

An application for suspension

- by -

Oceanfood Industries Limited
("OIL")

- 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/53

DATE OF DECISION: June 29, 2012

DECISION

SUBMISSIONS

Duncan Manson

counsel for Oceanfood Industries Limited

Rod Bianchini

on behalf of the Director of Employment Standards

OVERVIEW

1. Eight Oceanfood Industries Limited (“OIL”) employees filed complaints with the Director of Employment Standards (the “Director”) alleging that OIL had contravened the *Employment Standards Act* (the “*Act*”) in failing to pay compensation for length of service. On April 16, 2012, the Director issued a Determination ordering OIL to pay a total of \$29,154.87, representing wages, vacation pay and accrued interest for the eight employees. The Director also imposed an administrative penalty in the amount of \$500 for the contravention pursuant to section 29(1) of the *Employment Standard Regulation*.
2. On May 24, 2012, OIL appealed the Determination in respect of only one of the employees, Khamphou Chantavong, on the grounds that the Director had erred in law. OIL also sought a suspension of the Determination pursuant to Section 113 of the *Act* pending the outcome of its appeal. OIL deposited the sum of \$21,664.45 with the appeal, being the total amount OIL was ordered to pay less the wages determined to be owing to Mr. Chantavong. Counsel for OIL says that his law firm, Owen Bird Law Corporation, is holding the amount ordered due Mr. Chantavong in its trust account pending the outcome of the appeal.
3. This decision addresses only the suspension request.

FACTS AND ARGUMENT

4. The eight employees worked as night-shift cleaners at OIL, a food processing business. OIL contended that it had just cause to terminate the employment of all employees on the grounds that their actions demonstrated an organized effort not to engage in work for OIL. OIL also contended that the actions of the employees compromised the safety of its product and potentially jeopardized the health and potentially, the lives, of its consumers.
5. The Director’s delegate found that OIL did not engage in any form of corrective discipline or rely on previous instances of misconduct. The delegate noted that the employees were summarily terminated after being repeatedly observed engaging in behaviour which OIL characterized as serious misconduct.
6. The delegate assessed the conduct of the employees according to the test in *McKinley v. BC Tel* ([2001] 2. S.C.R. 161) and concluded that OIL did not have just cause to terminate the employment of the employees. OIL contends that the Director erred in law in this conclusion.
7. The Director did not oppose the suspension request, confirming that the total amount payable, less the amount payable to Mr. Chantavong, has been deposited in trust with the Director.

THE FACTS AND ANALYSIS

8. 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.
9. 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).
10. 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. The appeal raises a question of law which, on its face, requires serious consideration by the Tribunal.
11. OIL has deposited the total amount of the Determination less the amount disputed with the Director. Counsel for OIL has stated, and I accept, that the disputed amount (\$7,990.42) is being held in his firm's trust account in favour of the one affected employee.
12. The Director has not opposed the suspension request.
13. I find there is no risk that the affected employee will not fully recover the wages determined to be owing to him should the Tribunal ultimately dismiss OIL's appeal. Furthermore, if the Determination is upheld, it will be confirmed along with the interest that has accrued since the date of issuance. Any delay in receiving funds will be offset, to some degree, by that accrued interest. As Mr. Chantavong made no submissions in response to the suspension request, I infer that he will not suffer any prejudice by the suspension.
14. I conclude that a suspension order should be granted.

ORDER

15. Pursuant to section 113 of the *Act*, I allow the application to suspend the effect of the Determination as it pertains to Mr. Chantavong.

Carol L. Roberts
Member
Employment Standards Tribunal