

An application for suspension

- by -

Carestation Health Centres (Seymour) Ltd., Avicenna Group Holdings
(Chilliwack) Ltd., and Oxbridge Ventures, Inc.
("Carestation Health")

- 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.: 2010A/55

DATE OF DECISION: June 22, 2010

DECISION

SUBMISSIONS

Karim Rajani	on behalf of Carestation Health Centres (Seymour) Ltd., Avicenna Group Holdings (Chilliwack) Ltd. and Oxbridge Ventures, Inc.
Christine Ho	on her own behalf
Anne Kelley	on her own behalf
Shahab A. Rizvi	on his own behalf
Valli Tremblay	on her own behalf
Mary Walsh	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses a request by Carestation Health Centres (Seymour) Ltd., Avicenna Group Holdings (Chilliwack) Ltd. and Oxbridge Ventures, Inc. (“Carestation Health”) under section 113 of the *Employment Standards Act* (the “*Act*”) to suspend the effect of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 26, 2010.
2. The Determination was made by the Director on complaints filed by forty-seven former employees who alleged Carestation Health had contravened the *Act*. The Determination found that Carestation Health had contravened Part 3, sections 18, 21 and 26, Part 4, section 40, Part 5, section 45 and 46, Part 7, section 58 and Part 8, section 63 of the *Act* and ordered Carestation Health to pay the complainants an amount of \$327,691.01, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Carestation Health under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$6,500.00.
4. The total amount of the Determination is \$334,191.01. Carestation Health has appealed the Determination. Within the appeal is a request to suspend the effect of the Determination.
5. The Director and several of the complainants oppose the section 113 application. The Director says no funds have been deposited with the Director; the primary employer – Carestation Health – has filed for bankruptcy; there are a significant number of complainants and any delay will impact collection opportunities on their claims; and during the investigation Carestation Health never argued that wages were not owed to the complainants, and the appeal only takes issue with the amounts found to be owed. The complainants generally oppose any course of action that may further delay the chance of recovering the wages they have not been paid.

ANALYSIS

6. Section 113 of the *Act* reads:

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 full 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.*

7. There are two questions involved in a request under section 113. The first question is whether the Tribunal should suspend the effect of the Determination. The applicant has the burden of showing a suspension is warranted. The second question is whether, if a suspension is appropriate, on what terms it should be granted.
8. On the first question, the Tribunal will not suspend a Determination pending appeal as a matter of course. The Tribunal has indicated it is prepared to order a suspension of the Determination where the appeal “might have some merit”: *Tricom Services Inc.*, BC EST # D420/97; *TNL Paving Ltd.*, BC EST # D397/99. It is not, however, a function of the Tribunal considering a request under Section 113 to conduct an extensive analysis of the merits of the appeal. It is sufficient that the Tribunal satisfies itself that the appeal, or even parts of it, may have some merit.
9. In considering the suspension request, the Tribunal has also considered other factors, such as the financial hardship on the applicant of allowing the Director to enforce the amount of the Determination and the potential prejudice to both the applicant and the employees in denying or granting the requested suspension.
10. On the second question, the Tribunal is limited in its authority under section 113 by the conditions set out in subsection 2 (a) and (b); unless the full amount of the Determination has been deposited with the Director, or circumstances are established that would justify the Tribunal accepting some lesser amount may be deposited, the Tribunal may not exercise its discretion under Section 113.
11. The default position is to require the entire amount of the Determination to be deposited with the Director. If the deposit of a smaller amount is sought, there is a burden on the applicant to establish the circumstances that would justify that result.
12. The suspension request in this case is grounded in the merits of the appeal. Carestation Health has done little more than check off that part of the Appeal Form that asks if a suspension of the Determination is being sought and has written on the Appeal Form, “Yes – see letter of appeal”.
13. The appeal seeks to have the Determination vacated in its entirety and sets out six arguments in support.
14. Carestation Health says none of the complainants actually suffered any injury; that their wages were paid by the physicians who used their services. The appeal does no more than make the general statement and does not seem to be supported by the material in the file.
15. Secondly, Carestation Health says the complainants have an alternate remedy within the bankruptcy and the Director has made an error in law by allowing the complainants to do an “end run around” the applicable bankruptcy provisions. The appeal provides no support for the legal proposition asserted.
16. Next, Carestation Health says the Director has erred by applying “inconsistent standards” by accepting agreed facts and evidence from the complainants for some purposes, but not for others. This argument relates to

findings of fact made by the Director and does not indicate how such findings of fact could be considered an error of law.

17. Related to the above argument, Carestation Health says the Director misused evidentiary standards by accepting the “one sided” evidence of the complainants while ignoring payroll records submitted by the company. Carestation Health also says there were other available records, from Revenue Canada and the trustee in bankruptcy, which the Director should have considered. To some extent this argument raises concerns about submitting new evidence to support an appeal, but more specifically, it also relates to findings of fact. The substance of the appeal makes no effort to demonstrate how this alleged error has crystallized within the Determination in errors of law.
18. Fifth, Carestation Health says the Director misapplied the standards required in sections 17, 18 and 126 in dealing with the effect of NSF cheques received by the complainants. This aspect of the appeal relates to the conclusion of the Director under section 66 of the *Act*, but does not explain how these provisions impact the discretion of the Director under that provision.
19. Finally, Carestation Health says the Director misapplied section 95 of the *Act* when associating Carestation Health Centres (Seymour) Ltd. with Avicenna Group Holdings (Chilliwack) Ltd. and Oxbridge Ventures, Inc. The appeal expresses differences in the operations of the associated companies, but does not relate these differences to principles developed and applied to section 95 cases in a way that would suggest the Director erred in applying section 95.
20. The appeal is very general in substance. In sum, while not predetermining the outcome of the appeal, I am not at this stage prepared to conclude there is merit in the appeal.
21. In sum, I do not find the appeal satisfies the requirement to show there is “some merit” in it. Since the suspension sought is primarily grounded in the merits of the appeal, I can find no basis for granting an order under section 113.
22. In any event, even if I were to find some merit in the appeal, other circumstances present here would compel me to conclude no suspension would be granted. The most compelling factor is the potential prejudice to the complainants in granting a suspension.
23. Finally, if it were appropriate to grant a suspension, it would not be appropriate to grant such suspension without requiring anything less than the full amount of the Determination be deposited with the Director.

ORDER

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

David B. Stevenson
Member
Employment Standards Tribunal