

**BC EST #D049/99
Reconsideration of BC EST #D488/98
Suspension request under Section 113**

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for suspension pursuant to section 113
of the *Employment Standards Act*, R.S.B.C. 1996, c. 113

- by-

The City of Surrey

- arising from an application to reconsider the decision issued by -

The Employment Standards Tribunal
("the Tribunal")

ADJUDICATOR:	Frank A.V. Falzon
TRIBUNAL FILE NO.:	98/781
DATE OF DECISION:	February 9, 1999

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DECISION

OVERVIEW

The City of Surrey (“Surrey”) applies for a reconsideration of an Adjudicator’s October 27, 1998 decision (BC EST#D488/98) which confirmed an April 30, 1998 Determination that 32 persons receiving firefighting instruction at the Justice Institute were Surrey “employees” during the instruction period. By way of remedy, the Determination which was confirmed on the appeal required Surrey to pay approximately \$205,000 to the Director, to cover wages and other statutory entitlements of these employees.

The payment required by the Determination confirmed on appeal is set out as follows:

I further order the City of Surrey to pay \$204,793.90. Please send to this office a certified cheque or money order by May 25, 1998 made out to the Director of Employment Standards in the amount of \$204,793.90. If statutory deductions are required, please include a statement with your payment indicating the individual amounts remitted to Revenue Canada.

Under the *Employment Standards Act*, I can file this Determination in the British Columbia Supreme Court and begin collection proceedings. This may adversely affect your credit rating. Directors and officers of companies can also be required to pay wages owed to employees. If payment is not received within 23 days additional interest will accrue.

ISSUE TO BE DECIDED

In conjunction with its reconsideration application, the City applies under s. 113 of the Act to have the Tribunal suspend the effect of the Determination. The Director and the Surrey Firefighter’s Association (“the Association”) object to the City’s s. 113 application. The specific purpose of these reasons is to address the City’s application under s. 113, while the Panel continues its deliberations on the reconsideration application.

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ANALYSIS

It will, at the outset, be useful to reproduce ss. 113 and 116 of the *Act*:

- 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.
- 116 (1) On application under subsection (2) or on its own motion, the tribunal may
- (a) reconsider any order or decision of the tribunal, and
 - (b) cancel or vary the order or decision or refer the matter back to the original panel.
- (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
- (3) An application may only be made once with respect to the same order or decision.

The City applies to suspend the effect of the Determination pending the outcome of the reconsideration process. In support of its application, the City submits as follows:

The City also seeks a suspension of this determination under s. 113(2) of the *Act*. Briefly, the City does not want to be in a position where it has to recover significant amounts of money from numerous persons in the event that this application for reconsideration is successful. Further, the City is most confident that the Association does not fear that the City will be unable to pay this determination at a later date if this determination is upheld by the Tribunal.

The Director objects to the suspension application. She submits firstly that s. 113 of the *Act* does not contemplate a suspension order pending a reconsideration application. This is a legal question that must be addressed at the outset.

The Director's second objection concerns the facts here. After Surrey filed its reconsideration request, counsel for the Association in fact consented to a "suspension" on the understanding that the amount would be paid into trust, but not disbursed, until the

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outcome of the reconsideration. Director's counsel then advises: "However, no funds have been paid to the Director. The City has not approached the Director or her delegate regarding the payment in of these monies". Having learned of this, Association counsel joined in the Director's position. To this, counsel for Surrey responded as follows:

We submit that the most practical solution is to suspend the determination pending the reconsideration application. As stated in our previous submission, there is no issue as to the City's ability to pay. In the event that it is somehow a concern to the Tribunal, we submit that the Tribunal should accept the submission of Mr. Black that the determination be suspended so long as the City pays the money into trust pending the outcome.

Is s. 113 available on a reconsideration application?

The threshold question raised by the Director is whether the Tribunal has the legal authority to suspend the effect of a Determination pending a reconsideration decision. As pointed out by the Director, s. 113(1) specifically states that "[a] person who appeals a determination may request the tribunal to suspend the determination".

The broadest interpretation of this language would give the Tribunal the ongoing power to suspend the effect of a determination simply on the basis that a person has appealed at some point in the past. On this view, because the City has appealed the Determination, the Tribunal enjoys the discretion at any point in the future to suspend the Determination for the period and subject to the conditions it considers appropriate. If this interpretation were taken to an extreme, the Tribunal would have the ongoing power to entertain suspension requests at any future point in time, including during the institution of future judicial proceedings. In my view, this could not have been the intention of the Legislature in enacting s. 113. Clearly, the language, context and purpose of s. 113 is such that the power should be exercised by the Tribunal only in the context of the proceedings over which it has exclusive jurisdiction. The language should not be read so as to permit the Tribunal to encroach on the role of the courts or other adjudicative bodies merely because a person has appealed sometime in the past: see *Re New Pacific Limousine Service Inc.* BCEST #D054/96; *Re Paradon Computer Systems*, BCEST #D221/98. Section 113 must be limited in scope to proceedings over which the Tribunal has exclusive appellate jurisdiction.

The narrowest interpretation is that put forth by the Director, who argues that s. 113 applies only in the period between the Determination and the original Tribunal appeal decision. The Director submits that if the suspension power was meant to apply to the reconsideration process (or, for that matter, judicial review) the legislation would have said so. The Director argues that there is good reason the legislation did not say so, and that is because of the policy that encroachments on her ability to enforce orders for the Act's beneficiaries ought to be minimized.

The Director makes a persuasive argument, which I have declined to accept because I believe that there is a more appropriate "middle ground" approach to the very broad and

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very narrow interpretations discussed above. That middle ground approach is to read s. 113 so that “a person who appeals” a determination may make a s. 113 request at any point while the statutory appeal process - which includes the reconsideration process - is under way.

Central to this interpretation is my view that the reconsideration process is part of the appeal process, both in legislative structure (Part 13 of the Act) and in substance. To be sure, reconsideration is a unique part of the process which depends on the Tribunal’s discretion and which is available in limited circumstances. However, in its reconsideration capacity, the Tribunal does not cease to be the appeal tribunal. Far from being some form of proceeding alien to the appeal process, reconsideration is an integral part of it. When the Tribunal agrees to reconsider an Adjudicator’s decision, it is reviewing the correctness of that decision, which as a matter of substance necessarily involves a “reconsideration” of the Determination’s validity. As noted in *Milan Holdings* (BC EST #D313/98):

The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deemed worthy of reconsideration - particularly questions of law - should be reviewed for correctness. Such an approach is consistent with the Legislature’s confidence that questions of law should be fully and properly resolved within the specialized statutory regime governing employment standards: s. 110. It is consistent with the reasonable expectation of parties that if we exercise our discretion to reconsider, we will bring our best judgment to bear upon the issues.

If the reconsideration process is part of the appeal process, the question arises whether there is anything in the language or purpose of s. 113 to exclude the reconsideration portion of the appeal structure from the scope of s. 113. I would answer in the negative. While only a person who appeals a determination can take advantage of s. 113, the language of s. 113 does not bifurcate the different appeal proceedings in which the challenged determination is at issue before the Tribunal. To the contrary, s. 113 gives the Tribunal broad authority to suspend a determination that has been appealed for the period and subject to the conditions it thinks appropriate. The broad language of s. 113 is supported by its purpose which is to ensure that justice is done within the appeal process. To categorically exclude s. 113 from the reconsideration process is to prevent the Tribunal from ensuring that justice is done in that process. Absent clear language to the contrary, I am not prepared to interpret the legislation in that fashion. Such a construction would be inconsistent with the purpose of providing “fair and efficient procedures for resolving disputes over the interpretation and application of the Act”: *Act*. s. 2(d).

In my view, the Director’s submissions speak less persuasively to jurisdiction than to discretion - that is, to the fashion in which the Tribunal should exercise the power under s. 113 as part of the reconsideration process. When a suspension request is made in the context of a reconsideration application, two factors become particularly important. The first is that the application will typically arise before the Panel has even decided the “first

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stage” question of whether to even to engage in the reconsideration process. The second is that the request will arise in the context of a considered appeal decision by an Adjudicator.

In light of these factors, it is my opinion that for the Tribunal to grant a suspension request in conjunction with a reconsideration application, an applicant must make a clear and compelling case to the Tribunal that it will suffer serious prejudice if a suspension order is not granted. As part of the inquiry into prejudice, and out of deference to the Director’s fundamentally important enforcement role, a party should demonstrate to the Tribunal that it has approached the Director in good faith, was unsuccessful in attempting to resolve the question of payment and disbursement pending the reconsideration, and that the Director’s position pending the reconsideration process will cause them serious prejudice. The question as to what reasonable alternatives to the suspension application have been canvassed by the parties is important not just in principle, but as a practical matter. As the Director points out, it is not uncommon for her office to hold funds pending a reconsideration being decided. Encouraging the parties to engage in discussions to this possible end is clearly in the interests of minimizing the number and litigiousness of s. 113 applications.

Application of the principles to the present case

From its last submission, the City appears prepared to forward all the money in question to the Director for deposit in trust on the basis that the monies not be paid out until after the reconsideration matter is disposed of. In her letter of the same date, the Director appears amenable to that approach and encourages Surrey to forward the funds to her no later than February 5, 1999.

As I render these reasons, I am not aware whether the funds were in fact forwarded as per the Director’s letter. However, it is evident from the correspondence that a mutually acceptable solution is likely to emerge on this issue. To this end, I would encourage the parties, all of whom are represented by able, experienced and reasonable counsel, to seek to resolve the disbursement question in as expeditious and reasonable a fashion as possible.

That said, I am not prepared on the present state of submissions to order the Determination suspended pending the reconsideration process. Absent clearer evidence that the Director, in consultation with the Association, is insisting on disbursing the funds prior to a reconsideration decision and absent more detailed evidence regarding prejudice to Surrey occasioned by disbursement, I am not prepared at this time to issue an Order that would override either the Director’s enforcement discretion or the ability of the parties to resolve this matter between themselves.

Order

The application for a suspension of the Determination is dismissed.

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Frank A.V. Falzon
Adjudicator
Employment Standards Tribunal