Employment Standards TRIBUNAL

An appeal

- by -

Lions Concrete Ltd.
(the "Employer" or "Lions Concrete")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Ib S. Petersen

FILE No.: 2001/386

DATE OF DECISION: March 15, 2002

INTERIM DECISION

SUBMISSIONS:

Mr. Peter Gall Mr. Matthew Westfal	on behalf of Lions Concrete
Ms. Adele Adamic	on behalf of the Director

OVERVIEW

This application arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on April 23, 2001. The Determination concluded that a large number of employees were owed $193,015.61 by the Employer on account of overtime wages and statutory holiday pay.

FACTS AND ANALYSIS

On May 17, 2001, the Employer appealed the determination. The Employer, represented by counsel, took issue with the employee status of some of the complainants listed in the Determination, one question being whether three of those found to be employees were, in fact, managers for the purposes of the *Act*. The Employer also questioned whether the amounts set out in the Determination were, in fact, payable in the 24 month period before the date of their complaint or termination. The Employer's appeal conceded that some $98,384.80 were owing to a number of employees.

The Delegate responded by letter dated June 20, 2001. The Director, not surprisingly, agreed with the Employer's admission that monies were owed. The Director did not agree that the three employees, argued by the Employer to be managers, were, in fact, managers under the *Act*. One of the persons argued to be a manager also took issue with this characterization. As well, the Director took issue with the assertion that the employees were not employed within the 24 month period. The Director set out a list of employees and their respective termination dates.

By letter dated September 7, 2001, the appeal was set for hearing on October 4, 2001.

On September 28, 2001, the Tribunal was advised that the Employer had changed counsel. The letter stated that, among others, that some of the complainants did not wish to pursue a complaint and were pressured by the Delegate to do so and added another issue to the appeal. The Employer argued that the Delegate abused her discretion and requested that a summons be issued directing her to appear at the hearing.

Following submissions from the Director, now represented by counsel, and the Employer, I ordered that the hearing scheduled for October 4, 2001 be adjourned. The basis for the adjournment was the complaint to and investigation by the R.C.M.P. into alleged misconduct by the Employer. According to the letter from counsel for the Director, dated October 1, 2001, there were allegations that the Employer had made threats to "many" employees should they testify at the hearing. The Director argued that the proceedings before the Tribunal should be held in abeyance pending the resolution to the criminal investigation. The Employer agreed that the hearing ought to be adjourned.

On November 9, 2001, the Tribunal held a case management meeting, attended by the Director's counsel (and the Delegate) and the Employer's counsel. One of the issues discussed at the case management meeting was the payment into trust of some or all of the Determination amount. I understood that this matter was to be resolved between counsel, and that the Employer was to seek instructions to pay or make an application for a suspension of the Determination under Section 113 of the *Act*. As far as I am aware, no application under Section 113 has been received by the Tribunal.

As per the parties' request, on November 15, 2001, I made a formal request to the R.C.M.P. to advise me of the status of the investigation and whether charges were pending. On November 28, 2001, the R.C.M.P. advised the Tribunal that charges were unlikely. In the result, the Tribunal proceeded to schedule a hearing. By notice, dated February 14, 2002, a hearing was scheduled for March 25, 2002.

The Employer applies for an adjournment of the March 25 hearing date. The Employer submits that compelling reasons exists for granting the adjournment, specifically, that the principal of the Employer, Mr. Mario Silva will not be able to attend "as a result of a six-week business trip in the United States that had been arranged before the current hearing date was set." Mr. Silva is now employed as a sales representative selling concrete pumps. It is said that Mr. Silva is attending an important conference in Las Vegas between March 13 and March 23, 2002. On March 25, Mr. Silva is meeting with a client, of his employer, to negotiate the purchase of equipment worth some $160,000. Apparently, this meeting had been set up some three months ago. After March 26, Mr. Silva is meeting other clients in his territory. He does not "expect to return until approximately the end of April."

The Employer argues that Mr. Silva's presence is important both as a witness and to give instructions to counsel. The Employer argues that participation via telephone conferencing is impractical, because Mr. Silva's testimony may be time consuming, and, most importantly, will not be able to properly relay instructions to counsel.

Counsel for the Director strenuously argues that the request for an adjournment should not be granted. Among others, she points to the large amount of money at issue in the Determination, the delay in getting this matter to a hearing and says, that if Mr. Silva's presence was essential, as is argued, his availability would have been canvassed before the hearing was set down. The

Director argues that this is a matter of convenience rather than necessity and that Mr. Silva could attend at modest expense and inconvenience.

I deny the Employer's application. In my view, the Employer has not presented any compelling reasons why this hearing should be adjourned. First, in that regard, it is important that the hearing was scheduled by consent. The Employer's application acknowledges:

> "At the time the current hearing was scheduled, Mr. Silva had already made all his arrangements for his upcoming trip, including the meeting on March 25, 2002. Unfortunately, although we agreed that counsel would be available on March 25, 2002, we did not realize that Mr. Silva would not be available on that date. As a result of this miscommunication, we only realized this problem yesterday, following a discussion with Mr. Silva regarding preparation for the hearing...."

Second, in the circumstances, Mr. Silva's business meeting ought not to take precedence over the hearing. While I appreciate that it may be important to him to attend to the purchase and sale of equipment on behalf of his new employer, this is a matter of convenience. Business meetings can often be re-arranged. In my view, Mr. Silva could attend in person at relatively modest expense and inconvenience. While his participation via telephone is obviously not ideal, and I am somewhat sympathetic that it may be difficult to relay instructions to counsel, I am not persuaded--given that the basis for the Determination is the audit of the Employer's records--that the Employer would be unduly prejudiced. It may well be possible to accommodate those difficulties. In any event, the choice to give priority to the business meeting over the hearing is Mr. Silva's.

Third, I am also mindful of the fact that the Determination was issued almost one year ago and that it involves a large amount of money and a large number of employees (who have been given notice of the hearing). This matter was scheduled for hearing in October 2001 and adjourned.

In short, the application is denied.

ORDER

I order that the hearing scheduled for March 25, 2002, proceed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal