



An appeal

- by -

Grant Howard  
("Howard")

- 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.:** 2006A/85

**DATE OF DECISION:** January 29, 2007

## DECISION

### SUBMISSIONS

Grant Howard and Johannes Schenk, Esq.	on behalf of Grant Howard
Mary Walsh, Industrial Relations Officer	on behalf of the Director
Michael R. Kilgallin, Esq.	on behalf of Kirk Capital Corporation

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “Act”) by Grant Howard (“Howard”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 25, 2002.
2. The Determination addressed a complaint filed by Howard against Kirk Capital Corporation (“Kirk Capital”). The complaint alleged Howard was owed commission wages, length of service compensation and wages for unauthorized deductions from wages.
3. Briefly stated, in response to the complaint, Kirk Capital took the position that Howard was not an employee for the purposes of the *Act* and, in any event, was not owed the amounts claimed.
4. Following an investigation of the complaint, the Director concluded Howard was an employee of Kirk Capital under the *Act* and was entitled to commission wages, wages for unauthorized deductions, compensation under the *Act* for length of service compensation and vacation pay, statutory holiday pay and interest on those amounts. The Director found that Kirk Capital had contravened Section 18(1), Section 45, Section 58(1) and Section 63(2) of the *Act* and calculated Howard was entitled to an amount of \$29,535.29 in respect of those contraventions.
5. Howard appealed the Determination on December 24, 2002. Generally, he asserted the Director had erred in calculating the amounts owed to him and had erred in failing to award damages, both general and special, in his favour against Kirk Capital for alleged misconduct by some of its employees. The appeal was filed outside of the time allowed for appeal under subsection 112(3). The Tribunal considered whether the appeal period should be extended under subsection 109(1) of the *Act* and, in BC EST #D076/03, decided no extension would be allowed. That decision was confirmed in BC EST #RD231/03.
6. Howard sought judicial review of the above decisions of the Tribunal and, in a decision of the Supreme Court of British Columbia issued on May 18, 2006, they were set aside and Howard’s appeal was remitted to the Tribunal for consideration on its merits.
7. Subsequent to the Court’s decision, the Tribunal has sought and received submissions from the Director and Kirk Capital on the merits of the appeal.
8. In his appeal, Howard has not asked for an oral hearing, but says he would be “more than willing to attend” if it would assist his appeal. Neither of the other parties requests an oral hearing.

9. The Tribunal is not required to hold an oral hearing. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act*, SBC 2004, ch. 45 (“*ATA*”), including section 36 which states, in part: “. . . the tribunal may hold any combination of written, electronic and oral hearings” (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).
10. In my view, an oral hearing is not necessary to decide this appeal. Findings of fact have already been made by the Director in the complaint hearing. Some of those findings are challenged, and I will address those later in this decision. In challenging some of the findings of fact, Howard has sought to introduce additional evidence in the appeal. I shall also address the matter of additional evidence later in this decision.
11. I have before me the subsection 112(5) Record, which is substantial, and written submissions from Howard, Kirk Capital and the Director. No argument has been made concerning the sufficiency of the record.

## ISSUE

12. The issue is whether the Director committed a reviewable error in calculating the amounts owed to Howard in respect of his complaint under the *Act* and in denying parts of his claim for commission wages. This issue includes a consideration of whether the Director misconstrued his authority under the *Act* to award general or special damages under any of the heads of damage claimed by Howard.

## THE FACTS

13. Kirk Capital is a mortgage broker. Howard was employed by Kirk Capital from August 1997 to August 1, 2000 as a submortgage broker. Howard was employed under a contract dated the 11<sup>th</sup> day of November, 1997. Under the contract Howard was to receive a percentage of gross fee revenue resulting from mortgages arranged by him, either exclusively or in concert with another submortgage broker. There were fees, expenses and incidental charges which Howard agreed would be deducted by Kirk Capital from the percentage of gross fee revenue to which he was entitled. The Director characterized the amounts payable by Kirk Corporation as a “commission wages”. That is a fair characterization of the nature of that payment.
14. Howard was terminated from his employment with Kirk Capital effective August 1, 2000.
15. Howard filed a complaint with the Director in the time period allowed under the *Act*. Early in the complaint process, Howard referred the investigating delegate to eight files for which he claimed commission wages were owed. Eventually, there were ten files examined in the Determination on the claim by Howard for commission wages.
16. It should be noted that Howard’s complaint contained no allegation that he was claiming wages for hours worked. On the complaint form, there are several questions relating to hours of work, including the following questions:
  - Is your complaint about hours of work or overtime?
  - Are your hours of work regular?
  - Do you have a record of the hours worked for this employer?

17. To each of these questions, Howard said “No”.
18. The record shows that the Director made a Demand for Records, which included a demand for records relating to hours of work and wages. Counsel for Kirk Capital responded to the Demand by taking the position that Howard was an independent contractor who, among other things, set his own hours and that none of the requested records were kept by Kirk Capital. This response was provided to Howard, who replied in correspondence dated May 17<sup>th</sup>, 2001 that Kirk Capital maintains records of all transactions and, without seeing the scope of the Demand, said that “they have all the records you desire”.
19. In correspondence dated June 5<sup>th</sup>, 2001, Howard included the comment that his “claim for commissions rises out of my activity in the file”. Howard was speaking of a claim for commission wages relating to financing on a property described as 970 Burrard Street. Howard made no claim for wages other than commission wages based on the provisions of his employment contract nor did he seek to establish a general claim for wages owing based on hours worked and the minimum wage provisions of the *Act*. The Director examined whether there was compliance with the minimum wage standards found in the *Act*, but found no factual basis upon which to calculate regular wages or minimum daily wage for pay periods where no commissions were paid. The Director did find Howard had average weekly commission earnings of \$358.99 during the period January 1, 2000 to July 31, 2000.
20. In response to the complaint, Kirk Capital took the position that Howard was not an employee for the purposes of the *Act*. That issue was examined. The Director concluded Howard was an employee of Kirk Capital under the *Act*. There is no appeal from that conclusion. Kirk Capital acknowledged that Howard was owed commission on two files, but said Howard was required to pay legal and other expenses incurred on those files. They said Howard had no entitlement to any commission other than on those two files.
21. The Director accepted that Howard was owed commission wages on two of the files, referred to in the Determination as the “Lomba” and “Smolcic” files. The Director found some of the expenses deducted by Kirk Capital from the commission wages were allowable. Howard says the Director erred in calculating the amount owed to him on these files. His argument includes the correctness of the Director’s conclusion that some of the deductions from his wages were allowable under the *Act*.
22. In respect of five of the files, the Director found no evidence, or insufficient evidence, to support Howard’s claim for commissions on those files. Those files are identified in the Determination as: Dundarave Mews; Chancellor Peak Developments Ltd.; Hillside & Beauford Hotel; 1988 Stephens Street; and Clover House Inc. The appeal does not specifically indicate there is any issue being taken with the conclusions of the Director on four of those files. There is a reference in the appeal to the Director failing to consider a claim for “lost opportunity” relating the Dundarave Mews file.
23. In respect of Howard’s claim on the other three files, which are identified in the Determination as 4351 No. 3 Road, 970 Burrard Street and 3115 Crescentview Drive, the Director once again found no evidence, or insufficient evidence, to support Howard’s claim for commission wages on these files. It is helpful to set out the Director’s conclusions on these files:
1. 4351 No. 3 Road, Richmond:  
  
Mr. Howard has alleged he is owed unpaid commissions for a mortgage transaction which completed eleven months after termination of his contract. There is evidence that Mr. Howard did make efforts in April 2000 through August 1, 200 to secure a mortgage on this property for

commission fee. As of August 1, 2000, no mortgage had been secured, and at the time no commissions were owed. The letter dated July 27, 2000 from the client indicates that deadline for completion of a deal was five business days, and that the client would not consider further lenders presented by Mr. Howard.

Mr. Ford of Surrey Metro Savings Credit Union confirms that Mr. Howard was involved initially in discussions regarding a mortgage on this property; however, Mr. Ford has indicated that it was not the same deal that was ultimately entered into, after efforts by another submortgage broker, some eleven months later.

There is no evidence to show Mr. Howard is owed commission wages from completion of a deal different from that which he was attempting to secure, one which occurred substantially after his involvement in this matter, and one which resulted from efforts of another submortgage broker. I find that KCC does not owe Mr. Howard commission wages from this transaction.

2. 970 Burrard Street, Vancouver:

Mr. Howard has alleged that he entered into a commission split agreement with Ms. Kwon, but that when Ms. Kwon completed this transaction, she did not split the commission with Mr. Howard. There is some evidence that the agreement to work jointly on the financing of this project had ceased sometime in March or April 2000, prior to the alleged commission payment Ms. Kwon was to have received. Mr. Howard has acknowledged that the client declined the expression of interest he had obtained, and that Ms. Kwon sought assistance from another submortgage broker to complete financing at North Shore Credit Union, who had previously refused interest in this property when Mr. Howard approached the credit union. There is insufficient evidence to show that Mr. Howard's efforts resulted in a transaction for fees on which he is owed commission wages.

3. 3115 Crescentview Drive, North Vancouver:

Mr. Howard has acknowledged that the submortgage broker that assumed conduct of this file upon Mr. Howard's dismissal was instructed to not collect commission fees for this transaction. There is no evidence that KCC collected fees for this property, and accordingly I find that no commissions are payable to Mr. Howard.

24. In deciding Howard's claims for commission wages, the Director was compelled to interpret the contract under which he was employed. This appeal raises questions about the Director's conclusions on the above claims. The respective positions of the parties on those claims will be examined in due course.

25. The Director found Howard had been dismissed without the requisite notice set out in Section 63 of the *Act* and, accordingly he was entitled to length of service compensation under that provision. The Director found Howard was entitled to the equivalent of two weeks' wages in lieu of the failure to provide notice. The Director calculated entitlement on average weeks' wage over a period from January 1, 2000 to July 31, 2000. Howard disagrees with that conclusion.

## ARGUMENT

26. The arguments provided by the parties are extensive. The appeal and supporting submissions filed by and on behalf of Howard alone encompass in excess of three hundred pages, exclusive of supporting

documents. Much of the appeal and supporting submissions misconstrue the nature of the appeal process under the *Act* and the statutory authority of both the Director and the Tribunal.

27. I shall set out the arguments in the appeal as they have been structured by Howard. The appeal, and the submission filed with the appeal, deals with: the conclusion of the Director on Howard's claim for commission wages on the file relating to 4351 No. 3 Road; a claim for wrongful dismissal relating to his termination of employment; a claim for breach of contract and interference with his economic interests; a claim relating to an alleged failure by directors and officers of Kirk Capital to fulfill a duty of disclosure; the conclusions of the Director on Howard's claims for commission wages on the files relating to 3115 Crescentview Drive and 970 Burrard Street; the conclusions of the Director on deductions made by Kirk Capital from Howard's commissions; and a claim for "lost opportunity" concerning the file relating to Dundarave Mews.

#### ***4351 No. 3 Road***

28. Howard says he became involved in the file in March 2000 and performed a significant amount of work on this file between April 2000 and the date of his termination. The Record and the Determination confirm that assertion. On the 1<sup>st</sup> of May, 2000, the owners of the property, 482451 B.C. Ltd., signed an exclusive agency agreement with Kirk Capital. This agreement is dated April 17, 2000 and gives Kirk Capital the exclusive opportunity to attempt to secure financing for the property on terms outlined in the agreement for a period of sixty days. In the agreement, the owner agrees to pay a service commission to Kirk Capital if there is a commitment to finance given through them and funds are advanced. The foregoing is only a very general summary of the obligation to pay service commission and there are four subclauses in the agreement that define the scope of that obligation. In the context of this appeal, Howard says subclauses c) and d), and the words following those subclauses, are important:

- c) Upon any commitment to loan being given us at any time whether during the existence or after the termination of this exclusive agency agreement in respect of which the efforts of you or your agents during the term of this exclusive were an effective cause; or
- d) Upon a lender being introduced by us to the property during the term of this exclusive agency who provides a commitment to lend substantially in accordance with the aforesaid terms of or on other terms acceptable to us, whether or not such lender is introduced by you or your agents or by us and whether or not any loan is actually made:

We agree to pay a service commission of 2.0% on all funds advanced for any financing whatsoever, pursuant to a commitment described above, including but not limited to; refinancing, interim construction financing, bridge financing and take-out financing. Such commissions to become earned on the first to occur of the events described in subclauses (a) through (d) above and payable out of the first advance. . . .

29. Howard points to certain facts relating to his claim for commission wages on this file: that in, or around, May 2000, during the term of the agreement, he introduced Surrey Metro Savings Credit Union ("SMSCU") to 482451 B.C. Ltd.; that SMSCU made a commitment to loan funds to 482451 B.C. Ltd.; that funds were loaned on terms that substantially accorded with those set out in the exclusive agency agreement signed by SMSCU in April 2000; and a mortgage was filed on the property in favour of SMSCU. Howard submits those facts triggered an obligation on 482451 B.C. Ltd. to pay the service commission set out in the exclusive agency agreement.

30. Howard says a proper interpretation of paragraph 2 of his employment agreement, read against the above facts, should have led the Director to find he had “arranged” the mortgage and was entitled to the service commission that was payable by 482451 B.C. Ltd. Paragraph 2 of his employment contract is headed “Revenues”, and contains the following provisions:
- 2.1 100% of all gross fee revenue resulting from mortgages arranged by Howard, pursuant to the Act, shall be credited to Howard upon receipt.
  - 2.2 Where Howard and another submortgage broker both arrange the same mortgage, the fee revenue shall be divided on an agreed and negotiated basis between Howard and the other submortgage broker.
  - 2.3 This agreement applies to all gross fee revenue resulting from mortgages arranged pursuant to the Act by Howard and shall include payments of any kind, whether in cash, or in goods or services other than cash, by any party to the mortgage transaction, or by any other party.
  - 2.4 Howard agrees to appoint the Company to act as his agent for the purpose of collecting all monies, amounts or property due to Howard in relation to all mortgage transactions arranged by Howard pursuant to the Act. Howard undertakes to direct clients to pay the Company all monies or amounts owing to him.
  - 2.5 In the event all or any of a forfeited deposit relating to a mortgage transaction is retained, the deposit shall be subject to the same fees, royalties, and charges as all other gross fee revenue described in this agreement.
31. Howard says the director erred in finding he was not entitled to commission wages from this file.

***Length of Service Compensation and Damages for Breach of Contract/Economic Interests***

32. While not expressing it directly, it is clear from the appeal, and the submission filed with it, that Howard disagrees with how the Director handled the matter of compensation for the termination of his employment. To reiterate, the Director found Kirk Capital had contravened Section 63 of the *Act*, which sets out the statutory obligations of an employer terminating the employment of an employee. Specifically, the director found Kirk Capital had terminated Howard’s employment without providing the requisite notice or compensation in lieu of notice. Kirk Capital was not successful in persuading the Director that their statutory obligation should be deemed to have been discharged (see subsection 63(3) of the *Act*) and as a result, Kirk Capital was obligated to pay, and Howard was statutorily entitled to be paid, compensation for length of service determined by application of the formula described in that section.
33. Howard feels the director erred by failing to consider, among other things, damages for breach of contract (wrongful dismissal) and interference with his economic interests (loss of opportunity).
34. Additionally, the appeal includes a “quantum meruit” claim, a claim based on unjust enrichment and claims for damages for undue influence, duress, breach of fiduciary duty and duty of disclosure negligence, bad faith and mental distress.

***3115 Crescentview Drive***

35. Howard says the Director erred in finding he was not entitled to commission wages on this file. The Director denied his claim on this file because there was no evidence that Kirk Capital had received any fee revenue.

36. Howard does not dispute the finding that Kirk Capital received no fee revenue on this file, but says the conduct of Kirk Capital, and its officers and employees, relating to the fee revenue was deceitful, fraudulent, negligent and was designed to deprive and cheat him out of his commission wage on this file. He says Kirk Capital owed him a fiduciary duty, which they breached, to deal fairly with him and to protect him and his commissions.

### ***970 Burrard Street***

37. Howard says the Director erred in finding he was not entitled to commission wages on this file. Howard says there was “prima facie” evidence supporting his entitlement that was not contradicted by any evidence provided by Kirk Capital.
38. Howard continues to assert that he had entered into a “fee splitting” agreement with another submortgage broker, but that submortgage broker failed to honour that agreement. Howard says the investigating delegate failed to obtain relevant information. He says the relevance of this information was to determine whether the other submortgage broker received commission payment on this file. There appears to be no dispute that the other submortgage broker did receive commission on this file.
39. Howard says he had provided enough information to support a claim for commission wages. The Director found he had not provided sufficient evidence to support his claim.
40. Howard submits Kirk Capital, and its officers and employees, was negligent, deceitful and fraudulent in denying him a commission on this file. Alternatively, he submits there was a valid claim based on “quantum meruit” and/or unjust enrichment which was not considered or addressed in the Determination.

### ***Deduction of Costs***

41. Howard says the Director erred in finding Kirk Capital was entitled to deduct office and miscellaneous expenses from his commission wages.
42. The Determination described the amounts deducted as having been a valid deduction by written assignment. Paragraphs 3, 4 and 5 of the employment contract between Howard and Kirk Capital create debt obligations from Howard to Kirk Capital for certain costs, fees and other expenses described in the agreement. Paragraph 5.4 states:
- 5.4 Howard agrees that in the event of the termination of this agreement, the Company will be entitled to collect from Howard any balance due to the Company.
43. The Director and counsel for Kirk Capital have filed replies to the appeal. Generally, both take the position that Howard has not shown there is an error in the Determination under any of the grounds found in Section 112 of the *Act* and is simply attempting to have the Tribunal revisit his claims and reach different conclusions than were reached by the Director.
44. The Director has limited the response to the appeal to “the only issue which either the Director or the Tribunal have jurisdiction to address”, which is whether was Howard owed wages under the *Act* and, if so, in what amount.



45. As a global response, the Director says the Determination was based on a proper consideration of the relevant evidence, including the exclusive agency agreement and Howard's employment contract, and the *Act*.
46. Counsel for Kirk Capital echoes the position of the Director, submitting Howard has failed to raise any significant issue of fact or law and that the Determination was firmly grounded in a thorough investigation of the claims considered against the evidence provided during the investigation and its conclusions were reasonable.
47. The Director and counsel for Kirk Capital have provided responses to each of the matters specifically raised by Howard.

***Length of Service Compensation and Damages for Breach of Contract/Economic Interests***

48. While neither the Director nor counsel for Kirk Capital have specifically replied to this aspect of the appeal, it is implicit in both their submissions that the question of damages for breach of contract and/or interference with economic interests are not matters that fall within the jurisdiction of the Director or the Tribunal operating under the *Act*.

***4351 No. 3 Road***

49. The Director points out that as of the date of Howard's termination (August 1, 200) there was an ongoing dispute between Howard and Kirk Capital about the decision of Kirk Capital to reduce the service commission on this file from the 2% stated in the exclusive Agency agreement to 1%. For clarification, Kirk Capital wanted to reduce the service commission, Howard opposed such a reduction. Financing on the property was not completed at the time Howard was terminated and, on the evidence, was not completed until approximately 11 months after his termination. The Director says there was evidence given to the investigating delegate by Mr. Ford of SMSCU that, the "terms of the completed deal were different from that initially negotiated with Mr. Howard" (see page 12, Determination). The Director says the new evidence submitted by Howard with this appeal, suggesting the financing was advanced to 482451 B.C. Ltd. on similar terms as those found in the exclusive agency agreement and which Howard had negotiated with SMSCU, is neither probative nor demonstrative because it was accepted that commissions are only payable when a transaction is completed and the service commission received by Kirk Capital. The Director says that as the financing was not completed when Howard was terminated, he was not entitled to a commission and has failed to show an error was made in that finding.
50. The Director submits there was no error in how the evidence was managed in the Determination. The Director says that providing "prima facie" evidence is not equivalent to proving a claim. Ultimately, the Director says, questions of proof are decided on a weighing all of evidence and deciding on a balance of probabilities.
51. The Director says Howard has not shown there was any error in interpreting and applying the *Act* or applicable principles of law. In any event, the Director questions the relevance of applying real estate jurisprudence and principles of agency to decide Howard's entitlements under the *Act*. The Director says there was no requirement to apply "material contribution" or "effective cause" tests or any variation of those tests. The Director says the starting and ending point for the delegates findings must be the *Act*.

52. Counsel for Kirk Capital says this claim was properly investigated and the Tribunal should be reluctant to second guess the investigative process. There was clear evidence provided during the investigation by the parties and Mr. Ford concerning the financing on this file.
53. Counsel says there was no error in law made by the Director in respect of when Howard's commissions were earned and, in any event, the real substance of Howard's appeal is error of fact alone, a matter over which the Tribunal has no jurisdiction. Counsel says the appeal represents no more than a disagreement with the conclusion that there was no evidence to support Howard's assertion that he had "arranged" the financing on this property and was entitled to a commission.
54. Counsel for Kirk Capital says, if there is a question of law, the Director did not commit an error in deciding Howard had no claim to a commission on this file. He says the Tribunal has no jurisdiction to address claims such as the unjust enrichment claim advanced by Howard in his appeal. He submits that the cases relied on by Howard are distinguishable on their facts and the question of his entitlement must be approached through a plain reading of the language in his employment contract interpreted in a manner that promotes a sensible commercial result. On a plain reading, to be entitled to a commission Howard must have "arranged" the mortgage and it would be incorrect to view his preliminary, but unsuccessful, efforts to arrange a mortgage on the property as entitling him to a commission is not consonant with either common sense or with a sensible commercial result. In effect, Howard is asking the Tribunal to add language to the employment contract.
55. Counsel says that an essential element to Howard's claim for a commission on this file – an unbroken continuity between Howard's efforts and the completion of financing on the property – is, on the facts, absent.
56. Finally, counsel says this is not a case where the Director acted without evidence, took a view of the evidence that was unreasonable or failed to consider relevant evidence.

### ***970 Burrard Street***

57. The Director relies on the Determination and points to the statement in the Determination that Howard acknowledged the expression of interest he had obtained was not accepted by the client and the financing was completed by other submortgage brokers.
58. Counsel for Kirk Capital says the errors Howard alleges do not support a conclusion that the investigating delegates committed any reviewable error. He says this aspect of Howard's claim was fairly and efficiently investigated and Howard has provided no factual basis for asserting the Director's view of the available facts was unfair or unreasonable.

### ***3115 Crescentview Drive***

59. The Director notes that the conclusion in respect of this part of Howard's claim was based on a finding that Kirk Capital did not receive any service commission on this file and that nothing in the appeal raises any issue with that finding. The Director says there is no basis for Howard's argument that he had a claim for commission wages arising from the exclusive agency agreement on this file, rather than his employment contract.

60. Counsel for Kirk Capital says this aspect of Howard's appeal does not raise any matter that is within the Tribunal's jurisdiction. He echoes the point made by the Director that no service commission was received by Kirk Capital and consequently no commissions were owed to Howard.

### *Dundarave Mews*

61. Counsel for Kirk Capital says this aspect of Howard's appeal, which raises a claim for lost opportunity, does not relate to a matter that is within the jurisdiction of either the director or the Tribunal.

### *Deduction of Costs*

62. The Director says the findings on the question of deductions was reasonably grounded in the findings of fact applied to the relevant provisions of the *Act*. Specifically, the Director says the terms of the employment contract under which Howard agreed to assume certain expenses were appropriately characterized as a "written assignment" of wages under Section 22 of the *Act*.
63. Counsel for Kirk Capital makes the same point as the Director, that Howard had authorized the deduction of expenses in the employment agreement. He says Howard has not shown the amounts which were allowed by the Director to be deducted were not expenses listed in Schedule "A" of the employment contract. He adds that in the circumstances, Howard cannot say he is unaware of what the expenses related to. To briefly digress, I note from the Record that several discussions took place in late 2001 and early 2002 on the question of the legal and other expenses that Kirk Capital was attempting to set off against Howard's commissions. The only contentious issue that appears to have been generated within those discussions was the deduction of legal fees.
64. Howard's final reply adds little to the substance of his appeal. The reply is filed in three parts: the first provides further submissions on his claim relating to the 4351 No. 3 Road file; the second addresses his claims on 970 Burrard Street and 3115 Crescentview Drive; the final part provides Howard's response to the submission of the Director. The final part is extensive, comprising 259 pages. It raises several new matters as well as expanding on arguments made in the initial appeal submission. It is not, however, considered necessary to seek the position of the other parties on this submission.
65. The reply submission relating to 4351 No. 3 Road is filed by counsel for Howard. It restates Howard's submission on the relevance of the language of the exclusive agency agreement and the employment contract on the claim for commission for this file and argues Howard's entitlement based on his being the "effective cause" of the mortgage financing.
66. The reply on the claim relating to 3115 Crescentview Drive confirms the nature of Howard's claim is based on the premise that he should receive a commission wage on this file even though no "service commission" (using the terminology in the exclusive agency agreement) was ever received by Kirk Capital. Essentially, Howard says it is irrelevant that Kirk Capital did not collect a service commission on this file; that fact should not affect his entitlement to be paid for his "work" on the file. He says that as his "agent", there was a positive duty on Kirk Capital to collect whatever monies were owed by the client on this file and to pay it over to him. His reply on the claim relating to 970 Burrard Street is similarly grounded, focussing on a general assertion that because he performed work on this file, he is entitled to be paid for that "work". He cites and relies on Sections 1 and 18 of the *Act* to support his claims on these files. He does not rely on the terms of his employment contract in advancing his claims on this file.

67. To place these claims against the requirements of the *Act*, I reiterate that in the Determination the Director considered whether there was compliance with the minimum wage standards found, but found no factual basis on which to calculate regular wages or minimum daily wage for pay periods where no commissions were paid (see Determination, page 19). Howard has not challenged that part of the Determination.
68. The third part of his reply returns to and expands on several of the elements in his appeal. New arguments are also added. I will deal with these in my analysis, but generally I find the new arguments to be irrelevant to the validity of his wage claim and, in some respects, inappropriate.

## ANALYSIS

69. The grounds upon which an appeal may be made are 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.*

70. I will first address the allowable scope of this appeal. Both the Director and counsel for Kirk Capital say there are aspects of Howard's appeal that are not within the jurisdiction of the Tribunal to consider because they relate to matters over which neither the Director nor the Tribunal have authority under the *Act*. These include Howard's claims for general and specific damages for wrongful dismissal, undue influence, duress, loss of opportunity and deprivation of economic interests, breach of fiduciary duty, breach of contract, professional negligence, bad faith, mental distress, quantum meruit, unjust enrichment and a general claim for equitable relief. These claims are listed at pages 14 - 15 of the appeal and are restated throughout the appeal and Howard's replies to the submissions of the Director and counsel for Kirk Capital, where claims are related to additional allegations of deceit, fraud and negligence.

71. Notwithstanding Howard's submissions concerning the authority and the duty of the Director, and consequentially, the Tribunal to adjudicate all aspects of his claims, I agree with the position taken by the Director and counsel for Kirk Capital, that neither the Director nor the Tribunal have the jurisdiction to consider any claims other than claims for wage entitlement and protection under the *Act*<sup>1</sup>. The comment contained in the excerpt found in the Director's submission from *Old Country Restaurant Ltd.*, BC EST #D561/98 is, in my view, an accurate summary of the scope of jurisdiction of the Tribunal:

The Tribunal is a creature of statute. Its powers are defined and limited by the *Employment Standards Act*.

72. A more particular explanation is warranted for some of the claims.

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<sup>1</sup> "Wages" is defined in Section 1 of the *Act* and, in the circumstances of this case, includes commissions and the liability imposed under Section 63 of the *Act*.

73. Howard has made a claim for damages for wrongful dismissal. He has raised provisions of his employment contract relating to notice of termination and seems to have conflated this claim into the decision of the Director under Section 63 of the *Act* which contains provisions for length of service compensation.
74. There are, however, significant differences between length of service compensation under the *Act* and a claim for damages for wrongful dismissal. The former is a statutory benefit earned through employment, the latter a common law claim for breach of contract. The objectives of the statute and common law are different, as indicated in the following comment from *Williams Lake Cedar Products Ltd.*, BC EST #D415/01 (Reconsideration denied BC EST #RD073/02):

Length of service compensation should not be equated with common law damages for wrongful dismissal. The main objective of the common law is to adjudicate a breach of contract and to provide appropriate relief for that breach, depending on the Court's view of the circumstances and factors in each case. Developments in the common law in this area have expanded the remedial authority of the Courts, but the basic objective remains unaltered. ...

The objective of Section 63 of the *Act* is different. It is intended to provide an employee with brief period, at a time when that employee's loss of employment is imminent, which the employee can use to seek alternative employment and make adjustments to their personal and financial circumstances unaffected by the immediate financial consequences of unemployment. This period can be provided by giving notice, by paying compensation equivalent to the required notice or by some combination of those two....

75. Section 63 is part of the legislative scheme to "ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment". It is not necessary for an employee to prove a wrongful dismissal in order to claim payment for length of service compensation under the *Act*. The employee needs only to establish the fact of employment for a term longer than the qualifying period and the fact of termination. The *Act*, in subsection 63(3), allows an employer to discharge the statutory liability for length of service compensation by providing notice, or a combination of notice and compensation, paying compensation or by showing the employee has quit, retire or engaged in conduct that provides just cause for termination.
76. The Tribunal has consistently rejected appeals seeking to have the Director or the Tribunal engage in a consideration of damages relating to allegations of a wrongful dismissal, finding that such claims do not deal with rights under the *Act* and are consequently outside of the jurisdiction of the Director to adjudicate or the Tribunal to review. In *William Lavery*, BC EST #D100/98 (Reconsideration denied in BC EST #275/98), the Tribunal succinctly stated what I consider to be the appropriate response to Howard's claim for damages relating to his alleged wrongful dismissal; it equally applies to the other claims which are based on a consideration of common law principles that are independent of his statutory rights and entitlements under the *Act*:

Lavery alleged that he was entitled to damages for loss of reputation, and one year's wages for the wrongful termination. He relied upon the case of *Jack Wallace v. United Grain Growers* (SCC October 1997) in support of his argument. *United Grain Growers* involved an action for compensation under common law, specifically a claim in contract and in tort, for damages for wrongful dismissal and mental distress. That case may be distinguished from the case under appeal, as it deals with common law rights, not statutory rights. The *Employment Standards Act* sets out a framework which establishes minimum acceptable limits for employment relationships, and prescribes the jurisdiction of the Director and this Tribunal. That jurisdiction does not

encompass claims for loss of reputation or common law actions for wrongful dismissal. However, this does not preclude Lavery from pursuing any common law claims in another forum.  
(at pages 4-5)

77. The Director was correct in limiting the scope of the Determination to adjudicating rights and entitlements under the *Act* and made no error in concluding the multitude of common law and equitable claims and remedies arose independently of rights protected by the *Act* and were therefore outside the jurisdiction of the *Act*.
78. As it relates to the administration of complaints described in subsection 74(1) of the *Act*, the jurisdiction of the Director is set out in Parts 10 and 11 of the *Act* and the jurisdiction of the Tribunal is set out in Parts 12 and 13. Howard has not provided any sound legal basis for asserting the Director or the Tribunal have jurisdiction to adjudicate claims and provide remedies for common law and equitable claims independent of his claims for wages under the *Act*. He seems to suggest that the justification for a consideration of such claims can be found in Section 2 and in the recognition by the Tribunal and the Courts that the *Act* is remedial and “benefits conferring” legislation which should be given a broad and liberal interpretation. However, provisions setting out the purposes of the *Act* and judicial comments recognizing those statutory purposes do not clothe the Director or the Tribunal with jurisdiction they do not have.
79. In sum, the jurisdictional limitations under the *Act* on the authority of the Director and the Tribunal did not, and does not, allow for a consideration of Howard’s claims for general and specific damages for wrongful dismissal, undue influence, duress, loss of opportunity and deprivation of economic interests, breach of fiduciary duty, breach of contract, professional negligence, bad faith, mental distress, quantum meruit, unjust enrichment and a general claim for equitable relief. As a result, the arguments made by Howard on these claims will not be addressed any further in this decision.
80. Returning to an overview of the principles applicable to appeals on matters over which the Tribunal has jurisdiction; 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 set out in subsection 112(1), above. The statutorily limited grounds of appeal bear on this appeal in two ways. First, the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings are found to be an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). Second, new evidence in an appeal is statutorily limited to evidence that was not available at the time the Determination was made<sup>2</sup>.
81. The Tribunal has consistently indicated that the burden in an appeal is on the appellant. The nature of that burden is described in *World Project Management Inc. and others*, BC EST #D134/97 (Reconsideration of BC EST #D325/96 as the “burden of non-persuasion”:

Rules about the legal burden, called by Wigmore “the risk of non-persuasion”, define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, “How to Approach the Burden of Proof and Presumptions” (1952-53) 25 *Rocky Mountain L.Rev.* 34 puts it, “the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy”.

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<sup>2</sup> Additionally, the Tribunal retains a discretion to refuse new or additional evidence that does not satisfy certain conditions (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03).

82. While the Tribunal retains a flexibility in its approach to the burden in an appeal, the usual approach is impose the burden of persuading the Tribunal that the Determination ought to be varied or cancelled on the appellant. There are sound policy considerations for this which are outlined in the *World Project Management Inc.* decision and need not be repeated here. Nothing in this case justifies a deviation from the usual approach.

83. Based on the above analysis, the appeal can be reduced to the following questions:

1. Did the Director err in law in deciding Howard's entitlement to commission wages on 4351 No. 3 Road, 970 Burrard Street and 3115 Crescentview Place?
2. Did the Director err in law in deciding Kirk Capital was entitled to make certain deductions from Howard's commission wages?
3. Did the Director fail to observe principles of natural justice in making the Determination, and more particularly, did the Director fail to properly investigate the complaint and as a result fail to take into account evidence that was relevant to an issue in dispute?

84. I will first address the Howard's argument alleging an error in law relating to the claims for commission wages on 4351 No. 3 Road, 970 Burrard Street and 3115 Crescentview Place. Howard's entitlement to commission wages on these files depends on the facts and the interpretation of his employment contract.

85. None of the parties have challenged the jurisdiction of the Director to interpret and enforce the employment contract, even if the result is an award of wages that exceeds the minimum requirements of the *Act*. There is ample authority supporting such jurisdiction, see, for example, *Dusty Investments c.o.b. Honda North*, BC EST #D043/99 (Reconsideration of BCEST #D101/98), *Halston Homes Limited*, BC EST #D527/00, *Shell Canada Products Limited Produits Shell Limitée*, BC EST #RD488/01, *Susan A. McKay*, BC EST #D518/01, *Kamloops Golf and Country Club*, BC EST #D278/01 (Reconsideration denied, BC EST #RD544/01; judicial review dismissed, 2002 BCSC 1324), *Patrick O'Reilly*, BC EST #RD165/02 and *Seann Parcker*, BC EST #D033/04. In the *Honda North* decision, the reconsideration panel stated:

The Director has authority under the *Act* to regulate and enforce the employment relationship, including elements of the employment relationship that exceed minimum standards. There is no doubt that a primary purpose of the *Act* is to ensure employees receive "at least basic standards of compensation and conditions of employment", but the application of the *Act* is not limited to enforcing only minimum standards.

86. That statement was grounded in an examination of the provisions of the *Act* relating to wages and the payment of wages.

87. The interpretation of an employment contract is a question of law. In *Director of Employment Standards (Re Kocis)*, BC EST #D331/98 (Reconsideration of BC EST #D114/98), the Tribunal stated:

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.

88. In *Shell Canada Products Limited Produits Shell Limitée, supra.* the Tribunal accepted the above statement from *Re Kocis*, adding, at pages 7-8, that:

The legislature has not seen fit to grant the Director a roving mandate to regulate private employment contracts that in all respects satisfy the minimum statutory requirements of the Act. The authority of the Director is limited to enforcing such agreements. The Tribunal has also accepted that parties are free to arrange their relationship as they choose provided the terms of a private employment contract do not contravene the requirements of the Act and are otherwise consistent with the objectives and purposes of the legislation. We can find no prohibition in the Act against employers and employees agreeing, *simpliciter*, to conditions for the payment of incentive based remuneration. In fact, as the Director has noted, on one level such agreements are entirely consistent with the stated purposes of the Act, found in Section 2, to encourage open communication between employers and employees and to encourage continued employment.

89. A significant part of Howard's appeal on the decisions relating to his claim for commission wages on the files is focussed on the argument that he is entitled to be "paid wages for work performed". The argument is much like his "quantum meruit" claim, but has been grounded in provisions of the Act and decisions of the Tribunal and as such needs to be addressed from that perspective. The argument is developed from comments made by the Tribunal in *Fabrisol Holdings Ltd. operating as Ragfinder*, BC EST #D376/96, that money which is earned by an employee from his or her employment becomes "payable" for the purposes of the Act when it is earned. Howard submits that Section 1, the definitions of "wages" and "work", Section 4 and Section 18 of the Act support a conclusion that the Director should have considered how much work he performed under his employment contract and compensated him for that work. He refers to several other decisions of the Tribunal which he says supports his claim for commission wages on this basis.

90. While Howard's view of the Act and the result in *Fabrisol Holdings, supra.*, are quite correct, his argument fails to address critical differences between the issue in that case, and other cases on which he relies, and the issue in this one. In *Fabrisol Holdings, supra.* there was no issue that the commissions were earned by the employee and met the definition of wages. In *Jafic Holdings Ltd.*, BC EST #130/02, there was no employment contract. The commission wages that were found to be owed to the complainant in that case was determined entirely from the requirements of the Act. However, where the Tribunal has considered claims for wages owed in the context of commission salespersons, it has recognized the presumptive relationship of work and earnings can be affected by the facts and the terms of the employment contract (see *Re Kocis, supra.*).

91. The central issue in this case is whether Howard's employment contract entitles him to commission wages on the files under consideration. The Director's interpretation of the employment contract was that commissions were not payable. Effectively, that conclusion represents a finding that commissions were not "earned" and were not "wages" under the Act. While not deciding the Director's interpretation of the employment contract was correct, I am not convinced the Director's approach was wrong. Nor am I convinced that the Act dictates a different conclusion. In *Wen-Di Interiors Ltd. and Wen-Di Interiors (B.C.) Ltd.*, BC EST #D481/99, the Tribunal stated:

Under the Act, employers and employees are free to agree on any commission structure they choose so long as, in its operation, *the employee is paid at least the minimum wage for all hours worked in each pay period.*



92. In other words, Section 4 of the *Act* does not apply to commission structures provided the minimum statutory requirements are otherwise satisfied.
93. In that respect, one of the conclusions reached in the Determination, and which I have taken some pains to point out in this decision, is that Howard made no claim for wages other than commission wages based on the provisions of his employment contract nor did he seek to establish a general claim for wages owing based on hours worked and the minimum wage provisions of the *Act*. In his complaint, he did not assert his employment contract contravened the minimum standards of the *Act* and under Section 4 should not be given any effect. The evidence given to the Director during the complaint process did not show the hours of work or minimum wage requirements of the *Act* had been contravened. The Director did find Howard had average weekly commission earnings of \$358.99 during the period January 1, 2000 to July 31, 2000. Those earnings exceed minimum wage requirements if they are applied to a typical work week of forty hours.
94. In sum, Howard's argument for "wages for work performed" based on the requirements of the *Act* is both a new claim and without any evidentiary basis. This argument is rejected. If Howard is to succeed in this appeal, it will be on the basis that the Director erred in interpreting his employment contract relating to his entitlement to commission wages under that contract.
95. On this basis I also reject the argument made by the Director that the "starting and ending point" for the findings made in the Determination must be the *Act* and the Director was not required to apply any of the legal tests used by the Courts in determining entitlement in commission arrangements such as that which existed between Kirk Capital and Howard. In my view, where the Director is faced with a question of general law, as opposed to a question involving the law of the statute, the Director's analysis must conform to generally accepted legal principles relating to that question of law. The Director may choose between competing legal principles but in so doing must explain why one principle is being chosen over another. In the context of interpreting the employment contract, the principles governing that task are well established. The goal of contract interpretation is to determine, objectively, the parties' intentions at the time the contract was made. The words of the contract are the primary source. If the words are not clear, reference may be had to extrinsic evidence.
96. Counsel for Kirk Capital submits that the real substance of the appeals relating to commissions on the three files is an alleged error of fact, a matter about which the Tribunal has no jurisdiction, see *Britco Structures Ltd., supra*. I do not accept this submission.
97. Even a cursory reading of Howard's appeal clearly shows his primary dispute with the Determination is not with its treatment of the available facts, but with its interpretation of his employment contract based on incomplete facts. Particularly, Howard says the Director misinterpreted the meaning of the term "arranged" in Article 2.1 and 2.2 of his employment contract and says that error was directly related to the failure of the Director to properly investigate. He says the Director did not have important and relevant evidence when the contract was interpreted and the Determination was made.

***970 Burrard Street and 3115 Crescentview Drive***

98. Returning to the specific claims, there is obviously no merit to the appeals relating to 970 Burrard Street and 3115 Crescentview Drive.

99. If Howard was entitled to commission wages under the *Act* on either of these files, it could only be on the basis that he “arranged”, either exclusively or in conjunction with another submortgage broker, the mortgage on the file and the fee revenue had been “received”. The relevant provisions of his employment contract read:
21. 100% of all gross fee revenue resulting from mortgages arranged by Howard, pursuant to the *Act*, shall be credited to Howard upon receipt.
  22. Where Howard and another submortgage broker both arrange the same mortgage, the fee revenue shall be divided on an agreed and negotiated basis between Howard and the other submortgage broker.
100. The evidence concerning 970 Burrard Street was that he did not “arrange” the mortgage. It is not even a question of what Howard says is “prima facie” evidence of his entitlement. It is whether there is any evidence of actual entitlement based on the words used in his employment contract – evidence that he “arranged” the mortgage, either exclusively or in conjunction with Ms. Kwon – and there is not. It is apparent from the Record, which is reflected in the Determination, that his claim for a portion of the commission on this file arises from what he alleges was a private agreement with Ms. Kwon to share the fee revenue in return for him assisting her on the file, and not from his employment contract. Even if there was such a private agreement, that is an entirely different issue than what the Director and the Tribunal have jurisdiction over. In any event, Howard’s issue in that respect is with Ms. Kwon, not with his employer. The Director made no error in finding there was insufficient evidence to show he was entitled to commission wages for his efforts on that file.
101. The evidence concerning 3115 Crescentview Place also clearly shows he was not entitled to commission wages on this file. In respect of his claim for commission wages based on the terms of the employment contract, that contract cannot reasonably be read to ignore the words “upon receipt”. The undisputed fact is that no fee revenue was received by Kirk Capital on this file. As such, there was no commission wages with which Howard could be credited.
102. Howard’s arguments based on agency, duty of care or fidelity and fraud are not matters over which the Director or the Tribunal have jurisdiction. As well, the argument that Kirk Capital breached Article 2.4 of the employment contract by failing to collect monies is not a matter that arises under the *Act*. As the Tribunal stated in *Shell Canada Products Limited Produits Shell Limitée, supra.*, the Director has no roving mandate to regulate private employment contracts that satisfy minimum statutory requirements. A careful reading of that decision, and others which consider the terms of an employment contract, reveals that the scope of the authority of the Director and the Tribunal over the terms of an employment contract is governed by the scope of entitlements and protections included, directly or inferentially, in the *Act*. As I have expressed above, that authority does not extend to adjudicating claims of breach of the employment contract that are unrelated to wage entitlements and protections under the *Act*. The matter addressed in Article 2.4 of the employment contract is not a matter governed by any provision of the *Act*. The Director did not err in denying Howard’s claim to an entitlement to commission wages on this file and did not err by not adjudicating claims not governed by any provision in the *Act*.
- 4351 No. 3 Road**
103. The merits of the appeal on Howard’s claim for commission wages on 4351 No. 3 Road is not so apparent and requires some analysis.

104. I will first address the matter of “new” evidence. This “new” evidence is the mortgage form registered against the property (Form B) in the New Westminster Land Title Office in June 2001. It is provided by Howard to support of his assertion that a mortgage on this file was completed on similar terms as he had “arranged” prior to his termination on August 1, 2000, thus giving rise to at least a “prima facie” right to commission wages on this file. He also says this is a document that was not provided by Kirk Capital during the investigation nor requested by the investigating delegate.

105. The Director and counsel for Kirk Capital say this evidence should not be accepted by the Tribunal in this appeal. The Director says it is not probative. Counsel for Kirk Capital says this evidence was available to Howard and could have been provided to the investigating delegate well before the Determination was issued.

106. The Tribunal has the discretion to allow additional evidence but has taken a relatively strict approach to accepting such evidence in an appeal. The Tribunal considers whether such evidence was reasonably available and could have been provided during the complaint process the evidence is relevant to a material issue arising from the complaint and if it is credible, in the sense that it be reasonably capable of belief. The Tribunal has taken a more relaxed view of new evidence where that evidence is being submitted to support a question of procedural fairness. In *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST #RD317/03, the Tribunal made the following statement concerning the distinction between adducing evidence on a matter of procedural fairness and introducing it for the purpose of addressing the merits:

This distinction, which reinforces the fairness requirement in the Act, is consistent with elementary administrative law principles. Even on judicial review, courts allow “new evidence” to be tendered to show jurisdictional error such as a breach of procedural fairness: *Evans Forest Products Ltd. v. British Columbia (Chief Forester)*, [1995] B.C.J. No. 729 (S.C.). Brown and Evans, in *Judicial Review of Administrative Action in Canada* (2003) at pp. 6-56, 57, accurately summarize the law as follows:

. . . any evidence that relates to an excess of jurisdiction is admissible, as is evidence in support of the allegation that there was “no evidence” in support of a material finding of fact made by an administrative tribunal, evidence establishing an insufficient basis for the administrative action taken, or evidence of a breach of a duty of fairness . . . .

Breaches of procedural fairness are often not apparent on the record. Courts have long recognized that the traditionally restrictive “fresh evidence” principles cannot apply to evidence adduced to demonstrate a breach of procedural fairness. Justice and necessity require that evidence concerning such alleged breaches can be received so that procedural fairness allegations can be meaningfully raised and addressed.

107. See also: *Lucille M. Pacey, a Director or Officer of Mosaic Technologies Corporation*, BC EST #D121/04.

108. It is my view that the “new” evidence, if it can be called such, is inextricably linked to the argument by Howard that the Director failed to observe principles of natural justice in making the Determination and should be received. My view and decision is based on a review of the activity on the file between August 2001 and January 2002.

109. The Record shows that on August 22, 2001, the investigating delegate communicated with then counsel for Kirk Capital and, among other things, asked for “any information you may have” with respect to

several transactions, including 4351 No. 3 Road. On September 7, 2001, counsel provided the following response on 4351 No. 3 Road:

The owners of this property were clients of another broker who worked with Kirk, Ms. Karen Hoehn. Ms. Hoehn referred the clients to Mr. Howard in approximately 1999. Mr. Howard opened a file for them but was unsuccessful in obtaining any financing for them. No mortgage commitments were ever issued, nor were any contracts signed. Mr. Howard then terminated his contract and left Kirk. In 2001, the clients again approached Ms. Hoehn and she reactivated their file. She was ultimately able to arrange a mortgage for them this year through solely her own efforts and for which she received a commission. Mr. Howard had no involvement in the mortgage which was ultimately concluded with Ms. Hoehn, and is not entitled to share in any resulting commission.

110. Following receipt of this letter, the investigating delegate wrote to Howard, asking him to provide details the amounts of any commission wages he was claiming and any documentation and/or evidence supporting his allegations. The investigating delegate met with Howard on October 9, 2001. They discussed his claim relating to 4351 No. 3 Road. In the notes of the discussion there is reference to a commitment letter having been issued by SMSCU in September 2000. The discussion was confirmed in a letter from the investigating delegate to Howard on October 18, 2001. On October 31, 2001, Howard provided the investigating delegate with a letter to which he attached a copy of a land title search which he said, showed SMSCU completed. This information led to a discussion between the investigating delegate and Mr. Ford, from SMSCU, on November 1, 2001. There are notes of that discussion, which are generally reflected in the Determination, in which Mr. Ford said that Howard initially brought the “deal” to SMSCU but that deal did not complete, another submortgage broker took over the file and a new and different deal was “arranged” and completed by her. The following summary of the discussion was provided by the investigating delegate to counsel for Kirk Capital in a letter dated November 2, 2001:

Mr. Bruce Ford of Surrey Metro Savings Credit Union has indicated that Kirk Capital Corporation did receive commission for completion of a mortgage, and that Mr. Howard’s initial efforts to bring the deal forward resulted in this deal, although a different agent assumed conduct of the matter after Mr. Howard’s departure, and the terms of the mortgage altered.

111. On the same day, the investigating delegate wrote to Howard indicating she had read the land title document and adding:

I have contacted Mr. Bruce Ford of Surrey Metro Savings Credit Union, who has acknowledged that initially you approached the Credit Metro regarding this property. Mr. Ford says that an application was brought forward, and a commitment letter may have been issued in approximately August 2000, however the deal did not transpire. Mr. Ford says there were several problems with the initial deal, including legal impediments, which resulted in the failure of that commitment. Mr. Ford says that, at a later date, another sub mortgage [sic] broker entered into a different deal, which resulted in the issuance of the mortgage found on title.

112. The investigating delegate conducted a fact finding meeting in early December 2001. In a letter to Howard dated December 13, 2001, the investigating delegate summarized the information provided at that meeting. The following comments were made concerning Howard’s claim on 4351 No. 3 Road:

Information received from Mr. Bruce Ford of Surrey Credit Union indicates that the commitment letter issued in September 2000 did not result in a mortgage regarding the No. 3 Road property in Richmond. Another commitment letter was issued at sometime in 2001, by the efforts of another

sub-mortgage broker, and that resulted in the completion of a mortgage for which commissions were payable.

113. On December 18, 2001, Howard communicated with the investigating delegate. In that communication, Howard raised the failure of Kirk Capital to provide documents relating to his claim on 4351 No. 3 Road. He stated:

To elaborate, all documents would include any correspondence with the appropriate lender; Surrey Metro Credit Union, and all existing files which pertain to the financing of these properties. I understand that we have the right to obtain such documentation. I understand that this was the purpose of the meeting on December 7<sup>th</sup>, 2001. The Employment Standards Act specifically addresses this issue. You had insisted that I turn over all available documentation yet you have not insisted that Kirk Capital Corporation do the same.

114. There is no indication in the file that the investigating delegate ever followed up on the above statement.

115. The land title document showing the registration of the mortgage in favour of SMSCU on the property was provided by Howard to the investigating delegate and a request was made for her to obtain production of all documents relating to that transaction. He did so because he believed they were relevant. These documents were not provided by Kirk Capital nor were they sought by the Director.

116. It is far from clear at this stage that the evidence is not probative, since the investigating delegate never examined this evidence against the provisions of Howard's employment contract and the Exclusive Agency Agreement. I agree with Howard that it would seem, on its face, to be relevant that the mortgage registered in June 2001 was similar in its terms to the mortgage arranged by him in July 2000.

117. I accept, however, that the evidence relating to the terms of the mortgage that was registered in June 2001 are not relevant if it cannot in any event be said that Howard "arranged" that mortgage. That is the interpretive issue; the alleged error in law.

118. The clear words of the employment contract entitle Howard to commission wages for any mortgage "arranged" by him, either exclusively or in conjunction with another submortgage broker, when the revenue from the mortgage is received. The Director found that Howard was not entitled to commission wages on this transaction. The Director's conclusions and reasons for this finding are set out in this decision, at page 5 which reproduces page 17 of the Determination. The following factors are included in this finding:

- The mortgage transaction was completed 11 months after Howard was terminated;
- Howard had made efforts from April 2000 through to August 1, 2000 to secure a mortgage on the property;
- No mortgage had been secured by August 1, 2000 when Howard was terminated;
- A letter dated July 27, 2000 indicated the deadline for completion was five business days, and the client would not consider further lenders presented by Howard;
- The deal that Howard was attempting to secure was not the same as the one completed in June 2001;
- The June 2001 transaction resulted from the efforts of another submortgage broker.

119. In the submission filed in response to the appeal, the Director says, among other things, that the investigating delegate who wrote the Determination “accepted that commissions were earned if and when the transaction was completed and the commissions received”. I can find no basis for such an assertion in the Determination and it contradicts the Exclusive Agency Agreement which expressly says service commissions are “earned on the first to occur of the events described in subclauses (a) through (d)”, none of which require the transaction to be completed. In fact, the employment contract says nothing about when the commissions are “earned” by Howard. It only speaks directly to when that fee revenue will be “credited” to him. The Director goes on to say:

In finding Mr. Howard did not complete the transaction in question, the Delegate found he was not owed any commissions.

120. I have reviewed the Determination and there is no finding that Howard was not owed commission wages because he did not complete the transaction. The basis on which the finding of the Director to commission wages for the 4351 No. 3 Road transaction was made is outlined above. There is no finding in the Determination that the term “arranged” in the employment contract must be interpreted to mean “completed”. If the assertions made by the Director in the reply submission were accurately reflected in the Determination and directed the result of the Determination, I would not hesitate to find an error of law had been committed.
121. The correctness of the Determination, however, must stand or fall on the findings and conclusions expressed in it, and not on some other view or interpretation of what the Determination meant, or what it meant to say.
122. As indicated above, Howard’s entitlement to commission wages on the 4351 No. 3 Road transaction depends on whether he “arranged” the mortgage on that file, as that term is used in his employment contract. Deciding that question requires consideration of principles of contract interpretation. The Tribunal has recognized the following summary of the principles from the Court of Appeal’s decision, *Gilchrist v. Western Star Trucks Ltd.*, (2000) BCLR 102 at pages 108-109, that govern the interpretation of contracts:

The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties: *Delisle v. Bulman Group Ltd.* (1991), 54 B.C.L.R. (2d) 343 (S.C.), approved by Chief Justice McEachern in *Bramalea Ltd. v. Vancouver School Board No. 39* (1992), 65 B.C.L.R. (2d) 334 (C.A.); *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Eli Lilly and Co. v. Novopharm Ltd.* (1998), 161 D.L.R. (4th) 1, (S.C.C.).

The first inquiry, then, is to determine whether there is only one reasonable meaning to the words in the contract, or more than one. In this search one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning: *MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority* (1992), 72 B.C.L.R. (2d) 273 (C.A.); *Melanesian Mission Trust Board v. Australian Mutual Provident Society*, [1997] 1 N.Z.L.R. 391 (P.C.)

123. Words are to be given their ordinary meaning unless the context dictates otherwise. The Merriam-Webster Online Dictionary provides the following meaning to the word “arranged”:

*as a transitive verb:*

1. to put into a proper order or into a correct or suitable sequence, relationship, or adjustment.
2. to make preparations for.
3. to adapt (a musical composition) by scoring for voices or instruments other than those for which originally written.
4. to bring about an agreement or understanding concerning.

*as an intransitive verb:*

1. to bring about an agreement or understanding.
2. to make preparations.

124. Other dictionaries give the same meaning to the word. There can be no argument that the term is being used in the employment contract in the sense of bringing about an agreement or understanding. To give any other given meaning to the word would be unreasonable in the context of what the contract is addressing.

125. There can also be no argument that Howard’s efforts from April to August 2000 brought about a commitment from SMSCU to finance the property on terms substantially in accord with the terms found in the Exclusive Agency Agreement. The exact terms of the commitment made by SMSCU are not in the Record. I infer from my review of the Record that the document is not there because the investigating delegate did not consider it to be relevant. There is no doubt in my mind that had the mortgage been concluded on the basis of the commitment letter issued by SMSCU in August 2000, Howard would have been entitled to commission wages on that transaction, since it would have been very difficult to argue Howard had not brought about that agreement.

126. I do not accept the suggestion in the submission of counsel for Kirk Capital that Howard’s entitlement to commission wages should be lost because there was no financing or mortgage in place when he was terminated without cause and another submortgage broker was assigned the file and completed the transaction. His view of the term “arranged” is unnecessarily narrow in light of the Exclusive Agency Agreement that says a service commission is “earned” without the requirement of a mortgage being in place. The Exclusive Agency Agreement does not require that Kirk Capital complete the mortgage transaction; it only requires that Kirk Capital “pursue the arranging of a loan” on behalf of the client on terms that are set out in the Agreement. Entitlement to a service commission is secured by the issuance of a commitment by a lender which is brought about by the efforts of Kirk Capital or its agents or the execution of an agreement by the client to give a mortgage. That view is also inconsistent with long standing principles of law that have been applied in claims for commissions in real estate transactions. In *Turner, Meakin & Co. v. Yip*, (1953), 8 W.W.R. (N.S.) 168 (B.C.C.A.), the Court adopted the following statement of law from the judgment of the Privy Council in *Burchell v. Gowrie and Blockhouse Collieries*, [1910] AC 614, 80 LJPC 41, at p. 624:

There was no dispute about the law applicable to the first question. It was admitted that, in the words of Erle, C.J. in *Green v. Bartlett* (1863) 14 CB (NS) 681, 32 LJPC 261, 143 ER 613, ‘if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him.’ Or in the words of the latter authorities, the plaintiff must show that some act of his was the *causa causans* of the sale (*Tribe v. Taylor* [1876] 1 CPD 505, at 510) or was an efficient cause of the sale (*Millar, Son & Co. v. Radford* [1903] 19 TLR 575).

127. The facts of this case, however, are that the mortgage transaction was concluded by another submortgage broker some 11 months after Howard was terminated and that it was not the same deal as Howard was working to secure a commitment on before his termination.
128. As a matter of law, those facts do not disentitle Howard to his commission wages, unless the continuity between the original relation brought about by him and the concluded transaction has been not merely dislocated or postponed, but broken: see *McDonald Realty (1974) Ltd. v Saunders*, [1997] B.C.J. No. 1182 (B.C.S.C.); *Robertson-Neff and Associates Ltd. v. House*, (1978) 7 B.C.L.R. 142 at p. 145; *Bow's Emporium Ltd. v. A.R. Brett & Co.*, (1927) 44 T.L.R. 194 at p. 199; and *Taylor v. Silver Giant Mines Ltd.* [1954 3 DLR 225, (S.C.C)]. I accept, therefore, the submission of counsel for Kirk Capital that if Howard is to claim any entitlement to commission wages, the facts must show an unbroken continuity between his efforts and the resulting mortgage. In *Taylor v. Silver Giant Mines Ltd.*, supra, the Court said the following:
- . . . the agent is entitled to his commission unless the continuity between the original relation brought about by him has been *entirely severed* and he took no part in the proceedings which re-initiated the relation and led to the eventual conclusion of the deal.  
(emphasis added)
129. I am not persuaded that the language used in the employment contract or the context in which that language was intended to operate abrogates the application of the above legal principles in this case.
130. Returning to the Determination, none of the findings made in denying Howard commission wages on 4351 No. 3 Road are, as a matter of law, determinative of his entitlement because none of them, either individually or collectively, show the continuity in the relationship between the client and SMSCU, which was originally brought about by him, has been broken. Neither the passage of time, differences in the mortgage commitment and the concluded mortgage or the introduction of another submortgage broker are determinative of a break in continuity. The Director has not considered Howard's entitlement from the perspective of continuity. All of the facts and circumstances between the date of Howard's termination and the completion of the transaction, including all documentation and correspondence, need to be examined before deciding whether a break in continuity between his efforts and the eventual conclusion of the deal has occurred.
131. I am satisfied the Director erred in law in the analysis of his claim for entitlement. I am also satisfied the Director has failed to observe principles of natural justice by failing to acquire and consider evidence that was relevant to the question of law that had to be addressed.
132. This aspect of the Determination is cancelled. I must decide the appropriate remedy. I could either attempt to decide these issues myself based on the Record before me, or cancel this part of the Determination and remit this matter back to the Director. Howard objects to the matter being referred back to the Director. He says such a result would be unfair and inefficient.
133. Except for the failure of the investigating delegate to properly address the question of continuity, I have found no error in the Determination. Particularly, Howard has not been successful in attempting to demonstrate a pervasive failure to comply with principles of natural justice in making the Determination. The Record reveals a comprehensive investigation that was flawed by an incorrect view on a question of law, and a consequent failure to appreciate the need for relevant evidence to be acquired and analyzed. For that reason only, the appeal has partly succeeded.



134. At present, the factual record is not sufficient for a proper assessment of the issue of Howard's entitlement on the 4351 No. 3 Road file, so I am not in a position to make this determination myself. Further, given the limited grounds of appeal under the Act, it is more in keeping with the Tribunal's role to remit this case back to the Director for further investigation and consideration. In my view, the appropriate remedy in this case is to remit the matter back.

135. I would add the following. When reviewing this matter, the Director should be mindful of two points. First, the purposes of the Act are set out in section 2 and include ensuring the promotion of fair treatment of both employers and employees and encouraging fair and efficient procedures for resolving disputes. "Fairness" is a fundamental principle underpinning all of the provisions of the Act and the Regulation (see *Shelley Fitzpatrick operating as Docker's Pub and Grill*, BC EST #D511/98). Second, the Director should be aware of the following comment from *Shell Canada Products Limited Produits Shell Limitée*, *supra*:

It is important to note that this is not a case that can be characterized as the employer making a thinly disguised attempt to frustrate Verticchio's right to receive the incentive in question. Nor is this a case where the employer has unlawfully terminated the employee in order to avoid paying a financial incentive that it would otherwise be contractually bound to pay. It is probable that in such circumstances, the Tribunal would be less inclined to give effect to the contractual relationship.

### ***Deduction of Costs***

136. Howard says the Director erred in law by allowing Kirk Capital to deduct office and miscellaneous expenses from commission wages. The Director found the deducted expenses related to the sharing of office and other expenses and was within those matters described in Schedule "A" of the employment contract. The Director found that Howard's signature on the employment contract was a written assignment of the debts created by the applicable provisions of the employment agreement. I am not convinced there was any error in that finding. Accordingly, I reject Howard's assertion that there was no agreement about his obligation to pay office and other expenses. As a result, the decision of the Director is supported by Sections 21 and 22 of the Act, which was explained in the following terms in *Lawson Oates Chrysler Ltd.*, BC EST #D288/96:

Section 21 (1) of the Act states, "*Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose*". The Act does permit an employer to honour a credit obligation, section 22 (4) states "*An employer may honour an employee's **written** assignment of wages to meet a credit obligation*" (emphasis added).

137. Howard says no explanation or accounting has been done for the deducted costs. The material on the Record suggests otherwise. The Record indicates many discussions relating to the deduction of legal and other costs and that Howard was quite aware which costs were being deducted as office and other Schedule "A" expenses, and what was being deducted as legal costs. The Record also indicates that while the deduction of legal costs was an issue hotly contested by Howard, the deduction of office and other Schedule "A" expenses was not. Regardless, the burden is on Howard to show there is a reviewable error. That burden includes showing the deductions allowed by the Director are not included in those matters which Howard agreed in the employment contract would be debt obligations to Kirk Capital. That burden has not been met. This aspect of the appeal is dismissed.

138. Howard has raised a general issue concerning the sufficiency of the reasons. The Tribunal has said on many occasions that the reasons, and their sufficiency, are a necessary component of ensuring compliance the purposes of the *Act* and with the rules of natural justice. In *Hilliard*, BC EST # D296/97, the Tribunal said:
- One of the purposes of the Act, as set out in Section 2, is to “. . . promote the fair treatment of employees and employers. . .”. Another purpose is to “. . . provide fair and efficient procedures for resolving disputes. . .”. In my view, neither of these purposes can be achieved in absence of a clear set of reasons for a decision that either an employee is owed wages or is not owed wages by an employer. In addition, to ensure that the principles of natural justice are met, a person named in a Determination is entitled to know the decision resulting from an investigation and the basis for that decision. Without sufficient reasons, a person cannot assess the decision which includes knowing the case made against them or the case to be met if there is an appeal, and determining whether there are grounds for an appeal.
139. The Director has a statutory duty to give reasons (Section 81(1.3)). The failure to provide adequate reasons can have a significant impact on the right to appeal. The adequacy of the reasons should be viewed from the perspective of preserving and protecting the right of a person served with a Determination to appeal that decision.
140. Where the basis for the Determination is plain from the Record, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the Tribunal would likely not intervene. In this case, it is unfair to say the Determination contains no reasons for the decisions made. While Howard may disagree with the decision and clearly is critical of the extent of the reasons given in the Determination, he has not shown the reasons which were given have in any way affected his ability to appeal the Director’s decision. I do not accept that the reasons set out in the Determination contravene principles of natural justice or constitute any basis for rejecting the Determination.
141. Howard also says that statements made in the Determination inadequately convey the real facts, and consequently represent half-truths which, by default, represent deceit and fraud, fraudulent misrepresentation, bad faith, bias and breach of natural justice relating to the other half. Suffice to say, the burden of validating those allegations on objectively clear and cogent evidence is on Howard: see *Dusty Investments c.o.b. Honda North, supra*. Apart from evidentiary deficiencies flowing from the error of law made by the Director on the issue of Howard’s entitlement to commission wages on 4351 No. 3 Road, which I have referred back, there is nothing to this allegation beyond Howard’s perception of the relative importance of some of the evidence compared to how it was reflected in the Determination. This aspect of the appeal is rejected.
142. Howard’s reference to earlier decisions of the Tribunal considering an extension of time for filing an appeal are misplaced, as those decisions were set aside by the Court on judicial review.

**ORDER**

- <sup>143.</sup> Pursuant to Section 115 of the *Act*, I order that part of the Determination dated November 25, 2002 relating to Howard's entitlement to commission wages on the 4351 No. 3 Road file be set aside and the claim referred back to the Director. In all other respects, I order the Determination be confirmed.

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