

An appeal

- by -

YourFloors Chilliwack Inc.
(“YourFloors”)

- 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.: 2012A/113

DATE OF DECISION: February 14, 2013

DECISION

SUBMISSIONS

Cheryl Klippenstein	on behalf of YourFloors Chilliwack Inc.
Gwen Randall, Q.C.	Counsel for Carmen Peters
Jennifer Redekop	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) YourFloors Chilliwack Inc (“YourFloors”) has filed an appeal of a Determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on August 30, 2012.
2. The Determination found that YourFloors had contravened Part 3, section 18, Part 5, section 45, Part 7, section 58 and Part 8, section 63 of the *Act* in respect of the employment of Carmen Peters (“Ms. Peters”) and ordered YourFloors to pay Ms. Peters an amount of \$11,033.69, an amount that included wages and interest under section 88 of the *Act*.
3. The Director also imposed administrative penalties on YourFloors under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00.
4. The total amount of the Determination is \$12,533.69.
5. In its appeal, YourFloors alleges the Director erred in law and failed to observe principles of natural justice in making the Determination by finding Ms. Peters was entitled to regular wages, commission wages in the amount found to be owed, compensation for length of service, statutory holiday pay and annual vacation pay in the amount found to be owed. YourFloors does not dispute Ms. Peters is owed some wages, but in an amount considerably less than what was found by the Director. While not raised as a specific ground, the appeal also appears to rely on evidence which is being submitted to the Tribunal but which was not provided to the Director when the Determination was being made.
6. In decision BC EST # D131/12, I requested submissions on that part of the appeal questioning whether the Director had erred in finding Ms. Peters entitled to commission wages in the amount found to be owed to her by the Director. All other elements of the appeal were dismissed in that decision under section 114(1) of the *Act*.
7. In this part of the appeal, YourFloors seeks to have the Determination varied by recalculating the commissions owing.
8. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from Determination, the material on the section 112(5) “record”,

together with the written submissions of the parties and any additional evidence allowed by the Tribunal to be added to the “record”.

ISSUE

9. The issues in this appeal are whether there is evidence which has become available that was not available at the time the Determination was made which ought to be admitted into this appeal and whether YourFloors has shown the Director erred in law or failed to observe principles of natural justice in making the Determination on commission wages.

THE FACTS

10. YourFloors operated a flooring business in Chilliwack. Ms. Peters was employed as a salesperson until her termination on, or about, August 2, 2011. There was an issue about the term of her employment with YourFloors, revolving around whether she had been employed by a company apparently related to YourFloors for a period from February 28, 2011, to May 6, 2011, and by YourFloors from May 20, 2011, until her termination. The Director found Ms. Peters was employed by YourFloors for the entire period of her employment – February 28 to July 29, 2011. This finding impacted on Ms. Peters’ entitlement to compensation for length of service.
11. Ms. Peters claimed she was entitled to 10 or 11 days’ wages for the final pay period in which she worked. YourFloors argued she had worked only 9 days in that pay period. The Director found she was owed wages for those 9 days, that section 18 of the *Act* required those wages to be paid no later than July 31, 2011, and that they had not been paid as required. This part of the appeal has been dismissed under section 114(1) of the *Act* in decision BC EST # D131/12.
12. Ms. Peters claimed she was owed commission wages. There was no dispute from YourFloors that she was owed \$2,514.35 for commissions earned in June 2011 and for some of the commissions she was claiming for July 2011. There was a disagreement concerning two aspects of the commission wages being claimed. First, YourFloors contended the calculation of commissions should take into account matters included in a column marked “Error” on the Commission Sheet. The Director, based on the provisions of the employment agreement and the prevailing practice of the parties, found errors should not be taken into account in calculating commissions owed. Second, YourFloors argued that as Ms. Peters’ employment was terminated prior to some of the sales being completed, she was not entitled to commission on those. The Director found, interpreting and applying the provisions of the employment agreement relating to commission entitlement, that commissions were “earned” when Ms. Peters had attracted the account and obtained a deposit on the sale. The Director examined each of the accounts for which a commission was claimed by Ms. Peters, and disputed by YourFloors, and made findings in respect of them, allowing most of the claims and denying three.
13. As noted above, the Director found that Ms. Peters’ was entitled to compensation for length of service in an amount equal to one weeks’ wages, based on the finding that her period of employment with YourFloors was more than 3, but less than 12, consecutive months: see section 63(1).
14. The Director found Ms. Peters was entitled to statutory holiday pay for the May 23, 2011, and July 1, 2011, statutory holidays. The Director found no evidence indicating Ms. Peters worked on any of the statutory holidays and the wage entitlement for those days was based on an average days’ pay as determined under section 45 of the *Act* and section 37.14 of the *Regulation*.

15. The Director found no evidence that Ms. Peters was ever paid annual vacation pay and found she was entitled to that statutory benefit based on the gross amount of wages the Director found was earned during her employment, which included the amounts the Director found were not paid but which in the Determination were found to be earned and payable under the *Act*.
16. The appeals on the above findings were dismissed in BC EST # D131/12.
17. The Determination addresses the claim for commission wages at pages R6 to R10, which sets out the facts presented by the parties on that claim, and on pages R15 to R20, which provides an analysis of the facts, evidence and argument presented by the parties on the claim.

ARGUMENT

18. YourFloors challenges the findings of the Director on two issues relating to Ms. Peters' claim for commission wages: first, whether errors should be applied in calculating commissions; and second, whether commissions are earned and payable before an installation is fully completed and the customer had paid the account in full.
19. On the first challenge, YourFloors contends the evidence before the Director, contrary to the finding made in the Determination, did show the commission amounts listed for Ms. Peters were adjusted for errors.
20. In respect of the second issue, YourFloors appears to have provided evidence with the appeal that was not before the Director when the Determination was being made, although the "new evidence" ground in section 112(1) is not mentioned in the appeal. YourFloors says this evidence, and other evidence which also appears not to have been provided to the Director, shows Ms. Peters only received commission when the installation was complete and the account paid in full.
21. Also, YourFloors says the Director erred in interpreting the employment contract to require the payment of commission wages on transactions that were not completed and paid for at the time Ms. Peters' employment was terminated.
22. The Director and Ms. Peters have both responded to the appeal.
23. The response filed on behalf of Ms. Peters notes the material provided in support of the appeal should not be considered; she says all of this material predated Ms. Peters' dismissal and was not included in YourFloors' response to her claims. Counsel submits Ms. Peters' job was limited to soliciting customers for the business and securing a deposit on any orders placed by those customers. Counsel submits Ms. Peters was not responsible for ordering the product, monitoring its arrival, arranging its installation or for the final account sent to the customer.
24. The submission of the Director also says the new evidence that has been submitted with the appeal could have been provided before the Determination was made and, on that basis, it should not be admitted. The Director points to several requests made to and opportunities given to YourFloors during the complaint investigation to submit evidence.
25. In response to the two areas where YourFloors has asserted the Director erred – adjusting commissions for errors and commission entitlement after termination – the Director says, based on the available evidence there was no error reached in either area.

26. In respect of the former, the Director says most of the evidence and all of the documents submitted in YourFloors' appeal were not provided to the Director during the complaint investigation. The Director says the only information YourFloors provided that specifically addressed the issue of adjusting for errors was their May 25, 2012, letter and that information was considered when making the decision on this issue.
27. On the latter issue, the Director says the Determination was based on a fair reading of the employment contract and the evidence provided. The evidence provided with the appeal was not provided during the complaint investigation. The Director notes there was a specific finding that Ms. Peters' "commissions were earned when she had attracted the account and obtained the deposit" (at page R16) and there was no language in the employment agreement that required the sale to be completed and the installation to have taken place before commissions were earned.
28. In their final response, YourFloors says the "new" evidence submitted with the appeal was provided in their original submission on the complaint; it was just presented in a different manner. YourFloors restates its position on the appeal: that the evidence provided to the Director during the complaint investigation contained information indicating Ms. Peters' commissions were adjusted for errors and Ms. Peters was not entitled to commissions on transactions that were not completed before she was terminated.

ANALYSIS

29. The grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was made.*

30. An appeal to the Tribunal under Section 112 is not intended as an opportunity to either resubmit the evidence and argument that was before the Director in the complaint process or submit evidence and argument that was not provided during the complaint process, hoping to have the Tribunal review and reweigh the issues and reach different conclusions.
31. The Tribunal has established that an appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112. More particularly, a party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
32. As I indicated in BC EST # D131/12, the *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation. 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.

33. The above principle applies most specifically to the finding made by the Director that Ms. Peters' commission was earned when she had attracted the account and secured a deposit. Ms. Klippenstein, in the final reply submission filed by YourFloors, takes issue with the Director asserting YourFloors never provided an explanation of the duties of the sales representative. While she claims to recall the Director asking her for an explanation of the duties of Ms. Peters in some unspecified telephone conversation, she does not indicate that her response was inconsistent with the finding made by the Director or that it provided any basis for concluding the Director's finding is an error of law. Accordingly, that finding, for the purposes of this appeal, stands.
34. Otherwise, assertions of fact made by YourFloors in the appeal that challenge or are inconsistent with findings of fact made in the Determination, but do not demonstrate an error of law, may not be considered by the Tribunal.
35. I will first deal with the attempt by YourFloors to introduce additional evidence in this appeal. The Tribunal is given discretion to accept or refuse new or additional evidence. This discretion is not intended to allow a person dissatisfied with the result of a Determination the opportunity to seek out evidence to supplement what was already provided to, or acquired by, the Director during the complaint process, with the objective of having the Tribunal review and re-weigh all of the evidence, new and old, and reach a different conclusion if that evidence could have been provided at the time the Determination was made.
36. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination. New or additional evidence which does not satisfy any of these conditions will rarely be accepted: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.
37. I find the "new" evidence sought to be admitted by YourFloors should not be allowed. It was reasonably available when the investigation was being conducted and could have been provided to the Director. As I will set out later in this decision, I do not find this evidence to be relevant or capable of resulting in a different conclusion than what was found by the Director in the Determination. As well, I accept the submission of the Director, as it is supported by the "record", that YourFloors was given ample opportunity to provide the kind of detailed information it now seeks to add to the "record", but failed to use that opportunity.
38. Accordingly, the two substantive issues raised in this appeal will be decided on the findings of fact made in the Determination and those facts which may not have been stated in the Determination, but are apparent in the "record".

39. On the issue of adjusting the commission for errors, I find YourFloors has not shown there was an error in the Determination on any of the grounds of review. The decision of the Director was based on findings of fact that were reasonably grounded in the language of the Employment Agreement, the evidence that was provided to the Director and the insufficiency of the evidence provided by YourFloors before the Determination was made.
40. On the issue of Ms. Peters' entitlement to commissions on sales not completed and paid for until after her termination, I find this issue can be decided from the following points that arise in the Determination and the evidence on the "record": first, from the finding that Ms. Peters "commissions were earned when she had attracted the account and obtained the deposit"; and second, from a reading of the Employment Agreement which contains no language making her entitlement to a commission on a sale that has been completed and paid for conditional on her continued employment with YourFloors.
41. In decision BC EST # D131/12, I invited the parties to consider the Tribunal's decision in *Halston Homes Limited*, BC EST # D527/00 in the context of the appeal on this issue. YourFloors and counsel for Ms. Peters have not specifically addressed this decision. The Director acknowledges that applying the comments in *Halston Homes Limited* to the findings made in this case, the termination of Ms. Peters' employment with YourFloors would not disentitle her to commissions earned if the work required to earn the commission was completed, which, as noted above, was a finding made by the Director in this case.
42. I agree with the perception of the Director. Ms. Peters was entitled to wages for the work she performed and under the *Act* YourFloors was required to pay those wages. I interject at this point to note that when the commissions were actually paid does not determine when they were earned and "payable". In *Fabrisol Holdings Ltd., operating as Ragfinder*, BC EST # D376/96, the Tribunal decided that commissions, which are included in the definition of "wages" in section 1 of the *Act*, become payable under the *Act* when they are "earned". The decision notes that, as a matter of practice, the Director relaxes the legal requirement to pay all commission wages in the pay period they are earned (section 17), provided the employee is paid some wages, representing at least minimum wage, but said that practice, "does not change the legal conclusion that the *Act* says wages, which includes commissions, become payable, unless their payment is conditional upon some future event, when they are earned" (at page 5). Consequently, even if I accept that as a matter of practice YourFloors did not pay the commission until the installation was complete and the account was paid in full that would not alter the conclusion that, as a matter of law under the *Act*, Ms. Peters had earned the commission once her job – attracting the account and securing the deposit – was complete.
43. For all the above reasons, I find the Director made no error in law in making the Determination on commission wages.
44. This part of the appeal is also dismissed.
45. In sum, the effect of this decision and the decision in BC EST # D131/12 is to dismiss the entirety of YourFloors' appeal.

ORDER

- ^{46.} Pursuant to section 115 of the *Act*, the Determination dated August 30, 2012, is confirmed in the total amount of \$12,533.69, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal