

An appeal

- by -

Orca Security Corporation  
("Orca")

- 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* (as amended)

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE Nos.:** 2008A/122 and 2008A/123

**DATE OF DECISION:** January 7, 2009

## DECISION

### SUBMISSIONS

Chelsea C. Caldwell	on behalf of Orca Security Corporation
Ernest Sommerfeld and Gina Sommerfeld	on their own behalf
Andres Barker	on behalf of the Director

### OVERVIEW

1. This decision deals with two appeals brought pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Orca Security Corporation (“Orca”) of Determinations that were issued on September 9, 2008 by a delegate of the Director of Employment Standards (the “Director”). The Determinations found that Orca had contravened Part 3, Sections 18 and 21 of the *Act* in respect of the employment of Ernest Sommerfeld (“Mr. Sommerfeld”) and Part 3, Section 18 in respect of the employment of Gina Sommerfeld (“Mrs. Sommerfeld”) and ordered Orca to pay Mr. Sommerfeld an amount of \$18,282.18 in wages and interest and Mrs. Sommerfeld an amount of \$178.86 in wages and interest.
2. The Director also imposed administrative penalties on Orca under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1500.00.
3. The total amount of the Determination for Mr. Sommerfeld is \$19,282.18 and for Mrs. Sommerfeld is \$678.86.
4. Orca has filed appeals of the Determinations, alleging the Director committed errors in law and failed to observe principles of natural justice in making the Determinations and has asked that the Determinations be varied.
5. Orca has also grounded the appeals in evidence becoming available that was not available at the time the Determinations were made.
6. Orca does not seek an oral hearing on the appeals. In any event, the Tribunal has a discretion whether to hold a hearing on an appeal and, if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeals, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide these appeals.

## ISSUE

7. The issues in this case are whether Orca has shown any errors of law or that the Director has failed to observe principles of natural justice in making the Determinations. A further issue relates to whether the Tribunal will accept the new evidence submitted with the appeals.

## THE FACTS

8. The background facts provided in the Determination relating to Mr. Sommerfeld are as follows:

Orca operates a security and low voltage wire installation company which falls within the jurisdiction of the Act. Mr. Sommerfeld was employed as a sales representative from October, 2003 to October 25, 2007. The complaint was filed on December 17, 2007, within the time allowed under the Act.
9. The same background facts are provided in the Determination relating to Mrs. Sommerfeld.
10. Both Mr. and Mrs. Sommerfeld were paid commission wage on each job each of them secured. Generally speaking, the amount of commission varied depending on the equipment being sold and, in most respects, on the profit margin received by Orca on the particular job.
11. In their respective complaints, Mr. and Mrs. Sommerfeld alleged Orca had not paid all commission wages earned by each of them during their employment.
12. For Mr. Sommerfeld, his claim originally comprised claims for commissions on one hundred and ninety-nine job quotes, but that number was reduced substantially during the complaint process.
13. The Director made certain findings of fact in the Determination relating to his claims. For the most part, these findings are not disputed. The Director made findings of fact on several issues that had general application to the claims being made.
14. The Director first considered the question of when and whether the commissions were payable. In respect of that question, the Director made the following findings:
  - Orca changed their commission payment policy in 2007 to make commissions payable when Orca received payment in full for all the work done for jobs invoiced; and
  - As there was no contract of employment suggesting commissions were not payable after his employment ended and Orca had established a practice of paying out commissions on “correctly quoted items which have been substantially completed by Mr. Sommerfeld”, Sommerfeld was entitled to commissions payable following the termination of his employment.
15. The Director considered what the recovery period would be for commission wages that were not payable at the time Mr. Sommerfeld’s employment terminated. On that question, the Director found there were commission wages which had not yet become payable because Orca had not received payment in full for some of the jobs invoiced.

16. The Director found there were claims made by Mr. Sommerfeld for commission wages payable more than six months before the termination of employment and, applying the provisions of section 80 of the *Act*, were not recoverable. The Determination does not provide any reason for not extending the time for recovery.
17. Before September 30, 2007, Orca “gel-filled pulls” were considered a commissionable item and Mr. Sommerfeld was entitled to commission wages on “gel-filled” conduit pulls for which Orca received payment in the six months preceding his termination of employment.
18. The Director found that Orca had a unique commission policy on vacuum installations, had clearly communicated that policy to its salespersons and that Mr. Sommerfeld was aware of and had accepted that policy.
19. The Director found there were several invoices which had not “experienced the combination of being completed, invoiced and paid and as a result had not generated wages that were “payable” under the *Act*.”
20. The Director found wages had been paid for two of the invoices for which Mr. Sommerfeld had made a claim, that several of the claims were based on invoices where the installations were not done by Orca and, in respect of the claims related to four of the invoices, the job cost more than expected and reduced Mr. Sommerfeld’s commission entitlement.
21. The Director found Orca had made deductions from Mr. Sommerfeld’s wages that were prohibited by section 21 of the *Act* in the amount of \$1645.47.
22. There were a number of invoices relating to the wage claim that had been changed in some way by another salesperson after Mr. Sommerfeld had terminated his employment. The Director found a company policy existed, which Mr. Sommerfeld had seen, that indicated commissions were only payable on items that were sold, confirmed and written up by a particular salesperson. The parties did not identify any occasion where a salesperson lost the commission on a job as a result of another salesperson making a change to the contract and the Director did not find the policy “clearly spoke” to the commission wages claimed on these invoices.
23. The Director examined each of this kind of claim primarily in the context of whether there could be found a continuity between the efforts Mr. Sommerfeld put forward and the substance of the eventual sale. In applying this analysis, the Director found, for most of the claims, that Mr. Sommerfeld was entitled to commission wages.
24. For Mrs. Sommerfeld, the Director followed substantially the same analysis, reviewing the claims that were made by her, identifying claims that were withdrawn during the complaint process, identifying claims in dispute, setting out the argument and evidence provided by Mrs. Sommerfeld and Orca on the claims in dispute and making decisions on each of those claims.
25. As in the Determination relating to Mr. Sommerfeld’s claims, the Director considered the question of when and whether the commissions claimed were payable, what the recovery period would be for commission wages that were not payable at the time Mrs. Sommerfeld’s employment terminated, claims for “gel-filled pulls”, claims for vacuum installations and claims on items which had not yet become payable. The Director reached the same conclusions in respect of the analytic framework for considering the above matters as were made in the Determination for Mr. Sommerfeld.

26. The Director also made findings of fact relating to several miscellaneous claims. Since Orca is not asking in these appeals that any of these matters be reviewed, I do not need to make any further reference to them.

## ARGUMENT AND ANALYSIS

27. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, 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 made.*

28. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.

29. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03).

30. Orca alleges the Director made six errors of law in the Determinations and committed two breaches of natural justice. The errors which are alleged are common to each of the Determinations. I shall deal with each of the arguments relating to these errors in turn. First, however, I shall deal with the new evidence provided with the appeals.

31. Orca has submitted several documents with the appeals, under 11 tabs, that were not provided to the Director during the complaint process. Orca says this information relates to the revised quotes on the claims by Mr. Sommerfeld contained at tabs 19, 20, 105, 38, 157, 158 and 172 of the material provided to the Director by him. It is fair to say all of the documents and the information contained in them, while they are “new” to the process in the sense that they are being submitted by Orca for the first time at the appeal stage to support the arguments being made against the Determination on Mr. Sommerfeld, is not actually “new” evidence. It is all evidence that was available to Orca at the time the Determination on Mr. Sommerfeld’s claims was being made.

32. The documents go to the findings made by the Director on the claims related to those tabs and it is helpful to set out those findings and how the additional documents relate, or appear to relate, to the appeal.

33. In respect of tabs 19 and 20, the Determination for Mr. Sommerfeld addressed the invoices at those tabs in two ways. First, they were considered in the context of whether commission wages were payable on them. At page 17, the Determination states the following facts concerning this aspect of the claims on these invoices:
- Ms. Chan states that the price on this job was inflated and the customer refused to pay stating that he had been defrauded by the contractor and Orca. Orca has not received payment and there is currently legal action underway regarding this project.
34. The Director found these invoices were not “completed, invoiced and paid” and as a result found the wages claimed by Mr. Sommerfeld on those invoices were not yet payable as commissions or recoverable under the *Act* as wages.
35. Second, these invoices were considered in the context of section 21 of the *Act*. There was evidence from Mr. Sommerfeld that Orca had initially paid commission on the invoices at tabs 19 and 20 and had later taken that commission back when a dispute arose with the customer. The Director accepted that Orca had paid commissions on those invoices and later deducted the amount of those commissions from other wages. In finding that action contravened section 21, the Director stated, in Mr. Sommerfeld’s Determination at page R19:
- . . . the language of section 21 of the Act prohibits those deductions and renders them wages which are now payable. This applies even if the commissions would not have been payable under the terms of the employment agreement. . . . Although Orca may feel these deductions were justified, the Act does not permit me any other reading.
36. The relevance of the new documents to the basis on which the Director ordered payment of wages on the invoices at tabs 19 and 20 – a contravention of section 21 – is unstated and unclear.
37. In respect of tab 105, the Director accepted the evidence provided by Orca that this was another invoice that had not yet been “completed, invoiced and paid” and as a result found the commission wages claimed by Mr. Sommerfeld on this invoice were not yet payable as wages, but could be subject to further proceedings under the *Act* when they did become payable. It is unclear from the appeal submission filed on behalf of Orca how the “new” documents are relevant to the finding made by the Director.
38. In respect of the claim relating to tab 38, the Director noted that Orca asserted that “approximately \$20,000 in additional items were added to the project and multiple visits to the site were necessary in order to complete the project”. The Director made a finding that “Orca did not provide specifics of how the contract was altered and the evidence as it was given appears to suggest that the installation was upgraded as opposed to the base contract being altered”. The documents provided with the appeal provide the “specifics” that Orca failed to provide during the complaint process, because Orca “did not believe that the documents were relevant at that particular time”, and are clearly an attempt by Orca to have the Tribunal reach a different conclusion than the Director on whether Mr. Sommerfeld was entitled to a commission on this job.

39. In respect of the claims at tabs 157 and 158, the Director found the representatives of Orca gave conflicting evidence regarding the installation which gave rise to the claims. The Determination for Mr. Sommerfeld states, at page R22:

Ms. Chan stated that all items sold by Mr. Sommerfeld were not appropriate for the job and were subsequently replaced. However, Mr. Morrison delivered considerable information pertaining to “overhauls” that were performed, and claimed that the installation was not requoted but rather was “fixed”.

40. On the available information, which included a document signed by the client and involvement of another member of Orca’s staff in the job, the Director found there was no break in the continuity between Mr. Sommerfeld’s initial efforts and the eventual completed contract. The “new” documents and the argument for which they are used also represent an attempt by Orca to alter findings made by the Director.

41. In respect of the claim at tab 172, the Determination for Mr. Sommerfeld contains the following analysis and finding on this matter at page R23:

Ms. Chan stated changes to this particular installation included the alarm location, data outlets, camera system and vacuum package. Mr. Sommerfeld provided what he claims to be photo evidence that Orca completed the installation. A review of the quote sheet shows that there are five items listed, two of them related to the vacuum installation. Mr. Sommerfeld did not cross-examine Ms. Chan on the extent to which these changes would have altered the original quotation. Orca never argued that this job was requoted with a different salesperson, it was only stated that certain changes had been made. I am not of the opinion that making changes to the installation in itself would result in a break in continuity sufficient to disentitle Mr. Sommerfeld to the commission.

42. The “new” documents submitted with the appeal which relate to this invoice seek to change the finding of the Director that there was not a “break in continuity” sufficient to disentitle Mr. Sommerfeld from a commission on this job.

43. Orca argues, generally, that this evidence should be allowed. Several reasons are provided, which can be summarized as follows:

- the complaint hearing was a lengthy one, requiring Orca to answer claims relating to hundreds of individual customer contracts;
- in deciding what documents to provide, Orca looked to the test set out in *Re Kocis*, BC EST #D331/98 and did not produce documents beyond those felt necessary to show a change in the quote;
- Orca did not believe the specifics of the changes to the quotes was relevant;
- The “new” evidence will not result in a re-examination of the complaint as a whole, but only of those parts of Mr. Sommerfeld’s claims that address the question of continuity of effort applied in the Determination; and

- It would be unfair not to consider this “new” evidence to show there was an expenditure of effort by persons other than Mr. Sommerfeld.

44. In response, the Director says this “new” evidence is just a component of the main objective of much of the appeal on Mr. Sommerfeld’s Determination, which is to have the Tribunal reweigh the evidence and substitute different conclusions about whether the efforts of Mr. Sommerfeld were sufficiently connected to the completed work on each job to entitle him to commission wages for that job.

45. The Director says the evidence which Orca seeks to have the Tribunal accept could, with due diligence, have been provided during the complaint process. The Director also submits this “new” evidence is logically related to the argument made by Orca during the complaint process that some of the quotes made by Mr. Sommerfeld had changed and been requoted and should have been provided to support that assertion.

46. In his response, while not specifically objecting to the introduction of the “new” evidence, Mr. Sommerfeld substantially echoes the view of the Director, saying the facts related to his claims were fully canvassed over 2½ days of hearing time and were considered by the Director in making the Determinations. Mr. Sommerfeld submits it is beyond the purpose of an appeal to ask the Tribunal to receive new information, to re-evaluate all of the evidence based on that new information and reach different conclusions of fact.

47. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. In addition to considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03 and *Senor Rana’s Cantina Ltd.*, BC EST #D017/05).

48. I am not inclined to accept this “new” evidence in this appeal, for several reasons. First, it is apparent all of this evidence was reasonably available and could have been produced during the complaint process. Second, I agree with the Director that much this evidence is logically connected to Orca’s argument that Mr. Sommerfeld was not entitled to commission wages on some of the jobs because they had been changed and/or requoted by others prior to their completion. Third, the relevance of some of the documents, specifically, those relating to tabs 19, 20 and 105, to the chosen grounds of appeal have not been established. Fourth, the argument for which the documents have been provided would require me to alter findings of facts made in the Determination without there being any reviewable error shown in those findings of fact. In that sense, the documents represent an invitation to the Tribunal to exercise authority under Section 112 which it does not have. Fifth, Orca has not shown the documents are probative in the sense that they could, when considered against all of the other evidence, have led the Director to a different conclusion. The documents, particularly those relating to tabs 38, 157, 158 and 172, do little more than provide the specifics of evidence the Director had already received from Orca in an attempt by Orca to “tip the balance”.



## ***1. Errors of Law***

49. The Director and Mr. and Mrs. Sommerfeld, respectively, have filed replies to the appeals and the supporting submission. The reply of Mr. and Mrs. Sommerfeld is understandably general and while I have read and considered his comments, most of those comments will not be repeated in this analysis.

### **a) A limitation on claims for commission wages not yet payable**

50. Orca argues the Director erred in allowing Mr. and Mrs. Sommerfeld to pursue the recovery of commission wages which were not found to be payable at the time of the complaint hearing. Orca submits that allowing Mr. and Mrs. Sommerfeld to recover such amounts over an indefinite period of time in the future is inconsistent with the stated purpose of providing a “fair and efficient procedure for the resolution of disputes” and should be considered as falling outside of the period described in section 80(1) of the *Act*. That provision reads:

*80 (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning*

*(a) in the case of a complaint, in the 6 months before the earlier of the date of the complaint or the termination of employment, and*

*(b) in any other case, 6 months before the director first told the employer of the investigation that resulted in the determination.*

51. The Director says the *Act* does not contain any language that would restrict the recovery of wages payable under a commission structure agreed between the employer and employee to a six month period following termination of employment of the claiming employee.

52. There is no suggestion that Mr. or Mrs. Sommerfeld did not file their complaints within the six months described in the above provision. The issue here relates to wage claims on commissions which had not yet become payable. The Director read the above provision as relating only to the commencement of the recovery period, not its end, and the complaint process continued to apply to claims for commission wages which were not yet payable.

53. Orca says such a reading creates an absurd result where there is no foreseeable finality to Mr. or Mrs. Sommerfeld’s claims and encourages a process in which Mr. or Mrs. Sommerfeld may “lie in the weeds” indefinitely, effectively denying Orca the benefit of an “efficient” resolution of the claims, or even proceed in an alternate forum to recover wages while keeping the complaint process under the *Act* open.

54. Orca advocates a six month post-termination limitation on Mr. and Mrs. Sommerfeld’s claims for unpaid commission wages based on what is submitted to be the “correct” interpretation of section 80.

55. Such a suggestion is not supported on either a reading of section 80 of the *Act* or on a consideration of the purposes and objectives of the *Act* as a whole. While the argument of Orca raises a consideration of the purpose stated in section 2(d), it bears repeating that the *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, *Machtiger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336

(B.C.C.A.). I agree with and adopt the following comment from *Machtinger v. HOJ Industries Ltd.*, supra, that:

. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

56. The correct interpretive approach to issues arising under the *Act* is stated by the Court in *Re Rizzo & Rizzo Shoes Ltd.*, supra, as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (para. 21)

57. There are other purposes and objects at play in this case than what is set out in section 2(d). 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 been paid. I am not inclined to do that and, in my view, any perceived “efficiency” that is lost in meeting the objective of ensuring payment of wages for work performed is justified. I do not accept the argument made by Orca that applying provisions of the *Act* in a way that ensures the payment of wages earned is “absurd”.

58. It follows that I do not accept that the Director erred in law in allowing the complaint process to continue for those commission wages that had not yet become payable.

**b) Did the delegate conducting the complaint hearing err in law by not seizing himself of all future hearings on the wage claims as commissions became payable?**

59. The short answer on this issue is that Orca has not provided any basis for arguing the Director, or more specifically the delegate, erred in law in this respect. The submission made by Orca has not pointed to any statutory provision or authority that would compel such a finding. It may be that for reasons of efficiency and consistency, the Director would be justified in ensuring continuity in processing the wage claim filed by Sommerfeld, but there is no legal requirement that he do so.

60. I will note that liberally sprinkled into this ground of appeal are arguments that challenge the Director’s interpretation of the commission agreements between Orca and Mr. and Mrs. Sommerfeld. In respect of those arguments, the Director submits the interpretation of the agreement was based on findings of fact, which were adequately supported on the evidence provided at the complaint hearing, and Orca has not shown those findings raise an error of law.

61. I agree that Orca has not shown there was any error of law in the interpretation by the Director of the commission structure agreement. This ground of review is also dismissed.

**c) Did the delegate conducting the complaint hearing err in law by continuing the complaint hearing when not all the facts were available or in existence at the time of the hearing?**

62. Once again, Orca has not shown how any error of law arises in respect of this point and this ground of review is dismissed.

**d) The Director erred in law by applying a wrong “test” for determining whether Mr. Sommerfeld was entitled to a commission.**

63. This ground of appeal takes issue with the finding of the Director that Mr. Sommerfeld was entitled to commission wages on the work related to the quotes found at tabs 105, 38, 157, 158 and 172 of the material submitted at the complaint hearing. I have already addressed the merits of an appeal on the quote at tab 105. Much of the argument made by Orca on this ground challenges findings made in the Determination and, in particular, is dependent on the Tribunal taking a different view of the employment agreement than reached by the Director.
64. As indicated in the facts, above, Orca’s position on the claims under consideration here was that under the agreed commission structure, commissions were only paid on items that were sold, confirmed and written up by a particular sales person and since Mr. Sommerfeld was not the sales person when several of the jobs on which he had made claims were completed, he was not entitled to any commission on it.
65. The Director rejected the suggestion that any change, however minor, disentitled Mr. Sommerfeld to a commission on the sale he originally quoted. Orca has not shown there was any reviewable error made by the Director in rejecting their position. The reasons for rejecting Orca’s position are stated in the Determination. They are grounded in the evidence that was provided in the complaint process.
66. Having rejected Orca’s position on the commission structure and its effect on the commission wages claimed by Mr. Sommerfeld, it was open to the Director to decide whether, and if so, in what circumstances, changes to a quote originating with Mr. Sommerfeld and the intervention of another salesperson nullified his entitlement to a commission for the completed job. As a general proposition, the Director accepted that changes could disentitle Mr. Sommerfeld to a commission. He concluded the concept of substantial completion could be used in determining Mr. Sommerfeld’s entitlement to commission wages where quotes had been changed, applying that concept to describe the result of the analysis he subsequently undertook on each of the claims. “Substantial completion” is probably not a term I would have used to describe the analysis, but the process and objective of that analysis is clear enough in the Determination.
67. The Director examined each claim in the context of “all the facts and circumstances that exist[ed] between the between the initial sale and the eventual conclusion of the sale”. The Director identified four factors that would need to be considered: the terms of the employment contract; the continuity between the efforts of the sales person and the completed sale; Orca’s past practice in similar circumstances; and Orca’s policy, as communicated and enforced. The Director addressed each of these factors, finding the primary guiding factor was whether there was an “unbroken continuity” between the efforts of Mr. Sommerfeld and the completed contract.
68. As indicated above, for most of the claims for commission wages on those invoices where quotes were changed and/or other persons were involved in the completion of the job, the Director found a sufficient nexus between the efforts of Mr. Sommerfeld and the completed job to justify his entitlement to a commission on that job.
69. Not surprisingly, Orca disagrees with the Director’s conclusions on those claims. While the disagreement purports to be on a point of law, it is really, at its core, a disagreement with conclusions of fact and the Director’s application of those facts to the claims made. That much is apparent from the substantial recitation of the evidence provided by Orca’s representatives, several references to the incorrect treatment

of the evidence by the delegate conducting the complaint hearing, the fairly liberal addition to the factual matrix on this issue and the submissions on what the effect of the evidence ought to have been to the Determination.

70. There is frequent reference in Orca's argument on this issue to the test of "substantial completion", without ever clearly identifying what, as a matter of law, that test comprises. In context, Orca's use of that term appears to be nothing more than an argument that the Director should have assessed Mr. Sommerfeld's entitlement to commissions on these jobs on the basis of whether he completed the work required on each job without the intervention of any other employee or sales person of Orca. As stated above, the Director rejected that position, provided reasons for that decision and chose instead to assess Mr. Sommerfeld's entitlement to commissions on those jobs based on an evaluation of the continuity between his efforts and the completed contract.
71. The Director, in his response to the appeal, says no "test" was used, in the sense of how the term "test" is normally applied in law. The Director says there was a process used to decide whether there was a meaningful connection between the efforts of Mr. Sommerfeld and the completed job. Orca has not shown there was any "legal test" involved or that the Director's approach was, as a matter of law, wrong. This ground of appeal is dismissed.

**e) The Director misapplied the "test".**

72. As I have indicated above, I find there was no "legal test" involved in the Director's analysis. The analysis involved an examination of "all the facts and circumstances that exist[ed] between the between the initial sale and the eventual conclusion of the sale". The disagreement voiced by Orca on this ground is with the alleged failure of the Director to consider and properly apply their evidence relating to the claims on jobs where the quotes were changed and/or other employees of Orca were involved in completing the job.
73. The Director submits Orca is essentially challenging findings of fact, seeking to add new evidence and have the Tribunal reach different conclusions of fact based largely on that evidence. The Director submits this new evidence should not be considered as it could have been presented during the complaint process and is related to Orca's position that the quotes initially issued by Mr. Sommerfeld had been changed and quoted.
74. I have already addressed whether the new evidence will be accepted on this appeal.
75. In any event, this aspect of the appeal is an attempt by Orca to have the Tribunal review findings of fact made in the Determination without demonstrating such findings raise an error of law. The Tribunal has no authority under section 112 to consider an appeal that is based on a disagreement with findings of fact unless those facts give rise to an error of law. In that context, an error of law would include acting without any evidence and acting on a view of the facts which could not reasonably be entertained. No error of law has been shown and this ground of appeal is also dismissed.

**f) The Director effectively reversed the onus of proof.**

76. Orca says there was "no evidence" from Mr. Sommerfeld showing why he remained entitled to commissions on quotes that had been changed or cancelled by them. Orca argues that by finding

entitlement in the face of “no evidence”, the Director effectively required Orca to prove Mr. Sommerfeld was not entitled to a commission on those jobs.

77. In response, the Director says Mr. Sommerfeld provided extensive submissions in support of his claims. The submissions contained 199 individual claims for commissions, with supporting documents and written remarks. The Director says all of this material was provided at the complaint hearing and was accepted as evidence from Mr. Sommerfeld of his claims. Orca presented evidence and the combined evidence was considered and the claims made by Mr. Sommerfeld were decided on a balancing of all that evidence.
78. The submission of the Director is borne out by a review of the Determination for Mr. Sommerfeld, which contains a summary of the evidence given by Mr. Sommerfeld at pages R2-R4. Orca has not shown the Director effectively reversed the onus of proof or that there was an error of law in assessing the evidence provided by the parties.

## ***2. Breach of Principles of Natural Justice***

**The decision of the Director to accept the “test” of continuity rather than substantial completion resulted in a breach of natural justice because:**

- i) Orca was denied an opportunity to make full answer and defense to the continuity “test”; and**
- ii) Orca was denied an opportunity to be heard on the appropriateness of this “test”, or whether another “test” was more appropriate.**

79. As the Tribunal said in *Imperial Limousine Service Ltd.*, BC EST #D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated*, BC EST #D050/96).

80. Parties alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).
81. Orca submits that the failure to observe principles of natural justice in this case arose from the failure of the Director to “properly inform” Orca of the “test” the Director intended to use and allow them to present evidence and argument specific to that test.
82. In response, the Director submits that Orca had full opportunity to know the case against them and to be heard. The Director says Orca advocated their position on Mr. Sommerfeld’s entitlement to commissions on the quotes which were changed and completed by other sales persons and provided evidence on their position. The Director says there is no duty to explain to either party how he was going to decide this aspect of the complaint. The Director notes that Orca was represented by legal counsel. The Director

says it would be a “great inconvenience for administrative decision makers to conduct hearings, decide how they will determine an issue, and then canvas the parties on their methodology”.

83. There is no factual or legal basis for this ground of appeal. As noted above, the complaint hearing lasted 2½ days; Mr. and Mrs. Sommerfeld gave evidence on their respective claims; Orca gave evidence against the claims through two witnesses. The parties collectively provided a substantial amount of written material to the Director. There is nothing to indicate Orca was not given an opportunity to respond to all of the claims made.
84. On the claims relating to jobs where the quotes were changed and/or other employees of Orca were involved in completing the job Orca was given a full opportunity to present their case and to respond to the case presented by Mr. and Mrs. Sommerfeld. Their position was that a change in the quote and the involvement of another employee disentitled Mr. Sommerfeld to any commission on that job and their preparation was based on the test found in *Re Kocis, supra*, which says the entitlement of an employee to a commission depends on the facts and the interpretation of the employment contract. Orca either failed to appreciate or ignored the possibility the Director might not accept their view of the employment contract and address Mr. Sommerfeld’s claims within some other framework. Their argument on this ground of appeal is reduced to this: if the evidence presented by a party (or even both parties) is deficient, there is a duty on the delegate conducting the complaint hearing to tell the party, or parties, to get more and better evidence and the failure to do so is a breach of principles of natural justice. Implicit within this proposition is that the parties are then entitled to present “more and better” evidence and make submissions on that evidence as well as on the appropriateness of the approach the decision maker intends to take in deciding the issues before him or her.
85. The Tribunal has recognized that the Director, which includes delegates conducting complaint hearings, has a duty to ensure the parties clearly understand the issues involved in a complaint hearing, the provisions of the *Act* bearing on those issues and the law relating to those provisions and how they may affect the complaint hearing (see *Jennifer Oster*, BC EST#D120/08. As well, considering the nature of the complaint process overall and the role of the Director and his delegates in that process specifically and under the *Act* generally, a delegate conducting a complaint hearing has both the right and the duty to be interventionist, although in doing so must walk the fine line between ensuring fairness and losing neutrality. The role of the Director in the complaint process is not assisted by requiring the Director to descend into the arena and help one party, or both, to prepare their case. In conducting complaint hearings, the Director must make some allowances and permit some informality if there is an imbalance of experience between those presenting the case, but this does not necessarily extend to filling in an insufficiency of proof.
86. In this case, Orca was represented by legal counsel, who appears to have made a conscious decision to frame Orca’s case on their view of the employment agreement and its effect. From Orca’s perspective, that choice has resulted in a deficiency in their evidence, but it is not part of the appeal process under section 112 to provide a party with an opportunity to correct what turn out to be deficiencies in their case. Such an approach to section 112 is quite inconsistent with the objective efficiency and finality in the dispute resolution process.
87. This ground of appeal is dismissed.
88. In sum, the appeal is dismissed.

**ORDER**

- <sup>89.</sup> Pursuant to Section 115, I order the Determinations dated September 9, 2008 be confirmed in the amount of \$19,282.18 and \$678.86, respectively, plus any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**