

An appeal

- by -

OT & T Information Systems Inc.
(“OT & T”)

- 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: Lorne D. Collingwood

FILE No.: 2002/284

DATE OF HEARING: August 8, 2002

DATE OF DECISION: August 20, 2002

DECISION

APPEARANCES:

Yuping Guan	On behalf of OT & T
Eric Wong	On his own behalf

OVERVIEW

OT & T Information Systems Inc. (I will use “OT & T” and “the employer” for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the *Act*”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 15, 2002. The Determination orders OT & T to pay Eric Wong (Wrongly spelled “Wang” in the Determination.) \$1,924.02 in wages, vacation pay and interest included.

Mr. Wong worked for OT & T as a commission salesperson. OT & T is prepared to pay him \$400 and it accepts that he is entitled to another \$1,400 in commissions. It claims, however, that it should not be made to pay the employee at this time because it has yet to be paid.

I have in this decision found that the employee is owed \$1,800 in commissions plus vacation pay and interest. OT & T operated as a partnership in the period when the commissions were earned and the partnership has been paid. The employer, most importantly, is required to pay all wages within 6 days of the employee’s termination and it may not withhold moneys as it has because that is contrary to section 21 of the *Act*.

An oral hearing was held in this case.

ISSUES

The issue is whether the employer is or is not entitled to withhold an amount of wages.

What I must ultimately decide is whether it is or is not shown by the Appellant that the Determination ought to be varied or cancelled, or a matter(s) referred back to the Director, for reason of an error or errors in fact or law.

FACTS

The facts are in dispute. OT & T claims to have been misunderstood. I find that the important facts are as follows:

Eric Wong was employed by OT & T as a recruiter, a “head-hunter”. He is entitled to receive commissions under the contract of employment.

In March of 2001, OT & T began operating in loose partnership with a company called International Technology Staffing Network Ltd. (“ITSN”). ITSN took over responsibility for recruiting. The focus of OT & T was to be software development. At that same time, Yuping Guan, the owner of OT & T, and David Morton, the owner of ITSN, established a federally incorporated company called “Careershuttle”. I am told that they share equally in the ownership of Careershuttle.

In April, Wong began working out of ITSN’s offices. His work was directed by Morton. He, in the main, worked to place people for clients of ITSN but he also presented himself as a recruiter for OT & T.

OT & T continued to pay Wong. OT & T accepts that it is the employer until September 30, 2001. OT & T and ITSN were at loggerheads at that point and they were in the process of ending their partnership. Wong was forced to choose between OT & T and ITSN. In early October, 2001, he accepted a job offered by ITSN.

Wong placed several people with companies in the period March, 2001 to September 30, 2001 (“the relevant period”). He has not been paid for several of his placements. The employee and OT & T both accept that the net amount of commissions ‘owed’ is \$1,800 (\$2,600 – 800). It is not \$2,600 because one of Wong’s placements was deemed to be unsuitable and the person’s employment was terminated. (Wong himself views this as “a returned sale”.)

It is the practise of OT & T to pay commissions at such time as it is paid, not at the point where a person is placed or found suitable by the client.

OT & T, on appeal, indicates that it is prepared to pay Wong \$400 but not the remaining \$1,400 (\$1,800 – 400) because it has not been paid as yet by the client. But I find that the client of which it speaks is not some completely independent third party but ITSN and that ITSN has been paid: It is just that ITSN did not pay OT & T.

According to OT & T, it is entitled to half of placement fees paid to ITSN minus overhead charges. In respect to the placement fees of interest, namely, those that are to do with placements for which Wong has not been paid, Morton has said that “ITSN has either paid OT & T in cash ... or offset it against debts that OT & T owes ITSN” (letter dated April 5, 2002). As matters have been presented to me, however, there is not evidence to establish that any of the placement fees of interest have been turned over to OT & T or the debt of which Morton speaks. For all I know, Morton may have just decided, on his own, that OT & T owes money and so he started grabbing all of the money that he lay his hands on.

While Guan tells me that he is planning to sue ITSN, I find that he has not done so at this point.

ANALYSIS

In my view, it cannot really be said that the employer has not been paid. I am inclined to believe that this is case where the employer was in fact paid: It is just that one arm of the employer did not pay the other. Nothing turns, however, on the matter of whether the employer was or was not paid.

Commissions are a form of wages. They are payable for labour and services that are performed for the employer by an employee. That is clear from the *Act*'s definition of the terms "wages" and "work".

"wages" includes

(a) salaries, commissions or money paid or payable by an employer to an employee for work,

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

It became Wong's job to find workers that suited clients of both ITSN and OT & T. It was never his job to chase after bad debts, nor was it his responsibility to force clients to pay promptly.

The amount of the outstanding commissions, \$1,800, is money which is payable for work which has already been performed. Mr. Wong should, as such, have been paid for his work long ago. The *Act* requires that an employer pay all wages earned in a pay period within 8 days of the pay period.

17 (1) At least semimonthly 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.

The *Act* also requires that an employer pay all wages owing to an employee within 6 days of the point that the employee terminates his employment.

18 (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

OT & T is in effect arguing that wages are neither "earned", "payable", nor "owing" where the employer has itself not been paid. I cannot accept that line of reasoning. Clearly, accepting that line of reasoning would be to accept that the employee might never be paid for work which has been performed: It would all depend on whether the employer was paid. In my view, the *Act* cannot have its intended force and effect except where wages are considered to be earned as each unit of work is performed. In this case, Wong is entitled to receive a commission each time a worker was placed by him with a client and the worker was found satisfactory by the client.

Once an amount of wages are due (owing), an employer may not withhold wages except for purposes which are permitted by the *Act* or other enactment of British Columbia.

21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages **for any purpose**.

(2) An employer must not require an employee to pay **any of the employer's business costs** except as permitted by the regulations.

(my emphasis)

The *Act* does not allow an employer to withhold any part of an employee's earnings on the basis that the employer has not itself been paid by a client, nor is that permitted by some other enactment of British Columbia or Canada. Should an employer never be paid for services performed or products sold, it must still pay commissions earned on the sale. It may not withhold those commissions because that is to require that the employee pay some of what is the business cost of a bad debt.

The delegate appears to have decided that ITSN and OT & T are entirely separate companies but the two operated as partners in the relevant period. Their activities were so intertwined, it seems to me, that it may well be that the two companies, and possibly Careershuttle as well, can be treated as one person for the purposes of the *Act*.

- 95 If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and
 - (b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

OT & T has asked that I decide what amount it should pay and what amount ITSN should pay. I will not do that. The financial dispute between owners of OT & T and ITSN is a matter for the courts or commercial arbitration.

There are elements of the Determination with which I do not agree but the delegate has correctly ordered OT & T to pay Wong \$1,800 in outstanding commissions plus vacation pay and interest. I am therefore moved to confirm the Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which is against OT & T Information Systems Inc., in favour of Eric Wong, and dated May 15, 2002, is confirmed in the amount of \$1,924.02 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal