

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Tricom Services Inc.

(“Tricom”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/526

DATE OF DECISION: September 8th, 1997

DECISION

OVERVIEW

This is an appeal brought by Tricom Services Inc. (“Tricom” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on June 20th, 1997 under file number 070-514 and determination number CDET 006467 (the “Determination”).

Tricom is in the security business; it provides, *inter alia*, security guards and monitored alarm systems to its lower mainland customers. On September 11th, 1995, Tricom obtained a variance from the Director with respect to the shift schedules to be worked by its “station operators” situated at 6929 Royal Oak Avenue, Burnaby. This variance expired on October 1st, 1996.

The Director, during the course of an investigation of a complaint filed by a former employee, concluded that Tricom had effectively “abandoned” the variance on or about January 14th, 1996. Further, the Director determined that Tricom’s “station supervisors” were not “managers” as defined in section 1 of the *Employment Standards Regulation* and were, therefore, entitled to overtime pay in accordance with the provisions of Part 4 of the Act.

In the end result Tricom was ordered, by way of the Determination, to pay a number of its employees the total sum of \$34,076.82 representing unpaid wages and interest to June 20th, 1997.

On July 11th, 1997 Tricom appealed the Determination alleging several grounds of appeal including:

- bias on the part of the Director’s delegate who issued the Determination;
- the delegate failed to give Tricom a reasonable opportunity to respond to the complaint, contrary to section 77 of the Act;
- the Director was without jurisdiction to investigate the matter of the variance because a collective bargaining agreement then in force contained provisions that did “meet or exceed” the provisions of Part 4 of the Act and, by reason of section 43(2)(b) of the Act, any dispute with respect to the matters set out in variance ought to have been resolved through the grievance arbitration process;
- in fact, Tricom did not abandon the variance; and
- in fact, and in law, the supervisors in question were “managers”.

ISSUE TO BE DECIDED

In addition to the various grounds of appeal set out above, Tricom asks that the Determination be stayed pending the appeal. This is the sole issue addressed in these reasons.

ANALYSIS

The request for a suspension is contained in Tricom's solicitors' letter of July 11th, 1997, addressed to the Tribunal and appended to Tricom's written notice of appeal:

"Tricom requests a suspension of the effects of the Determination pursuant to section 113(1) of the ESA. Furthermore, on the basis that Tricom has a strong *prima facie* case given that the Determination is in direct conflict with s. 43 of the ESA, Tricom requests that no deposit be required pursuant to s. 113(2)(b) of the ESA."

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.

By way of a letter dated August 21st, 1997, addressed to the Tribunal, the Director advised that she "strenuously objects" to the suspension request. In particular, the Director is concerned that if the Determination was suspended without any monetary deposit, due to the ongoing precarious financial condition of the company, the employees might, ultimately, be severely financially prejudiced.

By way of reply to the Director's foregoing submission, Tricom's solicitors, in a letter of September 2nd, 1997, addressed to the Tribunal, submit that:

- "Tricom is able to pay the full amount of the Determination, although such payment will have a significant negative effect on Tricom's cashflow"; and
- in light of a strong *prima facie* meritorious appeal, the suspension ought to be ordered with no, or a very small deposit, being posted (Tricom cites *Motion Works Group Ltd.*, EST Decision No. D345/96 for this proposition).

In *Motion Works* Tribunal Chair Crampton ordered the suspension of a determination (in the amount of \$16,030.58) upon deposit of the sum of \$5,000 primarily because, on its face, the Determination appeared to overstate the unpaid wage entitlement of the two complainant employees. In the instant case, Tricom also argues that the amount payable under the Determination may be incorrectly calculated, but unlike the situation in *Motion Works*, this allegation has not been particularized--in other words, Tricom simply makes a general assertion that the Determination may be in error as to the calculation of the amounts due to the various employees. However, given that the Determination was based on Tricom's own payroll records, I would have thought it not a Herculean task for the appellant to more fully particularize its claim that the Determination contains calculation errors.

I am of the view that on a request for a suspension the Tribunal should not conduct an in-depth review of the merits of the appeal. To do so, in effect, creates a two-step appeal process on the merits and blends a "preliminary issue", namely, the suspension request, with the substantive issues that, in my opinion, ought to be dealt with exclusively in the appeal itself. It is enough at the suspension request stage for the Tribunal to simply satisfy itself that the appeal might have some merit; to put the matter another way, the Tribunal should not suspend a Determination where the appeal is obviously frivolous or otherwise without merit.

I am satisfied that Tricom's appeal may be meritorious; I am not prepared to go farther than that with respect to Tricom's probability of success on appeal.

In *TNL Paving Ltd. et al.* (EST Decision No. D002/97) the Director opposed a suspension request on the ground that if the determination there in question was suspended, an ongoing investigation would be "prejudiced". In *TNL* I suggested that if a party opposes a suspension request on the ground of "prejudice", there is an onus on that party to set out the nature of that prejudice. Similarly, in the instant case, there is a general assertion that if the Determination is not suspended, Tricom will be prejudiced by way of a "significant negative effect on [its] cashflow".

For my part, I cannot imagine *any* small or medium-sized business that would *not* have its cashflow negatively affected by having to post some \$34,000 in order to obtain a suspension of the payment order. However, I do not believe that this sort of prejudice is sufficient to justify an order under s. 113 such that a determination is suspended upon deposit of little or no monetary security. I believe it is important to note that the legislature has provided, as a first proposition, that a suspension should only be ordered if the "total amount" of the determination is posted; a "smaller amount" should only be ordered if such lesser amount would be "adequate in the circumstances of the appeal". In my view, the "adequacy" of any proposed deposit must be evaluated not only from the perspective of the employer, but also from the perspective of any employees whose rights might be affected by a suspension order.

I am particularly concerned that Tricom appears to have some financial difficulty and has, apparently, indicated to the Director that the firm might be closed down which, of course, could well result in the employees never fully recovering their unpaid wages. In light of this latter circumstance, the failure of the employer to identify some unique prejudice flowing from having to post the full amount of the Determination and the employer's admission that it "is able to pay the

full amount of the Determination”, I am of the view that the Determination should only be suspended if the full amount of the Determination is deposited with the Director.

ORDER

Pursuant to section 113(2)(a) of the *Act*, I order that Determination No. CDET 006467 be suspended until Tricom’s appeal of the Determination has been heard and decided, or until further order of this Tribunal, provided that Tricom deposits with the Director the full amount required to be paid under the Determination, namely, \$34, 076.82.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal