Citation: VJM Fitness Solutions Inc. (Re)
2020 BCEST 119

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

VJM Fitness Solutions Inc.
("VJM")

- 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: Kenneth Wm. Thornicroft

FILE NO.: 2020/104

DATE OF DECISION: October 20, 2020

DECISION

SUBMISSIONS

Vinay Hegde — on behalf of VJM Fitness Solutions Inc.

INTRODUCTION

1. On June 5, 2020, Chantelle MacInnis, a delegate of the Director of Employment Standards (the "delegate"), issued a determination (the "Determination") ordering the present appellant, VJM Fitness Solutions Inc. ("VJM"), to pay a former employee (the "complainant") the total sum of $316.15 on account of unpaid commissions in the amount of $290.00 plus concomitant 4% vacation pay and interest. This Determination was issued pursuant to section 79 of the *Employment Standards Act* (the "*ESA*").

2. Further, and also by way of the Determination, the delegate levied two separate monetary penalties, each in the amount of $500, in light of VJM's contraventions of section 18(1) of the *ESA* (failure to pay earned wages within 48 hours after termination of employment) and section 46 of the *Employment Standards Regulation* (failure to produce employment records). These penalties were levied as directed by section 98 of the *ESA*. Accordingly, the total amount payable under the Determination is $1,316.15.

3. VJM appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (sections 112(1)(a) and (b) of the *ESA*). VJM's appeal, on its face, relates solely to the two penalties. Although VJM does not directly contest the unpaid wage award, its submission nonetheless seemingly suggests that the commissions awarded were not payable by reason of a prior "overpayment" to the complainant.

4. In any event, in my view, this appeal has no reasonable prospect of succeeding and, as such, must be dismissed under section 114(1)(f) of the *ESA*. My reasons for reaching that conclusion now follow.

THE DETERMINATION

5. The delegate issued the Determination – together with her "Reasons for the Determination" (the "delegate's reasons) – following a complaint hearing held on September 23, 2019. The complainant, who was terminated for cause on February 21, 2019 (a matter not in dispute in this appeal), claimed that she had not been paid certain commissions and, in particular, commissions earned during the period from January 18 to February 21, 2019. As noted at page R8 of the delegate's reasons, VJM conceded that the complainant earned $290.00 in commissions during this latter period, but also claimed that she had been overpaid in the past for commissions that were not actually earned in accordance with the parties' commission agreement (the complainant was also paid an hourly wage separate from her commissions – her *ESA* complaint was solely in relation to alleged unpaid commissions).

6. The delegate noted that VJM agreed that the complainant "earned $290 in new member activation commissions for the period January 18, 2019 to February 21, 2019" (page R12). The delegate rejected VJM's "overpayment" argument because it "did not provide records to indicate how many new memberships and personal training sessions [the complainant] actually sold in her last year of

employment, or records of whether she exceeded her monthly benchmark goals each month." Accordingly, the delegate "decline[d] to make the finding that [VJM] overpaid $500.00 in commissions to [the complainant] over the course of her last year of employment" (page R12). Alternatively, the delegate held that even if there had been an overpayment, since the *ESA* is a "benefits-conferring" statute that provides no mechanism allowing employers to recoup overpayments through a wage deduction, no "offset" could be applied. I decline to pass judgment on the correctness of this latter alternative argument as it has not been placed in issue in this appeal.

7. In light of the delegate's finding that commissions were owed, a $500 monetary penalty was levied since there was "no dispute that [the complainant] is still owed outstanding commissions which were payable within 48 hours of her employment being terminated" (page R15).

8. As for the penalty levied for the section 46 (*Employment Standards Regulation*) contravention, the delegate noted that while VJM produced some employment records pursuant to a section 85 Demand, it failed to produce relevant records regarding the complainant's earned commissions, and thus "did not fully comply with the Demand for Records" (page R16).

FINDINGS AND ANALYSIS

9. At the outset, let me dispense with VJM's somewhat oblique assertion that no commissions were owed by reason of an "offset" in relation to alleged commission overpayments in prior payroll periods. As previously noted, VJM does not directly assert that the delegate erred in law in finding that commissions were owed. Indeed, as is clear from the delegate's reasons, VJM conceded that $290.00 in earned commissions had not been paid. The delegate was also not satisfied that an "overpayment" had been proved. Nevertheless, on appeal, VJM maintains:

> The [delegate] erred in law by failing to appreciate that short payment of the commission was dues to inadvertence and lack of communication by the Employee and was not deliberate or wilful so as to construe the same as contravention under section 18 of the Act, more particularly when Employee was even overpaid at times as reflected in the Employment record and in any case was never deprived of any part of the wages despite the Employee having admittedly breached the required standards on previous occasions.
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> The [delegate] erred in law by failing to appreciate that the short payment of commission along with the final pay was not due to the Employer's claim to recover the overpayment of commission wrongly claimed and paid but was purely due to inadequate communication of the total amount due by the Employee and the fact that there was overpayment recoverable from the Employee was discovered only when the numbers were reconciled with the sales history just prior to the adjudication.

10. The delegate's finding that the complainant was owed $290.00 in commissions that were not paid within the time limited by section 18(1) of the *ESA* is a complete answer to the above submissions. VJM's argument also ignores section 28 of the *ESA*, which requires all employers to maintain certain employment records including, where applicable, records concerning all commission earnings by its employees. These records must be kept, and then retained for a period of 4 years.

11. The simple fact here is that all wages owed to the complainant were not paid within the section 18(1) period, and thus VJM was subject to a $500 monetary penalty by reason of that contravention.

12. VJM's fundamental argument with respect to the section 46 contravention is that it did not have any records in its possession regarding the complainant's commission earnings. VJM says that the relevant record repository was held by a franchisor (VJM is a franchisee), and was not a database that VJM could access for purposes of producing a "commission earnings" report for the complainant. VJM's argument on this score is encapsulated in the following excerpt from its appeal submission:

> The Adjudicator has seriously erred in law by assuming, without any supporting evidence or even submissions to that effect that the "Anytime Fitness Dashboard" or "Agreement History" was a record of the company, purportedly maintained for the purposes of computation of sales commission and that since the same was not produced the Employer had contravened section 46 of the Act.

13. The complainant's commissions were based on selling new memberships in the gym operated by VJM. These sales were apparently recorded in a system known as "Dashboard" (testimony of VJM's principal, Mr. Hedge; see delegate's reasons, page R8). As noted above, VJM agreed that for the period January 18 to February 21, 2019, the complainant "sold 29 new memberships, earning a total of $290.00 in commissions" (page R8), but argued that due to overpayments in prior pay periods, the complainant was actually indebted to VJM in the amount of $210.00. As was quite rightly noted by the delegate in her reasons, the *ESA* does not provide a mechanism allowing employers to recover monies allegedly owed from an employee.

14. The section 112(5) record indicates that on August 8, 2019, a delegate (not the delegate who issued the Determination) issued a section 85 "Demand for Employer Records" relating to the complainant. The records to be delivered included all "[r]ecords of how commissions were earned, how calculated and when paid" for the period February 22, 2018 to February 28, 2019. The records were required to be delivered by no later than August 29, 2019. As noted by the delegate in her reasons (at page R12), although VJM produced some records pursuant to the section 85 Demand, "as far as commissions go, [VJM] did not produce any records of [the complainant's] new membership activations between January 18, 2019 and February 21, 2019."

15. The section 112(5) record does not contain any statement from VJM to the effect that it was unable to produce records relating to the complainant's earned commissions because such records were not in its custody or control. The record does contain a submission from VJM to the Employment Standards Branch that includes a section headed "How commissions were earned, calculated and paid". VJM, in its appeal submission, maintains that this memorandum (which was also appended to its appeal submissions), "read with the 'Employment Record Franke Bencher' gave the full detail of the commissions earned, calculated and paid and consequently the full and complete record as demanded was provided." I should note that VJM's reference to the complainant's "Employment Record" appears to be a reference to the Record of Employment it issued to the complainant following the termination of her employment – a document that provides no discrete information whatsoever regarding the complainant's commission earnings.

16. In my view, this latter submission setting out VJM's position regarding whatever commissions may be payable does not constitute compliance with the section 85 Demand, since the source records were never produced. I agree with the delegate's observation (at page R12) that VJM "only produced documentation to support

[its] argument that [the complainant] was overpaid by $500.00 over the course of her last year of employment for some commissions she did not actually earn [but VJM's] records regarding these overpayments indicate that these overpayments were not in relation to [the complainant's] commissions earned between January 18, 2019 and February 21, 2019." The delegate was clearly correct when she observed (at page R12) that "[VJM] did not provide records to indicate how many new memberships and personal training sessions [the complainant] actually sold in her last year of employment, or records of whether she exceeded her monthly benchmark goals each month." The section 85 Demand unequivocally required VJM to produce "[r]ecords of how commissions were earned, how calculated and when paid" for the period February 22, 2018 to February 28, 2019. But no such records were ever produced. That being the case, VJM failed to comply with the section 85 Demand, and thus the delegate did not err in law in issuing a $500 monetary penalty based on VJM contravention of section 46 of the *Employment Standards Regulation*.

17. In summary, the delegate did not err in law in issuing either of the $500 monetary penalties levied in this case, since the evidence before her clearly indicated that VJM contravened section 18 of the *ESA* and section 46 of the *Employment Standards Regulation*. Although not as plainly delineated as it might have been, VJM's "natural justice" argument appears to be predicated on the assertion that the delegate, broadly speaking, failed to properly weigh and consider all the evidence before her. I find this assertion to be entirely lacking any reasonable factual or legal foundation. The delegate fairly considered all of the evidence before her (and properly commented on the evidence that was missing from the evidentiary record), and issued a decision that, in my view, is entirely legally defensible.

ORDER

18. Pursuant to section 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the amount of $1,316.15 together with whatever additional interest that has accrued, under section 88 of the *ESA*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal