

**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-

566264 B.C. Ltd.  
operating as  
X-citement Video VIII and Kaytel Video

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No.:** 1999/606

**DATE OF DECISION:** December 6, 1999

## DECISION

### OVERVIEW

This is an appeal by 566264 B.C. Ltd. operating X-citement Video VIII and Kaytel Video ("566264") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination dated September 22, 1999 (ER# 95810) by the Director of Employment Standards (the "Director").

The Director determined that an employee, Nicole Weistra ("Weistra") was dismissed from employment with 566264 for just cause without compensation. The Director also found that despite the dismissal Weistra was entitled to certain wages and overtime. The determination also included vacation pay.

566264 has appealed on two grounds. Firstly, they point out that the vacation pay was included on Weistra's final pay cheque. Secondly, they submit that it would be inequitable to allow Weistra to benefit from the Determination when she was dismissed for theft and actually owes money to 566264. They submit that any money owing to Weistra should be held in trust pending the outcome of criminal charges and if convicted set-off against money stolen.

### ISSUE TO BE DECIDED

Is it permissible to withhold in trust wages owing to an employee pending the outcome of criminal proceedings in anticipation of set-off against restitution owing to the employer. wages by reason of section 95 of the *Act*.

### FACTS AND ANALYSIS

The first ground of appeal arises out of a misstatement in the Determination wherein the Director's delegate referred to vacation pay owing instead of referring to overtime. The delegate has acknowledged the error but confirms that the actual quantum owed is still calculated correctly. 566264 has not disputed the correction made by the delegate and therefore there is no reason to interfere with the determination on this ground.

The second ground raises an issue that has been discussed by this Tribunal before. There may well seem to be an inequity or unfairness in requiring an employer to pay wages to an employee who has stolen money from them: *Park Hotel (Edmonton) Ltd BC EST#D539/99; 445864 BC Inc. BC EST #D329/99*. However, the Tribunal has consistently decided that the obligation to pay wages is statutory and neither the director nor the Tribunal has the discretion to withhold wages legitimately owing to an employee.

The wages owing must be paid as required by the *Act* and the employer must look to other remedies to recover money allegedly owed by the employee. The employer may, for example, seek restitution in the criminal courts or pursue a remedy in civil court. There is no jurisdiction in the *Act* to grant the remedy sought by the employer in this case. Therefore the Determination must be confirmed.

**ORDER**

I order, under section 115 of the *Act*, that the Determination is confirmed.

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**