

An appeal

- by -

Allan Greenfield  
("Mr. Greenfield")

- 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:** Shafik Bhalloo

**FILE No.:** 2008A/7

**DATE OF DECISION:** March 26, 2008

## DECISION

### OVERVIEW

1. Allan Greenfield (“Mr. Greenfield”) filed a complaint (the “Complaint”) under Section 74 of the *Employment Standards Act* (the “Act”) with the Director of Employment Standards (the “Director”) alleging that his employer, Lunapress Inc. carrying on business as Marketmyclub.com (“Lunapress”) contravened the Act by failing to pay him commissions earned.
2. The delegate of the Director (the “Delegate”) investigated the Complaint and following his investigation issued a determination dated December 24, 2007 (the “Determination”), dismissing the Complaint.
3. Mr. Greenfield is appealing the Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Determination.
4. Mr. Greenfield is asking the Tribunal to change or vary the Determination. While Mr. Greenfield does not specifically delineate how he wants the Determination changed or varied, one can deduce from his submissions that he is really seeking a cancellation of the Determination together with an order requiring Lunapress to pay him the commissions he claims he is owed.
5. Mr. Greenfield has requested an oral hearing of his appeal. However, the Tribunal is of the view that an oral hearing is not necessary in order to adjudicate this appeal. Therefore, the Tribunal will determine the appeal based on the review of the Determination, the written submissions of Mr. Greenfield, Lunapress and the Director and the Section 112(5) “Record”.

### ISSUE

6. The sole issue in this appeal is whether the Director failed to observe the principles of natural justice in making the Determination.

### FACTS

7. Lunapress operates a marketing business in Kelowna, British Columbia.
8. Mr. Greenfield was employed as a Business Development Manager with Lunapress from March 1, 2006 to September 20, 2006 at the rate of pay of \$3,000.00 per month.
9. Mr. Greenfield claims that he was hired by Lunapress to generate annual subscription sales for the graphics services that Lunapress sold to health and fitness clubs. According to Mr. Greenfield, the service sold for \$1,695.00 (USD) and that he was entitled to receive a commission of \$600.00 (USD) on each subscription he sold, the same amount as that paid to outside consultants who sold subscriptions for Lunapress.
10. Mr. Greenfield claims that he sold 11 such subscriptions for which Lunapress failed to pay him commissions.

11. The founder and CEO of Lunapress, Sherry Robb (“Ms. Robb”), states that she hired Mr. Greenfield to manage the marketing needs of the growing client base of Lunapress and it was a term of Mr. Greenfield’s agreement or employment with Lunapress that he would write marketing plans, schedule client campaigns and perform various other client care duties.
12. Ms. Robb also states that under the agreement between Lunapress and Mr. Greenfield the latter received a salary of \$3,000.00 per month and had the opportunity to earn an extra \$5.00 per month from the sales of an electronic newsletter service provided by Lunapress called Clubcast. The sale of the said newsletter generated \$60.00 per year per client and Mr. Greenfield, having made three such sales, was paid \$180.00 in total for his sales of the newsletter. Ms. Robb produced to the Delegate a cheque dated April 27, 2007 in the amount of \$180 payable to Mr. Greenfield in support of her submission.
13. Ms. Robb further states that there was never any agreement between Lunapress and Mr. Greenfield for the payment of any commissions on the sales of subscriptions by him. She states that commissions for subscription sales were only paid to outside sales consultants who were not employees of Lunapress and were compensated strictly on a commission basis.
14. Ms. Robb further indicates that as a salaried employee, unlike the outside sales consultants, Mr. Greenfield was paid his salary regardless of the number of sales he made.
15. The Comptroller for Lunapress, Carla Jackson (“Ms. Jackson”), indicated to the Delegate that Lunapress hired Mr. Greenfield on March 1, 2006 at a flat contract rate of \$3,200.00 for that month. Subsequently, however, Mr. Greenfield became an employee of Lunapress at the salaried rate of \$3,000.00 per month and there was never any agreement to pay him any commissions in addition to his salary, according to Ms. Jackson.
16. Ms. Jackson also corroborated Ms. Robb with respect to the arrangement of Lunapress to pay Mr. Greenfield an additional \$5.00 for every Clubcast electronic newsletter service he sold on behalf of Lunapress.
17. Kerry McCabe (“Ms. McCabe”), who was employed as the office organizer at Lunapress and Ms. Robb’s assistant at the time Mr. Greenfield was hired, indicated that she worked directly with Mr. Greenfield in creating his job description and that his primary function was to work with clients in co-ordinating their various project needs with the art department.
18. Ms. McCabe also indicated that while Mr. Greenfield’s duties included sales, it was never agreed he would receive anything but his salary for performing this function of his job. According to Ms. McCabe, it was everyone’s job to sell subscriptions and that it was made clear to salaried staff that there was no commission for subscription sales.
19. Ms. McCabe, as with Ms. Jackson, indicated that she was aware that Ms. Robb and Mr. Greenfield had a side arrangement, which allowed Mr. Greenfield to earn or receive \$5.00 per month for each Clubcast newsletter he sold.
20. The Creative Director for Lunapress, Steve Ettridge (“Mr. Ettridge”), stated in a letter he submitted to the Delegate that at the time he was hired by Ms. Robb to work for Lunapress in mid-March 2006, he asked Ms. Robb if there would be an opportunity to earn commissions and Ms. Robb replied that there was no

provision for any staff to earn commissions at that time. Mr. Ettridge also indicated that the no-commission policy continued to be in place as at December 2007.

21. According to Mr. Greenfield, his hiring by Lunapress was “behind closed doors” between Ms. Robb and him and no one else was present.

22. In the findings and analysis of the Determination, the Delegate stated:

“The burden of proof in this matter rests with Mr. Greenfield to establish on a balance of probabilities that the deal struck with Lunapress was as he is claiming, salary and commissions. Once that is done, the onus would shift to Lunapress to prove it has paid Mr. Greenfield in accordance with the Act and the agreed upon remuneration”.

23. According to the Delegate, given the conflicting stories between Mr. Greenfield and the witnesses of Lunapress, he was required to assess the credibility of the evidence submitted by both parties. In his assessment, the Delegate states that the evidence of the witnesses of Lunapress was consistent and credible and therefore, he preferred it to Mr. Greenfield’s evidence.

24. Further, in the Delegate’s view, Mr. Greenfield failed to establish his claim on a balance of probabilities.

### **SUBMISSIONS OF MR. GREENFIELD**

25. Mr. Greenfield contends that he provided the Director or the Delegate with a written statement from Ms. Sharon MacKenzie (“Ms. MacKenzie”), a former employee of Lunapress, to support his claim for unpaid commissions but the Delegate failed to consider Ms. MacKenzie’s written statement in making the Determination and did not contact her before making the Determination. Similarly, Mr. Greenfield contends that the Delegate failed to contact another former employee of Lunapress, Mr. Kelly Powers (“Mr. Powers”), whose contact information Mr. Greenfield supplied to the Delegate. Both Ms. Mackenzie and Mr. Powers, according to Mr. Greenfield, “would confirm that there was a bell that was rung after each sale was made” by him and that “there was a map mounted on a cork board with a pin stuck in the location of each of the sales made” in the office of Lunapress.

26. Mr. Greenfield also submits that the Director or the Delegate “made a subjective Determination which failed to observe the evidence provided” and is critical of the Delegate’s assessment of the credibility of the witnesses and findings of fact.

27. Mr. Greenfield also challenges the credibility of the witnesses of Lunapress and, particularly, Ms. Jackson, Ms. McCabe and Mr. Ettridge. He also refers to the attendance of Mr. Ron Buddo (“Mr. Buddo”), who is the business partner of Ms. Robb and her spouse, in the proceeding before the Delegate (I trust he is referring to the investigation process as there was no hearing held before the Delegate) and contends that Mr. Buddo’s comments to the Delegate were “negative and derogatory and inappropriate” and “may have also influenced the Director’s Determination” but no mention of these comments is made in the Determination.

### **SUBMISSIONS OF LUNAPRESS**

28. Lunapress, in response to Mr. Greenfield’s appeal, has presented written submissions of Mr. Buddo and Ms. Robb and a copy of the e-mail of Mr. Ettridge to Ms. Robb.

29. I do not find it necessary to reiterate the submissions made by Mr. Buddo, Ms. Robb and Mr. Ettridge on behalf of Lunapress except to describe them in a very general manner for the reasons I explain herein.
30. In his submissions, Mr. Buddo explains his relationship to Lunapress and Ms. Robb. While Mr. Buddo was not present in the hiring meeting between Ms. Robb and Mr. Greenfield, Mr. Buddo states that he was involved in the decision to terminate Mr. Greenfield's employment. Mr. Buddo then goes on to challenge the credibility of Mr. Greenfield and the two individuals Mr. Greenfield refers to in his submissions, Mr. Powers and Ms. MacKenzie, by sharing his knowledge of certain behaviours and actions all three were allegedly involved in. I find Mr. Buddo's submissions in this regard unhelpful and frankly irrelevant for the purposes of the appeal and do not wish to specifically set them out in any detail here.
31. With respect to Ms. Robb's written submissions, I find that Ms. Robb, to a large extent, reiterates the submissions she made to the Delegate during the latter's investigation of the Complaint and which the Delegate, in numerous instances in the Determination, mentions. Further, Ms. Robb, as with her partner Mr. Buddo, attempts in her written submissions to discredit Mr. Powers and Ms. Mackenzie by sharing her view and knowledge of their alleged behaviours and actions in the past. I find these submissions of Ms. Robb irrelevant and unhelpful in this appeal. Similarly I find unhelpful in the appeal the submissions of Ms. Robb buttressing the credibility of the witnesses of Lunapress, namely, Ms. Jackson, Ms. McCabe and Mr. Ettridge. Accordingly, I do not find it necessary to delineate with any particularity or specificity the submissions of Ms. Robb.
32. Lunapress has also submitted the e-mail of Mr. Ettridge dated February 22, 2008 addressed to Ms. Robb, commenting on her and Mr. Buddo's morals and integrity. I do not find that e-mail very helpful and relevant to this appeal.

### **SUBMISSIONS OF THE DIRECTOR**

33. The Director states that Mr. Greenfield is simply rearguing the Determination.
34. The Director further asserts that he does not recall, in the investigation of the Complaint, finding or seeing a written statement of Ms. MacKenzie from Mr. Greenfield. The Director admits that both Ms. Mackenzie and Mr. Powers names came up during the Delegate's investigation but it was in irrelevant context. In particular, the Director notes that Ms. Mackenzie's and Mr. Powers names came up in context supporting Mr. Greenfield's position that he actually made the subscription sales. However, neither one of these individuals were in the room with Mr. Greenfield and Ms. Robb at the time the "deal was struck for his compensation". In the circumstances, the Director states that even if Mr. Greenfield had provided Ms. Mackenzie's statement to the Delegate, the probative value of such statement would be questionable since the main issue is whether it was a term of Mr. Greenfield's employment that he would be compensated for the sales and not whether he made the sales. This is clearly set out in the Director's following submission:

"The preliminary issue that had to be decided was whether compensation to Mr. Greenfield included commissions on subscriptions. He claimed it was to include commissions while Lunapress claimed that it did not. In a Determination I decided that his claim, on the balance had not been proven. I took no position with respect whether he actually made the sales, that issue would have been addressed if I found that his compensation included commissions on the

subscriptions. I found otherwise so establishing who made the sale was not a finding that was required.”

35. Finally, on the subject of Mr. Greenfield’s burden of proof, The Director states:

“I approach the issue from the position that Mr. Greenfield had the burden of proof because it was he who was asserting the claim, and as set out in the decision, he failed to meet that burden.”

## ANALYSIS

36. Mr. Greenfield’s appeal is based on the allegation that the Director failed to observe the principles of natural justice in making the Determination. To a very significant extent, Mr. Greenfield’s basis for invoking this ground of appeal in Section 112(1)(b) of the *Act* is based on his submission that he presented Ms. Mackenzie’s statement to the Delegate and the contact information of Mr. Powers and the Delegate neither referred to Ms. Mackenzie’s statement in making his Determination nor did he contact either of these individuals who “would confirm that there was a bell that was rung after each sale was made by (Mr.) Greenfield”. Further, both these employees, according to Mr. Greenfield, would “also state that there was a map mounted on a cork board with a pin stuck in the location of each of the sales made.”

37. This Tribunal has indicated in a previous decision, in context of an adjudicative hearing, that one of the most significant tasks of a Delegate is to assess and weigh the evidence presented and determine what evidence is not only relevant but also reliable. If the delegate fails to consider relevant evidence in making the determination, particularly if that evidence is determinative of an issue in the complaint, this could amount to a denial of natural justice (*Re: Economy Movers (2002) Ltd.*, [2007] B.C.E.S.T.D. No. 26 (QL)). In my view, this principle equally applies in context of a delegate’s investigation of a complaint and not simply in the adjudication context.

38. Having said this, in the case at hand, I need not determine whether Mr. Greenfield supplied the Delegate with Ms. Mackenzie’s statement. I simply need to consider what Ms. Mackenzie’s statement purportedly stated and what both Ms. Mackenzie and Mr. Powers would have said had the Delegate contacted them. Since the penultimate issue in Mr. Greenfield’s Complaint is whether or not it was a term of his employment with Lunapress that he would be paid commissions for any sales, neither Ms. Mackenzie’s nor Mr. Powers’ evidence could be relevant.

39. Furthermore, Mr. Greenfield admits that his hiring meeting at which he was advised of the terms of his employment was “closed doors” meeting between himself and Ms. Robb and no one else was present at that meeting. Therefore, even if I were inclined to conclude that Mr. Greenfield presented a statement from Ms. Mackenzie to the Delegate and provided the Delegate with the contact information of Ms. Mackenzie and Mr. Powers and the Delegate failed to contact these individuals, I am still unable to conclude, in such a scenario, that the Delegate failed to observe the principles of natural justice in making the Determination because the purported information Ms. Mackenzie and Mr. Powers had to offer was not determinative of the issue in the Complaint.

40. Having said this, I would like to next consider Mr. Greenfield’s submissions that question and dispute the findings of fact and credibility determinations made by the Delegate in the Determination. In particular, the Delegate noted in the Determination that the evidence of Mr. Greenfield conflicted with the evidence presented by the witnesses for Lunapress on the penultimate issue in the Complaint, namely, whether it

was a term of Mr. Greenfield's contract of employment that he would be paid commissions for any sales he made for Lunapress. Under these circumstances, the Delegate's task was to make an assessment of credibility of Mr. Greenfield against the witnesses presented by Lunapress and determine not only whether one or the other party's witnesses were lying, but also to determine which story is more true in all the circumstances. The following excerpt from the British Columbia Court of Appeal decision in *Farnya v. Chorny* (1952) 2 D.L.R. 354 illustrates the manner in which the determination of credibility must be made:

"The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions..."

41. In my view, the Delegate properly assessed the credibility of witnesses of both parties and preferred the testimony of the witnesses for Lunapress to Mr. Greenfield. Furthermore, I find that the findings of fact made by the Delegate, particularly on the penultimate issue in the Complaint, was amply supported by the evidence of the witnesses of Lunapress and in accord with the principles set out in *Farnya v. Chorny*, *supra*.
42. Finally, I also point out that the grounds of appeal available to Mr. Greenfield are limited to the three delineated in section 112 of the *Act*-error of law, breach of natural justice rules and availability of new evidence. It is neither appropriate for nor is it available to Mr. Greenfield to challenge the Director's findings of fact in his appeal, particularly where the findings of fact in the Delegate's Determination are amply supported in the evidence adduced.
43. It is also not open for this Tribunal to second-guess the Delegate's determination pertaining to the credibility of the witnesses, especially when the Delegate is in a more advantageous position to view and assess the witnesses and their demeanour when presenting their evidence.

## ANALYSIS

44. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**