

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 -

Commercial Lighting Products Ltd.
("Commercial")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Niki Buchan

FILE NO.: 98/414

DATE OF HEARING: October 14, 1998

DATE OF DECISION: November 2, 1998

DECISION

APPEARANCES

Randy Wilkes
David Sinclair

on behalf of Commercial
on his own behalf

OVERVIEW

This is an appeal by Commerical Lighting Products Ltd. (“Commerical”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued on June 5, 1998 and filed under number 072690. The Director found that Commercial had contravened Sections 21 and 53(3) of the *Act* and ordered Commercial to pay Sinclair the sum of \$2266.20, made up of a \$1350.00 deduction of wages from his final pay, \$785.94 unpaid vacation pay and \$130.26 interest. Commercial argues that the Determination is in error and claims that no wages and/or vacation pay are owed to David Sinclair (“Sinclair”).

In the uncontested part of the Determination, the Director dismissed Sinclair’s claim with respect to a cost adjustment deduction of 3% because the practice did not contravene the *Act*. Also, the Director was unable to conclude that commissions on sales yet to be completed at the time of his termination were owed to Sinclair. His claim for wages on those sales was not allowed.

At an oral hearing held in Victoria on October 14, 1998, I heard evidence and submissions from Sinclair and Randy Wilkes. The latter is the branch manager of Commercial’s Victoria operations. At this hearing, Sinclair withdrew his claim with respect to vacation pay owing. He has reviewed the accounting method used and admits he did receive his vacation pay. Both Sinclair and Wilkes agree that the Determination should be varied to cancel the order to pay vacation pay. Only one issue remains under appeal.

ISSUE TO BE DECIDED

Whether the deduction of \$1350.00 from Sinclair’s final pay cheque was a valid deduction?

FACTS

Commerical pays its sales representatives on either a salary or commission basis. A newly hired employee normally starts on a salary and later converts to the commission payment method. The salaried employees are paid up to the final day of the pay period but are given an advance (a “draw”) half way through the period which is then deducted off the

final cheque for that pay period. The commissioned salesmen receive their commissions for any month on the 16th of the following month. They are also allowed a draw at the end of the month.

Sinclair was hired by Commercial as a salaried salesman on August 24, 1995. He worked as salaried salesman thorough September 30, 1996. His monthly pay period ended on the 16th of each month. At the end of the month he received an advance (or draw) of a predetermined amount which was later deducted off the 16th pay cheque.

Sinclair received his full monthly salary, \$2700.00, for the period of September 16, 1996 to October 16, 1996. His payment was in the form of an advance on September 30th and the pay period net amount on October 16th. This amount was paid to him even though he was not on a salary pay scale from October 1, 1996 to October 16, 1996. He was overpaid \$1350.00 (one half the monthly salary) at that time.

On October 1, 1996, he was converted to a commissioned salesman. Because Commercial's payments to commissioned salesman for any given month are not paid until the 16th of the following month. Sinclair's commissions for sales made during the month of October 1996 were paid to him on November 16, 1996. Both the salary payment of October 16th and the and the commission payment on November 16th are clearly shown on Exhibit #4 attached to the Determination.

On April 10, 1997, Sinclair terminated his employment with Commercial. At that time Commercial deducted \$1350.00 from his final cheque as a repayment of the one half month's salary it had overpaid for the period October 1 to October 16, 1996. Sinclair did not agree to the deduction of these wages from his pay cheque. He denies that there was a verbal agreement or that he was told that the amount must be repaid at the time he terminated his employment with the company.

Several employees submitted unsworn statements stating that they were aware at the time of their conversion that on termination they would have to repay the extra one half month's salary they received during the switch over from salary to commission base pay.

Since this Determination, Commerical provides employees with a written explanation of the payment policy on conversion from salary to commissions. It obtains written acknowledgment of over payment at the time an employee converts to commission status and an authorization for the deduction of overpayment of the wages when the employment is terminated. Several examples of these letters and authorizations were presented in the submissions.

ANALYSIS

The appellant bears the burden to demonstrate that there is an error or some basis for the Tribunal to vary or cancel the Determination under review. Commercial contends that the

Director is wrong in making a finding Sinclair had not been overpaid wages. Commercial's submission dated June 26, 1998 states:

“On October 16, 1996, Mr. Sinclair was paid a salary of \$2700.00 which covered the one month period from September 17, 1996 (please see Exhibit #4). This is the point at which he received an extra half-month's salary of \$1350.00 (from October 01 – October 16, 1996) as Mr. Sinclair went on commission as of October 01, 1996. In addition, he received his commission payment in full for the month of October 1996 on November 16, 1996. This extra money was given to him with the realization that upon termination of employment, he would have to reimburse Commercial Lighting Products. It was given to him in good faith in order to facilitate the changeover from a salary to a commission basis. Mr. Sinclair was well aware of this procedure and complained numerous times to the employees at our Victoria branch about it.”

The above information does not differ from that which was sent to the investigator on March 16, 1998 (See Exhibit #3 attached to the Determination). Also, Exhibit #4 clearly discloses that Sinclair received both salary and commissions payments covering the period of October 1 through 16, 1996. Yet, the finding at the last paragraph on page 2 (unnumbered) of the Determination is stated thus: “A review of commission sales and wages paid indicates that when Mr. Sinclair switched over to a commission rate that he was not overpaid wages. This summary of wages indicated that he received all wages due and payable to him. Therefore, the amount deducted off the final pay cheque is owing to the complainant.” This finding is obviously incorrect. Sinclair not only received all wages due and payable to him but he also received an extra one half month's salary.

At the hearing, Sinclair did not contest the accounting records or deny he received the wages indicated there. His response and argument is that he was never informed that he was overpaid wages at the time of the conversion to commission status and that he did not authorize a deduction from his final pay. In short, he looked to Sections 21 of the *Act* to restrict the employer from deducting wages from his final pay cheque. The protection of Section 21 is to ensure that the employee receives the full wages to which he is entitled. It does not purport to prevent an employer from deducting an overpayment of wages. It reads:

Section 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.”*

In practice, the overpayment of wages is an exception to the restrictions of Section 21. Adjudicator McConchie in *492695 B.C. Ltd. Operating As Paloma Polynesian Bar & Restaurant*, BC EST No. D131/97 states at page 6:

“The *Act* is remedial, not punitive. One of its purposes is to ensure that employees receive the full measure of wages to which they are entitled.

Section 21 of the *Act* safeguards this purpose by restricting the circumstances in which an employer may deduct monies from an employee's pay. One of the exceptions as a matter of practice is with respect to overpayment of wages. The *Act* does not require the Company in these circumstances to satisfy the same wage entitlement twice."...

Following these principles, I find that Commercial was entitled to deduct the over payment of the one half month's salary it made to Sinclair on October 16, 1996. He was paid a commission for the sales he made October 1 through October 16, 1996. He is not entitled to both the salary and the commissions. The Determination is in error on the fact that Sinclair was not over paid wages and that he is entitled to the amount deducted off his final pay cheque. Whether he authorized the deduction is in this case irrelevant. The deduction is not an assignment of wages but a return to Commercial of wages over paid. The *Act* cannot be used to justify an unjust enrichment.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated June 5, 1998 and filed under number 072690 is cancelled.

Niki Buchan
Adjudicator
Employment Standards Tribunal