer prejudice if the suspension is granted. Mr. Pangalia submits that even if the Tribunal accepts that the appeal has merit, Hot Yoga has not

established any circumstances that would justify depositing a smaller amount than what is owing under the Determination.

8. Mr. Pangalia says that although Hot Yoga has asserted it will suffer prejudice if the suspension is not granted, it has failed to establish any prejudice. He contends that Hot Yoga is a business with significant revenue stream and other employees to pay.
9. Mr. Pangalia asserts that the money found owing to him should have been paid many months ago and that non-payment of those funds is a hardship to him as he has two young children to support and suffers from an ongoing medical condition. Mr. Pangalia submits that if the suspension request is granted, the full amount of the Determination should be deposited with the Director.
10. In reply to Mr. Pangalia's submissions, Hot Yoga contends that if the appeal is successful, it will suffer prejudice in attempting to collect money paid out not only to Mr. Pangalia but also the CRA. It submits that it is also unable to recover compensation for legal costs involved in any collections action. Hot Yoga contends that the amount deposited is adequate in the circumstances given that Mr. Pangalia is subject to a Requirement to Pay order dated September 8, 2011, issued by the CRA. Under the terms of that order, Hot Yoga is obliged to pay 30% of wages and 100% of additional monies payable upon termination of employment directly to the CRA. Hot Yoga has made withholdings pursuant to the order and has deposited the remaining net wages to the Director. Hot Yoga says that although it has deposited an amount less than the full Determination with the Director, it has effectively deposited the full amount of Mr. Pangalia's entitlement net of his obligations to the CRA.
11. Hot Yoga submits that Mr. Pangalia has not provided any evidence establishing that the grounds of appeal have no merit and argues that the appeal has some merit on all of the grounds.
12. Finally, Hot Yoga submits that prejudice can be inferred simply from the amount required to be paid. In addition, it says that CRA's Requirement to Pay places obligations on both Mr. Pangalia and Hot Yoga, and that Hot Yoga will be in breach of its obligations to CRA if it does not withhold funds pursuant to that Requirement to Pay. It submits that enforcing the Determination in full will cause direct prejudice by requiring Hot Yoga to breach an order of the CRA.

ANALYSIS

13. 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.
14. 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).

15. It is not the function of the Tribunal member to conduct an extensive analysis of the merits of an appeal on a suspension application. Nevertheless, I am persuaded that the appeal has some merit. It outlines three distinct grounds of appeal which, on their face, require serious consideration by the Tribunal.
16. Hot Yoga has deposited what it considers to be an accurate calculation of Mr. Pangalia's net compensation less what CRA has ordered it to pay on Mr. Pangalia's behalf. In effect, Hot Yoga has deposited with the Tribunal the full amount of what it would be paying Mr. Pangalia if the Determination is upheld. There is no risk that Mr. Pangalia will not fully recover the wages determined to be owing to him should the Tribunal ultimately dismiss Hot Yoga's appeal.
17. The Director has not opposed the suspension request.
18. Although Mr. Pangalia has asserted prejudice, I find no evidence in support of his assertion other than a delay in possibly receiving the funds ordered in the Determination. If the Determination is upheld, it will be confirmed along with the interest that has accrued since the date of issuance. Any delay in receiving funds will be offset, to some degree, by that accrued interest. Mr. Pangalia has asserted, but not demonstrated any medical condition that will be affected by any delay.
19. I conclude that a suspension order should be granted.

ORDER

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

Carol L. Roberts
Member
Employment Standards Tribunal