

An appeal

- by –

John Leslie Mitchell, a Director or Officer of Interior Pacific Flight Systems Ltd.

- and by -

Interior Pacific Flight Systems  
("Interior Pacific" or the "Employer")

- 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:** Ib S. Petersen

**FILE No.:** 2002/469 and 2002/542

**DATE OF DECISION:** January 28, 2003

## DECISION

### OVERVIEW

This decision concerns two appeals, one by the Employer, Interior Pacific, the other by Mr. Mitchell, pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of two Determinations of the Director issued on July 18 and August 13, 2002, respectively. The Determination against the Employer concluded that Mr. William Smith was owed \$13,586.26 by his Employer on account of commissions and compensation for length of service (the “Corporate Determination”). The Determination against Mr. Mitchell found that as he was corporate director or officer, established through the Registrar of Companies, he was liable for up to 2 months unpaid wages. The Delegate concluded that Mr. Mitchell was liable for the \$13,586.26 (the “Director Determination”).

Mr. Smith worked for Interior Pacific from June 15, 1999 to May 5, 2001. He was laid-off, or terminated, from his employment as a sales and marketing manager with the Employer in May 2001. The termination was based on financial problems encountered by the Employer. Mr. Smith had been away from work on parental leave since January 2001, and was about to return when he was informed of his layoff. He was never recalled. Interior Pacific went into receivership on December 7, 2001 and, at the time of the Determination was facing bankruptcy.

According to the Determination, Mr. Smith was paid \$1,500 per month plus 5% of “everything” (aircraft and parts) sold by the Employer. Mr. Smith’s position was that he was entitled to be paid upon “completion and successful delivery of the aircraft” by the Employer. Apparently, this was a verbal agreement between the parties. The Delegate concluded that Mr. Smith, in addition to compensation for length of service (\$1,146.90), was entitled to commission payments for one aircraft (\$11,169). Vacation pay and interests were also awarded.

### FACTS AND ANALYSIS

The Employer and Mr. Mitchell, as mentioned, appeal the Determinations. As the Appellants, they have the burden to persuade me that the Determinations are wrong. In the circumstances, I am not persuaded that the Employer has met the burden and, therefore, its appeal is dismissed. Mr. Mitchell’s appeal is granted in part.

I turn first to the Employer’s appeal.

The Employer argues, first, that Mr. Smith was overpaid on his commissions. This arises out of the sale of an aircraft that was, apparently, sold twice. The first sale, to a Mr. Cohen, was not completed in the sense that there was no successful delivery of the plane. The aircraft was subsequently resold to another buyer. Mr. Smith was paid commissions for both sales: \$8,256.75 for the first sale and \$9,375.00 for the second. Mr. Mitchell says that this amount should be taken into account. From the documentation, attached to the appeal, it appears that the commissions were paid in mid October 2000.

The Delegate questions whether this was an error. As noted, there is no submission from Mr. Smith.

While I appreciate the Employer’s point, I am not satisfied that the commission payments were made in error. In my view, the circumstances of this payment are far from clear. The amount in question is not a

trivial amount and it was paid, according to the Employer's own records, on October 13, 2000, months before Mr. Smith went on leave. There is nothing to indicate that the Employer raised this with Mr. Smith. In short, I do not accept this ground of appeal.

The second ground of appeal relates to the aircraft for which the Delegate ultimately agreed that Mr. Smith was owed commissions. The Delegate's submission is not terribly helpful on this point. The Delegate states that he has "no immediate comment on the evidence and argument." The delegate argues, in a general sense, that the Employer's appeal contains evidence not submitted in the course of the investigation. However, the appeal attaches material that, at least on its face, was, indeed, submitted to the Delegate.

The Employer agrees that the aircraft was, in fact, delivered. However, the "deal" with the purchaser changed, from a "new" to a "used" plane, and it was ultimately delivered to another purchaser, shortly after Mr. Smith's employment came to an end. As I understand the Employer's argument, a "new" aircraft was initially sold to a Mr. Scott. The Employer was not in a position to manufacture this plane and Mr. Mitchell negotiated the sale of a "used" (rebuilt) aircraft, for a lower price, and the construction started after Mr. Smith went on leave. Mr. Scott subsequently indicated to the Employer that he was not in a position to take the plane and it was assigned to a group of Montana businessmen. That deal fell through. Ultimately, the plane, financed by one of Mr. Scott's companies, was sold and delivered to a company controlled by a relative of Mr. Scott.

In the circumstances, I am not persuaded that the Delegate erred. The sale appears to have been completed and the aircraft delivered. While I accept that there were some changes to the "deal," as stated by the Employer, I am not persuaded that Mr. Smith was not entitled to the commission on the aircraft in question.

Third, the Employer argues that Mr. Smith, while he was employed, removed airplane parts from the shop. In some instances, this was done with the consent of the Employer with Mr. Smith's agreement to pay from his commissions. In other instances, says the Employer, items were removed without consent.

The Delegate argues that the Employer is not permitted to deduct these amounts. While I have some sympathy for the Employer's position, I am of the view that the Delegate did not err in not allowing these amounts to be taken into account. The *Act* is quite clear on this point. Section 21(1) provides that an Employer may not, except as permitted, "directly or indirectly, withhold deduct or require payment of all or part of an employee's wages for any purpose." The employer may (or may not) have recourse to the civil courts with respect to these amounts, that is not for me to decide.

Mr. Mitchell argues that the Delegate did not afford him an opportunity to respond to Mr. Smith's claims. I appreciate the difficult situation the Employer found itself in, namely being in receivership when the investigation was under way. Mr. Mitchell also says he was advised by the receiver that there was no need for him to respond. However, the Delegate did contact the Employer and raised the claim that Mr. Smith believed himself entitled to a little shy of \$100,000 in commission earnings. Mr. Mitchell did provide records to the Delegate. Based on these records, it would appear, he dismissed the bulk Mr. Smith's claim for commissions. I can appreciate Mr. Mitchell's understanding, based on his initial conversation with the Delegate, that Mr. Smith did not "have a leg to stand on," the investigation did continue and the Employer did provide documentation. I am not persuaded that the Employer's ground succeeds.

The Employer does not take issue with the award of compensation for length of service.

In short, the Employer's appeal is dismissed.

I now turn to the appeal by Mr. Mitchell in his capacity as a director or officer of the Employer. The Determination against Mr. Mitchell found him liable for the amount of the Corporate Determination, the \$13,586.26. The determination states:

“The wages applicable to commissions were earned from a single sale at a point in time so are fully payable for the Director/Officer.” [sic.]

Mr. Mitchell's appeal does not address the issues relevant under Section 96 of the Act, chiefly whether or not he was a director or officer at the material time and the whether the amount was calculated correctly. It is identical to the appeal of the Corporate Determination.

All the same, I am of the view that the Director Determination cannot stand. In my view, the Determination fails to address substantive issues.

First, Section 96 provides for personal liability for “up to 2 months' wages.” There is nothing on the face of the Director Determination to show that the delegate calculated two months wages. The Delegate assertion that the amount awarded arose “from a single sale at a point in time” and are, therefore, fully payable, is, in my respectful view, without foundation in the statute. Moreover, it is clearly incorrect because the amount awarded--\$13,586.26--also includes an amount awarded on account of compensation for length of service.

Second, there is, in my mind, the question of whether or not Mr. Mitchell is liable for the compensation under Section 63 (see Section 96(2)). This question does not seem to have been addressed at all.

In the circumstances, I refer the Director Determination back to the Director.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated July 18, 2002, (the Corporate Determination) be confirmed.

Pursuant to Section 115 of the *Act*, I order that the Determination dated August 13, 2002, (the Director Determination) be referred back to the Director.

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**