

An appeal

- by -

Witmar Developments Ltd. and Witmar Holdings Ltd. carrying on business as
Palisade Apartments, Recreation Inn and Suites, Ponderosa Motel, Dilworth Joint
Venture and Dilworth Inn
(“Witmar”)

- 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 No.: 2016A/149

DATE OF DECISION: January 16, 2017

DECISION

SUBMISSIONS

Walter Weisstock

on behalf of Witmar Developments Ltd. and
WitmarHoldings Ltd. carrying on business as Palisade
Apartments, Recreation Inn and Suites, Ponderosa Motel,
Dilworth Joint Venture and Dilworth Inn

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “*Act*”) by Witmar Developments Ltd. and Witmar Holdings Ltd. carrying on business as Palisade Apartments, Recreation Inn and Suites, Ponderosa Motel, Dilworth Joint Venture and Dilworth Inn (“Witmar”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 22, 2016.
2. The Determination found Witmar had contravened Part 3, sections 18 and 21 and Part 8, section 63 of the *Act* in respect of the employment of Nikola Milic (“Mr. Milic”) and ordered Witmar to pay Mr. Milic wages in the amount of \$25,085.00, and amount that included vacation pay, reimbursement of employer business costs and interest under section 88 of the *Act* and to pay administrative penalties for contraventions of the *Act* in the amount of \$1,500.00.
3. The Director also found Witmar had contravened section 46 of the *Employment Standards Regulation* (the “*Regulation*”) and imposed an administrative penalty for that contravention in the amount of \$500.00.
4. The total amount of the Determination is \$27,085.00.
5. Witmar has appealed the Determination on all of the allowable grounds of appeal listed in section 112(1) of the *Act*: alleging the Director erred in law; failed to observe principles of natural justice in making the Determination; and that evidence has become available that was not available when the Determination was being made.
6. Witmar also seeks an extension of the appeal period for the purpose of providing additional documents in support of the appeal and to review transcripts, if any are available, of evidence given in a teleconference held during the complaint hearing by a witness presented by Mr. Milic.
7. In addition to material provided with the appeal, on December 9, 2016, Witmar delivered approximately 105 more documents to the Tribunal which it seeks to have the Tribunal consider in support of the appeal.
8. Witmar has asked the Determination be referred back to the Director.
9. In correspondence dated November 9, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.

10. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Witmar, which has been provided with the opportunity to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts it as being complete.
11. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed with the appeal, my review of the material that was before the Director when the Determination was being made and any additional material accepted and considered by the Tribunal as additional evidence in this appeal. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
- 114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
- (a) the appeal is not within the jurisdiction of the tribunal;*
 - (b) the appeal was not filed within the applicable time limit;*
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;*
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
 - (f) there is no reasonable prospect the appeal will succeed;*
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;*
 - (h) one or more of the requirements of section 112(2) have not been met.*
12. If satisfied the appeal or a part of it should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Milic will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

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

THE FACTS

14. Witmar owns and operates real property holdings, rental apartments, rental housing and motels in Kelowna, BC.
15. Mr. Milic worked for Witmar from May 2009 to January 19, 2016, when he was summarily dismissed. He filed a complaint with the Director alleging he had been terminated without cause or notice and was, accordingly, owed compensation for length of service, that he was owed regular and overtime wages, concomitant vacation pay and that he was entitled to reimbursement for expenses incurred on behalf of Witmar.

16. The Director decided the complaint should be addressed in a complaint hearing; a date for hearing was set and the parties notified.
17. The record indicates a Notice of Hearing was sent to the parties on March 8, 2016. On the same date a Demand for Employer Records relating to Mr. Milic was sent to Witmar.
18. Documents were exchanged prior to the hearing date. A week prior to the hearing date, Witmar sought an adjournment. No adjournment was granted at that time, but Witmar was invited to raise that matter, or any other matter of concern, at the complaint hearing. There is no indication Witmar followed up its request for an adjournment at the complaint hearing. The hearing commenced on the appointed day. Things did not go well and caused the Director to cut short the complaint hearing and transition to a different approach to complete the complaint process.
19. The Determination provides a description of what transpired at the hearing. It suffices to say the conduct of Walter Weisstock, a director of Witmar and its spokesperson at the hearing, was viewed by the Director as objectionable and disruptive. The Determination notes Walter Weisstock was warned on two occasions that his behaviour was hampering the fairness and efficiency of the hearing process and if it continued he would be excluded from the hearing room. Despite the warnings, Walter Weisstock's behaviour does not appear to have improved and the Director, exercising the discretion accorded by section 84.1(3) (b) of the *Act*, ordered Walter Weisstock excluded from the hearing room until the Director was ready to hear his evidence. Tony Weisstock, also a director of Witmar, and Graham Weisstock, a manager for Witmar, who had been present at the complaint hearing from the outset, remained in the hearing room briefly as representatives for Witmar. All of this transpired during Mr. Milic giving evidence in support of his complaint.
20. Shortly after Walter Weisstock was excluded, Tony and Graham Weisstock also left the hearing room and abandoned the hearing process. The Director continued to receive evidence from Mr. Milic and questioned him on aspects of that evidence. The Director also placed a conference call to Connie Christenson ("Ms. Christenson"), the former bookkeeper for Witmar, and she provided evidence relating to aspects of the complaint in that call. After receiving that evidence, the Director ended the complaint hearing.
21. After hearing the evidence supporting Mr. Milic's claims at the complaint hearing, the Director decided to hear from Witmar and complete the complaint process by way of written submission.
22. On May 10, 2016, the Director delivered to the parties a summary of the evidence that had been provided up to that point in time and invited Witmar to respond in writing to Mr. Milic's case. The correspondence identified the issues that required Witmar's attention and indicated Witmar could include individual witness statements, payroll records, any further documentary material (in addition to what had been provided prior to the complaint hearing) and argument on the issues in dispute. The correspondence requested Witmar provide further payroll records for Mr. Milic. A deadline for submissions was set; the deadline was extended at the request of Witmar.
23. The Director received the written submissions, which included some additional documents and four witness statements, on May 31, 2016. Mr. Milic was given an opportunity to respond. Witmar provided no further payroll records.
24. The Determination identifies six issues that were being considered:
 1. Was Mr. Milic a "manager" under the *Act*;

2. was Mr. Milic owed overtime wages and, if so, in what amount;
3. was Mr. Milic owed regular wages and, if so, in what amount;
4. was Mr. Milic entitled to compensation for length of service and, if so, in what amount;
5. was Mr. Milic owed any vacation pay and, if so, in what amount; and
6. was Mr. Milic entitled to recover expenses he incurred on behalf of Witmar?

25. On the above issues, the Director found Mr. Milic was a manager under the *Act* and therefore not entitled to overtime premiums, that he was owed regular wages for time worked between January 3 and 18, 2016; that Witmar had not proved just cause for summarily dismissing Mr. Milic and he was entitled to length of service compensation; that Mr. Milic was owed vacation pay on unpaid wages and that he was entitled to be reimbursed for expenses he proved had been incurred on behalf of Witmar.

ARGUMENT

26. Witmar relies on all of the appeal grounds found in section 112 of the *Act*. Many of the arguments made are repeated under different grounds and, to the extent it is efficient, I will address them under each of the grounds in which they are raised.
27. Preliminary to Witmar addressing each ground of appeal, the appeal submission provides Walter Weisstock's perspective on the course of events that led to his exclusion from the complaint hearing room and to him and the other persons attending the complaint hearing for Witmar walking out of the hearing. He blames the events and the resulting decision to abandon the complaint hearing entirely on the delegate conducting the complaint hearing, alleging he caused this by: stopping Walter Weisstock's "questioning" of Mr. Milic; failing to recognize Mr. Milic was "taunting" and "smirking" at him; pointing a pen and gesturing at Walter Weisstock "as though he were ready to throw a dart" at him; refusing to order Mrs. Milic to leave the hearing room when Walter Weisstock complained of her presence there; excluding him from the hearing room; and by telling Tony Weisstock and Graham Weisstock they should act for Witmar in the absence of Walter Weisstock.
28. Walter Weisstock also complains the Director received and considered the written witness statements provided by Witmar without contacting any of the persons providing statements, particularly Tony Weisstock, to discuss their statements with them. He submits too little weight was given to these statements because they were provided in writing.
29. There is a suggestion in Walter Weisstock's assertions that the delegate who conducted the hearing and made the Determination was biased.
30. Witmar submits the Director erred in law, identifying several matters which it submits demonstrate such error.
31. Witmar says the first error of law was made by the delegate conducting the hearing allowing Mrs. Milic to be present in the complaint hearing room and was compounded by the delegate refusing to ask her to leave when Walter Weisstock complained about her presence.

32. Witmar submits a second error of law was committed when the delegate conducting the hearing did not ask Witmar to present its evidence before asking Mr. Milic to present his evidence and witnesses.
33. Witmar argues there was an error of law in the weight accorded to the evidence of Ms. Christenson as against the evidence submitted by Witmar. Witmar alleges the Director simply failed to consider the evidence it provided.
34. Witmar asserts the Director used the conduct of Walter Weisstock during the hearing to rule against it and that represents a method of assessing the evidence that was fundamentally wrong and could have been avoided if the Director had “just followed the rules and procedures of the hearing”.
35. Witmar argues the Director failed to observe principles of natural justice by allowing Mrs. Milic to be present in the hearing room. That argument is expressed in its appeal submission as follows:
- After lunch [I] told the director that I objected to Mrs. Milic being present at the hearing and I also indicated that there was a police investigation that involved both her and Mr. Milic. I also told the Director that the only reason Mrs. Milic’s Council [sic] invited her to the hearing was to “groom her” for an upcoming trial. I told the Director that I strongly objected to her being there and that if she wasn’t asked to leave than [sic] I would leave. The Director motion [sic] to me with his pen in the same way he did before and told me to leave the hearing. By these actions of the Director, I didn’t have an opportunity to hear about the case and to present my evidence and arguments.
36. Witmar also says the Director failed to observe principles of natural justice by not adopting a procedure where it would present its evidence first and which would involve being able to interrupt Mr. Milic, with questions (cross-examination), while he presented his case.
37. Witmar asserts that allowing Ms. Christenson to give evidence over the telephone (after Witmar had abandoned the hearing) without allowing it to cross-examine her on that evidence or providing an opportunity to respond to that evidence was a breach of principles of natural justice.
38. Witmar says the failure of the Director to attempt to call and speak with Walter and Tony Weisstock was a breach of natural justice. Witmar says the Director failed in his “duties to have a telephone interview with Tony Weisstock as his testimony was extremely important” to its case and should have talked to Walter Weisstock to have him “support the allegations” that Mr. Milic installed shredding software in Witmar’s computers to destroy his records. In the same vein, Witmar also argues the Director should have talked to the two employees who provided written statements for Witmar, as they might have given information that would have led the Director to a different conclusion of the evidence provided by Ms. Christenson. The foregoing arguments are restated in several different iterations throughout the submission on the natural justice ground of appeal. For efficiency, it is unnecessary to make note all of them. I have noted and considered them.
39. Witmar argues there is new and relevant evidence that it wishes to have accepted and considered in this appeal. This “new” evidence comprises documents pulled from one of two laptop computers used at Witmar’s motels in 2014 and 2015 and which, according to Witmar, are “very important to establishing whether or not Mr. Milic in fact punched time cards and at the same time could support my claim that Mr. Milic wrongfully paid himself a salary at the Dilworth Inn for work that he didn’t perform”. Approximately 150 pages of “new” evidence has been submitted for consideration.
40. An extension of the appeal period is requested to accommodate this evidence.

ANALYSIS

41. 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 being made.*

42. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have general application and have consistently been applied in considering appeals.

43. 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 there is an error in the Determination under one of the statutory grounds.

44. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

45. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

46. 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] B.C.J. No. 2275 (B.C.C.A.):

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.

47. Before addressing each of the grounds of appeal and the arguments made on those grounds, it is appropriate to comment on the preliminary comments made by Walter Weisstock. Nothing in his comments convinces me the Director was wrong to characterize his attitude at the hearing as “unruly and obstructive”, “confrontational” and “unacceptable”. I accept, based on the overall description in the Determination of his conduct at the hearing, he was manifestly obstructive.

48. Parts of Witmar's submission, which expresses Walter Weisstock's perception of what transpired at the hearing, confirm my view of his conduct. By his own admission, he attended the complaint hearing already annoyed with the decision to hold a hearing at all and with the refusal of his request to postpone it. It is

obvious from the tone and content of comments included in his submission that his mood at the hearing deteriorated from mere annoyance to “anger and frustration”, that was compounded by what I would characterize as a stubborn refusal to accept advice and direction from the Director on the hearing process. His mood was not improved by the Director indicating his continued behaviour might result in exclusion from the hearing. His response was exhibited in a delayed return from a “cool down” break – requested by him – and by his later challenge to Mrs. Milic continuing to be present in the hearing room.

49. In respect of the latter, the challenge to the presence of Mrs. Milic in the hearing room smacks of a conscious gambit by Walter Weisstock to establish a reason for Witmar to abandon the hearing. In any event, and notwithstanding my view on that matter, the decision of Witmar to abandon the hearing, which I am prepared to find was completely or substantially orchestrated by Walter Weisstock, demonstrates an ignorance of the complaint process if there was any sense by Witmar that its leaving would prevent the Director from reaching a decision on the complaint or somehow provide a “leg up” in an appeal to the Tribunal.
50. Section 84.1 of the *Act* grants to the Director authority to give directions or make orders that are considered necessary for maintaining order at the complaint hearing and provides the Director with certain tools for that purpose. The section allows the Director to give such directions and to make such orders as the Director considers necessary. The authority of the Director under that section is discretionary. It is firmly established that the Tribunal does not lightly interfere with an exercise of discretion by the Director unless it can be shown it was not made in good faith, there was a mistake in construing the limits of authority, there was a procedural irregularity or the decision was unreasonable, in the sense that there was a failure to correctly consider the applicable principles, a failure to consider what was relevant or a failure to exclude from consideration matters that were irrelevant or extraneous to the purposes of the *Act*.
51. I shall address whether the Director ran afoul of any of these considerations in the context of submissions made under the chosen grounds of appeal. At this point, I need say only that the Director had the authority to give the directions and make the orders about which Walter Weisstock complains. Having accepted the likelihood of his conduct having occurred as described in the Determination, I have no difficulty accepting the directions and orders given by the Director were reasonably necessary for the maintenance of order at the hearing.
52. I am not persuaded in the least to Walter Weisstock’s position about how things *should have* been run by the Director. He does not profess any particular knowledge of how complaint hearings are, or should be, conducted. It was entirely inappropriate for him to presume he was entitled to impose his view of how the hearing should have been run over those of the Director.
53. I shall next address the request by Witmar to submit additional, or “new”, evidence for acceptance and consideration in this appeal.
54. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be 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 (Meribus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the

circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *Act*.

55. There are several reasons why the “new” evidence submitted in this appeal does not satisfy the requirements of this ground of appeal.
56. First, I am entirely satisfied this material was “reasonably available” and could, with some acceptable degree of diligence, have been produced to the Director during the complaint process.
57. Second, Witmar was delivered a Demand for Employer Records and failed or refused to comply with the Demand. It is totally inappropriate and inconsistent with the legislative purposes and objectives to allow Witmar to avoid the legal obligation encompassed by the Demand and yet seek to introduce documents as “new” evidence that are firmly within the scope of that demand. I also note the Director found Witmar’s evidence that Mr. Milic destroyed all electronic and hardcopy records of his hours worked was unsupported and unpersuasive.
58. Third, the stated objective of having the Tribunal consider the evidence is to show Mr. Milic did not punch a time card. Witmar hopes to accomplish this by providing random time cards and what purports to be one month of time cards for the Recreation Inn and the Dilworth Inn. Witmar submits that because none of these groups of documents shows Mr. Milic punched his time in or out at either of those locations, the Tribunal should conclude he was paying himself for work not done.
59. The immediate difficulty with this argument is the evidence recorded in the Determination relating to time cards indicates Mr. Milic stating he “punched the Employer’s time clock to record his hours of work. The majority of his time was recorded at the Employer’s main office at the Palisade Apartments”. There is no indication in the evidence that Mr. Milic said he punched time cards at either the Recreation Inn or the Dilworth Inn. The evidence of Ms. Christenson is recorded as her indicating she saw time cards for Mr. Milic and that Witmar should have electronic and hard copy payroll records for Mr. Milic, which would include time cards and payroll sheets, as she recalled filing those at the main office of Witmar located at the Palisade Apartments.
60. I find Witmar has not established the relevance to any issue arising from the complaint of random time cards punched by employees at locations other than that at which Mr. Milic testified he recorded the majority of his time. They do not show Mr. Milic “fraudulently paid himself for working at two properties at the same time”. Nor do they show Mr. Milic was not entitled to two pay cheques or that he was embezzling funds from Witmar.
61. Fourth, I do not find this proposed evidence is either credible or probative of any material issue in dispute.
62. The “new” evidence is not accepted in this appeal. As a result of this decision, I do not need to consider whether Witmar should be granted an extension of the appeal period to submit “new” evidence.
63. Witmar has not shown any error of law in the Determination.
64. The first part of the arguments relating to this ground of appeal are based on what Walter Weisstock views as errors made by the Director relating to the conduct of the complaint hearing. Witmar has provided nothing beyond bald statements to support its arguments. As I indicated above, the Director has authority to control the complaint hearing. The only legal obligation on the Director relating to the conduct of a hearing arises

from the Director's statutory obligation contained in section 77 of the *Act*, which requires the Director to make reasonable efforts to provide a person under investigation with an opportunity to respond, and to the common-law duty to observe principles of natural justice, which in the context of the complaint process, has been described by the Tribunal in the following terms 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 *BWT Business World Incorporated*, BC EST #D050/96.

65. Beyond the above obligations, the Director has authority, confirmed in section 84.1, to do what he considers necessary to ensure an orderly hearing. Witmar has identified nothing from which I might find the Director interfered with the obligations expressed in the *Act* or the above statement. Walter Weisstock may disagree with the directions and orders of the Director but none of those demonstrate an error of law.
66. I find the Director did not improperly exercise the discretion provided in section 84.1 of the *Act* in the circumstances of this case.
67. In respect of the suggestion by Witmar that the delegate conducting the complaint hearing and making the Determination was biased against it, I find Witmar has provided no objective basis for any finding of bias. The Tribunal has indicated the test for finding bias requires clear and objective evidence; mere subjective impressions, such as those provided here, do not come near satisfying the test for establishing bias: see *Dusty Investments Inc. dba Honda North, supra*, at pages 7 – 9.
68. The other part of the arguments relating to the error of law ground of appeal are based on challenges to the findings of fact made by the Director from the evidence presented by the parties and the conclusions drawn from those findings.
69. Primarily, Witmar challenges decisions of the Director on the evidence submitted by the parties, alleging the Director acted without evidence, refused to admit relevant evidence and acted on a view of the evidence that could not reasonably be entertained.
70. I have reviewed the Determination and find there was no evidence from Witmar that the Director “refused to admit”. All of the written statements provided by Witmar were accepted and examined. There is equally no basis for claiming the Director “acted without evidence”. The decisions made by the Director on the evidence provided by the parties was not unreasonable; they were based on what appears to be a thorough consideration of the competing evidence and the findings are not perverse and inexplicable, in the sense that is required when seeking to challenge findings of fact as errors of law.
71. The Director has provided a rational foundation for each of the findings made. For example, the most strongly disputed factual issue involved the allegation by Witmar that Mr. Milic had embezzled thousands of dollars by forging signatures of Witmar's directors on cheques payable to himself. The Director considered this allegation and addressed it as follows:

. . . the Employer has not provided any convincing and supportable evidence that established Mr. Milic forged signatures on company cheques. Nor did it provide any financial records that actually confirms

employer funds have been misappropriated instead of being used for payroll and other business costs. Lastly, the Employer provided no explanation as to how a substantial amount of cash, \$451,365.69, could go missing in a span of two months without the Employer's directors noticing this significant issue in the early stages. (at p. R22)

72. I note here that the question of whether an employer has just cause to terminate an employee is predominantly one of fact. The *Act* places the burden of establishing the facts necessary to establish just cause on the employer. That burden has two elements: first, it requires an employer to show there is employee misconduct and, second, that the circumstances of the misconduct were sufficient to justify the employee's termination. In this case, simply put, the Director found Witmar had failed on the evidence to meet either element of that burden.
73. In this appeal, in order to establish the Director committed an error of law, Witmar is required to show the factual conclusions drawn by the Director, or the inferences drawn by those conclusions, are inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. Carrying on business as Jonathan's Restaurant*, BC EST # D390/98, at paras. 26 – 29. Witmar has not succeeded in meeting this burden.
74. Witmar argues the Director ignored the evidence of Walter Weisstock regarding vacation pay. There is nothing that would support that argument. The summary of the evidence of Walter Weisstock on this point in the Determination shows the Director was alive to the position of Witmar on vacation. The findings indicate the Director was persuaded by other evidence that Witmar had not paid Mr. Milic vacation pay accrued during the period December 20, 2015, to January 19, 2016. There is nothing in the appeal that shows this conclusion was an error of law.
75. Witmar submits the Director erred in law by not contacting persons who made written statements for Witmar to “substantiate” their statements. This submission suggests the Director has some positive obligation to assist a party in making its case by “ferreting out” information a party has not provided in support of its case. There is no obligation on the Director to assist a party in making their case; the obligation to prove its case lies on the party presenting that case. Adopting a position that is suggested by the argument of Witmar has serious implications for the impartiality of the Director as decision maker.
76. In assessing Witmar's natural justice arguments, I refer to and adopt the comments found in paragraph 64, above, and express my conclusion that Witmar was provided with all of the procedural rights required to be provided by the Director to parties to complaint proceedings under the *Act* and the principles of natural justice. All of the arguments made under this ground of appeal play on the same theme that can be summarized as follows: Witmar did not have the chance to present the case it might have presented had Witmar not abandoned the complaint hearing.
77. Witmar may not complain about the process applied by the Director, when that process was imposed on the Director by the conduct of Walter Weisstock, and the other representatives of Witmar, in making the decision to leave the hearing. The process adopted by the Director of summarizing for the parties all of the evidence provided before Witmar abandoned the hearing and allowing Witmar to present its evidence and arguments by written submissions did not deny Witmar the opportunity to present its case or answer the case presented by Mr. Milic.
78. The Director had discretion to adopt the complaint process chosen and I find that discretion was properly exercised. More particularly, Witmar has not shown there is any basis on which the Tribunal may interfere with that discretion.

79. In result, Witmar is bound by the procedure it was responsible for establishing. In the final analysis, Witmar failed on the evidence to establish the allegations it made in response to Mr. Milic's claims.
80. Based on the above, the appeal on its face is devoid of merit. It has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1) (b) and (f) of the *Act*.

ORDER

81. Pursuant to section 115 of the *Act*, I order the Determination dated September 22, 2016, be confirmed in the amount of \$27,085.00, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal