

An appeal

- by -

Patara Holdings Ltd. carrying on business as Canadian Lodge
(“Patara”)

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2009A/092

DATE OF DECISION: August 28, 2009

DECISION

SUBMISSIONS

Major Patara	on behalf of Patara Holdings Ltd. c.o.b. Canadian Lodge
William C. Boyte	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses a request filed under Section 113 of the *Employment Standards Act* (the “*Act*”) by Patara Holdings Ltd. carrying on business as Canadian Lodge (“Patara”) relating to a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 22, 2009.
2. The Determination was made by the Director on complaints filed by Brijesh Ansal (“Mr. Ansal”) and Mohan Godyal (“Mr. Godyal”), collectively the “complainants”, who alleged Patara had contravened the *Act* by failing to pay wages. The Determination found that Patara had contravened Part 2, section 8, Part 3, sections 16 and 28, Part 4, section 40, Part 5, section 46 and Part 7, section 58 of the *Act* and ordered Patara to pay the complainants an amount of \$31,254.00, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Patara under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$11,000.00.
4. The total amount of the Determination is \$42,254.00.
5. Patara has appealed the Determination and seeks a suspension of the effect of the Determination. In the suspension request, Patara has also asked that the Tribunal allow the amount of the Determination – whatever it may be – to be paid in four instalments. The Tribunal has no authority to consider this request at this stage of the process. It is a matter that should be raised with the Director, at least at first instance.
6. On July 8, 2009, the Tribunal asked for submissions from the complainants and the Director on the suspension request. The complainants did not respond. The Director filed a response dated July 16, 2009, which was provided to Patara and the complainants in correspondence from the Tribunal dated July 31, 2009. In that correspondence, those parties were given until August 15, 2009 to file any reply to the Director’s response. No reply has been received by any of those parties.
7. The suspension request can be decided.
8. 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.*

9. 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.
10. 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.
11. 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. As noted in *TNL Paving Ltd.*, *supra*, the former factor is a two-edged sword:

On the one side it speaks to the position of TNL that the Determination should be suspended on deposit of little or no money. On the other it speaks to the need to ensure there is sufficient money in trust to satisfy the employees’ unpaid wage claims in the event TNL’s “financial hardship” becomes acute.
12. There is some inference that the financial ability of Patara to pay the amount of the Determination is involved in this request, but if so, it is not elaborated on in the request or established on any evidence.
13. 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.
14. 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.
15. Some of the factors considered on the first question, such as financial ability and prejudice, also bear on the second.
16. There is no indication in the appeal material that Patara has deposited, or is prepared to deposit, with the Director the full amount required to be paid under the Determination. Nor has Patara indicated it is seeking to deposit “a smaller amount” or suggested an amount that might be “*adequate in the circumstances of the appeal*”. Presumably, Patara anticipates the Tribunal can set that amount if otherwise satisfied the deposit of a smaller amount is justified. I do not, however, consider it necessary to address this aspect of the suspension request as Patara has not met the burden of showing a suspension of the effect of the Determination is warranted in this case.
17. The suspension request is based on the bare assertion that the “summer season has not been as busy” as Patara would like to see it. While that assertion may be subjectively valid there is no evidence supporting it. Standing alone, that circumstance, even if proven, does not establish there is an overriding prejudice to Patara if the Determination is not suspended and does not justify ignoring the clear legislative preference that an order suspending the effect of a Determination will not be granted as a matter of course. As well, while not

predetermining the outcome of the appeal, I am not satisfied on a preliminary assessment there is much merit to it.

ORDER

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

David B. Stevenson
Member
Employment Standards Tribunal