



An application for suspension

- by -

Fraser Valley Community College Inc.  
("FVCC")

- 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.:** 2015A/154

**DATE OF DECISION:** February 10, 2016

## DECISION

### SUBMISSIONS

Sunanda Kikla	on behalf of Fraser Valley Community College Inc.
Vandana Khetarpal	on her own behalf
Kara L. Crawford	on behalf of the Director of Employment Standards

### OVERVIEW

1. Vandana Khetarpal (“Ms. Khetarpal”) filed a complaint under section 74 of the *Employment Standards Act* (the “*Act*”) alleging that Fraser Valley Community College Inc. (“FVCC”) contravened the *Act* by failing to pay her regular wages, overtime, statutory holiday pay, compensation for length of service and vacation pay (the “Complaint”).
2. On October 2, 2015, a delegate of the Director of Employment Standards (the “Director”) conducted a hearing of the Complaint (the “Hearing”) and, in a determination made on October 6, 2015 (the “Determination”), concluded that FVCC contravened Part 3, section 18 (payment of wages when employment is terminated); Part 4, section 40 (overtime wages); Part 5, section 45 (statutory holiday pay); Part 7, section 58 (vacation pay); and Part 8, section 63 (liability resulting from length of service) of the *Act* in respect of the employment of Ms. Khetarpal, and ordered FVCC to pay Ms. Khetarpal wages in the amount of \$3,953.10, including accrued interest pursuant to section 88 of the *Act*.
3. The Determination also ordered FVCC to pay administrative penalties under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$3,000.00 for contraventions of sections 17, 18, 40, 45 and 63 of the *Act*, as well as section 46 of the *Regulation*.
4. FVCC disagrees with the Determination and has filed an appeal on all available grounds under section 112(1) of the *Act*; namely, that the Director erred in law; the Director failed to observe the principles of natural justice in making the Determination; and that evidence has become available that was not available when the Determination was being made.
5. FVCC seeks the Employment Standards Tribunal (the “Tribunal”) to change or vary the Determination, or refer it back to the Director so that a “proper determination can be made with exchange of evidence and oral hearing”.
6. Pursuant to section 113 of the *Act*, FVCC is also seeking a suspension of the Determination pending the outcome of its appeal.
7. This decision addresses only the suspension request.

### SUBMISSIONS OF FVCC

8. Sunanda Kikla (“Ms. Kikla”), the sole director and one of the officers of FVCC, submits that the Tribunal should suspend the effect of the Determination pending the outcome of its appeal.

9. The basis for Ms. Kikla's suspension request is tied to the merits of FVCC's appeal. In that regard, I note that while FVCC has framed its appeal on the grounds of error of law, failure by the Director to observe the principles of natural justice in making the Determination, and "new evidence", central to FVCC's appeal is whether it was given a reasonable opportunity to respond to the Complaint. More particularly, FVCC, after failing to attend a previously-scheduled mediation and the Hearing, contacted a delegate of the Director, after the conclusion of the Hearing, to make written submissions to the adjudicator. When the delegate of the Director informed Ms. Kikla that the Hearing completed without FVCC and a determination was made, Ms. Kikla asked to make written submissions on behalf of FVCC. Ms. Kikla then, on October 7, 2015, one day after the Determination was made, sent an email to the delegate at 3:34 a.m., attaching FVCC's written submission.
10. Ms. Kikla contends that the Determination should not have been made in the absence of the adjudicator considering FVCC's written submissions. She explains that FVCC "missed" the Hearing date "due to a genuine oversight as the director [That is, Ms. Kikla] was in Supreme Court that day for filing materials" and also expected to be at "another court" as well. She states it was impossible for her to be at three (3) different places on the same date as the Hearing.
11. Nothing in any of the submissions of Ms. Kikla explains why she or FVCC was double or triple booked on the date of the Hearing, or why FVCC did not contact the delegate to adjourn the Hearing to a different date.
12. I also note that Ms. Kikla, in her submissions, refers to the email of the delegate dated November 17, 2015, advising her that if FVCC is appealing the Determination then FVCC need not make a payment until the result of the appeal is known.
13. The balance of Ms. Kikla's submissions largely dispute Ms. Khetarpal's evidence presented at the Hearing and summarized in the Reasons for the Determination. While I have carefully read those submissions and the documents she adduces in support of her submissions, I do not find it necessary to set them out here.

#### **SUBMISSIONS OF MS. KHETARPAL**

14. By way of correspondence, dated November 24, 2015, the Tribunal informed Ms. Khetarpal and the Director of FVCC's application for a suspension of the effect of the Determination pending the appeal, and provided both with an opportunity to provide written submissions in response to FVCC's application.
15. On December 8, 2015, Ms. Khetarpal emailed to the Tribunal her brief response, requesting that the amounts awarded in the Determination "should be collected from the employer" and held by the Director "until the next decision is made" otherwise she said it would be difficult for her to collect the money due to her.

#### **SUBMISSIONS OF THE DIRECTOR**

16. The Director takes no position on the suspension request of FVCC *if* the entire amount awarded in the Determination, including administrative penalties, totalling \$6,953.10, is paid to the Director to hold in trust pending the outcome of the appeal.
17. Should FVCC elect not to pay the full amount to the Director in trust, then the Director objects to FVCC's request for a suspension, as the Director is concerned with the financial viability of FVCC. The Director notes that FVCC is a private career training school specializing in the provision of services to international students and, therefore, subject to regulation by the Private Career Training Institutions Agency ("PCTIA"), a crown corporation under the Ministry of Advanced Education of British Columbia. The Director states that

all institutions offering a career training program with tuition of \$1,000.00 or more and 40 hours or more in instruction are required to register and comply with the basic education standards of PCTIA. Based on a search conducted of PCTIA's website on November 24, 2015, the Director states that PCTIA cancelled FVCC's registration effective October 26, 2015. The Director states that the loss of accreditation "will stop and/or severely jeopardize [FVCC's] ability to continue to attract students and tuition fees".

18. The Director further submits that as of June 1, 2014, an international student interested in studying in Canada for more than six (6) months requires a letter of acceptance from a "designated learning institution" to qualify for a study permit and potential accompanying work permit from Citizenship and Immigration Canada ("CIC"). Based on the search conducted on November 30, 2015, of CIC's website, FVCC does not appear on CIC's list of post-secondary designated learning institutions in British Columbia. In these circumstances, the Director submits that "there are reasonable grounds to believe that FVCC is not a going concern and/or its ongoing solvency is in jeopardy".

## **RESPONSE OF FVCC TO THE SUBMISSIONS OF MS. KHETARPAL AND THE DIRECTOR**

19. In response to Ms. Khetarpal's submission, Ms. Kikla alleges that Ms. Khetarpal is "attempting to discredit FVCC by making false statements", and submits that it is Ms. Khetarpal's failure to discharge her duties in good faith that has caused FVCC to commence its claim against her in the Supreme Court of British Columbia. Ms. Kikla also refers to another piece of litigation in the Provincial (small claims) court FVCC has commenced against Ms. Khetarpal to recover alleged overpayments to Ms. Khetarpal.
20. In the balance of her submissions in response to Ms. Khetarpal's submissions, Ms. Kikla states that the Determination "was one-sided as FVCC[s] response was not considered" and, therefore, the Determination was not based on "true facts". She states that "to deny [FVCC] a suspension of the [D]etermination...while the [a]ppeal is under consideration is not warranted".
21. In response to the Director's submissions, Ms. Kikla alleges bias and unfairness on the part of the adjudicator and the delegate of the Director. She states that the adjudicator and the delegate are colleagues "and had access to our file prior to [the adjudicator] dealing with this file" and, therefore, "acted in a manner which is against the principle of procedural fairness" and not "in a manner any 'independent adjudicator' would act while dealing with any file".
22. She further submits that the Director's submission that FVCC lost its accreditation with PCTIA is incorrect, as the cancellation by PCTIA of FVCC's accreditation is "not final" and FVCC has "requested a [r]econsideration on October 27, 2015". She also submits that PCTIA and its registrar and counsel are all defendants in a civil action commenced by FVCC in the Supreme Court of British Columbia.

## **ANALYSIS**

23. The authority of the Tribunal to consider suspension requests and the rules governing suspension requests are set out in section 113 of the *Act* and Rule 35 of the Tribunal's *Rules of Practice and Procedure* (the "*Rules*").
24. 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.

25. Rule 35 of the *Rules* provides:

**Rule 35 Request to Suspend a Determination**

Requirements for a request to suspend a determination

- (1) In order to request a suspension under section 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.

26. In *Patara Holdings Ltd. carrying on business as Canadian Lodge* (BC EST # D093/09), the Tribunal, when considering an application for suspension under section 113 of the *Act*, examined two (2) questions; namely, whether it should suspend the effect of the determination and, if so, on what terms it should grant the suspension.

27. 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 nor is the effect of the Determination automatically suspended pending the outcome of the appeal, contrary to the representation of the delegate to Ms. Kikla in his November 17, 2015, email. The Tribunal will only grant a suspension application when it is satisfied that the appeal may have some merit. Having said this, it is not the function of the Tribunal, on a suspension application, to conduct an in-depth or extensive analysis of the merits of the appeal. In *Re: Tricom Services Inc.* (BC EST # D420/97), the Tribunal stated at page 4:

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.

28. In addition to the instructive comments in *Tricom Services Inc.*, *supra*, the Tribunal may also consider other factors in a suspension application, 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.

29. With respect to the second question in *Patara Holdings Ltd.*, *supra*, the Tribunal's authority to grant a suspension is limited under section 113 of the *Act* by the conditions set out in subsection 2(a) and (b) and Rule 35(1). 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, the Tribunal may not exercise its discretion to suspend the determination.

30. Having said this, I reiterate that although FVCC has framed its appeal on the error of law, failure by the Director to observe the principles of natural justice in making the Determination and “new evidence” grounds of appeal, central to its appeal is whether it was provided a reasonable opportunity to respond to the Complaint of Ms. Khetarpal.
31. While I do not intend to pre-determine the outcome of FVCC’s appeal, I am, with respect, unable to see any merit in FVCC’s appeal on the central question of whether it was provided a reasonable opportunity to respond to the Complaint before the Determination was made. The evidence presented shows that FVCC failed to participate in the pre-Hearing processes, including the Hearing although it was given sufficient opportunity to participate at both stages. More particularly, FVCC declined to participate in the mediation, did not produce any documents requested by the delegate under the Demand for Employer Records, did not attend at the Hearing and did not request an adjournment of the Hearing. This case appears to look very much like the employer was “lying in the weeds” until the appeal. In these circumstances, it is unlikely that the Tribunal will allow FVCC to use the appeal procedure to make the case that it should have, and could have, made at the Hearing of the Complaint.
32. I also note that the Director is seeking FVCC to deposit the full amount of the Determination, including the administrative penalties, as a precondition to a suspension. FVCC has not deposited any funds with the Director, nor argued to deposit a smaller amount.
33. For all of the above reasons, I find the Tribunal cannot accede to FVCC’s request for a suspension of the effect of the Determination pending the appeal and I dismiss it.

## **ORDER**

34. Pursuant to section 113 of the *Act*, I deny FVCC’s application to suspend the Determination dated October 6, 2015.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**