



Applications for suspension

- by -

0862284 B.C. Ltd.

(“0862284”)

- and -

Paul Bourassa also known as Paul A. (Alexander) Bourassa a Director and Officer
of 0862284 B.C. Ltd.

(“Mr. Bourassa”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: David B. Stevenson

FILE Nos.: 2013A/52 and 2013A/58

DATE OF DECISION: November 14, 2013

DECISION

SUBMISSIONS

Paul Alexander Bourassa	on his own behalf as a Director and Officer of 0862284 B.C. Ltd. and on behalf of 0862284 B.C. Ltd.
Jani Martinius	on his own behalf
Chris Lockhart	on his own behalf
Jonty Davies	on his own behalf
Kirsten Parker-Sutton	on her own behalf
Rachael Kwasnica	on her own behalf
Angelo Piscitelli	on his own behalf
Sarah Craveiro	on her own behalf
Joao Vitor Wilke Silva	on his own behalf
Hans Suhr	on behalf of the Director of Employment Standards

OVERVIEW

1. On June 28, 2013, the Director issued a Determination against 0862284 B.C. Ltd. (“0862284”), 0862284 B.C. Ltd. carrying on business as Fun City Sightseeing, and Fun City Sightseeing Inc. (collectively the “Employer”) on behalf of forty-two former employees of the Employer, many of whom had complained to the Director that they had not received all wages owing from their employment with the Employer.
2. In respect of those that had not filed a complaint, the Director conducted an investigation under section 76(2) of the *Employment Standards Act* (the “Act”).
3. The Director found the *Act* had been contravened and that the former employees were owed wages and interest in the amount of \$50,466.16.
4. The Director also imposed administrative penalties on the Employer under Section 29(1) of the *Employment Standards Regulation* in the amount of \$4,000.00.
5. 0862284 has appealed that Determination.
6. On July 31, 2013, the Director issued a Determination against Paul Bourassa also know as Paul A. (Alexander) Bourassa a Director and Officer of 0862284 B.C. Ltd. (“Mr. Bourassa”) under section 96 of the *Act* in the amount of \$50,466.16.
7. Mr. Bourassa has appealed that Determination.

8. Both 0862284 and Mr. Bourassa have requested a suspension, under section 113 of the *Act*, of the effect of the Determinations made against each pending the outcome of the appeal of 0862284.
9. Several of the former employees have submitted a response to one or the other of the suspension applications and either specifically oppose any suspension of the effect of the Determinations or generally oppose the appeals. The delegate of the Director has filed a response; he does not object to a suspension of the effect of the Determinations provided 0862284 and/or Mr. Bourassa deposits the full amount of the Determinations in trust with the Director. The Director objects to the Tribunal accepting any lesser amount as an appropriate deposit.

ARGUMENT

0862284's Application for Suspension

10. Mr. Bourassa, on behalf of 0862284, has requested the Tribunal suspend the Determination against 0862284, giving three reasons why it is appropriate to do so: first, 0862284 has good grounds for appeal on the merits; second, 0862284 has good grounds for its stated concern regarding a reasonable apprehension of bias against the delegate conducting the complaint investigation; and third, allowing collection proceedings to be taken in advance of a final disposition of the appeal of 0862284 would damage the creditworthiness of both 0862284 and Mr. Bourassa.
11. The former employees who have made a response to the application of 0862284 either oppose it or do not agree with it.
12. The delegate of the Director says he does not oppose a suspension, provided it is granted on condition that 0862284 deposit the full amount of the Determination in trust with the Director pending the outcome of its appeal. He says it would be inappropriate to grant a suspension to 0862284 if less than the full amount is deposited.
13. The final reply of 0862284 contains several matters that are not relevant to the suspension application and do not need to be addressed in this decision. Otherwise, the reply by Mr. Bourassa asserts that 0862284 does not have the “wherewithal” to post anything but the most nominal sum. He says the application “should [not] be denied because of the Corporate appellant’s or my own impecuniosity.” He expresses the belief that while the claims may be entirely justified as against Fun City Sightseeing Inc. and/or Jordan Prince, they are not justified against 0862284.

Mr. Bourassa's Application for Suspension

14. Mr. Bourassa has also requested the Tribunal to suspend the Determination against him personally and has provided three reasons to support his application.
15. First, he says collection activity that might be taken by the Director against him personally could compromise his ability to effectively defend the Determinations made against him and 0862284. Second, he submits the Determination against him is premature because the company hasn’t yet had the opportunity to “defend itself” to the Tribunal. Third, as best I can glean from the section 113 application, he says the whole process, including the conduct of the Director, has been unfair and one-sided.
16. All of the former employees of 0862284 who have responded to the application by Mr. Bourassa do not agree with it. The delegate of the Director says only a deposit by Mr. Bourassa of the full amount of the

Determination in trust with the Director pending the outcome of the appeals justifies a suspension of the effect of the Determination. He says Mr. Bourassa is merely attempting to delay the collection process for his own purposes and the potential prejudice to the employees from further delays in that process would be unacceptable.

17. In a final response on the application, Mr. Bourassa responds to the former employees by disavowing any knowledge of all but one of them. Additionally, he says his personal situation would not permit him to post the security suggested by the Director. He says the application “should [not] be denied because of the Corporate appellant’s or my own impecuniosity.” He expresses the belief that while the claims may be entirely justified as against Fun City Sightseeing Inc and/or Jordan Prince, they are not justified against him personally.

ANALYSIS

18. Section 113 of the *Act* reads:

- 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 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.*

19. 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.

20. Neither 0862284 nor Mr. Bourassa have demonstrated a suspension of the Determinations made against them is warranted.
21. Both have implied a financial inability to pay the amount of the Determination, alluding to their respective “impecuniosity”. Neither, however, provides any evidence that collection efforts by the Director or a requirement to deposit the full amount of the Determination would pose a unique financial hardship on either of them. Mr. Bourassa’s suggestion that his financial situation does not permit him to deposit the full amount of the Determination is a factor that militates against any suspension or a lesser deposit. As the Tribunal noted in *Tricom Services Inc.*, BC EST # D420/97, an indication by the applicant for a suspension of a potential inability to pay the Determination, raises the prospect of the employees never fully recovering their unpaid wages and demonstrates prejudice to those employees. An applicant requesting a suspension may counter that presumption by showing there is some unique prejudice in their financial plight that off-sets the prejudice to the employees, but Mr. Bourassa has not done so here.
22. As well, I am not satisfied at this stage that the appeal by 0862284 demonstrates sufficient merit to warrant a suspension of the Determination. The Tribunal does not conduct an in-depth review of the merits of an appeal in a suspension request: see *Tricom Services Inc.*, *supra*. It is sufficient at this stage to make a general assessment of the strength of the appeal.
23. The appeal by 0862284, on its face, requires the Tribunal to accept the delegate of the Director conducting the complaint process exhibited actual, or a reasonable apprehension of, bias and otherwise relies quite heavily on the Tribunal reaching different factual conclusions than the Director in several areas of the Determination.
24. The burden on an appellant in both of those areas is not an easy one to meet. As the Tribunal has indicated in key decisions addressing bias allegations against a delegate of the Director, the burden in this area is to provide clear evidence allowing for objective findings of fact demonstrating actual, or a reasonable apprehension of, bias. In the other area, the burden on an appellant is to show an error of fact amounts to an error of law and should be reviewed on that basis.
25. The appeal of Mr. Bourassa is entirely dependent on the merits of the appeal by 0862284.
26. In reaching my conclusion, I am not making any judgment about the outcome of the appeals; I simply note there are difficulties apparent in the appeals that, at first blush, indicate they do not meet the required legal standard for an appeal relying on the grounds chosen in those appeals. Perhaps the arguments being made by 0862284 and Mr. Bourassa in their respective appeals will become more clearly focused as the appeal submissions and the final replies to those submissions are filed, but at this stage, on the appropriate level of analysis to be accorded the appeals in this application, I cannot find there is sufficient merit in it to support the suspension request.
27. I might add that even if I had found the appeal demonstrated some merit on its face and a suspension of the Determination was warranted, the other circumstances – the failure of Mr. Bourassa to show any unique financial prejudice to 0862284 or him and the prejudice to the former employees demonstrated in Mr. Bourassa’s assertions – would not have allowed for any suspension except on condition that the full amount of the Determination be deposited with the Director.

28. In sum, I am not prepared to grant the suspension requested by Mr. Bourassa or 0862284.

ORDER

29. The suspension requests under section 113 of the *Act* are denied.

David B. Stevenson
Member
Employment Standards Tribunal