

Citation: Comox Valley Floor Centre Ltd.  
2025 BCEST 27

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Comox Valley Floor Centre Ltd.  
("Comox Valley Floor Centre")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

SUBMISSIONS: Aniel Dato, counsel for Comox Valley Floor Centre Ltd.

FILE NUMBER: 2024/117

DATE OF DECISION: March 6, 2025

## DECISION

### OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“*ESA*”) by Comox Valley Floor Centre Ltd. (“Comox Valley Floor Centre”) of a determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the “deciding Delegate”), on August 6, 2024 (the “Determination”).
2. The Determination addressed a complaint filed by Jim DeDominicis who alleged Comox Valley Floor Centre had contravened the *ESA* by failing to pay him all commission wages owed.
3. The deciding Delegate found Comox Valley Floor Centre had contravened Part 3, section 21 of the *ESA* in respect of the employment of Mr. DeDominicis and ordered Comox Valley Floor Centre to pay Mr. DeDominicis wages in the total amount of \$32,098.39, interest under section 88 of the *ESA* in the amount of \$5,264.59, and to pay an administrative penalty in the amount of \$500.00.
4. Comox Valley Floor Centre has appealed the Determination, submitting the deciding Delegate erred in law by finding Comox Valley Floor Centre had contravened section 21 of the *ESA* “by requiring Mr. DeDominicis to pay its business costs.” (underlining included)
5. Another delegate of the Director investigated the complaint (the “investigating Delegate”) and issued an investigation report (the “IR”). A draft copy of the IR was delivered to each of the parties and an opportunity to respond to that draft was provided. Responses from the parties were received and reviewed by the investigating Delegate and a final version of the IR was delivered to each of the parties.
6. The section 112(5) record (the “Record”) has been provided to the parties and no objection has been raised to its completeness.
7. Under section 114(1) of the *ESA*, the Tribunal may, without a hearing of any kind, dismiss all or part of an appeal if, among other things, the Tribunal finds no reasonable prospect the appeal will succeed: section 114(1)(f) of the *ESA*.
8. For the reasons that follow, I dismiss this appeal under the above provision.

### ISSUES

9. The appeal raises a singular issue:
  - did the deciding Delegate err in law by finding Comox Valley Floor Centre had contravened section 21 of the *ESA* in respect of the employment of Mr. DeDominicis?

### ANALYSIS

10. The reasons for Determination (the “Reasons”) include the following facts and findings of fact.

11. When Mr. DeDominicis was hired, he agreed to be paid entirely by commission. He agreed his commission would be calculated as 33.33% of the gross profit on the sales he made.
12. The deciding Delegate found that even though the parties did not turn their minds to the granular details of how gross profit should be calculated, their agreement was “sufficiently clear” at the outset and there were no disputes about how Mr. DeDominicis’ commission was calculated.
13. The deciding Delegate noted that over the years, as Comox Valley Floor Centre introduced more and more costs into how gross profit was calculated, Mr. DeDominicis became unhappy with how his commission was calculated, and he ultimately filed a complaint under the *ESA*.
14. The deciding Delegate found that the parties had not agreed on which specific costs should be included when calculating the gross profit of a sale. At issue was whether the *ESA* permitted Comox Valley Floor Centre to deduct an Overhead Margins Cost (OMC) from Mr. DeDominicis’ commission.
15. The deciding Delegate considered the relevant provision of the *ESA* and noted section 21 of the *ESA* prohibits an employer from requiring an employee to pay any part of the employer’s business costs (except as permitted by regulation). The deciding Delegate noted that the term “business costs” is not defined in the *ESA*, but it is understood to include the general costs of operating a business.
16. In determining whether the OMC was a “business cost” under the *ESA*, the deciding Delegate considered the evidence provided by Comox Valley Floor Centre as to the specific costs that made up the OMC, and stated, at page R5:

...The Investigating Delegate asked the Employer to provide a breakdown of the OMC, but the Employer failed to do so. However, Mr. Henwood described it as “a general figure that was determined based on the operating costs of the business”. Later in the investigation, the Employer provided a list of some of the expenses covered by the OMC, including storage, warehousing, advertising, cell phone costs, carrying costs, accounts receivable, and some administration costs. The Employer also explained that the OMC was not calculated as the sum total of specific costs, but rather as 12% of the value of a sale (as determined by the material cost and the service cost).
17. The deciding Delegate determined, based on the limited evidence provided by Comox Valley Floor Centre, that OMC expenses were properly characterized as the general costs of operating a business and did not appear to be associated with one specific sale.
18. The deciding Delegate also considered Comox Valley Floor Centre’s argument that overhead costs had always been deducted from employees’ wages and Mr. DeDominicis knew this. The deciding Delegate noted Comox Valley Floor Centre conceded that its various software systems over the years did not always calculate or display these costs in the same way. The deciding Delegate determined the Complainant had not agreed that deductions not permitted by the *ESA* could be deducted:

...When the Complainant agreed to a commission rate of 33.33% on gross profit, he could not have been expected to understand or accept that this rate would account for deductions that are expressly prohibited by the Act. The Employer could have – and

indeed should have – offered the Complainant a wage rate that it could support without running afoul of the Act. The Employer also should have provided the Complainant with a detailed explanation of exactly how commissions were earned and calculated, and exactly how gross profit was defined. Having chosen to offer the Complainant a wage rate of 33.33% of gross profit, and having failed to ensure that both parties understood how gross profit was defined, the Employer cannot now argue that the Complainant is owed less simply because the Employer did not understand its legal obligations under the Act (at page R6).

19. In this appeal, Comox Valley Floor Centre says it and Mr. DeDominicis were free to come to any arrangement with respect to remuneration by commission, so long as it did not offend the minimum wage provisions of the *ESA* and argues that Mr. DeDominicis was “well-aware” of the costs that were factored into the calculation of “gross profit” and while he may not have liked them, he knew what they were and abided by them over the course of his employment.
20. As noted above, while accepting the parties were free to come to an agreement for the commission, the deciding Delegate found, as a matter of fact, the parties had not agreed on what specific costs would be included in calculating the gross profit of a sale.
21. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
  1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and
  5. adopting a method of assessment which is wrong in principle.
22. Comox Valley Floor Centre submits the deciding Delegate erred in law in finding that it contravened section 21 of the *ESA* by requiring the Mr. DeDominicis to pay its business costs.
23. An analysis of the issue involves a consideration of the nature of the expenditure in question in relation to the employer’s business operations, and then a determination on whether the employer wrongly required the employee to pay, or contribute to, the expenditure in question. In other words, the decision-maker must make findings of fact with respect to the essential nature of the expenditure (a factfinding exercise) and then determine whether the employer breached section 21(2) in relation to the expenditure in question: *Alternative Cartage Inc.*, 2024 BC EST 54.
24. There are two parts to the submission of Comox Valley Floor Centre on the issue.
25. First, that the deciding Delegate erred in law in finding “the parties [Comox Valley Floor Centre and Mr. DeDominicis] did not agree on what specific costs should be included when calculating the gross profit of a sale.” The analysis in the Reasons for that finding is at page R4.

26. This submission challenges a pure finding of fact.
27. I note here that the assertion made by counsel for Comox Valley Floor Centre, at point 3 of the appeal submission, that “some of the expenses which the Employer and the Complainant agreed to deduct under the heading of “Overhead Margin Cost” (“OMC”) were business costs,” is inconsistent with the finding of the deciding Delegate that there was no agreement on what specific costs, which would include OMC costs, would be deducted from his commission wage. The assertion made is not supported by the evidence in the Record.
28. Second, Comox Valley Floor Centre submits the deciding Delegate erred in law in finding the deduction of the OMC from Mr. DeDominicis’ commission in determining the “gross profit” on a sale was a contravention of section 21 of the *ESA* because, counsel argues, the “inclusion of business costs in the calculation of sales commission based on profit is not tantamount to requiring an employee to pay those business costs.”[underlining included]
29. That submission also challenges a finding of fact made by the deciding Delegate — that the character of the costs which make up the OMC are not costs that appear to be associated with a specific sale but “are the general costs of operating a business.” In other words, they are “business costs”: page R5 of the Reasons.
30. The grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
31. A finding of fact is only reviewable by the Tribunal as an error of law on the facts in limited circumstances. It is rare for the Tribunal to find that a finding of fact is an error of law. The test for establishing findings of fact constitute an error of law is stringent. To amount to an error of law, an appellant has to establish objectively that the delegate has committed a “palpable and overriding error on the facts,” “acted without any evidence or on a view of evidence that could not reasonably be entertained,” or arrived at a “clearly wrong conclusion of fact”: *3 Sees Holdings Ltd. (Jonathan's Restaurant)* (Re), BC EST # D041/13 at paras 26 to 29.
32. Findings of fact made by the deciding Delegate require deference. Asking the Tribunal to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact. Based on my assessment of the facts in the Record and as found in the Reasons, Comox Valley Floor Centre has not met the test.
33. The deciding Delegate legitimately identified a difference between specific costs associated with an individual sale and the general costs of operating a business. Comox Valley Floor Centre could not breakdown the OMC, describing it “as a general figure that was determined based on the operating costs of the business” and eventually providing a list of some of the expenses covered by the OMC: storage, warehousing, advertising, cell phone costs, carrying costs, accounts receivable, and some administration costs. The deciding Delegate found the costs which Comox Valley Floor Centre sought to deduct from Mr. DeDominicis’ commission wage were not specific costs associated with making a sale but were general costs of operating the business.

34. That finding is a finding of fact made by the deciding Delegate on substantially uncontested evidence and is adequately supported on that evidence. It is not seriously challenged in the appeal. I am completely satisfied the costs comprising the OMC, as identified in the Reasons, are correctly characterized as “business costs.”
35. This aspect of the appeal is dismissed.
36. The submission of Comox Valley Floor Centre on section 21 has not identified any discreet question of law.
37. The approach of the Tribunal to section 21(2) is framed in the following statement from *The Director of Employment Standards*, BC EST #D257/99 (Reconsideration of BC EST #D539/98 and BC EST #D557/98), at page 6:
- Any provision of the *Act* must be interpreted in the context of the purposes and objects of the *Act*, bearing in mind the consequences our decision might have on employment relationships in general. The objective of Section 21(2) is to prevent employers from unilaterally seeking contribution from employees to the cost of doing business. The experience of the Tribunal has shown that the ingenuity of some employers to avoid the prohibition contained in Section 21 justifies a broad and liberal interpretation of that provision.
38. Section 21(2) is crystal clear — an employer is not entitled to foist business costs onto an employee unless permitted by regulation (and no such regulatory authorization applies here). That being said, the Tribunal has accepted that purely voluntary payments to the employer’s business costs, which can be found in an agreement between the employer and employee, would not be prohibited by subsection 21(2). As above, questions about the “voluntariness” of such payments will be questions of fact to be decided in all the circumstances. The deciding Delegate has made a finding of fact on that question — that there was no agreement the costs included in the OMC were to be included in calculating the gross profit on a sale.
39. The appeal submission of Comox Valley Floor Centre appears to assert the decision of the BC Court of Appeal in *Skana Forest Products Ltd. v. Lazauskus*, 2015 BCCA 85 (Can LII) is determinative of the question of whether Comox Valley Floor Centre has contravened section 21(2) by requiring Mr. DeDominicis to pay the business costs reflected in the OMC. That case does not assist Comox Valley Floor Centre. It was decided on very different facts, without comprehensive analysis of the purposes and objects that drive a consideration of section 21 of the *ESA* and establishes no legal principle that might dictate the interpretation and application of section 21 of the *ESA*.
40. In that case, the commission agreement included agreement that the commission employees (“traders”) and the company would, if a sale of the inventory purchased by a trader resulted in a loss, share in that loss. There was no dispute this was an element of the commission agreement. The company changed its inventory policy to make traders personally responsible for the entire inventory purchased by them. The effect of this was to render traders liable for their share of the cost of the inventory purchased but not sold if they were to leave the company. The issue in the case was whether, by taking losses into account to determine a trader’s commission, the company was

effectively requiring the trader to reimburse, and thereby pay, a portion of the cost of the inventory. The Trial Judge said yes, the Court of Appeal said no.

41. The essential aspect of the *Skana* case is that the traders and their employer had *voluntarily agreed* to a commission structure where each would share in the profit or loss of any particular sale of inventory. Faced with the same facts, it is probable the Tribunal would have reached the same conclusion as the Court of Appeal.
42. However, the facts in the *Skana* case are not the facts here, where the critical finding made by the deciding Delegate was that there was no agreement to include the costs associated with the OMC when calculating the commission wage.
43. This argument shows no error of law. It cannot succeed and is dismissed.

## **CONCLUSION**

44. As I find there is no reasonable prospect this appeal will succeed, the purposes and objects of the *ESA* would not be served by requiring the other parties to respond to it. The appeal is dismissed.

## **ORDER**

45. Pursuant to section 115(1) of the *ESA*, I order the Determination dated August 6, 2024, be confirmed in the amount of \$37,862.98, together with any interest that has accrued under section 88 of the *ESA*.

*/S/David B. Stevenson*

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