



An application for suspension

- by -

AltaStream Power Systems Inc.
(“APS”)

- 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: David B. Stevenson

FILE No.: 2017A/14

DATE OF DECISION: March 17, 2017

DECISION

SUBMISSIONS

Thomas F. Beasley	counsel for AltaStream Power Systems Inc.
Diego A. Solimano	counsel for Tyler McMillan
Tiara Stiglich	on behalf of the Director of Employment Standards

OVERVIEW

1. On December 19, 2016, the Director of Employment Standards, through his delegate, issued a Determination against AltaStream Power Systems Inc (“APS”) in favour of Tyler McMillan (“Mr. McMillan”) in the total amount of \$129,985.73, representing unpaid wages, interest and administrative penalties.
2. APS has appealed the Determination on the grounds the Director erred in law and failed to observe the principles of natural justice in making the Determination.
3. Coincidentally, APS seeks an order pursuant to section 113 of the *Employment Standards Act* (the “*Act*”) suspending the effect of the Determination.
4. These reasons for decision only address the section 113 application. A decision on the merits of the appeal will be addressed in a separate decision.

THE SUSPENSION APPLICATION

5. Section 113 of the *Act* states:
 - 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.*
6. APS submits an order suspending the effect of the Determination is appropriate as APS has placed the full amount of the Determination in trust with its legal counsel’s law firm on an undertaking by counsel to hold the funds pending a final decision of any appeals under the *Act* and of any judicial proceedings relating to decisions of the Tribunal.
7. The Director’s position is that the suspension application should be dismissed and the full amount of the Determination should be deposited with the Director.
8. Mr. McMillan has also filed a submission on the request by APS which, in summary, takes two positions: first, that the Tribunal, for reasons which I do not need to repeat in this decision, summarily dismiss the request; and second, that the funds being held in trust at APS counsel’s law firm be paid over to the Director and be in the Director’s control while the Tribunal adjudicates the appeal.

9. In *Johnathan Miller, a Director or Officer of Abraxis Security Inc.*, BC EST # D090/10, the Tribunal summarized the principles that apply to a section 113 application:
- The Tribunal has the discretionary authority to issue a suspension order and no party is absolutely entitled to a suspension order on any particular terms and conditions.
 - Section 113 suspension applications should be addressed through a two-stage analysis. At the first stage, the Tribunal should determine whether it should suspend the determination. If the Tribunal decides that a suspension is warranted, it should then consider what terms and conditions are appropriate.
 - The applicant bears the burden of satisfying the Tribunal that a suspension order is warranted.
 - Suspensions are not granted as a matter of course and, in general, a suspension will not be granted on any terms unless there is some *prima facie* merit to the appeal. In addressing this latter question, the Tribunal must not engage in a detailed analysis of the merits but, rather, should consider whether the grounds of appeal, as advanced, appear to raise a “justiciable issue” in light of the Tribunal’s statutory powers. The Tribunal is not empowered to conduct a hearing *de novo* and thus the Tribunal should not suspend a determination if the appellant’s appeal documents fail to raise, on their face, at least an arguable case that the appeal might succeed on one or more of the three statutory grounds of appeal. Thus, a bare and unparticularized allegation that the delegate failed to observe the principles of natural justice in making the determination does not pass muster.
 - In determining if a suspension should be ordered, the Tribunal may also consider whether the applicant will likely endure unreasonable financial hardship if a suspension order is not issued and whether one or more of the respondent parties will be unreasonably prejudiced if a suspension order is granted.
 - If the Tribunal is satisfied that a suspension order is warranted, the “default” condition is that the full amount of the determination be deposited with the Director of Employment Standards to be held in trust pending the adjudication of the appeal. If the applicant seeks an order that some lesser sum to be deposited, the applicant must demonstrate why that would be appropriate given all the relevant circumstances.
10. A consideration and analysis of the above principles in the circumstances of this case persuades me that I should grant the suspension on conditions.
11. The Director has represented that if the funds are deposited with the Director the funds will be held while either, or both, parties are actively pursuing avenues of appeal, under the *Act* or in the Courts, in a timely way, subject to any overriding order by another tribunal or by the Court. Counsel for APS has indicated that APS would agree to transfer the monies being held in trust, which is represented to be the full amount of the Determination, to the Director on the conditions described by the Director in that representation.
12. I am prepared to make an order substantially to that effect, but also providing a deadline for completing the transfer (deposit) of the monies to the Director, limiting the scope of the suspension order to proceedings over which the Tribunal has exclusive appellate jurisdiction, see *The City of Surrey*, BC EST # D049/99 (Reconsideration of BC EST # D488/98), and allowing for any party to this appeal to return the matter to the Tribunal for further consideration of the terms of the order.

ORDER

13. Pursuant to section 113(2)(a) of the *Act*, the Determination is suspended provided APS, within ten working days after the date of these reasons for decision, deposits with the Director of Employment Standards the full amount of the Determination (\$129,985.73) to be held by the Director of Employment Standards while either, or both, parties are actively pursuing avenues of appeal, under the *Act*. If APS wishes to have an order requiring the Director to continue to hold the amount deposited with the Director after proceedings under the *Act* have been concluded, that order should be requested in the appropriate forum.
14. This Order is subject to further order by this Tribunal, by another tribunal acting within jurisdiction respecting the amount being held, or by a court of competent jurisdiction.
15. If APS fails to deposit the monies within ten working days as directed by this Order, the Director of Employment Standards shall be at liberty to enforce the Determination in accordance with the provisions of Part 11 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal