

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C. 38*

- by -

Workgroup Messaging & Communications Inc.  
("WM&C")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 95/027

**DATE OF DECISION:** March 14, 1996

## DECISION

### OVERVIEW

This is an appeal by WM&C pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against Determination No. CDET 000211 issued by the Director on November 27, 1995. In this appeal WM&C claims that no regular wages, vacation pay or compensation for length of service is owed to William Ballantyne (“Ballantyne”), Gordon Gibson (“Gibson”), Bernadette Lowery (“Lowery”), Istvan Szabo (“Szabo”) or Andrew ten Pas (“ten Pas”) under Section 63 of the *Act*.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128(3) of the *Act* states:

*If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director, or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including Section 80 of this Act, as a complaint under this Act.*

I have completed my review of the written submissions made by WM&C, Gibson, Ballantyne, ten Pas and the information provided by the Director.

### FACTS

Ballantyne was employed by WM&C as a Software Developer from April 27, 1995 to October 24, 1995. Ballantyne’s employment was terminated without *written* notice or compensation. At the time of his termination, Ballantyne earned \$4000.00 per month. Regular wages and vacation pay were not paid on termination as required pursuant to Section 18 of the *Act*.

Gibson was employed by WM&C as a Consultant from July 2, 1994 to October 11, 1995. Gibson’s employment was terminated without *written* notice or compensation. At the time of his termination, Gibson earned \$65,000.00 per annum. Regular wages were not paid on termination as required pursuant to Section 18 of the *Act*.

Lowery was employed by WM&C as a Consultant from February 1, 1995 to October 16, 1995. Lowery’s employment was terminated without *written* notice or compensation. At

the time of her termination, Lowery earned \$39,000.00 per annum. Regular wages and vacation pay were not paid on termination as required pursuant to Section 18 of the *Act*.

Szabo was employed by WM&C as a Software Developer from January 23, 1995 to October 24, 1995. Szabo's employment was terminated without *written* notice or compensation. At the time of his termination, Szabo earned \$40,000.00 per annum. Regular wages and vacation pay were not paid on termination as required pursuant to Section 18 of the *Act*.

Ten Pas was employed by WM&C as a Sales Executive from October 3, 1993 to October 19, 1995. Ten Pas' employment was terminated without *written* notice or compensation. At the time of his termination, ten Pas earned \$1250.00 per month plus commissions. Regular wages (commissions) and vacation pay were not paid on termination as required pursuant to Section 18 of the *Act*.

### **ISSUES TO BE DECIDED**

The first issue to be decided in this appeal is whether the employer's liability to pay compensation for length of service has been discharged under Section 63(3)(a) of the *Act*. That is, has WM&C demonstrated that *written* notice was provided to each employee as required.

The second issue to be decided in this appeal is whether the employer's obligation under Section 18(1) of the *Act* to pay all wages owing to an employee within 48 hours of termination has been met. That is, has WM&C demonstrated that all wages were paid within 48 hours of each employee's termination.

### **ARGUMENTS**

WM&C contends that verbal notice was given to all employees and that this should satisfy the requirements for notice.

WM&C also contends that while some wages were initially owed to the employees, it has subsequently paid all wages owing. WM&C further contends that, with the exception of ten Pas, there is no vacation pay owing to the employees as they all took "personal time off" and were paid for it.

WM&C finally contends that its payroll records were not available at the time of the request because the laptop computer containing those records had been "stolen" and further it was subsequently discovered that a "virus" had destroyed relevant material.

WM&C also argues that ten Pas was not an employee until March 1994.

The Director contends that there is no evidence of *written* notice being provided to the employees prior to their last day of employment pursuant to the requirements of Section 63(3)(a). The Director also contends that, in the absence of any payroll records being provided by the employer, and, based on the records and information provided by the employees, that regular wages and vacation pay are owing.

**ANALYSIS**

The burden of proof for establishing that all regular wages and vacation pay were paid to the employees and that written notice or compensation was provided rests with the employer.

I conclude, based on the evidence before me, that:

- WM&C did not provide *written* notice of termination or compensation to any of the employees, therefore compensation is owed to the employees as calculated and set out on the determination;
- Ten Pas was an employee of WM&C commencing October 4, 1993 as set forth in the employment offer letter from WM&C dated October 1, 1993.
- WM&C has not provided any documentary evidence to show that the employees took any vacation time off, therefore vacation pay is owed to the employees as calculated and set out on the determination.
- WM&C has subsequently made some payments to the employees, however, WM&C still owes regular wages and vacation pay to the employees as follows:

• <b>Ballantyne</b>	
Total amount as set out on the determination	\$4084.75
less amounts subsequently received	<u>\$ 893.96</u>
<b>Total owing to employee</b>	<b><u>\$3190.79</u></b>
• <b>Gibson</b>	
Total amount as set out on the determination	\$5229.63
less amounts subsequently received	<u>\$1170.73</u>
<b>Total owing to employee</b>	<b><u>\$4058.90</u></b>

• <b>Lowery</b>		
	Total amount as set out on the determination	\$2338.25
	less amounts subsequently received	<u>\$ 788.00</u>
	<b>Total owing to employee</b>	<b><u>\$1550.25</u></b>
• <b>Szabo</b>		
	Total amount as set out on the determination	\$4138.83
	less amounts subsequently received	<u>\$ 888.56</u>
	<b>Total owing to employee</b>	<b><u>\$3250.27</u></b>
• <b>ten Pas</b>		
	Total amount as set out on the determination	\$5767.96
	less amounts subsequently received	<u>\$ 306.24</u>
	<b>Total owing to employee</b>	<b><u>\$5461.72</u></b>

**TOTAL OWING TO ALL EMPLOYEES** **\$17511.93**

**ORDER**

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 000211 be varied to the new amount of \$17,511.93, as set forth in this decision.

\_\_\_\_\_  
**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

May 3, 2001

**Date**

:jel