

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 -

Parvez Nadeem Tyab,
a Director or Officer of Tara Capital Corporation
and Tara Capital Corporation
("Tara")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/603

DATE OF DECISION: October 12, 2000

DECISION

OVERVIEW

Parvez Nadeem Tyab, a Director or Officer of Tara Capital Corporation (“Tyab”) and Tara Capital Corporation (“Tara”) have appealed Determinations issued on August 1, 2000 by a delegate of the Director of Employment Standards (the “Director”) ordering, among other things, that Tyab pay an amount of \$12,875.36 and Tara pay an amount of \$13,887.36. On August 10, 2000, the Director filed the Determinations in the Supreme Court of British Columbia and collection proceedings were commenced. On August 28, 2000, Tyab and Tara applied pursuant to Section 113 of the *Employment Standards Act* (the “Act”) requesting a suspension of the effect of the Determinations.

This decision addresses the application under Section 113 of the Act.

ARGUMENT AND ANALYSIS

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.*

Tyab and Tara indicate they are willing to deposit an amount of \$6000.00 pending the outcome of their respective appeals. They submit that a deposit of this amount is “adequate in the circumstances” for the following reasons:

1. The Director exceeded her jurisdiction by awarding amounts for notice pay and annual vacation pay in excess of the minimum standards provided in the Act;
2. Because the Director had no jurisdiction to award amounts beyond the minimum statutory provisions, the Director also exceeded her jurisdiction by taking execution proceedings against a corporate director; and

3. Even if the Director was entitled to execute on the Determinations, the usual course is to attempt to execute against the corporate entity rather than from a director or officer and this was not done.

The above reasons are also found in the reasons given in support of the appeals. As well, the appeals challenge findings of fact made by the Director relating to a document containing terms of employment of the complainant but these grounds of appeal are not raised in support of this request.

The Director says there are several reasons why the effect of the Determinations should not be suspended:

Tyab and Tara failed to comply with a settlement agreement with the Director, stating that they were unable to comply because the company account had been frozen by Revenue Canada and there were no funds available;

Tara appears to have closed its office, removed all furniture from the office and has no other visible assets from which to satisfy the Determinations if the appeals are dismissed; and

Neither Tyab nor Tara have any funds in their personal and company bank accounts.

The Tribunal will not suspend Determinations pending appeal as a matter of course. Even where a Determination is suspended, the default position, in paragraph 113(2)(a), is to require the entire amount of the Determination to be deposited with the Director. Tyab and Tara have not made their request under paragraph 113(2)(a), but rather under paragraph 113(2)(b), which allows a smaller amount to be deposited if it is “adequate in the circumstances of the appeal”.

The circumstances indicate a real likelihood of there being no funds or assets at the end of the day to satisfy the full amount of the Determination if its effect is suspended upon the terms proposed, which would allow Tyab and Tara to deposit less than half of the amount of either Determination, and the appeals are dismissed.

It is not a function of the Tribunal considering a request under Section 113 to conduct an extensive analysis of the merits of the appeal. It is sufficient that the Tribunal satisfies itself that the appeal, or the parts of it raised in support of the request, may have some merit. Conversely, the Tribunal would not suspend the effect of a Determination in circumstances where the grounds for appeal are frivolous or have little or no apparent merit. In this case, Tyab and Tara have not relied on the relative merits of the appeals in their entirety as a basis for this application. They have used only one of the grounds for appeal in each of the appeals, the jurisdictional argument, as support.

In this case, I am not satisfied there is a sufficient merit to that ground of appeal to justify a suspension of the effect of the Determinations on the terms suggested. In *Re Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99 (Reconsideration of BC EST #D101/98), a three person panel of the Tribunal concluded the Director had jurisdiction to issue Determinations for amounts that exceeded the statutory minimums in the *Act*. The appeals in this case appear to raise the same issue. I am not prepared to make any final decision about whether the appeal in

this case would fall within the reasoning in the *Re Honda North* case, but the similarity between that decision and the grounds upon which this application is based supports my view of the merit of that ground of appeal and justifies my refusal to suspend the effect of the Determinations on the basis of the jurisdictional arguments.

In answer to the third reason given in support of this request, I am not aware of any basis for asserting that the Director has to attempt to collect from the corporate entity before proceeding against a director or officer of the corporation. Even if there were, there appears to be sufficient reason in this case for not doing that and proceeding directly against Tyab.

I do not consider this to be an appropriate case for a suspension order.

ORDER

The request by Tyab and Tara for an order suspending the effect of the Determination by depositing an amount of \$6000.00 with the Director pending a decision on the merits of their appeal is refused.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal