

An Application for Reconsideration

- by -

Jannex Enterprises (1980) Limited
("Jannex")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2001/105

DATE OF DECISION: February 26, 2001

DECISION

OVERVIEW

Jannex Enterprises (1980) Limited (“Jannex”) and the Director of Employment Standards (the “Director”) have both applied for reconsideration of a decision of an Adjudicator of the Employment Standards Tribunal (the “Tribunal”), Decision BC EST #D438/00, dated October 19, 2000 (the “original decision”). The original decision substantially confirmed a Determination dated January 14, 2000, referring one aspect of the Determination back to the Director for further investigation. In result, it was determined that Jannex owed an amount of \$13,450.48, and interest accruing on that amount under Section 88 of the *Act*, in respect of the employment of Peter Kerr.

Jannex has made a request under Section 113 of the *Act* that the Tribunal suspend the effect of the Determination pending completion of the reconsideration application and any subsequent judicial review proceedings.

The Tribunal understands that good faith discussions have taken place between counsel for Jannex and the Director in an effort to resolve the question of the terms upon which the amount of the Determination, as varied by the original decision, would be paid by Jannex. The Tribunal understands that Jannex has agreed to pay close to the full amount of the Determination, as varied by the original decision, and that such amount would be held in trust by its counsel on condition that the amount not be released until the reconsideration process and any subsequent judicial review proceedings were completed. The Director objects to an arrangement which would suspend the effect of the Determination until any judicial review proceeding was exhausted.

ARGUMENT AND ANALYSIS

An application to suspend the effect of a Determination may be requested on a reconsideration application, on the basis that a reconsideration application is properly characterized as part of the appeal process under the *Act* (see *Re New Westminster (City)*, BC EST #D518/98). Section 113 of the *Act* reads:

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 full 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.*

The discretion of the Tribunal to suspend the effect of a Determination is limited by the language of the above provision. The central question raised in this application is whether the language of Section 113 is sufficiently broad to allow the tribunal to suspend the effect of the Determination pending the completion of any judicial proceedings. In my view, it is not.

The Tribunal is a creature of statute. It has no existence and no authority outside of the *Act*, and more specifically, the Tribunal has no jurisdiction to assume the role of a Justice of a superior court in this province, or a Master of the Supreme Court, in respect of judicial proceedings. I agree with the comments made in *Re City of Surrey*, BC EST #D049/99, that:

“ . . . the language, context and purpose of Section 113 is such that the power should only be exercised by the Tribunal in the context of 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 administrative bodies merely because a person has appealed sometime in the past Section 113 must be limited in scope to proceedings over which the Tribunal has exclusive appellate jurisdiction.”

Those comments are also supported by the wording of the provision. The right to request a suspension of the effect of a determination belongs to a person “*who appeals a determination*”. Among other things, the language of subsection 113(2) limits the authority of the Tribunal to suspend the determination to “*the period*”, which in context can only refer to the period required to complete the appeal proceeding under the *Act*. I would add that even if I am wrong about whether the Tribunal has the statutory authority to suspend the effect of a determination pending completion of judicial proceedings, I would refuse to do so in light of the provisions and purposes of the *Act* and the availability of a right to petition the court for such relief.

The Tribunal is also limited in another respect in exercising its authority under Section 113 - a suspension of the effect of the Determination may only be issued on condition that the full amount, or a smaller amount considered adequate in the circumstances, be deposited with the Director. It is not an option, therefore, to allow the deposit to be held by some person other than the Director.

The only other matters that still need to be addressed are whether the Tribunal should exercise its discretion in this case, and, if so, whether something other than the full amount should be deposited with the Director. The Director does not object to the suspension of the effect of the Determination pending a decision on the reconsideration applications before the Tribunal. On

that basis, I see no reason to reject the request made by Jannex. There is nothing in the circumstances of this application or the reconsideration applications, however, that persuades me something less than the full amount required to be paid under the Determination should be deposited with the Director.

ORDER

The effect of the Determination dated January 14, 2000, as varied by the original Decision, shall be suspended for the period of time from the date on which Jannex deposits with the Director of Employment Standards the full amount required to be paid under the Determination, as varied by the original Decision (\$13,450.48, plus interest), to be held in trust until the reconsideration applications are decided by the Tribunal.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal