

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 -

Motion Works Group Ltd.
("Motion Works")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/603

DATE OF DECISION: December 4, 1996

DECISION

OVERVIEW

This decision concerns a preliminary matter which has been raised in an appeal by Motion Works Group Ltd. (“Motion Works”) under Section 112 of the *Employment Standards Act* (the “Act”).

Motion Works requests the Tribunal to exercise its power under Section 113(2) of the *Act* to suspend a determination pending an order by the Tribunal under Section 115 of the *Act*.

Determination # CDET 004112 was issued by a delegate of the Director of Employment Standards on September 25, 1996 and requires Motion Works to pay \$16,030.58 in respect of wages owing to two former employees, Koralee Pearson (“Pearson”) and Kim LeGoffic (“LeGoffic”) as a result of complaints about unpaid overtime wages and vacation pay. Motion Works’ appeal is based on four grounds:

- Pearson and LeGoffic were not employed for the entire period covered by the Determination;
- The Determination does not accurately calculate the amount of wages owing to Pearson and LeGoffic;
- The Director erred in calculating “regular wages;” and
- LeGoffic was a manager and, therefore, exempt from Part 4 of the *Act*.

This decision does not address any of those grounds for appeal and is limited expressly to the preliminary issue of Motion Works’ application under Section 113 for a suspension of the Determination.

A hearing will be held in the near future to decide the merits of the appeal.

ISSUE TO BE DECIDED

The issue to be decided is: should the Tribunal suspend the Determination and, if so, for what period of time, subject to what conditions, and what amount should Motion Works be required to deposit.

ANALYSIS

Section 113 of the *Act* states:

- 13. (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 total 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.*

Counsel for Motion Works requests, pursuant to section 113 of the *Act*, that the Tribunal suspend the Determination pending an order by the Tribunal pursuant to section 115 of the *Act*. Motion Works is willing to deposit a smaller amount with the Tribunal than that stated in the Determination, and submits that \$5,000.00 is adequate in the circumstances of this appeal. Counsel for Motion Works argues that it has a meritorious case and ought not to be required to submit the full payment until a decision of the Tribunal is rendered.

The Director's delegate opposes the application by Motion Works on the following grounds:

I am not aware of any special circumstances in this case which would warrant granting of the company's application. The Determination is a straightforward one - the issue is unpaid overtime hours. The company has had some past financial difficulties and is now controlled by interests from outside British Columbia jurisdiction. Paramount should be ensuring that there are funds available to pay the wages should the Determination be upheld.

Pearson concurs with the submission made by the Director's delegate.

The Calculation Schedule attached to the Determination shows the following amounts as wages owing:

Pearson:

Overtime (May 1/95 - March 28/96)	\$ 6,171.76
Vacation Pay	\$ 246.87
Interest (accrued to Sept. 25/95)	<u>\$ 202.76</u>
	\$ 6,621.39

LeGoffic

Overtime (Sept. 17/95 - Dec. 31/95)	\$ 2,177.38
(Jan. 1/96 - Apr. 3/96)	\$ 6,591.31
Vacation Pay	\$ 350.74
Interest (accrued Sept. 25/96)	<u>\$ 289.76</u>
	\$ 9,409.19

TOTAL AMOUNT OF DETERMINATION \$ 16,030.58

However, the calculation schedule contains calculations which appear to overstate the total amount of wages owing to Pearson and LeGoffic. The apparent calculation error arises from the use of "time and one half" and "double time" for all hours worked by Pearson and LeGoffic. The reason schedule attached to the Determination states that Pearson and LeGoffic were each paid a salary, that hours of work were recorded on computer-generated time cards (attached as an appendix to the calculation schedule) and that Motion Works has "...declined to pay the amounts owing which are set out in the calculation schedule." The calculation schedule does not show any accounting of salary payments which were made to Pearson and LeGoffic.

I note that the time card reports which are appended to the Determination show the "total hours" worked by Pearson and LeGoffic for each day worked. Given that each received a salary (and therefore received the "regular wage" for hours worked), the Determination appears to be flawed because the calculation schedule shows wages owing based on "time and one half" or "double time" for all hours, rather than just the overtime premium (0.5 x regular wages or 1.0 x regular wage) for overtime hours worked. In addition, vacation pay and interest payable are calculated on the "total wages" owing rather than the smaller overtime premium amounts.

In the circumstances of this appeal and the apparent calculation errors on which the Determination is based, I conclude that it is appropriate for the Tribunal to exercise its power under Section 113 (2) of the *Act*. I should emphasize, again, that this decision does not, in any way, deal the merits of Motion Works' appeal.

ORDER

I order that Determination # CDET 004112 be suspended the period of time from the date on which Motion Works deposits with the Director of Employment Standards the sum of five thousand dollars (\$5,000.00) until the Tribunal hears and decides the merits of the appeal of the Determination.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:nc