

An appeal

- by -

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

- 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.: 2003/14

DATE OF DECISION: April 15, 2003

DECISION

OVERVIEW

This decision arises out of two appeals, one by the Employer, Interior Pacific Flight Systems Ltd., the other by Mr. Mitchell, 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”). On appeal to the Tribunal, the Employer’s appeal was dismissed and the Corporate Determination upheld.

The Determination against Mr. Mitchell found that as he as corporate director or officer, established through the Registrar of Companies, 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”). This Determination was disposed of as follows:

“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.

...

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

On February 27, 2003, the result of the referral came back to the Tribunal. The Director concluded: (1) Mr. Mitchell was not liable for compensation for length of services because the Employer was in receivership; and (2) Mr. Smith was entitled to two months unpaid wages in the amount of \$11,635.42, plus interest, for a total of \$12,356.22. The amount was calculated on the basis of Mr. Smith’s average earnings in the year prior to going off on parental leave in January 2001. Mr. Smith was laid off from his employment in May 2001 before he could return from the leave.

According to the report, on February 19, 2003, Mr. Mitchell acknowledged receiving the report. He indicated to the Delegate that he had not reviewed them in detail. He asked for an extension of time to respond until February 21, 2003. As of the date of the report, he had not responded and the Delegate issued the report.

Mr. Smith did not file any submission.

In my view, the two months' unpaid wages in Section 96 must be established with reference to "normal" wages (*Re: Raymond Man Wah Lee, Director/Officer of C-O-E Posscan Systems Inc. et al.*, BCEST #D158/00). In the circumstances, I uphold the Delegate's findings.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated August 13, 2002 (the Director Determination), be varied to reflect that the amount owed by Mr. John Leslie Mitchell is \$12,356.22 together with such interest as may have accrued under the *Act*.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal