



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.: 2007A/139

DATE OF DECISION: January 29, 2008

DECISION

SUBMISSIONS

Grant Howard	on his own behalf
Michael R. Kilgallin	on behalf of Kirk Capital Corporation
J.R. Dunne	on behalf of the director

OVERVIEW

1. This decision completes an appeal filed by Grant Howard (“Howard”) under Section 112 of the *Employment Standards Act* (the “Act”) of a Determination that was 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”). Following an investigation of the complaint, 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.
3. Howard appealed the Determination on December 24, 2002. The Tribunal concluded 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.
4. 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.
5. Following the Court’s decision, the Tribunal considered the appeal and issued a decision, BC EST #D011/07 (the “original decision”). In the original decision, the Tribunal dismissed a substantial part of the appeal, confirming the Determination in respect of those matters, but found the Director had not fully considered Howard’s claim for commission wages on the financing transaction relating to the property at 4351 No. 3 Road from the perspective of a possible continuity between the efforts Howard had made to bring about financing for that property and the mortgage financing that was completed approximately 11 months after he was terminated.
6. That matter was remitted back to the Director under the statutory authority given to the Tribunal in Section 115 of the *Act*, which states:

115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

(a) confirm, vary or cancel the determination under appeal, or

(b) refer the matter back to the director.

7. Howard objects to both the authority of the Tribunal to make a decision to refer back and to the referral back process. Counsel for Kirk Capital has referred to the Tribunal's decision *Hub-City Boat Yard Ltd.*, BC EST #D027/04 as summarizing the authority, the policy rationale and the statutory objective of the Tribunal referring a matter back to the Director under Section 115. I agree with that summary and adopt it as an appropriate response to Howard's criticism of and opposition to the process adopted in the original decision for dealing with the gap in the Determination:

The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, and where a reinvestigation or reconsideration is required, with directions (see *Re Zhang*, BC EST #D130/01). The Tribunal's decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to confirm, vary or cancel the Determination with the benefit of the Director's reinvestigation and reconsideration, but without the delay and expense involved with the making of a new Determination (with a new right of appeal).

8. In accordance with the order made in the original decision, the Director has conducted a further investigation and has issued a supplement to the Determination, dated November 2, 2007 (the "Supplement"). Howard did not participate in the investigation relating to the Supplement.
9. In the Supplement, the Director has concluded that Howard was not the effective cause of the completed financial transaction on 4351 No. 3 Road (the "property") and dismissed that part of his claim. The Director found that "it was the preponderance of Hoehn's efforts that were the eventual cause of bringing a conclusion to the financing on the No. 3 Road property".
10. The Supplement has been provided to Howard and Kirk Capital for review and comment. Counsel for Kirk Capital has filed two submissions, one generally accepting the conclusion reached by the Director and the other responding to a submission delivered to the Tribunal by Howard on December 7, 2007. Howard has also filed two submissions.
11. Notwithstanding the view taken by Howard, the Supplement and this decision continue to be elements of the appeal process commenced by Howard on December 24, 2002.

ISSUE

12. The only matter returned to the Director was the question of whether the facts and circumstances between the date of Howard's termination and the completion of the transaction showed a continuity between his efforts to secure financing for the property prior to his termination and the completion of the financing transaction.

THE FACTS

13. The facts as found by the Director are set out in the Supplement and do not need to be entirely restated here. The information received, and to a large extent, relied on by the Director was provided by Grant Thomas ("Thomas") of Kirk Capital and Karen Hoehn ("Hoehn") who was employed by Kirk Capital

over the relevant period as a submortgage broker and was also involved in arranging the financing on the property.

14. Kirk Capital also provided the Director with a large amount of documentation relating to the issue referred back.
15. I will note at the outset, and return to later in this decision, that the commitment letter from Surrey Metro Savings Credit Union (“SMSCU”) which was originally issued on August 17, 2000 and re-issued on August 22, 2000, is not included among these documents. I find this omission to be extremely discomfoting since I strongly suggested in the original decision that the August commitment letter was a potentially probative document.
16. The findings of fact made by the Director recite that Howard came to be involved in efforts to find financing for the property in April 2000 and that his involvement continued until his termination on August 1, 2000. The Determination refers to the letter of July 27, 2000 which was sent to Howard by William J. Letourneau, Assistant to the President of 482451 B.C. Ltd. (the “client”). The Director characterizes this letter, in light of subsequent events, as a “termination of negotiations”, stating the “information . . . supports the position that the relationship between the client and Howard was at an end and its agents would not have been involved in the final conclusion of the financing if Hoehn had not taken on the work on a voluntary basis.”
17. The Determination finds the only commonality between the work done by Howard on the file and the final conclusion of financing was the lender, SMSCU. The Director finds the financing itself was considerably different than what was delivered to Howard by SMSCU on April 19, 2000. The following differences are cited:
 - The commitment fee in the April 19, 2000 document was shown as \$38,350; the commitment fee in the June 8, 2001 commitment letter was \$70,000;
 - The June 8, 2001 commitment letter included an administration fee of \$14,000 that was not mentioned in the April 19, 2000 document;
 - The final amount of the mortgage was \$7,000,000; the April 19, 2000 document referred to a mortgage amount of \$7,670,000; and
 - The interest rate for the financing, described in the Exclusive Agency Agreement as between 8% and 9% and later changed by the client to a range of 7.75% and 8.00%, was completed at 8.75%.
18. The Determination indicates that little weight was given to the commitment letter, because they are easily obtained, “dime a dozen” documents.
19. The Director found there were several hurdles that Hoehn had to overcome to successfully conclude the financing, including a consolidation of the property, several changes by the client of the person appointed to act on their behalf, a fact the Director finds made it difficult to maintain a consistent approach to communications with the client, changes to the conditions for financing and addition requirements demanded by SMSCU.
20. The Director did not conclude the circumstances showed that Kirk Capital was simply trying to avoid paying Howard a commission by terminating his employment. The information provided to the Director

indicated Kirk Capital did not stand to increase their portion of the commission whether Hoehn or Howard completed the financing.

SUBMISSIONS AND ARGUMENT

21. As indicated above, Kirk Capital and Howard have each made two submissions on the Supplement.
22. In its first submission, Kirk Capital makes two points. First, because Howard did not participate in the investigation of the referral back, he should be precluded from submitting additional evidence unless he can satisfy the conditions for the admission of such evidence on appeal set out in *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03. Second, the resulting investigation was fair, the evidence was clear and the result reached by the Director was reasonable. Kirk Capital submits that the evidence falls far short of showing Howard either “arranged” or was the “effective cause” of the financing on the property.
23. In respect of Howard’s first submission, I will confine myself to those parts of the submission that address the issue. Howard disputes aspects of the information provided to the Director by Thomas and Hoehn and set out in the Supplement. He challenges the statement attributed to Thomas that the “Exclusive Agency Agreement . . . had conditions attached to it that would make it virtually impossible to put a deal together”. Howard says the final financing remained consistent with the terms of the Exclusive Agency Agreement that were negotiated by him. Howard says the only contentious part of the Exclusive Agency Agreement was the amount of the commission, but that matter was one between Kirk Capital and the client, did not involve the lender and did not impede the issuance of a commitment by the lender, SMSCU. Howard also notes that the terms and conditions required by the lender, which were set out in the July 31, 2000 letter from SMSCU and which he had brought together, were accepted by the client when Kirk Capital reduced its broker fee commission from 2% to .85%.
24. Howard says some of the information attributed to Hoehn is inconsistent with other evidence. He has specifically referred to her comments that the financing for the property was “essentially a dead deal” at the time Howard was terminated and that she was asked by Kirk Capital after Howard’s departure “if she wanted to continue working on the deal”.
25. He also challenges findings and conclusions made by the Director in the Supplement. His submissions and arguments in this respect do not flow from any new or additional evidence.
26. He says there is no evidence that Hoehn was ever involved in putting together any part of the financing for the property before he was terminated. Rather, he says the evidence shows Hoehn was completely reliant on what he had done at the time she assumed conduct of the file and secured the commitment from SMSCU in late July 2000 and the commitment letters in August 2000.
27. He says there is no evidence indicating a break in continuity between the client and Kirk Capital; the financing that he had put in motion progressed to completion. He submits that the matters referred to by the Director as indicative of considerable differences between what he had done and the final terms of the financing are not determinative. He says the final financing was materially the same as what he had negotiated during his involvement. He submits that the Director’s characterization of the July 27, 2000 letter and the events immediately following that letter are a “gross and patently unreasonable error of law and fact.

28. Howard argues that while the Director has indicated the focus of the Supplement would be on the issue of continuity, the Director has digressed from that focus to an analysis of the terms and conditions of the financing, which Howard says are substantially similar to those in the Exclusive Agency Agreement.
29. Howard says the Director has failed to consider the issue from the perspective of what constitutes “effective cause” at law, has demonstrated a complete misunderstanding of commercial mortgage brokerage and has reached a wrong conclusion on whether Howard was an “effective cause” in the final financing transaction. Howard says the Director has missed or ignored the provisions of the Exclusive Agency Agreement and his involvement in developing the terms and conditions relating to the financing on the property.
30. Kirk Capital’s second submission addresses Howard’s first submission. Kirk Capital says Howard’s submission completely misses the point - that having consciously chosen not to participate in the investigation on the referral back, he should not be able to challenge the substance of it or the reasonableness of the conclusions found in it. Kirk Capital also says that Howard may not take issue with the fact that there was additional evidence collected and considered by the Director; that such a process is implicit in the decision by the Tribunal to refer the matter back under Section 115 of the *Act*. Kirk Capital says the position taken by Howard is entirely inconsistent with his position in his earlier appeal submissions that the Director had failed to properly investigate his claims for commission entitlement.
31. Kirk Capital says the errors by Howard in refusing to accept the authority of the Tribunal to refer the issue back to the Director and in refusing to accept the authority of the Director to seek additional evidence relating to the issue carry over into his submission on the Supplement, which in substance addresses that decision from the perspective of the evidence as Howard views it, rather than on the evidence that was actually before the Director.
32. Kirk Capital raises Howard’s approach to the August 1, 2000 letter as a prime example of the errors made by him. Kirk Capital says the letter cannot be viewed in complete isolation from all of the other evidence, but must be examined in context and when that is done, as the Director did, the conclusion that Howard’s attempts to arrange a deal for the client had come to an end was a reasonable one. Kirk Capital says that if Howard disagrees with that conclusion, he could have participated in the process and provided evidence and argument for a different conclusion, but he did not then and may not do so now.
33. Howard’s final reply is extensive and, at times, strays from the issue that was to be considered in the referral back. It includes his response to a June 29, 2007 letter from counsel for Kirk Capital, filed as part of the referral back investigation, a submission on the material provided during the referral back investigation and a reply to the last submission made on behalf of Kirk Capital.
34. He doesn’t directly address the submission by Kirk Capital concerning whether he should be allowed to introduce new evidence, choosing instead to continue voicing his objection to the referral back process generally.
35. A substantial portion of Howard’s submission addresses the effect of the language of the Exclusive Agency Agreement and his employment contract on his entitlement to a commission related to his involvement in financing the property. These submissions were addressed in the original decision and are largely unrelated to the matter that was referred back to the Director, which was whether the continuity between the original relationship brought about by him and the concluded transaction was broken. To the

extent these arguments seek to address the result of the original decision, I have given them no consideration.

36. Howard does submit, however, as he did in his first submission on the Supplement, that the facts do not support a finding that the relationship between Kirk Capital and the client was ever at an end, and argues that certain facts and circumstances are material to the question of whether the relationship between the client and SMSCU continued unbroken from his involvement in April 2000 until the final completion of financing:

1. he introduced the client to SMSCU;
2. he furnished the relevant and important documents to SMSCU and negotiated the terms and conditions for financing with SMSCU on behalf of the client;
3. the client stayed with Kirk Capital under the same Exclusive Agency Agreement from April 2000 until the financing was completed in June 2001;
4. there is no indication the client ever sought financing on the property except through Kirk Capital;
5. Hoehn stepped into a financing arrangement that had been brought about and worked on by him from April 2000 until his wrongful termination on August 1, 2000;
6. the commitment letter issued by SMSCU in August 2000 appears to have been issued on terms that were substantially the same as those set out in the Exclusive Agency Agreement;
7. the acquisition of a new tenant did not fundamentally change the principal amount of the mortgage or the interest rate;
8. the acquisition of an anchor tenant had been raised by SMSCU before he was terminated;
9. SMSCU issued the commitment letter in August 2000 without the client having acquired the new tenant;
10. there is no indication that the consolidation of the property was done by Hoehn or that it affected the financing that Howard had originally brought about;
11. the August 1, 2000 letter from Hoehn to the client reinforces the terms and conditions from the July 31, 2000 letter from SMSCU, saying “there will be no further negotiation”; and
12. the terms of the final financing are essentially the same as those described in the August 1, 2000 letter.

37. Howard argues that the circumstances relied on by the Director and Kirk Capital – the change in submortgage brokers, the addition of a new tenant on the property, the consolidation of the property, changes in the terms of the financing, additional requirements imposed by the lender and the terms of the final financing – are not unique occurrences and did not break continuity in the transaction.

ANALYSIS

38. The burden continues to be on Howard. The nature of that burden is described by the Tribunal in *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). In the context of the issue that was referred back and addressed in the Supplement, the nature of that burden requires the

Tribunal to be persuaded that the Director erred in finding Howard was not the effective cause of bringing about the financing of the property that was concluded in June 2001, with Howard bearing the risk that the Tribunal may not be so persuaded.

39. The basis for the referral back is included in the following statement from the original decision:

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 *MacDonald 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)

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.

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.
(at paras. 128-130)

40. Decisions of the Courts, some of which are identified above and in the original decision, note that issue in cases of this sort is whether a person claiming entitlement to the commission was the "effective cause" of the final transaction. In *MacDonald Realty (1974) Ltd.*, supra, Quijano, J. endorses the statement made by Hutcheon J. in *Robertson-Neff and Associates Ltd. v. House* (1978), 7 B.C.L.R. 142, at page 145:

The only question that needs to be answered is whether the plaintiff was an effective cause of the sale of the shares from House to Millar and Middleton, and the answer to that question depends on whether the negotiations between the vendor and the purchasers terminated in April 1976 or were postponed.

41. A resolution to the central question turns on the facts of each case: *MacDonald Realty (1974) Ltd.*, supra, at para. 25. There is a common question which runs through the analysis of this issue in many of the cases: was there an unbroken continuity between the efforts of the claimant and the final transaction? In other words and in the context of this case, on the facts, was there a clear end to the efforts of Howard and the final financing transaction? If there was, it cannot logically follow that he either "arranged" the final financing transaction or was its "effective cause". The Director found, on the facts,

that there was a break in continuity between the efforts of Howard and the completion of the financing transaction.

42. The finding of the Director must be accepted as a finding of fact for the purpose of the Tribunal's authority under Section 112 of the *Act*. To reiterate what was said concerning the scope of that authority at para. 80 of the original decision: 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).

43. 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.

44. In the circumstances of this case the operative provisions of the *Act* may be summarized as follows: if there is evidence establishing facts which, reasonably considered, support the conclusion that the relation between the client and SMSCU which was brought about by Howard in April 2000 was terminated, or broken, at some point between April 2000 and June 2001, no error of law arises and the Tribunal is without authority to review that finding under Section 112 of the *Act*; on the other hand, if there is no evidence for the finding made by the Director or if the Director has taken a view of the facts that cannot reasonably be entertained, the Tribunal has authority to review that decision under section 112 of the *Act* as an error of law.

45. A consideration of this question requires a review of the facts, the evidence, the findings of facts made by the Director and the basis for those findings tested against a proper legal analysis. In the original decision, I noted that as a matter of law, the passage of time, differences in the mortgage commitment and the concluded mortgage or the introduction of another submortgage broker are not determinative of a break in continuity. I accept the following statement from *Re Max Centre City Realty Ltd. v. Friesen and Friesen*, [2002] B.C.J. 1404, at paras. 56 and 57, as setting out the commonly accepted analysis that will be applied to questions such as that which was referred back to the Director in this case:

The Broken Chain:

56 If the Claimant is unable to show an unbroken continuity between its efforts and the eventual sale, it cannot be successful.

57 In *Bow's Emporium Ltd. v. A.R. Brett & Co.* (1927) 44 T.L.R. 194 at p. 199, Lord Shaw states:

(1) When it is proved - and it must, of course be proved - that parties to a transaction are brought together, not necessarily personally, but in the relation of buyer and seller through the agency of an intermediary employed for the purpose, the law simply is that if a transaction ensues, then that intermediary is entitled to his reward as such agent; (2) nor is

he disentitled thereto because delays have occurred, unless the continuity between the original relation brought about by the agent and the ultimate transaction has been not merely dislocated or postponed, but broken; and (3) finally, the introduction by one of the parties to a transaction of another agent or go between does not deprive the original agent of his legal rights, and he cannot thus be defeated therein.

46. There is no issue that Howard brought together SMSCU and the client in April 2000. The client had signed an Exclusive Agency Agreement with Kirk Capital on April 17, 2000. At the time, Howard was the submortgage broker on that Agreement. Howard obtained an expression of interest from SMSCU in financing a first mortgage for the client. The terms on which that expression was issued are found in a letter from SMSCU to Kirk Capital/Howard on April 19, 2000.
47. The financing did not proceed smoothly. It appears that the main stumbling block was a concern by SMSCU that there would not be sufficient income from the property to service the debt. The concerns are raised in communications between Howard and Mr. Ford, of SMSCU in June 2000. As a result of SMSCU's apparently waning interest, Howard sought other expressions of interest, although it does not appear that any other expression of interest proceeded very far and SMSCU was never out of the picture. Howard continued to work with SMSCU and, on July 27, 2000, SMSCU revised its expression of interest and provided it to Howard, who passed it on to the client.
48. By this time, however, the working relationship between Howard and the client appears to have soured. The reason is not completely clear, but it may have related to his intransigence about reducing the service commission which had been agreed to by the client in the Exclusive Agency Agreement signed in April. Kirk Capital terminated Howard on August 1, 2000. The Director found Howard had been terminated without cause and without notice or compensation in lieu of notice and the termination was, accordingly, a contravention of Section 63 of the *Act*.
49. On the same day, August 1, 2000, Hoehn sent the July 27, 2000 letter from SMSCU to the client, indicating in the letter, among other things, that SMSCU continued to have a "live expression of interest" which was still open to the client on the terms and conditions set out.
50. On August 17, 2000 SMSCU issued a commitment letter. That commitment letter was reissued on August 22, 2000 following some discussions between the client and SMSCU. Neither commitment letter has been provided to the Director, nor has it been sought by the Director. The failure of Kirk Capital to provide the commitment letters amounts to an implied admission that they would not support their arguments: see J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (1999), at p. 297; R. v. Jolivet, [2000] 1 S.C.R. 751, 2000 SCC 29, 185 D.L.R. (4th) 626, at para. 28.
51. The Director has provided no reason for not seeking that letter. I do not view the suggestion that such documents are "dime a dozen" as a valid reason in the circumstances for not requiring their production. In the absence of evidence to the contrary, I am entitled to conclude that the financing commitment made by SMSCU through Kirk Capital on August 17, 2000 was consistent with the terms and conditions described in the Exclusive Agency Agreement and the July 27, 2000 expression of interest letter. There is just no evidence that the commitment letters issued by SMSCU on August 17, 2000, and reissued on August 22, 2000, were not substantially the product of Howard's efforts. Nor is there any evidence of a break in continuity between the efforts of Howard up to the end of July 2000 and the issuance of the commitment letters.

52. In any event, I do not accept the characterization by the Director of a commitment letter generally as having little weight, or being “a dime a dozen”. Those descriptions are probably quite accurate in relation to letters that are clearly identified as expressions of interest, such as the April 19 and July 27, 2000 letters from SMSCU, but legally there is significant difference between the two; a letter simply expressing interest creates no legal obligation on the client under the Exclusive Agency Agreement to pay a commission, while a commitment to loan does. In other words, the commitment letter issued August 17, 2000 would have triggered the obligation on the part of the client to pay a service commission.
53. The finding by the Director that the “relationship between the client and Howard was at an end” is, in the circumstances, not shown to be relevant to what the Director was asked to do in the referral back, which was to examine all of the facts and circumstances between the date of Howard’s termination and the completion of the transaction, including all documentation and correspondence, and decide whether there was a break in continuity between his efforts and the completed financial transaction. The Director has misdirected himself by focussing on the relationship between the client and Howard. As indicated in the excerpt from *Bow's Emporium Ltd. v. A.R. Brett & Co.*, *supra*, the introduction of another agent into the transaction does not deprive the original agent of his or her rights if the continuity between the efforts of that person and the completed transaction is unbroken. There is no evidence of a break in the continuity of the transaction at the time of, or immediately following, Howard’s termination.
54. After August 22, 2000, when the commitment letter was reissued, with some changes, an examination of the material provided to the Director, which includes an unsigned copy of a new Mortgage Funding Commission Agreement dated September 14, 2000, does not show any break in continuity between August and the completion of the transaction in June 2001. The material provided by Kirk Capital in the referral back process includes a confidential fax memo from Hoehn to the client, also dated September 14, 2000, that seems to be related to the new Mortgage Funding Commission Agreement. That memo states, in part:
- If we do not have this signed contract by this time [September 14, 2000 at 5:00 pm], we will be forced to take you to court to collect our 2.0% commission and funding with Surrey Metro Savings Credit Union will collapse.
55. That statement carries two implications: first, a perception by Kirk Capital that the April 2000 Exclusive Agency Agreement continued to be effective and legally enforceable; and second, the SMSCU financing commitment had not collapsed as of September 2000.
56. There were two periods of delay in completing the financial transaction: the first appears to be related to securing an “anchor tenant” for the property; the second to a consolidation of the property with an adjoining parcel of land.
57. The former matter appears to have delayed the transaction for approximately three months. In a letter dated September 25, 2000, Hoehn notified SMSCU that:
- We are working directly with the client’s lawyer . . . in our efforts to satisfy the remaining conditions, and we are confident that we can arrange the documentation by the end of this month.
58. It seems that her optimism was misplaced. There are documents created in October and November 2000 indicating the process of securing an “anchor tenant” was being addressed, but not yet completed. Kirk Capital seems to have been involved to some extent in that process. A December 15, 2000 letter to the clients over the signatures of Hoehn and Mr. Boris Bozic contains the following paragraph:

As pursuant to your call on Friday, December 15, this letter is to confirm that the Mortgage Group and its Broker, Karin Hoehn, have agreed to *continue a working relationship* with the client(s), and have alerted the lender, Surrey Metro Savings Credit Union, that a new lease agreement on the property, representing an anchor tenant, is now forthcoming. (emphasis added)

59. In a letter dated December 20, 2000 from Hoehn and Mr. Bozic, SMSCU was notified that the lease agreement for an “anchor tenant” had been concluded. In January 2001 Hoehn updated the rent roll and schedule of tenants for SMSCU.
60. Nothing in any of the documentation up to the end of December 2000 indicates the transaction which Howard had brokered was at an end.
61. There is a gap in the documents from January 17, 2001 to late March 2001. This gap is not explained or examined in the Supplement, but appears to have occurred as a result of a concern on the part of SMSCU with the status of a parcel of land in the south-west corner of the property. Apparently, SMSCU wanted that parcel consolidated with the property and thus included in the property covered by the mortgage they had committed to.
62. There were efforts on the part of the client to have the transaction completed and mortgage funds advanced without the consolidation being completed. The client proposed that in a letter dated April 17, 2001. This was not acceptable to SMSCU and it advised the client of that in a letter dated April 18, 2001, a copy of which was provided to Hoehn.
63. On May 7, 2001, a new Mortgage Funding Commission Agreement was signed between the client and Kirk Capital.
64. The consolidation was completed in May 2001; some residual conditions were completed through early June 2001. On June 8, 2001, SMSCU issued a financing commitment letter replacing the ones issued on August 17 and August 22, 2000.
65. The transaction was concluded with the registration of the mortgage on June 28, 2001.
66. None of the facts relied on by the Director are such that would demonstrate to an objective viewer that there was a break in continuity in the relation between the client and SMSCU. On a complete examination of the facts, while there were delays in completing the transaction, I can find no break in the continuity from the original relation brought about by Howard and the final completed transaction. At no time did Kirk Capital, the client and SMSCU terminate the relationship with each other that had been established in April 2000. It is fair to say there were delays and changes to the terms and conditions of the relationship as it was first framed, but none of those show the relationship was at an end. Accordingly, I find the Director erred in law in deciding Howard was not the “effective cause” of the completed financial transaction. I do accept that Howard was not the exclusive cause of the completed transaction and that Hoehn contributed significantly to it.
67. It was, however, primarily Howard’s effort that led to the commitment letters issued in August 2000. Howard performed the event that the parties had agreed would entitle him to remuneration. I find the appeal on this aspect of the Determination is successful and find that Howard was entitled to commission wages for work he performed relating to the financing of the 4351 No. 3 Road property. I cancel that part of the Determination that concludes he was not entitled to wages for that work.

68. The question remains; what wages is Howard entitled to?

REMEDY

69. The Tribunal has the authority to decide the amount of wages owing. Kirk Capital has made some submissions in this regard during the referral back process.

70. The Tribunal recognizes, however, that Howard's employment contract contemplates that other submortgage brokers could be involved in arranging the same mortgage as Howard and provides that in such cases, there should be a negotiated agreement between Howard and the other submortgage broker of their respective portions of the service fee commission.

71. I am not particularly optimistic that any agreement can be reached if Kirk Capital, Hoehn and Howard are left to their own devices. In my view, the appropriate process would be to have these parties attempt to reach an agreement on the wages owing to Howard through the intervention of and with the assistance of a third party mediator.

72. The Tribunal does not have the resources to involve itself in attempting to mediate an agreement. The *Act* contemplates the Director may mediate all or parts of a complaint and under Section 78 of the *Act* is given statutory authority to assist in settling a complaint.

73. Accordingly, the matter of deciding the wages owing to Howard as a result of this decision is referred back to the Director with the expectation that the Director will attempt to mediate a settlement with the parties and, failing settlement, will issue an amendment to the Determination reflecting the total wage amounts found owing.

ORDER

74. Pursuant to Section 115 of the *Act*, I order the Determination, including the Supplement, be cancelled on the question of whether Howard was entitled to commission wages for work he performed on the 4351 No. 3 Road property and be replaced with the conclusion found in this decision. I also order that the matter of determining the amount of wages owed be referred back to the Director.

David B. Stevenson
Member
Employment Standards Tribunal