

An appeal

- by -

Media Mentors Management Inc.

- 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:** Paul E. Love

**FILE No.:** 2002/372

**DATE OF DECISION:** September 19, 2002

## DECISION

### OVERVIEW

This is an appeal by an employer, Media Mentors Management Inc., from a Determination dated June 13, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). The Delegate found that the total wages owing to Derek Boyd, Barry Dick , John Van Hemmen, and Tim Wohlberg (the “Employees”) was \$50,788.21.

While the Employer requested an oral hearing, the Tribunal did not grant an oral hearing. The points raised by the Employer could be dealt with by way of written submissions. This decision was made on the basis of written submissions. The Employer argued that it gave written notice of termination to Employees and Employees agreed to work on the express condition that they would be paid if the “Roma Group” provided investment funding, and then to the extent of the funding. The Roma Group has not provided funding to the extent expected by the Employer, and the Employer has ceased operations, and seeks to avoid liability to the Employees for payment of wages, vacation pay, and termination pay.

The Employer provided no proof, either to the Delegate or to the Tribunal, that it supplied written notice to the Employees. In any event, section 67 of the *Act*, provides that a notice is not effective if an employee continues to work after the effective date of the notice. If the facts were as alleged by the Employer, the Employees worked after the date of the notice, and such a notice is of no effect. Further, if the Employees agreed to work on the basis alleged by the Employer such an agreement violates section 4 of the *Act*, as it is agreement to work for payment on a “contingent basis”, and section 17 of the *Act* provides that all wages must be paid semi-monthly and within 8 days of the end of a pay period.

### ISSUES:

Did the Delegate err in determining that wages were due to Derek Boyd, Barry Dick , John Van Hemmen, Tim Wohlberg?

### FACTS

I decided this case after considering the submission of the Employer, Employees and the Delegate. Derek Boyd, Barry Dick , John Van Hemmen, Tim Wohlberg were employed by Media Mentors Management Inc. in its internet business. The Delegate found that the total wages owing to the Employees was \$50,788.21 as follows:

Employee	Derek Boyd	Barry Dick	John Van Hemmen	Tim Wohlberg
Regular Wages, Bonuses and Commissions	\$7,050.00	\$15,841.99	\$10,833.32	\$6,750.00
Vacation Pay	\$431.78	\$1,120.00	\$433.33	\$975.00
Termination Pay	\$2,699.98			\$899.99
NSF Cheques	\$1,800.00			
Interest	\$493.80	\$699.04	\$404.52	\$355.46
<b>Total Wages</b>	<b>\$12,475.56</b>	<b>\$17,661.03</b>	<b>\$11,671.17</b>	<b>\$8,980.45</b>

The Delegate indicated that the Employer has closed its business due to financial problems. The Delegate also noted in the Determination that the Employer admitted that money was owing to the employees, but that it was not in a financial position to pay the employees.

The Delegate found that the Employer did not give written notice of termination to each employee, as the Employer did not provide to the Delegate any proof of a written notice. In the absence of written proof, the Delegate accepted the submission of the Employees that they were terminated without notice being given. The Delegate found that the Employer violated section 17 of the *Act* by failing to pay wages to its employees, at least on a semi-monthly basis.

### **Employer's Argument:**

The Employer submits that there is nothing owing to Employees for wages because it advised the employees that wages would be paid only if funds were forthcoming from the Roma Group and only to the extent of funding by that group. Further the Employer claims that written notices of termination were provided to each employee, prior to each employee agreeing to continue working on the above noted basis.

### **Employees' Arguments:**

The Employees submit, that they were not paid wages by the Employer. Further, the Employees say that after the employer missed two pay cheques the employer said that payment would be forthcoming from another source. Mr. Dick indicates that he did resign, and the Employer accepted his resignation, but he did not resign because of any allegation of cause.

### **Delegate's Argument**

The Director's Delegate submits that the previous Delegate who made the Determination provided his preliminary findings to the Employer, and the Employer neglected to respond. The Delegate submits that the appeal should be dismissed because the Employer did not participate fully in the investigation.

## **ANALYSIS**

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer to show that there is an error in the Determination, such that the Determination should be canceled or varied.

### **Decision by way of Written Submissions:**

I note that in this case, the Employer has requested an oral hearing, but the Tribunal has indicated that this matter will proceed by way of written submissions. The Tribunal advised all parties by letter dated July 9, 2002:

The Tribunal will assign an Adjudicator to decide this appeal. The Adjudicator may decide the appeal based solely on written submissions or an oral hearing may be held.

In my view, an oral hearing is unnecessary to decide this matter. The propositions advanced by the Employer are unsound at law.

Here, the Employer alleges that the Delegate erred in the findings of fact that wages were owing to the Employees. In my view, there is ample evidence in this case that Media Mentors Management Inc. was the employer of all the Employees. There is no evidence that any of the employees were employed directly by an employer other than Media Mentors Management Inc..

### **Notice of Termination:**

The Employer claims that it does not owe compensation for length of service, because all employees were terminated in writing, once the Employer moved into the “broadcasting” portion of its internet business. The Employer offered no written evidence of the terminations to the Delegate during the investigation, and has not filed with the Tribunal any written evidence of terminations. Written termination notices are denied by the Employees. In any event, even if this Employer gave written notice of termination, section 67 of the *Act* provides that the written notice is ineffective if the employee works after the date of the notice:

- 67(1) A notice given to an employee under this Part has no effect if
  - (b) the employment continues after the notice period ends.

If the facts were as alleged by the Employer, that the Employees worked for the Employer after the effective termination date of the notice, such a notice has no effect.

### **Payment of Wages**

If the Employer entered into arrangements with the Employees that they would be paid only if the “Roma Group” came through with investment funding, this is an agreement that is contrary to the *Act*. This would be an employment contract “contingent upon funding”, and is in effect an agreement to be paid less than the minimum wage. This Tribunal has held that an agreement that the employee will be paid less than the minimum wage is of “no effect”: *Jutt Motors Ltd., BCEST #D607/97*. Further, such an agreement would violate section 17 of the *Act*. Section 17 of the *Act* requires that an Employer pay the wages of an employee at least semi monthly:

- 17(1) 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.
- (2) Subsection (1) does not apply to
  - (a) overtime wages credited to an employee’s time bank,
  - (b) statutory holiday pay credited to an employee’s time bank, or
  - (c) vacation pay.

Section 4 does not permit any employer or employee to contract out of the wage payment provisions of the *Act*:

The requirement of this *Act* or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

I note that the Employer has not challenged the arithmetic calculations of each employee's entitlement. The appeal simply has proceeded on the basis of the "written termination" and "contingent funding" arguments. For all the above reasons, I find that the Employer has not demonstrated any error in the Determination.

## **ORDER**

Pursuant to s. 115 of the *Act* I order that the Determination dated June 13, 2002 is confirmed with interest in accordance with s. 88 of the *Act*.

---

**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**