

An application for suspension

- by -

Mainland Demo Contracting Ltd. and Mainland Group Contracting Ltd. and
Mainland L. Contracting Ltd. and Mainland Labour Contracting Ltd. and Doon
Development Ltd.

(“MDC and the associated companies”)

- 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/17

DATE OF DECISION: April 10, 2017

DECISION

SUBMISSIONS

Ryan P. Berger	counsel for Mainland Demo Contracting Ltd. and Mainland Group Contracting Ltd. and Mainland L. Contracting Ltd. and Mainland Labour Contracting Ltd. and Doon Development Ltd.
Gurpal S. Sekhon	on his own behalf
Kara Crawford	on behalf of the Director of Employment Standards

OVERVIEW

1. On December 21, 2016, the Director of Employment Standards, through his delegate, issued a Determination against Mainland Demo Contracting Ltd. and Mainland Group Contracting Ltd. and Mainland L. Contracting Ltd. and Mainland Labour Contracting Ltd. and Doon Development Ltd. (“MDC and the associated companies”) in favour of Gurpal S. Sekhon (Mr. Sekhon”) in the total amount of \$20,231.38, representing unpaid overtime, statutory holiday pay, vacation pay, compensation for length of service, interest and administrative penalties.
2. MDC and the associated companies have 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, MDC and the associated companies seek 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 separate reasons.

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. MDC and the associated companies have requested a suspension of the effect of the Determination pending the outcome of the appeal upon depositing the amount of \$3,612.92 with the Director of Employment Standards.

7. Counsel for MDC and the associated companies submits an order suspending the effect of the Determination by depositing the above amount is fair and equitable, considering there were miscalculations in determining the amount owing to Mr. Sekhon and the appeal meets the bar of having “some merit”.
8. The delegate for the Director of Employment Standards has filed a response to the request, consenting to a suspension of the Determination provided the full amount required to be paid under the Determination is deposited with the Director of Employment Standards.
9. Mr. Sekhon has also filed a submission on the requested suspension. Sifting out those parts of the submission that are irrelevant to the request, Mr. Sekhon agrees with the position of the delegate for the Director of Employment Standards, that a suspension should only be considered if the full amount of the Determination is deposited with the Director of Employment Standards.
10. 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.
11. A consideration and analysis of the above principles in the circumstances of this case persuades me that I should grant the suspension.
12. I accept the appeal raises, on its face, at least an arguable case that might succeed on one or more of the statutory grounds of appeal.

13. I do not accept, however, that MDC and the associated companies have demonstrated the lesser amount proposed to be deposited would be appropriate. This amount contemplates that every aspect of the appeal will be successful and the appeal does not show that result is likely. I am also not persuaded that depositing any amount other than the full amount of the Determination is appropriate or that depositing the full amount of the Determination will result in undue financial hardship on MDC and the associated companies.
14. For the above reasons, I am prepared to make an order in the terms set out below.

ORDER

15. Pursuant to section 113(2)(a) of the *Act*, the Determination is suspended provided MDC and the associated companies, 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 (\$20,231.38) to be held by the Director of Employment Standards while either, or both, parties are actively pursuing avenues of appeal, under the *Act*.
16. 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.
17. If MDC and the associated companies 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