

Citation: Anna Elizabeth Brill-Edwards (Re)
2019 BCEST 21

An appeal

- by -

Anna Elizabeth Brill-Edwards

- 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: Carol L. Roberts

FILE NO.: 2018A/88

DATE OF DECISION: March 6, 2019

DECISION

SUBMISSIONS

Michael Kiperchuk on behalf of Anna Elizabeth Brill-Edwards
Dan Armstrong delegate of the Director of Employment Standards

OVERVIEW

1. The Appellant, Anna Elizabeth Brill-Edwards, alleges the Director of Employment Standards (the “Director”) has failed to disclose the complete record (the “Record”) as is required pursuant to subsection 112(5) of the *Employment Standards Act* (the “ESA”).
2. The Record has been sought from the Director in relation to the Appellant’s appeal of a Determination (the “Determination”) issued by a delegate of the Director (the “Delegate”) on July 12, 2018.
3. In the Determination, the Delegate concluded that Oceanside RCMP Victim Services Society (“ORVSS”, or the “Employer”) had contravened the *ESA* in failing to pay the Appellant wages and accrued interest in the total amount of \$1,657.51. The Director imposed two administrative penalties on the Employer for contraventions of sections 17 and 58 of the *ESA* in the total amount of \$1,000, for a total amount payable of \$2,657.51.
4. The Appellant appeals the Determination on the basis that the Director erred in law and failed to comply with the principles of natural justice in making the Determination.
5. In the Tribunal’s letter to the parties acknowledging the appeal, the Registrar asked the Director to provide the Record in accordance with section 112(5) of the *ESA* and noted that the Record included “any witness statement and document considered by the Director” Attached to the letter were specific directions to the Director on the production of the Record that outlined what the Record consisted of, what was to be redacted, and how it was to be compiled. The Directions noted:

”The following is not an exhaustive list of the contents of the Record, but serves as a guide. Nevertheless, the record should include, as minimum, legible copies of these documents...”
6. Specifically listed is “Delegate’s investigation notes, including written summaries of information provided orally by witnesses and all copies of memoranda prepared following telephone or other communications with a party or any other person with whom the delegate communicated during the course of the investigation or adjudication.”
7. Upon disclosing the Record to the Appellant, the Tribunal invited the Appellant to make submissions on the completeness of the Record. The Appellant’s submission on this issue consisted of 177 pages, the specifics of which will be addressed below. In response to the Appellant’s submission, the Delegate disclosed seven additional pages of written notes, three pages of “workflow notes,” and additional correspondence.

8. This decision, which relates only to the completeness of the Record, is based on the Determination, the documents submitted to date, and the written submissions of the parties.

FACTS AND ARGUMENT

9. The Determination was issued after an investigation under section 76 of the *ESA*. In the investigation, the Delegate sought written responses to specific questions from the Appellant and her co-worker.
10. The Determination indicates that the Delegate also obtained evidence from at least one of the Employer's former Board members as well as from the Employer's accountant.
11. The Determination was issued over one full year from the date the complaint was filed. Prior to the Determination being issued, the Appellant made a number of written requests for information and updates asking when the Determination would be issued. After the Appellant contacted the Deputy Minister of Labour regarding the delay in the issuance of the Determination, a telephone call was arranged between the Appellant and Chantal Webb, another delegate of the Director. Unbeknownst to Ms. Webb, the Appellant recorded the conversation. The audio, as well as a transcript, of the conversation was submitted to the Tribunal in support of the appeal.
12. The Appellant argues "internal communications between [the Employment Standards Branch staff] and the [Ministry of] Labour - regarding the delays" in issuing the Determination are critical to the grounds of her appeal and ought to have formed part of the Record. The Delegate contends those records are not properly part of the Record.
13. The Appellant also states that the Delegate has not included 43 e-mails between the Appellant and the Branch in the Record. I infer from the Appellant's submission that all these e-mails relate to inquiries made by the Appellant regarding the status of the Determination. The Delegate does not object to these e-mails forming part of the Record.
14. The Appellant also contends that the "source documents" for statements made by the former Board member to the Delegate and which are referenced in the Determination should form part of the Record. The Appellant notes that the Record contains no documents, either handwritten or otherwise, of the statements attributed to that Board member. The Appellant infers that the information was either obtained over the telephone or during an in-person meeting and should have been audio recorded. The Delegate says that it is not the Branch's practice to make audio recordings of conversations with witnesses and that he has not done so on any occasion. The Delegate further states that, with respect to the assertions attributed to the Employer's former Board member, those assertions, which were neither complex nor extensive, were recalled from his memory or recorded in the Determination contemporaneously with the conversation.
15. In response to the Appellant's submission on the completeness of the Record, the Delegate submitted to the Tribunal that having reviewed his physical file he "identified seven pieces of paper with written notes pertaining to conversations with parties to this investigation." The Delegate also stated that although "these documents do not contain any information that is not already addressed in my Determination" he was providing them to the Tribunal "so they may be added to the record."

The Delegate has also included “three pages of “workflow notes” which pertain to contact with the parties which occurred prior the assignment of the complaint” to him.

ISSUE

16. Has the Director complied with section 112(5) of the *Employment Standards Act*?

ANALYSIS

17. Section 112(5) provides that, upon receipt of the appellant’s written request, the Director “must provide the Tribunal with the record that was before the director at the time the determination...was made, including any witness statement and document considered by the director.”
18. The leading Tribunal decision relating to the content of the Record is *Super Save Disposal Inc. v. Action Transport Ltd.* (BC EST # D100/04) (“*Super Save*”) where the Tribunal stated:

In my view, when defining the ambit of the section 112(5) record, the governing principle should not be *reliance* or *materiality*-- that is, did the delegate rely on the document or was it material to the delegate’s decision? Rather, the governing principle should be *availability*--that is, was the document etc. in the hands of the delegate when he or she was making the determination? (“...the record that was before the director at the time the determination...was made”). It should be noted that a document may have been available notwithstanding that the delegate did not rely on that document when making his or her determination (say, because the delegate considered it to be irrelevant or not probative).

...

The record must also include “any witness statement”. Individual parties and their witnesses will likely give *viva voce* evidence although, I suppose, their evidence might be contained in a sworn or unsworn written statement. Written statements undoubtedly form part of the record. In *Balint* (BC EST # D103/03) the Tribunal made the following observations (at p. 4) about witness statements in the context of an investigation but I would conceive the following comments to be equally applicable where there is an oral hearing:

I find it curious that the Director, in responding to the appeal, says the investigating delegate “based his findings on the credibility of the parties based on his numerous conversations with them”. If that were so, and if the alleged conversations were considered when the Determination was made, those conversations should have been included in the record provided to the Tribunal. I can find no such documents in the material filed by the Director. If the Director seeks to rely on verbal communications when making the Determination, those communications must be transcribed in some way and included with the record.

19. As noted in *Super Save*, there is a rebuttable presumption that documents delivered to the Tribunal by the Director pursuant to section 112(5) constitute the complete Record.

20. After the Appellant challenged the completeness of the Record, the Delegate provided the Tribunal with additional documents to be included in the Record (see para 15 above). The Delegate also did not object to the inclusion of the 43 emails in the Record (see para 13 above).

21. It is difficult to understand why the Director, 14 years after the Tribunal's *Super Save* decision, is unable to comply with Tribunal directions, particularly since the Director's obligations regarding the Record were reinforced in the *Director of Employment Standards, Re: ProTruck Collision & Frame Repair Inc.* (BC EST # RD100/15):

...the *Super Save* decision is, and has been for quite some time, posted on the Tribunal's "Noteworthy Decisions" webpage specifically in regard to the "appeal record". This decision is thus readily available to any party who chooses to review the Tribunal's leading decisions in the course of preparing a submission. Third, and perhaps most importantly, the Director and delegates should be well aware of the *Super Save* decision. This case was perhaps the most vigorously litigated appeal ever brought to the Tribunal...

22. Additionally, in a decision issued just last year (*Golden Feet Reflexology Ltd.* (BC EST # D108/17) the Tribunal noted:

It appears that the Delegate in this particular instance is unclear on what constitutes the record, and the roles of the Director and the Tribunal surrounding the same. The Director's responsibility, as laid out in section 112(5) and discussed and clarified in the *Super Save* decision is to provide a complete copy of the record that was before the Director at the time the determination was made within the deadline set by the Tribunal.

23. In my view, all of these documents ought to have been submitted at first instance.

24. I will address each of the Appellant's requests for document disclosures in turn.

Internal Communications between the Employment Standards Branch Staff and the Ministry of Labour

25. The Appellant says that internal communications between the Employment Standards Branch staff and the Ministry of Labour regarding the delay in issuing the Determination should have been included in the Record.

26. As I understand the Appellant's submission, these communications relate solely to the length of time the Delegate was taking to issue the Determination.

27. There is no evidence the material was in the Delegate's possession at the time the Determination was made. In my view, none of these communications form part of the Record and I decline to make an order for production of these communications.

Emails between the Appellant and the Branch

28. The Appellant alleges 43 e-mails between her and the Branch relating to inquiries made by the Appellant regarding the length of time the Delegate was taking to issue the Determination, should be included in the Record.

29. The Delegate does not object to these e-mails forming part of the Record.
30. As the correspondence now forms part of the Record with the Delegate's agreement, I find no order for disclosure to be necessary.

Source Documents

31. The Appellant states that the "source documents" for statements made by a former Board member to the Delegate that are referenced in the Determination should form part of the Record.
32. The Delegate says that it is not the Branch's practice to make audio recordings of conversations with witnesses and that he has not done so on any occasion. The Delegate states he did not take written notes of the conversation other than those he may have recorded contemporaneously in the Determination.
33. I accept the Delegate's confirmation that no additional documents exist. Therefore, I find no further order for disclosure of "source documents" to be necessary.

CONCLUSION

34. After considering all the submissions, I conclude that the Record is now complete and no further Orders with respect to the Record are necessary. The parties will be invited to file submissions on the merits of the appeal to the Tribunal in due course.

Carol L. Roberts
Member
Employment Standards Tribunal