Employment Standards TRIBUNAL

An appeal

- by -

AltaStream Power Systems Inc.
("APS")

- 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.: 2017A/13

DATE OF DECISION: April 5, 2017

DECISION

SUBMISSIONS

Thomas Beasley — counsel for AltaStream Power Systems Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), AltaStream Power Systems Inc. ("APS") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 19, 2016.

2. The Determination found APS had contravened Part 3, sections 17, 18 and 21, and Part 8, section 63 of the *Act* in respect of the employment of Tyler McMillan (Mr. McMillan") and ordered APS to pay Mr. McMillan wages, including concomitant annual vacation pay and interest, in the total amount of $127,985.73 and to pay administrative penalties in the amount of $2,000.00. The total amount of the Determination is $129,985.73.

3. This appeal is grounded in error of law and failure by the Director to observe principles of natural justice in making the Determination. APS seeks to have the Determination cancelled.

4. In correspondence dated January 31, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.

5. The section 112(5) record (the "record") has been provided to the Tribunal by the Director and a copy has been delivered to APS, which has been provided with the opportunity to object to its completeness. No objection has been received and I am satisfied the record is complete.

6. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
>
> *(a) the appeal is not within the jurisdiction of the tribunal;*
>
> *(b) the appeal was not filed within the applicable time limit;*
>
> *(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
>
> *(d) the appeal was made in bad faith or filed for an improper purpose or motive;*
>
> *(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
>
> *(f) there is no reasonable prospect the appeal will succeed;*
>
> *(g) the substance of the appeal has been appropriately dealt with in another proceeding;*
>
> *(h) one or more of the requirements of section 112(2) have not been met.*

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Mr. McMillan will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

8. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

THE FACTS

9. APS operates a natural gas and power generation company. Mr. McMillan was employed by APS as a business developer from November 3, 2014, to November 25, 2015. Mr. McMillan sold natural gas generators. For the first part of his period of employment, he was on a salary plus commission wage structure and for the latter part of his employment period, he was on commission only wage structure. He was on the commission only wage structure when he was terminated.

10. Following his termination, Mr. McMillan filed a complaint with the Director alleging he was owed commission wages, annual and statutory holiday pay, length of service compensation and minimum wage in every pay period. During the complaint process, Mr. McMillan also claimed APS made improper deductions from his wages and improperly taxed his wages.

11. In respect of the commission only wage structure, the Director found that APS and Mr. McMillan had entered into a Memorandum of Understanding ("MOU") on June 11, 2015, that altered the terms of an earlier "Sales Commission Agreement". The MOU provided, among other things, that effective May 1, 2015, Mr. McMillan would be paid on a 100% commission basis on all quotes produced and presented to APS by Mr. McMillan, and another person who was being compensated in the same way, and accepted by the customer to whom the quote was provided.

12. Mr. McMillan was also receiving a monthly car allowance.

13. Mr. McMillan was paid commission on the "Gross Profit Margin" ("GPM") of the project he had helped secure for APS. There are two types of GPM: the booked GPM, which is the best estimate of what the project will cost; and the actual GPM, which is based on what the project actually cost. The MOU provided that payments of commissions were to be "made on a pro-rated basis" as APS received payment from its customers.

14. Mr. McMillan's commission was calculated and paid on the booked GPM and paid out to him incrementally as APS received payments from the customer. The MOU contained a provision that "on sales over 200K", actual costing would be reviewed upon completion of the project and the commission amount might be adjusted, "based on mutually agreeable cost differences".

15. The MOU also contained a provision relating to one particular sale where the "outstanding amount of commission owed" could, if a "Gross Margin Target" of 1200k was not achieved on that sale, be converted into a loan from Mr. McMillan to APS at 9% annualized interest and be paid monthly (over some unspecified period of time) until fully paid.

16. The MOU required that upon termination of Mr. McMillan's employment, commissions would be paid out in full for any quote that "closes within 90 days of the termination notice date".

17. There were some preliminary issues addressed in the Determination that have not been raised in this appeal.

18. The Determination identifies six substantive issues:

1. Whether Mr. McMillan was owed commission wages;
2. Whether Mr. McMillan was owed minimum wage for any pay period;
3. Whether Mr. McMillan was owed statutory holiday pay;
4. Whether APS made improper deductions;
5. Whether Mr. McMillan was owed compensation for length of service; and
6. Whether Mr. McMillan was owed annual vacation pay.

19. The Director found Mr. McMillan was owed commission wages, annual vacation pay and length of service compensation and that APS had made improper deductions from his wages. The Director found Mr. McMillan, as a salesperson paid entirely by commission, was not entitled to minimum wage or statutory holiday pay.

20. There was agreement between the parties that Mr. McMillan was owed commission wages; the dispute between them was how much was owed and when payments of those amounts should occur.

21. The position of APS was that, for projects where payment in full had been received by APS, commissions owed to Mr. McMillan were determined by the actual GPM of a project and on that basis, he had been paid all commissions owing to him for those projects. For the project described in the Determination as "Skyline", the position of APS was that Mr. McMillan was owed some additional commission wage payments for that project, but as the project was not yet paid in full, the amounts could not be determined. Their position on the other project, described as "CIOC", was that the commission wage payments owed on that project had been converted into a loan, which would be paid in due course.

22. The Director found the MOU was the governing agreement in determining when Mr. McMillan's commissions were earned and how they were to be calculated. The Director decided, for the reasons stated in the Determination, the Sales Commission Agreement was not applicable in determining how Mr. McMillan's commissions were earned and calculated.

23. Based on an analysis of the MOU, the Director concluded Mr. McMillan earned his commission on each sale when the customer accepted and confirmed the working relationship with APS by having the Purchase Order ("PO"), which was based on the bid prepared by Mr. McMillan, delivered to APS. The Director further concluded Mr. McMillan earned his commission in full upon receipt by APS of the PO and not incrementally, as argued by APS, and there were commissions owed on all but one of his sales.

24. The Director found the commission was earned on the booked GPM and, under the terms of the MOU, the amount of the commission could only be adjusted by mutual agreement of the parties to the MOU and there was no evidence of any such agreement. Accordingly, the Director found the unilateral adjustment by APS to Mr. McMillan's commissions were improper deductions from wages and contravened section 21 of the *Act*.

25. The Director also found a contravention of section 21 by APS deducting monthly car lease payments for the last six months of his employment from his wages, by deducting an amount in excess of advances made to Mr. McMillan and by deducting an amount for income tax from an advance made to Mr. McMillan.

26. The parties agreed Mr. McMillan's employment was terminated without cause or notice. There was no issue that Mr. McMillan was entitled to length of service compensation. The Director determined the amount of compensation for length of service should be based on all commission wages Mr. McMillan "earned and/or was paid in his last six months of employment and commissions he has earned but has yet to be paid". That decision by the Director has not been appealed by Mr. McMillan.

ARGUMENT

27. APS submits the Director erred in law and failed to observe principles of natural justice in making the Determination. I shall outline the arguments made by APS under each of these grounds of appeal.

28. The submissions on error of law are extensive but are comprised primarily of reiterating the reasons why the position of APS – that Mr. McMillan's commissions were not "earned and payable" until the project was fully paid by the customer and the *actual* GPM was calculated – should have been accepted by the Director as the correct interpretation of the commission agreement. I do not intend to set out all the arguments raised; rather, I will address those that are material to my decision.

Error of Law

29. APS submits the Director erred in law in finding Mr. McMillan's commissions were "earned and payable all at once upon receipt of the PO". APS says this finding goes against common sense, the past practice of APS and Mr. McMillan and the wording in the MOU stating, "payments will be made on a pro-rated basis as APS receives payments from its customers".

30. The central contention of this argument is that the Director incorrectly interpreted the agreement that established Mr. McMillan's commission wage structure.

31. APS submits the Director erred in deciding section 18 of the *Act* required all commission wages Mr. McMillan claimed ought to have been paid to him within 48 hours of his termination. This argument is entirely dependent on the validity of the central contention.

32. APS argues the Director erred in law in determining the amounts deducted from commissions owed by APS to Mr. McMillan. This argument is also entirely dependent on the central contention, as it presupposes the commissions owed to Mr. McMillan on the relevant projects were based on the *actual* GPM, which is the position of APS, rather than on the *booked* GPM, which is the conclusion reached by the Director.

33. APS submits the Director erred in calculating the amount of compensation for length of service that was payable to Mr. McMillan relative to his termination. The argument suggests the Director calculated compensation for length of service on wages that were not yet earned or payable and applied a method of calculation not allowed by the *Act*. To a large extent, this submission also depends on the validity of the central contention.

Natural Justice

34. APS submits there was no issue in the complaint filed by Mr. McMillan (or in his revision of that complaint) of a breach of section 21 and the Director failed to observe principles of natural justice by going outside of the complaint and not allowing APS to respond on the matter of a breach of sections 21 and 22 of the *Act*.

ANALYSIS

35. 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 being made.*

36. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

37. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is 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.

38. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

39. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

40. APS has grounded this appeal in error of law and failure by the Director to observe principles of natural justice. The submissions on error of law are extensive, but depend almost entirely on whether I am persuaded the Director did not correctly interpret the agreement between APS and Mr. McMillan on his commissions wage structure.

Error of Law

41. The appropriate backdrop to this appeal is contained in comments made by the Tribunal in *Fabrisol Holdings Ltd. operating as Ragfinder*, BC EST # D376/96, which stated the relationship between what is earned and what is payable in the context of commissioned sales persons in the following way:

> As a matter of law, the *Act* identifies wages in the context of work performed by an employee. Simply put, wages are earned when work is performed. The *Act*, with minor exceptions, requires wages to be paid relative to the time they are earned. Section 17 requires an employer to pay its employees at least semi monthly and within 8 days of the end of a pay period all wages earned by the employee in the pay period. The only exceptions to this requirement are banked overtime wages, banked statutory holiday pay and

> vacation pay. Commissions are not an exception to this statutory requirement. As a matter of law, this requirement would compel an employer to pay all commissions earned by employees in the pay period in which they are earned. I understand as a matter of practice, in certain circumstances, the director relaxes this legal requirement for commissioned employees, provided those employees are paid some wages semi monthly, the wages received represent at least minimum wage for all hours worked in the pay period and it is a term of the employment contract to allow deferral of earned commission to a subsequent pay period. This decision is not intended to interfere with that practice, which is eminently sensible in the context of commissioned employees. However, this 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.
>
> Also, Section 18 requires all wages owing to an employee to be paid within 48 hours if the employment is terminated by the employer, or within 6 days, if it is terminated by the employee. In this context, it is the practice of the Director to require all commissions to be paid if they have been earned, without regard to when they might otherwise be paid had the employment not been terminated. There is no exception to this practice.

42. It is appropriate to note in the above comment that arrangements which allow for the deferral of commission payments earned and payable are accommodated but when push comes to shove, as it has here, the requirements of the *Act* apply. Section 4 of the *Act* prohibits arrangements that seek to avoid those requirements. This point answers the argument of the effect of the wording in the MOU that commission wage payments would be made on a pro-rated basis. Such a term can, and I would speculate in most commission agreements probably is, included without offending the requirements of the *Act*, but such a term is not particularly helpful in deciding, as a matter of law under *Act*, when commissions are earned and payable.

43. The above comment is also directly relevant to this case to the factual finding made by the Director, one not challenged in the appeal, that Mr. McMillan's work in securing a client was almost completely done prior to the closing of the sale (delivery of the PO), that "APS provided no evidence to show that he performed post sale work or to show the extent of the work he performed" and, even accepting that some "client follow-up" was necessary, it was minimal. This finding weighs in favour of a conclusion that Mr. McMillan's commission wage agreement should be interpreted in a way that conforms with the requirements and objectives of the *Act* that wages are earned and payable once the work is performed, unless there is a clear expression of intention in the employment contract to achieve a different result.

44. In cases which have considered the issue of when wages were earned and payable in the context of commission salespersons, the Tribunal has recognized the presumptive relationship of work and earnings can be affected by the facts and the terms of the employment contract. This was the primary issue in this case. That issue required an interpretation of the commission wage agreement.

45. The Director has jurisdiction to interpret and enforce the employment contract. There is ample authority supporting such a jurisdiction, see, for example, *Dusty Investments c.o.b. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), *Halston Homes Limited*, BC EST # D527/00, *Shell Canada Products Limited Produits Shell Limitée*, BC EST # RD488/01, *Susan A. McKay*, BC EST # D518/01, *Kamloops Golf and Country Club Limited*, BC EST # D278/01 (Reconsideration denied, BC EST # RD544/01; judicial review dismissed, 2002 BCSC 1324), *Patrick O'Reilly*, BC EST # RD165/02 and *Seann Parcker*, BC EST #D033/04. The following statement is found in *Shell Canada Products Limited Produits Shell Limitée*, (*supra*), at pages 7-8:

> The authority of the Director is limited to enforcing [employment] agreements. The Tribunal has also accepted that parties are free to arrange their relationship as they choose provided the terms of a private

> employment contract do not contravene the requirements of the *Act* and are otherwise consistent with the objectives and purposes of the legislation.

46. The interpretation of an employment contract is a question of general law about which the Director must be correct: see *Director of Employment Standards (Re Kocis)*, BC EST # D331/98 (Reconsideration of BC EST # D114/98), where the Tribunal stated:

> The *Act* does not define when a commission is earned. The relationship between employee and employer is one of contract, and the effect of the *Act* is to prescribe minimum conditions for contracts of employment. The interpretation of an employment contract is a question of law. The entitlement of an employee to a commission depends on the facts and the interpretation of the employment contract.

47. Except for the arguments relating to section 18 of the *Act*, which are largely dependent on APS persuading this panel that the Director's interpretation of the commission agreement is wrong, this appeal does not really dispute the statutory context of the Determination; APS disagrees with the Director's interpretation of the commission agreement, specifically the Director's conclusion that "Mr. McMillan earned his commission in full all at once upon receipt of the PO": at page R20.

48. The burden on APS in this appeal is to show an error of law. For the purpose of appeals that allege an error of law, 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] BCJ No. 2275 (BCCA):

> 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.

49. In the context of the central contention made in this appeal, the operative part of that definition would be "misapplication of an applicable principle of general law".

50. Where the Director is faced with a question of general law, as opposed to a question involving the law of the statute, the Director's analysis must conform to generally accepted legal principles relating to that question of law. In the context of interpreting an employment contract, the principles governing that task are well established. The goal of contract interpretation is to determine, objectively, the parties' intentions at the time the contract was made. The words of the contract are the primary source. If appropriate, reference may be had to extrinsic evidence.

51. From that perspective, I can find no error of law in the Director's finding that the terms of the wage commission agreement were those contained in the MOU and with the analysis or interpretation of the commission wage agreement expressed in the MOU. While APS complains that such an interpretation is unreasonable, irrational and inconsistent with the wording of the MOU, the Director's conclusion was based on an analysis of the terms of the contract and available relevant evidence relating to its formation and operation. There was ample evidence on which the Director could rely in making the findings on the interpretive issue and the view taken by the Director of the evidence was not unreasonable.

52. As suggested earlier in this decision, many of the arguments made under the error of law ground of appeal are dependent on the central contention being accepted. As it has not, these derivative arguments are also not accepted.

53. APS submits the Director' calculation of length of service compensation for Mr. McMillan was an error of law. To the extent such submission depends on APS' position that some of the wages included in that calculation were not "owing", I reject it. It is trite that wages which have been found to be "earned and payable" under the *Act*, as the commission wages of Mr. McMillan were found to be, are "owing" under the *Act*. Section 18 is clear in its application to the findings made by the Director in this case; no error of law has been made.

54. To the extent APS contends the Director erred in law in calculating length of service compensation by averaging Mr. McMillan's wages over a period of six months, rather than eight weeks, I do not find the Director committed any error in that regard. Such an approach has been endorsed in several decisions of the Tribunal: see *BFI Canada Inc.*, BC EST # D017/14, at para. 49.

55. In one of the cases referred to in *BFI Canada Inc., Raymond Man Wah Lee, Director/Officer of C-O-E Posscan Systems Inc. and another*, BC EST # D281/00, the Tribunal stated, at page 2:

> Looking at the commission earnings from the standpoint of "average" commissions, throughout Mr. Law's employment, the average turns out to be $2,975.24. In some cases, an average is appropriate, in other cases, perhaps, not. In some cases, it may be appropriate to consider a relatively short period, in other cases, a longer period. In my view, there is no "magic way" to calculate the liability, the point being that the delegate must consider the "wages that are earned by an employee over a period of time and are reasonably reflective of the employee's typical, regular or usual wages."

56. As noted in *BFI Canada Inc.*, such an approach is sometimes required to prevent an unfairness to either the employee who has been terminated without cause or notice or the employer who may be liable to pay an entirely unrealistic amount if the Director was confined to an eight-week calculation period. In this case, the Director used a six-month period because limiting the calculation period to the last eight weeks of his employment resulted in a calculation that was neither accurately reflective of his earnings nor fair to APS.

Natural Justice

57. APS says the Director failed to observe principles of natural justice because the Director went outside the complaint filed by Mr. McMillan and considered whether section 21 of the *Act* had been contravened and never gave APS an opportunity to be heard on matters that might relate to sections 21 and 22 of the *Act*.

58. As noted above, APS has the burden of persuading the Tribunal there is an error in the Determination that justifies the Tribunal's intervention to correct that error. An allegation alleging denial of natural justice requires evidence in support. The relevant aspects of the allegations made under this ground of appeal are little more than bald assertions not supported by any objective evidence.

59. I will state at the outset, it is not relevant that sections 21 or 22 of the *Act* were not specifically identified in the complaint.

60. The obligation of the Director is to ensure the integrity of the *Act* and that obligation requires the Director to consider and decide, independently of the position of the parties, whether there has been compliance with the requirements of the legislation.

61. Section 74 of the *Act* contains the statutory requirements relating to the filing of complaints with the Director. Section 74(1) of the *Act* states:

> 74 (1) An employee, former employee or other person may complain to the director that a person has contravened
>
> (a) a requirement of Parts 2 to 8 of this Act; or
>
> (b) a requirement of the regulations specified under section 127 (2) (I).

62. Subsection 74(2) says the complaint must be in writing and must be delivered to an office of the Branch. There is no issue that Mr. McMillan complied with those statutory requirements. There is nothing in section 74, or in any other provision of the *Act*, that either requires a complainant to specifically identify the particular contraventions which have taken place or to indicate what is owed. Providing this information at an early stage undoubtedly assists the Director in administering the complaint process, but to suggest it delineates the scope of the Director's jurisdiction is unsupported by any provision and is inconsistent with the general authority of the Director to ensure compliance with the *Act*.

63. Subsection 76(1) of the *Act* requires that the Director, subject to subsection 76(3), accept and review a complaint made under section 74. Reading subsection 76(1) together with subsection 76(2) and section 2, which sets out the purposes of the *Act*, the Director is entitled, and quite probably required, to take a liberal view of the scope of the complaint. That conclusion is, of course, consistent with the statutory purpose of ensuring employees receive at least basic standards of compensation and conditions of employment and with the principles expressed in *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A.), *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Health Labour Relations Association of B.C. v. Prins*, (1982) 40 B.C.L.R. 313, 82 C.L.L.C. 14,215, 140 D.L.R. (3rd) 744.

64. Although concerns about the procedural fairness of the complaint process can arise if the Director does not allow the party under investigation a reasonable opportunity to respond to the Director's appreciation of the complaint following the required review, I find there is no such concern in this case. APS was aware of the case being advanced by Mr. McMillan, was given the right to present its own evidence and to be heard before and independent decision maker: see *Imperial Limousine Service Ltd.*, BC EST # D014/05.

65. The matter of deductions was on the table throughout the complaint process. All of the four matters identified by APS in its submission as amounts included in the Determination for improper deductions were either included in exchanges between APS and Mr. McMillan that are found in the record or flow logically from the claims made by Mr. McMillan.

66. In respect of the automobile lease, APS communicated to Mr. McMillan, through counsel, that it was going to be "invoicing Mr. McMillan 50% of the on-going lease until termination, as well as 50% of the associated costs in terminating the lease". APS also gave evidence on that matter in the complaint hearing, contending the deductions made by APS were authorized by Mr. McMillan.

67. In respect of the deduction from the commission earned on the "Chevron 1050" sale, that was part of the claim associated with the central issue in dispute between the parties, whether commission was earned and payable on booked GPM or actual GPM and could be unilaterally adjusted by APS. With respect to the $975.86, that matter was raised in communications between Mr. McMillan and Mr. Hanssmann, the principal owner and a director of APS, in March 2016, in which Mr. Hanssmann acknowledged the amount as a "carry-over" on advances but considered this amount was part of an overpayment to Mr. McMillan (that could be recovered by APS) and that APS had no "plans to further reconcile [it]". The Determination in respect of the deduction of $3,566.87 was based on an examination of records provided by APS as part of Mr. McMillan's

claim that APS had withheld money from him which was being applied to effectively reduce commissions he felt were payable to him.

68. APS was aware of all these claims that raised a consideration of section 21.

69. The response of APS to Mr. McMillan's commission wage claims was that he was owed nothing; that all commission wages had been paid to him. It seems somewhat incongruous in light of that position that APS would suggest they were not provided with an opportunity to be heard on matters that might relate to sections 21 and 22. APS was given ample opportunity to respond to matters that raised considerations under section 21 of the *Act*, but chose the high road of a blanket denial of Mr. McMillan's claim. I note that the position of Mr. McMillan, stated in his final argument, was that APS had attempted to offset amounts it claimed were owed by him against the amounts he claimed as wages; the position of APS in response, expressed in a submission from their counsel, was that Mr. McMillan's commissions were based on *actual* GPM and calculating his commissions on that basis did not contravene section 21. In the circumstances, it cannot be said APS was denied the opportunity to respond, but it is clear APS did not consider it was necessary to address section 21 in light of their position it did not apply. The opportunity was provided, but not taken.

70. I reiterate that the Determination on the deductions was based on documents provided by APS. There was no issue APS had deducted the amounts; APS claimed it was entitled to do so in the context of calculating Mr. McMillan's commission wage on the *actual* GPM.

71. APS has not established a failure by the Director to observe principles of natural justice in its appeal.

72. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *Act*.

ORDER

73. Pursuant to section 115 of the *Act*, I order the Determination dated December 19, 2016, be confirmed in the amount of $129,985.73, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal