

An application for suspension

- by -

D.J. Weed Busters Ltd.
("Weed Busters")

- 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: Raewyn J. Brewer

FILE No.: 2012A/23

DATE OF DECISION: May 14, 2012

DECISION

SUBMISSIONS

Myles Koene on behalf of D.J. Weed Busters Ltd.
Susan Marshall on her own behalf

OVERVIEW

1. On February 1, 2012, and following an oral hearing conducted on December 15, 2011, a delegate of the Director of Employment Standards (the “delegate”) issued a determination (the “Determination”) ordering D.J. Weed Busters Ltd. (“Weed Busters”) to pay its former employee Susan Marshall (“Ms. Marshall”) the sum of \$5,094.58 on account of six weeks’ wages as compensation for length of service payable under section 63 of the *Employment Standards Act* (the “*Act*”) together with concomitant section 58 vacation pay and section 88 interest. Further, and also by way of the Determination, the delegate levied a \$500 monetary penalty against Weed Busters. Thus, the total amount payable under the Determination is \$5,594.58.
2. Weed Busters appealed the Determination on March 5, 2012, contending the Director erred in law. When Weed Busters filed its appeal with the Tribunal, it also deposited the amount of \$3,851.49, representing a partial amount required to be paid under the Determination, and sought a suspension of the Determination pursuant to Section 113 of the *Act* pending the appeal outcome.
3. This decision addresses only the suspension request and is based on the written submissions of the parties.

FACTS AND SUBMISSIONS

4. Ms. Marshall filed a complaint alleging Weed Busters contravened the *Act* by failing to pay her sufficient compensation for length of service. Ms. Marshall received two weeks in lieu of notice but claimed she was entitled to an additional six weeks pursuant to section 63 of the *Act*. Before the delegate the parties agreed that there was no express or implied provision allowing for temporary layoff. Accordingly, and relying on the Supreme Court of British Columbia’s decision in *Besse v. Dr. A.S. Machner Inc.*, 2009 BCSC 1316, the delegate concluded that absence such a provision the temporary layoff constituted a fundamental breach of the employment contract. The delegate exercised her discretion to deem the employment relationship terminated due to a substantial alteration in the conditions of employment and awarded Ms. Marshall the six weeks compensation for length of service.
5. Before the delegate the parties also made submissions regarding whether Ms. Marshall was offered reasonable alternative employment.
6. Weed Busters contends that the Director erred in law in finding that Ms. Marshall was entitled to the compensation for length of service as set out above and seeks to have the Determination cancelled. In particular, Weed Busters argues that Ms. Marshall refused reasonable alternative employment on multiple occasions and therefore compensation for length of service would not be payable pursuant to the exception under section 65(1)(f) of the *Act*. Weed Busters attaches to its appeal correspondence from Weed Busters to Ms. Marshall to support its position. By way of a remedy, Weed Busters is seeking that the Tribunal set aside the entire award.

7. When Weed Busters filed its appeal with the Tribunal, it also deposited the amount of \$3,851.49, representing a partial amount required to be paid under the Determination. This amount represents the six weeks of outstanding compensation for length of service (\$20.00/hour x 40 hours x 6 weeks = \$4,800.00) less statutory deductions and tax withholding, as calculated by Weed Busters. The amount does not include the concomitant 4% annual vacation (\$192.00) or accrued interest (\$102.58) required per the Determination.
8. The Director made no submissions on the suspension request. Ms. Marshall has not made any submissions or taken any position on the suspension request. Rather, her submissions address the substantive issues of the appeal.

ANALYSIS

9. Section 113 of the *Act* provides as follows:
 - (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 does not grant an application by a party for a suspension of a determination pending an appeal as a matter of course. The Tribunal will only grant such an application where the appeal may have some merit. Having said this, it is not the function of the Tribunal, on such an application, to conduct an in-depth or extensive analysis of the merits of the appeal. It is sufficient for the Tribunal to exercise its discretion under section 113 and grant a suspension where the Tribunal is satisfied that the appeal may have some merit. This was set out by the Tribunal in *Re: Tricom Services Inc.*, BC EST # D420/97:

I am of the view that on a request for a suspension the Tribunal should not conduct an in-depth review of the merits of the appeal. To do so, in effect, creates a two-step appeal process on the merits and blends a 'preliminary issue' namely, the suspension request, with the substantive issues that, in my opinion, ought to be dealt with exclusively in the appeal itself. It is enough at the suspension request stage for the Tribunal to simply satisfy itself that the appeal might have some merit; to put the matter another way, the Tribunal should not suspend a Determination when the appeal is obviously frivolous or otherwise without merit.
11. Weed Busters submissions on appeal appear to be nothing more than an attempt to re-argue the case it advanced before the Director at the hearing. However, without benefit of the record that was before the delegate or the Director's submissions on the substance of the appeal, and based on the argument and evidence of Weed Busters before me, I am not prepared to conclude that Weed Busters' appeal is "obviously frivolous or otherwise without merit."
12. Further, Weed Busters has deposited what it considers to be the calculation of Ms. Marshall's net compensation for length of service, albeit without inclusion of the concomitant vacation pay or interest. In effect, Weed Busters has deposited with the Employment Standards Branch most of the amount that it would be paying Ms. Marshall if the Determination were upheld. Therefore, in my view, there is little risk that Ms. Marshall will not fully recover the amounts determined to be owing to her should the Tribunal ultimately dismiss Weed Busters appeal. I am not persuaded that granting a suspension, in these circumstances, would

be prejudicial to Ms. Marshall. Any delay in receiving the funds will be offset, to some degree, by the accrued interest since the date of issuance of the Determination.

13. I also note that neither the Director nor Ms. Marshall has taken a position on the suspension application.
14. I conclude that a suspension order should be granted and I consider the amount deposited by Weed Busters adequate in the circumstances. However, I do not want my decision, at all, to be taken as predetermining the outcome of the appeal on its merits. That is for the Tribunal reviewing in-depth the merits of the appeal to decide.

ORDER

15. Pursuant to section 113 of the *Act*, I will allow the application to suspend the Determination.

Raewyn J. Brewer
Member
Employment Standards Tribunal