

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 -

Hyper Pulse Sports Ltd.
("HPS")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Jim Wolfgang

FILE NO.: 96/396

DATE OF DECISION: September 11, 1996

DECISION

OVERVIEW

This is an appeal by Hyper Pulse Sports Ltd. (“HPS”), Pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against Determination No. CDET 002490 issued by a delegate of the Director of Employment Standards (the “Director”) dated June 4, 1996. In this appeal HPS agrees money is owed to Tim Carver (“Carver”) but, by virtue of a prior mutual agreement, is not payable at this time. There is also a disagreement as to the amount owed.

ISSUE TO BE DECIDED

What wages are owed to Carver, and when are they payable ?

FACTS

HPS was formed in November, 1992 and registered in January, 1993.

Carver was a 30% shareholder in the company, and a director. He had further financial involvement with the company which is the subject of a civil suit. The other shareholder and director is Anthony Beks, President of HPS.

Carver went to work for HPS as a Salesperson on November 15, 1993.

Carver ceased to be a director on January 8, 1994.

On January 20, 1995 Carver and HPS signed an agreement identifying Carver’s terms of employment and dealt with the company’s failure to pay his salary.

Carver received wages for one pay period in January, 1994 and during the period January 15, 1995 to November 29, 1995 he received wages for 14 of the 20 pay periods.

Carver was terminated on November 29, 1995.

Carver filed a complaint on February 7, 1996.

Determination No. CDET 002490, in the amount of \$28,542.76 was issued on June 4, 1996.

HPS appealed the Determination on July 8, 1996.

ARGUMENTS

HPS argues that, as a shareholder, Carver had a greater vested interest in the business than that of a normal employee. They claim there was a verbal agreement between Carver and HPS waiving the obligation to pay wages until the company was in a sound financial position.

HPS claims to have paid wages in the amount of \$5,850.00 to Carver for the period of January 15, 1994 to January 19, 1995. They admit additional wages in the amount of \$9,100.00 are owing for the period, and are to be paid at a future date.

Carver claims he invested a considerable amount of money into HPS, in addition to the shares he purchased at the time the company was formed. This was in the form of direct payments, an overdraft account and counter-signing a bank loan.

Carver did agree to wait for his wages until the financial situation in the company improved. When HPS terminated him, he then sought the money owed to him.

ANALYSIS

While varying amounts of money were paid to Carver by HPS during the period December 1993 to December 1995, HPS claim \$5,850.00 of those payments were actually wages, in part, for January 1994 to January 1995.

Carver's salary at the time was \$1,300.00 net per month and he was to be paid \$650.00 bimonthly. In a undated and unsigned document filed under the heading "Reconciliation of wages paid to Tim Carver January 1, 1994 to January 31, 1995" it lists 9 payments of \$650.00 each by date and check number. Total paid \$5,850.00. On the surface, this appears to be payment of wages.

Carver argued these were draws he received against his loan to the company, not wages. He does agree he received wages for one pay period in 1994. His salary was adjusted January 15, 1995 to \$1,800.00 gross and he began receiving intermittent wages for the adjusted amount in 1995.

I am inclined to support the position of Carver over that of HPS for two reasons:

1. Carver received a T -4 -1994 Statement of Remuneration issued by HPS showing a total employment income of \$850.00 for the year.
2. The president of HPS and Carver signed an agreement on January 20, 1995 as follows:

“It is understood and agreed:

that Tim Carver was and still is an employee of Hyper Pulse Sports Ltd. earning a net monthly salary of \$1,300.00 per month since November 15, 1993.

that due to current financial constraints Hyper Pulse Sports Ltd. was unable to pay Tim Carver any of his earned salary from January 15, 1994 to January 31, 1995.

that Hyper Pulse Sports Ltd. recognizes that the above mentioned salary is currently outstanding.”

The document is witnessed by the Manager of HPS and affixed with the company seal.

While I can have some sympathy for the parties trying to get a business started, there is an obvious violation of Section 17(1) of the *Employment Standards Act*:

Section 17(1) states:

“At least semi monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.”

HPS claims they had a verbal agreement with Carver to not claim any wages until the company was in a stronger financial position. If that agreement was made, it apparently ended when Carver was terminated.

The responsibility of the employer is clear under the *Act*. They cannot, with or without the consent of the employee, waive the minimum requirement of Section 17(1) of the *Act*.

I therefore deny the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 002490 be confirmed.

Jim Wolfgang
Adjudicator
Employment Standards Tribunal

JW:sr