

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-

Weissgeld Capital Group Ltd.
("Weissgeld")

-of a Determination issued by-

The Director Of Employment Standards
(the "Director")

ADJUDICATOR	E. Casey McCabe
FILE No.:	96/709
DATE OF DECISION:	January 28, 1997

DECISION

APPEARANCES

Robert B. Klein on behalf of Weissgeld Capital Group Ltd.

Dianne Hazelwood on her own behalf

Chris Finding for the Director of Employment Standards

OVERVIEW

This is an appeal by Weissgeld Capital Group Ltd. (“Weissgeld”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against Determination CDET 003871 issued by a delegate of the Director Of Employment Standards (the “Director”) on November 5, 1996. The Director’s delegate determined that Weissgeld contravened Section 15 of the *Act* by failing to pay the minimum hourly wage; Section 18(1) by failing to pay wages when an employee is terminated; and Section 58(3) by failing to pay vacation pay under Section 18. Weissgeld appeals.

ISSUES TO BE DECIDED

Is Weissgeld obligated to pay the minimum hourly wage when it alleges that the employee agreed at the point of hire to work for less? If so, is Weissgeld obligated to pay vacation pay on that greater amount?

FACTS

The complainant, Dianne Hazelwood, was hired as a general office clerk by Weissgeld to work on a new project known as “Faxified Vancouver 95”. She reported directly to Mr. Robert Klein the president of Weissgeld. Ms. Hazelwood worked a 37.5 hour week for the period October 17, 1995 to May 7, 1996. Ms. Hazelwood complains that she was paid a base salary of \$1000.00 per month which is less than the minimum wage for the hours she worked and that she was not paid wages owing, including vacation pay, upon her termination.

Weissgeld argues that the job that was created for Ms. Hazelwood was a training position which was set up as a favour to her father. The project was a business launch, done with minimal resources, which failed. Weissgeld argues that it lacks any surplus this year to pay and that it has been a struggle in view of the losses due to subsidizing this venture. It is hopeful that another transaction will cashier in February 1997 which will allow it “to resolve the financial aspects of this transaction”.

Weissgeld further argues that the salary of \$1000.00 per month was agreed to by the complainant at hire and that this agreement should be respected. Weissgeld acknowledges that wages are owing but disputes the amount. However, it appears that Weissgeld did not keep payroll records arguing that formal time controls were never imposed on the employee.

The Director's delegate, in the absence of any payroll calculations from Weissgeld, relied on the personal records kept by the complainant to substantiate work history.

ANALYSIS

It is a fundamental principle of the *Act* that parties cannot contract out of its provisions except where the *Act* specifically states such is allowed. Section 4 of the *Act* reads:

“The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.”

Section 15 of the *Employment Standards Regulations* reads:

“Subject to sections 16 to 18, the minimum wage is \$7.00 per hour.”

An employer and an employee are not allowed to establish a rate of pay that is less than the minimum set out in the *Act*. Section 4 specifically states that any agreement to waive the requirements of the *Act* is of no effect subject to certain sections. Those sections deal with employees covered by a collective agreement and are not applicable in Ms. Hazelwood's case. Similarly Section 58 requires that an employer must pay vacation pay of at least 4% of total wages during the year of employment entitling the employee to the vacation pay. Ms. Hazelwood is entitled to have her vacation pay calculated on the minimum hourly wage for hours worked rather than the agreed to monthly salary.

The employer cannot rely on its agreement with the employee as that agreement is contrary to the *Act*. I find that the Director's delegate properly calculated wages owing and vacation pay including interest accrued on outstanding amounts. The employer has failed to pay those amounts on termination. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act* Determination No. CDET 003871 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal