

An application for suspension

- by -

Devendra Narayan
("Mr. Narayan")

- 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: Shafik Bhalloo

FILE No.: 2012A/42

DATE OF DECISION: June 13, 2012

DECISION

SUBMISSIONS

Devendra Narayan	on his own behalf
Mogomotsi (Jayson) Madisa	on his own behalf
Joy Archer	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Devendra Narayan (“Mr. Narayan”) against a Determination of the Director of Employment Standards (the “Director”) issued March 22, 2012 (the “Determination”).
2. By way of background, Mr. Narayan was an owner/operator of a vehicle and contracted his services to Greyhound Canada Transportation Corp. (“Greyhound”). After suffering an injury, Mr. Narayan was unable to drive, and sought and received Greyhound’s permission to hire a relief driver to cover his route while he was off convalescing from his injury.
3. Mr. Narayan hired Mogomotsi (Jayson) Madisa (“Mr. Madisa”) as a relief driver from July 7, 2010, to January 14, 2011, at the rate of pay of \$150.00 per day, but required Mr. Madisa to pay for his own WCB insurance and purchase his own cargo insurance.
4. In December 2010, Mr. Narayan approached Mr. Madisa and expressed his intention to reduce Mr. Madisa’s daily wage from \$150.00 to \$100.00 as Mr. Narayan was having some financial difficulties. Mr. Madisa did not agree to the reduction in his wages and so advised Mr. Narayan. In the very same conversation, Mr. Narayan asked Mr. Madisa to look for alternative employment and the latter told him he was going to work for another driver and he would give him notice once he knew his start date with the other driver.
5. Subsequently, on January 14, 2011, Mr. Madisa quit his employment with Mr. Narayan. Shortly thereafter, Mr. Madisa filed a complaint against Mr. Narayan, pursuant to section 74 of the *Employment Standards Act* (the “*Act*”), claiming that Mr. Narayan contravened the *Act* by failing to pay him regular wages and allowing employer costs to be paid by him (the “Complaint”).
6. The delegate of the Director (the “Delegate”) investigated Mr. Madisa’s allegations in the Complaint and issued her Determination on March 22, 2012, finding Mr. Narayan to have contravened sections 18 (wages), 21 (employer business costs) and 58 (annual vacation pay) of the *Act*. The Delegate ordered Mr. Narayan to pay Mr. Madisa a total of \$2,959.46 inclusive of accrued interest pursuant to section 88 of the *Act*.
7. The Delegate also issued four (4) administrative penalties against Mr. Narayan of \$500.00 each for contraventions of sections 17, 18 and 21 of the *Act*, as well as section 46 of the *Employment Standards Regulation*.
8. Mr. Narayan is appealing the Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Determination.
9. Mr. Narayan is also asking the Tribunal to suspend the Determination pending the appeal.

10. In this decision, I am only dealing with the suspension request by Mr. Narayan and not the substantive merits of Mr. Narayan's application. Having said this, I am of the view that an oral hearing of the suspension application is neither necessary nor requested by the parties. I will therefore determine the suspension application based solely on a review of the Determination, the written submissions of the parties, as well as the section 112(5) "record".

ISSUE

11. Should the Determination be suspended pending the outcome of the appeal?

SUBMISSIONS OF THE PARTIES

12. While Mr. Narayan has asked the Tribunal to suspend the Determination pending the outcome of the appeal, he has not provided his explanation or reasons for such a request on a separate sheet of paper. He has simply handwritten on his Appeal Form "IN PART – WILLING TO PAY WCB AND CARGO INSURANCE". I note that the WCB and cargo insurance costs paid by Mr. Madisa totalled \$632.47, and constituted a small part of the total award made to Mr. Madisa in the Determination.
13. Mr. Madisa, in his lengthy submissions in response to Mr. Narayan's appeal, does not specifically address Mr. Narayan's suspension request but instead focuses on the substantive merits of Mr. Narayan's appeal, which I do not find necessary for me to reiterate here.
14. The Director, on the other hand, submits that the suspension request should be dismissed as Mr. Narayan has not provided any reasons for his request for the suspension. The Director also submits that Mr. Narayan's appeal submissions suggest that his suspension request is based on his disagreement with the Delegate's findings in relation to the amount of wages owed to Mr. Madisa in the Determination, and this is something that the appeal process should address.

ANALYSIS

15. At the outset, it should be noted that the Tribunal does not suspend a determination pending an appeal as a matter of course. Section 113 of the *Act* and Rule 31 of the Tribunal's *Rules of Practice and Procedure* (the "Rules") delineate the relevant requirements for the Tribunal to consider in entertaining or considering an application for suspension of a determination.
16. Section 113 of the *Act* provides:

- 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.

17. Rule 31 of the *Rules* provides:

Rule 31 Request to Suspend a Determination

Requirements for suspending a determination

- (1) At the request of an appellant or applicant, the tribunal may suspend a determination under section 113 of the *Act* for any period and subject to any conditions it considers appropriate.
 - (2) An appellant or applicant requesting a suspension must deposit with the director the amount that the director requires to be paid, if any, or a lesser amount as may be ordered by the tribunal.
 - (3) In order to request a suspension an appellant or applicant must, in writing, at the same time as filing the appeal or application for reconsideration:
 - (a) state the reasons for the request to suspend the determination;
 - (b) state the amount to be deposited with the director; and
 - (c) if that amount is less than the amount required to be paid by the director, state the reasons why depositing a lesser amount would be adequate in the circumstances.
18. The effect of section 113 of the *Act* and Rule 31 of the *Rules* is that the applicant requesting a suspension of a determination has to provide in writing his reasons for the request and deposit with the Director either the total amount, if any, required to be paid under the determination or a lesser amount that the Tribunal considers adequate or appropriate in the circumstances.
19. In this case, the applicant, Mr. Narayan, has not fulfilled the prerequisites for requesting a suspension of the Determination. Mr. Narayan has neither provided any reasons for his request to suspend the Determination, nor deposited any amount required to be paid under the Determination, nor has he requested to deposit a smaller amount. While Mr. Narayan appears to agree to pay in part the WCB and cargo insurance amounts ordered in the Determination, he does not explain why the Tribunal should consider this amount to be adequate or appropriate in the circumstances. It is not for this Tribunal to divine the basis of Mr. Narayan's suspension application. The onus is unequivocally on Mr. Narayan to persuade the Tribunal, on a balance of probabilities, of the merits of his application. Further, while the Tribunal may consider the merits of the appeal in assessing a suspension application, where, as in this case, the applicant has failed to satisfy the preconditions for the Tribunal to consider a suspension request, namely, to provide any written reasons for his request for suspension of the Determination, the suspension application cannot succeed. As a result, I reject Mr. Narayan's application for a suspension of the Determination.

ORDER

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

Shafik Bhalloo
Member
Employment Standards Tribunal