Citation: Venus Concept Canada Corp. (Re)
2023 BCEST 20

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Venus Concept Canada Corp.
("VCCC")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NO.: 2023/001

DATE OF DECISION: April 13, 2023

DECISION

SUBMISSIONS

Mark Tector — counsel for Venus Concept Canada Corp.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the *"ESA"*) by Venus Concept Canada Corp. ("VCCC") of a determination issued by Michael Thompson, a delegate of the Director of Employment Standards (the "deciding Delegate"), on November 30, 2022 (the "Determination").

2. The Determination found VCCC had contravened Part 3, sections 18, 21, and 28, and Part 7, section 58, of the *ESA* in respect of the employment of Margarita Diaz ("Ms. Diaz") and Maura Pajonk ("Ms. Pajonk"), collectively, the "Complainants". The Determination ordered VCCC to pay Ms. Diaz and Ms. Pajonk wages, including vacation pay, in the total amount of $38,216.74, interest under section 88 of the *ESA* in the amount of $2,838.47, and to pay administrative penalties in the amount of $2,000.00. The total amount of the Determination is $43,055.21.

3. VCCC has appealed the Determination on the ground that the deciding Delegate erred in law in making the Determination.

4. In correspondence dated January 19, 2023, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the "record") from the Director, invited the parties to file any submissions on personal information or circumstances disclosure and notified the other parties that submissions on the merits of the appeal were not being sought from them at that time.

5. The record has been provided to the Tribunal by the Director and a copy has been delivered to VCCC, in care of their legal counsel of record, to Ms. Diaz, and to Ms. Pajonk. All these parties have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received from any party.

6. The Tribunal accepts the record is complete.

7. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. 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 and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*
>
> *(a) the appeal is not within the jurisdiction of the tribunal;*

> *(b) the appeal was not filed within the applicable time limit;*
>
> *(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
>
> *(d) the appeal was made in bad faith or filed for an improper purpose or motive;*
>
> *(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
>
> *(f) there is no reasonable prospect the appeal will succeed;*
>
> *(g) the substance of the appeal has been appropriately dealt with in another proceeding;*
>
> *(h) one or more of the requirements of section 112 (2) have not been met.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director, Ms. Diaz, and Ms. Pajonk will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue in this appeal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

10. VCCC is an entity incorporated in Ontario, Canada and carries on some of its business in the province of British Columbia.

11. VCCC operates an aesthetic medical device sales business.

12. Mr. Diaz was employed as a Sales Manager from June 10, 2019, to March 31, 2020. Ms. Pajonk was employed as an Associate District Sales Manager from August 20, 2018, to March 31, 2020.

13. The Complainants each filed a complaint alleging VCCC had contravened the *ESA* by failing to pay commissions owed, overtime wages, and annual vacation pay. Ms. Diaz also alleged VCCC had required her to pay some of their business costs.

14. During the investigation VCCC denied any wages were owing to either of the Complainants.

15. The deciding Delegate identified four issues in the Determination:

1. Are the Complainants owed outstanding commissions?
2. Are the Complainants owed outstanding vacation pay?
3. Are the Complainants entitled to overtime wages?
4. Has [VCCC] required either Complainant to pay costs of its business?

16. On the first issue, the deciding Delegate found each of the Complainants were owed outstanding commissions. On the second issue, the deciding Delegate found each of the Complainants were owed outstanding vacation pay. On the third issue, the deciding delegate found neither of the Complainants were entitled to overtime wages. On the fourth issue, the deciding Delegate found VCCC had required Ms. Diaz to pay some of their business costs and required VCCC to reimburse her for those costs.

17. In deciding the first issue, the deciding Delegate considered the terms of the employment and commission agreements for each of the Complainants and found:

> The Complainants' commission agreements differed in many details, but each contained separate sections entitled "commissions" and "payment of commissions". [VCCC] argues that the terms of each commission agreement provided that each commission was earned incrementally as clients paid for their purchases. I find that this interpretation ignores the clear language of the agreements.
>
> Each commission agreement provided clear language in the "commissions" section indicating what triggered the Complainants' commission entitlement. The Complainants were entitled to commissions based on the value of "each system sale" depending on her involvement with the sale and the type of sale.
>
> I find that the commission agreements are clear as to when commissions are earned and include no reference to client payment or the installation of equipment triggering the earning of a commission. (at pages R3-R4 of the Determination)

18. The deciding Delegate noted there were other provisions in the agreements that addressed the timing of payment of the commissions earned, which depended on the type of sale, and purported to extinguish any entitlement to commissions where an employee resigns or is given notice of termination. The deciding Delegate found those provisions were nullified by operation of section 4 of the *ESA* and contravened section 18 of the *ESA*.

19. The deciding Delegate found the Complainants were entitled to annual vacation pay. The decisions on these claims were largely decided on information provided by the Complainants, as the deciding Delegate found the vacation pay records provided by VCCC to be "not entirely reliable".

20. The deciding Delegate found the Complainants were not entitled to overtime wages.

21. The deciding Delegate found Ms. Diaz had been required to pay some of VCCC's business costs and ordered reimbursement of those costs.

22. The deciding Delegate found VCCC had contravened several sections of the *ESA* and imposed administrative penalties for those contraventions.

ARGUMENTS

23. VCCC argues the deciding Delegate erred in law in making the Determination.

24. VCCC alleges the deciding Delegate committed errors of law in:

i. finding the Complainants had earned commissions based on the value of each system sale when the sale was made;

ii. failing to consider all the evidence in deciding the Complainants were entitled to annual vacation pay; and

iii. failing to consider evidence submitted by VCCC in finding Ms. Diaz was entitled to reimbursement for expenses incurred on behalf of VCCC.

25. In respect of the first of the alleged errors of law, VCCC disagrees with the interpretation the deciding Delegate placed on the Complainants' agreements relating to commissions. The submission made on behalf of VCCC asserts the deciding Delegate "ignored the language of the *ESA*, the terms of the Complainants' employment agreements, and the established case law". In this argument, VCCC submits that, as there is no definition of "commission" in the *ESA*, "Employers are free to set their own terms and conditions surrounding payment". Their argument postulates several scenarios where events or circumstances might justify delaying a commission payment.

26. VCCC refers to various provisions in the commission plan agreements for each Complainant, contending the totality of these provisions not only set out when a commission is payable but also when a commission is earned, arguing the result of an assessment of all these provisions ought to have led the deciding Delegate to find a commission was not "earned" until, applying the payment schedule, it was "payable" and if employment was terminated before it became payable, was never "earned".

27. VCCC says the deciding Delegate erred in law on the vacation pay claims by failing to consider evidence provided by VCCC "demonstrating" that all statutory vacation was taken or paid out by the Complainants. The submission on this argument contains several assertions of fact, but does nothing to show whether these facts were completely missed by the deciding Delegate or simply not accepted in favour of other evidence.

28. Finally, VCCC argues the deciding Delegate erred in law in finding Ms. Diaz was entitled to reimbursement for expenses incurred on behalf of VCCC by failing to consider the evidence that Ms. Diaz had failed to submit reimbursement request forms for the expenses claimed.

ANALYSIS

29. 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.*

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

31. 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.

32. 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.

33. The Director has the jurisdiction to interpret and enforce the contract of employment, even where those terms exceed the minimum standards provided in the *ESA*. There is ample authority supporting such jurisdiction: see, for example*, Dusty Investments d.b.a. Honda North*, BC EST #D043/99 (Reconsideration of BCEST #D101/98), *Halston Homes Limited*, BC EST #D527/00, *Shell Canada Products Limited/Produits Shell Limitée*, BC EST #RD488/01, *Susan A. McKay*, BC EST #D518/01*, Kamloops Golf and Country Club*, BC EST #D278/01 (Reconsideration denied, BC EST #RD544/01; judicial review dismissed, 2002 BCSC 1324), *Patrick O'Reilly*, BC EST #RD165/02, *Seann Parcker*, BC EST #D033/04 and *Grant Howard*, BC EST #D011/07. In the *Honda North* decision, the reconsideration panel stated:

> The Director has authority under the *[ESA]* to regulate and enforce the employment relationship, including elements of the employment relationship that exceed minimum standards. There is no doubt that a primary purpose of the *[ESA]* is to ensure employees receive "*at least basic standards of compensation and conditions of employment*", but the application of the *[ESA]* is not limited to enforcing only minimum standards. [*emphasis* in original]

34. The entitlement of an employee to a commission depends on the facts and the interpretation of the employment contract or, in this case, the employment contracts, which include the commission agreements.

35. The error in the argument of VCCC on the commission issue is that it seeks to equate the "earning" of a commission with the "payment" of the commission. That is evident in several aspects of their submission. However, identifying provisions in the Complainants' employment contracts that set a payment schedule

and, inarguably, attempt to disentitle the Complainants to commissions earned if their employment is terminated does not advance their argument about when the commissions are earned. In my view, provisions that set a schedule of payment of commissions are nothing more than part of a common practice, which has generally been accepted by both the Director and the Tribunal, of deferring earned commissions to subsequent pay periods. That practice does not, however, direct a legal conclusion about when commissions are earned. A conclusion on the latter is determined from the facts and the terms of the employment agreement.

36. The submission also fails to address the contractual provisions which the deciding Delegate found to have entitled the Complainants to the commissions claimed and, in fact, wrongly states the commission plans for Ms. Pajonk are "explicit" in stating commissions "are not earned or payable until specific dates".

37. I am not persuaded the deciding Delegate made any error of law in his interpretation of the employment agreements on commissions. I agree wholly with his conclusion and find the deciding Delegate's interpretation the commission plans were, as he found, "clear" and entitled the Complainants to a commission at the point of sale.

38. While not entirely necessary, I will add another perspective that supports the interpretation and finding of the deciding Delegate.

39. The General Rules for VCCC's sales commission plan for each of the Complainants for 2018 to 2020 reads, in part:

> For the purpose of this Plan . . .
>
> a. The Employee's entitlement to Commission ceases as of the date the employee submits her/his notice of resignation or receives notice of termination (for any reason) from the Company and no commissions are owing through any notice period or as pay in lieu of notice . . .

40. It is logically improbable for an employee's entitlement to commission to "cease" unless such entitlement has already been acquired.

41. I also agree with the deciding Delegate's findings that, notwithstanding the payment schedule language in the commission plans, the provisions of section 18 of the *ESA* dictated that payment of all wages, which would include any commissions earned, be made within 48 hours of VCCC having terminated the Complainants' employment and that the provisions in the commission plans which attempted to disentitle the Complainants to the commissions they earned ran afoul of section 4 of the *ESA* and were of no effect.

42. I will briefly address the authorities provided in the submission made on behalf of VCCC. The Court decisions were not decided under the *ESA* and were very different on the facts and the terms of employment to this case. The *Shell Products Canada Limited* case was also decided on different facts and employment provisions than are present here. None of these cases assist VCCC in this appeal.

43. In the second part of the argument on the error of law ground of appeal, VCCC asserts the deciding Delegate erred in law by failing to consider evidence relating to vacation pay that was provided by them and which resulted, presumably, in an incorrect finding.

44. The Tribunal has adopted a cautious approach to such assertions.

45. 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.

46. 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 factual findings raise an error of law: see *Britco Structures Ltd.*, BC EST #D260/03. 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.

47. The test for establishing that 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.

48. To expand the above point, in order to establish the deciding Delegate committed an error of law on the facts, VCCC is required to show the findings of fact and the conclusions and inferences reached by the deciding Delegate 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.

49. In the context of the argument being made here, VCCC is required to *objectively* demonstrate there was relevant evidence the deciding Delegate failed to consider, and that failure led to an error of law on the facts as described above. In other words, the Tribunal will not presume the deciding Delegate ignored or failed to consider evidence unless, it is objectively demonstrated that an express consideration of such evidence in the Determination is legally essential to the ultimate conclusion: see *Windy Willows*, *supra*.

50. VCCC has accepted that the record before the deciding Delegate was complete. Neither party sought to introduce "new" evidence.

51. The evidence which VCCC says was not considered was information that was before the deciding Delegate. There is no objective evidence that the deciding Delegate "failed to consider" this information.

52. Following from the above point, except in circumstances that do not arise in this case, there is no legal requirement for an administrative tribunal to recite all of the evidence before it in its reasons for decision. The deciding Delegate did not specifically refer to the information provided by VCCC, but clearly was

aware of it. In the Determination, the deciding Delegate noted that, while VCCC did provide a record of requests for time off made by the Complainants, the records kept by them did not meet their statutory obligation to record vacation days taken by the Complainants and were found not to be "entirely reliable as a record of vacation time taken." The deciding Delegate preferred the information provided by the Complainants on the vacation pay claim.

53. Some aspects of the argument on this issue make no pretence to a "failed to consider" argument, but directly challenge findings of fact made by the deciding Delegate on competing evidence. For example, in their appeal submission VCCC asserts (as they did during the investigation) Ms. Pajonk had taken 17 days' vacation in 2019 and had requested 14 days' vacation in 2020. The deciding Delegate found Ms. Pajonk had not taken 12 of the 17 vacation days VCCC said she had taken in 2019 and had not taken 2 of the days she had requested in 2020. Those findings were supported by objective evidence. A direct challenge to those findings is simply unsupportable and untenable.

54. I find the reasons provided by the deciding Delegate, viewed contextually and taking a functional approach, support the findings made. VCCC has not shown that the findings of fact made by the deciding Delegate lacked any evidentiary foundation. In reality, it seeks only to have the evidence re-evaluated and the factual findings changed.

55. In sum, I am not persuaded the deciding Delegate committed an error of law on the facts and this aspect of the appeal is also rejected.

56. Lastly, the appeal submission made on behalf of VCCC alleges the deciding Delegate erred in law by failing to consider the evidence that Ms. Diaz had not submitted reimbursement request forms for the expenses she claimed.

57. This argument needs little analysis in order to reject it.

58. Simply put, there is no legal obligation in the *ESA* for Ms. Diaz to have submitted a reimbursement request to VCCC for expenses incurred by her on their behalf. Nor is there any precondition, in section 21 or in any other part of the *ESA*, requiring an employee to request reimbursement or risk losing the statutory right to claim reimbursement from their employer under section 21. Rather, the prohibition set out in section 21(2) of the *ESA* is clear and explicit: an employer must not require an employee to pay any part of the employer's business expenses.

59. For the above reasons, I find there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

60. Pursuant to section 115 of the *ESA*, I order the Determination dated November 30, 2022, be confirmed in the amount of $43,055.21 together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal