

An application for suspension

- by -

Olympic Enterprises Ltd. – and – Pro-Active Personnel Inc.
(“OEL/PPI”)

– 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.: 2011A/92

DATE OF DECISION: August 8, 2011

(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.*

8. As the Tribunal set out in *Carestation Health Centres (Seymour) Ltd., Avicenna Group Holdings (Chilliwack) Ltd. and Oxbridge Ventures, Inc.*, BC EST # D062/10 at paras. 7-11:

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.

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.

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.

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.

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.

9. If the provisions of the statute were applied to this request, it would likely not be granted as sought. While a financial inability to meet the liability imposed in the Determination is inferred, the Tribunal has frequently noted that position is a double-edged sword; although it demonstrates some prejudice to the applicant, it also raises the prospect of the employees never fully recovering their unpaid wages and demonstrates prejudice to those employees and militates against any suspension.
10. Additionally, even if a suspension were justified, section 113 requires, as the default position, 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. If OEL/PPI is implicitly requesting they be allowed to deposit an amount smaller than the full amount of the Determination, they have not indicated what “smaller” deposit amount might be appropriate and that also operates against their request.
11. The Director has, however, rendered this application moot by agreeing to suspend the effect of the Determination order pending the Tribunal’s disposition of the appeal.

12. Accordingly, the Tribunal will give effect to the Director's agreement and will make no order on the application at this time, but reserves jurisdiction to reconsider the matter if circumstances warrant it.

David B. Stevenson
Member
Employment Standards Tribunal