

An application for suspension

- by -

Meadow Creek Cedar Ltd.
("Meadow Creek")

- 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/38

DATE OF DECISION: June 5, 2012

DECISION

SUBMISSIONS

Daljit Singh Kooner	on behalf of Meadow Creek Cedar Ltd.
Angel Villalobos	Consul General of Mexico on behalf of 6 employees
Ed Wall	on behalf of the Director of Employment Standards

OVERVIEW

1. Meadow Creek Cedar Ltd. (“Meadow Creek”), has appealed a March 7, 2012, Determination of the Director of Employment Standards (the “Director”) ordering it to pay \$50,647.02, representing wages and interest to 64 employees, and two administrative penalties for contraventions of sections 40 and 45 of the *Act*.
2. Meadow Creek appealed the Determination on April 16, 2011. The grounds for Meadow Creek’s appeal are that the Director erred in law, failed to observe the principles of natural justice in making the Determination, and that evidence had become available that was not available at the time the Determination was being made. Meadow Creek also sought a suspension of the Determination pursuant to Section 113 of the *Act* pending the outcome of its appeal.
3. This decision addresses only the suspension request and is based on the written submission of the parties.

FACTS AND ARGUMENT

4. On November 12, 2010, the Nelson office of the Employment Standards Branch received a complaint from an employee of Meadow Creek alleging that Meadow Creek had contravened the *Act* in failing to pay overtime wages. The complainant asked that his complaint be kept confidential. To protect the complainant’s identity, the Director sought all records Meadow Creek was obliged to maintain under section 28 of the *Act* for every employee who had been employed in the previous six month period.
5. Following a review of the Employer’s records and discussions with Rowland McCulloch, Meadow Creek’s mill manager, and Mr. Kooner, Meadow Creek’s President, the Director sent a preliminary findings letter to Meadow Creek. That letter detailed the wages owing to each employee and advised Mr. Kooner of his personal liability for wages and any administrative penalties. Mr. McCulloch responded with handwritten notes on the preliminary findings letter. The Director sought documentary evidence supporting Meadow Creek’s responses. Mr. McCulloch promised to provide the documents and Mr. Kooner indicated that his accountant would be in touch to provide additional documentation. The Director did not receive any further information from Mr. Kooner and Mr. McCulloch is no longer employed at Meadow Creek.
6. During the course of the Director’s investigation, it became clear to him that six temporary foreign workers from Mexico had also been employed at the mill site, so he sought records for those individuals as well. Meadow Creek argued that the Mexican workers had been hired under contract from a related corporation (Can-Pacific Farms Inc.) but provided no evidence of a contractual relationship between Can-Pacific and Meadow Creek. The Director found inconsistencies between Meadow Creek’s records and the Mexican workers’ daily records, and preferred the workers’ records over those of Meadow Creek’s.
7. The Director determined that 64 employees were owed wages.

8. Meadow Creek argues that the Director investigated the confidential complaint of only one employee just to “harass” it in an effort to cause Meadow Creek to close its mill. It contends that not one of the 64 employees has filed a complaint for non-payment of wages. Meadow Creek claims the delegate threatened him; was biased and “prejudiced” against him in preferring evidence of the workers over that of Meadow Creek; that the delegate had “no authority” to make a Determination in respect of Mexican workers; that the delegate failed to properly consider Meadow Creek’s responses to his preliminary report; and that the delegate erred in his interpretation of Service Canada’s opinion regarding the employment of foreign workers.
9. Meadow Creek deposited no funds with its suspension application.
10. The Director opposes the suspension request on the grounds that Meadow Creek has advanced no basis for its suspension request and that it has not deposited any funds with the request.
11. The Consul General of Mexico’s submissions relate to the grounds of appeal only, not the suspension application.
12. In a reply submission, Meadow Creek says that it has already explained the reasons for its suspension application. That is, that the Director investigated an “anonymous complaint” but that none of the 85 employees have complained to Meadow Creek about unpaid wages and that the Director’s investigation was simply an excuse to harass the Employer. Meadow Creek says that the reason it has not deposited any funds is because no money is owed to any of the employees.

ARGUMENT AND ANALYSIS

13. 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.
14. Suspension applications are not granted as a matter of course. To succeed on a suspension application, an applicant must make a clear case to the Tribunal that it will suffer prejudice if the suspension order is not granted.
15. Furthermore, the Tribunal will not suspend the effect of a Determination in circumstances where the grounds of appeal are frivolous or have no apparent merit. (*Tricom Services Inc.*, BC EST # D420/97; *TNL Paving Ltd.*, BC EST # D397/99)
16. Meadow Creek has not advanced any case in support of its application for suspension. All of its submissions relate to the merits of the appeal rather than the suspension application. Meadow Creek does not say, for example, what prejudice it might suffer if it is required to deposit an amount with the suspension application. In a reply submission, Meadow Creek simply repeated its argument that the Director conducted a “flawed” investigation.

17. While it is not my function, on a suspension application, to conduct an extensive analysis of the merits of the appeal, I find that Meadow Creek's appeal is not entirely without merit or that it is frivolous. There are apparent issues as to the status of the Mexican workers as well as with the Director's treatment of the evidence.
18. However, Meadow Creek has not submitted any funds with its suspension request because, it says, it does not owe the workers any money. That is a matter to be decided on appeal rather than a reason for not depositing any funds with the application.
19. Section 113(2) provides that the person seeking the suspension must have deposited at least some of the amount required to be paid under the Determination with the Director. The Director has not received any funds. Consequently, I find that I am unable to exercise my discretion to suspend the Determination without having any funds deposited. Other than its assertion that it does not owe the workers any money, Meadow Creek has not explained why it has not deposited any funds with the appeal.
20. In all of the circumstances, I find no basis to issue a suspension order.

ORDER

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

Carol L. Roberts
Member
Employment Standards Tribunal