

An appeal

- by -

Decor Home Enterprises Ltd.  
(“Decor”)

- 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.:** 2013A/42

**DATE OF DECISION:** August 28, 2013

## DECISION

### SUBMISSIONS

Naresh Aggarwal

counsel for Decor Home Enterprises Ltd.

### OVERVIEW

1. Pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) Decor Home Enterprises Ltd. (“Decor”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 17, 2013.
2. The Determination concluded that Decor had contravened Part 3, section 18 and Part 7, section 58 of the *Act* in respect of the employment of Paul Wenman (“Wenman”) and ordered Decor to pay to Wenman wages and interest in the amount of \$6,042.63 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$7,042.63
3. Decor has appealed the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. Decor also submits that new evidence has come available that was not available when the Determination was being made. Decor seeks to have the Determination varied or, alternatively referred back to the Director.
4. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and written submission made by Decor and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1), which states:

**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 the 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.*
5. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), Wenman will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

## ISSUE

6. In the context of this appeal, the issue at this stage is whether there is any reasonable prospect the appeal will succeed.

## THE FACTS

7. Decor operates a furniture store. Wenman was employed by Decor from January 1, 2011, to April 26, 2012, as its Store Manager on a commission salary of 6%. There was an issue between Decor and Wenman whether the 6% commission was, as Wenman asserted, payable on all written sales of the store, regardless of whether he was directly involved in the sale or which employee wrote up the sale, or, as Decor asserted, only on sales written up by Wenman and delivered to the customer while he was employed by Decor.
8. The Director found, on balance and on the evidence, the commission wage agreement between the parties was as asserted by Wenman. The Determination cites several pieces of evidence which led to this finding, including the internal consistency, or inconsistency, of the oral evidence given by the respective parties, the consistency of that evidence with other, objective, evidence and the pattern of the payment of commissions shown in Decor's sales invoices and payroll records.
9. Based on this finding, the Director found Decor owed Wenman commission wages in the amount of \$3,227.18.
10. The Director also found Decor had not paid Wenman all annual vacation pay owing to him and ordered payment of annual vacation pay in the amount of \$2,625.44.

## ARGUMENT

11. The appeal and appeal submission filed on behalf of Decor contend the Director erred in law and committed two breaches of natural justice.
12. The appeal argues the Director erred in law by awarding Wenman commissions on sales that occurred in the period March 17, 2012, to April 1, 2012, during which Wenman agreed he was on vacation time off. Counsel for Decor argues that by allowing Wenman commission wages while he was on vacation time off, the Director was awarding him wages "that were never earned". The appeal submission also argues the Director was wrong to find Wenman was to be paid commissions on all sales made in the store, even if he did not make them.
13. Counsel for Decor also submits the Director erred in law by awarding Wenman annual vacation pay. Two reasons are given to support this submission: first, Wenman never claimed annual vacation pay in his complaint; and second, annual vacation pay was included in his commission rate. In support of the second reason, counsel submits an e-mail sent by Wenman to Decor in May 2012, in which he says; "there never was vacation pay for me because I got that 6% commission of what the store wrote for business regardless of whether I was there or not".
14. The appeal submission alleges the Director breached the "fundamental rules of fairness and Natural Justice" by giving Wenman an opportunity to produce false evidence and by not giving Decor a proper opportunity to produce witnesses to prove its case.

15. Counsel says there is new evidence that is relevant to the finding made by the Director on the commission agreement and asks that the matter be referred back to the Director for a “redetermination of the right amount of the wages payable”.

## ANALYSIS

16. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at relative merits of an appeal, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.

17. 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.*

18. 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. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.

19. Decor has argued the Director committed errors of law in the Determination. The arguments made are not particularly clear on what legal issue arises in each of them.

20. The argument that, based on the findings by the Director, Wenman would receive commission wages while he was on vacation does not show an error of law. There is nothing inconsistent with any provision in the *Act* for a commissioned employee to continue receiving commissions generated during their vacation time off, if that is part of the commission agreement. The Director found the commission agreement in this case was to pay Wenman a commission on all store sales whether or not he was directly involved in the sale. Decor argued unsuccessfully for the Director to find there was a different commission agreement. This argument does nothing more than recast their unsuccessful argument in slightly different terms. It was never specifically made to the Director during the complaint process and there is no evidence in the file that would suggest this alternate form of commission agreement has any more substance than the one rejected by the Director in the Determination.

21. Counsel for Decor argues the Director erred in law by awarding Wenman vacation pay. There is a simple, and determinative, response to the reasons provided for this argument.

22. The *Act* does not allow annual vacation pay to be included in a commission structure; section 58 requires an employer to “pay something extra” as vacation pay. Section 4 of the *Act* operates to give no effect to an agreement to include annual vacation pay in a commission structure. The payment of annual vacation pay in accordance with the *Act* is a statutory entitlement that the Director is charged with enforcing. If the facts, as they did in this case, show the claimant is entitled to the statutory benefit, the Director must ensure the employee receives it. Far from being an error of law, the Director’s ensuring Wenman received the annual

vacation pay to which he was statutorily entitled was the proper and correct thing to do and accorded with the purposes and requirements of the *Act*.

23. The other elements of what counsel for Decor has cast as “errors of law” are nothing more than disagreements with and challenges to findings of fact made in the Determination. The authority of the Tribunal to consider such challenges is limited to circumstances where findings of fact raise an error of law. In this context, an error in fact finding can be an error of law where the finding of fact was made without any evidentiary foundation or where the finding is perverse (in the legal sense) given the totality of the evidence. There are two obvious problems with this part of Decor’s appeal. First, an examination of the section 112(5) “record” indicates there was evidence on which the Director could reasonably make the findings that are specifically being challenged. Second, the appeal seeks to have the Tribunal conclude that unspecified “averments” made by Wenman are wrong without showing there is any evidence that would allow for such a result.
24. Decor 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; see *Imperial Limousine Service Ltd.*, BC EST # D014/05. That requirement substantially echoes what is set out in section 77 of the *Act*.
25. Decor makes several arguments under this ground of appeal. None warrant a significant degree of analysis. Most do not raise natural justice issues at all, but express disagreement with conclusions made by the Director from the available evidence.
26. On any reasonable assessment of the section 112 “record”, Decor had a full and fair opportunity to present its position to the Director. As indicated above, an appeal is an error correction process, with the burden being on the appellant to show a reviewable error was made by the Director in the Determination. The appeal process is not an opportunity for a disgruntled party to shore up what it perceives after the fact to be deficiencies in its initial presentation in an attempt to have its position fully re-examined by the Tribunal or another delegate of the Director.
27. The Tribunal has established that appeals based on “new evidence” require an appellant to, at a minimum, demonstrate that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal also requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.
28. In this appeal, Decor has attached a copy of the May 2012 e-mail referred to above. If it was intended to include this document as “new evidence” – and the appeal is not clear on that – it is unnecessary, as the document is already included in the section 112(5) “record”. Otherwise, the “new evidence” appears to comprise unidentified documents which counsel for Decor says are “relevant” to issues that have been decided in the Determination and which he seeks to have the Tribunal revisit. Quite apart from there being no basis shown for revisiting those issues, in the sense that no errors have been shown on those issues, the documents themselves are not identified and not shown to satisfy any of the conditions the Tribunal has identified for allowing new evidence.
29. There is no merit in this ground of appeal.

30. Overall, an assessment of this appeal shows it has no prospect of succeeding on the chosen grounds of appeal. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
31. Accordingly, I dismiss the appeal and confirm the Determination.

### **ORDER**

32. Pursuant to section 115 of the *Act*, I order the Determination dated May 17, 2013, be confirmed in the amount of \$7,042.63, together with any interest that has accrued under Section 88 of the *Act*.

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