

An appeal

- by -

Golden Feet Reflexology Ltd.  
("Golden Feet")

- 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:** Marnee Pearce

**FILE No.:** 2017A/84

**DATE OF DECISION:** October 16, 2017

## DECISION

### SUBMISSIONS

Brahm Dorst	counsel for Golden Feet Reflexology Ltd.
Jennifer Jing Yi Feng	on her own behalf
Janko Predovic	on behalf of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Golden Feet Reflexology Ltd. (“Golden Feet”) has filed an appeal of a Determination issued by Janko Predovic, a delegate (the “Delegate”) of the Director of the Employment Standards (the “Director”), on May 10, 2017.
2. The Determination concluded that Golden Feet had contravened section 21 (business costs), section 40 (overtime), section 45 (statutory holiday pay), and section 58 (annual vacation pay) of the *ESA* when Jennifer Jing Yi Feng’s (the “Respondent”) employment ended, and ordered Golden Feet to pay the Respondent business costs of \$93.82, overtime in the amount of \$117.72, statutory holiday pay in the amount of \$358.02, annual vacation pay in the amount of \$1,771.86, accrued interest pursuant to section 88 of the *ESA* equalling \$75.68, and to pay five administrative penalties of \$500.00 each. The total amount of the Determination is \$4,917.10.
3. This appeal alleges the Director erred in law, failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was made; a cancellation of the Determination is requested.
4. While the specific arguments will be fleshed out later, the Respondent, counsel for Golden Feet, and the Delegate have filed submissions on appeal.
5. A preliminary issue has arisen concerning the section 112(5) record that will be addressed before turning to the merits of the appeal.

### PRELIMINARY ISSUE – THE RECORD

6. Has the Director provided the Tribunal with the complete section 112(5) record?

### FACTS AND ARGUMENTS – THE RECORD

7. On June 26, 2017, the Tribunal acknowledged to the parties that an appeal had been received from Golden Feet, and requesting production of the section 112(5) record (the “record”).
8. The Tribunal received the record from the Delegate on July 4, 2017. The record included a cover page entitled “Employment Standards Tribunal Appeal Record”, and an index of 4 included categories of information – BC Company Summary, Agreed Statement of Facts, Employee Materials, and Employer materials. The disclosed information totaled 377 pages.

9. On July 6, 2017, the Tribunal sent a copy of the record to Golden Feet.
10. On July 20, 2017, the Tribunal received a submission from Golden Feet indicating that there were two website screen shots used during cross-examination that were missing from the record and should be included, and that documents within the record and numbered 66 – 86 and 109 – 120 were not previously disclosed to the appellant. Concerning these latter documents, Golden Feet acknowledged that there appeared to be no reliance placed on these, and Golden Feet objected to any reliance on evidence or communications that were not provided to Golden Feet until after the hearing.
11. The Delegate responded to the appellant’s objections to the record on July 25, 2017, agreeing that the two website screen shots should be included in the record. The Delegate did not object to pages numbered 66 – 86 being struck from the record as zero reliance was placed on them in the Determination.
12. The Delegate also confirmed on July 25, 2017, that pages 109 – 120 of the record were disclosed to Golden Feet with the possible exception of emails between the complainant’s representative and the Employment Standards Branch. The Delegate did not object to these particular emails being struck from the record, as zero reliance was placed on them in the issuance of the Determination.
13. Golden Feet’s final response of August 2, 2017, indicates that there is some “overlap” but that pages 109 to 120 (12 pages) are not the same as the 8 pages attached to the July 5, 2016, email; only 61 pages of the 115 pages of complainant documents in the “proposed record” were accounted for; and regardless of whether all of the documents disclosed were considered part of the record, Golden Feet objected to placing reliance on documents that were unsworn, uncertified, and not spoken to or relied upon at the hearing.
14. The initial appeal document dated June 19, 2017, and filed by Golden Feet’s counsel included attachments. The 6<sup>th</sup> attachment was described as: “Copies of the Respondent’s Third and Fourth amended witness lists.” As the appellant’s witness lists were not provided to the Tribunal on July 4, 2017, in the material disclosed by the Director and described as the “Employment Standards Tribunal Appeal Record”, inquiries were undertaken.
15. On August 31, 2017, the Tribunal requested submissions from the Director and the Respondent concerning the record. The Director was asked to provide a submission concerning whether or not the missing witness list was indeed part of the record, as it had not been provided to the Tribunal by the Delegate in his submission of July 4, 2017. The Respondent was asked to review the record as provided, and advise if documents had been submitted during the complaint and investigation process that were not included in the record.
16. A response dated September 15, 2017, was received by the Tribunal from the Delegate. The Delegate’s response to the Tribunal’s query was that the appellant’s witness list was “erroneously omitted from the Record”, and a copy of a document entitled “4<sup>th</sup> Amended List of Witnesses for Complaint Hearing” submitted by Brahm Dorst, counsel for Golden Feet, was attached.
17. The September 15, 2017, response from the Delegate also confirmed that screenshots from a website named “Vansky”, previously identified as absent from the appeal record, were, upon further inspection, included from the outset and were numbered pages 374 – 377 in the record that was originally submitted to the Tribunal on July 4, 2017.
18. The September 11, 2017, response from the Respondent did not identify any additional material absent from the record.

19. Although not requested to do so, Mr. Dorst responded to the Tribunal's August 31, 2017, letter concerning the witness list missing from the record; Mr. Dorst, by way of email to the Tribunal received on September 1, 2017, attached four Golden Feet witness lists. The initial list is entitled "List of Witnesses for Complaint Hearing", while the next two were entitled "Amended List of Witnesses for Complaint Hearing", and the final list was described as "4<sup>th</sup> Amended List of Witnesses for Complaint Hearing". None of the lists were dated.
20. Only one of the four witness lists included in Mr. Dorst's September 1, 2017, material was ultimately submitted to the Tribunal by the Delegate as part of the Record – the earlier 3 lists were not provided to the Tribunal.
21. No further submissions on the issue of the record were received.

### ANALYSIS – THE RECORD

22. When addressing the record, both Mr. Dorst, counsel for Golden Feet, and the Delegate have raised arguments concerning the evidentiary value of documents, and whether or not specific documents should be relied upon during this appeal. Both parties have discussed the removal of items from the record.
23. Turning to the legislation and leading Tribunal decisions regarding 'the record', it is important to note that there are sections of the *ESA* dealing with the Director's disclosure obligations – section 77 and subsection 112(5), and separate and distinct obligations and considerations apply in each case. The governing test regarding disclosure under section 112(5) is not necessarily relevance or reliance on the material, but rather whether the documents were "before the director at the time the determination, or variation of it, is made". The issue at this stage is not whether the Director complied with the requirements in section 77 to "make reasonable efforts to give a person under investigation an opportunity to respond", but rather whether the Director has complied with the section 112(5) requirement to provide the record.
24. The Director, after having been served with the appeal notice "must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director" (subsection 112(5) of the *ESA*).
25. The governing Tribunal decision relating to contents of the record is *Super Save Disposal Inc. – and – Actton Transport Ltd.* (BC EST # D100/04) [*Super Save*]. This decision discusses in detail what constitutes the section 112(5) record, and reads, in part:

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 the document when making his or her determination (say, because the delegate considered it to be irrelevant or not probative).

26. *Super Save* addresses resolving disputes concerning the record, and reads, in part:

I am, however, prepared to accept that, in the ordinary course of events, there is a rebuttable presumption that the documents delivered to the Tribunal by the Director pursuant to section 112(5) constitute the complete record. The Tribunal should embark on an inquiry into the completeness of the record only if a party has raised a *bona fide* and presumptively meritorious argument that the record produced is deficient.

In other words, the party challenging the record bears the burden of proving a *prima facie* case that the record is incomplete...

27. *Super Save* distinguishes between oral and investigative decisions, with a broader expectation of what constitutes the record existing for investigative decisions. If the decision is investigative for example, the section 112(5) record will include notes recording the evidence of the complainant and other witnesses if, for example, this evidence is gathered by telephone. When this evidence is gathered at an oral hearing, these notes would not be available as part of the record.
28. *Director of Employment Standards, Re: ProTruck Collision & Frame Repair Inc.*, BC EST # RD100/15, discusses the significance of the *Super Save* decision, reading, in part:

...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...
29. Given the finality of the clarification provided within the *Super Save* decision concerning the Director’s disclosure obligations pursuant to section 112(5), I am alarmed that the Delegate in this instance agreed to Golden Feet’s request to remove a portion of the record, rather than relying on the *Super Save* decision and the requirement that the Director provide the complete record regardless of reliance placed on the material contained therein.
30. 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. Offering to remove portions of the record following objections from the appellant concerning the record is a wholly inappropriate response and not within the authority of the Director or his Delegate.
31. At this juncture, it is unclear whether the Director has indeed provided the record in its entirety as required pursuant to section 112(5) of the *ESA*. The document that was identified as missing from the record – the Appellant’s witness list – was provided by the Delegate in the September 15, 2017, letter to the Tribunal with the explanation that the list had been “erroneously omitted from the Record”. However, it has since become apparent that there were three earlier witness lists likely submitted to the Delegate, which have not been included in the record as provided within the original and supplemental disclosures.
32. The complete record is essential to adjudicating appeals since the Tribunal generally adjudicates appeals without holding an oral hearing (see section 103 of the *ESA* that incorporates, by reference, section 36 of the *Administrative Tribunals Act*) and therefore it is critically important that the Tribunal know what information and documentation was, or was not, before the Director when the Determination was being made.
33. I am unable to rely on the completeness of the record as provided by the Delegate to date.
34. The *Super Save* decision has provided direction in these circumstances:

...where an appellant raises a *bona fide* and seemingly meritorious challenge regarding the completeness of the record provided by the Director under s. 112(5), that issue must be resolved before the Tribunal can proceed to adjudicate the appeal on its merits. The Tribunal, not the Director, has the statutory jurisdiction to make a “final and conclusive” decision or order regarding the record (see section 110).

35. As the issue of the completeness of the record must be resolved before the appeal can be adjudicated on its merits, and as the record as provided has been found unreliable, I am making a preliminary order requiring the Director to resubmit the section 112(5) record.
36. Details of the requested format for the production of the record will be provided by way of separate letter. This formatting request is intended to assist the Director in ensuring the required material is properly before the Tribunal, and to assist the Tribunal in determining if the complete record has been provided.
37. Once the Tribunal is satisfied that the record is complete, an adjudication of the appeal on its merits will be undertaken.

### **ORDER**

38. In accordance with the provisions of subsection 2(d), section 109 and 110 of the *ESA*, I make the following Order:

The Director shall resubmit the entire record, as defined by section 112(5) of the *ESA*, to the Tribunal. Such disclosure shall be completed no later than October 30, 2017.

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**Marnee Pearce**  
**Member**  
**Employment Standards Tribunal**