

An application for suspension

- by -

Matthew Wren carrying on business as Ad Star Advertising,  
aka Ad Star Advertising Ltd.

(“Wren”)

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2010A/102

**DATE OF DECISION:** September 20, 2010

## DECISION

### SUBMISSIONS

Terry J. Hewitt	Counsel for Matthew Wren carrying on business as Ad Star Advertising, aka Ad Star Advertising Ltd.
Darrell Little	on his own behalf
Scott Moloney	on his own behalf
Nathan Gatabaki	on his own behalf
Glen Smale	on behalf of the Director of Employment Standards

### INTRODUCTION

1. On June 9, 2010, the Director of Employment Standards, through his delegate (the “delegate”), issued a determination pursuant to section 79 of the *Employment Standards Act* (the “*Act*”) against Matthew Wren carrying on business as Ad Star Advertising, aka Ad Star Advertising Ltd. (“Wren”), in the total amount of \$28,771.82 (the “Determination”). Appended to the Determination are the delegate’s 17-page “Reasons for the Determination” issued in accordance with section 81 of the *Act* (the “delegate’s reasons”). The determination amount represent \$25,771.82 in unpaid wages and section 88 interest owed to three individuals, alleged to have been former employees of Mr. Wren’s advertising and marketing business, as well as \$3,000 on account of six separate \$500 monetary penalties (see *Act*, section 98). The wages are, of course, payable to the individual complainants and the monetary penalties are payable to the provincial government and are collectable by the Director of Employment Standards.
2. Mr. Wren appealed the Determination on the grounds that the delegate erred in law, failed to observe the principles of natural justice and because he has new evidence that was not available when the determination was issued (see *Act*, subsections 112(1)(a) to (c)). In addition, Mr. Wren seeks an order pursuant to section 113 of the *Act* suspending the effect of the Section 96 Determination pending the adjudication of the appeal. Mr. Wren’s counsel asserts that there is a strong case on the merits. Accordingly, he says that the Determination should be suspended with Mr. Wren not being required to deposit any funds, or alternatively, only a nominal sum, as security. Mr. Wren’s counsel asserts that requiring Mr. Wren to deposit the total amount of the Determination would impose “a significant financial hardship” on him. The Director’s delegate opposes a suspension order coupled with no money, or very little, in the way of a deposit.
3. These reasons for decision only address the section 113 suspension application (Tribunal File Number 2010A/102). I will deal with the merits of Mr. Wren’s appeal in separate reasons for decision (Tribunal File Number 2010A/101).

### THE SUSPENSION APPLICATION

4. Section 113 of the *Act* provides as follows:

**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.

5. The delegate's position is that the entire appeal is without merit and that if a suspension order is issued, Mr. Wren should be required to deposit the full amount of the Determination. The three respondent former employees filed submissions in the main appeal but have not taken any specific position with respect to Mr. Wren's section 113 application.
6. The Tribunal has the discretionary authority to issue a suspension order and no party is absolutely entitled to a suspension order on any particular terms and conditions. Section 113 suspension applications are addressed through a two-stage analysis. At the first stage, the Tribunal should determine whether it should suspend the determination. If the Tribunal decides that a suspension is warranted, it should then consider what terms and conditions are appropriate. The applicant bears the burden of satisfying the Tribunal that a suspension order is warranted. If the Tribunal is satisfied that a suspension order is warranted, the "default" condition is that the full amount of the determination be deposited with the Director of Employment Standards to be held in trust pending the adjudication of the appeal. If the applicant seeks an order that some lesser sum to be deposited, the applicant must demonstrate why that would be appropriate given all the relevant circumstances.

## FINDINGS AND ANALYSIS

7. As noted above, Mr. Wren was the principal operator of a business known as "Ad Star Advertising". I understand that the business may have been carried on, at some point in time, through a business corporation (Ad Star Advertising Ltd., a company headquartered in North York, Ontario) that was incorporated under the *Canada Business Corporations Act* but was dissolved on January 4, 2006, for having failed to file an annual report since 2003. Mr. Wren was one of two directors of this dissolved corporation. A corporate registry search undertaken by the delegate indicated that there was no registration in any of British Columbia, Manitoba or Ontario for a corporation known as "Ad Star Advertising Ltd."
8. According to his legal counsel, Mr. Wren resides in Winnipeg, Manitoba, but it is also conceded that Mr. Wren operated the "Ad Star" business out of premises situated at 403 Columbia Street in New Westminster. However, it is also asserted that Mr. Wren "rarely visits" this office and "does not generally receive mail" at that office. The delegate's reasons indicate that in May 2010 (later corrected in a separate submission to May 2009) Mr. Wren applied for, and was granted, a New Westminster business licence under the name "Ad Star Advertising Ltd". Mr. Wren's business licence application identified his mailing address as 351 Berry Street in Winnipeg.
9. Mr. Wren's legal counsel says that the Berry Street address ceased to be his address in June 2009 and that he currently resides at 298 Springfield Road in Winnipeg. Of course, the obvious question to be asked is why Mr. Wren failed to advise the City of New Westminster of his changed mailing address if, in fact, he had ceased using the Berry Street address as of June 2009 or, at the very least, why he would not have arranged for Canada Post to forward mail sent to the Berry Street address to the Springfield Road address. I suppose

that one might also question why Mr. Wren applied for a business licence naming a non-existent corporation (since it had been dissolved) as the lawful entity operating the business.

10. The delegate says, and Canada Post records confirm, that an attempt was made to contact Mr. Wren at his Springfield Road address, by registered mail, prior to the issuance of the Determination in order to obtain his position with respect to the unpaid wage claims. The delegate's letter left the Burnaby Employment Standards Office on March 12, 2010, and on March 15 a delivery notice was left at the Springfield address – since, apparently, no one was available to take delivery. Canada Post records state that delivery was “refused” on March 31, 2010, and the letter was returned to the Employment Standards Branch Burnaby office. Mr. Wren's legal counsel says that Mr. Wren could not have “refused” to accept delivery since he was travelling from Hawaii to Vancouver on March 31 and did not return to Winnipeg until April 2, 2010 (and some documents have been submitted to corroborate that assertion). However, there is no explanation as to why Mr. Wren did not pick up the letter when he was given notice on March 15 that the letter was available for pickup – Mr. Wren does not say when he left Winnipeg for Hawaii prior to March 31, 2010.
11. Mr. Wren's appeal has two central thrusts. First, he says that the Determination was issued without his first being granted a reasonable opportunity to put his position forward to the delegate – he says that the delegate breached the general principles of natural justice and, more particularly, the express duty imposed on the Director of Employment Standards in section 77 of the *Act*. Second, he says that one of the three individuals was an independent contractor and thus was not entitled to advance a claim for unpaid “wages” under the *Act* and that the other two individuals, if they were employees, were not Mr. Wren's employees but rather were employed by the first individual. Both of these two matters are addressed in some detail in the delegate's reasons.
12. Mr. Wren's counsel says that if Mr. Wren were required to deposit the entire amount of the Determination that would constitute “a significant financial hardship” but Mr. Wren has not seen fit to provide any corroborating information about his personal financial circumstances.
13. Mr. Wren's counsel says that Mr. Wren was not given a fair opportunity to make his position known to the delegate before the Determination was issued but, at the same time, he offers no explanation for his failure to take reasonable steps to retrieve mail that was forwarded to him or why mail delivered to the business premises (and to an address that he provided in his business licence application) did not reach him.
14. As for the merits of this case on appeal, I am far from persuaded, based on an admittedly preliminary review of the matter, that, as Mr. Wren's counsel asserts, “the Appeal will certainly be successful”.
15. Mr. Wren does not appear to have any close personal connections to the province of British Columbia beyond apparently maintaining a business office, that he “rarely visits”, in New Westminster.
16. In light of the foregoing considerations, I do not believe that this is a case where any sort of suspension order is appropriate. Of course, the Director is free to voluntarily agree to not take any enforcement proceedings if the full amount of the Determination were deposited but, for my part, I do not think the Tribunal should issue a suspension order in this case. I can advise the parties that I expect to deliver my reasons for decision in the main appeal within the next 2 weeks.

**ORDER**

17. Mr. Wren's application to suspend the effect of the Determination, made pursuant to section 113 of the *Act*, is refused.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**