Citation: Yves Vachon (Re)
2020 BCEST 101

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Yves Vachon
("Mr. Vachon")

- of a Determination issued by -

The Director of Employment Standards

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

**PANEL:** David B. Stevenson

**FILE NO.:** 2020/027

**DATE OF DECISION:** August 12, 2020

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Yves Vachon | on his own behalf |
| Paula Krawus | counsel for HSL Automation Ltd. |
| Melanie Zabel | delegate of the Director of Employment Standards |

## OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), Yves Vachon ("Mr. Vachon") has filed an appeal of a determination issued by Glen MacInnes, a delegate of the Director of Employment Standards (the "Director"), on January 24, 2020 (the "Determination").

2. The Determination found HSL Automation Ltd. ("HSL") had contravened Part 3, section 17 and Part 7, section 58 of the *ESA* in respect of the employment and termination of employment of Mr. Vachon and ordered HSL to pay Mr. Vachon wages in the amount of $15,059.23, an amount that also included interest under section 88 of the *ESA* and concomitant vacation pay, and to pay administrative penalties in the amount of $1,000.00. The total amount of the Determination is $16,059.23.

3. This appeal is grounded in failure by the Director to observe principles of natural justice in making the Determination. Mr. Vachon seeks to have the Determination varied to find he is entitled to a total of $64,949.25 in wages, concomitant vacation pay and interest from his employment with HSL.

4. Mr. Vachon has not grounded his appeal in either error of law or evidence coming available that was not available when the Determination was being made, although he has submitted material with the appeal that is not included in the record and was not presented to the Director during the complaint process.

5. In correspondence dated February 24, 2020, the Tribunal acknowledged having received an appeal, requested the section 112(5) record (the "record") from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and advised that following such review all or part of the appeal might be dismissed.

6. The record has been provided to the Tribunal by the Director. A copy has been delivered to counsel for HSL and to Mr. Vachon. An opportunity has been provided to both to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.

7. There was a question raised by Mr. Vachon whether the record would include the hearing notes taken by the Director at the complaint hearing. The submission on that question made on behalf of the Director correctly stated that notes taken by the Director at a complaint hearing are not a verbatim account or official recording of the hearing but are a memory aid for personal use that are not normally required to be produced: *United Specialty Products Ltd.*, BCEST # D57/12, and *24/7 Excavating Ltd.*, BCEST # D066/15. Mr. Vachon has not pressed the point or made a formal application for production of the Director's

hearing notes. In a May 28, 2020 submission to the Tribunal, he expresses his belief that the evidence he has provided with his appeal is sufficient to convince the Tribunal to grant his appeal.

8. Upon review of the appeal, this panel decided to seek submissions on the appeal from HSL and the Director. Those parties have made submissions. Mr. Vachon was provided the opportunity to respond to the submissions and has done so.

**ISSUE**

9. The issue here is whether Mr. Vachon has shown a reviewable error in the Determination.

**THE FACTS**

10. HSL provides commercial services and products to a variety of customers across western Canada; they have two offices, one in Port Coquitlam, BC and another in Calgary, Alberta. Mr. Vachon was employed from the Port Coquitlam office as the "Technical Sales Representative for the British Columbia Industrial Territory" from February 22, 2018, to March 2, 2019. His primary responsibility was to sell HSL products to customers within his sales territory. Mr. Vachon was compensated on a salary plus commission basis.

11. When Mr. Vachon terminated his employment, he filed a complaint with the Director claiming HSL had not paid him for all commission wages to which he was entitled and to annual vacation pay. More specifically, Mr. Vachon claimed he was not paid commission on five accounts, which I shall refer to as the Altec, Encompass, Teck Metals, Martech and Andritz accounts.

12. The Director conducted a complaint hearing over two days: July 29, 2019, and September 3, 2019. Mr. Vachon gave evidence on his own behalf; Steve Hoyland, Jason Thain and Grant Huff gave evidence on behalf of HSL. Mr. Vachon cross-examined each of these persons on their evidence.

13. The Director addressed five matters that were in dispute between the parties:

i. how and when were Mr. Vachon's commissions earned;

ii. which of the disputed accounts were in the industrial sector;

iii. were all of the disputed commissions in Mr. Vachon's geographical sales territory;

iv. was there any agreement to pay Mr. Vachon for accounts that were outside his geographical sales territory; and

v. what, if any, wages were owed.

14. For the purposes of this appeal, there is only one issue: whether the Andritz account was in Mr. Vachon's geographical sales territory. If he is successful on that issue, there will be wages owed.

15. The Director found that Mr. Vachon's sales territory was all of the province of BC excluding the East Kootenay area, which was outlined on a map presented to the Director during the complaint process.

16. The Director found Mr. Vachon was entitled to commission wages on the Altec, Encompass and Martech accounts, which were within his sale territory, but was not so entitled on the Teck Metals and Andritz

accounts. The Director found Mr. Vachon was not entitled to commissions on these accounts because, "…HSL advised Mr. Vachon at the beginning of his employment that his sales territory would exclude the East Kootenay area", these accounts were "considered accounts in the East Kootenays" and "Mr. Vachon understood that the commissions he earned would be based on any sales in the industrial sector within his geographical sales territory…".

17. In this appeal, Mr. Vachon seeks only to affect the Director's finding relating to the Andritz account. There is no appeal on the Teck Metals account; presumably Mr. Vachon accepts all of the Director's findings relative to that account.

## ARGUMENT

18. Mr. Vachon submits there was failure by the Director to observe principles of natural justice. His argument is based on an understanding that an element of natural justice requires procedural fairness, which includes a decision maker not being wrong in law or fact.

19. Mr. Vachon contends there are two findings of fact that are wrong and thus satisfy this element.

20. The first is the Director's finding that the Andritz account is in the East Kootenays. The second, which is not significantly different from the first, is the Director's statement, found on page R14 of the Determination, that, "It was undisputed that Andritz and Teck Metals were considered accounts in the East Kootenays and Martech, based out of Castlegar, is in the west Kootenays".

21. Mr. Vachon's argument is that Andritz was not geographically located in the East Kootenays.

22. Mr. Vachon submits it was not "undisputed" that Andritz was in the East Kootenays. He says he was never asked whether he accepted Andritz was in the East Kootenays, but had it come up, he would have contested it. He also submits that, to the best of his knowledge, none of the witnesses for HSL said Andritz was in the East Kootenays.

23. Mr. Vachon has attached two appendices to his appeal submission. The first is a list of Andritz' operations in British Columbia. He notes that none are in the East Kootenays. The second is copies of purchase orders from Andritz and sales orders from HSL. His appeal does not rely on the ground of appeal set out in section 112(1)(c), but he submits the documents should be accepted and considered because he would have drawn the Director's attention to them had any of HSL's witnesses testified Andritz was in the East Kootenays.

24. I invited submissions on the appeal from HSL and the Director. HSL has responded through counsel and a delegate (the "delegate") has responded on behalf of the Director.

25. The delegate says the appeal, although grounded in natural justice, actually appears to raise an allegation of error of law.

26. The delegate submits none of the information and documents in the appendices was before the Director when the Determination was being made.

27. The delegate points to several areas of the Determination where there is reference to Andritz being an East Kootenay account, including two of HSL's witnesses, and that Mr. Vachon never contradicted that information in his evidence or challenged HSL witnesses' evidence that Andritz was classified as an East Kootenay account.

28. The delegate says the Determination appears to be based on the evidence provided and Mr. Vachon has shown no "overriding or palpable error" in stating as an undisputed fact the Andritz account was in the East Kootenays.

29. HSL submits the information and evidence submitted by Mr. Vachon is evidence that does not meet the test for allowing such information and documents to be accepted and considered in the appeal.

30. HSL says Mr. Vachon has not shown that the Director failed to comply with principles of natural justice in making the Determination: the record indicates Mr. Vachon was provided with a full and fair opportunity to make his case and to respond to the case presented by HSL.

31. HSL also submits, based on the Tribunal viewing the appeal as raising an allegation of error of law, that Mr. Vachon has not shown the decision of the Director was an error of law, which in the context of the arguments made by Mr. Vachon, required him to show the Director reached conclusions of fact without any evidence or that conclusions of fact were based on a view of the facts that could not reasonably be entertained.

32. Mr. Vachon has been provided with the opportunity to respond to the submissions of the Director and HSL.

33. In his reply, Mr. Vachon contends that, based on his understanding of natural justice principles, his appeal falls to be decided on natural justice principles, which he contends, requires that a decision not be wrong in fact or law. He reiterates his assertion that the Determination is wrong on the facts.

34. He seeks to justify the ground of appeal upon which his appeal is based, and the inclusion of the information and documents attached to his appeal by incorrectly referencing the Tribunal's Rules relating to applications for reconsideration under section 116 of the *ESA*.

35. His response to the Director's submission reiterates his contention the Director erred in stating it was "undisputed" that the Andritz account was considered an account in the East Kootenays.

36. Mr. Vachon argues for the inclusion of the information and documents in the appendices in the appeal, saying that because, in his view, there was no evidence that Andritz was in the East Kootenays, there was no logical reason to provide the information and documents at the complaint hearing. He says, in effect, the Director's "error" now provides a reason for providing these documents.

37. Mr. Vachon provides a summary of his position in the concluding remarks of his reply. There is nothing new provided in the conclusions, except perhaps the rather surprising remark that he is not "arguing that the basis of the decision is wrong, or that [the Director] erred in law. . . I simply argue that some facts of the case are wrong . . .".

**ANALYSIS**

38. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law:
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

39. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

40. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

41. The grounds of appeal 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.

42. Mr. Vachon has raised the natural justice ground of appeal.

43. A party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

44. I am able to address Mr. Vachon's natural justice ground without the need for extensive analysis. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated*, BC EST # D050/96)

45. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the record and in the information submitted to the Tribunal in this appeal Mr. Vachon was

provided with the opportunity required by principles of natural justice to present his position to the Director. Mr. Vachon has provided no objectively acceptable evidence showing otherwise.

46. It is not a breach of principles of natural justice for the Director to make a finding on the evidence with which one of the parties disagrees.

47. There is simply no factual or legal basis for this ground of appeal.

48. Mr. Vachon's understanding of principles of natural justice, to the extent that understanding is that the full panoply of principles of natural justice are engaged by a mere assertion of error of fact or law, is not in accord with how the Tribunal approaches this ground of appeal. Rather, the Tribunal has adopted an approach to this ground of appeal that generally accords with the common law principles of natural justice, which has three main requirements: adequate notice, fair hearing and no bias, and is reflected in the above reference from *Imperial Limousine Ltd*.

49. Questions about alleged errors of fact and errors of law are addressed under the error of law ground of appeal.

50. While Mr. Vachon has not raised error of law as a ground of appeal, it is apparent from his appeal submission that his arguments properly belong in this ground and I will consider whether his arguments, considered under the legal principles developed for this ground of appeal, have merit.

51. 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.

52. Whether or not the Director erred in law in respect to the facts, *simpliciter*, is, as noted above, a question over which the Tribunal has no jurisdiction. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.

53. This is not a case where the Director acted without evidence.

54. That test for assessing whether the Director acted on a view of the facts that could not reasonably be entertained has been stated to be as follows:

> … that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in

> terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could" … (*Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11 Richmond/Delta*, [2000] B.C.J. No. 331 (B.C.S.C.) at para. 18, cited with approval in British Columbia (*Assessor Area No. 27-Peace River) v. Burlington Resources*, 2003 BCSC 1272

55. Mr. Vachon's argument about the facts is smoke and mirrors and I am not impressed with his obvious misstatements of the findings made by the Director in developing his appeal argument.

56. His contention, which is presented under what he refers to as "Fact A" and "Fact B" in his submission is premised on the Director having found "Andritz and Teck are located in the East Kootenays" and "It was undisputed the Andritz and Teck are located in the Kootenays".

57. That is not, however, what the Director stated, or found, in the Determination. What the Director actually said was, on page R3 under the heading, "Background":

> The Andritz and Tack Metals accounts were in the East Kootenay region of BC, . . .

58. And again, on pages R14 – R15:

> It was undisputed that Andritz and Teck Metals were considered accounts in the East Kootenays and Martech, based out of Castlegar, is in the West Kootenays . . .
>
> I find that HSL advised Mr. Vachon at the beginning of his employment that his sales territory would exclude the East Kootenay area.

59. The statements made in the Determination on page R9, which are referred to by Mr. Vachon in his appeal submission, summarize information provided to the Director by two of HSL's witnesses, Mr. Thain and Mr. Huff, do nothing more in this appeal than confirm the Director had evidence that Andritz was considered to be an account in the East Kootenays, was not part of Mr. Vachon's sales territory, and was not an account for which he had any responsibility.

60. I do not disagree with Mr. Vachon in his assertion that no person who provided information to the Director ever said Andritz was "geographically" located in the East Kootenays, but the argument he has spun around that point is part of the smoke and mirrors, avoiding having to address the actual finding of the Director, which was that Andritz was *considered an account* in the East Kootenays – an account which Mr. Vachon could make no claim on – that Mr. Vachon knew that and made no challenge to it. In my view this appeal is about nothing more than Mr. Vachon trying to get through the back door what he was unable to acquire through the front.

61. More to the point, the test for establishing findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.

62. To expand the above point, in order to establish the Director committed an error of law on the facts, Mr. Vachon is required to show the findings of fact and the conclusions and inferences reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the

result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26 – 29.

63. I find Mr. Vachon has not satisfied that requirement.

64. I shall briefly address the appendices Mr. Vachon has attached to the appeal submission. There is no doubt this is new evidence and Mr. Vachon has not identified section 112(1)(c) as a ground of appeal.

65. The Tribunal does not simply allow an appellant to supplement their initial claim by advancing additional documents on appeal that were not provided to the Director during the complaint process.

66. The Tribunal has discretion to accept or refuse new evidence.

67. When considering an appeal based on this ground, the Tribunal has taken a principled, but relatively strict, approach to the exercise of this discretion. The Tribunal tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

68. In this case, I do not accept any of the information or documents provided in the appendices as evidence in the appeal for the following reasons. First, it is not new. It was reasonably available and could have been provided during the complaint process. I reject Mr. Vachon's rationale for not producing the information and documents at the hearing – "no testimonies or disputes that Andritz was in the East Kootenays". There never was testimony or dispute about the geographic location of Andritz. Second, the preceding point leads to the second reason for denying this evidence: it is not relevant or material to the issue in dispute, which was whether the Andritz *account* was in the East Kootenays and therefore outside of Mr. Vachon's sales territory and commission claim. Third, the evidence is not probative; in the sense that it is not capable of resulting in a different conclusion than what is found in the Determination on Mr. Vachon's claim *vis.* Andritz.

69. Based on all of the above, I find this appeal has no merit and it is dismissed.

**ORDER**

70. Pursuant to section 115 of the *ESA*, I order the Determination dated January 24, 2020, be confirmed in the amount of $16,059.23, together with any interest that has accrued under section 88 of the *ESA*.

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