

An appeal

- by -

Spencer Gifts (Canada) Inc.  
("Spencer")

- 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.:** 2007A/107

**DATE OF DECISION:** November 13, 2007



Julia Sykes ("Sykes"), Hardeep Dhuga ("Dhuga"), and Ken Eng ("Eng") are employed as store managers and all remain currently employed by Spencer.

Sykes has been employed from October 6, 2000 and became manager of Spencer's store located at #125 - 6631 North Island Highway, Nanaimo, B.C. V9T 4T7 in April 2005. She is paid a bi-weekly salary.

Dhuga was hired October 1, 1999 as a store manager and has worked in different stores operated by Spencer. She currently manages the store located at #254 - 9855 Austin Avenue, Burnaby, B.C. V3J 1N4 and is paid a bi-weekly salary. Dhuga has been on maternity leave since March 2007.

Eng commenced employment October 16, 1998 as a store manager and, over time, was given more responsibility. He is currently a senior area manager and performs the duties associated with this position in addition to the managerial responsibilities of Spencer's store located at #316 - 19705 Fraser Highway, Langley, B.C. V3A7E9. Eng is paid a bi-weekly salary of \$1840.54 as a store manager plus \$200.00 bi-weekly for his area manager duties. His total bi-weekly salary is \$2040.54.

The complaints were filed on December 12, 2006.

Sykes, Dhuga, and Eng appeared at the hearing to testify in person. Kevin Mahoney ("Mahoney"), Spencer's Senior Director and General Counsel, participated in the hearing by speaker telephone from his office in New Jersey, U.S.A.

Mahoney did not lead any evidence but he did conduct cross examination of each of the complainants and made arguments on behalf of Spencer.

Sykes, Dhuga, and Eng provided testimony with respect to the store manager positions. In addition, Eng provided testimony with respect to his additional duties as area manager. Sykes and Dhuga were excluded from the hearing while Eng testified and underwent cross examination. By agreement of the parties, Sykes and Dhuga gave their evidence and underwent cross examination together while Eng remained as an observer.

I have considered all the evidence and arguments of the parties for the purpose of determining whether the duties of store manager fall within the definition of "manager" in the *Employment Standards Act Regulations* (the Regulations). Spencer does not take the position that Sykes, Dhuga or Eng were employed in an executive capacity.

8. In addition to the above facts, the Director outlined the evidence provided at the complaint hearing and made findings of fact from that evidence. For the purpose of addressing the issues raised in this appeal, it is appropriate to briefly identify and reference some of the evidence received by the Director:

"The job description for store managers contains the following duties: . . ."

"Spencer provides specific written instructions to its store managers with respect to the following: . . ."

"Sykes, Dhuga and Eng provided the following information with respect to their job responsibilities as store managers: . . ."

"With respect to his duties as area manager, Eng stated he would normally report to a district manager (previously located in Alberta) but this position is currently vacant. He now reports

directly to a regional manager, located in the U.S.A. In addition to managing his store, Eng is required to spend two to three days a week visiting other stores in his area. He is responsible for checking to ensure the stores are operating in accordance with Spencer's policies and procedures. He performs audits on these stores when required.

Eng says he is required to get approval from Spencer's human resources manager and/or his regional manager in order to promote staff into acting positions when store managers are away. He is involved in the hiring and promotion of staff (associates, supervisors, assistant managers, and store managers, but only to the extent of making recommendations. He does not have authority to make these decisions on his own nor to set the salaries of staff."

"The area manager job description contains the following responsibilities: . . ."

"Mahoney raised the issue that Eng recently applied for the position of district manager. In his letter of application for this position, Eng listed his experience as: . . ."

"Eng acknowledges the above experience, but argues that all his duties are carried out under the strict guidelines provided by Spencer and he has no independent authority in any of these areas."

9. The Determination notes that Spencer did not call any evidence at the complaint hearing, choosing to make its case through cross-examination of the individual complainants.
10. The Determination contains an analysis of the definition of manager under the *Act* and applies that analysis to several findings of fact relating to Eng as both store manager and area manager. These findings, as they related to the store managers, are found at pages 8 and 9 of the Determination. The key findings, as they relate to store managers are:
  - (1) The store managers have very little power of independent action, autonomy and discretion;
  - (2) The store managers have no authority to make final decisions relating to supervising and directing employees or to the conduct of the business;
  - (3) The store managers have no authority to make final judgments about hiring, firing, authorizing overtime, time off or leaves of absence or laying off staff, although there appears to be some authority to call employees in to work during an emergency;
  - (4) There is mention in the job description that store managers are to recruit and hire associates, although in reality I find they do not independently hire anyone. Nothing in the job description relates to supervising staff.
11. The Director also found the job description, and other evidence, suggested the principal responsibilities of store managers was to ensure the stores operate in accordance with Spencer's established procedures.
12. The Director found Eng was not a manager under the *Act* with respect to his position as store manager. The Director considered whether Eng was a manager under the *Act* in his position as area manager. There was a similar analysis made in respect of this position and similar key findings made by the Director:

"Eng is the second level to be consulted when a store manager recommends the hiring of a sales associate, however, Eng's recommendation must be vetted through Spencer's regional manager and/or human resources manager. Likewise, Eng merely makes recommendations in the hiring of other staff up to and including store managers, makes recommendations regarding reprimands and

terminations, and makes recommendations regarding promotions and wage increases. He has no autonomy or authority in managing human resources.

Regarding managing other resources, I find Eng has no input into budgeting but rather budgets are set for him and he is required to operate within those budgets. He follows established procedures for visiting stores in his area and checks to ensure Spencer's templates are followed.

I find Eng's principal employment responsibilities are to ensure his store operates in accordance with Spencer's strict guidelines and to oversee other stores in his area to ensure those stores operate in accordance with those guidelines. Eng has no autonomy to make independent management decisions and, therefore, he is not a manager as defined in the Regulations.”

13. The Director found Eng was not a manager in his position as area manager.
14. In making the decision concerning Eng's status under the *Act*, the Director considered the broad remedial nature of the *Act*, applied principles and tests from decisions of the Tribunal, including *Howe Holdings Ltd.*, BCEST #D131/04, received and considered evidence and the arguments of the parties.
15. The Director has not filed a submission on the appeal, but has provided the Section 112(5) record. Eng has filed a reply submission, which is accompanied by a substantial number of documents. These documents have not been accepted or reviewed by me. This appeal will be decided with reference to the appeal, including the statutory declaration (to the extent it supports the grounds of appeal and does not seek to add new evidence), the appeal and reply submissions, the Determination and the Section 112(5) record.

## ARGUMENT AND ANALYSIS

16. As a result of amendments to the *Act* which came into effect on November 29, 2002, 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.
17. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. In particular, and in the context of one of the grounds raised in this appeal, the burden of showing the Director failed to comply with principles of natural justice in making the Determination is on Spencer (see *James Hubert D'Hondt operating as D'Hondt Farms*, BCEST #RD021/05 (Reconsideration of BCEST #D144/04)).
18. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see

*Britco Structures Ltd.*, BC EST #D260/03). The Tribunal has adopted the 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.).

19. Spencer says the Director made errors of law in the Determination. Those errors are identified as misapplying the general law, acting on a view of the facts that could not reasonably be entertained, failing to adopt the correct methodology in the analysis for deciding whether Eng was a manager under the *Act* and failing to consider, or ignoring, relevant evidence. The last error alleged is framed as a failure to comply with principles of natural justice. Spencer relies on comments made by the Tribunal in *Britco Structures Ltd.*, *supra*, in support of that characterization and approach (see also *Jane Welch operating as Windy Willow Farms*, BCEST #D161/05).
20. However, as noted by the Tribunal in *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BCEST #RD317/03:

... the complexity of administrative law is such that there is no sharp distinction [between error of law and natural justice]. The grounds for reviewable error in administrative law are not neatly divisible into watertight compartments. They often overlap. Procedural unfairness has, for example, been described as a species of jurisdictional legal error: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643. Jurisdictional error is by definition a serious form of error of law; when it exists, a court will quash a decision despite a privative clause: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220; *Canada (A.G.) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963. An unreasonable finding of fact has been characterized as either an error of law or a jurisdictional error: *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476. In administrative law, a failure of natural justice thus is a species of error of law. This is even more clearly the case when the procedural obligation is written into the statute itself, as is the case with section 77.

21. The approach endorsed by the Tribunal is to avoid the potential complexities involved in categorizing the nature of the appeal with a common sense and plain language orientation, focussing on addressing the substance of the appeal rather than its form. It is not apparent from the language of the *Act* that viewing such an error as alleged in this appeal as one involving natural justice concerns provides any different, and broader, scope for review than if it is viewed as an error of law.
22. For ease of reference, I will address each of the grounds of appeal as they are framed by Spencer.

### ***Error of Law***

23. The Determination sets out the legislative framework within which the issue of whether a person is a manager is decided, lists the factors to be considered in deciding that issue and describes how those factors are considered. Spencer does not challenge this aspect of the Determination but says the Director misapplied this test in the circumstances. The concession made by Spencer that the appropriate test was applied is instructive. In *Howe Holdings Ltd.*, the Tribunal affirmed, for the purpose of the definition of manager as it currently stands in the *Employment Standards Regulation*, that to be considered a manager under that definition the facts needed to demonstrate the employee in question has the power and authority to make independent decisions relating to supervising and/or directing human and other resources.

24. Spencer says the error made by the Director was in analyzing Eng's position as store manager separately from his position as area manager. Spencer says Eng was not just employed as a store manager or as an area manager, but as both. Spencer argues that both positions should have been analyzed as a whole and suggests that such an analysis would change the "total characterization" of his job and bring him within the definition of manager.

25. While that argument may have some initial attraction, it is not borne out in the appeal submission, which at its core represents nothing more than an invitation to the Tribunal to review and re-assess the analysis of the Director and reach a different conclusion on the issue of Eng's status under the *Act*. Spencer has not tied this aspect of the appeal to any specific question of law, but rather to a general analysis of whether the decision was correctly decided on the facts presented to the Director. In that sense, I find the discussion about matters of mixed law and fact in *Britco Structures Ltd.* to be helpful: see pages 13-15. In particular, I note the following point made in that case, at page 14:

In *Cominco*, the question was whether or not the Assessment Appeal Board erred by determining that all of the items were properly assessable against the appellant. This question was said to be so broad and general in its scope as to amount to simply asking "was the decision right?" Because the Court's jurisdiction was to hear and determine cases submitted on questions of law alone, and because no question of law emerged from the question put, it was held in that case that the Court had no power to answer it.

The Court in *O'Connell Holdings Ltd.* found that the question as stated by the appellant did not define the Court's jurisdiction. The Court said:

In framing the question put in the case at bar the appellant tracked the wording of the question put in *Star of Fortune Gaming, supra*. In deciding whether the question in this case relates to a question of law, it is necessary to consider what it is that the appellant wishes to have answered. If, as in *Star of Fortune Gaming, supra*, the issue is that of statutory interpretation, then the question put relates to a matter of law. If, as in *Cominco Ltd., supra*, the issue is whether the Board erred in deciding whether a particular thing or matter falls within the legal definition of its term, the question put relates to a matter of fact or mixed law and fact: see *Holliger Consolidated Goldmines Ltd., supra*. (para. 16, Quicklaw version)

26. There is no basis for the suggestion that sequentially examining the responsibilities included in the two areas of responsibility that Eng had, was an error of law in this case. While I cannot conceive of a circumstance where an employee might carry out responsibilities in different roles, neither of which would draw the employee into the definition of manager when analyzed separately, would be found to be a manager under the *Act* when those responsibilities are looked at together, I don't totally discount that possibility. However, where the basis for such an assertion is that "the "total characterization" on one's position is often much greater than the sum of its parts", there is, at least, a burden to show, first, that such is the case, second, that the Director did not do that and third, that such a failing on the part of the Director, in the context of deciding if a person is a manager under the *Act*, is an error of law.

27. Spencer says, "The findings of fact in the Determination establish that the employee was responsible for the supervision and/or direction of "human and other resources" for multiple stores." That statement does not accurately reflect the findings of fact. The Director found the evidence did not show the necessary autonomy and independence of authority to make Eng a manager under the *Act* and, consequently, that Eng, either as a store manager or an area manager, was not responsible for supervising and/or directing human or other resources as that phrase is interpreted and applied in the definition of manager. As part of

that conclusion, the Director found that Eng's principal employment responsibilities were to ensure the operation of the stores for which he was responsible "in accordance with Spencer's strict guidelines", but that he had no "autonomy to make independent management decisions" in respect of those responsibilities. These conclusions were based on the same evidence that Spencer has referred to in this appeal to show a different conclusion should have been reached.

28. The arguments made by Spencer go to why the Director, on the facts available, should not have reached these conclusions, rather than to show a reviewable error in that regard. It is apparent from the Determination that the findings made by the Director were findings which were capable of being made from the evidence. It is also apparent that Spencer disagrees with those findings. There is a qualitative, and legal, difference between acting on a view of the facts that cannot reasonably be entertained – which is an objective test with the burden on Spencer to show that has occurred – and reaching a conclusion on the facts with which one party disagrees and subjectively considers unreasonable.
29. Nor am I persuaded, even if the Director incorrectly "bifurcated" the analysis (and I am not deciding that), that a consideration of the "total characterization" of Eng's position as both a store manager and area manager would have led to any different conclusion. The Determination clearly indicates that its conclusion on the status of Eng under the *Act* was based on an assessment of the responsibilities related to his position generally, all of which showed Eng did not have autonomy or authority in supervising or directing human or other resources, or in making independent management decisions generally, and that his principal responsibilities were ensuring his store, and those stores which he oversaw, operated according to the guidelines set by Spencer.

#### ***Failure to Comply with Principles of Natural Justice***

30. The argument made by Spencer on this ground is similar to that made above. Spencer argues that the Director failed to comply with principles of natural justice by failing to consider relevant evidence or ignoring such evidence in making the Determination. In support of this ground of appeal, Spencer has introduced a statutory declaration from Kevin W. Mahoney, who is identified in the statutory declaration as Senior Director and General Counsel for Spencer, and who represented Spencer at the complaint hearing.
31. The statutory declaration describes four areas of evidence which Mr. Mahoney says is "not discussed or referred to in the Determination" (statutory declaration - para. 7). The argument made by Spencer in the appeal is that the described evidence was highly relevant and critical to the status of Eng and the failure to address that evidence is a breach of natural justice. I will consider each of these areas of evidence in turn:
32. 1. " . . . The Employee testified that as an Area Manager, he had successfully "manag[ed] multi-unit stores in British Columbia and Alberta". The Employee recounted, in detail, his management and supervisory responsibilities."
33. While the Director did not recite, in detail, the evidence provided by Eng relating to his responsibilities, the Determination does indicate that Eng said "all his duties are carried out under the strict guidelines provided by Spencer and he has no independent authority in any of these areas." The Director found the evidence supported that assertion and made that finding; a finding which was central to the final conclusion relating to Eng's status under the *Act*. In other words, while the evidence provided by Eng about his supervisory and management responsibilities is not set out in detail, I do not find a reviewable



deficiency when it is apparent from the Determination that such evidence was countered by other evidence which showed Eng had no independent supervisory or managerial authority.

34. 2. “The Employee testified that he was directly responsible for “Human Resources recruitment”, including having directly hired and terminated employees working in the Employer’s stores under his supervision. The Employee testified that he was responsible for training the employees under his supervision, including, providing training in the areas of “sales and customer service”, “loss prevention training”, and “merchandise management”.”
35. All of that evidence is referred to in the Determination and, if the Determination is correct on its face, was not given by any of the witnesses, including Eng, without a caveat. The Determination reflects the following evidence relating to the store manager position, noting as part of the background that Sykes, Dhuga and Eng collectively provided that evidence:
- “They must follow specific processes established by Spencer with respect to hiring and reprimanding sales associates. They participate in the hiring process . . . and then make recommendations to the area manger”
  - “They train sales associates under specific training guidelines provided by Spencer.”
36. 3. “The Employee testified that he was responsible for staff development at each of the stores under his supervision. In this regard, the Employee was responsible for disciplining employees in violation of the Employee’s [sic]<sup>1</sup> policies, with both progressive discipline and termination, ensuring compliance with the Employer’s policies and procedures, and providing training and coaching for store employees.”
37. In the context of the area manager responsibilities in Eng’s position, the Determination indicates he said he “was involved in the hiring and promotion of staff . . . but only to the extent of making recommendations.” Accordingly, I don’t accept that the evidence referred to the statutory declaration was not referred to. Once again, in light of the conclusions reached by the Director on the totality of the evidence, I do not consider the failure to discuss such evidence in detail constitutes an error of law.
38. 4. “In addition to managing the employees at the stores under his supervision, the Employee was directly responsible for the critical financial controls at the stores. The Employee was responsible for establishing employees work schedules, the application of payroll, conducting store and inventory audits, and overseeing loss prevention. Because the Employee was responsible for these critical financial components in each store, the Employee was entitled to and did receive bonuses based on the success of the stores under his supervision.”
39. The appeal submission does not indicate how the information in the last sentence is either highly relevant or critical to the question of Eng’s status under the *Act*. In respect of the first part of the above statement, each of the matters raised are reflected in the recitation of the evidence given at the complaint hearing. Once again, however, the Determination indicates that all of the evidence was provided with the caveat that these functions were carried out in accordance with strict guidelines provided by Spencer.

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<sup>1</sup> I have noted this as a typographical error in the statutory declaration, since there is no evidence in either the Determination or the Section 112(5) record that Eng having his own set of “policies” nor is such an assertion made anywhere in the appeal. If the statement is intended to convey that assertion, I would consider that to be an attempt to introduce new evidence (which is a separate ground of appeal) and would not allow it.

40. Overall, I can find no basis for the contention that the Director failed to comply with the principles of natural justice by not discussing or referring to any of this evidence in the Determination. All of this evidence is reflected in the Determination, although perhaps not exactly as it is framed by Mr. Mahoney in his statutory declaration. I do not accept that it was not considered, even if there is no extended discussion of it. A reasonable assessment of the Determination is that this evidence was received and noted, but its acceptance and the conclusions which were drawn from it were impacted by the evidence that Eng did not have the autonomy or authority to make independent management decisions. It is also noteworthy that each of the areas raised in the statutory declaration are substantially reflected in the summary of the arguments attributed to Mr. Mahoney in the Determination.
41. In sum, I am not persuaded there is any error of law. The Determination is based on findings of fact and conclusions which the Director could reasonably make based on the evidence provided. There was no failure by the Director to comply with principles of natural justice in making the Determination. The appeal is dismissed.

### **ORDER**

42. Pursuant to Section 115 of the *Act*, I order the Determination dated August 10, 2007 be confirmed in the amount of \$7816.85, together with any interest that has accrued under Section 88 of the *Act*.

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