

An application for Reconsideration

- by -

Grant Howard
("Howard")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2008A/95

DATE OF DECISION: March 4, 2009

DECISION

OVERVIEW

1. This decision deals with applications by Grant Howard (“Mr. Howard”) under Section 116 of the *Employment Standards Act* (the “Act”) for Reconsideration of three decisions issued by the Employment Standards Tribunal (the “Tribunal”), namely, BC EST #D011/07 (the “Original Decision”), BC EST #D013/08 (the “Referral Back Decision”) and BC EST #D086/08 (the “Final Decision”) (collectively the “Decisions”). I will delineate the orders of the Tribunal in the Decisions and the basis of Mr. Howard’s Reconsideration applications later after reviewing to the protracted history of Mr. Howard’s complaint against his former employer, Kirk Capital Corporation (“KCC”) first.
2. Mr. Howard was employed by KCC as a sub-mortgage broker on a commission basis. He filed a complaint against KCC (the “Complaint”) with the Director of Employment Standards (the “Director”) alleging that KCC wrongfully terminated his employment; failed to pay his commissions respecting ten transactions he was involved in; and improperly deducted legal fees from some of his commissions. The delegate of the Director investigated the Complaint and issued her Determination on November 25, 2002 (the “Determination”).
3. Mr. Howard appealed the Determination and the Tribunal ultimately considered the appeal in the Original Decision, which is a precursor to the Referral Back Decision and the Final Decision. In the Referral Back Decision, the Tribunal concisely reviews the Determination and the history of the proceedings taken thereafter and I propose to refer to that history verbatim as follows:

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.

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.

Howard appealed the Determination on December 24, 2002. The Tribunal concluded the appeal was filed outside of the time allowed for appeal under subsection 112(3). The Tribunal considered whether the appeal period should be extended under subsection 109(1) of the Act and, in BC EST #D076/03, decided no extension would be allowed. That decision was confirmed in BC EST #RD231/03.

Howard sought judicial review of the above decisions of the Tribunal and, in a decision of the Supreme Court of British Columbia issued on May 18, 2006, they were set aside and Howard’s appeal was remitted to the Tribunal for consideration on its merits.

Following the Court’s decision, the Tribunal considered the appeal and issued a decision, BC EST #D011/07 (the “original decision”). In the original decision, the Tribunal 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.

That matter was remitted back to the Director under the statutory authority given to the Tribunal in Section 115 of the Act....

Howard objects to both the authority of the Tribunal to make a decision to refer back and to the referral back process. Counsel for Kirk Capital has referred to the Tribunal's decision *Hub-City Boat Yard Ltd.*, BC EST #D027/04 as summarizing the authority, the policy rationale and the statutory objective of the Tribunal referring a matter back to the Director under Section 115. I agree with that summary and adopt it as an appropriate response to Howard's criticism of and opposition to the process adopted in the original decision for dealing with the gap in the Determination:

The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, and where a reinvestigation or reconsideration is required, with directions (see *Re Zhang*, BC EST #D130/01). The Tribunal's decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to confirm, vary or cancel the Determination with the benefit of the Director's reinvestigation and reconsideration, but without the delay and expense involved with the making of a new Determination (with a new right of appeal).

In accordance with the order made in the original decision, the Director has conducted a further investigation and has issued a supplement to the Determination, dated November 2, 2007 (the "Supplement"). Howard did not participate in the investigation relating to the Supplement.

In the Supplement, the Director has concluded that Howard was not the effective cause of the completed financial transaction on 4351 No. 3 Road (the "property") and dismissed that part of his claim. The Director found that "it was the preponderance of Hoehn's efforts that were the eventual cause of bringing a conclusion to the financing on the No. 3 Road property".

The Supplement has been provided to Howard and Kirk Capital for review and comment. Counsel for Kirk Capital has filed two submissions, one generally accepting the conclusion reached by the Director and the other responding to a submission delivered to the Tribunal by Howard on December 7, 2007. Howard has also filed two submissions.

Notwithstanding the view taken by Howard, the Supplement and this decision continue to be elements of the appeal process commenced by Howard on December 24, 2002.

4. In the Referral Back Decision, the Tribunal, after reviewing the Director's supplementary report (the "First Supplementary Report") concluded that while Mr. Howard might not have been the sole cause of the of the completed financial transaction pertaining to the property at 4351 No. 3 Road, Richmond (the "Richmond Property"), the Director made an error of law in concluding that Mr. Howard was not the effective cause. According to the Tribunal, Mr. Howard was entitled to commission wages for the work he performed pertaining to the financing on the Richmond Property and referred back to the Director the task of calculating the commission wages with specific instructions to attempt to mediate a settlement between the parties pertaining to this matter. Unfortunately, the Director was not successful in mediating

a settlement between the parties and ultimately issued another supplementary report (the “Second Supplementary Report”) wherein he concluded that Mr. Howard is entitled to \$4,501.21 as commission wages in respect of his work pertaining to the financing on the Property.

5. The Tribunal requested and received submissions from both parties on the Director’s calculations in the Second Supplement. While KCC agreed with the Director’s calculations in the Second Supplement, Mr. Howard did not. The Tribunal, in the Final Decision, considered the submissions of the parties and was not persuaded by Mr. Howard’s submissions and went on to confirm the Director’s calculations stating:

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.

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.

The Supplement 2 is confirmed.

6. Mr. Howard has applied to this Tribunal to reconsider the Decisions and submitted in excess of 500 pages of submissions and documents in support. Pursuant to Section 36 of the *Administrative Tribunal’s Act* (the “ATA”), which is incorporated into the *Act* (S. 103), and Rule 17 of the Tribunal Rules of Practice and Procedure, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, an oral hearing of the reconsideration application is not necessary and therefore, I propose to adjudicate Mr. Howard’s reconsideration applications based on the written submissions of the parties and a review of each of the Decisions under separate descriptive headings below.

THE LAW GOVERNING A RECONSIDERATION APPLICATION AND THE TWO-PART PROCESS THE TRIBUNAL WILL EMPLOY IN DECIDING MR. HOWARD’S RECONSIDERATION APPLICATIONS

7. Section 116 of the *Act* confers the Tribunal with the authority to reconsider and confirm, cancel or vary its own orders or decisions:

Reconsideration of orders and decisions

116 (1) On application under subsection (2) or on its own motion, the tribunal may

- (a) reconsider any order or decision of the tribunal, and
- (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

(2) The director or a person named in a decision or order of the tribunal may make an application under this section.

(3) An application may be made only once with respect to the same order or decision.

8. The Tribunal's authority under Section 116 of the *Act* is discretionary in nature as the Tribunal "may" reconsider its own orders or decisions. Furthermore, the Tribunal's discretion in this regard is to be exercised with caution. As indicated by the Tribunal in *Re Eckman Land Surveying Ltd.* BC EST #D413/02:

Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.

9. In *Re British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.)*, BC EST #D313/98, the Tribunal delineated a two-stage process that it employs in determining whether or not to exercise its reconsideration power. First, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include such factors as: (i) whether the reconsideration application was filed in a timely fashion; (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the Member; (iii) whether the application arises out of a preliminary ruling made in the course of an appeal; (iv) whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases; (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
10. If the Tribunal, after weighing the factors in the first stage, concludes that the application is not appropriate for reconsideration then the Tribunal will reject the application and provide its reason for not reconsidering. However, if the Tribunal finds that one or more issues in the application is appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis. The second stage in the analysis involves a reconsideration of the merits of the application.
11. In the case of Mr. Howard's reconsideration applications, this approach will be employed with respect to each of his reconsideration applications. That is, the Tribunal will first consider the threshold or preliminary issue of whether it should exercise its discretion under Section 116 of the *Act*. Only if the Tribunal is satisfied the case is appropriate for reconsideration, then the Tribunal will proceed to the second stage and consider the substantive issues raised by Mr. Howard in each reconsideration application.

APPLICATION FOR THE RECONSIDERATION OF THE ORIGINAL DECISION

12. In the Original Decision, the Member summarized the issues in Mr. Howard's appeal to three as follows:
1. Did the Director err in law in deciding Howard's entitlement to commission wages on 4351 No. 3 Road, 970 Burrard Street and 3115 Crescentview Place?
 2. Did the Director err in law in deciding Kirk Capital was entitled to make certain deductions from Howard's commission wages?
 3. Did the Director fail to observe principles of natural justice in making the Determination, and more particularly, did the Director fail to properly investigate the complaint and as a result fail to take into account evidence that was relevant to an issue in dispute?

13. The Member, after careful consideration of all of the submissions of the parties and particularly Mr. Howard's extensive submissions totalling in excess of 300 pages, found only a single error of law on the part of the Director pertaining to the entitlement of Mr. Howard to commission wages on the Richmond Property and confirmed the Determination in all other respects. With respect to the Richmond Property, the Member stated:

The facts of this case, however, are that the mortgage transaction was concluded by another submortgage broker some 11 months after Howard was terminated and that it was not the same deal as Howard was working to secure a commitment on before his termination.

As a matter of law, those facts do not disentitle Howard to his commission wages, unless the continuity between the original relation brought about by him and the concluded transaction has been not merely dislocated or postponed, but broken.... I accept, therefore, the submission of counsel for Kirk Capital that if Howard is to claim any entitlement to commission wages, the facts must show an unbroken continuity between his efforts and the resulting mortgage. In *Taylor v. Silver Giant Mines Ltd.*, supra, the Court said the following: . . . the agent is entitled to his commission unless the continuity between the original relation brought about by him has been *entirely severed* and he took no part in the proceedings which re-initiated the relation and led to the eventual conclusion of the deal. (emphasis added)

I am not persuaded that the language used in the employment contract or the context in which that language was intended to operate abrogates the application of the above legal principles in this case.

Returning to the Determination, none of the findings made in denying Howard commission wages on 4351 No. 3 Road are, as a matter of law, determinative of his entitlement because none of them, either individually or collectively, show the continuity in the relationship between the client and SMSCU, which was originally brought about by him, has been broken. Neither the passage of time, differences in the mortgage commitment and the concluded mortgage or the introduction of another submortgage broker are determinative of a break in continuity. The Director has not considered Howard's entitlement from the perspective of continuity. All of the facts and circumstances between the date of Howard's termination and the completion of the transaction, including all documentation and correspondence, need to be examined before deciding whether a break in continuity between his efforts and the eventual conclusion of the deal has occurred.

I am satisfied the Director erred in law in the analysis of his claim for entitlement. I am also satisfied the Director has failed to observe principles of natural justice by failing to acquire and consider evidence that was relevant to the question of law that had to be addressed.

This aspect of the Determination is cancelled. I must decide the appropriate remedy. I could either attempt to decide these issues myself based on the Record before me, or cancel this part of the Determination and remit this matter back to the Director. Howard objects to the matter being referred back to the Director. He says such a result would be unfair and inefficient.

Except for the failure of the investigating delegate to properly address the question of continuity, I have found no error in the Determination. Particularly, Howard has not been successful in attempting to demonstrate a pervasive failure to comply with principles of natural justice in making the Determination. The Record reveals a comprehensive investigation that was flawed by an incorrect view on a question of law, and a consequent failure to appreciate the need for relevant evidence to be acquired and analyzed. For that reason only, the appeal has partly succeeded.

At present, the factual record is not sufficient for a proper assessment of the issue of Howard's entitlement on the 4351 No. 3 Road file, so I am not in a position to make this determination myself. Further, given the limited grounds of appeal under the Act, it is more in keeping with the Tribunal's role to remit this case back to the Director for further investigation and consideration. In my view, the appropriate remedy in this case is to remit the matter back.

14. While the Member in the Original Decision set aside the Determination relating to Howard's entitlement to commission wages on the Richmond Property and referred the matter back to the Director to further investigate and address the question of continuity between Mr. Howard's efforts and the resulting mortgage on the Richmond Property, Mr. Howard filed his application for a reconsideration of the Original Decision on May 7, 2007 which the Tribunal held in abeyance until the referral back process was completed.
15. Mr. Howard's submissions in support of his reconsideration application total about 155 pages, discounting earlier shorter submissions. To the extent that any part of these submissions relate to common law and equitable claims and remedies outside the jurisdiction of the *Act*, I support the conclusion of the Member in the Original decision that the Director was correct in limiting the scope of the Determination to adjudicating only the rights and entitlements under the *Act* and that neither the Director nor the Tribunal has jurisdiction under the *Act* to consider such claims. Accordingly, any submissions or arguments of Mr. Howard pertaining to these claims will not be considered or addressed further in this decision and he may, if he wishes, pursue those claims and remedies in the appropriate arena, namely, in courts.
16. At page 7, in paragraph 9, of his submissions, Mr. Howard sets out the grounds on which his application is based and the submissions he intends to rely upon in support of his application. In particular, Mr. Howard states:
 - 9.) There are several distinct errors of law with respect to Mr. Stevenson's decision they generally concern:
 - a) Unauthorized Deductions.
 - b) Ordering the Branch to reinvestigate when the employer failed to originally participate.
 - c) Failure to enforce the terms and conditions of the "Exclusive Agency Agreement."
 - d) The distinct failure to address any of the significant issues with respect to a denial of natural justice, a reasonable apprehension of bias, bias, bad faith, and an abuse of power. Save and accept one item which was oddly presented.
 - e) The Adjudicator had not determined if the Original Delegate had acted with bias, and in bad faith when she reported on the face of the record statements which were contradicted by written material records. This is repugnant. I will not allow this Tribunal to make such an omission.
 - f) The Interpretation of **Section #18** and **Section #1** of the Act.
 - g) The findings of fact reported by the Adjudicator and which were contrary to written records.
 - h) The decision leads to an *absurd* and *frivolous* result.

...

The appellant refers the Tribunal to previous submissions of the appellant for greater detail with regard to any of the subjects and serious issues in law he has raised. The appellant will rely on this material and past submissions for Reconsideration.

17. I have carefully read the section 112(5) record including all the submissions of Mr. Howard starting with his earlier submissions during the investigation of the Complaint by the delegate including his submissions (totalling over 300 pages) in the appeal of the Determination and his equally extensive submissions in his application for the reconsideration of the Original Decision. It is clear to me that Mr. Howard was very dissatisfied with the outcome of the Determination and equally, if not more, dissatisfied with the outcome of his appeal of the Determination. While I do find it necessary to reiterate his extensive submissions in support of his reconsideration application relating to the Original Decision here, it is very clear to me that Mr. Howard is effectively trying to reargue the same issues or matters previously argued in his appeal of the Determination with a view to obtaining a favourable outcome this time. This is also evident in the preamble to his extensive submissions in support of the reconsideration application where he states:

The appellant refers the Tribunal to previous submissions of the appellant for greater detail with regard to any of the subjects and serious issues in law he has raised. The appellant will rely on this material and past submissions for Reconsideration.

18. In my view, Mr. Howard has misconceived the purpose or object of a reconsideration application. It is not a function of a reconsideration to re-weigh the evidence but to consider if the proper legal principles were applied in the original decision.
19. I further add that with respect to the specific issues before the Member in the appeal of the Determination, namely, Mr. Howard's entitlement to commission wages on three properties, KCC's entitlement to make certain deductions from Mr. Howard's wages, and whether the Director failed to observe the principles of natural justice in making the determination, I do not find that Mr. Howard has, on a balance of probabilities, persuaded me that the Member made any errors in the Original Decision on any of these matters. I find that the Member neither misconstrued the evidence nor misinterpreted it in relation to the said issues raised in Mr. Howard's appeal of the Determination to constitute an error of law. While there are situations where errors in findings of fact may amount to an error of law, this is not such a case. Mr. Howard has not persuaded me, on a balance of probabilities, that there was no evidence to support the Member's findings of fact or that the Member took a view of the facts that could not be reasonably be entertained on the evidence before him on any of the above referenced matters before him in the appeal of the Determination. While Mr. Howard may not agree with this conclusion, the Tribunal is not going to substitute his view of the evidence for that of the Member simply because he disagrees with the Member's view.
20. Having said this, I find that Mr. Howard's application for reconsideration of the Original Decision fails to meet the criteria in the first of the two-stage process delineated in *Milan Holdings Ltd., supra*, for reconsideration. In particular, the main factors that weigh against reconsideration of Mr. Howard's application in the first stage of the test are three: (i) Mr. Howard's primary focus to have the reconsideration panel effectively "re-weigh" evidence already provided to the Member; (ii) Mr. Howard's failure to raise questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases; and (iii) Mr.

Howard's failure to make out an arguable case of sufficient merit to warrant the reconsideration. Accordingly, I propose to dismiss Mr. Howard's application for reconsideration of the Original Decision.

21. In light of my decision above, I do not find it necessary to delineate KCC's or the Director's submissions in response to Mr. Howard's reconsideration application here except to say that KCC has filed its own application for reconsideration of the Original Decision which will be the subject of a separate decision.

APPLICATION FOR RECONSIDERATION OF THE REFERRAL BACK DECISION

22. Pursuant to the order made by the Member in the Original Decision, the Director conducted a further investigation in the matter of Mr. Howard's entitlement to commission wages pertaining to the Richmond Property and produced the First Supplementary Report. In the First Supplementary Report, the Director concluded that Mr. Howard was not the effective cause of the completed financial transaction on the Richmond Property and thus not entitled to any additional wages and dismissed that part of Mr. Howard's claim. The Member entertained submissions from both Mr. Howard and KCC and concluded in the Referral Back Decision that the Director had committed an error of law in arriving at his decision in the First Supplementary Report and further concluded that Mr. Howard was entitled to commission wages for the Richmond Property and referred back to the Director the calculation of the wages, with a request that the Director attempt to mediate a settlement with the parties.

23. Mr. Howard filed a reconsideration application pertaining to the Referral Back Decision. In his reconsideration application form, Mr. Howard appears to continue also with his reconsideration application pertaining to the Original Decision as he references both in answer to paragraph 2 of the reconsideration application form. Mr. Howard then, in paragraph 3 of the reconsideration application form, provides the following as his reasons for requesting a reconsideration:

The Adjudicator erred in law.
The Adjudicator has denied the Appellant natural justice and acted with bias.
The Adjudicator made patently unreasonable findings of fact.
The Adjudicator failed to consider relevant evidence.
The Adjudicator provided an inadequate rationale.
The Adjudicator has accepted parol hearsay over written contractual documents.
The Adjudicator has misstated the evidence.

The Appellant made reconsideration submissions last year and is in the process of making a final submission.

24. Attached to the reconsideration application are Mr. Howard's further submissions totalling 7 pages. In paragraphs 6 and 7 of these submissions he states:

- 6.) I will furnish further arguments for "*Reconsideration*" as time permits. These arguments should be used in conjunction with the Reconsideration arguments forwarded last year which respond to the decision of Mr. Stevenson BC EST #D 011/07 and to Mr. Kilgallin's arguments. In deed, these arguments should be applied with that of all my extensive submissions to this Tribunal. [*sic*]
- 7.) Last years "Reconsideration" submissions were very extensive, and therefore, I do not believe there will be need to add additional arguments of such magnitude. However, there are some serious issues in law that must be clearly addressed at "Reconsideration". I am

quite taken back that you have overlooked Mr. Stevenson's previous decision BC EST #D 011/07. There are several key errors of law which greatly impact the appellant's position. [sic]

25. In the balance of the submissions, there are a number of pages devoted to Mr. Howard's criticism of the Member's request or direction to the Director in the Referral Back Decision to "attempt to mediate a settlement" between parties to determine the amount of commission wages Mr. Howard is entitled to for the Richmond Property. While in my view it is well within the jurisdiction of the Member in section 115 of the *Act* and consistent with the object of the *Act* in section 2(c), namely, "to encourage open communication between employers and employees" to suggest or direct the Director to attempt to mediate a settlement between the parties on any issue, it appears from the submissions of Mr. Howard that he has misconstrued the Member's direction to the Director and somehow interpreted it as if the Member was ordering the parties to submit to a mediation. This is clearly not the case as the Member contemplated the possibility of the Director failing to mediate a resolution in this regard when he states that "failing settlement, [the Director] will issue an amendment to the Determination reflecting the total wage amounts found owing [on the Richmond Property to Mr. Howard]".
26. I also deduce from Mr. Howard's submissions in the reconsideration application that he is opposed to the Member's decision to refer the matter back to the Director independent of his opposition to participate in mediation with KCC on the subject of commission wages for the Richmond Property. In my view, the Member has jurisdiction and discretion under Section 115(1)(b) of the *Act* to refer the matter back to the Director and I do not find anything wrong with the Member's decision in this regard. To the extent that Mr. Howard's submissions criticize the Member for either referring the matter back to the Director or requesting the Director to attempt to mediate a settlement between the parties because he thinks that this compromises his substantive rights or denies him natural justice, I find no merit in those submissions whatsoever and reject them.
27. Having said this, much of the balance of Mr. Howard's submissions in support of his application for reconsideration of the Referral Back Decision does not meaningfully address the determinations made in the Referral Back Decision. It is clear to me that Mr. Howard is very disillusioned with the employment standards process and has spent a fair bit of time and effort in his submissions to make allegations against the Tribunal, the Member and the Director which are without any foundation and based on his disagreement with the findings of fact and conclusions reached by these bodies. In particular, I find no basis for the allegations of bias and wrong doing on the part of the Director, the Member or the Tribunal in the following passages in Mr. Howard's submissions:
- 28.) A close look at [the Director's] "Report", in comparison with the prima facie material evidence is quite frankly, so far-off the wall and repugnant that I do not believe for an instant that these people, particularly the Director, is remotely competent or alternatively, is so biased and or corrupt that he has decisively turned a "*blind eye*" fundamental principles of law, and considerable prima facie material evidence. The institutional bias is so obvious and outright that there is simply no alternative than to reach a finding of actual bias. [The Arbitrator's] active choice to overlook and condone the shortfall of this report is simply astonishing. It is beyond comprehension, yet the Tribunal member continues to find excuses, ways or means to always ignore the behaviour of its members or that of other governmental agencies. [sic]

...

- 31.) Unfortunately, as depicted through [the Director's] Report it is obvious and quite clear, that the Director of Employment Standards has still not been able to discern fact from fiction and law from opinion. I am not sure if this is manifested out of sheer hatred or contemplated out of sheer arrogance or plain stupidity. Whatever the underlying theme, the rationale of the Director requires avid attention and close scrutiny. [sic]
- 32.) It is my ardent belief that it will take a momentous effort to get the Tribunal to open their eyes to the shortcomings of the Director, yet alone their own Tribunal members as witnessed by the Tribunals absolute refusal to address the significant issues in law contained within the "Petition" arguments. Unfortunately, it appears once again, I must turn to the courts in attempt to seek retribution. [sic]

28. With respect to the subject of the calculation of Mr. Howard's commission wages for the Richmond Property; in paragraphs 6 and 7 of his written submissions quoted above, he expressly relies on his previous submissions, which he submitted in context of his application for reconsideration of the Original Decision. In those submissions, Mr. Howard is claiming commissions based on the Exclusive Agent's Agreement with KCC and in my view the Member considered those submissions in context of Mr. Howard's appeal of the Determination in the Original Decision and I found those submissions in context of Mr. Howard's application for reconsideration of the Original Decision to be a re-argument from earlier. I also find that the same factors that weigh against Mr. Howard's application for reconsideration of the Original Decision apply in the case of his reconsideration application pertaining to the Referral Back Decision and therefore deny the said application.
29. With respect to the submissions of KCC and the Director pertaining to Mr. Howard's application for reconsideration of the Referral Back Decision, I do not find it necessary to reiterate those submissions here except to note that KCC has submitted its own reconsideration application of the Referral Back Decision which will be dealt with in a separate decision of the Tribunal.

APPLICATION FOR THE RECONSIDERATION OF THE FINAL DECISION

30. As neither Mr. Howard nor KCC was interested in mediating a resolution of the issue of commission wages Mr. Howard was entitled to on the Richmond Property, the Director sought and received submissions from both parties on the subject and ultimately decided the matter in the Second Supplementary Report.
31. In the Second Supplementary Report, the Director notes that Mr. Howard is claiming 2% commission delineated in the Exclusive Agency Agreement dated April 17, 2000 KCC entered into with the client. That 2%, based on the \$7,000,000 advanced by the lender to the client, totals \$140,000 of commissions. However, notes the Director, KCC's position is that any commission owed to Mr. Howard must be based on the actual commission received by KCC which in this case was \$57,000, although KCC ultimately agreed to reduce the commission to .85% which would have netted \$59,500 in commissions. While Mr. Howard did not agree to the said reduction in commission, he agreed, according to the Director, "that the client had threatened to remove the financing if the commission fee was not reduced". Faced with this prospect, KCC reduced the commission rate to .85% rather than pursue litigation against the client which course of action made Mr. Howard unhappy.
32. According to the Director, KCC, as a party to the Exclusive Agency Agreement with the client, had the right to renegotiate terms and conditions of the said agreement including the commission fee. In the

circumstances, the Director accepted the \$57,000 amount of commission received by KCC to base Mr. Howard's entitlement of commission wages for the Richmond Property.

33. The Director also noted, based on the findings of fact of the Member in the Referral Back Decision, including the Member's finding that Mr. Howard was not the exclusive cause in the completed mortgage financing on the Richmond Property and there was another mortgage broker, Ms. Hoehn, significantly involved in concluding the mortgage financing, he would have to determine a division of the commissions between the latter and Mr. Howard pursuant to the Working Agreement between the parties.
34. Having said this, the Director noted in the Second Supplementary Report that while KCC in its submissions assigned Ms Hoehn 75% of the received commissions and Mr. Howard 25% and Ms. Hoehn previously agreed to give him 10% of the commission, Mr. Howard sought 70% of the commissions based on the previous 2% commission rate. This left the Director with the herculean task of determining a fair and reasonable solution for dividing the commissions from the Richmond Property between Ms. Hoehn and Mr. Howard with no effective guidance in the Working Agreement as the latter did not contain any provision for an arbitrated solution if an agreement could not be attained between two brokers on the division of commissions where both participated in concluding the mortgage financing.
35. The approach the Director ultimately chose in determining Mr. Howard's commission wages was based on "assign[ing] proportions based on the length of their involvement in concluding the mortgage on the [Richmond Property]" as the Director felt that would recognize the contributions made by both Ms. Hoehn and Mr. Howard. The Director counted 438 days from the date the execution of the Exclusive Agency Agreement between KCC and the client and the registration of the mortgage on the Richmond Property with Mr. Howard working on the matter for a period of 107 days and Ms. Hoehn for 331 days. Accordingly he apportioned Mr. Howard \$13,924.66 based on the actual commission received for his involvement ($\$57,000 \times 107/438 = \$13,924.66$). As the Working Agreement between Mr. Howard and KCC allocates 40% of the revenue fee obtained to KCC, the Director apportioned 60% of the \$13,924.66 to Mr. Howard-i.e. \$8,354.79. As Mr. Howard was previously paid \$5,000, the Director subtracted that amount leaving the balance owing to Mr. Howard to \$3,354.79 plus interest on the said sum in the amount of \$1,146.42 for a total of \$4,501.21.
36. The Second Supplemental Report was submitted to the Tribunal and the Member sought and received submissions from both parties on the Second Supplemental Report, which the Member considered in the Final Decision.
37. The Member notes in the Final Decision that while KCC agreed with the Director's calculations, Mr. Howard did not. In his decision, the Member notes that Mr. 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.

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. [emphasis added]

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".

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".

38. The Member also notes Mr. Howard's submissions wherein he alleges bias against the Director and denial of a fair hearing but dismisses those allegations as lacking any foundation.

39. On the substantive issues, the Member notes that he is in agreement with the Director and KCC that the commission wages are properly calculated on the commission actually received by KCC and the matter of wheatear it was improper for KCC to agree to reduce the commission rate "is not a matter over which the tribunal has any jurisdiction" and if "Howard believes [KCC] 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."

40. With respect to Mr. Howard's contention that Ms. Hoehn should receive only 15% of the commission on the Richmond Property, the Member rejects the said contention stating that it disregards the Member's earlier finding that Ms. Hoehn "significantly contributed" to the completion of mortgage financing.

41. The Member also rejects Mr. Howard's submission that his gross fee revenue to KCC under the Working Agreement should be reduced from 40% to 30% simply on the basis of his "assertion of a verbal agreement to that effect" when this is contrary to the "employment agreement between Howard and [KCC]".

42. The Member, in confirming the Second Supplemental Report in the Final Decision, states:

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

43. Mr. Howard, not unexpectedly, filed an application for reconsideration of the Final Decision containing extensive written submissions comprising 225 pages. I have reviewed those submissions and referred back to his earlier submissions in the appeal of the Determination and his earlier reconsideration applications pertaining to the Original Decision and the Referral Back Decision. I find his submissions relating to reconsideration of the Final Decision to be largely duplicitous of previous submissions and comprising of re-argument of issues previously argued in his submissions in the Appeal of the Determination and subsequently when he made submissions in the proceedings before the Member leading to the Referral Back Report and the Final Decision. Some examples of these include but are not limited to his re-argument alleging bias against the Director; re-argument alleging denial of natural justice by the Director and the Member; re-

argument challenging the Director's method of calculation of the commission relating to the Richmond Property; re-argument challenging the findings of fact in the commission claims on transactions previously dealt with in the appeal of the Determination; and re-argument challenging the findings of fact relating to apportionment of the commission wages for the Richmond Property. Mr. Howard also includes in his submissions under the heading "Petition" his critique of the court in the judicial review process he initiated prior to his appeal of the Determination that was considered on its merits by the Tribunal. This evidences once again Mr. Howard's failure to understand the purpose or object of a reconsideration application. As indicated previously, it is not a function of a reconsideration to re-weigh the evidence but to consider if the proper legal principles were applied in the original decision. In this case, Mr. Howard has not persuaded me that the Member has applied wrong or improper legal principles or made findings of fact without evidence or took a view of the facts on any matters in dispute that could not be reasonably be entertained on the evidence before him. In the circumstances, I dismiss Mr. Howard's application for reconsideration of the Final Decision.

ORDER

44. Pursuant to Section 116 of the *Act*, I order the Original Decision (BC EST #D011/07), the Referral Back Decision (BC EST #D013/08) and the Final Decision (BC EST #D086/08) be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal