Citation: QMI Manufacturing Inc., Avcom Systems Inc.,
and Geo Alert Incorporated (Re)
2024 BCEST 6

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration
pursuant to section 116 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
(collectively, the "Applicants")

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Robert E. Groves

FILE No.: 2023/122, 2023/123, 2023/124

DATE OF DECISION: January 22, 2024

DECISION

SUBMISSIONS

Daniel Sorensen	counsel for QMI Manufacturing Inc., Avcom Systems Inc., and Geo Alert Incorporated
Carrie Manarin	delegate of the Director of Employment Standards

OVERVIEW

1. This is an application ("Application") brought by QMI Manufacturing Inc. ("QMI"), Avcom Systems Inc. ("Avcom"), and Geo Alert Incorporated ("Geo") (collectively, the "Applicants"). The Application is brought pursuant to section 116 of the *Employment Standards Act* ("*ESA*"). The Applicants seek a reconsideration of an appeal decision of a Member ("Member") of the Employment Standards Tribunal ("Tribunal") dated July 17, 2023, and referenced as 2023 BCEST 55 ("Appeal Decision").

2. This matter arose when Michael Hanrahan ("Complainant") filed a complaint under section 74 of the *ESA* ("Complaint") alleging that the Applicants had contravened the statute when they failed to pay him regular wages, vacation pay, and compensation for length of service.

3. A delegate ("Investigating Delegate") of the Director of Employment Standards ("Director") investigated the Complaint and issued a report containing relevant facts dated September 7, 2022.

4. A second delegate ("Adjudicating Delegate") of the Director issued a determination of the Complaint on February 24, 2023 ("Determination"). In it, the Adjudicating Delegate determined that the Applicants should be treated as an associated employer of the Complainant, pursuant to section 95 of the *ESA*.

5. The Determination ordered the Applicants to pay wages, annual vacation pay, compensation for length of service, and interest totalling $44,132.81. The Adjudicating Delegate also imposed five administrative penalties of $500.00. The total found to be owed was $46,632.81.

6. The Applicants appealed the Determination pursuant to section 112(1) of the *ESA*. It reads:

> 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.

7. The Applicants alleged that the Adjudicating Delegate had failed to observe the principles of natural justice (section 112(1)(b)), and that evidence had become available that was not available at the time the Determination was being made (section 112(1)(c)).

8. In his Appeal Decision, the Member held, pursuant to section 114(1)(f) of the *ESA*, that the appeals should be dismissed because there was no merit to them and no reasonable likelihood they would succeed. The Member confirmed the Determination, pursuant to section 115 of the *ESA*.

9. I have before me the Appeal Form and the Application delivered on behalf of the Applicants, the Applicants' submissions in support of both, a submission from the Adjudicating Delegate, the Determination and its accompanying Reasons ("Reasons"), the Appeal Decision, and the record ("Record") the Director was obliged to deliver to the Tribunal pursuant to section 112(5) of the *ESA*. No submission was received from the Complainant for the purposes of the Application.

ISSUES

10. Should the Appeal Decision be reconsidered?

11. If so, should the Appeal Decision be confirmed, varied, or cancelled, or should the matter be referred back to the original panel of the Tribunal or to another panel?

ARGUMENT

12. The focus of the Application is the Applicants' challenge to the Member's confirmation of the finding made by the Adjudicating Delegate that Geo was an associated employer of the Complainant pursuant to section 95 of the *ESA*, which reads:

> 95 If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
>
> (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and
>
> (b) if so, they are jointly and severally liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

13. The Applicants submit that the Tribunal is not bound by the statutory grounds of appeal selected on their appeal documents and that the Member should have examined more closely the possibility of errors of law in the Determination given that the Applicants did not have the benefit of legal counsel when they limited their grounds of appeal to natural justice concerns and the availability of "new evidence."

14. The Applicants assert they were denied natural justice because the Member dismissed their appeals of the Adjudicating Delegate's finding summarily, without full investigation. They argue the Member failed to consider their evidence and submissions that the Complainant was not employed by Geo, that Geo was not carrying on a business, trade, or undertaking at the times the Complainant was alleged to have provided work for that firm, that there was no demonstrable statutory purpose for associating Geo with QMI and Avcom, and that Geo, therefore, was not an entity that should have been treated as an associated employer. They say, too, that this failure constitutes an error of law pursuant to section 112(1)(a) of the *ESA*.

15. The Applicants say further that the Appeal Decision is tainted because the Member's reasons for confirming the finding of the Adjudicating Delegate that Geo was an associated employer were insufficient. The Applicants argue that the Member's reasons failed to give a proper explanation for the conclusion the Member reached.

16. In a responding submission, the Adjudicating Delegate asserts that the uncontradicted evidence of the Complainant during the investigation of his Complaint was that he performed work for the purpose of establishing Geo as an e-commerce division of QMI that would sell Avcom and QMI products directly to customers online, and while Geo may not have been an operating business throughout the Complainant's period of employment, it was nevertheless an "undertaking" for the purposes of section 95. The Adjudicating Delegate submits further that, contra the position of the Applicants, it is not fatal to a finding that Geo is an associated employer that the Complainant was not employed by that firm.

17. As for the Applicants' assertion that there was no statutory purpose supporting Geo's status as an associated employer, the Adjudicating Delegate points to the fact that a purpose of section 95 is to enable the recovery of wages, and while QMI and Avcom remained in operation, they were financially challenged, as witnessed by the fact that the Complainant did not receive payment of his wages for a period of months prior to his employment being terminated.

ANALYSIS

18. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 of the *ESA*, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

19. As the Tribunal has stated repeatedly, the reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

20. The attitude of the Tribunal towards applications under section 116 is derived in part from an acknowledgement of certain of the purposes of the *ESA* set out in section 2, namely, the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.

21. With these principles in mind, the Tribunal has adopted a two-stage analysis when considering applications for reconsideration (see *Re Milan Holdings*, BC EST # D313/98). In the first stage, the Tribunal considers an applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant wishes to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. A "yes" answer means that the applicant has raised questions of fact, law, principle, or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

22. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal proceedings. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an appeal decision of the Tribunal.

23. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

24. In my view, some of the grounds on which the Applicants rely do not raise the requisite questions of fact, law, principle, or procedure flowing from the Appeal Decision which justify a reconsideration. However, the matter of the adequacy of the Member's reasons regarding the status of Geo as an associated employer is, in this instance, an issue that is sufficiently important, and so it should not be dismissed at the first stage of the reconsideration inquiry.

25. The appellate jurisdiction of the Tribunal is limited to the three statutory grounds set out in section 112(1) (see, for example, *Re Sasowski Wax Hair Removal Bar Ltd. and Luba Sasowski*, 2019 BCEST 110). That said, the Tribunal has held that it should not mechanically adjudicate an appeal based solely on the particular box identifying a statutory ground a party has checked off on an appeal form if the submissions filed in support of the appeal would have sustained an argument engaging another ground the appellant neglected to select (see *Re Triple S Transmission Inc. (c.o.b. Superior Transmission),* BC EST # D141/03; *Re 683233 B.C. Ltd. (c.o.b. Pacific Kia, Cal National Leasing Ltd.)*, BC EST # D041/06).

26. As the Applicants point out in their submissions, they did not have the benefit of legal counsel in the appeal. When this occurs, as it often does in proceedings involving the *ESA*, the Tribunal will take a large and liberal view of an appellant's explanation why a determination should be varied or cancelled, or the matter should be returned to the Director (see *Re Silver Arrow Investments Ltd.*, BC EST # D134/16). It must be said again, however, that an appellant, unrepresented or not, must always take care to explain the basis for an appeal in sufficient detail to enable the Tribunal to discern its substantive basis within at least one of the statutory grounds set out in section 112(1). It follows, logically, that when the Tribunal addresses appeals, it was not the intent of the legislature that the Tribunal have a broad remedial authority to investigate all the possible arguments a party might have presented, or made more ably if the party had been represented by counsel. Rather, the Tribunal's review powers should be limited to the matters that are discernible from the relevant materials submitted by the parties in an appeal (see *Re Mt. Rocky Investment Ltd.*, BC EST # RD457/01).

27. Here, the Appeal Decision acknowledged that, while the appeal was grounded in challenges based on natural justice and new evidence concerns, and not on errors of law, there should be an assessment whether there was a basis for the argument that the Adjudicating Delegate had made such an error. The Appeal Decision then states that the Member conducted that assessment, and he concluded that it indicated the Adjudicating Delegate had committed no error of law in making the Determination. It cannot be said, therefore, that the Member failed to examine the possibility of errors of law in the Determination.

28. What the Applicants assert, however, is that the Member should have examined the Determination "more closely" in a search for legal errors. What an examination of the Record "more closely" might have revealed is left largely unsaid, and so the Application fails to establish in what manner the Member's

assessment was insufficiently "close." For these reasons, I cannot conclude that the Applicants' assertion the Member's assessment fell short warrants a reconsideration of the Appeal Decision.

29. A related submission from the Applicants contends that the Appeal Decision reveals both a failure to observe the principles of natural justice, and an error of law, because the Member dismissed their appeals "summarily, without full investigation," and he failed to consider their evidence and submissions that Geo was not an associated employer.

30. The difficulty I have with the Applicants' submission on these points is that it misconstrues the nature of appeals to the Tribunal contemplated by the *ESA*. As the Appeal Decision states, an appeal is not meant to be a *de novo* opportunity to re-argue the merits of a claim to a different decision-maker in the hope of achieving a different outcome. Instead, an appeal is an error correction process, and it is the appellant who carries the burden of establishing that a determination contains a reviewable error within the framework of the three grounds of appeal set out in section 112(1).

31. It follows that the role of the Tribunal is primarily adjudicative, not investigatory. Indeed, the *ESA* gives the Tribunal no power to correct errors of fact made by the Director or her delegates, unless those errors of fact can be characterized as errors of law.

32. Errors of fact do not become errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Put another way, a party will only succeed in challenging a delegate's findings of fact if the party establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusions set out in the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR (3d) 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No 331).

33. In her Reasons (R11), the Adjudicating Delegate set out the factual circumstances that had persuaded her to find that Geo was an associated employer of the Complainant. The Adjudicating Delegate acknowledged the assertions of the Applicants, that the shareholders of Geo were different from the shareholders of QMI and Avcom, and that Geo did not start operating until after the Complainant ceased to be employed by any of these companies. Still, the Adjudicating Delegate decided there was sufficient evidence of the common control and direction within the three entities required by section 95 to establish Geo as an associated employer because they carried on related businesses, there was an operational integration between the three companies, the same individual was the sole principal of each company and was the controlling mind of all three, the companies shared employees including the Complainant, and the Complainant performed specific work attributable to the needs of Geo in the form of a logo, a sales platform, and most of its products.

34. It was not, as the Applicants contend, the role of the Member on appeal to re-investigate the factual circumstances underlying the Complaint, either to avoid a natural justice breach or an error of law. Instead, it was the obligation of the Applicants to show that the findings of fact the Adjudicating Delegate did make were unreasonable, in the sense that they were perverse or inexplicable, or that she

misconceived the elements of the legal tests to be applied when she decided that Geo was an associated employer.

35. What the Applicants submit, in essence, is that it was legally incorrect for the Member to decline to disturb the Adjudicating Delegate's conclusion that greater weight should be attributed to the facts I have set out that supported a finding that Geo was an associated employer, and lesser weight to the evidence of the Applicants that suggested otherwise. However, it is trite to say that questions of the weight to be attributed to evidence is part of the fact-finding exercise that, absent an error of law of the type I have described, it was the sole prerogative of the Adjudicative Delegate to undertake. The fact that the Adjudicating Delegate might have reached different conclusions, acting reasonably, is of no moment.

36. The Member did treat the factual evidence tendered by the Applicants on appeal in the proper manner when he assessed its admissibility as evidence that had become available that was unavailable at the time the Determination was being made. This includes the Applicants' assertion in its appeal submission that the Complainant was never employed by Geo. The Applicants do not challenge the Appeal Decision on this point. The Member found that if there was any evidence that was "new" in the sense that it had not been previously offered during the proceedings prior to the Determination being issued, it was not adequately identified as such or addressed by the Applicants based on the considerations relating to new evidence that have been established by the Tribunal in many of its decisions. As the Applicants failed to present any pertinent arguments demonstrating that new evidence should be admitted, the Member was entirely right to dismiss the Applicants' appeal on this ground.

37. Regarding the Applicants' contention that the Member fell into error when he neglected to address an element of the test for establishing associated employer status, namely, that there must be some statutory purpose for treating the entities as one employer, I observe that this was not an argument the Applicants raised in the appeal proceedings. The Adjudicating Delegate did, however, deal with it in her Reasons (R11) when she noted that the statutory purpose in this case was to facilitate the collection of wages pursuant to the statute. Elsewhere in her Reasons (R16), the Adjudicating Delegate determined that the Complainant's employers did not pay him all his wages "primarily due to financial difficulties."

38. Since there was no obligation on the part of the Member to re-investigate the facts as found by the Adjudicating Delegate, there was no other evidence satisfying the strictures relating to the tender of new evidence in an appeal that was declared admissible in the appeal proceedings, and there was no plausible argument tendered in the appeal that the Adjudicating Delegate had applied the test for associated employer status incorrectly, I decline to decide that the Appeal Decision should be reconsidered on the natural justice and error of law grounds relating to these matters that have been offered by the Applicants.

39. The Applicants challenge the adequacy of the reasons delivered by the Member in the Appeal Decision. They contend that they submitted evidence sufficient to establish that Geo was not an associated employer of the Complainant, and that the Member failed to observe the principles of natural justice because he did not "deal with" the Adjudicating Delegate's conclusion to the contrary in detail. The Applicants refer to the following statement of the Member in paragraph 40 of the Appeal Decision:

> …my assessment indicates the deciding Delegate made no error of law in making the Determination. The factual findings made in the Determination are adequately supported by the

> record and the applicable statutory provisions and legal principles were correctly applied by the deciding Delegate to the facts as found.

40. The Applicants say the Member's statement discloses error, on natural justice grounds, because it fails to incorporate any detailed analysis of the applicable evidence, the statutory provisions that are engaged, or the way the relevant legal principles should be applied to reach a result that is correct. The Applicants cite in support the decision of the Federal Court of Appeal in *Garcia v. Canada (Attorney General)*, 2001 FCA 200 where the court intervened on judicial review to set aside a decision of the Pension Appeal Board because the Board's decision "…does not accept, reject, or analyse any of [the] evidence, but simply concludes that in its opinion the applicant does not meet the strict requirements of the Act. No explanation for the conclusion is expressly stated."

41. I acknowledge the authority of the *Garcia* decision. However, in the case now before me, the circumstances are different.

42. The Tribunal is obligated to provide written reasons for its decisions (see *ESA* section 103, and the *Administrative Tribunals Act*, SBC 2004 c.45, section 51). As the Supreme Court of Canada has affirmed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paragraph 81, the purpose of reasons is to demonstrate "justification, transparency and intelligibility" in the administrative process under scrutiny.

43. One of the factors that informs a discussion of the adequacy of reasons is that they must be responsive to the submissions of the parties. In this case, the Applicants' position in the appeal was that the Determination should be set aside on the grounds that there had been a failure of natural justice, and that evidence was available that was not available at the time the Determination was being made. The Applicants made no allegation in the appeal that the Determination was tainted on the ground that the Adjudicating Delegate had committed errors of law. There were, therefore, no discrete, identifiable submissions from the Applicants regarding errors of law to which the Member's reasons in the Appeal Decision ought to have provided a response.

44. In dismissing the Applicants' claim that the Determination exhibited a failure of natural justice, the Member observed, correctly in my opinion, that the Applicants had failed to identify any basis for a finding that the process followed by the Director was unfair.

45. As I have noted above, the Member did provide detailed reasons why the evidence the Applicants sought to tender in the appeal proceedings as "new" pursuant to section 112(1)(c) of the ESA should not be admitted on that basis. It cannot, therefore, be accepted that the Member did not consider that evidence.

46. I am also of the view that, in the circumstances here presented, the Member provided adequate reasons for declining to find that the Adjudicating Delegate committed an error of law following the Member's assessment of the Determination on this basis undertaken on his own motion. In addition to the comments of the Member excerpted from paragraph 40 of the Appeal Decision relied upon by the Applicants, set out above, the Member went on to say this at paragraph 41 concerning his reasons for drawing this conclusion:

> At its core the submission presented on behalf of the associated employer does not do more than express disagreement with the conclusions reached by the deciding Delegate on the issues listed in

> the Determination that have been challenged in these appeals. Most of the points raised in the submission simply reiterate the position taken during the investigation. An analysis of the Determination clearly indicates each of these points were addressed, some of them extensively, in the reasons provided by the deciding Delegate.

47. This passage affirms that, instead of repeating the analysis of the Adjudicating Delegate in her Reasons regarding the disposition of the associated employer issue, the Member elected to incorporate it by reference into the Appeal Decision, thereby adopting it for the purposes of deciding the appeal. That being so, I am not persuaded that the Member's reasons on this point merely state a conclusion, without proper analysis, such that they lack the requisite justification, transparency, or intelligibility.

ORDER

48. Pursuant to section 116 of the *ESA*, I order that the Appeal Decision referenced as 2023 BCEST 55 be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal