

An appeal

- by -

Alan Lazauskas  
("Mr. Lazauskas")

- 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/43

**DATE OF DECISION:** July 9, 2012

## DECISION

### SUBMISSIONS

Robert Smithson	counsel for Alan Lazauskas
Steven R. Ross	counsel for Skana Forest Products Ltd.
Ed Wall	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 Alan Lazauskas (“Mr. Lazauskas”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 21, 2012.
2. The Determination was made in respect of a complaint filed by Mr. Lazauskas, who alleged his former employer, Skana Forest Products Ltd. (“Skana”), had contravened the *Act* by failing to pay all wages owing to him on the termination of his employment.
3. The Director found the *Act* had not been contravened by Skana, that no wages were outstanding and declined to take any further action on the complaint.
4. In this appeal, Mr. Lazauskas says the Director erred in law and failed to observe principles of natural justice in denying his wage claim.
5. The Tribunal has discretion to choose the type of hearing for deciding an appeal. 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 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. 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 and any additional evidence allowed by the Tribunal to be added to the “record”.

### ISSUE

6. The issue, broadly stated, is whether the appeal discloses any reviewable error that was made by the Director in the Determination.

### THE FACTS

7. The facts relating to the issues raised in this appeal are set out in the Determination as follows:
  1. Mr. Lazauskas was employed as a trader in the Cedar Program at Skana on a commission only basis. He terminated his employment with Skana effective April 29, 2011.

2. While Mr. Lazauskas was paid on a commission only basis, he received a draw against commissions of \$5,000.00 a month, paid on the first and fifteenth of each month. At the end of each month, he received a commission statement showing each sale made during the month, the profit (or loss) and the commissions earned.
  3. Mr. Lazauskas was paid commissions three times a year. Every four months of the fiscal year, Skana made a payment to Mr. Lazauskas for the difference between the draws and the commission earned in the preceding four months. At Skana's fiscal year end – October 31 – Mr. Lazauskas was paid the difference between commissions earned in the last four month period minus draws received in that period, annual vacation pay and any commission bonus to which he was entitled according to provisions of the Commission Sales Policy.
  4. The final commission payment, any commission bonus and annual vacation pay was paid out in January of the following year after the financial statements were finalized.
  5. From July 1 – October 31, 2010, Mr. Lazauskas earned \$29,264.13 in commission (including annual vacation and yearend bonus). His draws against commission in that period were \$20,000.00. In the period November 1, 2010 – April 29, 2011, Mr. Lazauskas earned \$17,125.01 in commission and was paid \$27,500.00 in draws against commission.
  6. From time to time during his term of employment, Mr. Lazauskas, like other traders, had agreed to write down the value of certain aged inventory in order to make it more saleable. Skana and Mr. Lazauskas would share the cost of the write down.
  7. In 2011, Mr. Lazauskas refused to agree to contribute to any write down of inventory as he previously had done and so no write down occurred.
8. On the above facts, the Director found the six month liability period set out in section 80(1) of the *Act* was October 30, 2010, – April 29, 2011, a period that included wages that were earned and became payable in the period from July 1, 2010, – April 29, 2011.
  9. The Director found that all wages earned and payable over this period had been paid by Skana and, as a result, found there was no contravention of the *Act*.
  10. The Director considered the argument that some of the sales made in 2011 were based on written down values of the inventory sold and that his commissions should be based on written down values, but found no actual write down affecting Mr. Lazauskas had occurred in 2011.
  11. In the appeal, counsel for Mr. Lazauskas has taken issue with some of the findings of fact made by the Director in the Determination. The following exceptions to the findings made by the Director are noted:
    1. Mr. Lazauskas, although entitled to, did not always receive a monthly commission statement showing each sale made, during the month and the profit or loss and the resulting commission;
    2. Mr. Lazauskas was not paid the difference between commissions earned and draws received on October 31, 2010 because at that time Skana deducted/withheld \$17,500.00 in wages earned by him; and
    3. Skana did impose and implement a write down of the value of aging inventory in the period from November 1, 2010 – April 29, 2011.
  12. Counsel for Skana takes issue with two aspects of the findings made by the Director. First, counsel takes issue with the statement by the Director that a write down of aging inventory was done in order to make that inventory “more saleable”. Counsel for Skana submits the purpose of a write down was to enable Skana to carry the inventory at a “more realistic market value”. Second, counsel takes issue with the suggestion by the

Director that Mr. Lazauskas in some way “contributed” to a write down, asserting that the lumber trader does not “contribute” to a write down.

## ARGUMENTS

13. Counsel for Mr. Lazauskas says the Director made four errors in the Determination. I shall summarize the salient points of each of the errors that are alleged to have been made.
14. First, he says the Director misconstrued or misapplied the “jurisdiction of the *Act*”, specifically section 80, by basing the application of section 80 on the thrice-annual commission payment structure at Skana, ignoring and failing to give effect to the evidence relating to Mr. Lazauskas’ claim for wages in the amount of \$17,500.00. Essentially, counsel says the Director unduly limited the recovery period set out in section 80, which he contends should have been the period from November 1, 2009, to April 29, 2011, rather than the period used by the Director – July 1, 2010, to April 29, 2012.
15. Second, counsel says the Director failed to address the legality of Skana’s commission payment practices, specifically its practice of imposing a deduction/withholding of commissions already earned by a trader in the course of “writing down” the value of its inventory. Counsel says this practice is clearly contrary to section 21(2) of the *Act*, but the Director failed to address that contravention.
16. Third, counsel says the Director misconstrued the nature of Mr. Lazauskas’ claim to entitlement of \$17,500.00, submitting the evidence showed, contrary to the finding made by the Director, that Skana did implement an inventory write down which impacted Mr. Lazauskas’ commissions by the amount claimed. Counsel says, however, that if Skana did not write down the inventory, then there was no basis at all for withholding \$17,500.00 of Mr. Lazauskas’ commission and the Director should have ordered it to be paid.
17. Finally, counsel for Mr. Lazauskas submits the Director failed to require Skana to produce detailed payroll records to support its assertion that no deduction/withholding of the \$17,500.00 had occurred.
18. The Director and Skana have filed replies to the appeal.
19. The Director says the central issue is whether section 80 of the *Act* has been correctly interpreted and applied. The Director says the evidence showed the commission agreement between Mr. Lazauskas and Skana, which included the payment to Mr. Lazauskas of a semi monthly draw against commissions earned exceeding the minimum wage requirement of the *Act* and a payment of commission entitlements every four months, was one which was not inconsistent with provisions of the *Act*. Accordingly, the Director says the commission entitlement, which would represent the wages “payable” referred to in section 80, was determined on that agreement and the result was to include commissions payable in the period July 1, 2010, to April 29, 2011, and exclude commissions that were payable in any of the four month periods before July 1, 2010, as they fell outside of the claim period set out in section 80.
20. The Director says there no basis to consider Skana’s practice of “writing down” inventory, as Mr. Lazauskas did not contribute to any “write down” during the claim period and therefore suffered no loss under section 21 of the *Act*.
21. The Director says there was no evidence that Skana deducted/withheld \$17,500.00 of commission wages in the claim period.

22. Counsel for Skana notes the finding made by the Director that no “write down” of inventory occurred in 2011 because Mr. Lazauskas refused to contribute to it as he had in previous years. He says that finding is correct. He also agrees with the finding of the Director that commission earnings became payable three times annually – February 28, June 30, and October 31 of each year.
23. Counsel for Skana says the evidence supports the conclusion that there was no need to deal with section 21(2) of the *Act* as no “write down” of inventory occurred during the claim period.
24. Counsel for Skana submits the claim for \$17,500.00 fails on the on the basis of the Director’s finding under section 80 and on the fact that, in any event, no such amount was deducted or withheld from Mr. Lazauskas’ commission earnings.
25. Finally, counsel for Skana says his client responded to the Demand for Records made by the Director without any concern being expressed by the Director that their response was incomplete or that the records provided showed a contravention of the *Act*.
26. In his final reply, counsel for Mr. Lazauskas responds to the Director’s submission concerning Skana’s commission payment practices, saying:
- . . . the Delegate seems to have applied the flawed reasoning that that a four month payment cycle, or payment period, *precluded* any payment obligations by Skana outside of those four month windows. Put another way, the delegate seems not to have allowed for the possibility – asserted by Lazauskas – that Skana *also* performed a year-end reconciliation of commissions earned and draws paid to determine if anything remained owing to Lazauskas.
27. This assertion runs through the reply. He says the Director ignored evidence that showed Skana did a year-end reconciliation of amounts paid to Mr. Lazauskas in the November 2009 to October 2010 period that included an amount identified as “balance due”.
28. In reply to the submission of Skana on the inventory “write down”, counsel for Mr. Lazauskas reiterates his argument on that matter and speculates on what might have occurred involving the \$17,500.00 in wages claimed by Mr. Lazauskas, saying the position taken by Skana is no answer to the claim. Counsel also reiterates his initial appeal argument concerning Skana’s commission pay practices, stating the commission pay structure was not, as suggested by Skana, compartmentalized.
29. Counsel for Mr. Lazauskas also reiterates his arguments concerning the legality of Skana’s inventory “write down” practice and the onus to show wages were paid that add nothing new to the initial appeal arguments.
30. An additional reply has been received from counsel for Skana. It is not necessary to set out the points made in that submission as all of them which have relevance to this appeal have previously been included in his earlier submission.

## ANALYSIS

31. As a result of amendments to the *Act* which came into effect on November 29, 2002, 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.*

32. The Tribunal has established certain overriding principles that apply to appeals under section 112 of the *Act*. 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.
33. 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 re-weigh the issues and reach different conclusions.
34. 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.
35. Mr. Lazauskas has alleged the Director has committed an error in law.
36. 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.
37. Mr. Lazauskas has also alleged the Director failed to observe principles of natural justice in making the Determination. In the context of the complaint process conducted in this case, the notion of “natural justice” required 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 *BWT Business World Incorporated*, BC EST # D050/96).

38. The “natural justice” ground is not specifically identified or argued in the appeal submission. I can see nothing in the appeal that raises any concern that the Director failed to accord the parties the required procedural rights. If there are any other natural justice concerns contemplated in this ground of appeal, no effort has been made in the appeal to identify, raise, argue, demonstrate or substantiate them and I will not speculate on their possible presence. No natural justice issues are apparent in either the process adopted by the Director or in the Determination. This ground of appeal is rejected.

39. I agree with the Director that the central issue in this appeal involves section 80(1) of the *Act*. That provision states:

**80** (1) *The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning*

(a) *in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of employment, and*

(b) *in any other case, 6 months before the director first told the employer of the investigation that resulted in the determination,*

*plus interest on those wages.*

40. I am not persuaded that the issue involves the interpretation of that provision, but rather involves the application of that provision to the commission arrangement the Director found to exist in this case. More particularly, the central issue in this case raises the question of whether the Director properly interpreted the commission arrangement between Mr. Lazauskas and Skana.

41. Before addressing this question, it is appropriate to set out how the requirements of section 17 the *Act* relating to the payment of wages has been applied to commissions and how that impacts this case.

42. In *Shell Canada Products Limited Produits Shell Limitée*, BC EST # RD488/01, a reconsideration panel of the Tribunal endorsed the following proposition from *Fabrisol Holdings Ltd. operating as Ragfinder*, BC EST # D376/96, in the context of commissioned sales persons:

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.

43. A strict application of the *Act* in this case would have required a finding that Mr. Lazauskas’ commissions were “payable” in the manner required by section 17. If that had been done, Mr. Lazauskas would have no argument about what wages were “payable” in the context of section 80(1). The Director could simply have

looked when the commission wages became payable in the context of when they were earned and when they were required to be paid applying section 17.

44. However, a strict approach to the payment of commission wages has not been adopted and applied by either the Director or the Tribunal. In *Wen-Di Interiors Ltd.*, BC EST # D481/99, a case referred to by the Director in his submission, the Tribunal said the following about the payment of commission wages, at page 8:

Under the *Act*, employers and employees are free to agree on *any* commission structure they choose so long as, in its operation, *the employee is paid at least the minimum wage for all hours worked in each pay period*. As previously observed, the *Act* permits employers to establish commission-based compensation systems. On the other hand, a commission-based system cannot be used as an instrument to pay employees less than the minimum wage for each hour worked in a given pay period. Neither section 16 nor 17 is contravened so long as employees are paid, for each pay period, not less than the minimum wage for each hour worked during the pay period.

45. Accordingly, while the requirements of the *Act* have some impact on commission wages structures, provided certain minimum criteria are met, the parties to the commission arrangement are allowed to structure their own agreement and the Director may interpret and enforce the resulting agreement. The authority of the Director to interpret and apply the provisions of an employment agreement has been noted and reinforced in several decisions of the Tribunal: 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*, 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.
46. In the context of this case, the comments of the Tribunal in *Director of Employment Standards (Re Kocis)*, BC EST # D331/98 (Reconsideration of BC EST # D114/98), are also relevant:

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. The evidence before the Director concerning the commission wage structure of Skana and Mr. Lazauskas, and the conclusions based on that evidence, is found in the Determination. In sum, there was evidence from both parties that Mr. Lazauskas was paid commissions three times a year. There was evidence that only the commission bonus had reference to commissions earned over the entire year, as it was calculated on the entire years' commissions and could only be determined after the year end. There was no evidence to support Mr. Lazauskas' assertion that all commissions were paid out on an annual basis. The Director interpreted and applied the commission arrangement between the parties consistent with the forgoing evidence. I am not persuaded that there was any error made by the Director in doing so. I do, in fact, find the Director's interpretation of the commission arrangement to be a correct and reasonable one.
48. That being so, the Director was not wrong to find Mr. Lazauskas' commission earnings, for the purpose of section 80(1) of the *Act*, were "payable" at the end of each four month period during the fiscal year and there was no error in law in the conclusion that the claim period for which Skana could be liable for wages was October 30, 2010, to April 29, 2011.
49. Having disposed of the central issue, the other arguments made by counsel for Mr. Lazauskas may be addressed quickly.



50. First, there was no evidence before the Director that the question of Skana’s commission payment practices was relevant to any part of Mr. Lazauskas’ wage claim under the *Act*. The Director found, as a matter of fact, that those elements of the commission arrangement that Mr. Lazauskas alleged were illegal never occurred during the claim period. As noted in the Determination, the Director confined his investigation and his findings to Mr. Lazauskas’ entitlement under the *Act* – that is, to his claim he was owed wages. The Tribunal is a creature of statute. Its powers are defined and limited by the *Employment Standards Act*: see the comments in *Old Country Restaurant Ltd.*, BC EST # D561/98. The Director was correct in limiting the scope of the Determination to adjudicating rights and entitlements under the *Act*. The jurisdictional limitations under the *Act* on the authority of the Director did not, and does not, allow for espousing views on the legality of matters that do not arise in the context of the complaint being considered under the *Act*.
51. I find the Director made no error in not deciding the ‘legality’ of Skana’s commission payment practices as such a finding was not necessary in order to adjudicate the claim made by Mr. Lazauskas.
52. A similar response applies to Mr. Lazauskas’ argument concerning the “missing” \$17,500.00. This argument challenges the finding of the Director that Mr. Lazauskas was paid all wages earned in the claim period. There was no evidence provided to the Director that this amount was deducted or withheld from Mr. Lazauskas’ wages during the claim period. As indicated above, the *Act* does not allow for appeals based on challenges to findings of fact unless it is shown such findings raise an error of law and Mr. Lazauskas has not shown this aspect of his appeal raises an error of law relating to the challenged finding of fact.
53. In respect of the argument relating to the Director failing to apply the evidentiary onus on Skana to produce payroll records showing Mr. Lazauskas was paid all wages earned, I am unable to accept the suggestion implicit in this argument – which is that Skana did not appropriately respond to the Director’s Demand for Employer Records and the other inquiries for information and clarification made by the Director. There is simply no indication, either in the section 112(5) Record or in the appeal, raising any question that Skana concealed relevant information from the Director. This aspect of the appeal is substantially speculative, being based on a proposition – that Skana did “deduct or withhold” \$17,500.00 from commission earnings – that was rejected by the Director. The appeal contains no objective analysis demonstrating the Director committed a reviewable error in rejecting Mr. Lazauskas’ position on his claim or similarly erred in accepting the validity of the information provided by Skana during the complaint investigation.
54. For the above reasons, the appeal is denied.

## **ORDER**

55. Pursuant to section 115 of the *Act*, the Determination dated March 21, 2012, is confirmed.

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