

An application for suspension

- by -

C.G. Motorsports Inc.  
("CGM")

- 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/77

**DATE OF DECISION:** August 22, 2012

## DECISION

### SUBMISSIONS

Aidan P. Butterfield

counsel for C.G. Motorsports Inc.

Sukh Kaila

on behalf of the Director of Employment Standards

### OVERVIEW

1. Kwok Chiu Yeung worked for C.G. Motorsports Inc. (“CGM”) from May 2003 until January 19, 2011. Mr. Yeung filed a complaint with the Director of Employment Standards (the “Director”) alleging that CGM contravened the *Employment Standards Act* (the “*Act*”) in failing to pay him compensation for length of service. On May 1, 2012, the Director issued a Determination ordering CGM to pay Mr. Yeung \$7,396.61, representing compensation for length of service, annual vacation pay and accrued interest. The Director also imposed an administrative penalty in the amount of \$500.00 for the contravention of section 63 of the *Act*, for a total amount payable of \$7,896.61.
2. The date for filing an appeal of the Determination was June 8, 2012. CGM appealed the Determination on July 4, 2012, alleging that the Director had erred in law. CGM further alleged that evidence had become available that was not available at the time the Determination was being made. CGM also sought a suspension of the Determination pursuant to Section 113 of the *Act* pending the outcome of its late appeal.
3. This decision addresses only the suspension request.

### FACTS AND ARGUMENT

4. At issue before the Director’s delegate was whether or not Mr. Yeung quit his employment. Following a hearing, the Director concluded that Mr. Yeung had not quit and that he was entitled to compensation for length of service in the amount set out above.
5. CGM contends that the Director erred in law in a number of respects, including applying the wrong standard of proof for determining whether or not Mr. Yeung had resigned, failing to give effect to section 65(1)(f) of the *Act*, and in giving determinative weight to the evidence of a record of employment.
6. CGM deposited \$700, or 10% of the amount of the Determination net of statutory deductions, with the appeal.
7. Counsel for CGM says that CGM is a small, family-owned auto repair company and that its work requires a very large cash outlay at the outset of a job with a lengthy delay before the work is completed and billed. While noting that CGM is financially sound and well established, counsel argues that it is essential that the business maintain a minimum level of working capital at all times. Counsel argues that for CGM to pay the full amount of the Determination would work considerable hardship and restrict its ability to operate efficiently. Counsel submits that payment of 10% of the amount of the Determination will meet the objectives of the *Act* while allowing CGM freedom to conduct its business as usual. Finally, counsel submits that Mr. Yeung has expressed an indication to return to China and that, should the funds be paid out to him, the appeal would be moot.

8. The Director confirmed that CGM had deposited the sum of \$700 but noted that this amount was a fraction of the total amount of the Determination. The Director did not oppose the suspension request on the condition that the full amount of the Determination was submitted on the late appeal.
9. In response, CGM's counsel submits that CGM has demonstrated a *prima facie* case on a substantive issue, and as such, the appeal is not frivolous. Counsel argues that CGM has shown that it would suffer financial prejudice - a loss of working capital, if it were required to deposit the full amount of the Determination on appeal. Counsel notes that Mr. Yeung made no submissions on any potential prejudice to him and contends that the suspension should be granted on the condition that CGM pay the amount deposited with the appeal.

## ANALYSIS

10. 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.
11. 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).
12. It is not the function of the Tribunal Member to conduct an extensive analysis of the merits of an appeal on a suspension application. I note that the appeal was filed late and the Tribunal will initially be required to address the issue of whether or not to allow the late appeal. If the Tribunal decides to allow the late appeal, I am persuaded that it 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 Tribunal will also be required to assess whether or not there is new and relevant evidence.
13. As Mr. Yeung made no submissions in response to CGM's application, I infer that the only prejudice he may suffer if CGM is unsuccessful on appeal, or if the Tribunal decides not to grant the application to extend the time in which CGM may file an appeal, would be a short delay in receiving funds determined owing.
14. 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 to suspend the effect of the Determination.
15. However, I am not persuaded that the amount submitted with the appeal is adequate in the circumstances. While I appreciate that depositing the full amount of the Determination may inconvenience CGM, I have no evidence it would suffer any prejudice. Although counsel asserts financial prejudice, there is no evidence that is the case. Furthermore, given that counsel concedes CGM is a long-standing financially sound business, I am not prepared to infer any prejudice. The amount paid will be held with the Director in trust until the Tribunal's decision is issued. If CGM is successful in its appeal, the amount will be returned to CGM, with interest. There is no reason to conclude a smaller amount would be adequate in the circumstances.

**ORDER**

16. Pursuant to section 113 of the *Act*, I allow the application to suspend the effect of the Determination pending the outcome of the appeal on the condition that CGM deposit the balance of the Determination, that is \$7,196.61, with the Director no later than August 28, 2012.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**