



An appeal

- by -

ProTruck Collision & Frame Repair Inc.
(“ProTruck”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2015A/45

DATE OF DECISION: July 23, 2015

DECISION

SUBMISSIONS

Diana Wright on behalf of ProTruck Collision & Frame Repair Inc.
Melony Forster on behalf of the Director of Employment Standards

OVERVIEW

1. This is an interim decision in an appeal filed by ProTruck Collision & Frame Repair Inc. (“ProTruck”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued on March 3, 2015 (the “Determination”). In the Determination, the Director found that ProTruck had contravened sections 58 and 63 of the *Act* in failing to pay its former employer, Steven Martin Thomas, compensation for length of service and annual vacation pay. ProTruck has appealed the Determination arguing that the delegate erred in law and failed to observe the principles of natural justice. ProTruck also argues that new evidence has become available that was not available at the time the Determination was issued.
2. Following the filing of the appeal, the Director disclosed the section 112(5) “record.” ProTruck has objected to the completeness of that record. This is my decision on that objection.

FACTS

3. The Determination was issued after an investigation pursuant to section 76 of the *Act*.
4. ProTruck contends that the record ought to contain any records in written and/or electronic format, including any records of telephone conversations, emails, and any other form of correspondence or communication that Melony Forster, the delegate, and Ken Proulx, an employee of the Employment Standards Branch, had with individuals concerning the complaint. (I note parenthetically that ProTruck also argued it has been prejudiced because certain documents that were disclosed in the record were not disclosed to ProTruck during the investigation process. However, that is an issue to be dealt with in the appeal, and not an issue relating to the completeness of the record.)
5. ProTruck submits it is essential for the Tribunal to have the missing records so the Tribunal can determine whether the delegate adhered to the principles of administrative fairness and natural justice during the investigation and in making the Determination.
6. With respect to the request for all records of telephone conversations, emails, and any other form of correspondence or communication on the file, the delegate submits that “[n]otes made during the conduct of an investigation are not customarily provided as part of the Record, as the verbal statements of the parties that contained relevant information are recorded in the decision.”

DECISION

7. When defining the ambit of the section 112(5) record, the governing principle is not materiality or reliance, but availability. The issue of what constitutes the section 112(5) “record” was canvassed by the Tribunal in *Super Save Disposal Inc. - and - Acton Transport Ltd.* (BC EST # D100/04). In that decision, the Member stated:

The record must also include “any witness statement”. Individual parties and their witnesses will likely give *nova 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.

...

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.

8. In this case, ProTruck seeks records of telephone conversations, emails, or other form of correspondence or communication that the delegate or another employee of the Employment Standards Branch had with individuals concerning this complaint.
9. The issue at this stage of the proceeding is not whether the delegate complied with the requirements in section 77 to “make reasonable efforts to give a person under investigation an opportunity to respond”. Rather, the issue is whether the delegate has complied with the section 112(5) requirement to provide the record. I find that any records of conversations with witnesses or other individuals who provided evidence to the delegate (or another employee of the Employment Standards Branch) are documents that should be included as part of the record in this case, whether or not the delegate relied on this evidence.

ORDER

10. In accordance with subsections 109(1)(e), (g) and (h) of the *Act*, I make the following Order:

The Director shall disclose any documents in written and/or electronic format that record evidence provided by individuals giving evidence in relation to the complaint. Such disclosure shall be completed **no later than August 7, 2015**.

Carol L. Roberts
Member
Employment Standards Tribunal