

An application for suspension

- by -

Bluecurl Technologies Inc.
("Bluecurl")

- 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.: 2012A/48

DATE OF DECISION: June 20, 2012

DECISION

SUBMISSIONS

Chris Slattery	on behalf of Bluecurl Technologies Inc.
Stephen Van Deventer	on his own behalf
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. On March 12, 2012, a delegate of the Director of Employment Standards (the “Director”) issued a Determination against Bluecurl Technologies Inc (“Bluecurl”).
2. The Determination was made by the Director on a complaint filed by Stephen Van Deventer (“the complainant”), who alleged Bluecurl had contravened the *Act* by failing to pay regular wages and annual vacation pay. The Determination found that Bluecurl had contravened Part 3, section 18 and Part 7, section 58 of the *Act* and ordered Bluecurl to pay the complainant \$3,671.57, an amount which included both wages and interest.
3. The Director also imposed administrative penalties on Bluecurl under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00.
4. The total amount of the Determination is \$4,671.57.
5. Bluecurl has filed an appeal of the Determination under Section 112 of the *Employment Standards Act* (the “*Act*”), seeking to have it varied, and has also requested a suspension of the effect of the Determination under section 113 of the *Act*.
6. The complainant opposes any suspension. The Director takes no position on the suspension, noting that \$4,240.63 has been collected from Bluecurl. The Director has agreed to hold those funds in trust and to halt further collection proceedings on the Determination until the appeal is decided by the Tribunal.
7. This decision addresses only the section 113 request.

ANALYSIS

8. 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.*

9. 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.
10. 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 consider whether 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.
11. The appeal here does not specifically identify what error, in the context of the grounds of appeal set out in section 112 of the *Act*, has been made by the Director. It seeks a variance of the Determination to allow Bluecurl to award the complainant shares in lieu of the wages the Director found to be owed to the complainant under the *Act*. Without reaching any final conclusion about this request, I am dubious whether such a result would be allowed by the *Act*. In contemplating the request found in the appeal, I have reviewed the definition of wages in the *Act*, section 4 and section 20 of the *Act*, the remedial authority of the Director when addressing a complaint filed under the *Act* and that line of authority developed by the Tribunal which says wages may not be paid by issuing shares in the employer.
12. In considering the suspension request, the Tribunal has also considered the potential financial hardship on the applicant employer of allowing the Director to enforce the amount of the Determination and assertions of potential prejudice to both the applicant and the employee in denying or granting the requested suspension.
13. In this case, the appeal submission indicates the seizing of the funds by the Director has placed Bluecurl in a tenuous position. While this is a factor, it is one that does not weigh heavily. In this case, like in many other cases where prejudice is claimed, the stated effect on Bluecurl is unsupported and does not advance a suspension request, since to some extent it reinforces the need for the Director to act expeditiously on the Determination.
14. Finally, the Tribunal considers the particular circumstances and the response of the Director to the request.
15. In this case, the circumstances are that the Director has collected a substantial portion of the amount of the Determination and is content to allow that to stand as security until the appeal is decided. Based on those circumstances, I am content to allow the suspension request, but it will be granted on terms.
16. 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.
17. 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, the circumstances must justify that result.
18. That justification is shown in the fact the Director has collected most of the amount of the Determination and is content to allow that smaller amount to be held in trust until the appeal is decided.

19. Based on the above, and notwithstanding my concerns about the merits of the appeal, this is an appropriate case to grant a suspension allowing for the deposit of a smaller amount than found in the Determination.

ORDER

20. Pursuant to section 113 of the *Act*, I order the Determination dated March 12, 2012, be suspended on condition that the amount of \$4,240.63 collected by the Director be held in trust with the Employment Standards Branch until the completion of the appeal or until further order of the Tribunal, whichever is earlier.

David B. Stevenson
Member
Employment Standards Tribunal