Citation: QMI Manufacturing Inc., Avcom Systems Inc. and
Geo Alert Incorporated (Re)
2023 BCEST 50

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

QMI Manufacturing Inc., Avcom Systems Inc. and Geo Alert Incorporated
(the "Employers")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NOS.: 2023/041, 2023/043 and 2023/044

DATE OF DECISION: July 6, 2023

PRELIMINARY DECISION

SUBMISSIONS

Michael Hanrahan	on his own behalf
Carrie H. Manarin	delegate of the Director of Employment Standards

BACKGROUND

1. This is a preliminary decision which concerns the completeness of the record (the "record") that has been provided to the Tribunal by the Director of Employment Standards (the "Director") pursuant to section 112(5) of the *Employment Standards Act* ("*ESA*").

2. I have been appointed as a panel of the Tribunal to decide appeals filed by QMI Manufacturing Inc., Avcom Systems Inc. and Geo Alert Incorporated (the "Employers").

3. During the administrative processing of the appeal, the Tribunal requested the Director to provide the record to the Tribunal.

4. A question has arisen on the completeness of the record.

ANALYSIS AND ORDER

5. Section 112(5) reads:

> 112 (5) On receiving a copy of the request under subsection (2) (b) or amended request under subsection (4) (b), the director must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was being made, including any witness statement and document considered by the director.

6. On April 26, 2023, the Director provided a copy of the record to the Tribunal.

7. In correspondence dated May 9, 2023, the Tribunal disclosed the record to the Employers and to the complainant, Michael Hanrahan ("Mr. Hanrahan"), and invited submissions from those parties on the completeness of the record.

8. The Employers provided no response. Mr. Hanrahan filed a submission, dated May 10, 2023, indicating the record provided by the Director did not include a document he had submitted to the delegate who was investigating his complaint (the "investigating Delegate"). He provided a copy of that document to the Tribunal. The Tribunal invited submissions from the Director.

9. In response, the delegate who wrote the Determination (the "deciding Delegate") submitted the record was complete, arguing the document in question was not included in the record because it was "irrelevant to the issues to be decided" and was "not considered by the delegate when she made the Determination". The deciding Delegate, while asserting the record is complete, says the Director "takes no position as to whether the [document] should be included in the Record or not."

10. Based on the response given by the deciding Delegate, this is an appropriate case to address whether the view of the deciding Delegate – that the record is complete – is correct. In my view, it is not.

11. In *Super Save Disposal Inc. and Accton Transport Ltd.*, BC EST # D100/04, the Tribunal addressed the interpretation and scope of section 112(5), providing extensive and detailed reasons.

12. The Director sought reconsideration of this decision. In *The Director of Employment Standards*, BC EST # RD172/04, a reconsideration panel varied some elements of the order, but confirmed the decision of the Tribunal Member on section 112(5), expressing its agreement with the interpretation of the scope of the record in section 112(5) for the reasons given by him, and finding the appeal decision "addresses both the scope of the obligation [under section 112(5)], its limits, and its practical operation."

13. The response of the deciding Delegate – that the record is complete – does not accord with the Tribunal's interpretation of the scope of section 112(5) set out in the *Super Save* appeal decision, and endorsed on reconsideration. The following paragraphs, found at page 10 of the *Super Save* appeal decision, identify and answer the principal concerns raised in this case:

> 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).
>
> Counsel for the Director submits that only documents actually considered to be relevant and relied on by the delegate constitute the record; I reject that submission as being overly narrow. In my opinion, a document is "considered by the delegate" even though the delegate may conclude that it is not relevant. One must "consider" a document before one can conclude whether it is relevant. The *Oxford Dictionary* defines "consider", among other things, as "a mental contemplation in order to reach a conclusion", "an examination of the merits", "to view attentively" and "to take into account after careful thought". If a delegate were to reject a document as irrelevant without having first "considered" it, that decision might well offend the principles of natural justice.

14. The above comments are not avoided because the investigating Delegate vetted the material submitted by the parties and decided some of it was not relevant to the issues. In that respect, I agree entirely with the statement found at page 11 of the *Super Save* appeal decision:

> If a determination is issued following an independent factfinding investigation by a Director's delegate, the record consists of all documents submitted by (or on behalf of) the parties to the delegate and, in addition, any other documents obtained by, or on behalf of, the delegate during the course of the investigation. Where, as in the present case, more than one delegate had conduct of the matter, the record consists of all documents submitted to, or obtained by, any delegate who had conduct of the file.

15. The definition of "director" in section 1 of the *ESA* is inclusive of any person delegated a function, duty or power granted to the Director under the *ESA*. The investigating Delegate and the deciding Delegate are both the "Director" in the complaint process. That conclusion is not changed by having two (or more) delegates of the Director perform discreet functions.

16. There is an assertion in the response of the Director that "the Tribunal's directions for the Record require the Director to include 'any document considered by the Director' at the time the Determination was made". With respect, the Tribunal has prepared, and provided, directions to the Director for production of the record in this appeal. The directions commence with the text of section 112(5) prominently displayed and, while the phrase "any document considered by the director" is included in the text of section 112(5), on any rational reading of that provision, it is clear that phrase is not exclusive of what must be included in the record.

17. On the basis of the above, the Director is wrong in asserting the record is complete. I find the document submitted by Mr. Hanrahan to the investigating Delegate was "before the director at the time the determination was made" – there is also a valid argument it was 'considered' by the Director – and it should have been included in the record.

18. The deciding Delegate has indicated the Director takes no position on whether or not the document should be included in the record. That position is not, however, responsive to the Director's statutory obligation to provide the record. Except in the context of the ground of appeal set out in section 112(1)(c), the Tribunal does not add to the documents obtained by the Director during the complaint process. In other words, it is not the responsibility of the Tribunal to provide a 'complete record', but it is the Director's obligation. Having the Tribunal simply 'include' the document in the record is not responsive to that obligation. The appropriate response here is to have that obligation manifested.

19. Accordingly, I order the Director amend the record by listing the document referred to by Mr. Hanrahan as being part of the record and confirm to the Tribunal that the amendment has been made.

20. A letter from the Tribunal will be issued to the parties, under separate cover, with the deadline for the Director to confirm with the Tribunal that the amendment has been made.

David B. Stevenson
Member
Employment Standards Tribunal