Employment Standards TRIBUNAL

An appeal

- by -

Lyle Storey
("Mr. Storey")

- 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: Shafik Bhalloo

FILE No.: 2014A/100

DATE OF DECISION: September 26, 2014

DECISION

SUBMISSIONS

Lyle Storey — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Lyle Storey ("Mr. Storey") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on July 3, 2014 (the "Determination"). In that Determination, the Director determined that the *Act* had not been contravened by Mr. Storey's former employer, ARAS 360 Technologies Inc. ("ARAS"), and accordingly, no wages were outstanding.

2. Mr. Storey appeals the Determination alleging that the Director failed to observe the principles of natural justice and erred in law in making the Determination.

3. Section 114 of the *Act* provides that the Employment Standards Tribunal (the "Tribunal") may dismiss all or part of an appeal without seeking submissions from the other parties or from the Director if it decides the appeal does not meet certain criteria. I have decided that this appeal is an appropriate case for consideration under the said provision of the *Act*. Accordingly, this appeal will be decided based on the Reasons for the Determination (the "Reasons"), Mr. Storey's written submissions and my review of the section 112(5) "record" that was before the Director at the time the Determination was made. If I am satisfied that Mr. Storey's appeal has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal may invite ARAS and the Director to file reply submissions on the appeal, and Mr. Storey may be afforded an opportunity to make a final Reply to those submissions, if any. If the appeal is not meritorious, it will be dismissed.

ISSUES

4. The issues in this appeal are twofold; namely:

   (a) Did the Director fail to observe the principles of natural justice in making the Determination?

   (b) Did the Director err in law in making the Determination?

THE FACTS

5. Based on an online corporate search of ARAS conducted by the delegate on February 11, 2014, ARAS is a company incorporated under the laws of the Province of British Columbia on February 4, 2010, with Michael Kennedy ("Mr. Kennedy") listed as its sole director and Officer.

6. ARAS operates a software sales business, and employed Mr. Storey in various positions from September 15, 2010, to February 5, 2014, when ARAS terminated Mr. Storey's employment, alleging just cause.

7. Mr. Storey filed a complaint, dated February 9, 2014, under section 74 of the *Act* against ARAS, alleging that the latter contravened the *Act* by failing to pay him earned commissions and compensation for length of service (the "Complaint").

8. On March 26, 2014, the delegate sent ARAS a Demand for Employer Records (the "Demand") requesting the following payroll records:

> 1. Any and all payroll records relating to wages, hours of work and conditions of employment, as specified in section 28 of the *Act*; and
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> 2. Any and all documents relating to the termination of Mr. Storey's employment, including any and all documents upon which ARAS relied to establish just cause to terminate Mr. Storey's employment, as well as a copy of the Record of Employment ("ROE").

9. Based on my review of the record adduced by the Director in this appeal, ARAS appears to have complied with the Demand and produce the records requested by the delegate.

10. I also note, based on the letter dated April 25, 2014, from the delegate to Mr. Storey (produced by Mr. Storey in his appeal submissions) and the delegate's letter dated August 13, 2014, to the Tribunal enclosing the record, that the delegate disclosed each party's documents to the other before conducting a hearing into the Complaint on June 19, 2014 (the "Hearing").

11. In the Reasons, the delegate notes that ARAS informed Mr. Storey, by way of a letter dated January 24, 2014, that his position as Regional Business Developer would be eliminated effective February 3, 2014, and offered him a position of Business Developer. In the latter position, he would be compensated by way of an hourly wage of $12 per hour plus bonuses for booking and completing product demonstrations of ARAS' products. Further, Mr. Storey was also to earn a commission of 10% on opportunities he developed in his previous position that had not yet materialized into completed sales. Under this arrangement, Mr. Storey was required to provide a list of his pending accounts or potential sales to Mr. Kennedy, which Mr. Storey did.

12. In examining both issues in the Complaint – whether there was just cause for ARAS to terminate Mr. Storey's employment and if Mr. Storey was entitled to commission from his pending accounts – the delegate reviewed the evidence of both parties at the Hearing. Mr. Storey gave evidence on his own behalf at the Hearing, which was conducted by way of a telephone conference call. On behalf of ARAS, the Director of Operations, Ricci Krizmanich ("Ms. Krizmanich"), appeared and provided evidence.

13. The delegate meticulously reviews the evidence of both parties in the Reasons and, with respect to the question of whether ARAS terminated Mr. Storey's employment for just cause, the delegate reviews the provisions of section 63 of the *Act* and delineates the governing legal principles for what constitutes just cause for the termination of an employee's employment before assessing the evidence of the parties.

14. In concluding that ARAS terminated Mr. Storey's employment for just cause, the delegate reasons as follows:

> ARAS has provided a series of disciplinary notices regarding Mr. Storey's failure to make the required number of calls, book the required number of product demonstrations, meet his sales targets, and follow approved scripts when communicating with clients, all but one of which were signed by Mr. Storey, indicating that he undertook to make the required changes. The final three formal notices, issued in February and March, 2013, indicated that Mr. Storey would be terminated should he not meet the expectations set out in the notices. Mr. Storey received notices on April 3 and 9, 2013, indicating that ARAS was removing his responsibility for certain territories due to his low call volumes.
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> The next record of discipline was the email dated January 13, 2014, in which Mr. Kennedy notes that Mr. Storey was "continuing to simply do it 'your way'" with respect to his refusal to use the script. The email states that Mr. Storey must make significant changes to his performance. Following this email, Mr. Storey

> was demoted by ARAS, due, Ms. Krizmanich testified, to Mr. Storey's inability to perform his duties to ARAS's standards. The 'Business Developer Schedule of Earnings' attached to the contract for his new job included a clause headed 'Script Expectations.' Mr. Storey signed this schedule, acknowledging that he understood ARAS's [*sic*] expectations.
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> It was Ms. Krizmanich's un-contradicted testimony that she conducted a 45 minute meeting with Mr. Storey on February 5, 2014, reiterating the requirement that Mr. Storey use the employer's script when making calls. That same day, Mr. Storey made a call to the Ontario Provincial Police in which he chose not to follow ARAS's provided script, and was terminated.
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> Mr. Storey's refusal to use the script provided by ARAS can best be categorised as a series of minor insubordinations, in that one instance would be insufficient to justify dismissal. Taken altogether, it is clear that the expectation to follow the script was understood by Mr. Storey; that Mr. Storey was given ample opportunity to meet the expectation; that Mr. Storey was warned that continued failure to meet the expectation would place his employment in jeopardy; and that Mr. Storey ultimately refused to meet the expectation. The final incident, on February 5, 2014, was particularly egregious, given that Mr. Storey met with Ms. Krizmanich, his direct supervisor, for 45 minutes to discuss ARAS's expectations, and that Mr. Storey almost immediately did the opposite.
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> ARAS failed to follow through with terminating Mr. Storey following the final notice issued March 14, 2013. It is clear, however, that ARAS did not condone Mr. Storey's continued refusal to meet ARAS's expectations, as he was subsequently stripped of responsibility for certain territories, and then demoted. Mr. Storey was subject to a series of escalating disciplinary actions which he knew, or should have known, would result in termination if his behaviour did not improve.
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> I find that Mr. Storey clearly indicated by his actions that he would continue to refuse the lawful and reasonable instructions of his employer, and thereby repudiated his contract of employment. I find that ARAS was justified in terminating Mr. Storey's employment.

15. With respect to the question of whether Mr. Storey was entitled to commissions from his pending accounts, the delegate again carefully reviews the evidence of both parties and considers the terms of the applicable contract between the parties, and the provisions of the *Act*. In concluding that Mr. Storey was not owed any wages, the delegate reasons as follows:

> Mr. Storey quite correctly argued that the January 24, 2014, contract of employment contains an 'entire agreement' clause, which precludes ARAS from reading terms in from previous contracts. Ms. Krizmanich argued that the term 'bonuses' in the January contract should be read to include commissions. The contract makes mention of both bonuses and commissions, clearly treating the two as the separate entitlements that they are. I find that Mr. Storey's entitlement to payment for commissions earned during his employment was not extinguished when he was terminated.
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> The Act allows for recovery of wages, including commissions, earned by employees. Depending on an individual's contract of employment, commissions may become payable at some time after an employee is terminated, but they must be earned during the individual's tenure as an employee. It is therefore necessary to determine when commissions are earned and payable in any individual employment contract in order to determine what wages may be recoverable under the Act.
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> The contract at issue is silent as to how and when commissions are earned. The entirety of its discussion is as follows:
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> > 'As a previous Regional Business Developer with ARAS 360 Technologies, Inc. you will be entitled to convert and collect commission on existing opportunities currently in progress. These accounts will need to be identified by you and a list provided to Mike Kennedy. You will earn 10% commission on these opportunities.
> >
> > All state wide deals will be handled by Mike Kennedy, with the exception of agreed upon accounts that will remain assigned to you. You will earn 10% commission on these opportunities.'

> The contract refers to a future eligibility to collect commission from existing opportunities. It is clear that at the time the document was written, Mr. Storey had not yet earned the commissions; there was an unspecified future event which needed to occur to crystalize his entitlement.
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> ARAS's practise has been that commissions are earned when a client submits a signed order form, as indicated by the Employer's 'Procedure re: Incoming Sales' document, which was unchallenged by Mr. Storey. Mr. Storey's un-contradicted testimony was that he entered into a verbal agreement with Ms. Krizmanich, by which he would receive his full commission on any sales generated from his existing opportunities in February, 2014. This supports a conclusion that commissions were earned when a sale was generated. I find that commissions were earned when a sale was made, indicated by a customer submitting a signed order form.
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> Mr. Storey provided no evidence as to which opportunities generated order forms from customers. ARAS provided an annotated copy of Mr. Storey's list of existing opportunities, indicating that orders were submitted on four accounts. One order was received on February 11, two on February 25, and the final one on March 28, 2014. I find this annotated list to be the best evidence of which accounts generated sales, and when the order forms were submitted. These orders were all submitted after Mr. Storey's termination, when he was no longer an ARAS employee.
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> I find that no sales were generated from the list of opportunities during Mr. Storey's employment, and that therefore, no commissions were earned during his employment. The Act deals only with wages earned by employees. Any entitlement to commissions for sales generated from Mr. Storey's list of opportunities was earned while Mr. Storey was no longer an employee of ARAS, and therefore is outside the jurisdiction of the Act.
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> Given these findings it is unnecessary to determine the commission rate under the contract.

SUBMISSIONS OF MR. STOREY

16. As indicated, Mr. Storey appeals the Determination on the basis that the Director failed to observe the principles of natural justice and also erred in law in making the Determination.

17. With respect to the natural justice ground of appeal, Mr. Storey submits that leading up to the Hearing, ARAS did not provide him notice or documentation that it would allege failure to follow ARAS' "script" under his previous contract as evidence to justify his dismissal under his new contract. Therefore, he argues that "justice was not done, nor was it seen to be done".

18. He also argues that at the Hearing, Ms. Krizmanich was permitted "to lead a body of evidence on the 'script' issue" including the warning or "reprimand" she gave him on the matter earlier, but this evidence was not put to him in cross examination at the Hearing, nor was it included in the (documentary) evidence of ARAS the delegate sent to him in April 2014, prior to the Hearing.

19. Mr. Storey also submits that the delegate did not take any steps to allow him to rebut Ms. Krizmanich's evidence on the "'script' issue" after Ms. Krizmanich adduced the said evidence at the Hearing. He states the result of this was that the delegate accepted ARAS' version of events on the subject without giving him the opportunity to tell his side of the issue. This is a breach of natural justice on the part of the delegate, he argues.

20. He also submits that the event that led to the termination of his employment, namely, his alleged failure to follow the "script" during the call with the Ontario Provincial Police, was not a sales call that required him to follow a "script". Mr. Storey contends that this, too, is a breach of natural justice.

21. With respect to the error of law ground of appeal, Mr. Storey argues that the Director "fundamentally misapprehended the nature of the employer/employee relationship which arose in all the circumstances as of February 5, 2014" leading to ARAS' decision to terminate his employment. This misapprehension, Mr. Storey contends, led the delegate to incorrectly conclude that ARAS had discharged the liability imposed upon it by section 63 of the *Act*. He further contends that this same "misapprehension" resulted in the Director failing to "assess the monetary consequences" which flowed from ARAS' breach of section 63.

22. In support of the foregoing arguments, Mr. Storey, under the heading "Specifics" in his submissions, states:

> 1. On page R5 of the Determination, the Director correctly sets out the basis upon which an employer can demonstrate just cause for determination [*sic*], and specific to this case, later finds just cause arose from a series of minor misconducts, namely, failure to abide by what is described in the contract, as the 'script expectations'.
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> 2. The new Contract provides that it is the 'entire (employment) agreement' between the parties and my prior position was being eliminated. This is paraphrased by Ms. Krizmanich who testified that the employer '…restructured in February 2014, and that Mr. Storey's new position was no longer a sales position' (Determination, page R4.)
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> 3. The Director failed to apprehend that the written contract encompassed the entire employment agreement between the parties effective February 3, 2014, and that the employment position and contract entirely replaced the previous position and contract.
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> 4. The Director further failed to consider the supporting evidence of Ms. Krizmanich that the elimination of the position arose from restructuring and accepted only the contradictory evidence of Ms. Krizmanich that I was demoted due to inability to follow the employer's direction (Determination, page R4). As noted above, there was no challenge by way of cross examination of me, regarding this evidence that I was presented with a 'new contract' (Determination, R3), nor was I cross examined or allowed to lead rebuttal at all on the evidence later led by Ms. Krizmanich, nor was their prior notice of this allegation, upon which the Determination was ultimately founded. This failure to observe a principal [*sic*] of natural justice (discussed above), is directly connected to the Determinations [*sic*] findings.
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> 5. The full and final employment contract between the parties was to be found only within the written contract. It specifically states that the employers [*sic*] remedy – a penalty, if you will – provided for that failure to ask the qualifying questions (ie – the script) may result in cancellation of the demonstration and will result in loss of compensation for the demo booked. It did not state that this would be grounds for termination.
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> 6. Instead of recognizing that the Business Developer Contract evidenced the complete employment contract in my new (and lesser) role as a Business Developer, the Determination ignored the clearly stated written consequences of the alleged failure to follow the script, and went outside the written contract to apply presumed consequences that would follow upon warnings found to have been given when I was in the previous position of Regional Business Developer, and working pursuant to a contract that the evidence apparently reveals was partly in writing and partly verbal. Regardless, the previous written contract did not provide that the written contract was the entire agreement.
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> 7. The result of these errors in law is that notifications made previous to the Business Developer Contract were given an impact not provided for in that new Business Developer Contract, and were treated as if the new Business Developer Contract did not apply. **In other words the new Contract was forward looking, whereas the Determination treated the new Contract as a continuation of the previous employment agreement which the contract (and the evidence of the parties) clearly states it is not.** (emphasis added by Mr. Storey)

ANALYSIS

23. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds only:

> (a) the Director erred in law;
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> (b) the Director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

24. In this case, as indicated previously, Mr. Storey appeals on the basis of the "error of law" and "natural justice" grounds of appeal set out in subsections 112(1)(a) and (b) of the *Act*. I will address each under separate headings below.

(a) *Error of Law*

25. The British Columbia Court of Appeal, in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275, explains error of law as:

> (1) a misinterpretation or misapplication of a section of the Act;
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> (2) a misapplication of an applicable principle of general law;
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> (3) acting without any evidence;
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> (4) acting on a view of the facts which could not reasonably be entertained; and
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> (5) adopting a method of assessment which is wrong in principle.

26. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal stated that the definition of error of law expounded by the Court of Appeal in *Gemex, supra*, should not be applied so broadly as to include errors which are not, in fact, errors of law, such as errors of fact alone or errors of mixed law and fact, which do not contain extricable errors of law. Subsequently in *Re: Pro-Serv Investigations Ltd.*, BC EST # D059/05, and *Re: Koivisto (c.o.b. Finn Custom Aluminum)*, BC EST # D006/05, the Tribunal reiterated that it does not have jurisdiction over questions of fact unless, of course, the matter involves errors on findings of fact which may amount to an error of law. In *Re: Funk*, BC EST # D195/04, the Tribunal expounded on the latter point, stating that the appellant would have to show that the factfinder made a "palpable and overriding error" or that the finding of fact was "clearly wrong" to establish error of law.

27. Having said this, I have carefully read Mr. Storey's submissions on the error of law ground of appeal, and, particularly, his contention that the Director misapprehended the nature of the employer/employee relationship which led him to incorrectly conclude that ARAS discharged the liability imposed on it by section 63 of the *Act* and relatedly failed to assess the monetary consequences which flowed from ARAS' breach of section 63. I am not persuaded in the merit of Mr. Storey's argument here. More particularly, based on the evidence in the seven (7) enumerated paragraphs in Mr. Storey's written submissions under the heading "Specifics", it is clear to me that Mr. Storey is doing little more than simply disputing the delegate's findings of fact and rearguing in the hopes that he will get a more sympathetic hearing from the Tribunal.

28. Having said this, I note the Tribunal is generally reluctant to substitute the delegate's findings of fact even if it is inclined to reach a different conclusion on the evidence. In this case, based on the relevant or applicable tests for finding an error of law delineated in *Gemex, supra,* as well as the Tribunal's decisions in *Re: Britco, supra*, and *Re: Funk, supra*, I am not persuaded that the delegate made a palpable or overriding error, or

reached a clearly wrong conclusion of fact, or acted without any evidence or on a view of evidence that could not reasonably be entertained on either of the issues – the conclusion that ARAS' termination of Mr. Storey's employment was for cause and the conclusion that Mr. Storey was not owed any wages. I find that the delegate's findings of fact on both these issues are sufficiently supported in evidence.

29. In the result, I find Mr. Storey has failed to discharge the onus on him to establish that the delegate erred in law in making the Determination. Therefore, I dismiss this ground of appeal.

(b) ***Natural Justice***

30. Mr. Storey has also advanced the natural justice ground of appeal. The Tribunal has explained in previous decisions that the principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; to present their evidence; and to be heard by an independent decision maker (see *Re: Imperial Limousine Services Ltd.*, BC EST # D014/05).

31. The Tribunal has also noted in past decisions that the onus is on the appellant claiming a breach of natural justice to demonstrate, on a balance of probabilities, a violation of its natural justice or procedural rights.

32. In this case, in support of his claim of breach of natural justice on the part of the Director, Mr. Storey argues that he was not provided with any notice or documentation leading up to the Hearing, giving him notice that ARAS was alleging failure on his part to follow the "script" as grounds for dismissal. Based on my review of the record adduced in this appeal, on March 26, 2014, the delegate issued ARAS the Demand to provide, *inter alia*, documents relating to the termination of Mr. Storey's employment, including any and all documents upon which ARAS was relying to establish just cause for terminating Mr. Storey, and ARAS complied with the Demand. The delegate then sent all documents from ARAS to Mr. Storey in April 2014 before the Hearing. I note Mr. Storey has included, together with his appeal submissions, Exhibit B, a cover letter from the delegate, dated April 25, 2014, which shows that the delegate sent ARAS's documents to Mr. Storey. These documents included several disciplinary notes or warnings related to Mr. Storey's work performance. Therefore, I do not find Mr. Storey's argument –that he did not have notice or documentation that would have alerted to him to what ARAS was relying upon to allege just cause for termination of his employment- credible or meritorious.

33. If Mr. Storey, in his submissions, is arguing that he should have been provided some written submissions from ARAS setting out the latter's argument or what it was intending to argue at the Hearing based on its reliance documents, then I do not think that the concept of natural justice extends that far. The principles of natural justice do not require parties in administrative proceedings such as the one before the Director of Employment Standards to provide written notification or submissions of their arguments to opposing parties before the oral hearing.

34. Further, also under the breach of natural justice ground of appeal, Mr. Storey argues that ARAS' witness, Ms. Krizmanich, led a body of evidence on the "script" issue, which evidence was not put to him in cross-examination, nor was it included in the documentary evidence of ARAS that he received from the delegate in April 2014. He further contends that the delegate did not "take steps to allow [him] to rebut this evidence after it was first led by [Ms. Krizmanich]". He contends that the Director accepted ARAS' version of events without giving him the opportunity to tell his side "of this issue". Again, I am not persuaded that Mr. Storey has made out a case of a breach of natural justice here. First, I note that there is no legal obligation on the part of ARAS to put any oral evidence of its witness (Ms. Krizmanich) to him in cross examination or to give the oral evidence to be proffered at the Hearing to him in advance of the Hearing. Mr. Storey certainly could have cross examined Ms. Krizmanich and challenged any oral evidence she gave at the Hearing.

35. I also do not find there to be any basis to conclude that the delegate prevented Mr. Storey from rebutting any evidence of Ms. Krizmanich or ARAS.

36. I find this to be a case where the delegate heard both parties and, in reaching his conclusions, carefully evaluated and weighed that evidence and reached conclusions about the strength of the parties' respective positions, and ruled in favour of ARAS. This does not constitute a failure to observe the principles of natural justice, nor demonstrate any denial of natural justice on its face.

37. Finally, Mr. Storey appears to contend, under the natural justice ground of appeal, that the telephone call that he had with the Ontario Provincial Police, which was the last event that ARAS appears to have relied upon to terminate his employment for cause, was not a sales call that would require him to follow the "script". It would appear that Mr. Storey is arguing that ARAS' reliance on that call in terminating his employment and the delegate's acceptance of that evidence to find that ARAS had just cause to terminate Mr. Storey's employment was wrong, and amounted to a failure on the part of the delegate to observe the principles of natural justice. I find that Mr. Storey, again, is disputing the delegate's findings of fact and, furthermore, re-arguing his case, which is not permissible on appeal.

38. Accordingly, I dismiss Mr. Storey's appeal based on the natural justice ground of appeal.

ORDER

39. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *Act*, the Determination dated July 3, 2014, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal