

An application for suspension

- by -

Autofolks Parts Inc.
("Autofolks")

- 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: Carol L. Roberts

FILE No.: 2012A/29

DATE OF DECISION: May 1, 2012

DECISION

SUBMISSIONS

Shiraz Omar	on behalf of Autofolks Parts Inc.
Ali Allawy	on his own behalf
Joy Archer	on behalf of the Director of Employment Standards

OVERVIEW

1. Autofolks Parts Inc. (“Autofolks”) has appealed a Determination of the Director of Employment Standards (the “Director”) issued February 15, 2012, ordering it to pay \$10,532.30, representing compensation for length of service, annual vacation pay, and accrued interest owed to Ali Allawy and two administrative penalties in the amount of \$500.00 each for contraventions of sections 28 and 63 of the *Employment Standards Act* (the “*Act*”).
2. Autofolks seeks a suspension of the Determination pursuant to Section 113 of the *Act* pending the outcome of its appeal. No money was deposited along with the suspension request.
3. This decision addresses only the suspension request.

FACTS AND ARGUMENT

4. Autofolks contends that evidence has become available that was not available at the time the Determination was being made and seeks to have the Determination cancelled. Mr. Omar says that he advised the delegate at the hearing that he had a witness who would corroborate his evidence that Mr. Allawy was warned on many occasions that his conduct was not acceptable. Mr. Omar contends that he advised the delegate that this witness, a former employee, was in China from September 2010 until September 2011.
5. Autofolks also sought a suspension of the Determination pending the conclusion of the appeal on the basis that the issues appealed may either result in the total cancellation of the Determination.
6. Autofolks seeks a suspension of the Determination on the grounds of “hardship”. It says that, as a small company with one employee and no line of credit, it would have to borrow money, a step that would be unnecessary if the appeal was successful.
7. The Director, while expressing empathy for Autofolks’ alleged position, submits that Mr. Omar has not provided any evidence to support his claim of financial hardship. Consequently, the Director submits that Autofolks has failed to provide convincing argument or sufficient evidence to substantiate its grounds for requesting a suspension.
8. Mr. Allawy contends that the appeal does not have merit and that he will suffer prejudice if the suspension is granted. Mr. Allawy says that he was a faithful employee who conducted himself honestly and ethically. He notes that Mr. Omar signed a letter of recommendation regarding his commitment and work ethics while employed by Autofolks and signed a Record of Employment indicating that his dismissal was based on a shortage of work. He submits that Mr. Omar’s claim of financial hardship is a last ditch effort to avoid responsibility for paying the money he is entitled to.

ANALYSIS

9. Section 113 of the *Act* provides as follows:
- 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.”
10. The Tribunal will not suspend the effect of a Determination in circumstances where the grounds of appeal are frivolous or have no apparent merit; however it may suspend where the appeal may have some merit. (*Tricom Services Inc.*, BC EST # D420/97; *TNL Paving Ltd.*, BC EST # D397/99)
11. Autofolks has deposited no funds with its suspension request and has provided no evidence in support of its position that it would suffer financial hardship if required to pay any or all of the amount required to be paid under the Determination. Although some financial hardship might be inferred where a small company is faced with a relatively large award, in the absence of any evidence, the Tribunal is unable to determine the extent of that hardship or determine what smaller amount might be adequate. Given that Autofolks has not deposited any amount, the Tribunal has no jurisdiction to grant the suspension request.
12. Furthermore, while it is not the function of the Tribunal member to conduct an extensive analysis of the merits of an appeal on a suspension application, I am not persuaded that the appeal has merit. The appeal submission suggests that Autofolks has new evidence. That new evidence is alleged to be statements by a witness who was not in Canada at the time of the hearing. However, there is nothing in the Determination that suggests that Mr. Omar either advised the delegate that he had a witness who could corroborate the employer’s evidence or that Mr. Omar sought an adjournment of the hearing in order for his witness to attend.
13. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
14. On its face, Autofolks has not met the Tribunal’s test for new evidence as the witness evidence was available at the time of the hearing of Mr. Allaway’s complaint.

15. Furthermore, although Mr. Omar contends in his appeal submission that Autofolks had just cause to terminate Mr. Allaway's employment, he conceded at the hearing that he issued a Record of Employment that indicated his employment ended because of a shortage of work and gave him a letter of reference, actions that conflict with his asserted grounds of appeal.
16. I conclude that a suspension order should not be granted.

ORDER

17. Pursuant to section 113 of the *Act*, I deny the application to suspend the Determination.

Carol L. Roberts
Member
Employment Standards Tribunal