

An appeal

- by -

Metasoft Systems Inc.  
(“Metasoft”)

- 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.:** 2011A/184

**DATE OF DECISION:** February 22, 2012

## DECISION

### SUBMISSIONS

Todd Sherman	on behalf of Metasoft Systems Inc.
Ashley R. Ayliffe and Christopher D. Drinovz	on behalf of Marcie L. Roy
J.R. Dunne	on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Metasoft Systems Inc. (“Metasoft”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 9, 2011.
2. The Determination was made in respect of a complaint filed by Marcie L. Roy (“Ms. Roy”), who alleged Metasoft had contravened Part 8, section 63 of the *Act* by failing to pay length of service compensation and Part 10, section 83 of the *Act* by refusing to continue her employment for reasons prohibited by that provision.
3. The Director found Metasoft had contravened section 63 and section 83 of the *Act* when they terminated Ms. Roy and ordered the company to pay an amount of \$20,149.03, an amount which included wages and interest.
4. The Director also imposed an administrative penalty on Metasoft under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00.
5. The total amount of the Determination is \$20,649.03.
6. Metasoft has appealed that part of the Determination relating to the finding of a contravention of section 83 of the *Act*. Metasoft does not contend Ms. Roy was not entitled to length of service compensation. Metasoft contends the Director failed to observe the principles of natural justice in making the Determination.
7. 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 the written submissions and the material on the section 112(5) “record”, together with the submissions of the parties.

### ISSUE

8. The issue raised in this appeal is whether Metasoft has shown the Director failed to observe the principles of natural justice in making the Determination.

## THE FACTS

9. The Determination contains an extensive examination of the facts. By way of background, the Determination indicates that Metasoft is a software sales company; that Ms. Roy was employed by Metasoft as a sales associate from May 12, 2003, to September 30, 2010, when her employment was terminated.
10. Following her termination, Ms. Roy filed a complaint with the Director, alleging Metasoft had contravened sections 63 and 83 of the *Act*. The Director unsuccessfully attempted to mediate a resolution of the complaint. A complaint hearing was scheduled and cancelled. The complaint was investigated and a Determination was issued.
11. The Determination contains the following paragraph:

During the course of the investigation both parties submitted a large amount of documentation including numerous e-mails. I have reviewed all the evidence submitted to me, and although I have considered it all, I am only including in this Determination that which I consider to be relevant.
12. Metasoft argued that Ms. Roy had quit her employment and, accordingly was not entitled to compensation for length of service. The Director found Metasoft had not shown Ms. Roy had quit her employment, or had otherwise acted in a manner that discharged Metasoft from its statutory liability to pay her length of service compensation.
13. The Director found that Ms. Roy had met the burden of showing Metasoft had contravened section 83 of the *Act*.

## ARGUMENT

14. The appeal submission of Metasoft is grounded in the contention that the Director failed to observe principles of natural justice in making the Determination for “not having all the involved parties actually meet” before the Determination was issued. The suggestion in the appeal submission is that Metasoft responded to the complaint on the expectation a face-to-face meeting would be held and there would be a “thorough vetting of the material”. Metasoft says the Director’s appreciation of the evidence was affected by not having such a meeting.
15. The appeal submission introduces an explanation relating to Ms. Roy having received a minimum wage payment that was later deducted that was not provided to the Director during the complaint investigation process.
16. Metasoft contends the Director failed to appreciate the effect of, and therefore ignored, some of the facts that were presented. As examples, Metasoft says, contrary to the finding made by the Director, they did not want Ms. Roy to leave the company. In support of that assertion Metasoft points to a communication from Ms. Roy to her direct supervisor, Mr. Rusty Jones, on August 4, 2010, in which she indicated her intention to leave the company at the end of August. The appeal submission says that if Metasoft wanted her to leave, they could have simply accepted the letter and the Director ignored the logic in this evidence. Metasoft submits the Director also dismissed the fact that Ms. Roy had threatened to and/or lodged employment standards complaints “on numerous occasions in the past” without incurring any discipline or admonishment from the company. Metasoft argues the adage “past behaviour is the best predictor of future action” applies and Metasoft’s past action in response to Ms. Roy’s previous complaints should not have been dismissed so lightly by the Director.

17. Metasoft says these matters should have tipped the balance against Ms. Roy meeting the burden of proof that was on her in the section 83 issue.
18. The Director and counsel for Ms. Roy have responded to the appeal.
19. The Director says the fact the parties did not meet in person does not establish a denial of natural justice. There was no indication from Metasoft that they did not understand the proceedings or the issues raised by the complaint. Metasoft was provided with ample opportunity to know the case against them; to respond to that case and to present its own case.
20. The Director says the explanation provided by Metasoft for having later deducted the minimum wage payment made to Ms. Roy on June 30, 2010, is new; it was not provided during the investigation. In any event, the Director notes that the fact a deduction was made without Ms. Roy's consent, despite having been provided with information regarding the requirements of the *Act*, remains unaffected by the explanation.
21. The Director says the examples of "ignoring facts presented" are not accurate. A reading of the Determination clearly show those facts were considered, along with all of the other evidence presented by the parties. The Director says the appeal merely seeks to re-argue the case in an attempt to have the Tribunal reach a different conclusion.
22. Counsel for Ms. Roy submits Metasoft has not shown there was a denial of natural justice. Counsel says that in the circumstances, Metasoft received natural justice: Metasoft was made aware of the details of the complaint; were made aware of material evidence submitted on behalf of Ms. Roy; and given an opportunity to respond.
23. Counsel for Ms. Roy says the Director committed no reviewable error in finding Metasoft contravened section 83 of the *Act*. Counsel argues the Director applied the proper legal test to the facts and reached conclusions that were rationally grounded on those facts. Counsel submits the justification provided by Metasoft for failing to provide Ms. Roy with minimum wage was considered and rejected by the Director. The explanation attributing the subsequent deduction of the minimum wage payment to payroll error is new evidence which could have been provided to the Director during the complaint investigation and is, in any event, a statement unsupported by any objectively reliable evidence.
24. Counsel submits that in all other respects, the appeal reargues the case submitted by Metasoft during the investigation, challenging findings, inferences and conclusions of fact made by the Director that were reasonable and supported by reliable facts.
25. In the final reply, Metasoft summarizes their position on the appeal as follows:
  2. The basis of the appeal is that the company proceeded to respond to the complaint in the expectation there would be a face-to-face meeting or hearing. When that didn't happen, and a determination was simply issued, we did not have the opportunity to put the documents that Mr. Dunne relies on into context.
  3. While there may be no obligation for Mr. Dunne to hold a hearing, it was our clear understanding that there would be one. The failure to hold such a meeting or hearing constitutes a denial of natural justice.

## ANALYSIS

26. 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.*
27. 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.
28. 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.
29. I will first deal with the attempt by Metasoft 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 submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. 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. I find the new evidence sought to be admitted by Metasoft should not be allowed. It was reasonably available when the investigation was being conducted and could have been provided to the Director. It is unsupported by any objective material. As well, I would not find such evidence to be capable of resulting in a different conclusion than what was found by the Director in the Determination.
30. In respect of the ground of appeal advanced by Metasoft, I find the material and the submissions of Metasoft do not show there was a failure by the Director to observe the principles of natural justice in making the Determination.
31. In challenging the findings by the Director on the section 83 issue, Metasoft says the “process was hampered by not having the parties actually meet”. Metasoft says they had an expectation and an understanding there would be a meeting or hearing and the Director’s failure to hold such meeting or hearing was a denial of natural justice. Metasoft, correctly, appears to concede the Director is not obligated to have a face-to-face meeting. In that respect, I observe that the *Act* appears to provide the Director with a level of discretion about whether to conduct an investigation and does not direct how an investigation is to be conducted. The decision of the Director about the complaint process is not *per se* open to challenge on natural justice

grounds. There may well be a failure to observe principles of natural justice within the complaint process selected by the Director, but that would be substantially different than there being a breach arising directly from the process chosen, and would have to be established on objective evidence: see *Jennifer Oster*, BC EST # D120/08, and *Emmanuel's House of Dosas Inc.*, BC EST # D006/11.

32. In the context of the complaint process conducted in this case, the notion of “natural justice” requires the Director to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way. That requirement substantially echoes what is set out in section 77 of the *Act*. As the Tribunal stated in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

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

33. It is clear from the Determination and the material in the section 112(5) “record” that Metasoft was provided with the opportunity to know the claim being made by Ms. Roy and an opportunity to present their position on that claim. There is no suggestion, and in any event no evidence, of any bias on the part of the decision maker.

34. There is, however, a suggestion in the appeal submission that a breach of natural justice evolved through some understanding or expectation held by Metasoft about how the complaint investigation process would be conducted. There is reference in that submission to the Director having said, in May 2011, that “instead of going back and forth between the parties it is easier to get the parties together to review the documents and allow for thorough vetting of material”. As noted in the response of counsel for Ms. Roy, reference to this comment is unsupported by any evidence that might identify the date on which the comment was allegedly made, in what form it was communicated and the name of the person or persons to whom the comment was allegedly made. I would add that the appeal submission contains no reference to the context in which the comment was allegedly made by the Director, whether there was any response by Metasoft, and, if so, what it was, and how this alleged statement affected Metasoft’s approach to the complaint or its ability to respond. I also note there was more than five months between the time the comment was allegedly made – May 2011 – and the date of the Determination. There is nothing in the file at all suggesting a meeting or hearing might take place and, perhaps more to the point, no inquiry from Metasoft in all that time about when, or if, a meeting might occur. In *James Hubert D’Hondt operating as D’Hondt Farms*, BC EST # RD021/05, the Tribunal made the following statement in respect of allegations such as are suggested in this appeal:

A finding that the Branch has breached natural justice through representations or assurances that were reasonably relied upon and misled a party is a serious matter. While sworn evidence is not necessarily required, clear and reliable first party evidence is required.

35. There is no evidence in this appeal that the Director actually made any representations or gave any assurances about conducting a meeting or hearing nor is there any evidence that the conduct of the Director during the complaint process could reasonably have given rise to the understanding and expectation which Metasoft contends it had.

36. Metasoft has not met the burden of showing the Director failed to observe principles of natural justice and this ground of appeal is dismissed.
37. The remainder of the appeal does no more than challenge findings and conclusions of fact made by the Director on the section 83 issue while resubmitting Metasoft's position on the section 83 issue.
38. It is well established that the Tribunal has no authority to consider appeals based on alleged errors in findings and conclusions of fact unless such findings and conclusions amount to an error of law (see *Britco Structures Ltd.*, BC EST # D260/03). 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.
39. It suffices to say that I find no error of law in the Determination. The conclusion reached by the Director on the section 83 issue followed an analysis of the evidence presented by the parties during the complaint process and is rationally supported on the facts and the law. While I appreciate that Metasoft disagrees with the conclusion, it is not shown that any of the factual findings and conclusions were made without any evidence at all, were perverse and inexplicable or that the Director misapplied the law of the *Act* relating to section 83.
40. The appeal is dismissed.

## ORDER

41. Pursuant to Section 115 of the *Act*, I order the Determination dated November 9, 2011, be confirmed in the total amount of \$20,649.03, together with any interest that has accrued under Section 88 of the *Act*.

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