

An Application for Reconsideration

- by -

AltaStream Power Systems Inc.
("AltaStream")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2017A/51

DATE OF DECISION: May 2, 2017

DECISION

SUBMISSIONS

Thomas F. Beasley

counsel for AltaStream Power Systems Inc.

INTRODUCTION

1. This is a section 116 application by AltaStream Power Systems Inc. (“AltaStream”) for reconsideration of a section 113 suspension order.
2. Section 113 and subsection 116(1) of the *Employment Standards Act* (the “*Act*”) provide 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.
- 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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

PRIOR PROCEEDINGS

3. Very briefly, the relevant background proceedings are set out, below.
4. On December 19, 2016, a delegate of the Director of Employment Standards (the “delegate”) issued a Determination under section 79 of the *Act* ordering AltaStream to pay its former employee, Tyler McMillan (“McMillan”), the total sum of \$127,985.73 on account of unpaid wages and section 88 interest. The largest component of the award comprised unpaid regular wages in the form of sales commissions (\$93,575.74), but the delegate’s unpaid wage order also included an amount for unlawful wage deductions (\$14,015.87), compensation for length of service (\$12,012.26) and vacation pay (\$4,784.15). Further, and also by way of the Determination, the delegate levied four separate \$500 monetary penalties against AltaStream (see section 98 of the *Act*) thus bringing the total amount payable under the Determination to \$129,985.73.
5. On January 26, 2017, AltaStream filed an appeal of the Determination, asserting that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see subsections 112(1)(a) and (b) of the *Act*). AltaStream concurrently applied for a section 113 suspension order. On April 5, 2017, Tribunal Member Stevenson issued a decision summarily dismissing the appeal under subsection 114(1)(f) of the *Act* as having no reasonable prospect of succeeding (see BC EST # D033/17; the “Appeal Decision”).

6. On March 17, 2017, and prior to issuing the Appeal Decision, Member Stevenson issued a separate decision (and this decision is the subject of the instant section 116 application) regarding AltaStream’s section 113 application (BC EST # D027/17; the “Suspension Decision”). AltaStream’s position regarding its section 113 suspension application was as follows (Suspension Decision, para. 6):

[AltaStream] submits an order suspending the effect of the Determination is appropriate as [AltaStream] has placed the full amount of the Determination in trust with its legal counsel’s law firm on an undertaking by counsel to hold the funds pending a final decision of any appeals under the *Act* and of any judicial proceedings relating to decisions of the Tribunal.

7. Both the Director of Employment Standards and Mr. McMillan opposed that form of order.
8. Member Stevenson issued the following order (Suspension Decision, paras. 13 – 15):

Pursuant to section 113(2)(a) of the *Act*, the Determination is suspended provided [AltaStream], within ten working days after the date of these reasons for decision, deposits with the Director of Employment Standards the full amount of the Determination (\$129,985.73) to be held by the Director of Employment Standards while either, or both, parties are actively pursuing avenues of appeal, under the *Act*. If [AltaStream] wishes to have an order requiring the Director to continue to hold the amount deposited with the Director after proceedings under the *Act* have been concluded, that order should be requested in the appropriate forum.

This Order is subject to further order by this Tribunal, by another tribunal acting within jurisdiction respecting the amount being held, or by a court of competent jurisdiction.

If [AltaStream] fails to deposit the monies within ten working days as directed by this Order, the Director of Employment Standards shall be at liberty to enforce the Determination in accordance with the provisions of Part 11 of the *Act*.

9. AltaStream now applies to have this order reconsidered.

THE RECONSIDERATION APPLICATION

10. AltaStream’s principal objections to the form of the suspension order, and its preferred form of order, are set out in the following excerpts from its legal counsel’s memorandum appended to its Reconsideration Application Form (Form 2):

- “In the Suspension Application, [AltaStream] requested that any suspension granted apply pending final determination of not only the Appeal, but of any judicial review of the decision on Appeal and any appeal of the judicial review.”
- “In the [Suspension] Decision, the Tribunal ordered that the Determination was suspended only ‘while either, or both, parties are actively pursuing avenues of appeal, under the [*Act*].’ The Tribunal declined to include avenues of judicial review and appeal in the courts to the period for which the suspension applies.”
- “[AltaStream] deposited the funds for the Payment with the Director. The Deposit was made based on the prior agreement of the Director to hold the funds while either, or both, parties are actively pursuing avenues of appeal, under the *Act* or in the Courts, in a timely way, subject to any overriding order by another tribunal or by the Court.”
- “[AltaStream] applies to vary the [Suspension] Decision by ordering the suspension will continue to apply pending completion of any judicial proceedings being a judicial review and any

appeal of the judicial review of the Determination including on the issue of whether the additional payment of \$26,294.58 paid by [AltaStream] to Mr. McMillan should reduce the amount of the Determination.”

11. AltaStream’s legal counsel says that the suspension order should be varied “to the effect that the suspension of the Determination applies while either, or both, parties are pursuing avenues of appeal under the *Act* or in the courts”.
12. With respect to the \$26,294.58 payment noted above, as I understand the situation, AltaStream says that this sum represents monies paid by AltaStream to Mr. McMillan on account of commissions payable. This total amount was apparently paid to Mr. McMillan after April 5, 2016 (when the complaint hearing regarding Mr. McMillan’s unpaid wage complaint was held) and prior to the Determination being issued on December 19, 2016. In its section 113 application, AltaStream identified these payments and asked the Tribunal to reduce the required deposit to \$103,691.15 to reflect this payment ($\$26,294.58 + 103,691.15 = \$129,985.73$ being the total amount of the Determination including monetary penalties). I shall refer to the \$26,294.58 apparently paid to Mr. McMillan as the “Contested Payments” and, in that regard, I am not making any affirmative finding as to whether this sum was actually paid to Mr. McMillan (although I have no reason, at this juncture, to dispute counsel’s assertion that these monies were paid) and, if so, whether these payments are directly referable to AltaStream’s liability under the Determination.
13. Although AltaStream, in its section 113 application, specifically requested that “the amount of the deposited funds (\$129,985.73) be reduced by \$26,294.58 to \$103,691.15”, it appears that Member Stevenson did not specifically address this matter in the Suspension Decision or in the Appeal Decision. However, as will be seen, I do not consider that oversight to be particularly consequential inasmuch as I do not believe that the deposit amount should have been reduced on account of the Contested Payments.
14. To summarize, there are essentially two components to AltaStream’s reconsideration application; first, whether the suspension order should have been extended to remain in force beyond the completion of adjudicative proceedings before the Tribunal if any subsequent judicial proceedings were filed; and, second, whether the amount ordered to be deposited into the Director’s trust account should have been reduced to reflect the Contested Payments.

FINDINGS AND ANALYSIS

15. As matters now stand, this application could be characterized as premature inasmuch as AltaStream has not yet filed an application for reconsideration of the Appeal Decision. However, AltaStream’s counsel says that his client intends to seek reconsideration of the Appeal Decision and, given that representation, I do not intend to summarily dismiss the instant application on the basis that it is premature.
16. However, in my view, this is not a proper case for the Tribunal to exercise its statutory discretionary power to reconsider the Suspension Decision because the application does not pass the first stage of the two-stage *Milan Holdings* test (see BC EST # D313/98). Accordingly, there is no need to seek submissions from the respondent parties.
17. With respect to the proposed form of the order, I am not persuaded that the Tribunal has the statutory authority to issue a section 113 suspension order that purports to extend beyond the Tribunal’s statutory mandate. Once the Tribunal has issued a final order – namely, an order following a section 112 appeal that has not been reconsidered, or an order finally disposing of a section 116 application, it has no further statutory mandate. In my view, the Tribunal cannot issue an order suspending the effect of a determination

such that the order would continue to bind the parties (and the Director) after the Tribunal has exhausted its statutory mandate by issuing a final order regarding the determination under appeal. If a party files an application for judicial review of a section 116 reconsideration decision, and wishes to have the effect of the determination and the reconsideration decision suspended pending the outcome of that judicial review, such an application must be filed with the court, not with the Tribunal.

18. If I am wrong, and the Tribunal can issue a suspension order that extends beyond the date of the Tribunal's final order with respect to the determination under appeal, I am not, in any event, prepared to issue such an order in this case. The Appeal Decision is not presently the subject of a section 116 reconsideration application and there is no pending application for judicial review. I do not think that it would be appropriate to issue a suspension order that would continue to bind the parties (including the Director) after the Tribunal's adjudicative functions under the *Act* have been finally completed. A suspension order should be made with a clear understanding of the parties' relative legal and financial positions and, at this stage, I have no idea what the parties' relative positions might be if and when a judicial review application is filed. I would not wish to presuppose that a suspension order would continue to be appropriate that far into the future.
19. As for the application to vary the deposit amount to account for the Contested Payments, the Determination reflected the evidence that was before the delegate as of the completion of the April 5, 2016, complaint hearing. To the extent that monies were paid to Mr. McMillan after the hearing but prior to the date of the Determination, AltaStream could, but apparently did not, have filed a section 86 application with the Director to have the Determination varied to account for these further payments. On appeal, AltaStream did not argue that it had "new evidence" (subsection 112(1)(c) of the *Act*) and thus the Tribunal's task on the appeal was to determine whether, based on the evidence that was properly before the delegate, the Determination should be confirmed, varied or cancelled (see subsection 115(1)(a) of the *Act*) or referred back to the Director (see subsection 115(1)(b) of the *Act*).
20. In my view, and in the circumstances of this case, issues relating to the Contested Payments concern the Director's enforcement powers under Part 11 of the *Act* rather than the Tribunal's adjudicative functions under Parts 12 and 13 of the *Act*. To the extent the Director is reasonably satisfied that the Contested Payments were made on account of AltaStream's liability under the Determination, they will be properly credited against AltaStream's liability. If there is a dispute between the Director and AltaStream regarding what funds have or have not been paid, or otherwise recovered, on account of AltaStream's liability under the Determination, that is a matter for the civil courts.
21. AltaStream maintains that it deposited the funds with the Director on the understanding that the Director would hold the funds until any judicial review (and possible further appeal) proceedings were completed (see para. 10, 3rd bullet point, above). If, in fact, the Director agreed to hold the funds on that basis, that is a matter between AltaStream and the Director. Such an agreement is not binding on the Tribunal and, of course, was not reflected in the suspension order issued in this case. If and when the Director acts in a manner that is inconsistent with this alleged agreement, AltaStream's remedy lies in a court action to have the alleged agreement enforced.

ORDER

22. Pursuant to subsection 116(1)(b) of the *Act*, AltaStream's application for reconsideration of the Suspension Decision is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal