

An application for suspension

- by –

Cellular Baby Cell Phone Accessories Specialist Ltd. and B-Mobile Telecommunication Inc.

("Cellular")

- 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/99

DATE OF DECISION:

October 5, 2012





DECISION

SUBMISSIONS

Sandra Li-Seller	counsel for Cellular Baby Cell Phone Accessories Specialist Ltd. and B-Mobile Telecommunication Inc.
Rod Bianchini	on behalf of the Director of Employment Standards

OVERVIEW

- ^{1.} Between June 3, 2010 and March 28, 2011, seven employees of Cellular Baby Cell Phone Accessories Specialist Ltd. and B-Mobile Telecommunication Inc. ("Cellular") filed complaints with the Director of Employment Standards (the "Director"). The employees alleged that Cellular had contravened the *Employment Standards Act* (the "*Act*") in failing to pay them regular wages; commissions and bonuses and vacation pay on those commissions; well as overtime and statutory holiday pay. On July 25, 2012, the Director issued a Determination ordering Cellular to pay the employees a total of \$22,943.69, representing wages, vacation pay, withheld wages, overtime wages, statutory holiday pay and accrued interest. The Director also imposed seven administrative penalties in the total amount of \$3,500.00 for contraventions of sections 17, 18, 21, 40, 46 and 58 of the *Act* and section 46 of the *Employment Standards Regulation* (the "*Regulation*"), for a total amount payable of \$26,443.69.
- ^{2.} Cellular appealed the Determination on September 4, 2012, alleging that the Director had erred in law and failed to observe the principles of natural justice. Cellular also sought a suspension of the Determination pursuant to Section 113 of the *Act* pending the outcome of its late appeal.
- ^{3.} This decision addresses only the suspension request.

FACTS AND ARGUMENT

- ^{4.} There were a number of issues before the Director's delegate. Those were a) whether or not Cellular had withheld, cancelled, stopped or clawed back commissions and bonuses that resulted in the non-payment of wages to the employees, b) the non-payment of vacation pay on previously paid commissions and bonuses and c) whether or not Cellular had properly paid overtime and/or statutory holiday pay. Following an investigation, the Director concluded that Cellular had failed to pay wages (commissions and bonuses), vacation pay on the bonuses, overtime wages and vacation pay in the amount set out above. The Director also determined that Cellular had failed to produce payroll records as required.
- ^{5.} Cellular contends that the Director erred in law by considering improper factors and evidence in assessing Cellular's credibility, leading the Director to dismiss Cellular's position on the amount of commissions payable. Cellular also alleges that the Director failed to observe the principles of natural justice in failing to sufficiently disclose to Cellular the case to be met and afford it a reasonable opportunity to respond. Cellular further asserts that the process followed by the Director was inappropriate for the complexity of the claim. Finally, Cellular contends that the Director breached the principles of natural justice by penalizing Cellular for a without prejudice conversation.
- ^{6.} Cellular deposited the total amount required to be paid under the Determination with the appeal.

- ^{7.} Counsel for Cellular says that the amount awarded to some of the employees exceeds the amount claimed and that to require Cellular to pay monies on these increased amounts before the appeal is decided will prejudice Cellular since the amount awarded to some of the employees "do not have any relation to the risk presented to the Appellant in the first place".
- ^{8.} Cellular says that because it is not in possession of each employee's current contact particulars, if its appeal is successful, it will suffer prejudice in attempting to collect money paid out to the employees if the suspension application is not granted. Moreover, it submits, it will be required to commence seven separate collections actions for small amounts rather than a single action for the entire amount, a duplication of effort which would further prejudice it.
- ^{9.} Cellular submits that the appeal has merit and that a suspension may operate to encourage a timely settlement.
- ^{10.} The Director confirmed that Cellular had deposited the full amount of the Determination with the appeal and did not oppose the suspension request.

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.} The Tribunal will not suspend the effect of a Determination in circumstances where the grounds of 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)
- ^{13.} While it is not the function of the Tribunal Member to conduct an extensive analysis of the merits of an appeal on a suspension application, I am persuaded that the appeal has some merit. Without expressing an opinion on those merits, the appeal raises issues of law which will require serious consideration by the Tribunal.
- ^{14.} As none of the employees made any submissions in response to Cellular's application, I infer that the only prejudice they may suffer if Cellular is unsuccessful on appeal would be a short delay in receiving funds that have been determined owing.
- ^{15.} Having received no submissions opposing the application and after a consideration of all of the other factors, I find no reason not to grant the application to suspend the effect of the Determination.



ORDER

^{16.} Pursuant to section 113 of the *Act*, I allow the application to suspend the effect of the Determination pending the outcome of the appeal.

Carol L. Roberts Member Employment Standards Tribunal