

An application for suspension

- by -

United Specialty Products Ltd.
(“USP”)

- 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/46

DATE OF DECISION: June 13, 2012

DECISION

SUBMISSIONS

Roger Repay	on behalf of United Specialty Products Ltd.
Diana Douglas	on her own behalf
Chantal Martel	on behalf of the Director of Employment Standards

OVERVIEW

1. Ms. Douglas worked for United Speciality Products Ltd. (“USP”) from March 31, 2010, until her employment was terminated on November 17, 2010. She filed a complaint with the Director of Employment Standards (the “Director”) alleging that she was entitled to wages and compensation for length of service. On March 26, 2012, the Director issued a Determination ordering USP to pay Ms. Douglas \$1,991.71, representing wages and accrued interest. The Director also imposed two administrative penalties in the total amount of \$1,000.00 for contraventions of sections 18 and 63 of the *Employment Standards Act*.
2. USP appealed the Determination on May 3, 2012, alleging that the Director had erred in law and failed to observe the principles of natural justice. USP 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.

FACTS AND ARGUMENT

4. At issue before the Director’s delegate was whether or not Ms. Douglas was an employee, as she contended, or a contractor, as asserted by USP, and if she was an employee, whether or not she was entitled to outstanding wages and compensation for length of service.
5. Ultimately, the Director found that Ms. Douglas was an employee and that she was entitled to additional wages in the amount of \$1,000. Finally, the Director also concluded that Ms. Douglas’ employment was terminated without notice and that she was entitled to compensation for length of service.
6. USP deposited no funds with the appeal. It argues that it would be unfair for USP to deposit funds considering that it had a prior ruling from Canada Revenue Agency (CRA) that Ms. Douglas was not an employee. It argues that, since the CRA and the Director use similar tests for evaluating whether or not an individual is an employee, USP had done “nothing wrong” in the eyes of the CRA. USP also argues that it has already been put to considerable inconvenience and expense and that ordering the payment of a deposit would not serve any remedy. It further argues that Ms. Douglas will not suffer any prejudice that cannot be compensated by way of interest. It argues that Ms. Douglas has been untruthful and that her complaint was filed maliciously.
7. The Director stated that she would take no position on the suspension application provided that the entire amount is paid into trust.
8. Ms. Douglas seeks to have the suspension application denied.
9. In reply, USP says that the Director’s position is both contradictory and unfair. USP advances a number of points that, while may be relevant to the appeal proper, do not relate to the suspension application. USP

repeats its submission that being required to pay any amount into trust would further inconvenience it and would not serve any remedial purpose.

ANALYSIS

10. 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.
11. The Tribunal will not suspend the effect of a Determination in circumstances where the grounds of appeal are frivolous or have no apparent merit; however it may suspend where the appeal may have some merit. (*Tricom Services Inc.*, BC EST # D420/97; *TNL Paving Ltd.*, BC EST # D397/99).
12. It is not the function of the Tribunal Member to conduct an extensive analysis of the merits of an appeal on a suspension application. Nevertheless, I am persuaded that the appeal has some merit. Without expressing an opinion on those merits, the appeal raises issues of law and the delegate's assessment of the facts in light of the applicable law, issues which will require serious consideration by the Tribunal.
13. However, while I am persuaded that the appeal has merit, I am unable to find that no funds ought to be deposited with the Director. The only reason USP advanced for not depositing any funds is that the Determination is wrong. That is a matter for the Tribunal to decide. USP had not provided any evidence of financial hardship, for example, stating only that to pay any funds would be an "inconvenience". While I appreciate that USP may view the entire proceedings as an 'inconvenience' that is not a sufficient basis for a suspension order.
14. In the absence of any information on USP's financial position, I infer that an order in the full amount of the wages determined owing, that is, \$1,991.71, will not be a financial hardship to a company that appears to be a going concern. If USP is successful in its appeal, the amount paid into trust with the Director will be repaid, with interest. In my view, the amount ordered protects both Ms. Douglas' wages, if the Determination is upheld, as well as recognizing that the administrative penalties may not be owed, if USP is successful on appeal.

ORDER

15. Pursuant to section 113 of the *Act*, I allow the application to suspend the effect of the Determination, on the condition that USP deposits the amount of \$1,991.71 with the Director no later than June 18, 2012.

Carol L. Roberts
Member
Employment Standards Tribunal