

An application for suspension

- by -

Consumers Distributing Inc.  
("CDI")

- 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:** David B. Stevenson

**FILE No.:** 2017A/41

**DATE OF DECISION:** May 24, 2017

## DECISION

### SUBMISSIONS

Marc Cartlidge King

on behalf of Consumers Distributing Inc.

### OVERVIEW

1. On May 27, 2016, the Director of Employment Standards, through his delegate, issued a Determination against Consumers Distributing Inc. (“CDI”) in favour of Veronica Lo (Ms. Lo”). The Determination is for unpaid regular wages, overtime, vacation pay and compensation for length of service. Interest and administrative penalties were added to the wage amounts found to be owing. The total amount of the Determination is \$2,151.44.
2. CDI has appealed the Determination on the grounds the Director erred in law.
3. CDI seeks an order pursuant to section 113 of the *Act* suspending the effect of the Determination.
4. These reasons for decision only address the section 113 application. A decision on the merits of the appeal is addressed in a separate decision.

### THE SUSPENSION APPLICATION

5. Section 113 of the *Act* states:
  - 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.*
6. CDI has requested, although “demanded” may be more appropriate terminology, a suspension of the effect of the Determination. CDI has not indicated it is prepared to deposit any amount owing under the Determination.
7. The delegate for the Director of Employment Standards has filed a response to the request, submitting the Determination should not be suspended, but if the Tribunal were to decide a suspension ought to be granted, it should only be done on condition that the full amount of the Determination be deposited with the Director.
8. Ms. Lo has also filed a submission on the requested suspension. She says a suspension should not be approved.
9. In *Johnathan Miller, a Director or Officer of Abraxis Security Inc.*, BC EST # D090/10, the Tribunal summarized the principles that apply to a section 113 application:

- The Tribunal has the discretionary authority to issue a suspension order and no party is absolutely entitled to a suspension order on any particular terms and conditions.
  - Section 113 suspension applications should be addressed through a two-stage analysis. At the first stage, the Tribunal should determine whether it should suspend the Determination. If the Tribunal decides that a suspension is warranted, it should then consider what terms and conditions are appropriate.
  - The applicant bears the burden of satisfying the Tribunal that a suspension order is warranted.
  - Suspensions are not granted as a matter of course and, in general, a suspension will not be granted on any terms unless there is some *prima facie* merit to the appeal. In addressing this latter question, the Tribunal must not engage in a detailed analysis of the merits but, rather, should consider whether the grounds of appeal, as advanced, appear to raise a “justiciable issue” in light of the Tribunal’s statutory powers. The Tribunal is not empowered to conduct a hearing *de novo* and thus the Tribunal should not suspend a determination if the appellant’s appeal documents fail to raise, on their face, at least an arguable case that the appeal might succeed on one or more of the three statutory grounds of appeal. Thus, a bare and unparticularized allegation that the delegate failed to observe the principles of natural justice in making the determination does not pass muster.
  - In determining if a suspension should be ordered, the Tribunal may also consider whether the applicant will likely endure unreasonable financial hardship if a suspension order is not issued and whether one or more of the respondent parties will be unreasonably prejudiced if a suspension order is granted.
  - If the Tribunal is satisfied that a suspension order is warranted, the “default” condition is that the full amount of the determination be deposited with the Director of Employment Standards to be held in trust pending the adjudication of the appeal. If the applicant seeks an order that some lesser sum to be deposited, the applicant must demonstrate why that would be appropriate given all the relevant circumstances.
10. A consideration and analysis of the above principles in the circumstances of this case persuades me that I should not grant the suspension.
11. On its face, the appeal has no merit. I need not consider whether CDI might endure financial hardship if the suspension is not granted as CDI has not argued that consideration and there is no evidence in the material that it might be a valid consideration.

## **ORDER**

12. The request for a suspension of the effect of the Determination dated May 27, 2016, is denied.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**