Citation: Centra Windows Inc. (Re)
2024 BCEST 48

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Centra Windows Inc.
("Centra")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Robert E. Groves

FILE NO.: 2023/174

DATE OF DECISION: June 3, 2024

DECISION

SUBMISSIONS

Edward Lewis	counsel for Centra Windows Inc.
Sarah Vander Veen	delegate of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal brought by Centra Windows Inc. ("Employer") challenging a determination dated October 20, 2023 ("Determination"), issued by a delegate ("Delegate") of the Director of Employment Standards ("Director"). The appeal is brought pursuant to section 112 of the *Employment Standards Act* ("*ESA*"). The Employer submits that the Determination is flawed because the Director erred in law and failed to observe the principles of natural justice.

2. The Determination was the result of an investigation of a complaint ("Complaint") delivered to the Director by Kevin McCreadie ("Employee"), a former employee of the Employer. The Employee alleged that the Employer had failed to pay him commission wages.

3. The Determination stated that the Employer had contravened sections 17, 18, and 58 of the *ESA*. It ordered the Employer to pay $4,651.73 for unpaid commission wages, $1,703.09 for unpaid vacation pay, and $654.45 in accrued interest. The Delegate also imposed two $500.00 administrative penalties. The total found owing was, therefore, $8,009.27.

4. I have before me the Employer's Appeal Form and its submissions delivered in support, a submission from the Delegate, the Determination, the Reasons for the Determination ("Reasons"), and the record ("Record") the Director is obliged to deliver to the Tribunal pursuant to section 112(5) of the *ESA*. Despite his being invited to do so, the Employee delivered no submission regarding the appeal.

ISSUES

5. Should the Determination be cancelled or, alternatively, varied because it reveals errors of law and/or a failure to observe the principles of natural justice?

THE DETERMINATION

6. The Delegate's Reasons state that the Employer operates a window sales and installation business, and that the Employee was employed by the firm as a sales representative from May 23, 2019, until May 17, 2021.

7. Another delegate of the Director ("Investigator") investigated the Employee's Complaint and produced a report dated February 8, 2023 ("Report"), setting out the information the Investigator had collected. In her Reasons, the Delegate states that she reviewed all the information in the Complaint file, including the

Report, that the parties had responded to the contents of the Report, and that she considered their responses when preparing the Determination.

8. In addition, the Reasons state that an issue which arose during the investigation was whether the Employer had paid vacation pay to the Employee as required by section 58 of the *ESA*. Following the issuance of the Report, the Investigator invited the parties to provide submissions regarding this matter. The submission the Employer delivered in response to this request was also considered by the Delegate before she issued the Determination.

9. Regarding the issue of unpaid commissions, the Delegate noted the following provisions of the *ESA*:

- The section 1 definition of "wages," which includes "commissions…payable by an employer to an employee for work…."
- The section 1 definition of "work," which "means the labour or services an employee performs for an employer…."
- The section 17 requirement that an employer pay an employee all wages "earned" during a pay period.
- The section 18 requirement that an employer pay all wages "owing" to an employee within 48 hours after the employer terminates the employee's employment.

10. The Delegate found that the parties executed two employment contracts during the Employee's employment. The first ("Contract 1") was dated May 9, 2019. The second ("Contract 2") was dated January 28, 2021.

11. The Employer's position was that Contract 2 governed the employment relationship at the time the disputed commissions were earned and payable. It submitted that, pursuant to Contract 2:

- commissions on the Employee's sales were earned when the window products he sold were installed;
- the 50% of the Employee's commissions that he was paid at or about the time of a sale were "advances" on commissions that were not earned until the windows were installed; and
- the Employee was not entitled to commissions on window sales when the windows were installed after his employment ended.

12. Applying the terms it said were contained in Contract 2, the Employer argued that no disputed commission wages on sales were owed to the Employee because the windows in question were not installed until after the Employee's employment was terminated.

13. The Employee argued that Contract 2 was unenforceable because it was procured by duress or undue influence. He contended, therefore, that Contract 1 should constitute the governing document for the entirety of his period of employment with the Employer.

14. The Delegate determined that Contract 2 was not rendered unenforceable, either by duress or by undue influence, because it was open to the Employee to have obtained independent legal advice before

executing it, he made no complaint regarding Contract 2 while he was employed, and there was no evidence the Employer exerted illegitimate pressure on the Employee to obtain what would otherwise have been construed to be a valid consent.

15. The Delegate also found that the Contract 2 provisions relating to the Employee's entitlement to the payment of commissions were unambiguous. Accordingly, absent any concerns involving provisions of the *ESA*, the Delegate affirmed that the parties were free to re-define in Contract 2 when the Employee "earned" his commissions, and he could, therefore, rightly claim that they became "payable" to him.

16. Having concluded that Contract 2 was the relevant document the parties had assented to, the Delegate also determined, however, that the provision depriving the Employee of a commission if the commission was "earned" after his employment ended did, indeed, contravene the *ESA*, with the result that it must be found to have no effect. It followed, moreover, that the Delegate concluded the Employee was owed commission wages the Employer had declined to pay owing to its reliance on the provision in Contract 2 basing the Employee's entitlement to commissions, in part, on his continued employment at the time window products were installed following a sale.

17. The Delegate's Reasons reveal that certain findings of fact were utilized by her to support her conclusion on this point. They include:

- A finding based on a review of the Employee's Job Description, and a communication from the Employer's Director of People and Culture ("LG") to the Investigator, that the Employee had completed all his job responsibilities with respect to the disputed sales prior to the termination of his employment (R8); and
- A finding that the Employee's employment agreement did not allocate his salary or commissions as remuneration for the performance of any specific job duties (R9).

18. The rationale for the Delegate's conclusion deeming void the employment term rendering the Employee's entitlement to commissions contingent on continued employment at the time of product installation is to be found at R9-R10 of the Reasons. It reads as follows:

> Simply put, the Employee performed all his work under Contract 2 with respect to the disputed sales, and the Employer should have, pursuant to sections 17 and 18 of the Act, paid all the wages owing to the Employee for his work.
>
> Even though parties are free to define the term "earned" by contract, parties do not have boundless latitude in doing so. Rather, any definition of "earned" set by contract cannot have the effect of depriving an employee of the minimum standards set out in the Act, as such a definition is void pursuant to section 4 of the Act.
>
> To enforce a definition of "earned" that makes payment of wages for work an employee has already performed conditional on the occurrence of some future event that is unrelated to an employee's job duties and out of the employee's control does not conform to the Act. Rather, allowing such a definition pulls the legislative and regulatory rug out from underneath the Act. This is precisely what Contract 2 does by making the earning of commissions conditional on continuing employment. In this case, the Employee had no control over changes in price between the time of a sale and time of installation. Further, and more fundamentally, the Employee had no control over when he was fired.

> Allowing the parties to define "earned" in such a manner results in a windfall for the Employer and could lead to absurd results such as nefarious employers strategically terminating employment relationships to avoid paying commissions. Such results could not have been in the mind of the Legislature when it drafted the Act, and such absurd interpretations should be avoided.
>
> The Employer submits that commissions are not fully calculable until the final sales price is known. This cannot be used as a justification for denying the Employee wages for work I have found he performed. I note that this is why many contracts have so-called "clawback" provisions that allow an employer to reconcile commission payments and changes in pricing. The purpose of the Act is to provide minimum standards for employees, not to enforce employers' contractual rights or protect their profit margins.

19. I pause here to note the relevant portion of section 4 of the *ESA* provides that "[t]he requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements…has no effect."

20. As stated earlier, the question whether the Employer had paid the Employee all the vacation pay that was owed to him also arose during the investigation of the Complaint. On this point, the Delegate observed that the Employer had paid the Employee vacation pay on the salaried portion of his remuneration.

21. Regarding the vacation pay that was payable on the Employee's commission wages, however, the Delegate concluded the Employee was not paid vacation pay "on top of his commissions" as required by section 58 of the *ESA*. In reaching this conclusion, the Delegate relied on Tribunal authority to the effect that vacation pay cannot be "included" in an employee's wage. Rather, vacation pay must be paid "on top of" or "in addition to" an employee's regular wages. Accordingly, the Delegate ordered the Employer to pay the Employee the requisite amount of vacation pay on all commission wages, paid or payable, earned by the Employee during the recovery period established for the Complaint.

22. The Determination imposed an administrative penalty for the Employer's failure to pay commission wages as required by section 17 of the *ESA*, and a second penalty because the Employer did not pay vacation pay to the Employee pursuant to section 58.

ARGUMENTS

23. As I have noted, the Employer's appeal submissions assert that the Determination should be cancelled or, alternatively, varied because the Delegate erred in law and failed to observe the principles of natural justice.

24. In its initial submission delivered in support of its appeal the Employer contends the Delegate erred in law when she determined the Contract 2 provision stipulating that no commission was earned by the Employee unless he continued to be employed at the time the window products he had sold were installed was void because it contravened section 4 of the *ESA*. The Employer submits that this conclusion is erroneous, as it is inconsistent with other Tribunal decisions holding that such contractual conditions regarding the payment of commission wages are legally permissible.

25. The Employer also submits that the Delegate erred in law because she focused on isolated terms in the Employee's Job Description and failed to consider the provisions of Contract 2 in their totality, contrary to the general rules of contractual interpretation. More specifically, the Employer says the Delegate failed to consider provisions in Contract 2 incorporating industry custom relating to work the Employee was expected to perform up to the date the windows he had sold were installed.

26. The Employer says the Delegate erred in law when she determined that the Employer failed to pay vacation pay on the Employee's commission wages as required. The Employer argues the Employee's Contract 2 made it clear the sums the Employee was paid for sales, at a fixed rate of 3%, included 6% for vacation pay, with the balance shown as the amount payable by way of "commission." The Employer contends that the Delegate's refusal to apply the terms expressed in Contract 2 regarding vacation pay constitutes an error of fact giving rise to an error of law because the legal conclusion the Delegate derived from her error lacked an evidentiary foundation, and so it was irrational. Accordingly, the Delegate's assessments of vacation pay owed are also erroneous.

27. The Employer submits that where an *ESA* appeal examines alleged errors of law in a determination, the standard of review is correctness.

28. The Employer alleges the Delegate failed to observe the principles of natural justice when she neglected to consider the full statement of LG concerning the Employee's fulfillment of his employment responsibilities in respect of the sales in dispute when the Delegate considered whether the Employee was entitled to payment of commission wages. The Employer acknowledges that LG told the Investigator the Employee had completed his job responsibilities regarding the disputed sales. However, the Employer contends, and the Report confirms, that LG also told the Investigator "there was the possibility of changes to orders or other amendments and commissions were therefore not payable until the installation was complete." The Employer questions why the Delegate only cited but a part of LG's communication in her Reasons.

29. The Employer alleges further natural justice breaches arising from the Delegate's selective analysis of submissions delivered on its behalf, and a failure to consider all the Employer's submissions, which led her to erroneous conclusions regarding the interpretation of the totality of the Employee's Contract 2, and whether all the vacation pay owed to the Employee had been paid.

30. The Employer also refers to aspects of the Delegate's Reasons that it contends must indicate an animus against it, and which lead to a reasonable apprehension of bias. The Employer points to the Delegate's comment in her Reasons, referred to above, stating that the way the parties defined how commissions were earned "results in a windfall for the Employer and could lead to absurd results such as nefarious employers strategically terminating employment relationships to avoid paying commissions."

31. The Employer takes issue, too, with the Delegate's statement that "[t]he purpose of the Act is to provide minimum standards for employees, not to enforce employers' contractual rights or protect their profit margins." It says the comment ignores other purposes of the statute, in addition to basic standards of compensation and conditions of employment, including the promotion of fair treatment of both employees and employers, the encouragement of open communication between employees and employers, and the provision of fair and efficient procedures for resolving disputes.

32. Following the review of the Employer's initial materials delivered in support of its appeal, I requested submissions from the Director and the Employee on the merits, generally, of the appeal, but also from the Employer regarding a comment in its initial submission that it had not seen a spreadsheet contained in the Reasons setting out wage data for the Employee, and so the Employer could not verify its accuracy.

33. In a submission delivered to the Tribunal dated February 20, 2024, counsel for the Employer challenged the accuracy of two of the entries in the spreadsheet. In relation to Order L90214, the Employer says a further change in price on the order necessitated an adjustment to the commission amount. Regarding Order L90189, the Employer challenged the Delegate's statement in her Reasons that the Employer offered no evidence to support its assertion that no commission was owed because the order was cancelled. The Employer asserts that documents associated with this order, delivered during the investigation, support its position that the order was cancelled, and so the statement of the Delegate is inaccurate.

34. The Delegate has delivered a submission in the appeal, on behalf of the Director.

35. The Delegate submits that the standard of review to be applied by the Tribunal to the Director's interpretation of an employment contract is reasonableness. In support of this argument, the Delegate relies on previous Tribunal authority stating that since contractual interpretation involves issues of mixed law and fact deference should be given to decision-makers at first instance, and appellate bodies should be cautious in identifying extricable questions of law in disputes involving the meaning of contractual terms.

36. The Delegate argues that she interpreted Contract 2 having regard to all the evidence, including the factual matrix, and determined, reasonably, that Contract 2 did not require the Employee to engage in any meaningful post-sale duties.

37. The Delegate disputes the Employer's claim that she did not consider evidence, or terms in Contract 2, which should have led her to conclude that the "work" expected from the Employee entitling him to commission wages included post-sale duties. The Delegate observes that a failure to refer, specifically, in her Reasons to all the evidence tendered by the parties does not inexorably lead to a conclusion that she neglected to consider that evidence. She submits, too, that in her Reasons (R3-R4) she stated she had reviewed all the evidence, but she would refer only to those parts of it that were necessary to reach the required findings and to apply the legislative scheme.

38. Regarding the Employer's contention that the Determination failed to take into account the full statement of LG concerning the completion of the Employee's work on sales, the Delegate asserts that the portion of the LG statement on which she relied – the portion which acknowledged that the Employee had completed his job responsibilities with respect to the disputed sales – was the portion that established the Employee's entitlement to payment of commissions for his work. The portion of the LG statement to which the Delegate did not refer – the portion stating that commissions were not payable until installation was complete because changes to the specific order, or other amendments and conditions, were possible thereafter – alluded to business considerations and industry practices that were unrelated to any duties the Employee was required to perform to complete the "work" established for him in Contract 2. The Delegate submits, therefore, that her approach to the reproduction of the LG statement was reasonable.

39. As for the Employer's contention that the Determination mis-interpreted the Employee's job responsibilities, the Delegate refers to the Employee's Job Description, discussed in the Reasons, which made it clear he would be selling "supply only products," as well as "installed product sales," that he was meant to "secure orders," and that he would be expected to represent the Employer "in every aspect of sales." Moreover, the wording in the Job Description requiring the Employee to "[f]ollow up with leads and customers by providing the highest level of customer service at all times" [emphasis included] was not determinative of an obligation to perform post-sale work, particularly since this wording appeared in the Job Description under the heading "Lead Generation." The Delegate states that, having regard to this evidence, and the lack of any convincing evidence to the contrary, it was reasonable for her to conclude the Employee's responsibilities related to the securing of orders for the sale of the Employer's products, and not to any significant post-sale duties.

40. The Delegate disputes the Employer's assertion she erred in determining that the term of Contract 2 denying the Employee a commission on a sale if he was no longer employed at the time of the installation was void because it contravened section 4 of the *ESA*. In substance, the Delegate repeats the analysis contained in her Reasons. She states that the minimum standard in the statute the relevant part of Contract 2 contravenes is the stipulation, based on a reading, together, of the definitions of "work" and "wages" in section 1, and sections 17 and 18 regarding the timing for the payment of wages, that an employee who completes work his employment contract requires him to perform will be paid the wages he has "earned."

41. The Delegate's rationale is set out in the following excerpts from her submission:

> In this case the Delegate reasonably interpreted the Contract and found that the Employee substantially completed his job duties with respect to the sales at issue, and that section 18 of the Act therefore required he be paid the commission wages he had been promised for his work.
>
> …
>
> Once the question of when wages are earned has been determined, the Act and Regulation provide the complete answer to the question of when those wages become payable. Section 17 of the Act requires that all wages earned in a pay period be paid within eight days of the end of the period. Section 18 of the Act requires that all wages earned be paid within 48 hours of an employer terminating an employee.

42. The "Regulation" to which the Delegate refers to is the *Employment Standards Regulation* ("*Regulation*"). In her submission, the Delegate refers to section 37.14 of the *Regulation*, which permits an employer to defer the payment of some of the commission wages earned by certain categories of salesperson, not including the Employee, during the first pay period in a month, provided that the total wages earned in the month are paid in the second pay period of the month. The Delegate observes that beyond this provision, there is nothing in the legislative scheme which creates an exception for employers regarding the timing for the payment of earned wages to commission salespersons, and so, in the result, the finding made in the Determination reveals no error.

43. The Delegate notes the reliance by the Employer on Tribunal decisions finding no contraventions of the *ESA* where the applicable employment contracts required employees to be employed at the time commissions were earned, but she submits the Complaint requires a different resolution. In the alternative, the Delegate submits the decisions are distinguishable.

44. Regarding the finding in the Determination that the Employer owed the Employee vacation pay, the Delegate repeats the statements contained in the Reasons that a commission wage, and vacation pay, are separate benefits under the *ESA*, which means that it is unlawful for an Employer to subsume the latter within the former, as the Delegate found Contract 2 did in the instant case. The Delegate asserts that she did not ignore the plain language of Contract 2, as alleged by the Employer. Rather, the Delegate submits that the Reasons rely on the wording of Contract 2 which, when properly interpreted, clearly show the parties' intention that the Employee's commission wages were to include an amount of vacation pay.

45. The Delegate rejects the Employer's submission that her Reasons establish bias. As set out above, she argues that she considered the totality of LG's communication. She says, too, that the Determination accords with all the purposes of the *ESA* set out in section 2, and an emphasis on but one relevant purpose in her Reasons should not be construed to mean that other purposes of the statute were ignored. Further, the Delegate explains that a reference to "nefarious employers" was not meant to refer to the Employer. Instead, it was intended to illustrate why the Employer's submission on the payment of commission wages being conditional on continued employment at the time of installation might lead some hypothetical employers to attempt to deprive employees of wages they had earned; an absurd result the legislature could not have intended when it enacted the *ESA*.

46. The Delegate has also replied to the submission offered by the Employer that two entries in the wage date spreadsheet appearing in the Reasons are inaccurate. Regarding Orders L90214 and L90189, the Delegate states that while the Employer contended the orders had been amended, or cancelled, respectively, it provided no evidence to support its assertions, and so the findings in the Determination that commissions remained owing was reasonable.

47. In a submission by way of final reply, the Employer asserts that since contractual interpretation involves questions of mixed law and fact, the standard of review for the Determination regarding the meaning of the terms of Contract 2, and the answer to the question whether the entitlement to a commission being made conditional on continued employment at the time of product installation establishes a contravention of the *ESA*, must still be correctness. The reason for this is that these matters involve extricable questions of law.

48. In the alternative, the Employer submits that even if I find the applicable standard of review is reasonableness, and not correctness, the Determination is unreasonable. The Employer argues that the Reasons, and the Delegate's submission in the appeal, do not adequately counteract the force of existing Tribunal authority in cases based on similar facts establishing that, unless a contractual term otherwise infringes a minimum requirement of the *ESA*, parties are at liberty to enter into agreements stipulating when commission wages are earned, and that the payment of such wages may lawfully be subject to a continued employment condition. The Employer acknowledges that neither the Tribunal nor the Director are bound by the legal doctrine of *stare decisis*, but the Tribunal has also stated there is a virtue in applications of the provisions of the *ESA* that are uniform and consistent. The Employer states further that the Delegate has cited no Tribunal authority challenging the decisions on which it relies on this point.

49. Regarding the matter of unpaid vacation pay, the Employer argues that the Tribunal authority relied upon by the Delegate is distinguishable because the offensive contract wording in the authority in question was different in substance from the wording in Contract 2. The Employer submits that while the wording in the contract the Delegate relied on made vacation pay a part of the commission amounts paid, the

wording in Contract 2 clearly distinguished the commission wage amount from the vacation pay amount in the rate payable to the Employee. The Employer contends that the Delegate's determination is in error because it is incorrect or, alternatively, because it is unreasonable.

ANALYSIS

The applicable standard of review

50. Section 112(1)(a) of the *ESA* limits the Tribunal's power in an appeal to a review of allegations that a delegate has erred in law. The decision of the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33 ("*Housen*") states, at paragraph 8, that the standard of review applicable to a question of law is correctness. The Tribunal has adopted this standard when deciding whether an appeal engages such a question (see, for example, *J. C. Creations o/a Heavenly Bodies Sport*, BC EST # D132/03).

51. It follows that the first item of business for the Tribunal in an appeal grounded in section 112(1)(a) is to determine whether the allegations made identify such an error.

52. This is important, because the *ESA* provides no power for the Tribunal to correct a delegate's errors of fact, unless those errors can be said to constitute errors of law. Errors of fact do not amount to errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Another way to describe the test is to say that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354 ("*Gemex*"); *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

53. Difficulties arise where an issue identified in an appeal involves a question of mixed law and fact. In *Canada (Director of Research, Competition Act) v. Southam Inc.* [1996] SCJ No.116 it was said, at paragraph 35, that questions of law are questions about what the correct legal test is, questions of fact are questions about what took place between the parties, and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

54. *Housen*, at paragraphs 36 and 37, stipulates that appeals citing alleged errors on questions of mixed law and fact are subject to the same test as the test that is applied to allegations a decision-maker at first instance has committed an error of fact constituting an error of law – the error must be palpable and overriding. However, a matter in an appeal involving a question of mixed law and fact may give rise to an error of law if a question of law can be extricated that has resulted in such an error (see, also, *Britco Structures Ltd.*, BC EST # D260/03 ("*Britco*")).

55. *Housen* provides examples, at paragraph 36, of cases involving issues of mixed law and fact in which a question of law might be extricable and reviewable according to the standards of appellate review applicable to a question of law, including "the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle…."

56. In *Gemex*, the court also defined circumstances in which an error of law might arise. It is a formulation that has been adopted by the Tribunal in many of its decisions. The circumstances that have been identified include:

1. A misinterpretation or misapplication of the legislation in question;
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;
5. Adopting a method of assessment that is wrong in principle.

57. In *Britco*, too, the Tribunal's review of *Housen*, and other authorities, led it to conclude that if the matter at issue relates to a question of statutory interpretation "at some level of generality," the matter may also involve an extricable error of law. The same cannot, however, be said for a circumstance where the question is whether a matter or thing under scrutiny falls within a statutory definition, correctly construed. In *Housen*, at paragraph 37, the majority judgment of the court employed the test for a review of a finding of negligence as an example to illustrate this point. The court said this:

> …we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

58. In my view, the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, does not alter this formulation. At paragraphs 36 and 37 of the decision, the court affirmed that in circumstances where a legislative scheme provides for a statutory appeal to the courts from a decision of an administrative tribunal on a question of law, the applicable standard of review continues to be correctness. Where, however, the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error, as it is for questions of mixed law and fact where a question of law is not readily extricable.

59. While *Vavilov* does not appear to have concerned the standard of review on questions of law to be applied by internal appellate bodies like the Tribunal, as opposed to courts hearing statutory appeals, I see no evidence in the decision leading to a conclusion that a different standard of review should be applied in an appeal on a question of law pursuant to section 112(1)(a) of the *ESA*, including an appeal where the issue involves an allegation the matter involves an extricable error of law that has been committed regarding a question of mixed law and fact. Indeed, as the court observes, also in paragraph 37, if the legislature had intended to provide for a different standard of review than the normal standard of

appellate review discussed in *Housen*, it could have established such a standard expressly in the wording of the statute.

60. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("*Sattva*"), provides guidance regarding the posture the Tribunal should adopt when considering cases, such as the one presented in this appeal, where issues arise involving the interpretation of the rights and obligations appearing in a contract. In that decision, the court determined that the historical approach, which considered the exercise to be one involving a pure question of law, should no longer apply. Instead, the court stipulated that the proper course was to treat matters of contract interpretation as raising issues of mixed law and fact, principally because, as the court stated at paragraph 50, "[c]ontractual interpretation…is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in the light of the factual matrix."

61. The court in *Sattva* also recognized, at paragraph 51, a purpose for distinguishing questions of mixed law and fact from questions of law in this context. There, it stated:

> One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to a particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a forum for parties to continue their private litigation.

62. The court went on to state, again in paragraph 51, that this means the "degree of generality," or precedential value, is a key factor in determining whether a matter engages a question of law, or a question of mixed law and fact, and so "[t]he more narrow the rule, the less useful will be the intervention of the court of appeal."

63. At paragraph 52, the *Sattva* court also noted, based on comments made in *Housen*, that "deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings…." The court then said this:

> These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

64. That said, the *Sattva* court did recognize, at paragraph 53, it might be possible to identify an extricable question of law within a matter initially characterized as a question of mixed law and fact. However, it also made clear that appellate bodies should exercise caution in identifying such questions in disputes over contractual interpretation. It then went on to observe, at paragraph 55:

> As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare.

65. In my opinion, the principles applied in *Sattva*, a case involving a statutory appeal to the courts on a question of law arising from a decision of an arbitrator under the British Columbia *Arbitration Act*, are equally applicable to appeals brought pursuant to section 112(1)(a) of the *ESA* where a party alleges that a delegate has erred in law regarding matters of contractual interpretation. It follows that such appeals should be treated as raising questions of mixed law and fact. It also means that a finding the appeal involves an extricable question of law permitting the Tribunal to intervene will be a rarity. Such an approach will tend to vindicate the integrity of the investigations conducted on behalf of the Director, and it will also be consistent with a purpose of the *ESA* set out in section 2, that it provides fair and efficient procedures for resolving disputes over the application and interpretation of the statute.

66. The decision of the Tribunal in *AltaStream Power Systems Inc. (Re)*, BC EST # RD065/17, cited by the Delegate, refers to *Sattva*, and has affirmed that contractual interpretation involves questions of mixed law and fact, which cautions an attitude of deference on the part of the Tribunal when considering whether an appellant has established an extricable error of law in a determination. The Delegate submits that this approach means the appropriate standard for reviewing her interpretation of Contract 2 is reasonableness. As I have noted, the Employer argues the decision of the Delegate determining that the relevant provisions of Contract 2 concerning the date commissions were earned were of no effect pursuant to section 4 of the *ESA* is reviewable under the less deferential standard of correctness or, in the alternative, the decision was unreasonable.

67. In my view, the use of the word "reasonableness" to describe the standard of review the Tribunal must apply in this case is unhelpful, because it is imprecise. I prefer to employ the legal formulations in the authorities to which I have referred. Errors of fact and errors relating to questions of mixed law and fact do not constitute errors of law, and are thus immune from review by the Tribunal in an appeal pursuant to section 112 of the *ESA*, unless the error in question can be said to be palpable and overriding or, as has been said in the case of an error relating to a question of mixed law and fact, an extricable error of law is identified. Once a question on an error of law has been identified the Tribunal's standard of review of a delegate's decision regarding the matter is correctness.

68. As we have seen, there are circumstances in which the Tribunal has accepted jurisdiction in an appeal where the analysis of an alleged error of law focuses on an assertion, for example, that a decision-maker has acted unreasonably, and therefore one might say, incorrectly, because the decision-maker relied on a view of the facts which could not reasonably be entertained. In that context, however, the term "reasonably" has a specific meaning, which must be applied to ensure the correctness of a decision. In other circumstances where an error of law is at issue, the concept of "reasonableness," generally, has no, or no substantial, role to play when a determination is made regarding the correctness of a decision.

69. The proper characterization of the questions to be answered in this case involving the application of section 112(1)(a), then, is not whether the Delegate acted reasonably *per se*, but rather, whether the Determination reveals errors of fact or errors of mixed law and fact that are palpable and overriding or, in the case of errors of mixed law and fact, the errors incorporate extricable errors of law. If so, the standard of review, applicable to all errors of law, is, as I have said, correctness.

Did the Delegate err in law or fail to observe the principles of natural justice?

70. I reject the Employer's contention the Delegate fell into error because she focused on certain terms of the Employee's Job Description and neglected to consider the provisions of Contract 2 in their entirety, especially the terms the Employer argued were meant to incorporate an industry custom requiring the Employee to provide work up to the date windows he sold were installed.

71. I accept the Delegate's statement in her Reasons (R4) that she reviewed all the evidence the parties tendered. I accept, too, the Delegate's statement in her submission on appeal that a failure to refer to all the evidence in a case does not automatically lead to a conclusion that the evidence was not considered. In my view, the Delegate's Reasons reveal a careful review of the relevant terms of Contract 2, including the Employee's Job Description attached to and incorporated as an element of the document, leading the Delegate to conclude, as a matter of fact, the Employee had performed substantially all the duties to secure sales that Contract 2 required of him so as to entitle him to payment of the disputed commissions once the Employer terminated his employment. There was, I find, some evidence on which a reasonable delegate could have arrived at that conclusion. That being so, there is no basis on which I may decide that the Delegate committed an error that was palpable and overriding.

72. Much of the evidence and argument submitted by the Employer relating to industry practice was extraneous to the precise wording of Contract 2. Accordingly, the Delegate was entitled to confer upon it a more limited weight, especially since Contract 2 contained a provision stipulating that the words in it constituted the entire agreement of the parties. It was, indeed, for this reason, I infer, that the Delegate concluded (R7) the parties intended Contract 2 should be interpreted "within the four corners of the contract itself if possible."

73. I reject, in addition, the Employer's submission the Delegate ignored the part of the statement of LG that changes to a sales order might have occurred after the Employee had completed his job responsibilities, which meant that commissions were not payable until installation was complete. I am persuaded the Delegate did not refer, expressly, to this aspect of the LG statement because it related only to circumstances which might affect the proper calculation of the amount of the commission the Employee should be paid, and not whether the Employee had completed job duties set out in Contract 2 which might entitle him to claim a commission. This approach to the evidence was entirely plausible given the Delegate's analytical focus, and I discern no palpable and overriding error in the manner the Delegate dealt with it.

74. Similarly, I am not persuaded the Employer has established a natural justice concern on the basis the Delegate ignored elements of the Employer's submissions, leading her to arrive at erroneous conclusions, particularly regarding the need to consider Contract 2 as a whole, and the issue of unpaid vacation pay. As I have noted, the Delegate stated in her Reasons that she considered all the evidence tendered by the parties. She also stated (R4) that she considered all the arguments submitted by the parties, not only the arguments summarized in the Report, but the subsequent arguments delivered following a request for submissions on the vacation pay issue which had emerged during the investigation.

75. In essence, the Employer is saying the Delegate must have ignored its arguments because certain of the conclusions she reached in the Determination did not give effect to them. I do not accept the Employer's position. The rationales for the various conclusions drawn by the Delegate are clearly set out in her

Reasons, in a manner that is transparent and intelligible. The inference to be drawn from the Reasons is not that the Delegate ignored the Employer's submissions on key points but, rather, she simply declined to give effect to them because, on balance, she decided they were less persuasive.

76. I am also of the view that it is incorrect for the Employer to allege the Determination is tainted by a reasonable apprehension of bias. A failure to consider relevant purposes of the *ESA* may give rise to a concern that a delegate has misapprehended important aspects of the statute, but it cannot, without more, serve to ground an allegation that the delegate is motivated by an animus against a party. Moreover, the Delegate's use of words such as "windfall," "absurd results," and "nefarious employers" in her Reasons, while colourful, is no evidence of bias against the Employer, in my view. It is clear from the context in which these references appear in the Reasons, and the discussion in the Delegate's submission in the appeal regarding the point, that she was merely referring to what hypothetical employers might do if the Employer's interpretation of the relevant provisions of the *ESA* were to be accepted, and not to the actions of the Employer in the instant case.

77. All of this said, where I do depart from the analysis of the Delegate is in the legal approach she employed to conclude that the Employee had "earned" commissions which should have been paid to him, despite Contract 2 stating plainly, and the Delegate acknowledging, that commissions could only be earned when windows he had sold were installed, and that he would not be entitled to commissions on sales if the products he sold were installed after his contract was "terminated for any reason."

78. I do not conclude the Determination reveals a reviewable error in the Delegate's interpretation of Contract 2. As the Delegate herself stated in her Reasons, the terms of Contract 2 were "unambiguous" (R7). I confirm, too, that the Delegate acted lawfully in finding, as a fact, that the Employee had completed substantially all the duties required of him regarding the disputed commission sales before his employment was terminated. However, I am persuaded the Delegate did commit an error when she decided section 4 of the *ESA* rendered of no effect the terms in Contract 2 that made the Employee's entitlement to commissions conditional on continued employment at the time windows he sold were installed.

79. In my view, the Delegate's error is an error of mixed law and fact because it arises in the context of her deciding whether her findings of fact regarding the proper interpretation of the words in Contract 2 warrant a particular outcome having regard to the relevant legal requirements of the *ESA*. As I have noted, a decision-maker's conclusions relating to matters of mixed law and fact are entitled to a degree of deference. In this case, however, I have decided that the Delegate misapplied the law in the form of the *ESA* test the Tribunal has established for determining whether a commission has been "earned." I have concluded, therefore, that the Tribunal must intervene because the Determination contains an error of mixed law and fact containing an extricable error of law reviewable on a standard of correctness.

80. Several decisions of the Tribunal, dating back years, recognize circumstances in which it will be no contravention of the *ESA* for parties to an employment agreement to agree that commissions are not fully "earned" until terms are fulfilled conditional on the happening of a future event unrelated to the employee's performance of work (see, for example, *Fabrisol Holdings Ltd. operating as Ragfinder*, BC EST #D376/96); *Kocis*, BC EST # D114/98; *TSI Telequip Services Inc.*, BC EST #D221/99). Situations where this might occur include, for example, cases involving employment contracts entitling an employer to decline to pay a commission where a buyer simply fails to complete a sale, or where the employer is permitted to

renegotiate sales prices to a lower amount for reasons unrelated to the employee's performance, resulting in the payment of a commission on the lower amount, rather than the higher amount originally negotiated by the employee.

81. Conversely, there have also been cases where the Tribunal has found an employee to be entitled to a commission notwithstanding the balance of the purchase price, and therefore the net profit derived from a sale, on which the employee's employment contract based the calculation of the amount of his commission, was not paid until after the employee's employment was terminated (see *Halston Homes Limited*, BC EST # D527/00 ("*Halston*")). In *Halston*, the Tribunal decided that the termination of the employee's employment did not bar his claim for payment of the commission, because he continued to be an "employee" protected by the terms of the *ESA* for the purpose of collecting it. The Tribunal stated that it was not the fact of a continuing employment relationship that determines whether a person is an "employee" for the purposes of the *ESA*, but the entitlement to wages for "work."

82. It is important for our purposes to note, however, that in *Halston* the employee had not only completed all the work his contract required of him regarding the disputed sale, but his employment contract nowhere required that he continue to be employed when the net profit from it was finally determined, and he then became entitled to a commission. In those circumstances, the commission was fully "earned" by the employee before his employment came to an end, and his continued employment was, therefore, irrelevant.

83. *Shell Canada Products Limited*, BC EST # RD488/01 ("*Shell Canada*"), cited by the Employer, is instructive regarding this issue. That was a case involving a "bonus," that is, incentive based "wages" under the *ESA*, like commissions, and defined in section 1 as "money…paid or payable by an employer as an incentive and relat[ing] to hours of work, production or efficiency." The employee in that case worked subject to an employment contract in which his entitlement to a bonus, called "Results Pay," was made conditional, in part, on his not having voluntarily resigned. The employee resigned, and his employer declined to pay a bonus. An appeal panel of the Tribunal determined the employee had earned the bonus because he had performed the work for the entire period in respect of which the bonus was to be calculated and, therefore, section 4 of the *ESA* prevented the employer from applying any term in the bonus plan that had the effect of terminating the employer's obligation to pay the incentive.

84. A reconsideration panel of the Tribunal cancelled the appeal decision and confirmed the determination of the Director at first instance that no bonus was owed. The basis for the panel's decision is captured in the following excerpts from the decision (pages 7-8):

> The legislature has not seen fit to grant the Director a roving mandate to regulate private employment contracts that in all respects satisfy the minimum statutory requirements of the *Act*. The authority of the Director is limited to enforcing such agreements. The Tribunal has also accepted that parties are free to arrange their relationship as they choose provided the terms of a private employment contract do not contravene the requirements of the *Act* and are otherwise consistent with the objectives and purposes of the legislation. We can find no prohibition in the *Act* against employers and employees agreeing, *simpliciter*, to conditions for the payment of incentive based remuneration….
>
> …

> We also agree with the Director that the real issue in this case is whether the Results Pay was earned and, if it was not earned, that no issue arises about whether there was a contravention of the prohibition found in Section 4 of the *Act* against "contracting out" of the minimum statutory requirements.
>
> We do not find that Shell contravened the *Act* when it refused to pay [the employee] Results Pay. From the material on file, we are satisfied that part of the employment contract between Shell and [the employee] required [the employee] to be actively at work when Results Pay was paid in order to be eligible for it. Simply put, he was not. The failure to satisfy that contractual requirement made him ineligible to receive Results Pay and, having failed to satisfy that requirement, he could not be said to have earned, for the purposes of the *Act*, the incentive based remuneration that is Results Pay.

85. There is a further statement in the *Shell Canada* decision that is of interest for our purposes. The panel said this (pages 8-9):

> It is important to note that this is not a case that can be characterized as the employer making a thinly disguised attempt to frustrate [the employee's] right to receive the incentive in question. Nor is this a case where the employer has unlawfully terminated the employee in order to avoid paying a financial incentive that it would otherwise be contractually bound to pay. It is probable that in such circumstances the Tribunal would be less inclined to give effect to the contractual relationship. In this case, however, [the employee] voluntarily resigned….

86. In *Seann Parcker*, BC EST # D033/04 ("*Parcker*"), a decision also cited by the Employer, the Tribunal considered circumstances in which an employee who was an admissions representative for a private educational institution was employed pursuant to a contract that stated he would not be entitled to any commissions "in connection with tuition fees received after the date of termination of employment." The employee resigned before tuition fees in respect of which he sought a commission were received. The Director determined that no wages described in the *ESA* were owed.

87. On appeal, the employee argued that the Director's determination permitted a "contractual forfeiture of wages – a result prohibited by Section 4." The employee submitted that "the objectives of the *Act* are not met by a decision that results in an employee foregoing wages that have been earned but unpaid and, more specifically, Section 4 prohibits an agreement that attempts to accomplish that result." The employee also contended that "a commission is earned when the work required to earn it is substantially done, that a commission is payable when it is earned and entitlement, once established, cannot be lost."

88. The Tribunal acknowledged that in cases which have considered whether commission wages are "earned," the Tribunal has recognized that "the presumptive relationship of work and earnings can be affected by the facts and the terms of the employment contract." Having considered this admonition in light of the terms of the employee's contract of employment, and given there was no evidence the employee had not received at least minimum wages for all the hours he had worked to secure the tuition fees in question, the Tribunal decided the Director had made no error of law in determining that commissions on tuition fees received after the employee's termination were not fully earned, and so they were not properly payable under the *ESA*.

89. In my view, a review of the line of decisions I have discussed reveals a preferred interpretation of the *ESA* the Tribunal will apply, at least in situations where the minimum requirements of the statute have been observed in the form of minimum wages for work being paid to the employee, that there can be lawful provisions in an employment contract establishing conditions beyond the control of an employee which permit an employer to decline to pay commissions for work the employee has previously completed. In such cases, there is no contravention of section 4, and the provisions should not be declared to be of no effect, because the commissions have not been fully "earned" and, therefore, they are not yet wages that are "payable" under the statute.

90. The *Shell Canada* and *Parcker* decisions deal expressly with contracts, like Contract 2, where the term rendering conditional the payment of wages for work performed was continued employment at the time the right to payment crystallized. In each case, the Tribunal found that the terms requiring continued employment did not contravene section 4, despite the fact the employees in each case were found to have completed the work their contracts required of them to establish their entitlement to payment of commissions absent the existence of the limiting terms.

91. The Delegate's submission asserts, in substance, that I should decide the appeal in a manner that is inconsistent with the line of Tribunal decisions I have noted. I decline to do so. It is accurate to say that the Tribunal is not bound by its previous decisions, but there is merit in the view that its decisions should, if possible, embody the principles of uniformity and consistency, and thereby promote an element of predictability in the interpretation and application of the *ESA*. In this case, I do not discern a compelling reason to depart from the interpretative approach revealed in the line of authority to which I have referred. To the contrary, I am of the view that it is correct.

92. In the alternative, the Delegate submits that the *Shell Canada* and *Parcker* decisions are distinguishable. Again, I must disagree. While *Shell Canada* dealt with a bonus, and not a commission, and both cases involved circumstances in which the employee in question resigned, rather than being dismissed without cause, as was the case here, I view the different reasons for the terminations of the employees to involve distinctions without a material legal difference. In all these cases the employees had to continue to be employed at the relevant time for their wages to be earned, and therefore payable, under the *ESA*.

93. I note, too, there is no suggestion in the case now before me that the term in the Employee's Contract 2 requiring continued employment before the employee became eligible to receive a commission, once it became payable, was devised to frustrate the right to payment of it, or that the Employee was dismissed because the Employer sought to avoid paying commissions it would otherwise have been obliged to pay. Indeed, in her submission in the appeal, the Delegate takes pains to explain that the term "nefarious" in her Reasons was not meant to refer to the Employer.

94. It follows I have decided the Delegate erred in law when she determined that the provisions in Contract 2 establishing the Employee's entitlement to commission wages were conditional on installation of products, and continued employment at that time, were of no effect because they contravened section 4 of the *ESA*.

95. My decision means that it was lawful for the Employer to decline to pay commission wages to the Employee on sales transactions where products were installed after the Employee ceased to be employed

by the Employer, including commissions regarding Order L90214 and Order L90189 which became the subject of particular scrutiny in the materials delivered in the appeal.

Did the Delegate err in law in deciding that vacation pay was owed to the Employee?

96. In her Reasons, the Delegate cited the decision of the Tribunal in *Brandt Tractor Ltd. (Re)*, 2013 CanLII 148505 ("*Brandt Tractor 2013*"), as an authority establishing that section 58 of the *ESA* prohibits employment agreements where vacation pay is included in an employee's wage rate. What parties must do, instead, is ensure that vacation pay be paid "on top of" or "in addition to" an employee's regular wages.

97. Section 58(1) requires an employer to pay an employee at least the requisite amount of vacation pay, based on a percentage of "total wages" during the year of employment entitling the employee to that form of pay.

98. *Brand Tractor 2013* was an appeal decision of the Tribunal. It was reconsidered for a second, and last, time in 2017, following a successful application for judicial review. The second reconsideration decision was issued in 2017 (*Brandt Tractor Ltd. (Re)*, BC EST # RD042/17 ("*Brandt Tractor 2017*")).

99. The employment contract reviewed in the *Brandt Tractor* decisions stipulated that "on each commission payment" made to the employee "6% vacation pay will be included on all commissions, in accordance with Schedule 'B'." Schedule B stated, in part, that "[a]ll commission amounts set out in this Schedule 'B' include 6% vacation pay." The delegate considering the matter determined that section 4 of the *ESA* prohibited this formulation in the employee's contract because it resulted in a payment for vacation pay that failed to take into account the total wages on which the relevant percentage was required to be calculated. Instead, the employment contract incorporated, in effect, a mathematical exercise to remove, and then add back, six percent from the commission amounts paid to the employee to account for vacation pay.

100. The appeal panel in *Brandt Tractor 2013* concurred with the delegate's analysis. Citing previous jurisprudence, the Tribunal held that section 58 requires an employer to "pay something extra" for vacation pay, and that it was impermissible to include vacation pay in commission wages (see *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards)* (1994) 99 BCLR 2d 37; *British Columbia (Director of Employment Standards)*, BC EST # RD348/01; *Howard C. Chui operating as Label Express,* BC EST # D239/03).

101. *Brandt Tractor 2017* confirmed the principles relating to vacation pay set out in *Brandt Tractor 2013*.

102. The issue in this case, then, is whether the Delegate was correct in deciding that the wording in Contract 2, properly interpreted, unlawfully incorporated vacation pay within the amounts to be paid for the Employee's commission wages. This issue is, of course, entirely a matter of contractual interpretation, as the law regarding the inclusion of vacation pay in the formulation of commission wages in a contract, set out above, is crystal clear. Since, as I have noted, issues of contractual interpretation arising in circumstances where no extricable error of law is engaged are treated as issues of mixed law and fact, the Tribunal must show deference to the Delegate's analysis.

103. The important parts of Contract 2 regarding the payment of vacation pay to which the Delegate alluded in her Reasons (R13-14) are paragraph 11, and Schedule "B." Paragraph 10 is also apposite.

104. Paragraph 10 refers, in part, to "commissions" calculated and payable "under the Commission Rate Structure." The relevant wording of paragraph 11 states that "[a]ll commission…rates are inclusive of all related costs, including…vacation pay…." Paragraph 11 then contains an example involving a "Combined" rate of 3% payable on $1,000.00, broken down into a 2.83% "Commission/Bonus Portion" of $943.40, and a 0.17% "Vacation Pay Portion (6%)" of $56.60.

105. Schedule "B" is entitled "Commission Rate Structure." It sets out the different "Commission" rates, ranging from 2% to 4%, referable to the several, and unique, types of sales the Employee might complete pursuant to Contract 2. Under the heading "Rate Conditions" it also states that the different commission "[r]ates are inclusive of commission pay plus vacation pay…."

106. The Delegate also reviewed commission reports tendered by the Employer, which she accepted as the best evidence of the amounts of the Employee's sales, the applicable commission rates, and the commissions that were paid. The reports separated the Employee's commissions into commission amounts, vacation pay amounts, and the total amounts to be paid. However, the total of these amounts the reports stipulated the Employer was obliged to pay corresponded to the Employee's commission percentage rate multiplied by the sale amount in each case.

107. Having regard to the wording of Contract 2, and the commission reports, the Delegate determined that the Employee was not paid vacation pay on top of his commissions.

108. I discern no palpable and overriding error in the way the Delegate analyzed, and resolved, the question whether Contract 2 included vacation pay in the amounts paid, or payable, to the Employee as commission wages.

109. The Employer argues that the only reasonable interpretation of the parts of Contract 2 dealing with commission wages is that the commission "rate" the Employee enjoyed must be distinguished from the commission "amount" he was actually paid within the rate.

110. I disagree. Contracting parties are presumed to intend the legal consequences of the words they have chosen (see G. R. Hall, *Canadian Contractual Interpretation Law*, 1st ed., Lexis Nexis, 2007, pages 76-77 ("*Hall*")). Here the rates Contract 2 stated the Employee would be paid on sales amounts were more than once referred to as "commission" rates. I am persuaded that a reasonable person noting the utilization of that wording in a contract could conclude that the rate payable was intended to represent the amount to be received in respect of commission wages.

111. Even if one were to conclude – which I have not done – that the provisions in Contract 2 relating to vacation pay are ambiguous on this point, the Delegate's Reasons state (R8) that the Employer drafted the agreement and so, applying the *contra proferentum* rule of contract interpretation, the ambiguity, if it exists, must be resolved in favour of an outcome that favours the party who had no role in preparing the document (see *Hall*, at pages 53-54). In this case, that party is the Employee.

112. All of this being so, I find it was not irrational for the Delegate to decide that the inclusion of vacation pay as part of the commission wage rates contravened the prohibition contained in section 4 of the *ESA*.

113. It was, therefore, appropriate for the Delegate to calculate, and to order the Employer to pay, an amount for vacation pay "on top of" the commissions earned by, and payable to, the Employee pursuant to the commission rates established in Contract 2. However, having regard to my decision that it was lawful for Contract 2 to provide that the Employee's entitlement to commission wages on sales was conditional on product installation and continued employment at that time, vacation pay should only be added to commissions attributable to sales transactions that fully satisfied those terms.

114. In this case, the Delegate calculated the commission wages paid to the Employee during his employment with the Employer having regard to the Employee's wage statements. The Delegate found that the Employer had paid $37,925.42 (R14). The Delegate found that the proper percentage rate for the payment of vacation pay to the Employee was four percent. Neither party has challenged these findings. Four percent of $37,925.42 is $1,517.02, which is the amount I find the Employee is entitled to be paid for vacation pay arising from his employment with the Employer.

ORDER

115. Pursuant to section 115(1) of the *ESA* I order that:

a) the part of the Determination finding that commissions earned upon product installation to be void with respect to sales installed after the Employee's employment was terminated be cancelled;

b) the part of the Determination establishing the amount of vacation pay payable to the Employee be varied to provide that the Employer owes $1,517.02, not $1,703.09;

c) the administrative penalty imposed in the Determination due to the Employer's failure to pay commissions in a timely way, contrary to section 17 of the *ESA*, be cancelled;

d) the administrative penalty imposed in the Determination due to the Employer's failure to pay vacation pay, contrary to section 58 of the *ESA*, be confirmed; and

e) interest owing be re-calculated having regard to the orders made in this decision.

Robert E. Groves
Member
Employment Standards Tribunal