

Citation: Lynum Management Resources Inc.
2024 BCEST 118

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Lynum Management Resources Inc.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Lynn Muldoon

SUBMISSIONS: Sania Chaudhry, legal counsel for Lynum Management Resources Inc.

FILE NUMBER: 2024/094

DATE OF DECISION: December 20, 2024

DECISION

OVERVIEW

1. This decision addresses the appeal filed under section 112 of the *Employment Standards Act (ESA)* by Lynum Management Resources Inc. (“**Lynum**”) of a determination issued by a delegate (the “**Delegate**”) of the Director of Employment Standards (the “**Director**”) on June 13, 2024 (the “**Determination**”).
2. The Determination found that Lynum had contravened sections of the *ESA* in respect of the employment of Jordan Easton by failing to pay regular wages, commission wages, and annual vacation pay. The Determination ordered Lynum to pay \$666.67 for regular wages, \$42,317.35 for commission wages, and \$28,650.34 for vacation pay. In addition, the Determination ordered Lynum to pay \$8,405.86 for interest under section 88 of the *ESA*, and \$1,000.00 in administrative penalties. In total, Lynum was ordered to pay \$81,040.32.
3. Lynum has appealed the Determination on two grounds: that the Delegate erred in law in finding that commission wages are owed; and that the Delegate breached the principles of natural justice by failing to consider Lynum’s relevant evidence about commissions.
4. Lynum does not dispute regular wages or vacation pay. However, Lynum asserts that vacation pay should be adjusted, as it was calculated based on commission wages that were incorrectly assessed. Lynum argues that the Delegate’s error in law in determining commission wages resulted in an inflated amount for vacation pay.
5. I have reviewed Lynum’s Appeal Form and the supporting documents, the record provided by the Director pursuant to section 112(5) of the *ESA* (the “**Record**”), and the Determination. For the reasons that follow, I find it unnecessary to seek submissions from Mr. Easton or the Director. I find Lynum has not established a reasonable prospect of success with respect to its arguments that the Delegate erred in law or breached natural justice.

ISSUES

6. In this appeal, I have considered whether Lynum has shown a reasonable prospect of success in its arguments on two issues: first, whether the Delegate erred in law by failing to consider past practices in finding that Lynum owed commission to Mr. Easton; and second, whether the Delegate breached natural justice by failing to consider Lynum’s relevant evidence about commissions.

BACKGROUND FACTS

7. Mr. Easton, following termination of his employment by Lynum, filed a complaint under section 74 of the *ESA* alleging Lynum had contravened the *ESA* by failing to pay commissions totalling \$42,324.95. The complaint was filed on October 19, 2022, within the time period allowed under the *ESA*.
8. A delegate of the Director (the “**Investigator**”) was assigned to the complaint and requested evidence and submissions from the parties. Subsequently, the Investigator prepared a report that

summarized the evidence and arguments provided by Mr. Easton and Lylum, including copies of the relevant documents submitted by each party during the investigation (the “**Investigation Report**”).

9. The Investigation Report was provided to Lylum and to Mr. Easton, and each party had the opportunity to review it and indicate whether it contained any errors or required clarification. Both Lylum and Mr. Easton responded to the Investigation Report.
10. The Delegate issued the Determination on June 13, 2024, and addressed two issues under section 18, regular wages and commission wages, and one issue under section 58, vacation pay. However, as this appeal concerns only commission wages, I have summarized only the relevant portions of the Determination.
11. Mr. Easton was employed as a Technical Sales Representative at Lylum from January 12, 2012, to August 4, 2022. At the time of termination, Mr. Easton received a base salary of \$60,000.00 per year, plus 2% sales commission.
12. Mr. Easton submitted that he initially began his employment at Progressive Rubber Industries Inc. (“PRI”), an associated company of Lylum, in 2011. His written contract with PRI specified a base salary and a 2% commission on sales. When Mr. Easton accepted a position with Lylum in 2012, no written agreement was signed; however, he stated that the parties verbally agreed to carry forward the terms of the PRI contract. Although Lylum disputed that these terms were carried forward, the Determination suggests that Lylum did not contest that the 2% commission rate continued throughout Mr. Easton’s employment with Lylum.
13. Mr. Easton’s position was that, upon termination, Lylum failed to pay commissions on 48 sales he made between November 11, 2021, and August 4, 2022. Mr. Easton asserted that Lylum owed him \$42,324.95 in unpaid commission wages, representing 2% of the total value of those 48 sales.
14. Lylum, on the other hand, submitted that the total commission earned from the 48 sales amounted to \$41,093.18, with a minor discrepancy from Mr. Easton’s claim. Of this amount, Lylum contended that Mr. Easton was entitled to only \$729.22, asserting that he was either not employed at the time the invoices were paid, was not an employee in good standing, or was terminated for just cause.
15. In the absence of a written employment contract, the Delegate found that Lylum failed to provide sufficient evidence to support the claim that Mr. Easton had to be employed at the time of invoice payment to receive commission. Similarly, the Delegate determined that Lylum provided insufficient evidence to substantiate its past practice that commission payments were made to a successor when sales were completed after a predecessor’s termination.
16. Subsequently, the Delegate found that Mr. Easton was entitled to commission wages of \$42,317.35, with a minor adjustment due to one sale payment not being made.

ARGUMENTS

17. Lylum claims that the Delegate erred in law, pursuant to section 112(1)(a) of the *ESA*. Lylum alleges that the Delegate relied exclusively on the absence of the contractual terms on when the commissions are earned to decide that they are payable after the termination. It also alleges that the

Delegate erred in law by failing to assess past practices when determining that commission was owed post-termination.

18. Lynum's appeal submission also implies an argument regarding an error in the Delegate's finding of fact, although this is not explicitly stated. Lynum claims that the Delegate incorrectly found that the parties did not dispute Mr. Easton's role as the salesperson responsible for and effective cause of each of the 48 deals. Lynum asserts that the detailed information it provided on the 48 sales during the investigation (including details such as invoice date, invoice payment date, and sale value) was intended to dispute which sales were not payable to Mr. Easton, thereby challenging his role as the effective cause of those sales.
19. Lynum further argues that the Delegate's failure to consider its evidence on past practices breached natural justice, pursuant to section 112(1)(b). It contends that the Delegate was required to evaluate implied terms through past practices in the absence of a written contract.
20. Lynum contends that they provided evidence to support its past practice of not paying commissions post termination. For example, Lynum argues that paystubs demonstrated that Mr. Easton was paid monthly commission rather than immediately after invoicing. Lynum also pointed to an instance where Mr. Easton, upon starting his employment, received commission payments for sales completed by his predecessor. According to Lynum, this practice demonstrates a consistent understanding that commissions were payable only when sales payments were received, not upon invoicing, implying that commissions were not intended to be payable post-termination. Lynum contends that the Delegate's failure to consider these past practices, as required by common law principles, constitutes an error in law.
21. Lynum disagrees with the Delegate's finding that it provided insufficient evidence to support that commissions were payable upon invoice payment, asserting that multiple pieces of documentary evidence were submitted to support its position. Specifically, Lynum states that it submitted Mr. Easton's paystubs, the record of the first commission payment, the detailed information on the list of 48 sales for which Mr. Easton claimed commission, as well as its response to the Investigator's Investigation Report.
22. Lynum reiterates that the paystubs demonstrate Mr. Easton was paid monthly commissions rather than upon invoicing. Additionally, Lynum states that Mr. Easton's first commission payment, received less than a month into his employment with Lynum in 2013, originated from a commission invoiced by his predecessor. Finally, Lynum contends that its response to the Investigation Report clarified that commissions were earned not upon invoicing, but upon payment of the invoice and completion of delivery.
23. Lynum submits that the Delegate failed to consider the said evidence, thereby breaching natural justice under section 112(1)(b) of the *ESA*.

ANALYSIS

Error of Law

24. Under section 112(1)(a) of the *ESA*, an appeal on the grounds of an error of law requires the appellant to establish that the original decision involved a misinterpretation or misapplication of the law, or that the decision reached lacked evidentiary support relevant to the legal standard applied.
25. The Tribunal has consistently held that appeals based on error of law involve questions of legal analysis and reasoning. In determining whether a delegate of the Director erred in law, the Tribunal considers whether the delegate misinterpreted or misapplied a section of the *ESA* or a relevant legal principle, acted without evidence or based on an unreasonable view of the facts, or adopted an analysis or exercised a discretion in a way that was wrong in principle: *Dr. Eli Rosenberg Inc.*, 2023 BCEST 4; *Britco Structures Ltd.*, BC EST # D260/03; *Jane Welch operating as Windy Willow Farm*, BC EST # D161/05; *C. Keay Investments Ltd. (Re)*, 2018 BCEST 5.
26. Lynum bears the onus of addressing these factors and proving, on a balance of probabilities, that the delegate erred in law.
27. However, the *ESA* does not grant the Tribunal authority to correct a delegate's errors of fact, unless those errors can be said to constitute errors of law. Errors of fact typically do not amount to errors of law, except in rare circumstances where they reveal as palpable and overriding error. The same standard applies to issues on appeal involving errors on questions of mixed fact and law, unless a question of law can be extricated that has resulted in such an error: see *Centra Windows Inc.*, 2024 BCEST 48.
28. The onus is on Lynum to show that the Delegate made a “palpable and overriding error” or that the finding of fact was “clearly wrong” to establish error of law: see *Tamara Kirk (Re)*, 2023 BCEST 59.
29. I will firstly address Lynum’s claim on the Delegate’s failure to assess past practices. In this case, Lynum alleges that the Delegate erred in law in finding that Mr. Easton was entitled to those commissions without assessing Lynum’s past practice to determine implied terms in the absence of a written contract. Lynum argues that it was “incorrect in law” and contends that “this error stems from a misapplication of a general principle of law.”
30. Lynum references several common law and Tribunal cases that require the Delegate to assess implied terms regarding post-termination commissions in the absence of a written contract, asserting that post-termination commissions are not payable unless an explicit or implied term specifies otherwise.
31. The issue of when Mr. Easton earned commissions was a point of contention between the parties. Mr. Easton argued he earned his commission pay on a sale when the sales were invoiced. On the contrary, Lynum argued that Mr. Easton only earned his commission pay when the invoice on the sale was paid.

32. Firstly, in my view, the Delegate made no finding about entitlement to commission earned post-termination, which would concern whether commissions earned after termination should be payable. Rather, the Delegate agreed with Mr. Easton, concluding he earned his commission pay at the time a sale was invoiced.
33. Lynum now says the Delegate failed to assess its past practices with respect to commission pay in reaching this conclusion. I disagree.
34. The evidence Lynum claims was not considered by the Delegate includes Mr. Easton's paystubs, the record of the first commission payment, the detailed information on the list of 48 sales for which Mr. Easton claimed commission, as well as its response to the Investigator's Investigation Report.
35. However, the Determination indicates that the Delegate did consider the evidence presented by Lynum regarding its alleged past practice of not paying commission post-termination.
36. The Delegate acknowledged Lynum's claim that commissions were only payable to employees actively employed at the time of sales completion and evaluated the evidence Lynum provided to support this claim. Specifically, the Delegate reviewed Lynum's argument that commissions were paid to Mr. Easton's successor following the termination of Mr. Easton's employment, and Lynum's argument that the first commission payment made to Mr. Easton in his new role may have been for sales completed by his predecessor. Both points were examined by the Delegate who found this evidence insufficient to establish a consistent past practice or implied term requiring active employment for commission eligibility.
37. The Delegate noted that, while Lynum argued it paid commissions to Mr. Easton's successor, this fact alone did not prove that Mr. Easton should not be paid those commissions. Additionally, while Lynum pointed to the commission payment Mr. Easton received in his first month of employment, the Delegate observed that Lynum failed to provide further context to substantiate that this payment was actually for a sale completed by a previous employee, much less that this instance represented a binding practice.
38. Ultimately, the Delegate concluded that Lynum's evidence did not demonstrate an implied term or established past practice restricting commissions to employees actively employed at the time of payment. In my view, rather than overlooking Lynum's evidence of practices, I find that the Delegate evaluated it and found it lacking in clarity and consistency. This approach aligns with the requirement to consider implied terms in the absence of a written contract, and does not constitute a misapplication of legal principles, as Lynum claims.
39. While not all of the evidence that Lynum alleges to have been overlooked to examine past practices is explicitly referenced in the Determination, I do not find this unreasonable given its limited probative value in establishing past practices. Further discussion on the probative value of the evidence is provided below.
40. I also disagree with Lynum's assertion that the Delegate relied solely on the absence of contractual terms regarding commission payments to conclude that the commissions are payable after termination. The language in the Determination clearly indicates that this finding was based on Lynum's failure to provide sufficient evidence to support its position that the commissions are

earned upon sales payment. The Delegate conducted an analysis of past practices, including a review of past commission payments. Had the absence of contractual terms been the sole basis for the decision, such an analysis would have been unnecessary. Also, as I noted above, the Delegate did not make any findings on whether commissions that are not earned before termination should be payable after termination

41. In light of these findings, I turn now to Lynum’s implicit argument of an error in the Delegate’s finding of fact. Lynum contends that the Delegate incorrectly concluded that there was no dispute regarding Mr. Easton’s role as the effective cause of each of the 48 sales. Lynum argues that by providing details identifying certain sales they believed were not payable to Mr. Easton, they were disputing his role as the effective cause of those sales.

42. However, to establish an error of law based on a factual finding, the onus is on Lynum to demonstrate that the Delegate’s finding constitutes a “palpable and overriding error” or is “clearly wrong.” In this case, the Delegate’s conclusion that Mr. Easton was the effective cause of the sales does not rise to this level of error. The Delegate’s determination appears to be reasonably supported by the overall evidence presented, including the fact that Mr. Easton was identified as the primary salesperson for the sales in question. While Lynum may have identified individual sales it deemed non-payable, this does not necessarily equate to a factual error regarding Mr. Easton’s role as the effective cause of the sales. Consequently, there is no basis to conclude that the Delegate’s finding was clearly wrong or constituted a palpable and overriding error that would justify intervention.

Breach of natural justice

43. Lynum further alleges that the Delegate failed to consider evidence it provided to support non-payment of post-termination commissions, resulting in a breach of natural justice.

44. Specifically, Lynum claims that the Delegate’s error in law led to its evidence being overlooked. The evidence that Lynum asserts was not considered includes Mr. Easton’s paystubs, a record of first commission payment showing that Mr. Easton received commission invoiced by his predecessor, sales details for the 48 sales claimed by Mr. Easton, and Lynum’s response to the investigation report. I find, however, that the Delegate did consider this evidence in their assessment of past practices.

45. Natural justice is fundamentally the right to a fair procedure, which includes specific rights such as knowing the case against oneself, having the opportunity to respond, and being heard by an impartial decision maker (see *Re 607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05, and *Imperial Limousine Service Ltd.*, BC EST # D014/05). To succeed on an appeal based on natural justice, there must be credible evidence demonstrating how the determination procedure failed to meet these requirements (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99, and *Robert Krausz*, BC EST # D073/17).

46. A breach of natural justice can occur when a delegate fails to consider relevant evidence (see *Daniel Alberto De Buen*, BC EST # D025/12), and such a failure can also be characterized as an error of law (see *Euro Asia Transload Inc. (Re)*, 2022 BCEST 72).

47. However, the Tribunal takes a cautionary approach and does not find the assertion that a delegate of the Director failed to consider evidence lightly, as stated in *Jane Welch carrying on business as Windy Willows Farm*, BC EST # D161/05 at para 40:
- . . . there are good reasons for the Tribunal to exercise caution in intervening with a decision of the Director on the basis that a delegate failed to consider relevant evidence. First, as pointed out by D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at paragraph 12:3700,
- ...any attempt to determine whether an administrative decision-maker has considered “all of the evidence” as a matter of procedural fairness, can come very close to the reassessment of the actual findings of fact, which would be inconsistent with the usual deferential approach to review of findings of fact.
48. As the Delegate noted, the record of the first commission payment merely shows that a payment was made, without clarifying whether it was for invoiced or completed sales. Similarly, the paystubs only demonstrate that Mr. Easton received monthly commission payments, without establishing whether these payments were based on invoicing or sales completion. The detailed commission information on the 48 sales does not contribute to assessing “past practices” regarding when commissions were earned. Lynum’s written response to the investigation report, which asserts a practice of non-payment of post-termination commissions, is merely a position statement. This alone does not constitute evidence and would require corroboration with actual records or documentation – evidence that Lynum did not provide.
49. The Tribunal has consistently held that a delegate’s reasons do not need to recite all the evidence considered, nor is there an obligation to explain every single finding of fact and conclusion. Instead, reasons should provide sufficient detail to allow parties to understand the basis of the conclusions reached (see *Regent Christian Academy Society*, BC EST # D011/14 at para. 37, and *Golden Fleet Reflexology Ltd.*, 2018 BCEST 22 at para. 28). Consequently, the Tribunal is generally reluctant to conclude that a delegate failed to consider evidence solely because it is not expressly mentioned in the determination (see *Regent Christian Academy Society*, *supra*).
50. Further, the Tribunal will not presume a delegate ignored or failed to consider evidence unless it can be objectively shown that explicitly addressing that evidence in the determination was legally necessary to reach the final conclusion: see *Jane Welch*, *supra*, and *Euro Asia Transload Inc. (Re)*, *supra*. Lynum has not done so.
51. For the reasons I stated above, I am not convinced that explicitly addressing this evidence in the Determination was legally necessary to reach the final conclusion.
52. I find that the Determination sufficiently recites the relevant information and evidence, allowing the parties to logically understand the basis of the Delegate’s conclusions and the factual findings supporting them. This approach meets the standard outlined in *Golden Fleet Reflexology Ltd.*, *supra*, to which a delegate’s reasons are held.
53. I do not find that the Delegate erred in law in determining that commission is owed to Mr. Easton, nor do I find that the Delegate breached natural justice by failing to consider relevant evidence.

ORDER

54. Pursuant to section 114(1)(f) of the *ESA*, I dismiss the appeal and pursuant to section 115(1)(a), I confirm the Determination dated June 13, 2024.

/S/ Lynn Muldoon

Lynn Muldoon
Member
Employment Standards Tribunal