

An appeal

- by -

New Pacific Nissan 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: John M. Orr

FILE No.: 2001/684

DATE OF DECISION: December 6, 2001

DECISION

OVERVIEW

This matter involves an appeal filed by New Pacific Nissan Ltd. (“NPN”) pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) from a penalty determination dated September 13, 2001 by the Director of Employment Standards (“the Director”).

The Director found that NPN owed wages to an employee, Sylvester Tai (“Tai”), in the amount of \$9,077.47. The Director found that NPN had contravened Sections 17(1), 18(2) and 21(1) of the *Act*. This was the third time that NPN had been found to have contravened aspects of Part 3 of the *Act* and the applicable penalty was calculated accordingly. There is no appeal of the quantum of the penalty.

The employer did not dispute the amount of wages but alleged that Tai had misappropriated money from NPN and that the wages were withheld to repay the money owed to the company by Tai. However, the Director found that under the *Act* an employer is prohibited from withholding or deducting wages unless required to do so by the legislation and that there were no circumstances in this case to justify the withholding of wages.

NPN appealed both the finding against the corporation and the determination that imposed the penalty. In a previous decision the Tribunal dismissed the corporate appeal and confirmed the determination.

This decision is in relation to the appeal of the penalty determination issued on September 13, 2001. The Tribunal previously decided that it was appropriate that this appeal be decided on the basis of written submissions.

The grounds for this appeal of the penalty determination are identical to the grounds for the corporate determination. Those grounds were found not to provide a substantial legal basis for the cancellation of the determination and the corporate determination was confirmed. In the absence of any separate and persuasive reasons there is no basis upon which the penalty determination is challenged and therefore the penalty determination is confirmed.

FACTS AND ANALYSIS

Sylvester Tai (“Tai”) worked as a general sales manager for New Pacific Nissan Ltd. (“NPN”) from August 15 2000 to February 28 2001. His wages were based on a salary plus commission structure. In January and February 2001 NPN withheld Tai’s wages because NPN claimed that Tai had misappropriated funds from the company. At the end of February there were some surplus wages payable to Tai but NPN required Tai to sign a release in order to receive those wages. Tai refused to sign any release and quit his employment.

The Director took no position as to whether or not Tai had misappropriated the funds as alleged by NPN but found that even if the allegation was true there was no legal right for NPN to withhold wages earned. The Director referred to section 17 (1) of the *Act* which provides that an employer must pay to an employee all wages earned by an employee in a pay period. Section 21 also provides that an employer may not make deductions from an employee's wages except as required by law. The section provides as follows:

Deductions

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.

The employer made a good case that Tai misappropriated funds but did not show any legal justification for the withholding of wages. An employer may withhold wages to honour a credit obligation provided there is a written assignment provided by the employee. There was no evidence of any written authorization given by Tai for the deduction or withholding of his wages. The Tribunal commented in the previous decision that the employer must seek a remedy in another forum for the misappropriation.

The Tribunal found that the onus was on the appellant to persuade the Tribunal that the determination was wrong. In that case the appellant presented no substantial legal basis upon which the withholding of wages could be justified. The Tribunal was satisfied that the determination was correct and therefore it was confirmed.

The penalty determination was based on the finding that in failing to pay Tai's wages NPN had contravened the *Act*. The penalty was based on the previous history and calculated accordingly. NPN has provided no separate or independent submission in regard to the penalty determination that would warrant a cancellation of the penalty. Therefore the penalty determination should also be confirmed.

ORDER

Pursuant to section 115 of the *Act* I order that the penalty determination dated September 13, 2001 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal