

# An application for suspension

- by –

Frontier-Kemper Constructors ULC ("FKC")

– 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/56

**DATE OF DECISION:** June 28, 2012



## **DECISION**

### **SUBMISSIONS**

Taryn Mackie counsel for Frontier-Kemper Constructors ULC

Rod Bianchini on behalf of the Director of Employment Standards

### **OVERVIEW**

- John Evinger worked for Frontier-Kemper Constructors ULC ("FKC") from June 21, 2010, until August 19, 2011. On September 23, 2011, Mr. Evinger filed a complaint with the Director of Employment Standards (the "Director") alleging that he was entitled to overtime wages. On April 16, 2012, the Director issued a Determination ordering FKC to pay Mr. Evinger \$4,586.91, representing overtime wages, vacation pay and accrued interest. The Director also imposed two administrative penalties in the total amount of \$1,000.00 for contraventions of sections 28 and 40 of the Employment Standards Act (the "Act").
- FKC appealed the Determination on May 25, 2012, alleging that the Director had erred in law and failed to observe the principles of natural justice. FKC also sought a suspension of the Determination pursuant to Section 113 of the Act pending the outcome of its appeal. FKC has deposited the full amount of the Determination with the Director.
- 3. This decision addresses only the suspension request.

### **FACTS AND ARGUMENT**

- <sup>4.</sup> At issue before the Director's delegate was whether or not Mr. Evinger was a manger, as defined in the *Employment Standards Regulation* ("Regulation") and if not, whether or not he was entitled to overtime wages.
- The Director ultimately concluded that Mr. Evinger's duties were not those of a manager and that Mr. Evinger was entitled to overtime wages in the amount set out above.
- FKC contends that the Director erred in law by incorrectly interpreting the term "manager" under the Regulation and in finding that Mr. Evinger's job duties did not fall within that definition. FKC also contends that the Director failed to observe the principles of natural justice by ignoring evidence before him that established that Mr. Evinger was a manager.
- <sup>7.</sup> FKC contends that the appeal clearly has merit. It submits that there would be limited prejudice to Mr. Evinger if the effect of the Determination is suspended as he will receive the full amount of the Determination if FKC's appeal is unsuccessful. On the other hand, FKC submits that there will be prejudice to FKC if the Determination is not suspended as Mr. Evinger resides outside of British Columbia and it is unlikely that FKC would be able to recover the amount of the Determination if it is successful on appeal.
- 8. The Director confirmed that the total amount of the Determination was deposited in trust with the Director and did not oppose the suspension request.

#### **ANALYSIS**

- 9. 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.
- 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).
- 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. The appeal also raises an issue of natural justice which the Tribunal will be required to address.
- The full amount of the Determination has been deposited with the Director, satisfying the requirements of section 113(2)(a).
- 13. As Mr. Evinger made no submissions in response to FKC's application, I infer that the only prejudice he may suffer if FKC is unsuccessful on appeal would be a short delay in receiving funds determined owing. On the other hand, I accept that if FKC is successful on appeal, it may have difficulty recovering funds from Mr. Evinger if those are paid out, given that Mr. Evinger no longer resides in British Columbia.
- Having received no submissions opposing the application and after a consideration of all of the other factors, I find no reason not to grant the application.

### **ORDER**

Pursuant to section 113 of the *Act*, I allow the application to suspend the effect of the Determination pending the outcome of the appeal.

Carol L. Roberts Member Employment Standards Tribunal