

An appeal

- by -

YourFloors Chilliwack Inc.
(“YourFloors”)

- 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/113

DATE OF DECISION: December 6, 2012

DECISION

SUBMISSIONS

Cheryl Klippenstein

on behalf of YourFloors Chilliwack Inc.

OVERVIEW

1. YourFloors Chilliwack Inc (“YourFloors”) has filed an appeal under Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 30, 2012.
2. The Determination found that YourFloors had contravened Part 3, section 18, Part 5, section 45, Part 7, section 58 and Part 8, section 63 of the *Act* in respect of the employment of Carmen Peters (“Ms. Peters”) and ordered YourFloors to pay Ms. Peters an amount of \$11,033.69, an amount that included wages and interest under section 88 of the *Act*.
3. The Director also imposed administrative penalties on YourFloors under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00.
4. The total amount of the Determination is \$12,533.69.
5. In its appeal, YourFloors alleges the Director erred in law and failed to observe principles of natural justice in making the Determination by finding Ms. Peters was entitled to regular wages, commission wages in the amount found to be owed, compensation for length of service, statutory holiday pay and annual vacation pay in the amount found to be owed. YourFloors does not dispute Ms. Peters is owed some wages, but in an amount considerably less than what was found by the Director. While not raised as a specific ground, the appeal also appears to rely on evidence which is being submitted to the Tribunal but which was not provided to the Director when the Determination was being made.
6. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act* and, at this stage, I am assessing this appeal based solely on the Determination, YourFloors’ written submissions and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1), which states:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*

- (a) *the appeal is not within the jurisdiction of the tribunal;*
- (b) *the appeal was not filed within the applicable time period;*
- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*

(b) *one or more of the requirements of section 112(2) have not been met.*

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

BACKGROUND

8. YourFloors operated a flooring business in Chilliwack. Ms. Peters was employed as a salesperson until her termination on, or about, August 2, 2011. There was an issue about the term of her employment with YourFloors, revolving around whether she had been employed by a company apparently related to YourFloors for a period from February 28, 2011, to May 6, 2011, and by YourFloors from May 20, 2011, until her termination. The Director found Ms. Peters was employed by YourFloors for the entire period of her employment – February 28 to July 29, 2011. This finding impacted on Ms. Peters' entitlement to compensation for length of service.
9. Ms. Peters claimed she was entitled to 10 or 11 days' wages for the final pay period in which she worked. YourFloors argued she had worked only 9 days in that pay period. The Director found she was terminated July 29, 2011, had worked 9 days in that final pay period, that wages were owed for those 9 days, that section 18 of the *Act* required those wages to be paid no later than July 31, 2011, and that they had not been paid as required.
10. Ms. Peters claimed she was owed commission wages. There was no dispute from YourFloors that she was owed \$2,514.35 for commissions earned in June 2011 and for some of the commissions she was claiming for July 2011. There was a disagreement concerning two aspects of the commission wages being claimed. First, YourFloors contended the calculation of commissions should take into account matters included in a column marked "Error" on the Commission Sheet. The Director, based on the provisions of the employment agreement and the prevailing practice of the parties, found errors should not be taken into account in calculating commissions owed. Second, YourFloors argued that as Ms. Peters' employment was terminated prior to some of the sales being completed, she was not entitled to commission on those. The Director found, interpreting and applying the provisions of the employment agreement relating to commission entitlement, that commissions were "earned" when Ms. Peters had attracted the account and obtained a deposit on the sale. The Director examined each of the accounts for which a commission was claimed by Ms. Peters, and disputed by YourFloors, and made findings in respect of them, allowing most of the claims and denying three.
11. As noted above, the Director found that Ms. Peters' was entitled to compensation for length of service in an amount equal to one weeks' wages, based on the finding that her period of employment with YourFloors was more than 3, but less than 12, consecutive months: see section 63(1).
12. The Director rejected YourFloors' argument that Ms. Peters was terminated for cause and therefore not entitled to compensation for length of service. YourFloors alleged Ms. Peters had committed "time theft", engaging in personal activities on company time, but provided no evidence to support the allegations. YourFloors also alleged Ms. Peters engaged in incidents involving writing profanities on the office window and the car window of one of the owners of the business. The Director found that, even if both allegations were accepted, the behaviour, as described, did not warrant her immediate dismissal. There were also allegations by YourFloors concerning potentially inappropriate use by Ms. Peters of the "galaxy tablet" issued to her by the company, which the Director found were not directly related to her, were not supported by independent observation and were, in any event, not raised as a basis for termination until much later in the

complaint investigation. The Director noted the concept of “after acquired cause” is not incorporated in the *Act*, citing *BNW Travel Management Ltd.*, BC EST # D170/04, for that conclusion.

13. The Director found Ms. Peters was entitled to statutory holiday pay for the May 23, 2011, and July 1, 2011, statutory holidays. The Director found no evidence indicating Ms. Peters worked on any of the statutory holidays and the wage entitlement for those days was based on an average days’ pay as determined under section 45 of the *Act* and section 37.14 of the *Regulation*.
14. The Director found no evidence that Ms. Peters was ever paid annual vacation pay and found she was entitled to that statutory benefit based on the gross amount of wages the Director found was earned during her employment, which included the amounts the Director found were not paid but which in the Determination were found to be earned and payable under the *Act*.

REASONS FOR THE APPEAL

15. In the appeal, YourFloors challenges each element of the Determination. I shall summarize the position of YourFloors on each of the challenged areas using the headings found in the Determination and in the appeal.

Regular Wages

16. The appeal on this element of the Determination appears simply to protest the issuance of an administrative penalty for failure to comply with the requirement of section 18 to pay all wages owed to an employee within 48 hours of termination.

Commissions

17. YourFloors challenges the findings of the Director on two issues relating to Ms. Peters’ claim for commission wages: first, whether errors should be taken in calculating commissions; and second, whether commissions are earned and payable before an installation is fully completed and the customer had paid the account in full.
18. On the first challenge, YourFloors contends the evidence before the Director, contrary to the finding made in the Determination, did show the commission amounts listed for Ms. Peters were adjusted for errors.
19. In respect of the second issue, YourFloors appears to have provided evidence with the appeal that was not before the Director when the Determination was being made, although the “new evidence” ground in section 112(1) is not mentioned in the appeal. YourFloors says this evidence, and other evidence which also appears not to have been provided to the Director, shows Ms. Peters only received commission when the installation was complete and the account paid in full.
20. Also, YourFloors says the Director erred in interpreting the employment contract to require the payment of commission wages on transactions that were not completed and paid for at the time Ms. Peters’ employment was terminated.

Compensation for Length of Service

21. YourFloors challenges the conclusion of the Director that just cause for terminating Ms. Peters’ employment was not established on the evidence provided. YourFloors argues there was evidence provided to the Director that ought to have been sufficient to support her immediate dismissal.

Statutory Holiday Pay

22. YourFloors says the decision on statutory holiday pay is being appealed because they understood Ms. Peters was not owed statutory holiday pay as she did not work any statutory holidays during her employment.

Annual Vacation Pay

23. YourFloors agrees Ms. Peters is owed vacation pay, but disputes the amount calculated to be owing to her by the Director.

ANALYSIS

24. After a careful review of the Determination, the section 112(5) “record” and the appeal, and applying well established principles which operate in the context of appeals to the Tribunal, I am able to dismiss substantial portions, but not all, of this appeal.

Regular Wages

25. This aspect of the appeal appears only to challenge the imposition of an administrative penalty for the undisputed failure of YourFloors to meet the requirements of the *Act* relating to the payment of wages. There is no merit at all to the appeal of the administrative penalty. Section 98 of the *Act* provides that a person in respect of whom the Director makes a Determination and imposes a requirement under section 79 is “subject to” a monetary penalty prescribed by the *Regulation*: Section 29(1) of the *Regulation*, sets out a schedule of monetary penalties for “a person who contravenes a provision of the *Act* or this regulation, as found by the director in a determination made under the Act or this regulation”. As stated in the Tribunal decision *Marana Management Services Ltd. operating as Brother’s Restaurant*, BC EST # D160/04:

Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory and are thus not subject to mediation. Furthermore, penalty assessments do not constitute costs. This is not a matter that can be, as suggested by Brother’s counsel, “remitted back” for mediation.

As the Tribunal recently noted in *Summit Security Group Ltd.* (BC EST #D059/04, Reconsidered BC EST #D133/04), administrative penalties under the *Act* are part of a larger scheme designed to regulate employment relationships in the non-union sector. The Tribunal determined that penalties are generally consistent with the purposes of the *Act*, and the design of the penalty scheme established under section 29 meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*.

26. The argument by YourFloors that the failure to meet the requirements of section 18 of the *Act* was the consequence of the absence of the office manager does not alter their liability for the administrative penalty, as the Director had no alternative but to impose the administrative penalty and the Tribunal has no discretion to relieve YourFloors from it.

Commissions

27. I am satisfied there is some presumptive merit to this element of the appeal; I do not intend to summarily dismiss it under section 114(1) and will hear further submissions from Ms. Peters and the Director. The responses of the other parties should address the matter of adjusting commissions for errors, commission entitlement where the installation was not fully completed when Ms. Peters was terminated and whether the “new evidence” on this aspect of the appeal sought to be submitted by YourFloors should be allowed. In

responding, the parties should consider the Tribunal's decision in *Halston Homes Limited.*, BC EST # D527/00, a case that I perceive is not dissimilar in its circumstances, and possible analysis, to this one.

Compensation for Length of Service

28. 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 noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation. 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.
29. Conclusions about whether there was just cause to terminate an employee are typically determined on the facts as found by the Director. This case is typical and the difficulty for YourFloors with the appeal on Ms. Peters' entitlement to compensation for length of service is that it would require the Tribunal to interfere with findings and conclusions of fact made by the Director without there being any error of law in respect of those facts being demonstrated in the appeal. As indicated above, the authority of the Tribunal in respect of appeals challenging findings of fact or seeking to have the Tribunal re-visit and alter findings of fact is limited.
30. YourFloors disagrees with the conclusion of the Director, but no error of law, on either facts, the analysis of "just cause" under section 63 or the application of the proper approach to "after acquired cause", has been made in the Determination on this element of Ms. Peters' claim. As such, there is no presumptive merit to this part of the appeal and it is dismissed under section 114(1).

Statutory Holiday Pay

31. There is no merit to this aspect of the appeal. The conclusion in the Determination was not based on whether Ms. Peters worked any of the statutory holidays claimed, but on a finding, based on conclusions of fact and an application of the provisions of section 37.14 of the *Regulation*, that she was entitled to statutory holiday pay for the May 23 and July 1, 2011, statutory holidays.

Annual Vacation Pay

32. There may be some basis to this aspect of the appeal, depending on the outcome on Ms. Peters' entitlement to commission wages, but not otherwise. Any argument from the parties relating to annual vacation pay entitlement must be confined to the relationship of this entitlement to Ms. Peters' entitlement to commission wages.

ORDER

33. Pursuant to subsection 114(1) of the *Act*, all elements of the appeal apart from the matter of the entitlement, and possible recalculation of, commission wages, are dismissed on the ground that there is no reasonable prospect that it will succeed. I order the appeal relating to the commission wages found to be owed to Ms. Peters to proceed under section 112 of the *Act*.
34. Ms. Peters and the Director are invited to file submissions on the remaining matter in the appeal.

David B. Stevenson
Member
Employment Standards Tribunal