

An appeal

- by -

A-Class Doors Ltd.  
("A-Class")

- 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:** Carol L. Roberts

**FILE No.:** 2014A/73

**DATE OF DECISION:** August 1, 2014

## DECISION

### SUBMISSIONS

Paramjit Jagpal, Director

on behalf of A-Class Doors Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), A-Class Doors Ltd. (“A-Class”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on May 23, 2014. In that Determination, the Director ordered A-Class to pay its former employee, Jagdeep Mangat, \$6,785.40 in wages, annual vacation pay and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for A-Class’ contravention of sections 17 and 18 of the *Act*, for a total amount payable of \$7,785.40.
2. A-Class appeals the Determination alleging that evidence has become available that was not available at the time the Determination was being made and seeks to have the Determination cancelled.
3. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
4. These reasons are based on A-Class’ written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Respondent will and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

### FACTS

5. The facts are drawn from the Determination and the section 112(5) “record”.
6. Mr. Mangat was employed by A-Class, a door manufacturing business, as a salesman commencing April 1, 2010. He said that he resigned from his employment on January 16, 2012.
7. On March 19, 2012, Mr. Mangat filed a complaint with the Director alleging that A-Class had contravened the *Act* in failing to pay him his last two wage payments.
8. Mr. Mangat gave the delegate his pay statements that indicated his rate of pay was \$3,500 per month. The statements did not indicate that vacation pay was being paid on that amount. Mr. Mangat also provided the delegate with a December 28, 2011, letter signed by A-Class’s account manager stating that Mr. Mangat was a salesman earning commission wages of \$3,500 per month. The delegate found no evidence that Mr. Mangat’s wages were calculated based on his sales.
9. Mr. Jagpal, A-Class’s sole director, said that Mr. Mangat did not receive a salary. Mr. Jagpal advised the delegate that Mr. Mangat was paid on a 5% commission basis with \$3,500 being paid each month for the first five or six months, after which the commission would be calculated and the balance of the commission paid in the following month.

10. Mr. Jagpal also took the position that Mr. Mangat did not earn the money he had been paid and that Mr. Mangat owed A-Class money.
11. Mr. Jagpal advised the delegate that Mr. Mangat had gone to work with a competitor in January and that he did not work for A-Class that month. The delegate asked Mr. Jagpal to provide her with evidence supporting his assertions and gave him several deadlines by which he was to provide the information. No additional information was provided before the date of the Determination.
12. The delegate found there was no evidence to support A-Class's assertions that Mr. Mangat failed to earn commissions or worked for an A-Class competitor in January 2012. She noted Mr. Mangat's evidence that he made a sale on January 13, 2012, along with A-Class's confirmation of his employment as of December 28, 2011. She noted that Mr. Jagpal had failed to explain how Mr. Mangat had made a sale for A-Class while allegedly working for a competitor during that time.
13. The delegate determined that, even though Mr. Mangat's employment agreement was that he would be paid 5% commission on his sales, because he had been paid \$3,500 per month with no adjustment for his commissions for the duration of his employment, that payment term had become a condition of his employment and A-Class could not "claw back" wages that had been paid to him.
14. The delegate determined that Mr. Mangat's wages were \$3,500 per month, that he worked for the first pay period in January, and that he had not been paid for the last pay period in December 2011 and the first pay period in January 2012. She concluded that he was entitled to wages in the amount of \$3,500 as well as annual vacation pay for the entire period of his employment.
15. The delegate determined that A-Class had contravened sections 17 and 18 of the *Act* in failing to pay Mr. Mangat all wages he was entitled to within 8 days of the end of the pay period and within 6 days of the end of an employee's employment.

## **ARGUMENT**

16. In its appeal submissions, A-Class says that it now has evidence that Mr. Mangat began his own company in January 2012 to compete with A-Class. Mr. Jagpal further asserts that Mr. Mangat took secret A-Class information with him to set up this company.
17. Attached to the appeal is a May 28, 2014, letter from Harvir Natt, President of A-Star Doors and Mouldings Ltd., which states that Mr. Mangat began working with the company full time in November 2011 as "co-partner". Mr. Natt states that Mr. Mangat holds 25% of the company shares and that he managed a number of aspects of the business including installing machines, placing orders and inventory. The letter states that A-Star began production in January 2012.

## **ANALYSIS**

18. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
  - the director erred in law;
  - the director failed to observe the principles of natural justice in making the determination;
  - evidence has become available that was not available at the time the determination was being made.

19. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds. I find that A-Class has not met that burden.
20. The sole ground of appeal is that evidence has become available that was not available at the time the Determination was being made.
21. The Tribunal's test for new evidence is a strict one. The appellant must establish that:
  - a. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - b. the evidence must be relevant to a material issue arising from the complaint;
  - c. the evidence must be credible in the sense that it is reasonably capable of belief; and
  - d. the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
22. The record discloses that the delegate sent A-Class her preliminary findings on January 14, 2014. In response, A-Class asserted that Mr. Mangat had begun his own company to compete with A-Class and that he went to work for that company in January 2012. Although the delegate sought proof of those assertions and gave A-Class several extensions of time in which to provide the information, nothing was submitted. I note, in particular, an email from A-Class to the delegate on April 25, 2014, stating "We'll send this information to you before May 2, 2014." When advised that Mr. Jagpal's father had been hospitalized, the delegate granted yet another extension to May 20, 2014.
23. The letter from Mr. Natt could have been submitted to the delegate during her investigation. If the information contained in Mr. Natt's letter is to be believed, the information was available in December 2011. A-Class provides no reasons why this information was not submitted by the deadline imposed by the delegate.
24. The information contained in Mr. Natt's letter is relevant, but not determinative, of the issues before the delegate.
25. Although A-Class told the delegate that Mr. Mangat began working with A-Star in January, Mr. Natt states that Mr. Mangat began working for A-Star in November. This information also contradicts the information from A-Class's accounts manager who stated that Mr. Mangat was working for A-Class as of December 28, 2011. In light of these evidentiary discrepancies, I am not persuaded that the "new evidence" is reasonably capable of belief. If Mr. Mangat was indeed an owner, director and/or shareholder of A-Star, presumably A-Class could have provided that evidence to the delegate as well. It did not.
26. I conclude that A-Class has not met the test for new evidence and find no reasonable prospect that the appeal will proceed.

**ORDER**

27. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1) of the *Act*, the Determination, dated May 23, 2014, is confirmed, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**