

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an application for suspension pursuant to section 113  
of the *Employment Standards Act*, R.S.B.C. 1996, c. 113

- by-

The City of New Westminster

- arising from an application to reconsider the decision issued by -

The Employment Standards Tribunal  
("the Tribunal")

<b>ADJUDICATOR:</b>	Frank A.V. Falzon
<b>TRIBUNAL FILE NO.:</b>	98/791
<b>DATE OF DECISION:</b>	February 9, 1999

**BC EST #D050/99**  
**Reconsideration of BC EST #D518/98**  
**Suspension request under Section 113**

**OVERVIEW**

The City of New Westminster applies for a reconsideration of an Adjudicator's December 1, 1998 decision (BC EST #D518/98) confirming an August 24, 1998 Determination finding that the City contravened s. 10(1) of the *Act* when it charged job applicants a \$50 non-refundable fee as part of the application process. The payment required by the Determination confirmed on appeal is set out as follows:

Please send certified cheques or money orders, each in the amount of \$50.00, made out to each individual listed in Schedule A of this Determination [98 persons], to this office within twenty three (23) days. Total amount owing \$4900.00.

Under the *Employment Standards Act*, I can file this Determination in the British Columbia Supreme Court and begin collection proceedings. This may adversely affect your credit rating. Directors and officers of companies can also be required to pay wages owed to employees. If payment is not received within 23 days additional interest will accrue.

**ISSUE TO BE DECIDED**

In conjunction with its reconsideration application, the City applies under s. 113 of the Act to have the Tribunal suspend the effect of the Determination. The Director has objected to the City's s. 113 application. The specific purpose of these reasons is to address the City's application under s. 113, while the Panel continues its deliberations on the reconsideration application.

**ANALYSIS**

It will, at the outset, be useful to reproduce ss. 113 and 116 of the Act:

- 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.

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- 116 (1) On application under subsection (2) or on its own motion, the tribunal may
- (a) reconsider any order or decision of the tribunal, and
  - (b) cancel or vary the order or decision or refer the matter back to the original panel.
- (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
- (3) An application may only be made once with respect to the same order or decision.

The City applies to suspend the effect of the Determination pending the outcome of the reconsideration process. In support of its application, the City submits that its arguments on the merits are strong, that its conduct throughout the investigation process has been exemplary, that it is financially solvent and the following prejudice will arise if the Order is not granted:

If execution proceedings are taken against the City there will be prejudice to the City. The City expects difficulty in recovering the amount enumerated in the Determination from the individuals should the Tribunal cancel or vary the Determination.

With reference to s. 113(2), the City does not propose to deposit the entire amount with the Director. It suggests “the sum of \$500.00 as an adequate amount in the circumstances of this appeal. Please advise us whether you consider this amount to be adequate in the circumstances of this appeal”.

The Director objects to the suspension application. She summarizes her argument by submitting that:

- 1) It [suspension pending a reconsideration decision] is not contemplated by s. 113 of the Act;
- 2) This matter is at a point at which the whole amount of the Determination should be deposited with the Director, and
- 3) At the reconsideration stage the employer should deal with the Director, as statutory fiduciary, responsible for enforcement under the Act, regarding disbursement of funds collected.

**Is s. 113 available on a reconsideration application?**

The threshold question raised by the Director is whether the Tribunal has the legal authority to suspend the effect of a Determination pending a reconsideration decision. As

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pointed out by the Director, s. 113(1) specifically states that “[a] person who appeals a determination may request the tribunal to suspend the determination”.

The broadest interpretation of this language would give the Tribunal the ongoing power to suspend the effect of a determination simply on the basis that a person has appealed at some point in the past. On this view, because the City has appealed the Determination, the Tribunal enjoys the discretion at any point in the future to suspend the Determination for the period and subject to the conditions it considers appropriate. If this interpretation were taken to an extreme, the Tribunal would have the ongoing power to entertain suspension requests at any future point in time, including during the institution of future judicial proceedings. In my view, this could not have been the intention of the Legislature in enacting s. 113. Clearly, the language, context and purpose of s. 113 is such that the power should be exercised by the Tribunal only in the context of the proceedings over which it has exclusive jurisdiction. The language should not be read so as to permit the Tribunal to encroach on the role of the courts or other adjudicative bodies merely because a person has appealed sometime in the past: see *Re New Pacific Limousine Service Inc.* BCEST #D054/96; *Re Paradon Computer Systems*, BCEST #D221/98. Section 113 must be limited in scope to proceedings over which the Tribunal has exclusive appellate jurisdiction.

The narrowest interpretation is that put forth by the Director, who argues that s. 113 applies only in the period between the Determination and the original Tribunal appeal decision. The Director submits that if the suspension power was meant to apply to the reconsideration process (or, for that matter, judicial review) the legislation would have said so. The Director argues that there is good reason the legislation did not say so, and that is because of the policy that encroachments on her ability to enforce orders for the Act’s beneficiaries ought to be minimized.

The Director makes a persuasive argument, which I have declined to accept because I believe that there is a more appropriate “middle ground” approach to the very broad and very narrow interpretations discussed above. That middle ground approach is to read s. 113 so that “a person who appeals” a determination may make a s. 113 request at any point while the statutory appeal process - which includes the reconsideration process - is under way.

Central to this interpretation is my view that the reconsideration process is part of the appeal process, both in legislative structure (Part 13 of the Act) and in substance. To be sure, reconsideration is a unique part of the process which depends on the Tribunal’s discretion and which is available in limited circumstances. However, in its reconsideration capacity, the Tribunal does not cease to be the appeal tribunal. Far from being some form of proceeding alien to the appeal process, reconsideration is an integral part of it. When the Tribunal agrees to reconsider an Adjudicator’s decision, it is reviewing the correctness of that decision, which as a matter of substance necessarily involves a “reconsideration” of the Determination’s validity. As noted in *Milan Holdings* (BC EST #D313/98):

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The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deemed worthy of reconsideration - particularly questions of law - should be reviewed for correctness. Such an approach is consistent with the Legislature's confidence that questions of law should be fully and properly resolved within the specialized statutory regime governing employment standards: s. 110. It is consistent with the reasonable expectation of parties that if we exercise our discretion to reconsider, we will bring our best judgment to bear upon the issues.

If the reconsideration process is part of the appeal process, the question arises whether there is anything in the language or purpose of s. 113 to exclude the reconsideration portion of the appeal structure from the scope of s. 113. I would answer in the negative. While only a person who appeals a determination can take advantage of s. 113, the language of s. 113 does not bifurcate the different appeal proceedings in which the challenged determination is at issue before the Tribunal. To the contrary, s. 113 gives the Tribunal broad authority to suspend a determination that has been appealed for the period and subject to the conditions it thinks appropriate. The broad language of s. 113 is supported by its purpose which is to ensure that justice is done within the appeal process. To categorically exclude s. 113 from the reconsideration process is to prevent the Tribunal from ensuring that justice is done in that process. Absent clear language to the contrary, I am not prepared to interpret the legislation in that fashion. Such a construction would be inconsistent with the purpose of providing "fair and efficient procedures for resolving disputes over the interpretation and application of the Act": *Act*. s. 2(d).

In my view, the Director's submissions speak less persuasively to jurisdiction than to discretion - that is, to the fashion in which the Tribunal should exercise the power under s. 113 as part of the reconsideration process. When a suspension request is made in the context of a reconsideration application, two factors become particularly important. The first is that the application will typically arise before the Panel has even decided the "first stage" question of whether to even to engage in the reconsideration process. The second is the request will arise in the context of a considered appeal decision by an Adjudicator.

In light of these factors, it is my opinion that for the Tribunal to grant a suspension request in conjunction with a reconsideration application, an applicant must make a clear and compelling case to the Tribunal that it will suffer serious prejudice if a suspension order is not granted. As part of the inquiry into prejudice, and out of deference to the Director's fundamentally important enforcement role, a party should demonstrate to the Tribunal that it has approached the Director in good faith, was unsuccessful in attempting to resolve the question of payment and disbursement pending the reconsideration, and that the Director's position pending the reconsideration process will cause them serious prejudice. The question as to what reasonable alternatives to the suspension application have been canvassed by the parties is important not just in principle, but as a practical matter. As the Director points out, it is not uncommon for her office to hold funds pending a reconsideration being decided. Encouraging the parties to engage in discussions to this

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possible end is clearly in the interests of minimizing the number and litigiousness of s. 113 applications.

**Application of the principles to the present case**

The City has failed to satisfy me that the Determination ought to be suspended while the reconsideration process is pending. The following passage from the submission of the Director is, in my view, compelling:

The funds [the application fees] were collected in full knowledge that the Director disagreed with the Cities' [sic] actions. The City should pay the full amount of the Determination and statutory interest into the Director's interest bearing trust account. Further, the Director invites the City to engage in talks on the timing and conditions for disbursement of the monies, so that the Director may fulfill her role....

While the City has submitted that it has offered to deposit \$500 with the Director, it has also emphasized that "it is in good financial health". Given the total amount in question in this case, the City has offered no compelling reason why it has not offered to deposit the entire amount which the Adjudicator confirmed that it was required to pay, let alone that the Director has taken a position to the City's prejudice with respect to issues of disbursement pending the reconsideration.

**ORDER**

The application for a suspension of the Determination is hereby dismissed.

**Frank A.V. Falzon**  
**Adjudicator**  
**Employment Standards Tribunal**