Employment Standards TRIBUNAL

An application for suspension

- by –

0708964 B.C. Ltd.
(the "Appellant")

– 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/164

DATE OF DECISION: December 6, 2010

DECISION

SUBMISSIONS

Jonathan D. Tweedale	Counsel for 0708964 B.C. Ltd.
Leahanne Hodges	on her own behalf
Karry Kainth	on behalf of the Director of Employment Standards

INTRODUCTION

1. On October 1, 2010, a delegate of the Director of Employment Standards (the "delegate") issued a Determination and accompanying "Reasons for the Determination" under section 79 of the *Employment Standards Act* (the "*Act*") regarding the unpaid wage complaints filed by 25 former employees (the "complainants") of an educational institution known as "VIS-Greybrook Academy". This independent school, which was located in Pitt Meadows, ceased operations on or about November 30, 2009. The complainants were employed as teachers, administrators and other support staff. The delegate investigated the complaints and ultimately issued a Determination in the total amount of $88,726.57 representing unpaid wages (largely comprising section 63 compensation for length of service), $1,500 in administrative penalties (section 98) and section 88 interest.

2. The Determination was issued against an incorporated society, "Vancouver International Primary and Secondary School", carrying on business as VIS-Greybrook Academy ("Greybrook"), and against the current appellant, 0708964 B.C. Ltd. (the "Appellant"). The delegate determined that Greybrook and the Appellant were "associated corporations" as defined by section 95 of the *Act* and, accordingly, were jointly and separately liable for the full amount of the Determination (section 95(2)).

3. As detailed in the delegate's reasons, Greybrook operated the school and the Appellant was its landlord. The Appellant owns the lands and premises where the school was located. Both incorporated entities were apparently controlled by a common individual, Mr. Nigel Turner. Although Greybrook was a tenant, it appears that the Appellant allowed Greybrook to fall into significant rent arrears and Mr. Turner provided significant operating funds, both personally and through the Appellant, to Greybrook.

4. The Appellant now appeals the Determination under section 112(1)(a) of the *Act* on the sole ground that the delegate erred in law in making the section 95 declaration. The Appellant seeks an order cancelling the Determination. It should be noted that the Appellant does not challenge the delegate's calculation of the 25 complainants' unpaid wage claims nor does it challenge the propriety of the administrative penalties. Further, so far as I am aware, Greybrook has not appealed the Determination.

5. These reasons do not address the merits of the appeal. Rather, at this juncture, I am only dealing with the Appellant's section 113 application to suspend the Determination pending the final adjudication of this appeal.

THE APPELLANT'S SUSPENSION APPLICATION

6. Section 113 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.

7. The Appellant says that the Determination should be suspended without any deposit or, alternatively, with only a nominal deposit being posted. The Appellant says that it has a strong *prima facie* on appeal and that there are "extraordinary circumstances" that justify a suspension with none, or very little, posted security. The Appellant's legal counsel outlined the extraordinary circumstances as follows (Appeal Submission, paras. 67-68):

> …the Appellant Company's sole assets are the land upon which the School was situated and a receivable from the Society which the Society does not have the resources to repay. (At present the Appellant Company also has a small income stream deriving from a daycare which is renting premises at the School, but the income derived therefrom is insufficient even to cover the Appellant Company's monthly expenses relating to the School, such as heat, water, mortgage payments, etc.)
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> The Appellant Company submits that the Tribunal recognize as an extraordinary circumstance the fact that the only practicable manner that the Appellant Company would have of satisfying the outstanding amount due under the Determination (or in order to provide a deposit with the Director) would be by selling the Lands. In the Appellant's submission, this is a "unique prejudice" (per *Tricom*, supra, at para. 16, and *Carestation*, supra, at para. 9). In the Appellant Company's respectful submission, it would be premature to require the appellant to take the irrevocable step of selling real property owned by an appellant which has a *prima facie* meritorious appeal.

8. None of the complainants filed a submission dealing directly with the suspension application. The delegate opposes the suspension application.

FINDINGS AND ANALYSIS

9. In a recent decision, *Miller* (BC EST # D090/10), I summarized the Tribunal's case law regarding section 113 applications (para. 7):

> The Tribunal has issued several decisions in the last year that set out the governing principles in a section 113 application (see *Patara Holdings Ltd.*, BC EST # D093/09; *Mickey Transport Ltd.*, BC EST # D005/10; *Meiklejohn*, BC EST # D034/10; and *Shaw*, BC EST # D086/10). These principles may be summarized as follows:
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> - 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 should be 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.

- Suspensions are not granted as a matter of course and, in general, a suspension will not be granted on any terms unless there is some *prima facie* merit to the appeal. In addressing this latter question, the Tribunal must not engage in a detailed analysis of the merits but, rather, should consider whether the grounds of appeal, as advanced, appear to raise a "justiciable issue" in light of the Tribunal's statutory powers. The Tribunal is not empowered to conduct a hearing *de novo* and thus the Tribunal should not suspend a determination if the appellant's appeal documents fail to raise, on their face, at least an arguable case that the appeal might succeed on one or more of the three statutory grounds of appeal. Thus, a bare and unparticularized allegation that the delegate failed to observe the principles of natural justice in making the determination does not pass muster.
- In determining if a suspension should be ordered, the Tribunal may also consider whether the applicant will likely endure unreasonable financial hardship if a suspension order is not issued and whether one or more of the respondent parties will be unreasonably prejudiced if a suspension order is granted.
- 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.

10. In his appeal submission, legal counsel for the Appellant acknowledges that both Greybrook and the Appellant are largely directed and controlled by Mr. Nigel Turner. Mr. Turner and his two daughters are the only directors of Greybrook and Mr. Turner is the sole director of the Appellant (para. 5). In February 2004, Mr. Turner purchased the property where the school was situated for $1.4 million (para. 6). Although Greybrook was a tenant, it did not regularly pay rent as it fell due and "Mr. Turner…simply accrued this rent and never imposed such expenses upon the Society in the short-term" (para. 9(f)). Mr. Turner also provided funding (approximately $5 million) for the school's operations (paras. 9(k) and (m)). Mr. Turner was the Chairman of Greybrook's Board of Directors (para. 9(o)). Mr. Turner apparently made the decision to close the school in November 2009 (para. 9(p)).

11. The Appellant's legal counsel says that there was no evidence that the Appellant "exerted any control, design or direction over the School or the Society", however, since Mr. Turner is the sole director of the Appellant, it may be difficult to sort out what was undertaken by Mr. Turner in his purely personal capacity versus acting on behalf of the Appellant. Certainly, it was his decision to have the Appellant grant a rent dispensation to Greybrook. In light of the following facts, I am not persuaded that it is clear and obvious that this appeal will succeed. On the other hand, I am not prepared, at this juncture, to characterize this appeal as one doomed to fail. Clearly there was some form of symbiotic relationship between the two entities since the school could not operate without premises and the school appeared to be the primary, if not the only, tenant of the Appellant's land and premises during the relevant time frame. If the parties' relationship is to be characterized as a "landlord-tenant" relationship, it nonetheless appears to be the case that the firms were not in an independent "arms-length" relationship such as is usually the case with commercial landlords and their tenants.

12. With respect to the asserted "extraordinary circumstance" – namely, having to sell the property in order to raise the necessary funds to post security – I do not think that this is the only viable option open to the Appellant. The Appellant could raise funds by using the land as collateral security. I do not have before me audited financial statements regarding the financial health of the Appellant and thus I am not in a position to determine if this company could post security from its other assets or revenue streams.

13. Further, I do not have any particulars before me regarding the value of the land and premises where the school was located or regarding any encumbrances that may have been registered against the title. I do know that Mr. Turner, through the Appellant, purchased the land and buildings for $1.4 million (para. 9(d)) in February 2004 and one can reasonably assume that the current fair market value of this property should be in the same ballpark (if not substantially greater). Thus, the amount payable under the Determination represents about 6% of the February 2004 market value. I fail to see why the Appellant's only viable option would be to sell the property if it were ordered to post security equivalent to the Determination amount.

14. The Director of Employment Standards could perhaps secure the Determination by filing it against the Appellant's property under section 91 of the *Act*. I can assure the parties that I will render a final decision regarding the merits of this appeal within a relatively short time frame (a few weeks after delivery of the parties' final submissions). Thus, as a practical matter, the Appellant need not be concerned about the property being subjected to a judicial sale order prior to the appeal being finally determined.

15. From the complainants' perspective, it would appear that the Appellant is the only likely source of recovery of their unpaid wages since Greybrook is defunct and seemingly valueless.

16. In light of the competing considerations, I do not think that it would be appropriate to issue a suspension order in this case.

ORDER

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

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal