

An appeal

- by -

Digital Commerce Canada Ltd.
("Digital")

- 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: Norma Edelman

FILE No.: 2002/313

DATE OF DECISION: August 12, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") by Digital Commerce Canada Ltd. ("Digital") of a Determination that was issued on May 14, 2002 by a delegate of the Director of Employment Standards.

The delegate found that Digital owed Chelsea Greene ("Greene") and Tony Lee ("Lee") [collectively, the "Respondents"] a total of \$18,462.21 on account of regular wages and vacation pay. Digital says the Respondents' claims are without merit.

ISSUE TO BE DECIDED

Does Digital owe the Respondents a total of \$18,462.21?

FACTS AND ANALYSIS

Greene worked for Digital from November 1, 2002 to July 15, 2001 as an account manager. Lee worked from June 1, 2000 to July 15, 2001 as a marketing manager. Digital ceased operating on July 15, 2001.

The Respondents filed complaints at the Employment Standards Branch alleging they were not paid wages or vacation pay for the period May 1 to July 15, 2001.

The delegate found that the Respondents were owed a total of \$18,462.21 representing regular wages, vacation pay and interest for the period May 1 to July 15, 2001. The delegate said that Digital did not deny that the Respondents were owed this amount. Digital's position was that it could not pay its former employees due to lack of funding. The delegate noted that the Records of Employment issued by Digital contained the following comments: the Respondents received their last pay cheque on April 30, 2001 and since then the company has been unable to pay them; they continued to work (unpaid) up to and including July 15, 2001 in good faith that additional funding would arrive; to this date no funding has arrived; and the company fully intends to pay them for work performed between May 1, 2001 and July 15, 2001 if/when funding arises. The delegate found that Digital was unable to find the additional financing to pay the Respondents and thus he issued the Determination in the amount noted above.

In its appeal, Digital says the Respondents were aware the company was in serious financial deficit from late 2000. On April 30, 2001 the company handed out its last salary payments with an explanation that there was no more money. The Respondents were given the option of leaving or of staying at their own risk, in the hope that some business could be transacted whereby they would be paid. No salary was paid or promised except on an "if we get it" basis. There was no guarantee of any sort that salary payments would be made unless revenue was generated or capital was raised. As it turned out the company was unsuccessful in generating either revenue or capital and a decision was made to cease operations. The Respondents were so informed in early July and they chose to leave on July 15, 2001. It is the company's position that

the Respondents voluntarily continued to work after April 30 on the basis that the company would pay them if funding were raised. No funding was raised and therefore no payment could nor should be made under the circumstances since Lee and Greene voluntarily assumed the risk that no payment would ever be available to them if the company did not raise funds. For these reasons Digital disputes the claim that any funds are outstanding to the Respondents. It believes the Respondents' claims are without merit. Digital further says that both Lee and Green were given \$1000.00 in July to "help out" but Lee did not note this in his claim.

The delegate and the Respondents were invited to reply to the appeal.

The delegate replied that Digital does not dispute that the Respondents performed work and were not paid. Its position is only that it has no more money. The delegate is of the view that the appeal should be denied on the basis that no new evidence has been presented.

Lee replied that he remained with the company after April 30, 2001 because he was under the impression financing would arrive. Management, however, misrepresented the company's financial position and its future financing prospects. Based on management's optimistic outlook employees made the decision to remain with the company in spite of the fact there were not receiving any wages. Had he known the reality of Digital's financing prospects he would never have worked a single day past April 30. When he realized that financing was more a dream than reality he left the company.

Lee further said that he did receive a cheque for \$1000.00 but he was under the impression this payment was a "good faith subsidy" that was in addition to the wages currently owed to him and compensation for not having received any wages for one and a half months. He says that if he misinterpreted the matter, then the Tribunal can deduct the amount from the wages owed to him.

Greene replied that she was never informed the company was insolvent, nor was she ever given the option of leaving or staying at her own risk. She said she was advised financing was in the works and it was not a question of if financing would come, but of when. She said she was given continual assurances that funding was imminent and that gave her the confidence to continue working for the company. She further said that the \$1000 payment was made to tide her over until the other payments could be made.

The burden is on the Appellant, Digital, to show that the Determination is wrong. I am not satisfied that Digital has met that burden except with respect to the \$1000.00 payment to Lee.

There is no question that the Respondents performed work for Digital during the period May 1 to July 15, 2001. I accept the Respondents' position that they were under the impression they would eventually be fully paid for their work and that is the reason they remained with the company after April 30, 2001. I find it highly unlikely that they would have continued to work for Digital for some 2 and one half months without some expectation of full payment of wages. However, even if they did voluntarily assume the risk of nonpayment of wages, as is claimed by Digital, they are still entitled to be paid for all work performed during the period May 1 to July 15, 2001. Section 4 of the Act prevents parties from waiving their minimum rights under the Act. An agreement not to claim wages is of no effect. For these reasons, the Respondents are entitled to be paid all of their wages for the period in question.

The delegate calculated that Greene was owed the following:

\$1770.83 (semi - monthly pay) X 5 pay periods	\$8851.65
Vacation pay on the above	\$ 354.07
Paid	(\$1000.00)
Balance	\$8205.72
Interest	<u>\$334.52</u>
Total owing	\$ 8540.24

Digital does not dispute the above calculation and I accept it as accurate.

The delegate calculated that Lee was owed the following:

\$1833.33 X 5 pay periods	\$ 9166.65
Vacation pay on the above	\$366.67
Interest	<u>\$388.65</u>
Total	\$ 9921.97

Digital claims that it paid Lee \$1000.00 as well as Greene. Lee says that this payment was made in addition to the amount of wages owed to him by Digital, but he also concedes that he may have misinterpreted the purpose of the payment. I am not satisfied that the payment was made in addition to the wages owed to Lee. I accept that this payment was made for work performed during the period May 1 to July 15 based on Lee's concession and the fact that Greene received a similar payment and she has accepted that the payment was for work performed during the period in question. Accordingly \$1000.00 must be deducted from the amount of wages owed to Lee. This will effect the delegate's calculation as it relates to vacation pay and interest.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination is confirmed with respect Greene. I further order that the Determination is referred back to the delegate to recalculate the amount of wages owed to Lee in accordance with the above direction.

Norma Edelman
Vice-Chair
Employment Standards Tribunal