

A suspension request

- by -

Retirement Concepts Seniors Services Ltd (a federal corporation), Retirement Concepts Holdings Ltd (a federal corporation), Nanaimo Seniors Village Partnership (a partnership) and Well-Being Seniors Services Ltd (a federal corporation)

- 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 VICE-CHAIR: Norma Edelman

FILE No.: 2006A/105

DATE OF DECISION: October 6, 2006

DECISION

SUBMISSIONS

David McDonald	on behalf of Retirement Concepts Seniors Services Ltd (a federal corporation), Retirement Concepts Holdings Ltd (a federal corporation), Nanaimo Seniors Village Partnership (a partnership) and Well-Being Seniors Services Ltd (a federal corporation)
Sam Black	on behalf of 94 employees
Michelle Alman	on behalf of the Director of Employment Standards

OVERVIEW

1. Retirement Concepts Seniors Services Ltd., Retirement Concepts Holdings Ltd., Nanaimo Senior Village Partnership and Well-Being Seniors Services Ltd. (the “Appellants”) have appealed a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 24, 2006 ordering them to pay \$729,761.87, representing unpaid wages and accrued interest owed to 120 persons and an administrative penalty for a violation of Section 64 of the *Employment Standards Act* (the “Act”).
2. As a preliminary matter the Appellants seek a suspension of the Determination pursuant to Section 113 of the *Act* pending the outcome of their appeal.
3. This decision addresses only the suspension request.

DECISION

4. I have before me written submissions from Counsel for the Appellants dated August 31, 2006 and September 28, 2006, a submission from Counsel for 94 employees dated September 21, 2006 and a submission from the delegate dated September 21, 2006. I have reviewed these submissions and the Tribunal decisions cited in the submissions.
5. Section 113 of the *Act* provides as follows:
 - 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.

6. The Appellants seek a suspension of the Determination. Counsel for the Appellants indicates the Appellants have deposited \$ 183,000.00, which amounts to nearly 25 % of the Determination, with the Director to be held in trust pending the outcome of their appeal and submits this amount is adequate in the circumstances of the appeal.
7. Counsel for 94 employees submits that the suspension request should be denied, but if the Tribunal grants the suspension, it should be on the condition that the Appellants deposit the total amount required to be paid under the Determination or the posting of an irrevocable letter of credit in the full amount.
8. The delegate submits "...the Director would like to point out that the amount claimed in the Determination is an unusually large amount and therefore suggests that 50% of the determination would be an appropriate amount for the deposit."
9. The first issue to be decided is whether the Tribunal should suspend the effect of the Determination. The Tribunal will not suspend the effect of a Determination in circumstances where the grounds for 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; *Fetchomatic.Com Online Inc. and Fetchomatic Global Internet Inc.* BC EST # D550/01). In this case, I am satisfied this appeal is not frivolous or devoid of merit; it may have some merit. I am therefore prepared to issue an order under Section 113(2) of the *Act* to suspend the effect of the Determination.
10. The remaining issue is whether the Tribunal should order that the full amount of the Determination should be deposited with the Director or a smaller amount that the Tribunal considers adequate in the circumstances of the appeal. In arriving at this decision the Tribunal considers the perspectives of both the employees and the employer (*Tricom*, supra).
11. The amount of the Determination is not inconsequential. The Appellants, correctly in my view, have not taken the position that no monies should be deposited with the Director. Rather they submit that payment of the full amount would be prejudicial to the organization. They do not assert they are unable to pay the full amount. The Tribunal has held that where there are concerns about an Appellant's financial condition or it is shown that an Appellant is in financial difficulty or has no funds to satisfy the Determination it will require the full amount to be deposited with the Director (*Tricom* supra; *Wen-Di Interiors Ltd. and Wen-Di Interiors (B.C.) Ltd.*, BC EST # D307/99) or alternatively it will refuse to order a suspension (*Fetchomatic* supra, *Anne Elizabeth Lowan and Timothy James Lowan jointly operating as Corner House*, BC EST # D254/00).
12. In this case, the evidence does not suggest there would be a risk if the full amount is not deposited with the Director. I am not satisfied that the Appellants are in financial difficulty at this time such that further collections by the Director of the entire amount would be impossible. The delegate, who is responsible for collecting wages, has raised no issue about collecting the full amount of the Determination pending a decision on the appeal, and he suggests that 50% of the Determination would be appropriate as a deposit.
13. I recognize that the employees have been without the wages set out in the Determination since 2004, but interest is accruing on those wages and will be payable to the employees should the appeal be dismissed.
14. I am satisfied that less than the full amount of the Determination can be deposited with the Director. I find that a deposit of 50% of the Determination or \$364,881.00 (rounded off for convenience) is reasonable and adequate in the circumstances of this appeal.

ORDER

15. Pursuant to Section 113(2) of the *Act* I order that the Determination dated July 24, 2006 be suspended and I order that the Appellants deposit with the Director the outstanding sum of \$ 181,881.00 forthwith, which results in a total deposit of \$364,881.00, to be held in trust until the Tribunal hears and decides the merits of the appeal of the Determination.

Norma Edelman
Member
Employment Standards Tribunal