

An application for suspension

- by -

Khaira Enterprises Ltd.
("Khaira")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2011A/21

DATE OF DECISION: May 12, 2011

DECISION

SUBMISSIONS

Khalid M. Bajwa	on behalf of Khaira Enterprises Ltd.
Ros Salvador	on behalf of twenty-five former employees
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. On February 4, 2011, the Director issued a Determination against Khaira Enterprises Ltd. (“Khaira”) on behalf of fifty-eight former employees of Khaira, some of whom had complained to the Director that they were not receiving wages from their employment with Khaira.
2. The Director conducted an investigation under section 76(2) of the *Employment Standards Act* (the “Act”). The Director found the Act had been contravened and that the former employees were owed wages and interest in the amount of \$236,800.52.
3. The Director also imposed administrative penalties on Khaira under Section 29(1) of the *Employment Standards Regulation* in the amount of \$3,500.00.
4. Khaira has appealed the Determination and has requested a suspension of the effect of the Determination under section 113 of the Act pending the outcome of the appeal.
5. The Director and counsel acting on behalf of twenty-five of the former employees oppose the section 113 application.

ARGUMENT

6. Khaira says it is making the request “to suspend the determination and deposit the amount because at the request of the Director whatever the amount was to be paid to the appellant has been stopped and the appellant has no money with him to deposit”. I take that statement as an indication by Khaira that steps which the Director has taken to collect the amount of the Determination, which includes asking Khaira’s contractors to withhold amounts owing to Khaira, has affected its financial ability to deposit any amount with the Director. The suspension request does not say either how much the Director has realized from his collection proceedings or how much, if any, Khaira believes ought to be deposited with the Director.
7. The Director has confirmed in his response to the suspension request that collection proceedings have been commenced and says if the collection proceedings are to be suspended that should only occur upon deposit by Khaira of the full amount of the Determination.
8. Counsel for the twenty-five former employees says Khaira has not provided any evidence that it has no financial ability to ensure the full amount of the Determination is in the hands of the Director and that no suspension should be granted unless the Director has secured the full amount, either through collection proceedings or by deposit from Khaira. Counsel raises a concern that if some lesser amount is allowed to be deposited and the Determination suspended there would be prejudice to her clients, who are predominantly

impoverished refugees, that far outweighs any prejudice to Khaira in requiring the full amount to be deposited. Counsel also submits there is limited prospect of Khaira's appeal having any success and that factor should weigh against the requested suspension.

ANALYSIS

9. 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.*

10. As the Tribunal set out in *Carestation Health Centres (Seymour) Ltd., Avicenna Group Holdings (Chilliwack) Ltd. and Oxbridge Ventures, Inc.*, BC EST # D062/10, at paras. 7-11:

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.

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.

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.

On the second question, the Tribunal is limited in its authority under section 113 by the conditions set out in subsection 2 (a) and (b); unless the full amount of the Determination has been deposited with the Director, or circumstances are established that would justify the Tribunal accepting some lesser amount may be deposited, the Tribunal may not exercise its discretion under Section 113.

The default position is to require the entire amount of the Determination to be deposited with the Director. If the deposit of a smaller amount is sought, there is a burden on the applicant to establish the circumstances that would justify that result.

11. Khaira has not demonstrated a suspension of the Determination is warranted.

12. Khaira has implied a financial inability to pay the amount of the Determination. Khaira alleges their financial difficulties are the result of collection efforts taken by the Director. There is however, no evidence how much of the amount of the Determination has been secured by the Director through collection efforts or that the Determination poses a unique financial hardship on Khaira. If the full amount has been collected, this application is essentially unnecessary. The objective of the Director – to secure the amount of wages found to be owed to the former employees – would be met and the appeal, which challenges those amounts, can proceed. Alternatively, if the full amount of the Determination has not been secured through the collection

processes undertaken by the Director, Khaira's assertion that it is financially unable to deposit the full amount of the Determination is a factor that militates against any suspension or a lesser deposit. As the Tribunal noted in *Tricom Services Inc.*, BC EST # D420/97, an indication by the applicant for a suspension, of a potential inability to pay the Determination, raises the prospect of the employees never fully recovering their unpaid wages and demonstrates prejudice to those employees. An employer requesting a suspension may counter that conclusion by showing there is some unique prejudice in their financial plight that off-sets the prejudice to the employees, but Khaira has not done so here.

13. As well, I am not satisfied at this stage that the appeal demonstrates sufficient merit to warrant a suspension of the Determination. The appeal, on its face, relies quite heavily on the Tribunal reaching different factual conclusions than the Director in several areas of the Determination and on "new" evidence submitted in support of some elements of the appeal. The burden on an appellant in both of those areas is not an easy one to meet. As the Tribunal has indicated in many decisions, the burden in the former area is to show the error of fact amounts to an error of law and should be reviewed on that basis and, in the latter, to show the "new" evidence being submitted meets the conditions described in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. In reaching my conclusion, I am not making any judgment about the outcome of the appeal. Perhaps the arguments being made by Khaira will become more clearly focused as the appeal submissions and Khaira's response to those submissions are filed, but at this stage, on the appropriate level of analysis to be accorded the appeal in this application, I cannot find there is sufficient merit in it to support the suspension request.
14. I might add that even if I had found the appeal demonstrated some merit on its face and a suspension of the Determination was warranted, the other circumstances – the failure of Khaira to show any unique financial prejudice and the prejudice to the former employees demonstrated in Khaira's assertions – would not have allowed for any suspension except on condition that the full amount of the Determination be deposited with the Director.
15. In sum, I am not prepared to grant the suspension requested by Khaira.

ORDER

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

David B. Stevenson
Member
Employment Standards Tribunal