

An appeal

- by -

Digital Accelerator Corporation
(“DAC”)

- 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: Mark Thompson

FILE No.: 2002/292

DATE OF DECISION: September 9, 2002

DECISION

OVERVIEW

This is an appeal by Digital Accelerator Corporation (“DAC”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 2, 2002. The Determination found that DAC had failed to pay 15 former employees, (“Certain Employees”) regular wages, vacation pay, and compensation for length of service. In total, DAC owed the Certain Employees \$158,954.34, including interest. Subsequently, DAC provided information on the status of a number of the Certain Employees, and the Director’s delegate issued informed the Tribunal that she had varied the Determination by changing the amount of wages owed to some employees covered in the Determination, with the result that DAC’s liability was reduced to \$158,591.09, including interest.

DAC filed an appeal on May 27, 2002. The appeal implicitly acknowledged that it owed wages to former employees, but alleged errors of fact and law in the Determination that affected the amount owed. In particular, it argued that it had settled all claims with several employees, that a number of employees had received payments of \$500.00 against wages owed, that some employees were “over subscribed” for their vacation pay. Any monies due to individuals who had taken more vacation than they had earned should be reduced by the amount of the over subscription. DAC also argued that the use of a 4 per cent formula to calculate vacation pay was incorrect in some cases.

DAC also filed a document on July 5 containing information containing employment records of the Certain Employees. The effect of this submission was to reduce the amount owed to the employees to approximately \$99,000.

This Decision was based on written submissions.

ISSUES TO BE DECIDED

The issues to be decided in this case were: what were the appropriate amounts of wages vacation pay and compensation for length of service owed to Certain Employees, and what weight should be given to the July 5, 2002 submission from DAC.

FACTS

DAC is a software development company. Both the delegate and management of DAC stated that it encountered financial difficulties in 2001. A number of employees filed complaints that they did not receive their wages within the time limits required by the *Act*. The Director’s delegate consolidated the complaints of 15 individuals into the Determination in question.

The delegate issued a determination on April 15, 2002, which included “bonus shares”, issued to employees in February 2002. Subsequently, the delegate concluded that the shares were not “wages” under the *Act*, so the original determination was cancelled, and the May 2, 2002 Determination was issued to cover other areas of compensation. While the record contained a number of references and documents related to the bonus shares, this decision will not deal with that issue.

The delegate wrote to DAC on February 6, 2002 giving notice that 19 employees who had quit their jobs as a result of non-payment of wages or had been laid off had filed complaints. She outlined the requirements of the *Act* with respect to payment of wages, vacation pay, compensation for length of service and outstanding business expenses. She asked DAC to provide 2001 T-4's for all employees listed in the letter, a calculation of unpaid wages, vacation pay, compensation for length of service and unpaid expenses for each employee and a copy of the employment contract no later than February 20, 2002. She added that the employer's submission should include "a detailed explanation showing how the wages, vacation pay, compensation for length of service and outstanding business expenses were calculated. The deadline for the submission was February 20, 2002. A Demand for Employer Records was sent to DAC on February 6, 2002 with the same 19 individuals and the same categories of information. On February 9, 2002, the delegate wrote to DAC, providing a calculating wages owing to former employees who had filed complaints. The purpose of sending the calculations was to assist DAC in its submission. In addition, the delegate stated that DAC should provide appropriate documentation for each employee with his or her annual salary, vacation pay earned, vacation pay paid, dates vacation taken and a copy of employment agreements. She also pointed out that DAC had the burden of providing the necessary information to the Employment Standards Branch. The delegate's calculations showed that the employees in question were entitled to \$191, 697.13, including interest.

Phil Nerland ("Nerland"), president of DAC, replied to the delegate on February 20, 2002. His letter identified four individuals who were then employed by DAC, another four who had been paid in full, two who had left the firm for "new jobs" and thus were not entitled to termination pay, leaving 8 individuals for which information was necessary. He attached a spreadsheet with DAC's calculation for the 8 individuals, plus "Employee Summary" printouts for annual income, information on statutory deductions from pay and vacation information. A copy of the standard employment contract also was included.

The documentation contained data for wages paid from September 15 through October 15 for 11 employees, plus the two employees who were identified as having left the company. The back pay data included gross pay by pay period, less statutory deductions, plus vacation pay to produce a total due to each individual. A statement of total wages paid and deductions for 2001 for each employee was submitted. Handwritten notes of vacation entitlement and vacation taken by month were included on the summary sheets. The standard contract provided for 3 weeks of vacation for each contract year of employment.

The delegate replied on February 23, 2002 with a series of letters dealing with the groups of former employees identified in the DAC letter of February 20, 2002. She informed DAC that the two individuals as having left the company for other jobs had filed complaints claiming unpaid wages. They had sought employment elsewhere because they realized that DAC was in financial difficulty. Their employment relationship ended when DAC failed to pay their wages. The delegate stated that the information provided did not meet her previous requests for information. She extended the deadline for submission of the necessary information to March 1, 2002 and reiterated the information needed for each employee. She also outlined the procedure for issuing a determination and the filing of an appeal of a determination. She pointed out that an appeal was not a new investigation of a party's case. The delegate attached calculations of unpaid wages; vacation pay owing and termination pay for the two individuals who had quit their employment.

The delegate wrote a second letter on February 23, 2002 to respond to DAC's submissions regarding 9 individuals whom DAC had identified as having to be reviewed, plus one other individual who had filed a complaint and had not been addressed in the February 20, 2002 letter. According to the delegate, DAC

had agreed that it owed wages to these individuals, and she provided a calculation of wages due plus interest. She gave DAC until March 1, 2002 to pay the complainants named or to provide additional information. She repeated her description of the process for issuing a determination and appeals of determinations.

Finally, she wrote a third letter concerning persons who were described as current employees of DAC. She asked the company to have these persons sign letters requesting that the investigations of their complaints be ended. Again the deadline was March 1, 2002.

DAC replied on February 28, 2002, enclosing letters from three persons who requested that the investigation of their claim for unpaid wages be ended. Also attached were a spreadsheet allegedly showing final payments to four individuals on or before October 31, 2001 and a statement of release for one person. The pay information previously submitted was re-submitted for 12 persons, plus the 2001 summary for two persons.

Nerland also stated that the bonus shares compensated for other items and stated that the company would be able to make payments owing between March 20 and 30, 2002.

On March 4, 2002, the delegate advised that another individual, Brent Simon, had filed a complaint alleging that he was owed several weeks wages after he quit his job because of nonpayment of wages. He had not received the offer of bonus shares. The delegate included a calculation of the monies owed to this individual and ordered DAC to pay the amount owing, \$17,176.43, no later than March 8, 2002. A second letter with the same message was sent on March 6, 2002 with respect to Robert (Brian) Rose. The delegate calculated that he was entitled to \$8,837.93 and gave DAC a deadline of March 8, 2002.

Nick Ringma ("Ringma"), a vice president of DAC, contacted the delegate on March 12 asking for an extension of the time limits to pay "the outstanding amounts." The delegate gave DAC a new deadline of March 22, 2002. There also was a discussion of the bonus shares with DAC. On March 25, Ringma notified the delegate that DAC would begin discharging its obligations for unpaid wages at the rate of \$20,000 per week, commencing April 9, 2002. The delegate replied two days later stating that DAC agreed with her calculations of wages owing, although it did not state how much each employee would receive. She stated that she would issue a determination for all wages owing on April 9. DAC would have 23 days to file an appeal of the determination. Ringma replied in turn on April 2, stating that DAC would be making payments of wages based on its calculations provided on February 20, 2002. On the same day, the delegate faxed a notice to Ringma that she would proceed with a determination based on her calculations of the amounts owing. She suggested that DAC inform her office of any wages paid out so the determination could be adjusted. Evidence of payment should include copies of cheques issued.

In fact, the delegate issued a determination on April 15, 2002, and then replaced it with the Determination under appeal in this case. The May 2 Determination noted that DAC had failed to make any payments in March. As noted above, the Determination concerned 15 individuals. The Determination clearly stated that the deadline for filing an appeal was May 27, 2002.

On that date, Ringma sent an e-mail to the delegate with an attachment of a spreadsheet containing an attendance record for 2001-2002, showing hours worked and vacation time taken. DAC also sent calculation sheets for the 15 individuals named in the Determination. Finally, it filed a formal appeal, alleging as follows: that the delegate failed to consider that some persons might not be entitled to compensation for length of service, that the delegate had failed to consider the information provided in its

letter of February 20, that DAC had paid each employee \$500 on October 5, which was not included in the delegate's calculations, that some employees had "over subscribed their vacation accounts," that the delegate had not provided enough information to DAC to enable it to respond to its requests and annual vacation pay was corrected incorrectly.

The delegate responded to the Tribunal on June 12, 2002. She pointed out that DAC had not provided all of the information she requested did not provide calculations for compensation for length of service or clear evidence that wages had been paid. The delegate stated that she was unable to verify that employees had received payments of \$500 on October 5, except for one individual. There were discrepancies in DAC's records for Brian Rose concerning computer equipment he purchased, no records were available for Ignatius Cheng and did not provide calculations for compensation for length of service.

Based on information DAC provided, the delegate amended the calculations of annual vacation pay, pointing out that DAC had never provided its calculations of these amounts. Furthermore, DAC provided no information on the termination of each employee or how wages were paid.

As stated above, the delegate amended the Determination, with the net effect that DAC owed the 15 Certain Employees a total of \$158,591.00, including interest.

DAC submitted an extensive document to the Tribunal in support of its appeal of another determination issued with respect to a number of employees, including three who were subjects other determinations, on July 5, 2002. The status of DAC's July 5, 2002 submission is the subject of analysis below.

In brief, the document stated that DAC's calculations were based on net wages. It reverted to using 4% as the basis for vacation pay, deducted \$500 from wages owing to reflect payments on October 5, identified five individuals who were not the subject of the May 2 Determination who were entitled to compensation for length of service. It also stated that three individuals, Todd Gosselin, Megan Price and Wayne Williams, covered by the Determination, had been paid in full.

The submission contained statements of earnings for the Certain Employees named in this Determination as well as two others, copies of cancelled cheques made out to 9 individuals in the Determination on October 5, 2002 for \$500. A Record of Employment for Wayne Williams dated June 14, 2002 stated that he had been paid and was not owed any vacation pay. Cancelled cheques made out to Megan Price, Wayne Williams and Todd Gosselin and payroll statements dated in 2001 were included. A petition dated September 12, 2001 tendering the resignation of a group of employees unless a new management team took over DAC, including 9 individuals named in the Determination, was an exhibit. A copy to Nerland from an accounting firm dated May 17, 2002 explained that DAC should expect a substantial tax credit to be paid by the Canada Customs and Revenue Agency. Finally, copies of correspondence to the same agency were attached to demonstrate that remittances had been made in behalf of a number of employees.

The delegate's declined to offer any comment on the July 5, 2002 submission.

ANALYSIS

In its July 5, 2002 submission DAC basically argued that its calculations should be used to determine the amounts due to its former employees. It allegedly decided unilaterally to withhold deductions at the source. It argued that the delegate had not used the information it provided in a timely fashion. It also

calculated vacation pay on the basis of 4%, although its standard contract specified 6% (three weeks per year). DAC does not appear to have included compensation for length of service in its calculations of the amounts due. In any case, no records of wages paid were produced for 12 persons, the exceptions being Todd Gosselin, Megan Price and Wayne Williams.

The first issue to be addressed in this decision is the status of DAC's July 5, 2002 submission to the Tribunal. The fact pattern of this case falls under the precedent of *Re Tri-West Tractor Ltd.* BC EST # D268/96. (See also *Re Kaiser Stables Ltd.* BC EST # D058/97). In *Tri-West Tractor*, the delegate requested information from the employer to support its allegations against a former employer to justify her termination. The adjudicator found that the employer had produced no documented evidence to support its claim. The employer ignored verbal and written requests for information, and there was no evidence to validate its claim of cause for termination. In its appeal, the employer provided new information to support its termination. The adjudicator stated:

The Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

In this case, the Director's delegate wrote to DAC on February 6, 2002, asking for specific types of employee records. A Demand for Employer Records was issued the same day. The delegate stated the types of information that would be necessary, as did the Demand for Employer Records. The delegate contacted DAC again on February 9 to illustrate the type of information she would need in her calculations.

In its February 20 reply, DAC made a number of unsupported statements, and provided no information to show that any of the amounts of unpaid wages in question had been paid. No calculations of vacation pay were produced, or any acknowledgement that compensation for length of service was owed. The delegate replied on February 23, extending the deadline for DAC to provide the information needed. Twice she sent letters containing her calculations of the amounts to which she believed the former employees were entitled. She also provided calculations for Brent Simon and Brian Rose and extended the deadline for a reply. At Ringma's request, she extended the deadline for submission of information and suggested that DAC provide evidence of payment of wages.

The delegate then issued her first determination on April 15 2002. When she realized that bonus shares did not fall under the definition of wages, she issued a second Determination on May 2, with a deadline for appeals of May 27, 2002. DAC's formal appeal of May 27 contained only unsupported allegations of errors of law and fact in the Determination. However, it did provide some documentation that the delegate used to re-calculate the amounts owing to Certain Employees. She then varied her Determination.

Without any explanation, DAC then presented its July 5, 2002 document, which contained more detailed information concerning Certain Employees.

It would be hard to imagine a more egregious case of employer “*lying in the weeds*,” in the words of the adjudicator in *Tri-West Tractor*. DAC knew the claim being made against it. It was invited repeatedly to reply with documentation to support any contrary conclusion. Deadlines to reply were extended. DAC did not meet its commitments to begin payment. When DAC did provide information regarding some of Certain Employees, the delegate responded by varying re-calculating the amounts owed and finally by amending the Determination. Six weeks after the deadline for appeals, DAC produced records to shed light on its positions. It offered no excuse or explanation for the delay or any argument to persuade the Tribunal to accept its submission.

These records could have and should have been made available to the delegate in her investigation. The Tribunal has consistently refused to accept submissions of this type, and DAC cannot rely on the data in the July 5, 2002 document to overturn the Determination. DAC attempted to put the Tribunal in the position of investigating individual complaints. Section 112 of the *Act* clearly states that the Tribunal is an appellate body, limiting its role so that parties will participate fully in investigations of complaints. The delegate has the discretion to deal with additional information as she enforces the Determination.

The delegate dealt with the substantive issues in DAC’s May 27 appeal in her amendments to the Determination on June 12, 2002. In particular, DAC resisted paying Certain Employees compensation for length of service. No obligation is more fundamental to the employment relationship than the employer paying its employees for their services. DAC admitted that it failed to fulfill that obligation. It then submitted calculations excluding compensation for length of service, evidently because it believed that they had resigned when their wages were not paid, the position it took on February 20. DAC never presented any evidence on the circumstances of the termination of Certain Employees. It cannot raise any arguments that they were not entitled to compensation for length of service at this stage of the proceeding.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination is confirmed. DAC owes Certain Employees \$158,591.09, plus interest accrued under Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal