

An application for suspension

- by -

Jesse Keller a Director or Officer of Security Pro Management Inc.
(“Mr. Keller”)

- 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: Shafik Bhalloo

FILE No.: 2012A/66

DATE OF DECISION: August 8, 2012

DECISION

SUBMISSIONS

Jesse Keller	on behalf of Security Pro Management Inc.
Cody Nelson	on his own behalf
Roger Abela	on his own behalf
Steven Wraith	on his own behalf
Justin Malzhan	on his own behalf
Kathleen Demic	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Jesse Keller (“Mr. Keller”), a director of Security Pro Management Inc. (“SPM”), against a determination of the Director of Employment Standards (the “Director”) issued March 2, 2012 (the “Section 96 Determination”).
2. By way of background, Mr. Keller was a sole owner and director of SPM which operated a security company in Kelowna, British Columbia, as well as in Prince George, British Columbia. Roger Abela (“Mr. Abela”), Anthony LaCroix (“Mr. LaCroix”), Justin Malzhan (“Mr. Malzhan”), Cody Nelson (“Mr. Nelson”) and Steven Wraith (“Mr. Wraith”) (collectively the “Complainants”) were employed as security guards with SPM and previously by the latter’s predecessor, Highland Security Group Ltd. (“HSG”), for varying lengths of time at various rates of pay. The Complainants filed complaints under section 74 of the *Employment Standards Act* (the “Act”) alleging that SPM contravened the Act by failing to pay them regular wages, overtime, annual vacation pay, statutory holiday pay, and, in the case of one (1) employee, compensation for length of service (the “Complaints”).
3. A delegate of the Director (the “Delegate”) conducted an investigation of the Complaints and, during the investigation, contacted Mr. Keller, the sole owner and director of SPM. More particularly, the Delegate, on January 27, 2011, sent a letter to SPM advising the latter of her investigation of the Complaints, along with a demand for payroll records. On February 3, 2011, Mr. Keller, in response, contacted the Employment Standards Branch (the “Branch”). After this, Mr. Keller followed up with a letter to the Branch dated February 10, 2011. One week later, on February 17, 2011, the Delegate emailed Mr. Keller requesting information pertaining to the disposition of some security service contracts by HSG to SPM, to which Mr. Keller responded by way of an email dated February 25, 2011.
4. On October 11, 2011, the Delegate sent a preliminary findings letter to SPM by way of registered mail. However, the registered mail was returned to the Branch marked “unclaimed”. The letter was also sent by regular mail, but that letter was not returned. Subsequently, on November 1, 2011, the Delegate received an email from Mr. Keller advising that he had received the preliminary findings letter and he requested that the Delegate call him. The Delegate obliged by calling Mr. Keller on November 3, 2011, and left a voice-mail message, but did not hear back from Mr. Keller. The Delegate left another message for Mr. Keller a few days later on November 9, 2011, but did not receive any response.

5. Thereafter, on January 24, 2012, the Delegate issued a determination (the “Corporate Determination”) finding SPM to have taken over existing contracts of HSG during the Complainants’ employment with the latter, which triggered section 97 of the *Act* and effectively deemed the employment of all of the Complainants, for the purposes of the *Act*, to be continuous and uninterrupted by the disposition of assets, namely, the transfer of security service contracts of HSG to SPM. Having made the said finding, the Delegate, in the Corporate Determination, then went on to find SPM to have contravened sections 18 (wages), 27 (wage statements), 40 (overtime wages), 45 (statutory holiday pay), 58 (vacation pay) and 63 (compensation for length of service) of the *Act*, and ordered SPM to pay the Complainants’ wages, including accrued interest pursuant to section 88 of the *Act*, in the total amount of \$10,326.50.
6. Pursuant to section 98(1) of the *Act* and 29(1) of the *Employment Standards Regulation* (the “*Regulation*”), the Delegate also issued four (4) administrative penalties against SPM of \$500.00 each for contravention of sections 18, 27, 40, and 45 of the *Act*.
7. The Corporate Determination also contained a notice to the director, Mr. Keller, explaining his personal liability under the *Act*. The Corporate Determination was sent to SPM by registered mail with copies to its director, Mr. Keller.
8. When the appeal period for the Corporate Determination expired on March 2, 2012, and no appeal was lodged at the time, nor any effort made by SPM to settle the Determination, the Director issued the Section 96 Determination after conducting a corporate search of SPM and discovering that SPM was incorporated on March 17, 2010, and Mr. Keller was its sole director between August 1, 2010, and January 3, 2011, when the Complainants’ wages were earned or should have been paid. Subsequently, on March 2, 2012, the Director issued the Section 96 Determination holding Mr. Keller liable for up to two (2) months’ unpaid wages for each employee but did not hold Mr. Keller liable for the administrative penalties issued against SPM in the Corporate Determination, as there was insufficient evidence that Mr. Keller authorized, permitted or acquiesced in the contraventions of SPM. The total of the award Mr. Keller is responsible for in the Section 96 Determination is \$9,980.67, inclusive of accrued interest under Section 88 of the *Act*.
9. The Section 96 Determination was sent to Mr. Keller by registered mail on March 2, 2012, and the appeal period for the Section 96 Determination expired on April 10, 2012.
10. Mr. Keller filed late appeals of the Corporate Determination and the Section 96 Determination on June 19, 2012. Based on the identical appeal submissions of Mr. Keller in the Corporate Determination and the Section 96 Determination, a bailiff attempted to contact him at his residence on June 18, 2012. This appears to have prompted Mr. Keller to file both late appeals on June 19, 2012.
11. As indicated, Mr. Keller has submitted identical submissions in both appeals. He is appealing the Section 96 Determination (as with the appeal of the Corporate Determination) on the sole ground that the Director failed to observe the principles of natural justice in making the Section 96 Determination. While Mr. Keller does not specifically identify the basis for advancing the natural justice ground of appeal, it would appear from his submissions that he may be relying upon his assertion that no one from the Branch “called or emailed” him or informed him of the Determination in advance of the bailiff attempting to contact him in the context of enforcement proceedings. It would appear he is referring to the Corporate Determination. He also submits that he never received the registered mail from the Delegate enclosing the Corporate Determination, but does not deny receiving the Corporate Determination by regular mail. He also submits that he was under the impression that the information he dropped off to the Branch in context of the investigation of the Delegate into the Complaints was sufficient to show that the Complainants received their wages “fairly and honestly” because “no one called or emailed” him, although he does not deny receiving the

Delegate's preliminary findings letter and contacting the Delegate via email to request she call him. However, his claim that no one called him in the appeal submissions is inconsistent with the Delegate's assertion that she attempted to call him twice, on November 3, 2011, as well as on November 9, 2011, and left messages for him, but did not hear back from him as of the point when she made the Determination.

12. Having said this, I note that Mr. Keller is asking the Tribunal to refer the Corporate Determination back to the Director of Employment Standards with a view to allowing him "the opportunity to voluntarily resolve the [C]omplaints or provide further information to refute the Complainants' evidence and avoid penalties". In this regard, I note that the balance of his two (2) written submissions in the appeal, which I have very carefully read, reiterate some of the arguments the Delegate considered in her Reasons for the Corporate Determination. His submissions also predominantly, if not wholly, challenge the Delegate's conclusions of fact in the Corporate Determination.
13. I also note that Mr. Keller is asking the Tribunal to suspend the Section 96 Determination pending the appeal. He made a similar request of the Tribunal in the Appeal of the Corporate Determination using identical submissions as previously noted.
14. In this decision, I am only dealing with the suspension request of Mr. Keller in context of the appeal of the Section 96 Determination, although in determining the suspension request, I must incidentally consider whether Mr. Keller's appeal of the Section 96 Determination might have some merit. Having said this, I am of the view that an oral hearing of the suspension application is neither necessary nor requested by the parties. I will therefore determine the suspension application based solely on a review of the Determination, the written submissions of the parties, as well as the section 112(5) "record".

ISSUE

15. Should the Section 96 Determination against Mr. Keller be suspended pending the outcome of his appeal?

SUBMISSIONS OF THE PARTIES WITH RESPECT TO THE SUSPENSION APPLICATION

16. In support of his request for a suspension of the Section 96 Determination pending the appeal, Mr. Keller states that a suspension of the Section 96 Determination should be granted "because the amounts listed" in the Determination "appear to be inflated" and he does not feel that there are any explanations as to how those numbers were arrived at. He also states that he never had "the opportunity to discuss the findings to come to a fair resolution". Therefore, he states that he is not including "a cheque with this information" but wants an opportunity to "view what was submitted to see how they [the Complainants] came up with those numbers". Thereafter, Mr. Keller wants to "prepare some sort of fair payment arrangement".
17. Of those Complainants who have responded to Mr. Keller's application for suspension of the Section 96 Determination, all oppose his suspension request.
18. The Director submits that Mr. Keller's request for suspension is because "he disagrees with the amounts found owing in the determinations and claims he did not know of the findings prior to issuance of the determinations". The Director further states that Mr. Keller "has made no attempt to pay any amount into trust" nor has he provided the Director with "information pertaining to insolvency [of SPM]". The Director further states that she will take no position on the suspension request "if the wages found owing in the determination are paid into trust".

ANALYSIS

19. Section 113 of the *Act* and Rule 31 of the Tribunal's *Rules of Practice and Procedure* (the "Rules") delineate the relevant requirements for the Tribunal to consider in entertaining or considering an application for suspension of a determination.

20. Section 113 of the *Act* provides:

Director's determination may be suspended

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 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.

21. Rule 31 of the *Rules* provides:

Rule 31 Request to Suspend a Determination

Requirements for suspending a determination

(1) At the request of an appellant or applicant, the tribunal may suspend a determination under section 113 of the *Act* for any period and subject to any conditions it considers appropriate.

(2) An appellant or applicant requesting a suspension must deposit with the director the amount that the director requires to be paid, if any, or a lesser amount as may be ordered by the tribunal.

(3) In order to request a suspension an appellant or applicant must, in writing, at the same time as filing the appeal or application for reconsideration:

(a) state the reasons for the request to suspend the determination;

(b) state the amount to be deposited with the director; and

(c) if that amount is less than the amount required to be paid by the director, state the reasons why depositing a lesser amount would be adequate in the circumstances.

22. The effect of section 113 of the *Act* and Rule 31 of the *Rules* is that the applicant requesting a suspension of the determination has to provide in writing his reasons for the request and deposit with the Director either the total amount, if any, required to be paid under the determination, or a lesser amount that the Tribunal considers adequate or appropriate to the circumstances.

23. The Tribunal does not grant a suspension of a determination pending an appeal as a matter of course. The Tribunal will only grant such an application when the appeal may have some merit. Having said this, it is not the function of the Tribunal, on such an application, to conduct an in-depth or extensive analysis of the merits of the appeal. It is sufficient for the Tribunal to exercise its discretion under section 113 of the *Act* and Rule 31 of the *Rules* where the Tribunal is satisfied that the appeal may have some merit. This is amply set out in the very instructive reasons of the Tribunal in *Re: Tricom Services Inc.*, BC EST # D420/97:

I am of the view that on a request for suspension the Tribunal should not conduct an in-depth review of the merits of the appeal. To do so, in effect, creates a two-step appeal process on the merits and blends a 'preliminary issue', namely, the suspension request, with the substantive issues that, in my opinion, ought to be dealt with exclusively in the appeal itself. It is enough at the suspension request stage for the Tribunal to simply satisfy itself that the appeal might have some merit; to put the matter another way, the Tribunal should not suspend a Determination when the appeal is obviously frivolous or otherwise without merit.

24. While not intending to predetermine the outcome of the appeal of Mr. Keller's Section 96 Determination, I do not find the appeal satisfies the requirement to show there is "some merit" in it. Mr. Keller's request for suspension is primarily grounded in his challenge of the Delegate's conclusions of fact pertaining to the wages found owing by SPM to the Complainants in the Corporate Determination. As indicated, Mr. Keller has filed, albeit rather late, his appeal of the Corporate Determination, in which he has made identical submissions to those he now makes in support of his appeal of the Section 96 Determination. He appears to be appealing the Corporate Determination again in his late appeal of the Section 96 Determination.
25. I note, he does not dispute that he was a Director of SPM between August 1, 2010, and January 3, 2011, when the Complainants' wages were earned or should have been paid.
26. I also note that, as in the appeal of the Corporate Determination, Mr. Keller, in his appeal of the Section 96 Determination, wants a further "opportunity to discuss the findings to come to a fair resolution". While this is not the purpose of the appeal mechanism in section 112 of the *Act*, I am mindful of my role at this stage and I do not wish to predetermine the outcome of his appeal. It is for another panel of this Tribunal to assess whether or not the opportunity for Mr. Keller or SPM "to come to a fair resolution" has come and gone prior to both determinations and prior to the bailiff knocking at his door to enforce the determinations.
27. I also note that Mr. Keller wants to "have the opportunity to review what was submitted" by the Complainants to determine how the wages owing were arrived at in the determinations. However, the Delegate, in the Reasons for the Determination, has indicated that all information she received from the Complainants in terms of the hours they each worked was provided to SPM, and the Delegate, in arriving at the wage determinations, reviewed both the Complainants' evidence of hours worked against the employer's evidence to the extent it was available.
28. I also note that Mr. Keller, as part of his request for a suspension of the Section 96 Determination, has not deposited the full amount of the Determination with the Director nor has he established circumstances that would justify the Tribunal accepting some lesser amount. In these circumstances, I can find no basis for granting a suspension of the Section 96 Determination under section 113 of the *Act*.

ORDER

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

Shafik Bhalloo
Member
Employment Standards Tribunal