

An application for suspension

- by -

Metropolitan Fine Printers Inc.
("MFP")

- 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/88

DATE OF DECISION: October 4, 2012

DECISION

SUBMISSIONS

Ib Petersen	counsel for Metropolitan Fine Printers Inc.
Henry Ducluzeau	on his own behalf
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

1. Metropolitan Fine Printers Inc. (“MFP”), has appealed a July 4, 2012, Determination of the Director of Employment Standards (the “Director”) ordering it to pay \$6,006.54, representing annual vacation pay and accrued interest to Henry Ducluzeau and an administrative penalty for a contravention of section 58 of the *Act*.
2. MFP appealed the Determination on August 13, 2012. The grounds for MFP’s appeal are that the Director erred in law. MFP also sought a suspension of the Determination pursuant to Section 113 of the *Act* pending the outcome of its appeal.
3. This decision addresses only the suspension request and is based on the written submission of the parties.

FACTS AND ARGUMENT

4. The facts relevant to this suspension request are as follows.
5. Mr. Ducluzeau was employed as a sales representative from June 24, 2008, until February 28, 2011. On June 8, 2011, he filed a complaint alleging that MFP had contravened the *Act* in failing to pay him vacation pay. The parties entered into an employment agreement that provided, among other things, that Mr. Ducluzeau would be paid a guaranteed draw against his commissions. He was paid this draw until September 30, 2010, after which his base salary was reduced. Mr. Ducluzeau received vacation pay and severance/termination pay when his employment was terminated.
6. The Director’s delegate determined that Mr. Ducluzeau did not take all the vacation to which he was entitled under his contract of employment. He also determined that Mr. Ducluzeau had not lost his earned and unused vacation pay at the end of the calendar year. The delegate concluded that Mr. Ducluzeau was owed vacation pay earned and not paid after January 1, 2009 until the end of his employment.
7. MFP argues that the delegate erred in his interpretation of Section 57(2) of the *Act* in concluding that MFP’s company policy fell below minimum standards under the *Act* because it limited Mr. Ducluzeau’s ability to carry forward unused vacation time to subsequent years. Counsel for MFP says that the delegate erred in finding that section 57(2) provided an independent statutory requirement limiting the employer’s ability to restrict carrying forward unused vacation time. Counsel submits that, under his contract of employment, Mr. Ducluzeau was not entitled to carry forward unused vacation into the following year without express written permission from senior management.

8. MFP contends that the appeal is meritorious. It also contends that while there is no prejudice to Mr. Ducluzeau in granting a suspension, if the suspension is not granted and the appeal is successful, MFP would experience an expensive and time-consuming process to recover its funds.
9. The Director did not oppose the suspension request.
10. Mr. Ducluzeau seeks to have the Employment Standards Branch continue to collect the funds outlined in the Determination.

ARGUMENT AND ANALYSIS

11. 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.
12. Suspension applications are not granted as a matter of course. To succeed on a suspension application, an applicant must make a clear case to the Tribunal that it will suffer prejudice if the suspension order is not granted.
13. Furthermore, the Tribunal will not suspend the effect of a Determination in circumstances where the grounds of appeal are frivolous or have no apparent merit. (*Tricom Services Inc.*, BC EST # D420/97; *TNL Paving Ltd.*, BC EST # D397/99)
14. While it is not my function, on a suspension application, to conduct an extensive analysis of the merits of the appeal, I find that MFP's appeal has some merit. Counsel for MFP has raised a *prima facie* issue regarding the Director's interpretation of Mr. Ducluzeau's vacation pay entitlement under his employment contract in light of section 57(2) of the *Act*, an issue that will require some consideration by the Tribunal.
15. Although Mr. Ducluzeau wishes to have the Director proceed with the enforcement of the Determination, he has made no submissions regarding any possible prejudice he may suffer if the suspension application was granted. The Director did not oppose the application even though no funds were deposited with the suspension application.
16. In light of all of the factors, I find no reason not to grant the application to suspend the effect of the Determination.
17. However, MFP has not submitted any funds with its suspension request. Section 113(2) provides that the person seeking the suspension must have deposited at least some of the amount required to be paid under the Determination with the Director. There is no submission, nor any evidence, that MFP would suffer any prejudice if the full amount of the Determination were deposited as a condition of granting the application.

ORDER

18. 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 MFP deposits the full amount of the Determination, that is, \$6,006.54, with the Director no later than October 12, 2012.

Carol L. Roberts
Member
Employment Standards Tribunal