

An application for suspension

- by -

Ken Meiklejohn, a Director of Ancient Mariner Industries Ltd.
("Meiklejohn")

- 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.: 2010A/10

DATE OF DECISION: April 7, 2010

DECISION

SUBMISSIONS

Ken Meiklejohn	on his own behalf
Lisa Marie Agostinho	on her own behalf
Tiberiu Jichici	on his own behalf
Donna Whalley	on her own behalf
Victor Lee	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses a request by Ken Meiklejohn, a director of Ancient Mariners Industries Ltd. (“Meiklejohn”) under section 113 of the *Employment Standards Act* (the “*Act*”) to suspend the effect of a Determination (the “section 96 Determination”) issued by a delegate of the Director of Employment Standards (the “Director”) on December 18, 2009.
2. On August 9, 2007, and January 25, 2008, the Director issued Determinations in favour of 15 complainants, former employees of Ancient Mariner Industries Ltd., in the amounts of \$31,907.95 and \$8,390.57, respectively, against Ancient Mariner Industries Ltd. (the “corporate Determinations”). The corporate Determinations also imposed administrative penalties on Ancient Mariner Industries Ltd. totalling \$2,500.00. Neither of the corporate Determinations was appealed and the period allowed in section 112 of the *Act* for an appeal of either Determination has long expired.
3. Meiklejohn has appealed the section 96 Determination. The suspension request is contained in the document listing the reasons for the appeal and simply states:

With respect to #2, #3 and 5, I am seeking a suspension of the Determination in whole or in part . . .

4. The Director and several of the affected complainants oppose any suspension of the effect of the Determination.
5. The Tribunal has decided this request can be decided from a review of the material on file and a consideration of the submissions of the parties.

ANALYSIS

6. Section 113 of the *Act* reads:

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 full 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.*

7. There are two questions involved in a request under section 113. The first question is whether the Tribunal should suspend the effect of the Determination. The applicant has the burden of showing a suspension is warranted. The second question is whether, if a suspension is appropriate, on what terms it should be granted.
8. On the first question, the Tribunal will not suspend a Determination pending appeal as a matter of course. The Tribunal has indicated it is prepared to order a suspension of the Determination where the appeal “might have some merit”: *Tricom Services Inc.*, BC EST # D420/97; *TNL Paving Ltd.*, BC EST # D397/99. It is not, however, a function of the Tribunal considering a request under Section 113 to conduct an extensive analysis of the merits of the appeal. It is sufficient that the Tribunal satisfies itself that the appeal, or even parts of it, may have some merit.
9. In considering the suspension request, the Tribunal has also considered other factors, such as 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 employees in denying or granting the requested suspension.
10. In this case, the suspension request is based on three assertions: that the amounts set out in the section 96 Determinations are greater than the amounts of the Determinations against Ancient Mariner Industries Ltd.; that the Director failed to observe principles of natural justice in making the section 96 Determination; and there is additional evidence to be submitted.
11. The first part of an assessment of the appropriateness of the suspension request is to consider the possible merits of the appeal. Meiklejohn has entirely based the request on the merits of the appeal.
12. The assertion that the section 96 Determination is greater than the corporate Determinations is not borne out on a review of the corporate and section 96 Determinations.
13. The submission relating to a supposed failure by the Director to observe principles of natural justice is based on the allegation that Ancient Mariner Industries Ltd. was never given an opportunity to respond to the complaints before the corporate Determinations were issued. The Tribunal has decided that an appeal of a section 96 Determination is limited to those issues which arise under that provision: see *Kerry Steinemann, a director/officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96. The merit of the corporate Determinations is not the focus of an appeal. Meiklejohn may not seek to re-litigate those Determinations. In that respect, the appeal is misguided.
14. The appeal on the section 96 Determination was delivered to the Tribunal on January 25, 2010. It indicates that additional evidence is being gathered and “will be submitted”. That has not happened and there is no indication from Meiklejohn this material will ever be submitted. In any event, the “evidence” appears to relate to alleged errors in the corporate Determinations which, as indicated, have not been appealed and are well beyond the period allowed in the *Act* for an appeal. Even at this juncture there has been no effort to seek an extension of the appeal period for the corporate Determinations. The foregoing concerns do not address another potential issue with any appeal of the corporate Determinations, which is whether any new “evidence”, if such an appeal were accepted, would be allowed.
15. Meiklejohn is incorrect in his view that his defence in this appeal is the same as that of Ancient Mariner Industries Ltd. in responding to wage claims made by the complainants. As stated above, the Tribunal has established that a section 96 Determination may not include an appeal of the corporate wage liability.

16. In sum, I do not find any aspect of the appeal satisfies the requirement to show it has “some merit”. Since the suspension sought is grounded in the merits of the appeal, I can find no basis for granting an order under section 113.

ORDER

17. The suspension request under section 113 of the *Act* is denied.

David B. Stevenson
Member
Employment Standards Tribunal