



An appeal

- by -

Grant Howard  
("Howard")

- 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.:** 2008A/55

**DATE OF DECISION:** September 2, 2008

## DECISION

### SUBMISSIONS

Grant Howard	on his own behalf
Michael R. Kilgallin	on behalf of Kirk Capital Corporation
J.R. Dunne	on behalf of the Director

### OVERVIEW

1. This decision completes an appeal filed by Grant Howard (“Howard”) under Section 112 of the *Employment Standards Act* (the “Act”) of a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on November 25, 2002.
2. The Determination addressed a complaint filed by Howard against Kirk Capital Corporation (“Kirk Capital”). Following an investigation of the complaint, the Director found that Kirk Capital had contravened Section 18(1), Section 45, Section 58(1) and Section 63(2) of the *Act* and calculated Howard was entitled to an amount of \$29,535.29 in respect of those contraventions.
3. In BC EST #D011/07 (the “original decision”), I dismissed a substantial part of the appeal, confirming the Determination in respect of those matters, but found the Director had not fully considered Howard’s claim for commission wages on the financing transaction relating to the property at 4351 No. 3 Road from the perspective of a possible continuity between the efforts Howard had made to bring about financing for that property and the mortgage financing that was completed approximately 11 months after he was terminated.
4. The Director reviewed the question which was referred back and issued a Supplement to the Determination. In the Supplement, the Director concluded that Howard was not the effective cause of the completed financial transaction on 4351 No. 3 Road (the “property”), was not entitled to any additional wages and dismissed that part of his claim.
5. In BC EST#D013/08 (“the referral back decision”), I found the Director had committed an error in law in concluding Howard was not the effective cause of the completed financial transaction on the property and that he was entitled to commission wages for work he performed relating to the financing on the property. I referred the calculation of the wage amount back to the Director, together with a request that the Director attempt to mediate a settlement with the parties.
6. The Director has broached the possibility of a settlement with the parties, has received submissions, made the requested wage calculation and has issued another Supplement to the Determination, dated May 29, 2008 (“Supplement 2”). Supplement 2 has found that Howard is entitled to an amount of \$4,501.21 as commission wages in respect of his work relating to the financing on the property.
7. The Tribunal requested submissions from the parties on the calculations set out in Supplement 2.

8. Kirk Capital Corporation has filed a response. They agree with the calculations done by the Director and with the amount the Director has found owing.
9. Howard has also filed a submission on the wage calculation. Not surprisingly, Howard disagrees with the Director's wage calculation. Essentially, his disagreement goes to two matters. First, with decision to divide the commission on the property between Howard and Hoehn based on an assessment of the time which each spent working on the financing. He asserts that such a method of dividing the commission is absurd and patently unreasonable. Second, he disagrees with the calculation of the commission at .85% of the funds advanced on the financing rather than the 2% that was initially included in the Exclusive Agency Agreement.
10. In the course of his extensive submission, Howard revisits several aspects of the original decision and the first Supplement that he contends are incorrect. What I indicated in the referral back decision continues to hold: I do not intend to address arguments that have been fully addressed in previous decisions or which are largely unrelated to the matter being dealt with in this decision. This comment speaks most directly to that part of the original decision that considered the scope of the Tribunal's jurisdiction over many of the claims being made by Howard: see paragraphs 70-79.
11. Howard submits that the commission should be calculated at 2% of the funds advanced, that Kirk Capital Corporation should receive a 30% share of that commission, because they agreed to take that amount, that Ms. Hoehn should receive a 15% share of the commission, because that was the agreement with her, and the balance should be paid to Howard, "with interest and penalties".
12. Howard has also provided a reply to the response made by Kirk Capital Corporation. He addresses the submission made by Kirk Capital Corporation that the commission should be calculated on amounts actually received by them, that it was the continued involvement of Kirk Capital Corporation that crystallized the financing, that Howard has the burden of disproving the submission of the Director and that the conclusions of the Director are "reasonable".
13. Kirk Capital Corporation has filed a response to the above submission.
14. I have considered all of these submissions to the extent they are relevant to the matter being considered in this decision.

## **ANALYSIS**

15. As in stated in the referral back decision, as the appellant in these proceedings, the burden continues to be on Howard. The nature of that burden is described by the Tribunal in *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). In the context of the issue that was referred back and addressed in Supplement 2, the nature of that burden requires the Tribunal to be persuaded that the Director erred in finding Howard was entitled to commission wages in the amount of \$4,501.21 for the work he performed on the property.
16. At the outset, I will briefly address two matters raised by Howard in his submissions: his allegation of bias against the Director and his assertion that he has been denied a fair hearing.
17. No more than a brief analysis is warranted on either of these matters.

18. An allegation of bias against a decision maker is serious and should not be made speculatively: see *Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.). The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a “real likelihood” or probability of bias must be demonstrated. Mere suspicions, beliefs or impressions, are not enough. A decision maker, in this case the Director, does not demonstrate bias by disagreeing with or refusing to accept the position of one of the parties to a complaint. Howard’s arguments on what he feels are the facts do not acquire any greater weight because they are accompanied by allegations of bias, manipulation and dishonesty in the Director’s decision making processes. This allegation is without foundation and is rejected.
19. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. Howard has been given ample opportunity to be heard on this matter. This argument is also rejected.
20. Returning to the more substantive issues raised in the submissions of the parties, I agree with the Director and Kirk Capital Corporation that the commission wages are properly calculated on the commission Kirk Capital Corporation actually received. Whether it was unfair or improper for Kirk Capital Corporation to agree to reduce the commission rate is not a matter over which the Tribunal has jurisdiction. For the purposes of calculating Howard’s wage entitlement, the commission is what it is, not what Howard thinks it should be. If Howard believes Kirk Capital Corporation has breached some legal obligation to him in agreeing to a reduced rate of commission on this property and/or not litigating his commission claim, he will have to pursue those questions in another forum.
21. I do not accept the inference of Howard’s submission on what he believes would the appropriate division of the commission. His submission ignores the following finding from the referral back decision:
- I do accept that Howard was not the exclusive cause of the completed transaction and that Hoehn contributed significantly to it.
22. Nor do I accept that I should either ignore that part of the employment agreement between Howard and Kirk Capital Corporation that allocates 40% of Howard’s gross fee revenue to Kirk Capital Corporation or reduce that amount from 40% to 30% based on Howard’s assertion of a verbal agreement to that effect.
23. In the final analysis, the commission wage calculations made by the Director are not unreasonable or absurd. Nor do they appear to be manifestly unfair from an objective standard. They are based on evidence that was before the Director and are justifiable on that evidence. The Director has complied with the direction provided in the referral back decision. As the Tribunal stated in *Mykonos Taverna operating as Achillion Restaurant*, BC EST#D576/98, at page 6:

After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving “efficient” resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and

reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker's Pub and Grill*, BC EST #D511/98). In this case the question is whether the appellant has shown the decision is unfair or unreasonable.

24. Howard has not met the burden on him as it relates to the Director's calculation of the commission wages owed to him for his work on the property.
25. The Supplement 2 is confirmed.

### **ORDER**

26. Pursuant to Section 115 of the Act, I order the Determination dated November 25, 2002, be varied in accordance with the decisions made by the Tribunal in this appeal and the resulting decision be confirmed.

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