

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Cansin Yang

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE No.: 2023/086

DATE OF DECISION: November 28, 2023

DECISION

SUBMISSIONS

Cansin Yang	on his own behalf
Candace Hawkins	on behalf of Johnson Controls Canada LP / Societe de Controle Johnson Canada S.E.C.
Matthew Osborn	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed under section 112 of the *Employment Standards Act* (“ESA”) by Cansin Yang of a determination issued by Matthew Osborn, delegate (“Delegate”) of the Director of Employment Standards (“Director”) on May 25, 2023 (“Determination”).
2. In the Determination, the Delegate determined that Mr. Yang was not owed any outstanding commissions by his former employer, Johnson Controls Canada LP / Societe de Controle Johnson Canada S.E.C. (“Employer”).
3. Mr. Yang says the Director failed to observe the principles of natural justice in making the Determination. I also infer from Mr. Yang’s submissions that he is also alleging the Director erred in law in reaching the Determination on a view of the facts that could not reasonably be entertained.
4. The appeal was filed within the statutory appeal period.
5. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made, and the submissions received from the parties. I have reviewed all of the submissions of the parties but reference only those required to reach my conclusions.
6. The Tribunal received submissions on the merits of the appeal from the Director on September 20, 2023, from the Employer on October 3, 2023, and a reply from Mr. Yang on October 16, 2023.
7. For the reasons that follow, I dismiss the appeal.

ISSUES

8. Did the Director fail to observe the principles of natural justice in failing or refusing to consider Mr. Yang’s claim for vacation pay for the period from 2006 to 2017?
9. Did the Director err in law in concluding that Mr. Yang was not entitled to any outstanding commissions relating to projects 8N1A0171 and 8N1A0172?

THE DETERMINATION

10. Mr. Yang resigned from his employment with the Employer on March 23, 2021. Mr. Yang filed a complaint with the Employment Standards Branch on May 12, 2021, claiming that he was owed outstanding commissions and vacation pay.
11. During the investigation into the complaint, Mr. Yang confirmed that he received payment from the Employer for his 2021 vacation pay. Accordingly, the Determination focused on Mr. Yang's claim for outstanding commissions.
12. The Delegate reviewed Mr. Yang's contract of employment, and specifically the section outlining when commissions are owing, and accepted that commissions or other incentives are not earned until the contract those commissions relate to is complete and fully paid by the customer.
13. While the contract provides for a portion of an employee's pending commissions to be paid in the event of transfer, death, or retirement, the Delegate concluded that Mr. Yang had resigned, rather than retired, and as such that provision did not apply to his circumstances.
14. The Delegate accepted the evidence of the Employer that the two projects referenced in Mr. Yang's complaint were not 100% complete and paid for, and therefore commissions were not owing on those projects.

ARGUMENTS

15. Mr. Yang says the Determination did not address his request for vacation pay for the period from 2006 to 2017. I accept that this is also apparent on the face of the Determination, which notes "[t]he parties confirmed the only matter to be decided relates to any vacation pay that would be owed on the commissions the Complainant alleges to be outstanding."
16. Mr. Yang also submits that the projects he is seeking commission in relation to were 100% completed. He disputes the Delegate's finding that project 8N1A0171 was only 97% paid, insisting instead that a review of the information provided by the Employer indicates that this project was 99.9066% paid, which is an insignificant portion of the overall project valued at \$8.7 million.
17. Mr. Yang agrees that he resigned on March 23, 2021, which was before the final invoice date for project 8N1A0172, but that in any event says he strongly believes he earned the commissions for both projects.
18. The Delegate does not dispute that Mr. Yang's claim for vacation pay for the period from 2006 to 2017 was not addressed in the Determination, but says in any event this period does not fall within the recovery period constrained by section 80 of the *ESA*.
19. The Delegate says that underlying the appeal is, in essence, a disagreement with the Delegate's findings of fact regarding the completion of the two projects referenced.
20. The Delegate submits that Mr. Yang's appeal simply reiterates the same arguments he made during the investigation, and which were not accepted.

21. With respect to the specific arguments Mr. Yang makes relating to the details of the invoices referenced in the Determination, the Delegate says these arguments were not made during the investigation, or after the investigation report was provided, and no explanation has been given for not advancing those arguments earlier.
22. The Delegate says the findings of fact in the Determination were supported by the evidence in the section 112(5) record (“Record”). Further, the Delegate points out that Mr. Yang does not articulate how these findings of fact are “irrational, perverse, or inexplicable,” nor does he identify any procedural fairness issues.
23. The Employer supports the Delegate’s submissions and says it is clear on the evidence provided during the investigation that the two projects in question were not complete, and that Mr. Yang forfeited any unearned commissions when he resigned from his employment.
24. The Employer points to Mr. Yang’s own submissions which admit that the projects were delayed due to supply chain issues. The Employer says Mr. Yang admits that he resigned prior to full payment being received by the Employer from the client, which in itself makes him ineligible for the commission he is claiming.

ANALYSIS

25. The grounds of appeal are statutorily limited to those found in section 112(1) of the *ESA*, which provides:
 - 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.
26. 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.
27. 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 that there is an error in the determination under one of the statutory grounds.
28. Mr. Yang has applied to overturn the Determination under section 112(1)(b), and I accept that it can be inferred that he also alleges an error in law, which would fall under section 112(1)(c). I address each of these in turn, first, with respect to Mr. Yang’s claim for vacation pay from 2006 to 2017, followed by his claim for commissions on certain projects.
29. Natural justice has been described as the right to a fair procedure and includes specific rights such as the right to know the case being made, the right to respond, and the right to be heard by an unbiased 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 be successful on this ground of appeal, there must be credible evidence about how the determination procedure did not meet the requirements of natural justice (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).

30. The Tribunal has recognized the following ways in which an “error of law” may be found to have occurred, as set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), [1998] B.C.J. No. 2275 (BC CA):
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.

Vacation Pay, 2006-2017

31. It is clear on the face of the complaint that part of Mr. Yang’s claim is for vacation pay for the years 2006 through 2017. There is no indication on the Record, however, of either the investigation report or the Determination dealing with this claim.
32. Section 80(1) reads as follows:
- 80 (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
- (a) in the case of a complaint, 12 months before the earlier of the date of the complaint or the termination of the employment, and
 - (b) in any other case, 12 months before the director first told the employer of the investigation that resulted in the determination,
- plus interest on those wages.
33. Mr. Yang filed his complaint on May 12, 2021, but his employment ended on March 23, 2021. Accordingly, the 12-month recovery period in this case would limit recovery to the period beginning March 24, 2020.
34. While the *ESA* also indicates the availability of some discretion to the Director to extend the recovery period in section 80(3), that discretion is constrained to a maximum of 24 months. This discretion, however, is based on the presence of what the *ESA* refers to as “prescribed circumstances.” In the absence of any “prescribed circumstances,” however, the section 80(1) 12-month “wage recovery/employer liability” period is not capable of being extended by the exercise of the Director’s discretion.
35. Even if the Delegate had addressed Mr. Yang’s claim, and had there been “prescribed circumstances” to consider, recovery would in any event not be permitted to reach back before March 24, 2019.

36. I accept that the Delegate did not directly address the claim for vacation for the period 2006 - 2017. However, it is clear that this claim falls outside the statutory recovery period in section 80(1) of the ESA and would not have been successful. Accordingly, in these circumstances, I decline to remit this issue to the Director, and I dismiss this aspect of the appeal.

Commissions: Projects 8N1A0171 and 8N1A0172

37. While Mr. Yang indicated his appeal was based on a failure to follow the principles of natural justice, he does not, in his submissions, provide any evidence to suggest that he was not afforded the right to be heard, nor the right to respond to the submissions and materials provided by the Employer.

38. Instead, the focus of Mr. Yang's appeal is on the Delegate's finding that the two projects, 8N1A0171 and 8N1A0172, were not 100% complete, nor fully paid, when Mr. Yang resigned from his employment.

39. Mr. Yang says in his submissions that he strongly believes he earned the commissions for both projects. While he concedes that project 8N1A0171 was not 100% paid, he says it was 99.9066% paid, rather than the 97% indicated in the Determination, and suggests for all intents and purposes that this is close enough. In this regard, I infer that the error of law Mr. Yang says occurred was that the Delegate's finding that the project was not 100% completed was made on a view of the facts that could not be reasonably entertained.

40. Mr. Yang also says that he resigned prior to the final invoice date for project 8N1A0171.

41. While Mr. Yang took the position in his complaint that he should be considered to have retired, rather than resigned, from his employment, he did not dispute this finding on the appeal before me.

42. In reply, Mr. Yang asserts that the projects were both in fact cancelled, and the only outstanding aspect of these projects were the cost of monthly storage of the equipment. Mr. Yang says "[t]he projects should have been flagged as complete and paid [by the end of 2020] but it was not because of the monthly storage invoices which I negotiated." [underline in original]

43. Rather than supporting Mr. Yang's argument that the projects were, in fact, 100% completed and paid prior to his resignation, this submission appears to accept that as a result of the ongoing storage services he negotiated, the projects remained ongoing. Further to this, I note that this information was before the Director at the time of the Determination.

44. It is not the role of this Tribunal to substitute its view of the facts for that of the Director. Unless it can be said that there was no evidence on which the Delegate reached their conclusions, or that they arrived at a clearly wrong conclusion of fact, the findings will not be overturned.

45. On the materials before me, the Delegate reviewed all of the evidence before him and concluded both that Mr. Yang's contract required a project to be completed and 100% paid before the full commission for that project is owing, and that the projects in question were not 100% paid. The evidence in the Record demonstrates that final payments on projects 8N1A0171 and 8N1A0172 had not been received by the Employer as of the date Mr. Yang resigned, and, accordingly, it was clearly open to the Delegate to conclude that the projects were not 100% paid.

46. Accordingly, I can find no evidence before me that the Delegate's conclusions were reached on a view of the facts that could not be reasonably entertained.
47. For these reasons I deny the appeal.

ORDER

48. Pursuant to section 115(1), the Determination is hereby confirmed.

Ryan Goldvine
Member
Employment Standards Tribunal