

An Application for Reconsideration

- by -

Fraser Valley Community College Inc.  
("FVCC")

- 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.:** 2016A/38

**DATE OF DECISION:** April 5, 2016

## DECISION

### SUBMISSIONS

Sunanda Kikla

on behalf of Fraser Valley Community College Inc.

### INTRODUCTION

1. This is an application made pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of an appeal decision (BC EST # D026/16; the “Appeal Decision”) issued by Tribunal Member Bhalloo on February 10, 2016. By way of the Appeal Decision, Tribunal Member Bhalloo refused to issue a suspension order under section 113 of the *Act*. This latter provision states:
  - (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.
2. It is important to note that this application is *not* an originating application to suspend a determination; rather it is an application for reconsideration of the Tribunal’s decision to refuse to issue a section 113 order and, as such, different considerations apply. The question before me is not whether I should issue a section 113 suspension order but, rather, whether the Appeal Decision was unreasonable (say, by reason of a clear error of fact or law), and therefore must be varied or set aside.
3. The relevant background facts are as follows.
4. On July 9, 2015, Ms. Vandana Khetarpal (“Khetarpal”) filed an unpaid wage complaint under section 74 of the *Act* against the current applicant, Fraser Valley Community College Inc. (“FVCC”). This complaint was the subject of an oral complaint hearing before a delegate of the Director of Employment Standards (the “delegate”) conducted on October 2, 2015.
5. FVCC did not attend the complaint hearing and Member Bhalloo concluded that it did not provide a reasonable explanation for its failure in that regard (see BC EST # D027/16 – this decision is the subject of a related reconsideration application that I will address in separate reasons for decision).
6. On October 6, 2015, the delegate issued a Determination ordering FVCC to pay Ms. Khetarpal the total sum of \$3,953.10 on account of unpaid wages (over half of which was regular wages but also including overtime pay, statutory holiday pay, vacation pay and compensation for length of service) and section 88 interest. Further, and also by way of the Determination, the delegate levied six separate \$500 monetary penalties (see section 98 of the *Act*) based on FVCC’s contraventions of sections 17 (failure to pay wages at least semimonthly), 18 (failure to pay earned wages on termination of employment), 40 (failure to pay overtime pay), 45 (failure to pay statutory holiday pay) and 63 (failure to pay compensation for length of service) of the *Act* and section 46 of the *Employment Standards Regulation* (failure to produce employment records as demanded). Thus, the total amount payable under the Determination is \$6,953.10.

7. On October 22, 2015, the delegate issued written “Reasons for the Determination” under subsection 81(1.3) of the *Act* (the “delegate’s reasons”).
8. FVCC appealed the Determination and, as noted above, also applied for a suspension of the Determination pending the adjudication of the appeal. Member Bhalloo dismissed FVCC’s appeal of the Determination as having no reasonable prospect of succeeding (see BC EST # D027/16 and subsection 114(1)(f) of the *Act*). As previously noted, FVCC has also applied for reconsideration of this latter decision and I will address that application in separate reasons for decision. *These reasons for decision deal solely with the reconsideration application concerning Member Bhalloo’s decision refusing FVCC’s section 113 suspension application.*

## ANALYSIS AND FINDINGS

9. The Appeal Decision was issued on February 10, 2016. The reconsideration application was not fully perfected until March 14, 2016, due, it would appear, at least in part to FVCC’s difficulties in transmitting its very voluminous application (nearly 750 pages) via e-mail. Thus, the application was filed late but only by a few days (see subsection 116(2.1) of the *Act*). The Tribunal has the statutory authority to extend the reconsideration application period (see subsection 109(1)(b) of the *Act*) and FVCC has applied for such an extension.
10. It is also my understanding that on February 22, 2016, FVCC forward a bank draft for the full amount of the Determination to the Director of Employment Standards. Of course, FVCC had not deposited any funds with the Director when the Appeal Decision was issued on February 10, 2016.
11. Although the Director has not, so far as I can determine, given an undertaking regarding the funds, I expect that the Director will hold the funds – now presumably deposited into the Director’s trust account – until the entire reconsideration proceedings have been concluded (as is the Director’s usual practice).
12. Member Bhalloo refused FVCC’s suspension application based on the following reasons (Appeal Decision, paras. 30 – 33):

...although FVCC has framed its appeal on the error of law, failure by the Director to observe the principles of natural justice in making the Determination and “new evidence” grounds of appeal, central to its appeal is whether it was provided a reasonable opportunity to respond to the Complaint of Ms. Khetarpal.

While I do not intend to pre-determine the outcome of FVCC’s appeal, I am, with respect, unable to see any merit in FVCC’s appeal on the central question of whether it was provided a reasonable opportunity to respond to the Complaint before the Determination was made. The evidence presented shows that FVCC failed to participate in the pre-Hearing processes, including the Hearing although it was given sufficient opportunity to participate at both stages. More particularly, FVCC declined to participate in the mediation, did not produce any documents requested by the delegate under the Demand for Employer Records, did not attend at the Hearing and did not request an adjournment of the Hearing. This case appears to look very much like the employer was “lying in the weeds” until the appeal. In these circumstances, it is unlikely that the Tribunal will allow FVCC to use the appeal procedure to make the case that it should have, and could have, made at the Hearing of the Complaint.

I also note that the Director is seeking FVCC to deposit the full amount of the Determination, including the administrative penalties, as a precondition to a suspension. FVCC has not deposited any funds with the Director, nor argued to deposit a smaller amount.

For all of the above reasons, I find the Tribunal cannot accede to FVCC’s request for a suspension of the effect of the Determination pending the appeal and I dismiss it.

13. Member Bhalloo, at paragraphs 23 – 29 of his reasons, succinctly and accurately summarized the governing legal principles regarding a section 113 application and, in my view, correctly applied those principles to the application at hand. I can find no error in fact or law in his analysis. If FVCC had deposited, or had unequivocally agreed to deposit, the full amount of the Determination with the Director when the Appeal Decision was issued, that might have augured in favour of a suspension order. Even though the amount of Determination has now apparently been deposited with the Director, that is not a fact that I should consider in a reconsideration application since I am reviewing the correctness of Member Bhalloo's decision based on the facts that were before him when he was making that decision.
14. I have reviewed the nearly 750 pages submitted by FVCC in support of its reconsideration application (although several documents are reproduced on multiple occasions throughout the submission) and while there are many assertions relating to what FVCC says are the obvious merits of its appeal of the Determination, I am unable to find a single argument within those pages that speaks to any alleged errors in the Appeal Decision now before me. In other words, FVCC has not provided any argument as to how or why Member Bhalloo erred in refusing to issue a section 113 suspension order.
15. In summary, this application is late but I am not prepared to dismiss it on that sole basis. Indeed, if the application were meritorious, I would have been inclined to extend the reconsideration period. However, given that this application *is* late, and more importantly, wholly devoid of merit, I am of the view that it must be refused.

## **ORDER**

16. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**