

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 -

Dunamis Development Corporation operating as Cross Country Contracting

("Dunamis")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/602

DATE OF HEARING: November 20, 2000

DATE OF DECISION: January 2, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) and by Dunamis Development Corporation operating as Cross Country Contracting (which I will henceforth refer to as “Dunamis” and “the employer”). Dunamis appeals a Determination issued by a delegate of the Director of Employment Standards (“the Director”) on August 4, 2000. The Determination orders Dunamis to pay Brian Zimmerman and Robert Martens, \$10,683.32 in wages and interest, and \$2,979.34 in wages and interest, respectively.

Dunamis, on appeal, asks that the Tribunal reduce the amount of the Determination because it was unaware of what the *Act* requires and because it is nearly bankrupt and does not have the money to pay the amount of the Determination.

APPEARANCES

J. Hoogendoorn	For Dunamis
B. Zimmerman	On his own behalf
R. Martens	On his own behalf

ISSUES TO DECIDE

The employer suggests that its dispute with Zimmerman was settled by agreement.

The appeal is, in the main, an appeal for mercy. Dunamis wants the Tribunal to reduce the amount of the Determination because it is unable to pay the amount of the Determination and it was unaware of what the *Act* requires.

The employer asks that it be permitted to pay, whatever it is that it must pay, over time in a series of instalments.

FACTS AND ANALYSIS

Dunamis develops mobile home sites, transports mobile homes, connects the homes to site services and undertakes final set-up. Zimmerman and Martens worked for Dunamis.

During the course of investigating the complaints which were filed by Zimmerman and Martens, the delegate drew the employer’s attention to various sections of the *Act*. The employer conducted its own reassessment of what Zimmerman and Martens should have been paid. The Determination is based on that reassessment of pay.

In a written submission dated October 2, 2000, Dunamis claims that Zimmerman “committed to returning to work” and agreed to “waive his complaint with the Ministry of Labour” if the employer would “work on some form of bonus”. According to the employer, they shook hands in “waiving (the) overtime issue”. Zimmerman accepts that he and Jack Hoogendoorn, who owns and runs Dunamis, did discuss the possibility that Zimmerman might again work for Dunamis. But, according to Zimmerman, he decided against returning to Dunamis because Hoogendoorn would never say what ‘the bonus’ was to be.

Zimmerman did not in fact return to his old job. I find that it is not clearly evident that Hoogendoorn and Zimmerman reached an agreement as alleged.

Should I be wrong in the above conclusion and it is the case that Zimmerman did enter into an agreement as the employer alleges, I would still not vary or cancel the Determination. I am not prepared to give an agreement of that sort any force or effect because it provides for less than the minimum standards of the *Act*. Agreements which provide for less than the *Act* are null and void by virtue of section 4 of the *Act*.

4 The requirements 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.

According to Hoogendoorn, owner and manager of Dunamis, it no longer has control of two of its three bank accounts because of a Revenue Canada decision. Apparently, Dunamis has been ordered to pay Revenue Canada a substantial amount of taxes, an amount which, I am told, is in the hundreds of thousands. I am led believe that Dunamis is in dire straits financially and that it is at this point just trying to survive.

The Tribunal is asked to reduce the amount of the Determination because Dunamis cannot pay that amount and will be forced into bankruptcy if forced to pay, at least, all at once. The employer also seeks an order which reduces the amount of the Determination because the employer was unaware of what the *Act* requires. I am satisfied, however, that neither an ignorance of the law, nor the employer’s inability to pay, are a defence against an order to pay wages.

The Tribunal may vary a determination.

115 (1) After considering the appeal, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

That power to vary a determination must, however, be exercised within the context of the law. The Tribunal does not have an unfettered power to alter Determinations and the Tribunal does not have the discretionary power to reduce the amount of a determination for reason of an inability to pay or ignorance of the law. As I noted at the outset of the appeal hearing, my job as Adjudicator is to decide whether it is shown on appeal that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

Zimmerman and Martens, as employees of an employer in British Columbia, are entitled to the protections and benefits of the *Act*. The Determination is that they were not paid in accordance with the *Act* and that Zimmerman and Martens are therefore owed \$10,683.32 and \$2,979.34, respectively. I will not reduce the amount of the Determination as I may not. If I were to reduce the amount of the Determination, Zimmerman and Martens would then receive less than the legislated minimum. It would deprive the employees of that to which they are entitled under the *Act*.

The final issue is the matter of whether the employer may or may not pay Zimmerman and Martens over time in a series of instalments. It is, of course, not in the employees' interest to enforce the Determination in such a way as to force the employer into bankruptcy. But the matter of whether the amount of the Determination can be paid over time is a matter to take up with the Director in that it is the Director, not the Tribunal, that enforces Determinations.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated August 4, 2000 be confirmed. Dunamis has been found to owe Brian Zimmerman \$10,683.32 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*. And Dunamis has been found to owe Robert Martens \$2,979.34 and to that amount I also add whatever further interest has accrued pursuant to section 88 of the *Act*.

LORNE D. COLLINGWOOD

**Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal**