

An appeal

- by -

Enviro Surface Care Ltd.
(“Enviro”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2010A/004

DATE OF DECISION: March 17, 2010

DECISION

SUBMISSIONS

Robert Doran

Counsel for Enviro Surface Care Ltd.

Karry Kainth

on behalf of the Director of Employment Standards

OVERVIEW

1. On December 2, 2009, pursuant to section 79 of the *Employment Standards Act* (the “*Act*”), a delegate of the Director of Employment Standards (the “delegate”) issued a determination under file number ER 155-166 against Enviro Surface Care Ltd. (“Enviro”) ordering it to pay its former employee, Al Ordge (“Ordge”), the sum of \$3,239.89 on account of unpaid wages (including regular wages, statutory holiday pay and vacation pay) and section 88 interest (the “Determination”). Further, and also by way of the Determination, the delegate levied three separate \$500 monetary penalties (see *Act*, section 98) against Enviro for having contravened sections 17 (regular payment of wages) and 18 (payment of wages after termination of employment) of the *Act* and section 46 of the *Employment Standards Regulation* (failure to produce/deliver records on demand). Thus, the total amount payable under the Determination is \$4,739.89.
2. On January 8, 2010, Enviro appealed the Determination to the Tribunal alleging that the Determination should be cancelled or varied because the delegate erred in law and breached the rules of natural justice (see *Act*, sections 112(1)(a) and (b)). In addition, Enviro asks that the Tribunal suspend the Determination pending the adjudication of this appeal. These reasons for decision address only the suspension request. The merits of the appeal will be addressed in a separate set of reasons that I shall endeavour to issue within the next two weeks.

THE PARTIES’ SUBMISSIONS

3. The Tribunal’s authority to suspend a Determination is set out in section 113 of the *Act*:

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.
4. In a submission appended to its Appeal Form, legal counsel for Enviro asked the Tribunal to suspend the effect of the Determination without any amount being deposited. Counsel asserted that “Enviro is no longer in business” and that “the likelihood of success of Enviro’s appeal is high”. Counsel also asserted that “requiring Enviro to have to pay any amount of the Determination to the Director of Employment Standards would in effect deny Enviro’s right of appeal” and “In the circumstances, Enviro is no longer in business and any amount that has to be paid to the Director of Employment Standards would have to be paid personally

by the former directors of Enviro”. Finally, counsel also referred to a Small Claims action that Enviro has apparently commenced against Mr. Ordge for \$14,460.36.

5. Upon receipt of Enviro’s application to suspend the Determination, the Tribunal’s Appeals Manager wrote to the parties seeking their submissions solely with respect to the suspension request. I now have before me a submission dated January 25, 2010, from the delegate and a further submission, dated February 22, 2010, from Enviro’s legal counsel. The respondent, Mr. Ordge, did not file any submission with respect to the suspension request.
6. The delegate’s position is that the Determination should be suspended only if the full amount is deposited – including the \$1,500 in monetary penalties – by way of certified cheque to be paid within 7 days of the Tribunal’s suspension order.
7. By way of reply, counsel for Enviro reiterated a number of points that he advanced in his initial application, namely:
 - “Enviro...no longer carries on business and cannot afford to pay any amount.”
 - “If the Appeal is unsuccessful then the former Directors of Enviro will become personally liable for the payment to be paid under the Determination. The fact that the Directors of Enviro would become personally responsible for payment of the Determination is in itself evidence of prejudice.”
 - In the event that the Tribunal finds that some deposit is appropriate, counsel says that only one-half of the regular wages owed under the Determination should be deposited (\$1,376) to be paid by a solicitor’s trust cheque within 14 business days after the issuance of the Tribunal’s suspension order.

DECISION

8. According to the information set out in the delegate’s December 2, 2009, “Reasons for the Determination”, Mr. Ordge’s unpaid wage complaint was filed on April 28, 2008. The complaint was investigated and the Determination issued on December 2, 2009 (some 19 months later). While I am not necessarily ascribing any fault to Enviro for this delay, the fact remains that this matter has been outstanding for some time and, during the interim period, it appears that Enviro has ceased business operations. Thus, if the appeal is unsuccessful, there is a very real chance that Mr. Ordge will not be able to collect anything from Enviro.
9. While it is true that a section 96 determination could be issued against any person who was a director or officer of Enviro when Mr. Ordge’s wages were earned or should have been paid (*Act*, section 96), that liability is limited to 2 month’s wages and there a number of section 96(2) defences that may be open to the corporate directors or officers in this case (especially if the company is currently subject to an insolvency proceeding). While I am not aware of any such proceedings, if the appeal is unsuccessful, it is far from certain that Mr. Ordge will be able to ultimately recover the full amount of the Determination from Enviro or from any of its directors or officers.
10. Enviro apparently has no money to pay a judgment and, so far as I am aware, no section 96 determinations have yet been issued. If security is to be posted, it will apparently not be posted by Enviro but, rather, by one or more of its former directors or officers. The alleged prejudice flowing to the directors or officers from having to post security is not a prejudice that flows directly to Enviro. Further, Enviro’s directors or officers are not under any personal legal obligation to post security. Whether security is, or is not posted, will not in any way affect Enviro’s legal entitlement to pursue this appeal. If the Determination is suspended with some lesser amount being deposited it seems to me that the greater prejudice lies on the Director’s and Mr. Ordge’s shoulders since those parties now bear the principal risk of non-recovery.

11. In light of these circumstances, I see no reason to depart from the usual order requiring the full amount of the Determination to be deposited with the Director of Employment Standards. Of course, Enviro need not post any security in which case the Director remains free to take whatever enforcement proceedings he thinks appropriate.

ORDER

12. Pursuant to section 113 of the *Act*, the effect of the Determination is suspended on the following terms and conditions:

Enviro shall deposit into the trust account of the Director of Employment Standards, either by way of a certified cheque or a cheque drawn on the trust account of a duly licensed barrister and solicitor, the sum of \$4,739.89;

The deposit must be made within 5 business days after the issuance of these reasons for decision;

In the event Enviro makes the requisite deposit, the effect of the Determination shall be suspended until further order of the Tribunal or until the Tribunal issues a final order in these appeal proceedings.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal