

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Josh Lewis
("Lewis")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE No.: 2000/572

DATE OF DECISION: October 25, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") by Josh Lewis ("Lewis") from a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on August 4, 2000. The delegate found that Emotive Solutions Inc. ("Emotive") owed \$81,505.97 in wages to forty-seven former employees. Lewis, along with ten other former employees, appealed the Determination on the basis that they were owed more wages than the amount calculated by the delegate.

ISSUE TO BE DECIDED

Is Lewis entitled to more wages than the amount set out in the Determination?

FACTS AND ANALYSIS

In the Determination, the delegate said:

Emotive Solutions Inc. is a high tech company which operates an on-line bingo game.

...

The employer states that they are strapped for cash at this time. They are looking for new investors and can not meet the payroll. Accordingly, the employer has laid all staff off without written notice as of July 28, 2000. The employer has provided records indicating the amounts of regular pay and annual vacation pay owing to each employee.

The delegate determined that Emotive owed a total of \$81,505.97 in wages to forty-seven former employees, including Lewis. She found that Lewis was owed regular wages and vacation pay in the amount of \$1305.68. Her calculations for Lewis were based on a start date of May 15, 2000 and an end date of July 15, 2000.

Lewis appealed the Determination on August 10, 2000. He said he is owed \$2028.00 excluding vacation pay. He stated that he was taken advantage of by Emotive and he believes it knowingly withheld information from the delegate that would show the true amount the company owes him. He says he worked at Emotive until July 27, 2000. He submitted a copy of his hours and days of work from June 19, 2000 to July 27, 2000, which he says went unpaid; a copy of a letter to his former employer dated July 28, 2000 in which he complains about not being properly paid; copies of two memos from Emotive to staff apologizing for errors and delays with respect to their cheques; a copy of a bounced cheque dated July 11, 2000; a copy of a letter to him from Emotive dated July 17, 2000, which he says supports his claim he worked beyond July 12, 2000; and pictures of him which he says prove he worked to at least to July 26, 2000.

Emotive and the delegate were invited to reply to Lewis' appeal. No reply was received from Emotive. The delegate forwarded a submission to the Tribunal dated August 31, 2000. In her submission, the delegate said:

...The Delegate is supportive of the Determination being varied as per the attached calculations.

It appears that some of the employees were in receipt of NSF cheques and or worked past the last pay period for which the employer forwarded records. The employee's records all appear credible and should be accepted.

...

...The evidence presented by ...Lewis is new evidence that appears to be creditable (sic). Accordingly, the Delegate would support the Tribunal in varying the Determination as follows:

...

Varied amount:

June 19, 2000 to July 27, 2000 - 169 hours @\$12.00 per hour = \$2028.00
Vacation pay \$162.36

For a grand total owing of \$2190.36

The Delegate has discussed this with the appellant, who is in agreement with the varied amount. The Delegate has tried but has not been able to contact the employer.

The delegate's submission was forwarded to Emotive and Lewis for their reply. Neither replied to the delegate's submission.

The burden is on the appellant, Lewis, to show that the Determination should be varied or cancelled. In this case, I am satisfied that Lewis has met the burden to show the Determination should be varied.

Lewis claims that he is owed more wages than the amount calculated by the delegate in the Determination. He provided information to support his position. Emotive and the delegate were invited to reply to the appeal. Only the delegate replied and she made no argument that the Tribunal should refuse to consider the information provided by Lewis. Rather, the delegate accepted Lewis' information as credible and, as a result, she revised her calculations. The delegate said that Lewis agreed with her revised calculations and she was unable to contact Emotive about its position. The Tribunal forwarded the delegate's revised calculations to Lewis and Emotive for their reply. Neither made a submission to the Tribunal challenging the accuracy of the amounts. Accordingly, I can find no basis to reject the delegate's conclusion that Lewis is owed \$2190.36 and the Determination should be varied to reflect that amount.

I have issued concurrent Decisions (BCEST #D454 to #D461 and #D463 to #D464) with respect to the other ten former employees of Emotive who have filed appeals of the Determination. As in this case, I have concluded that the delegate's new calculations should be accepted. As a result the total amount of the Determination is varied to \$89, 558.03.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination dated August 4, 2000 be varied to show that Lewis is owed \$2190.36 and further that it be varied to show the total amount owed by Emotive is \$89,558.03, together with whatever additional interest that may have accrued, pursuant to Section 88 of the Act, since the date of issuance.

Norma Edelman

**Norma Edelman
Vice-Chair
Employment Standards Tribunal**