

An appeal

- by -

Boss Management Inc.

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the

*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Marnee Pearce

**FILE NO.:** 2017A/140

**DATE OF DECISION:** May 2, 2018



7. On February 2, 2018, the Delegate responded to Boss' objection to the completeness of the Record by providing the Tribunal with the complete Complaint Form and advising that due to a scanning error, not all pages of the Complaint Form had been included in the Record.
8. On February 22, 2018, Boss e-mailed a letter to the Tribunal objecting to the completeness of the Record as the Director was unable to confirm that a full copy of the original complaint was sent to Boss. This issue was addressed on the same date when the Delegate forwarded to the Tribunal an e-mail sent to Boss on June 1, 2017, attaching the complaint in its entirety.
9. The Tribunal provided, by way of a February 26, 2018, letter to the parties, an opportunity for Boss to provide its final reply by March 12, 2018, to the Delegate's February 22, 2018, submission. No further objection to the completeness of the record has been received, and accordingly, the Tribunal accepts it as being complete.
10. I have reviewed the appeal, including the submissions of Boss supporting the appeal, the Reasons for the Determination (the "Reasons") and the Record, and have decided this appeal is an appropriate case for consideration under section 114 of the *ESA*. Therefore, I will assess the appeal based solely on the Reasons, the appeal submissions of Boss and my review of the Record. Pursuant to section 114 of the *ESA*, the Tribunal has discretion to dismiss all or part of the appeal, without a hearing of any kind, for any of the reasons listed in sub-section 114(1). If I am satisfied that the appeal, or part of it, has some presumptive merit Ms. McGreevy will, and the Director may, be invited to file reply submissions. On the other hand, if it found the appeal is not meritorious, it will be dismissed under section 114(1) of the *ESA*.

## ISSUE

11. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

## THE FACTS

12. Boss operates a talent agency, duly licenced, and Ms. Siltani is listed as the sole director and officer.
13. Ms. McGreevy was hired and trained by Boss as a talent agent, working from October 1, 2015, to February 26, 2017. She had no prior experience as a talent agent. Initially she was hired to manage half of Ms. Siltani's client roster, earning  $\frac{1}{2}$  of the 15% commission Boss charged the performers.
14. Ms. McGreevy signed an 'independent contractor' agreement on October 1, 2015, which confirmed the manner of her commission payments and the services she would provide to Boss.
15. Commencing in February 2016 and continuing until December 15, 2016, Boss paid Ms. McGreevy \$500.00 every two weeks in exchange for office work; this was in addition to her ongoing commission-based employment.
16. Effective January 1, 2017, Ms. McGreevy was entitled to the full 15% commission on outstanding and new bookings.

17. On February 26, 2017 Ms. McGreevy told Boss that she was moving to another agency and offered to work for two more weeks and train her replacement. On February 27, 2017 Boss revoked Ms. McGreevy's work e-mail account and terminated Ms. McGreevy's employment contract.
18. Ms. McGreevy filed a complaint with the Director on March 21, 2017, alleging that Boss had contravened the *ESA* by failing to pay outstanding commissions earned.
19. The Director investigated the complaint and held a complaint hearing by teleconference on July 11, 2017, with post-submissions accepted into late August 2017.
20. Although the completed complaint form only identified a claim for unpaid commissions, annual vacation pay and compensation for length of service were also identified as outstanding, and at the outset of the hearing both parties agreed to address these issues.
21. The Determination sets out four issues:
  1. Was Ms. McGreevy an employee as defined by the *ESA*? If so,
  2. Is Ms. McGreevy entitled to outstanding commission-based wages?
  3. Is Ms. McGreevy entitled to compensation for length of service?
  4. Is Ms. McGreevy entitled to vacation pay?
22. A summary of the evidence provided by Ms. McGreevy and Ms. Siltani is set out in the Determination. Both parties were affirmed prior to giving evidence during the hearing.
23. Ms. McGreevy testified that she was owed \$3,340.05 in commissions from Boss, as well as \$2,925.00 in buyouts that may or may not have been paid to performers, supplying supporting documentation and invoices.
24. Ms. Siltani testified that Ms. McGreevy was an independent contractor obligated to promote her roster of clients, as is the standard practice with the talent agencies in the city of Vancouver. She said that Ms. McGreevy should not continue to receive commissions after quitting her employment, as she earned her commissions when the performer booked a job.
25. Regarding Ms. McGreevy's final invoice showing buyout commissions of \$2,925.00, Ms. Siltani agreed that Boss had received or expected to receive these buyouts from the producers, but they could come a year from now, in contrast to day rate commissions.
26. Ms. Siltani acknowledged that the jobs for which Ms. McGreevy was seeking commissions had been completed, in that Ms. McGreevy had secured the contracts, the contracts had been signed, and the performers had completed the work under the contracts.
27. Ms. Siltani testified that Ms. McGreevy had been overpaid on some commissions in December as the increased rate of 15% was not effective until January 1, 2017, resulting in an overpayment of \$3,901.99. She argued this should be offset from any commissions owed.

28. Ms. Siltani testified that she terminated Ms. McGreevy's contract based on e-mail evidence that Ms. McGreevy was attempting to 'client poach' for her new agency.
29. In determining whether Ms. McGreevy had an employee/employer relationship with Boss, the Delegate considered the evidence of the parties in context of the definition of "employee", "employer" and "work" in the *ESA* and looked at the specifics of Ms. McGreevy's employment, placing little weight on Boss testimony concerning the industry norm.
30. In finding that Ms. McGreevy was an employee under the *ESA*, the delegate concluded:
- The central question when assessing whether a person is an employee or an independent contractor is sometimes expressed as "Whose business is it?" The business is a talent agency belong to Boss. Ms. Siltani said Boss is in the business of representing people. Ms. McGreevy was helping Boss carry out that business by managing some of Boss' performers for Ms. Siltani. After weighing all of the evidence, I find that Ms. McGreevy was an employee of Boss under the Act.
31. Having determined that Ms. McGreevy was an employee of Boss, the Delegate then went on to determine that Ms. McGreevy was entitled to wages in the form of commissions. There were two events that triggered a commission, the first being the 'day rate' when the performer and the producer signed a contract, and the second being a 'buy-out' triggered when the company that contracted the producer ran the advertisement.
32. The Delegate considered the employment contract and the *ESA* and found that Ms. McGreevy earned both types of commissions, the day rate and buyout, upon the execution of the contract between the performer and the contractor. Ms. McGreevy was entitled to outstanding commissions equalling \$6,265.00.
33. The Delegate addressed the applicable commission rate, as the effective date of modifying the employment contract from a 50/50 split of commissions to Ms. McGreevy's entitlement to the full 15% was in dispute.
34. The Delegate determined that the invoice and commission ledger evidence showed that effective January 1, 2017, Boss began paying Ms. McGreevy the full 15%. As Boss controlled the invoices and commission ledger, this was accepted as compelling evidence of the true agreement. The evidence supported that the parties agreed Ms. McGreevy would receive 15% of all outstanding commissions for which Boss received an agency fee, commencing in January 1, 2017, regardless of whether the commissions were earned before or after January 1, 2017.
35. The Delegate found that Ms. McGreevy was entitled to compensation for length of service. Boss terminated Ms. McGreevy on February 27, 2017, based on a work e-mail to a client. The Delegate concluded that there was no concrete evidence known to Boss on February 27, 2017, that Ms. McGreevy was soliciting clients, and the termination on that date was based on suspicion or in anticipation of such conduct only.
36. Ms. McGreevy was entitled to annual vacation pay of 4% based on her total wages earned and awarded by the Director.

## ARGUMENT

37. Counsel for Boss argues that the administrative services for which Ms. McGreevy was paid \$500.00 biweekly was separate from work performed under the employment contract and should be considered work done as an employee “on top of the Commissions under the Contract”. Accordingly, the errors identified and argued relate to commission payments only.
38. Boss submits the Director erred in law in the Determination. I shall summarize the salient points of each of the errors that are alleged to have been made.

### Employee

39. Boss argues that the Delegate compressed the analysis of whether there is an employment relationship into an analysis of “Whose business is it?”, erred in the application of that test and did not apply on the face of the Reasons the regularly applied tests for determining an employee under the common law and under the *ESA*. *North Delta Real Hot Yoga Ltd.* BC EST # D026/12, and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 SCR 983 were cited in support.
40. Boss argues that the Tribunal has listed the relevant factors that should be considered in conjunction with the *ESA*, and these include the language of the contract, the control of the employer over the ‘what and how’ of the work, the chance of profit/risk of loss, the parties perception of their relationship, the degree of integration between the parties, and the intention of the parties. *Cove Yachts (1979) Ltd.*, BC EST # D421/99, was cited in support.
41. Boss argues that McGreevy’s lack of a talent agency licence was not relevant as a factor in the employment analysis, as Boss had a talent agency licence, and chose to operate its sales force by contractors, not employees, not precluded by the *ESA*.
42. Boss argues industry practice was foremost, not employer control, when determining the fees to charge performers, controlling of the flow of money, and Boss oversight over Ms. McGreevy’s roster.

### Commissions – Buyouts

43. Boss agrees with the finding that Ms. McGreevy “would receive the full 15% of all commissions for which Boss received an agency fee, commencing in January 1, 2017, regardless of whether the work was completed and the commissions were earned before or after January 1, 2017”.
44. Boss agrees with the finding that Ms. McGreevy “earned her commissions, including day rates and buyouts, upon the execution of the contract between the performer and the producer”. However, there are no commissions for buyouts until the company runs a commercial which incurs a buyout payment to the performer and triggers the buyout commission.
45. Boss argues that the Director erred in law in determining commissions for buyouts are payable when the criteria for their payment has not occurred, and that commissions for buyouts are payable when there is no

evidence that the buyout payments have been paid. The evidence relied upon by the Director is purely speculative.

#### Commissions – Day rates

46. Ms. McGreevy invoiced Boss the full 15% on bookings prior to January 1, 2017. Boss argues that the Director erred in law in determining that the new payment rate applied to bookings made before January 1, 2017, as this is not reflected in the evidence and indeed, Boss has overpaid Ms. McGreevy and will seek relief in court for that overpayment.

#### Termination

47. Boss argues that the Director erred in law in determining that Boss did not have cause to terminate Ms. McGreevy's employment for cause. Ms. McGreevy quit to join another talent agency and contacted clients to advise them where to reach her. This was a breach of her contractual requirement to hold the client contacts in strict confidence and not to compete with Boss.
48. Boss argues that the Director erred in not putting appropriate weight on the after acquired evidence of Ms. McGreevy's contact with Boss's client and the break-in of Boss's office where all but one of the contracts for the roster of clients managed by Ms. McGreevy were stolen.
49. Boss argues that on a proper weighing of the evidence, the Director erred in determining that Boss did not establish on a balance of probabilities that Boss had cause to terminate her employment.

#### Vacation Pay

50. Boss argues that vacation pay applies only to the \$500.00 for administration work, and the matter should be referred back to the Director for that calculation and the balance of the Determination should be dismissed.

### **ANALYSIS**

51. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- a. the director erred in law;
  - b. the director failed to observe the principles of natural justice in making the determination;
  - c. evidence has become available that was not available at the time the determination was being made.

52. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.

53. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] BCJ No. 2275 (BCCA):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and
  5. adopting a method of assessment which is wrong in principle.

54. The burden of establishing that the Determination is incorrect rests with the Appellant, Boss.

#### Employee

55. The *ESA* does not allow for an appeal based on alleged findings of fact unless such findings raise an error of law, if they were based on no evidence, or on a view of facts that could not reasonably be entertained based on the evidence before the Director (*Britco Structures Ltd.*, BC EST # D260/03).
56. It should also be noted that where there is no evidence that the Director acted without any evidence or a view of evidence that could not be reasonably entertained, or committed a ‘palpable, overriding error’ or arrived at ‘clearly wrong conclusion of fact’, the Tribunal is reluctant to substitute a Delegate’s findings of fact even if it is inclined to reach a different conclusion on the evidence (*Re: United Specialty Products Ltd.*, BC EST # D075/12).
57. Boss argues that the industry practice of talent agencies explains the setting of fees charged to performers, who controls the monies and payments, and Boss’s exercise of control over Ms. McGreevy’s roster, which consisted of performers who were Boss’s property; in other words, the Director misapplied the common law tests of control and client ‘ownership’.
58. Turning to the analysis provided within the Determination, the Director addressed the submissions made by Ms. Siltani who focused on the relationship with ‘typical’ talent agents and determined that this information would be given limited weight. The Director considered Ms. McGreevy’s particular circumstances as she did not bring a roster to the job, had no prior experience in the talent agency, and needed training and supervision. There was regular interaction between Ms. Siltani and Ms. McGreevy.
59. In the Determination, the Director considered the statutory definitions of “employee”, “employer” and “work”, and also considered common law tests including the ‘control’ test and provision of ‘tools’, specifically essential programs and websites accessible through Boss as a licenced talent agency. The chance of profit/risk of loss was considered and found to be typical of a commission-based remuneration, and not necessarily a strong indicator of a contractor relationship.
60. The comments of the Supreme Court of Canada in *Sagaz Industries, supra*, describes the limitations of any specific common law test and indicates that the final result at common law in any case will evolve from a



weighing of many factors and “will depend on the particular facts and circumstances of the case” as a whole. The decision says the “central question is whether the person who has been engaged to perform the services performs them as a person in business on his own account.” Thus, even the common law as it now stands is less concerned about defining the actual “form” of any particular test than obtaining, on a weighing of all the relevant factors, which are themselves dependent on the particular facts and circumstances of the case viewed of the whole, an answer to the central question: “is the person who has been engaged to perform services performing those services in business on his or her own account”, or as more expeditiously expressed: “whose business is it”?

61. On a fair and reasonable reading of the Determination it is apparent the Delegate identified and considered several of the factors evolving from the common law tests the Tribunal has identified as being potentially relevant to the determination of employment status, including the language of the contract, the degree of control over the work, the chance of profit, risk of loss, ownership of the means of performing the work, the degree of integration and whose business is it. Viewed in this respect, the Delegate approached the issue in the manner required by the *ESA* and endorsed by the Tribunal.
62. It also bears reminding that although common law tests are a helpful and useful tool when addressing employment status, they are subordinate to the provisions of the *ESA*. As stated in *Ajay Chahal carrying on business as Zip Cartage BC*, EST # D109/14, the “only appropriate “test” is whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the *ESA*.” The goal is to determine, for the purposes covered by the *ESA*, the reality of the relationship through objective facts.
63. I am unable to identify an error in law in the Delegate’s analysis including the application of common law tests. The Delegate considered the appropriate definitions within the *ESA*, provided reasons for his findings, including the application of potentially relevant common law tests. The Delegate found differently than Boss’s argument during the hearing. I am unable to say that the Director acted on a view of the facts which could not reasonably be entertained.
64. For the reasons set out above, I am not persuaded the Director has made any error of law and these arguments are dismissed.

#### Commissions – Buy-outs

65. The Determination found that:

Once McGreevy had promoted a performer, secured an audition with a casting director and helped the performer sign a contract, her work was substantially complete. After that, it was simply a matter of Boss invoicing the producer, waiting for the cheque to come from the producer, and distributing the funds to the performer. Accordingly, I find that that Ms. McGreevy earned her commissions, including day rates and buyouts, upon the execution of the contract between the performer and the producer.

As Ms. Siltani said, Boss expected the buyouts to be paid. Based on the evidence it is more likely than not that the buyout payments have been or will be received – but even if they are not, I find that Ms. McGreevy has earned and is entitled to her commissions.

66. In the context of this case, the comments of the Tribunal in *Director of Employment Standards (re Kocis)*, BC EST # D331/98 (Reconsideration of BC EST # D114/98) support the Director's review of the employment contract in order to determine when Ms. McGreevy earned the buy-out commissions:

The *Act* does not define when a commission is earned. The relationship between employee and employer is one of contract, and the effect of the *Act* is to prescribe minimum conditions for contracts of employment. The interpretation of an employment contract is a question of law. The entitlement of an employee to a commission depends on the facts and the interpretation of the employment contract.

67. The Director has jurisdiction to interpret and enforce the employment contract, which is a question of general law, as opposed to a question involving the law of the statute. In the context of interpreting the contract, the Director's analysis must conform to generally accepted legal principles relating to the question of law. The goal of contract interpretation is to determine, objectively, the parties' intention at the time the contract was made.

68. Counsel for Boss agrees that Ms. McGreevy earned her commissions, including day rates and buyouts, upon execution of the contract between the performer and the producer, but disagrees with the finding that Ms. McGreevy should be paid buyout commissions even if the buyout payments have not yet been received.

69. Counsel for Boss argues that there is no evidence that commercials were run which triggered the payments, and until the commercials are run there are no commissions; it is an error of law to determine that:

- Commissions for buyouts are payable when the criteria for their payment has not occurred;
- Commissions for buyouts are payable where there is no evidence that the buyout payments have been paid. The evidence before the Director was purely speculative.

70. The Delegate considered the *ESA's* wage requirements, noting that when an employee's employment is terminated, all wages earned become payable pursuant to section 18 of the *ESA*, even though the employer may not have expected to pay the employee right away and may not receive the corresponding payment from the client for some time.

71. In *Orca Security Corporation*, BC EST # D003/09, the Tribunal considered, among other issues, commission wages that were not payable at the time the complainant's employment terminated and upheld the Director's ability to allow the complaint process to continue for commission wages that had not yet become available. The Tribunal Member wrote, in part:

...A fundamental objective of the *Act* is that employees receive the wages which they have earned for the work they have performed. The argument of Orca would have this Tribunal read into the *Act* a limitation on a claim for wages that has the effect of disentitling an employee to wages which have been earned but not yet paid. I am not inclined to do that and, in my view, any perceived "efficiency" that is lost in meeting the object of ensuring payment for wages for work performed is justified.

72. Although not the deciding factor in the case, *LNS Enterprises Ltd.*, BC EST # D009/09, discussed the impact on an employee's earned commission when that commission was not paid and the original billing source was subsequently written off by the employer. The Tribunal Member wrote:

In *Orca (supra)* the Tribunal upheld the Director's ability to allow the complaint process to continue for commission wages that had not yet become available. In light of my decision to refer the matter back to the delegate, the delegate has the opportunity to review all payments made, or not made, to date on [the complainant's] sales. However, it seems to me that the delegate's submission above is the correct one. Extending credit to a customer carries the risk it may not be paid. That risk should be borne by the employer or business owner, who has the ability to write off unpaid accounts as "bad debts" rather than an employee.

73. A more recent decision, *AltaStream Power Systems Inc.*, BC EST # D033/17 (upheld on Reconsideration – BC EST # RD065/17), discussed the significance of a Memorandum of Understanding ("MOU") entered into by the parties when determining the commission only wage structure. In that case, the Director made the factual finding that the complainant's work in securing a client was almost completely done prior to the closing of a sale, and that the commission was earned in full upon the receipt of the purchase order. The appellant's submissions primarily took issue with the commission effective date, arguing that the commissions were not 'earned and payable' until the project was fully paid by the customer in keeping with past practice and the MOU wording. In upholding the Determination, the Tribunal Member wrote that arrangements which allow for the deferral of a commission payment earned and payable are accommodated but when "push comes to shove" the requirements of the *ESA* apply.

74. *Fabrisol Holdings Ltd. operating as Ragfinder*, BC EST # D376/96, considered the relationship between what is earned and what is payable in the context of commission payments and was relied upon in *AltaStream Power Systems Inc.*, *supra*. In discussing the practice of deferring earned commissions within an employment contract to a subsequent pay period, the following was emphasized:

However, this practice does not change the legal conclusion that the *Act* says wages, which includes commissions, become payable, unless their payment is conditional upon some future event, when they are earned.

75. *AltaStream Power Systems Inc.*, *supra*, refined this to read, in part:

...wages are earned and payable once the work is performed unless there is a clear expression of intention in the employment contract to achieve a different result.

76. Such a contractual intention to 'achieve a different result' was not found within the employment contract's payment terms - the Delegate found, and Boss agrees, that the contract supports the finding that Ms. McGreevy earned her commissions, including day rates and buyouts, upon execution of the contract between the performer and the producer.

77. The deferral of payment of the buyout commission appears to be a matter of practice for the employer's benefit, as, in keeping with the employment contract, no further work was required by Ms. McGreevy in order to earn the commission.

78. Boss also argues that there is no evidence that the buyout payments have been paid, and the evidence before the Director on this matter was purely speculative, resulting in an error of law.
79. In the Determination, the Delegate took note of Ms. McGreevy evidence that she had checked with the performers and knew that producers had sent cheques for some of the performer's buyouts, but she had not received related commissions. She also said that the performers "almost always" receive their buy-out, even though it may come months after booking.
80. Ms. Siltani testified that Boss had received or expected to receive the invoiced buyouts from the producers, but they could come a year from now. She could not say for certain which, if any, of the buyouts had not been received. It was also possible that an advertiser could decide not to run an advertisement.
81. The Delegate relied on Ms. Siltani's testimony that Boss expected the buyouts to be paid, and that based on the evidence presented at the hearing from both Ms. Siltani and Ms. McGreevy it was more likely than not the buyout payments have already been or will be received.
82. There is some evidence that buyouts have been paid, and although more evidence would have been useful, I do not find that the Director acted without evidence in concluding that the evidence supports, on the balance of probabilities, that the buyout payments have already been or will be received.
83. Following a review of the employment contract, and as agreed by both the Director and Boss, Ms. McGreevy earned all of her commissions once the contract between the performer and the producer was signed. The Director's finding that this includes the buyout payments is reasonable, in keeping with the intent of the *ESA*, and supported by evidence.
84. I find Boss's appeal did not show the Director committed an error of law in either the findings of fact made or on the conclusions based on those facts concerning entitlement to all commissions including the buy-out commissions.

#### Commission – Day rates

85. Counsel for Boss argues that the Director erred in law in determining that the new payment rate of 15% applied on bookings made before January 1, 2017, as this was not reflected by the documents or the evidence.
86. I would point out paragraph 43 (c) of Counsel's submissions:
- c) "Ms. McGreevy would receive the full 15% of all commissions for which Boss received an agency fee, commencing in January 1, 2017, regardless of whether the work was completed and the commissions were earned before or after January 1, 2017." at p. R14.
- [Boss] agrees with that finding.
87. Having accepted the Director's conclusion on this issue several paragraphs above his argument, I do not find a basis for further review of this finding of fact.

88. In any event, the Director found that Boss had control of the invoices and ledger and what was paid to Ms. McGreevy, and accordingly accepted the invoices and commission ledger to be evidence of the true agreement. The Director found the parties agreed that Ms. McGreevy would receive the full 15% of all commissions for which Boss received an agency fee, commencing in January 1, 2017, regardless of whether the work was completed, and the commissions were earned before or after January 1, 2017.
89. I am unable to conclude that the Director acted in the absence of evidence, or on a view of the facts that could not reasonably be entertained, when deciding that the increased commission was payable effective January 1, 2017, on all bookings including those made prior to January 1, 2017.

### Termination

90. Counsel for Boss argues that the Director erred in law in determining that Boss did not have cause to terminate Ms. McGreevy's employment for cause.
91. Counsel for Boss argues that Ms. McGreevy breached her contractual requirement to hold client contacts in strict confidence and not to compete with Boss. Ms. McGreevy breached these provisions when she contacted the clients and told them that she was joining another talent agency.
92. Counsel for Boss also argues that evidence of a break-in where all but one of the contracts for the roster of clients managed by Ms. McGreevy were stolen was not given adequate weight by the Director.
93. Counsel for Boss argues that "on a proper weighing of evidence" the Director erred in determining that Boss did not establish on the balance of probabilities that Boss had cause to terminate Ms. McGreevy's employment.
94. The role of the Tribunal is not to reconsider and reweigh evidence that was before the Director during a hearing or investigation, and that was considered and discussed in the Determination. As noted previously, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than that was made by the Director unless the Director's findings raise an error of law; this requires the appellant to show, on the balance of probabilities, that the Director's findings of facts are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation (*Britco Structures Ltd., supra*). Short of the appellant discharging this burden to show an error of law, the Tribunal must respect and defer to the findings of the Director.
95. The Delegate considered the arguments and evidence concerning Ms. McGreevy's contact with Boss clients and found that "there was no concrete evidence known to Boss on February 27, 2017 that Ms. McGreevy was soliciting clients. Ms. Siltani terminated Ms. McGreevy's employment on suspicion or in anticipation of such misconduct."
96. The Delegate considered the post-hearing submissions including Boss's submission that the office suffered a break-in and all but one of the contracts Ms. McGreevy's clients had signed went missing. The Director concluded: "I note that there was no police report or other substantiating evidence provided. The apparent accusation stands unsubstantiated, so I have not given it any significant weight."

97. I am not persuaded that the Delegate, in making his findings of fact on the above issues, acted without any evidence or reached a clearly wrong conclusion of fact, or on a view of the evidence that could not reasonably entertained. To the contrary, I find the Delegate's conclusions of fact on the material issues supported in evidence and do not find any reason to disturb those conclusions.

#### Vacation Pay

98. As I have found that commission payments were properly considered as wages in this analysis, the argument submitted by Boss on this issue – namely, that vacation pay is only applicable to the \$500.00 paid for administrative work, is not accepted.

#### Summary

99. Boss's appeal is predicated on the statutory ground of an error of law. Having considered each material issue in turn, I am unable to conclude that the stated grounds of appeal has any presumptive merit. In my view, the appeal cannot succeed and thus must be dismissed as having no reasonable prospect of succeeding.

### **ORDER**

100. Pursuant to subsections 114(1)(f) and 115(1)(a) of the *ESA* this appeal is dismissed, and the Determination is confirmed as issued.

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**Marnee Pearce**  
**Member**  
**Employment Standards Tribunal**