Employment Standards TRIBUNAL

An appeal

\- by -

Frontier-Kemper Constructors ULC
("Frontier-Kemper")

\- 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/55

DATE OF DECISION: August 8, 2012

British Columbia

DECISION

SUBMISSIONS

Taryn L. Mackie	counsel for Frontier-Kemper Constructors ULC
John Evinger	on his own behalf
Rod Bianchini	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 Frontier-Kemper Constructors ULC ("Frontier-Kemper") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 16, 2012.

2. The Determination was made in respect of a complaint filed by John Evinger ("Mr. Evinger") who alleged Frontier-Kemper had contravened the *Act* by failing to pay overtime.

3. The Director found Frontier-Kemper had contravened Part 3, section 28 and Part 4, section 40 of the *Act* in respect of Mr. Evinger and ordered Frontier-Kemper to pay him an amount of $4,586.91, an amount which included wages and interest.

4. The Director also imposed administrative penalties on Frontier-Kemper under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $1,000.00.

5. The total amount of the Determination is $5,586.91.

6. In this appeal, Frontier-Kemper says the Director erred in law and failed to observe principles of natural justice in finding Mr. Evinger was not a manager under the *Act* and therefore exempted from its overtime provisions. Frontier-Kemper seeks to have the Determination cancelled.

7. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. 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 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. 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

8. The issues in this appeal are whether the Director erred in law in deciding Mr. Evinger was not a manager under the *Act* and whether the Director failed to observe principles of natural justice in making the Determination.

THE FACTS

9. Mr. Evinger was employed in the Occupational Health and Safety ("OH&S") division of Frontier-Kemper on the Seymour-Capilano tunnel project from June 21, 2010, to August 9, 2011, at the rate of $84,000.00 a year. The position which Mr. Evinger held was variously referred to in the Determination as OH&S Officer and OH&S Coordinator. The title, of course, is largely irrelevant as the question of whether a person is a manager depends on a total characterization of that person's duties: see *Director of Employment Standards (Re Amelia Street Bistro)*, BC EST # D479/97.

10. Following his termination, Mr. Evinger filed a complaint with the Director alleging Frontier-Kemper had failed to pay overtime wages. Frontier-Kemper opposed the complaint, saying Mr. Evinger was a manager for the purposes of the *Act* and excluded from the overtime provisions in Part 4 of the *Act*. In any event, and alternatively, Frontier-Kemper challenged the amount of overtime wages claimed by Mr. Evinger. Those two matters were described in the Determination as the issues to be decided by the Director.

11. It is unnecessary to engage in an extensive recitation of the facts that were before the Director. As noted in the Determination:

> With a few exceptions there was not much disagreement about the work [Mr. Evinger] performed. Rather the disagreement centred on the characterization of that evidence as it applied to the definition of manager found in the Employment Standards Regulation (the "Regulation").

12. Accordingly, the facts found by the Director to be relevant can be gleaned from an examination of the Determination. I will only summarize the factual findings made, or, as argued by Frontier-Kemper, not made, by the Director.

13. The Director considered an outline of what Frontier-Kemper purported to be Mr. Evinger's duties. The Director's summary of the evidence in respect of this outline is organized in the Determination according to the main headings used by Frontier-Kemper, with some adjustments to avoid overlap. Those headings are:

- Ensuring company policies are followed and altering work processes;
- Work stoppages and direction of workforce;
- Training employees; and
- Committing or authorizing the use of company resources and managing a budget.

14. The Director also received an e-mail dated December 15, 2011. The e-mail was created by Frontier-Kemper based on a description of Mr. Evinger's duties provided by him.

15. The Director found the e-mail provided a "succinct summary of Mr. Evinger's duties". The description was heavily relied on by Frontier-Kemper in making their submissions to the Director on the status of Mr. Evinger under the *Act*. The Determination sets out the duties described in that e-mail on page R7 of the Determination, followed by the statement:

> Some of these items have been canvassed already in this Determination but I have expanded on some points in the following paragraphs.

16. The Director proceeded to address the references in the description under the headings workplace modifications, advice and counsel to management, internal audits and monthly meetings.

17. The Director referred to the evidence of Mr. Page, the Safety Manager for Frontier-Kemper on the work site, noting Mr. Page's comment that "Mr. Evinger's role was nearly equal with his own", and the evidence of Mr. Phillips, the Site Superintendent for Frontier-Kemper.

18. Mr. Evinger and Frontier-Kemper provided written arguments to the Director on their respective positions.

19. The Director found Mr. Evinger was not a manager under the *Act*. In reaching this conclusion, the Director considered the definition of manager in the *Regulation* applied to the facts as found and the comments of the Tribunal in *Director of Employment Standards (Re Amelia Street Bistro)*, *supra*. The Director noted the parties agreed that Mr. Evinger "had no authority over human resources matters such as hiring, firing or disciplining employees", did not regulate employees' schedules or their time away from work, did not lay off employees or set work schedules. He was able to keep employees after their working hours if he was conducting an investigation, but did so infrequently.

20. The Director found Mr. Evinger had the authority to direct all employees on site "as it concerned safety issues". The parties agreed Mr. Evinger "could autonomously direct work stoppages upon seeing issues that concerned him and provide specific direction required in order to obtain compliance". That comment also refers to safety issues. Notwithstanding, the Director found that Mr. Evinger had no "direct and real authority over employees", having no authority to enforce on employees the consequences of a failure or refusal to follow his directions.

21. The Director found Mr. Evinger had no "independent authority" to implement the revisions he made to policies and response plans. The Director concluded that while Mr. Evinger's primary duties included overseeing the safety operations of the workers on the project site, he did not "supervise and direct" human resources, as that term has been interpreted and applied by the Director. The Director also considered whether Mr. Evinger's training responsibilities brought him within the definition of manager and found those responsibilities, while extensive, did not normally fall under the ambit of "human resources" and were not enough to compel a finding that his "primary employment duties" were supervising and directing human resources.

22. The Director considered whether Mr. Evinger's principal duties could be said to be supervising "other resources" and found that the reference to "resources" in the definition of manager related to financial resources, such as budgeting, or material resources, including products or services, research and development and marketing, but did not include safety.

23. The Director noted the absence of evidence showing Mr. Evinger's responsibilities relating to controlling access to safety equipment and submitting inventory for ordering was a primary employment responsibility and, in sum, found there was a lack of evidence showing that his primary duties involved supervising or directing other resources.

24. The Director found Mr. Evinger was therefore entitled to overtime wages and calculated the amount owing. That calculation is not at issue in this appeal.

ARGUMENT

25. The appeal submission made by counsel acting on behalf of Frontier-Kemper rests substantially on the same arguments and analysis that was made to the Director in the complaint process.

26. Counsel for Frontier-Kemper says the issues in the appeal concern the Director's interpretation of the legal definition of manager in the *Regulation* and how the Director applied that definition to the facts, or more particularly, how the Director applied the definition to the exclusion of the facts before him. In respect of the latter point, counsel for Frontier-Kemper says the Director ignored evidence that supported a conclusion that Mr. Evinger was a manager under the *Act* and as a result failed to observe principles of natural justice.

27. Counsel for Frontier-Kemper has provided an argument that includes an extensive recitation of the facts and evidence that was before the Director. The central objective of this approach is to persuade the Tribunal the facts, as outlined in the argument, ought to have led the Director to conclude Mr. Evinger was a manager under the *Act*. The two principal, and general, assertions are firstly, that the Director erred, on the facts, in concluding Mr. Evinger's primary employment duties did not consist of supervising and directing human resources and secondly, that the Director misinterpreted the definition of manager by finding "safety" did not constitute a "resource" within the meaning of that definition.

28. Mr. Evinger has filed a very brief response, saying he opposes the appeal.

29. The Director has also provided a response to the appeal, submitting the appeal is, at its core, no more than a re-arguing of the position Frontier-Kemper provided to the Director during the complaint process and which was fully canvassed and analyzed in the Determination. The Director says the arguments made on behalf of Frontier-Kemper, which focus on analyzing specific areas of Mr. Evinger's duties and seeking to fit these duties into the definition of manager, miss the point, which requires the Director to look at what are the "principal duties" of a manager and then apply those to the duties performed by the complainant. The Director says the fact that some of the duties performed by Mr. Evinger might be seen as management duties does not compel a finding that he falls within the definition; such a finding depends on a "total characterization" of his duties and is a matter of degree. The Director says the proper analysis and weighing of facts and factors was performed.

30. In final reply, counsel for Frontier-Kemper disagrees with the Director's characterization of the appeal as "re-arguing its position". Counsel says the appeal raises a question of law involving the interpretation of the definition of manager and is a proper basis for appeal. Counsel does not dispute the Director's position that "the key component of the definition of Manager in the Act, as it relates to the supervising or directing, or both supervision and directing human and other resources, is that these have to be the employees 'principal responsibilities'", but says the evidence showed Mr. Evinger's time on site was spent solely supervising and directing human and other resources, that he exercised considerable autonomy in exercising these duties, that safety was of primary importance to Frontier-Kemper and that Mr. Evinger supervised and directed a large workforce over an expansive worksite.

31. Counsel for Frontier-Kemper resubmits key aspects of their disagreement with the Determination – the findings that Mr. Evinger had no "enforcement authority" and that safety did not fall within the term "other resources" – and says these two matters were not addressed in the submission of the Director. As well, counsel resubmits her position on the natural justice ground, noting there is no indication on the face of the Determination that the elements of the evidence surrounding this ground of appeal were ever considered by the Director in reaching a conclusion about the status of Mr. Evinger under the *Act*.

ANALYSIS

32. 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.*

33. The Tribunal has consistently and repeatedly stated that an appeal 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 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. 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.

35. It is well established that the Tribunal has no authority to consider appeals based on alleged errors in findings and conclusions of fact unless such findings and conclusions amount to an error of law (see *Britco Structures Ltd.*, BC EST # D260/03). 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.

36. Frontier-Kemper says the Director failed to observe principles of natural justice and erred in law in finding Mr. Evinger was not a manager under *Act.*

37. I shall first address the natural justice ground of appeal. The Tribunal has accepted a failure by the Director to consider relevant evidence is a breach of natural justice: see *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05, and the cases cited in it. A consideration of whether a delegate has failed to consider relevant evidence involves an assessment of both the reasons given by the delegate for making a Determination, and an analysis of the issue to which the evidence is relevant. The Tribunal has, however, also indicated that such consideration should be exercised with caution, for the reasons set out in the following excerpt, found at paragraphs 40-43, from the *Jane Welch* decision:

> . . . there are good reasons for the Tribunal to exercise caution in intervening with a decision of the Director on the basis that a delegate failed to consider relevant evidence. First, as pointed out by D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at paragraph 12:3700,
>
>> . . . any attempt to determine whether an administrative decision-maker has considered "all of the evidence" as a matter of procedural fairness, can come very close to the reassessment of the actual

> findings of fact, which would be inconsistent with the usual deferential approach to review of findings of fact.

Second, the Tribunal should not lightly find that a delegate has failed to consider relevant evidence. Although the Director and his delegates have a duty, both under the Act and at common law, to provide reasons for their determinations, "[i]t is trite law that an administrative tribunal does not have to recite all of the evidence before it in its reasons for decision": *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, [2002] 212 F.T.R. 111, 2001 FCT 1115, at para. 46; see also *Manuel D. Gutierrez*, BC EST #D108/05, at para. 56. Thus, that a delegate does not mention particular relevant evidence in his or her reasons does not, in and of itself, demonstrate a failure to consider that evidence in making the determination. That said, the more relevant and probative the evidence is, the greater the expectation that this evidence will be considered expressly in the delegate's reasons.

Third, even if an appellant establishes that a delegate failed to consider relevant evidence, it does not automatically follow that the delegate failed to observe the principles of natural justice in making the determination. In *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at 491-92, Lamer C.J. held that the rejection of relevant evidence is not automatically a breach of natural justice; rather, whether it constitutes a breach of natural justice depends on the impact of the rejection of the evidence on the fairness of the proceeding:

> For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.

Relevant factors include the importance to the case of the issue upon which the evidence was sought to be introduced, and the other evidence that was available on that issue. Although *Université du Québec à Trois-Rivières* involved a refusal to permit a party to adduce relevant evidence, this reasoning applies with equal force to the question of whether a failure to consider relevant evidence denied a party a fair hearing. Thus, whether a failure to consider relevant evidence amounts to a breach of the principles of natural justice will depend on the particular circumstances of each case.

38. With these cautions in mind, I shall address the argument of Frontier-Kemper on this ground. Counsel for Frontier-Kemper says the Director ignored evidence that Mr. Evinger had authority to do the following:

- administer drug and alcohol tests of employees and managers on behalf of Frontier-Kemper;
- perform workplace investigations in the event of an accident or incident;
- perform the internal C.O.R. audit on behalf of Frontier-Kemper;
- liaise with WorkSafe BC and GTC with respect to injured employees and develop and implement return to work programs for employees and managers to follow; and
- evaluate and report on safety trends and accident and injury data, and identify needs for new and modified occupational safety programs.

39. I will make two points in respect of the above matters.

40. First, the particular question being addressed by the Director was whether Mr. Evinger directed and/or supervised human or other resources. In respect of "other resources", the Director concluded that term did not include safety within the meaning of the definition of manager. That conclusion has been challenged in

this appeal as an error of law and will be addressed later in this decision. However, as all of the above matters are associated with safety, it logically follows that the Director would not have found any of them to be relevant to whether performing these duties identified Mr. Evinger as a manager under the *Act*.

41. Secondly, the Determination clearly indicates that the Director was alive to all of the above points of fact. Each is mentioned as an aspect of Mr. Evinger's job duties. Four of the five matters listed would comfortably fall within the Director's analysis and conclusion about whether Mr. Evinger's "principal employment responsibilities" involved directing and/or supervising "human resources". The Director found that such duties did not bring Mr. Evinger within the definition of manager in the *Regulation* because they did not reflect or demonstrate the kind of "power of independent action, autonomy and discretion" relating to supervising and/or directing employees to warrant finding he was a manager. In respect of the fifth matter – his authority to conduct workplace investigations – the Director specifically addresses that authority, finding, at page R14, it did not fall within the ambit of managerial authority for the same reasons as expressed in the preceding sentence.

42. Ultimately, I am not persuaded the Director ignored or failed to consider relevant evidence. The evidence which counsel for Frontier-Kemper alleges was ignored, when considered in the context of the Director's analysis, does not appear to have been ignored at all. Some of the alleged ignored evidence was addressed. The other evidence listed by counsel for Frontier-Kemper, and which was not specifically mentioned in the Director's analysis, falls within a general type of evidence the Director found not to be demonstrative of the status of manager because such evidence did not reflect Mr. Evinger's principal job responsibilities and/or did not include the kind of independent authority typical of a manager, which is a necessary element for finding a person was a manager under the *Act*.

43. This ground of appeal is dismissed.

44. The other ground of appeal alleges error of law in the Director's interpretation of the definition of manager, which reads:

> ***"manager"*** *means*
>
> *(a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or*
>
> *(b) a person employed in an executive capacity.*

45. There is no dispute in the appeal that an assessment of whether a person's employment falls within the definition of manager is governed by the analysis directed in the *Re Amelia Street Bistro*, *supra* at pages 5-6:

> The task of determining if a person is a manager must address the definition of manager in the *Regulation*. If there are no duties consisting of supervising and directing other employees, and there is no issue that the person is employed in an executive capacity, then the person is not a manager, regardless of the importance of their employment duties to the operation of the business. That point was made by the Tribunal in *Anducci's Pasta Bar Ltd.*:
>
>> Many of the duties to which the employer pointed as evidence of Lum's managerial status did not address the definition of manager in the *Regulation*. Handling of cash, custody of a key, responsibility for checking purchases and the like are all responsible duties, but they are not connected with the supervision or direction of employees.
>
> Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the

> person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party.
>
> We also accept that in determining whether a person is a manger the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. The Director raises a concern that an interpretation of manager which does not accept the limited scope of exclusion from the minimum standards of the *Act* could have serious consequences for persons in positions such as foreman and first line supervisor who spend a significant amount of time supervising and directing other employees but frequently do not exhibit a power and authority typical of a manager. As we stated above, the degree to which some power and authority typical of a manger is present and is exercised by an employee are necessary considerations to reaching a conclusion about the total characterization of the primary employment duties of that employee.
>
> Typically, a manger has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.

46. While amendments to the definition have changed some aspects of the analysis, the central considerations remain intact: see *Howe Holdings Ltd.*, BC EST # D131/04. I also note the following comment from *Howe Holdings Ltd.* at page 7, reinforcing the view that the definition of manager must consider the remedial nature and the purposes of the *Act*:

> As remedial legislation, the *Act* is to be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects. (see, for example, *On Line Film Services Ltd v Director of Employment Standards*, BC EST #D319/97 and *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th)336 (B.C.C.A.)).

47. Counsel for Frontier-Kemper has approached the challenge to the Director's conclusion relating to the question of whether Mr. Evinger's principal employment responsibilities related to supervising and/or directing human resources primarily from a factual perspective, asserting the facts, properly characterized in their totality, ought to have led to the conclusion that he fell within the definition of manger.

48. The difficulty with this approach, however, is that it requires the Tribunal to engage in the kind of factual analysis to which the cautions identified in the *Jane Welch* decision were directed and to make findings on the facts the Tribunal has no authority to make in the absence of a demonstrable error of law in respect of those facts.

49. Notwithstanding counsel's singular challenge to the meaning of the term "enforcement authority", I read that term, as it is used in the context it is found, as well as the context of the Determination generally, to be saying nothing more than that the evidence did not show Mr. Evinger, in the words of *Amelia Street Bistro*, had the "power of independent action, autonomy and discretion; . . . the authority to make final decisions, not simply recommendations, relating to supervising and directing employees". My reading of the Determination

indicates the finding of the Director was based on factual conclusions considered against the test for determining whether an employee is a manager under the *Act*. The test used by the Director is the correct test.

50. Frontier-Kemper disagrees with the Director's view of the conclusion drawn from the facts, and says the facts did demonstrate that Mr. Evinger had the necessary power and authority to be considered a manager and ought to have led the Director to that conclusion instead of the one reached. Frontier-Kemper's arguments do not demonstrate an error of law in the Director's factual findings, but, primarily, disagree with the conclusions of the Director on those facts. It is worth noting that nowhere in the appeal submissions relating to this aspect of the appeal has Frontier-Kemper suggested or argued the Director used a legal "standard" to decide the issue that was wrong and different than the "standard" set out in cases such as *Amelia Street Bistro*.

51. In sum, while Frontier-Kemper may disagree with the conclusion reached by the Director, it is one the Director was entitled to make on the facts and is one in respect of which the Tribunal has no authority to interfere with as it was clearly based on evidence that was before the Director.

52. The other aspect of the error of law ground is based on the conclusion by the Director that safety does not constitute a "resource" within the meaning of the definition of manager.

53. At the outset I note the Director accepted Mr. Evinger's responsibilities relating to his controlling access to safety equipment and inventory and submitting inventory for ordering would engage supervising and/or directing other resources, but the Director found no evidence that this was "a primary employment duty of Mr. Evinger". The arguments made by counsel for Frontier-Kemper on this aspect of the Determination only seek to have the Tribunal alter the effect of the findings of fact made by the Director on this point. It is similar in nature to the attempts to have the Tribunal re-assess the Director's conclusion about whether Mr. Evinger supervised and/or directed human resources and my comments on those efforts apply equally here.

54. In respect of the assertion that the Director erred in not finding safety constituted a "resource" for the purposes of the definition of manager, I am not persuaded the Director made any such error. I accept that workplace safety is a legislative responsibility and an important objective for employers, but the Tribunal has consistently advocated a strict interpretation of provisions that derogate from minimum standards. Such an approach to interpreting the *Act* is consistent with the remedial nature of the *Act* and with its purposes and accords with the comment from *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.), that:

> . . . an interpretation of the *Act* which encourages employers to comply with the minimum requirements of the *Act*, and so extends its protection to as many employees as possible is favoured over one that does not.

55. I find no error in the Director limiting the term "resources", in the phrase "other resources", to aspects of the business pertaining to the economic, or financial, elements of the enterprise. This approach represents a balance, and a recognition, that persons who supervise and direct human resources, the employees, are no more significant to the profitability of the business than those who supervise and direct the financial resources of the business. The full scope of what might be included in the general concept of financial resources will be decided on a case by case basis, but I can see no basis for including safety within that concept.

56. For these reasons, I do not accept the Director erred in how the phrase "other resources" in the definition of manager was interpreted and applied in the circumstances of this case.

57. Accordingly, the appeal is dismissed.

ORDER

58. Pursuant to section 115 of the *Act*, I order the Determination dated April 16, 2012, be confirmed in the amount of $5,586.91, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal