

An Application for Reconsideration

- by -

Zach Anthony
("Anthony")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2017A/11

DATE OF DECISION: August 23, 2017

DECISION

SUBMISSIONS

Derek G. Knoechel	counsel for Zach Anthony
Ian Kennedy	counsel for Suncoast Health Corp.
Laurel Courtenay	counsel for the Director of Employment Standards

OVERVIEW

1. This is a decision on a preliminary question which has arisen in an application for reconsideration filed by Zack Anthony (“Anthony”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”).
2. These proceedings commenced when Anthony and another individual named Michael Hug (“Hug”) filed complaints with the Director of Employment Standards alleging that they were owed wages as a result of their work performed at a medical marijuana production facility operated by Suncoast Health Corp., formerly known as 0955323 BC Ltd. (“Suncoast”).
3. Having conducted an investigation, the Director issued a single determination incorporating both complaints (the “Determination”) dated September 30, 2015. The Determination ordered Suncoast to pay regular wages, overtime wages, statutory holiday pay, annual vacation pay, and interest. The total found to be owed was \$47,759.97. The Determination also imposed \$3,000.00 in administrative penalties.
4. Suncoast appealed the Determination pursuant to section 112 of the *Act*.
5. On March 23, 2016, the Tribunal issued decision BC EST # D058/16 (the “First Appeal Decision”) which, among other things, referred the complaints back to the Director so that pertinent questions identified in the appeal proceedings, which had not been answered in the Determination, could be investigated and decided. More specifically, the Tribunal was of the view that the Director should consider whether the employment relations between Suncoast and the complainants were governed by the *Act*, or whether they fell within federal jurisdiction under the *Canada Labour Code*. In addition, the Tribunal decided that the Director should address whether the complainants were farm workers pursuant to the *Employment Standards Regulation* (the “*Regulation*”) and, if so, how such a designation might affect the calculation of the amounts of wages and penalties Suncoast should be ordered to pay.
6. On July 21, 2016, the Tribunal received the Director’s report on the referral back (the “Report”). Thereafter, the Tribunal sought, and received, further submissions from the parties, including a submission from the Attorney General of British Columbia on the jurisdictional question whether the complaints were properly determinable under the *Act*.
7. On December 21, 2016, the Tribunal issued its final decision BC EST # D164/16 in the appeal proceedings (the “Final Appeal Decision”). The Final Appeal Decision varied the Determination to reflect a finding that Anthony was a farm worker for a part of the period he was employed at the Suncoast facility, and Hug was a farm worker throughout his tenure there. It also referred the complaints back to the Director for the purpose of a recalculation of the complainants’ wage entitlements, as section 34.1 of the *Regulation* meant that their status as farm workers exempted Suncoast from an obligation to adhere to the requirements relating to hours of work, overtime, and statutory holiday pay in Parts 4 and 5 of the *Act*.

8. Anthony's application for reconsideration of the Final Appeal Decision was filed with the Tribunal on January 20, 2017.
9. In his submission delivered in support of his application, Anthony asserted, as a preliminary matter, that the record in the appeal proceedings was incomplete and that "the continuing failure to provide such records will continue to prejudice the complainant on the present application." Through the Tribunal, I requested a submission from the Director regarding this preliminary matter, and later, submissions from Suncoast and Anthony in reply. A series of submissions have now been received from those parties.
10. This decision determines what constitutes the appeal record on this section 116 application for reconsideration.

POSITION OF THE PARTIES

11. In my opinion, the arguments presented by the parties that are relevant to a resolution of the preliminary issue are as follows.
12. Anthony's argument regarding the record addresses two separate concerns.
13. Anthony submits, first, that when the complaints were referred back to the Director as a result of the First Appeal Decision, the Director engaged in a further investigation and fact-finding. In doing so, the Director relied on the existing record, but also supplementary materials delivered by the parties on the referral back (the "Supplementary Materials"). Anthony states that, unbeknownst to him, these Supplementary Materials were not delivered to the Tribunal along with the Director's Report, and so they did not form part of the record that was before the Tribunal when it rendered the Final Appeal Decision.
14. Anthony asserts that he reasonably expected the section 112(5) record would include all materials delivered by all the parties to the Director, including the Supplementary Materials delivered on the referral back. He argues that this expectation was reasonable because communications issued by the Director to the parties throughout the process leading to the Determination stated that all records or documents submitted by the parties would be deemed to be part of the record, and so he could not be expected to appreciate that this policy might not apply to materials delivered on the referral back.
15. Anthony therefore submits that all the Supplementary Materials delivered to the Director on the referral back should form part of the record for the purposes of his application for reconsideration.
16. Second, Anthony submits that throughout the appeal proceedings the record produced to him did not include materials, made available to Suncoast, relating to the complaint filed by Hug. Hug was employed at the Suncoast facility during Anthony's time there. The Director chose to investigate Hug's complaint in conjunction with Anthony's, and the Determination renders a decision in respect of both their complaints. Notwithstanding this, Anthony states that while Suncoast had the benefit of access to the entire record relating to both complaints, he was never provided with the investigatory materials in the record before the Director, the Reasons for the Determination, or any submissions delivered to the Tribunal in the appeal which related to Hug (the "Hug Materials").
17. Anthony argues that this lack of access to the Hug Materials precluded him from assessing whether any of the evidence or findings relating to Hug, or statements made on behalf of Suncoast concerning Hug, might have assisted him in pursuing his own complaint. As I have stated, one of the issues that ultimately confronted both the Director and the Tribunal in these proceedings was whether Anthony and Hug were farm workers

for the purposes of the *Regulation*, a question which turned substantially on an examination of the nature and duration of the duties performed by them at Suncoast's production facility. I infer from Anthony's submission that since he and Hug worked at the facility during the same period, and their complaints were governed, in large part, by the same legal considerations, he should have been provided with the Hug Materials generated in the proceedings before the Director that led to the Determination, and in the appeal.

18. Anthony therefore submits that the Hug Materials should be made available as part of the record to be considered for the purposes of his application for reconsideration.
19. I should add, here, that Anthony also alleges it was a breach of procedural fairness and natural justice that the Supplementary Materials and the Hug Materials were not provided to him prior to the Tribunal's issuing the Final Appeal Decision. He also asserts that the Tribunal failed to observe the principles of natural justice when it did not deliver a request to the Director for the production of the Supplementary Materials generated on the referral back.
20. In my view, these are matters of substance I will have to address when I render my decision on Anthony's application for reconsideration on its merits. For the moment, the issue before me is limited to a determination of what material properly forms part of the record for the purposes of the section 116 application for reconsideration.
21. The Director submits that the Report it prepared and delivered is consistent with the orders made by the Tribunal in the First Appeal Decision. The Director says that, in practice, it is the Tribunal that requests the record from the Director, and sets a time for delivery. In this case, the Tribunal requested the record created in the proceedings preceding the Determination, but did not request the documents and information compiled thereafter. In the result, the Supplementary Materials created on the referral back were not delivered to the Tribunal.
22. All of that said, the Director opines that "in order to be consistent with the administrative law principles of procedural fairness and natural justice" the "record" generated on the referral back should be disclosed to the parties. Accordingly, the Director has delivered the Supplementary Materials to the Tribunal.
23. At the same time, the Director rejects Anthony's claim that the Hug Materials should also have been produced to him. The Director submits that Anthony and Hug made separate complaints, and that the Director "handled" each complaint as "an individual complaint". The Director states further that the Determination relating to Anthony was based upon the evidence gathered in the investigation of Anthony's complaint, the issue of Hug's entitlement to wages was not relevant to a resolution of Anthony's claim, and it was speculative to suggest that any of the records created in respect of Hug might have been of assistance to Anthony.
24. Finally, the Director asserts that since the Hug Materials contain personal information, they should not be disclosed without his consent, except as provided for under the *Freedom of Information and Protection of Privacy Act* RSBC 1996 c.165 ("FOIPPA").
25. Following the identification of the preliminary issue relating to the integrity of the record on the section 116 application for reconsideration, the Tribunal corresponded with Hug, requesting that he advise whether he consented to a disclosure to Anthony of the materials in the record that related to his complaint, together with submissions made by him to the Director, and to the Tribunal in the appeal. Hug responded, advising the Tribunal in writing that the Tribunal was authorized to release the subject documents. The Tribunal subsequently disclosed these documents to Anthony.

26. Anthony now submits that the Hug Materials should form part of the record for the purposes of the application for reconsideration. A reason Anthony offers is that they are said to contain evidence relating to the division of labour at the Suncoast production facility, and so they are relevant when consideration is given to the issue whether the Final Appeal Decision should have determined that Anthony was a farm worker pursuant to the *Regulation* for a part of the time he was working there.
27. Suncoast's submission supports the position of the Director regarding the record. It contends that the First Appeal Decision ordered the Director to deliver the Report, but did not request the Director to provide it with the parties' submissions on the referral back. Suncoast also asserts that a review of the Tribunal's *Rules of Practice and Procedure* (the "Rules") would have revealed to Anthony that the Director is only required to provide the Tribunal with the record that was before the Director at the time the Determination was made. Accordingly, Anthony should have understood that the submissions from the parties on the referral back would not be delivered to the Tribunal along with the Report. Further, Suncoast argues that Anthony had the opportunity to make a submission to the Tribunal after the delivery of the Report, which he did, before the Final Appeal Decision was issued.
28. Suncoast also submits that throughout the several years during which these proceedings have continued Anthony has known that Hug was making submissions to the Director and to the Tribunal that were not being forwarded to him, yet he raised no complaint until the Final Appeal Decision was issued and he then elected to bring this application for reconsideration.
29. Suncoast affirms the Director's argument that Anthony was never entitled to the Hug Materials, as the latter's complaint was an entirely separate matter, and the Tribunal came to different conclusions as to the entitlement of Anthony and Hug to wages, given the different effect on each of their complaints due to the application of the farm worker exemption.
30. Suncoast also contends that since the Hug Materials contain personal information, they could not have been disclosed to Anthony without Hug's consent, citing *FOIPPA*.
31. Finally, Suncoast addresses the fact that it received Hug's submissions throughout, while Anthony did not. Suncoast disagrees that this resulted in a denial of procedural fairness to Anthony. It says that Hug filed his complaint against Suncoast, and Suncoast was obliged to respond to it.

DISCUSSION

32. The statutory elements of the Director's obligation to provide a record to the Tribunal once an appeal is filed are set out in section 112 of the *Act*, the relevant parts of which read as follows:

- 112 (2) A person who wishes to appeal a determination to the tribunal ... must, within the appeal period ...
- (a) deliver to the office of the tribunal
 - (i) a written request specifying the grounds on which the appeal is based ...
 - ...
 - (b) deliver a copy of the request under paragraph (a)(i) to the director.

...

- (5) On receiving a copy of the request under subsection 2(b) ..., 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.

33. Subsection 11(1) of the *Administrative Tribunals Act* SBC 2004 c.45 (the “*ATA*”) provides that the Tribunal “has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.”

34. The Tribunal’s *Rules* also address the issue of the production of a record. In particular, Rule 19 says this, in part:

RULE 19 THE DIRECTOR’S RECORD

- (1) The Director must, as required by section 112(5) of the *Act*, provide the Tribunal with a complete copy of the Record that was before the Director at the time the determination was made ...
- (2) The Record must be provided by the deadline set by the Tribunal.
- ...
- (4) The Director must advise the Tribunal whether or not the submissions in the Record were disclosed to the other parties prior to the issuance of the Determination.

35. Rule 22(1)(c) also provides that once the Tribunal has assessed the documents received in respect of an appeal, it will request, in writing, that the Director provide the Tribunal with the record that was before the Director at the time the determination was made. Rule 22(3) states that the Tribunal will provide to the appellant a copy of the record delivered by the Director, and will request that the appellant deliver, within a stipulated time, any objections that the record is incomplete. If the appellant objects, Rule 22(4) says that the Tribunal will request a response from the Director.

36. Rule 23(1) clarifies that if an appeal is not summarily dismissed, the Tribunal will invite the Director and any respondents to respond to the merits of the appeal. Other parts of Rule 23 contemplate that the Tribunal will make the record available to the other parties to an appeal. That said, Rule 9(1) states that the Tribunal “may sever information from documents it discloses, subject to natural justice and procedural considerations.”

37. The Tribunal has other statutory powers to require the inspection or delivery of documentary records. For example, section 109 of the *Act* empowers the Tribunal to:

- “inspect any records that may be relevant to an appeal or a reconsideration” (ss. 109(1)(e));
- “require a person to disclose, either orally or in writing, a matter required under this Act and require the disclosure to be made under oath or affirmation” (ss. 109(1)(g)); and
- “order a person to produce, or to deliver to a place specified by the tribunal, any records for inspection under paragraph (e)” (ss. 109(1)(h)).

38. In addition, section 110 of the *Act* vests in the Tribunal the “exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration ... and to make any order permitted to be made.” The section states that “a decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.” The Tribunal has decided that the authority provided in section 110 includes final and conclusive decisions or orders relating to the integrity of the record (see *Super Save Disposal Inc. and Acton Transport Ltd.*, BC EST # D100/04).

39. Rule 11(1) also canvasses the powers of the Tribunal to compel the giving of evidence and the production of documents. It reads:

RULE 11 COMPELLING WITNESSES AND ORDERING DISCLOSURE

- (1) At any time before or during an appeal or application for reconsideration, the Tribunal may make an order requiring a person:
- (a) to participate in a telephone conference call or in-person hearing to give evidence that is admissible and relevant to the appeal or application for reconsideration;
 - (b) to produce for the Tribunal, or a party, a document or other thing in the person's possession or control, as specified by the Tribunal, that is admissible and relevant to an issue in the appeal or reconsideration application.

40. Rule 11(2) permits a party to an appeal or reconsideration to apply for a similar order.

41. Section 103 of the *Act* provides that various sections of the *Administrative Tribunals Act* (“*ATA*”) apply to the Tribunal. These include Sections 14 and 40 of the *ATA*.

42. Subsection 40(1) of the *ATA* stipulates that the Tribunal “may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.”

43. Section 14 of the *ATA* provides that “in order to facilitate the just and timely resolution of an application the tribunal, if requested by a party . . . , or on its own initiative, may make an order . . . (c) in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings.” Section 15 says that a tribunal “may make an interim order in an application.”

44. Part I of the Tribunal’s *Rules* also state that they are subject to any directions the Tribunal may make in a particular case.

45. In this case, I understand that the Hug Materials and the Supplementary Materials have now been disclosed to Anthony. As I indicated earlier in these reasons, I will leave for a later time, when I consider the application for reconsideration on its merits, a decision regarding Anthony’s contention that the failure to deliver these materials to him during the appeal process means that the Final Appeal Decision is tainted in a way that engages the remedial authority of the Tribunal pursuant to section 116. The issue to be decided now is whether those documents are properly before me for the purposes of the application for reconsideration.

46. The fact that all the documents have now been produced does not determine whether the Hug Materials and the Supplementary Materials are part of the record for the purposes of the application for reconsideration, or alternatively should be admitted by exercise of my discretion pursuant to the statutory powers of the Tribunal outlined above.

47. To answer that question, I return to subsection 112(5) of the *Act*. Once Suncoast appealed the Determination, the statute required that the Director provide the Tribunal with the record that was before the Director at the time the Determination was made. There was only one Determination in this matter, notwithstanding that it incorporated decisions relating to two separate, albeit very similar, complaints. Suncoast’s appeal challenged the Director’s conclusions with respect to the claims of both complainants.

48. On a plain reading of subsection 112(5), the Director was obliged to deliver to the Tribunal the entire record relating to the complaints of both Anthony and Hug that the Director considered prior to issuing the

Determination. This is what the Director appears to have done, subject to certain redactions relating to personal information of the parties that no one has indicated are suspect. The Hug Materials were part of that subsection 112(5) record. The Supplementary Materials were not, as they did not exist until after the issuance of the Determination.

49. Although the Hug Materials were part of the subsection 112(5) record, the Tribunal followed its usual practice of not disclosing material specific to the complaint of one employee to other employee complainants, as it explained in writing to the parties at the time. On December 31, 2015, the Tribunal wrote to the parties concerning the information and documents that would be made available to them for the purposes of the appeal. The letter said this, in part:

To protect privacy rights under the *Freedom of Information and Protection of Privacy Act* ("FOIPPA"), the Tribunal's practice is that it may sever information from documents it discloses to parties while ensuring fulfilment of natural justice and the processes under the *Employment Standards Act* (the "*Act*") as determined by the Tribunal.

In this case, the Tribunal has only provided each employee with the information that pertains to that employee.

50. This practice on the part of the Tribunal was in accord with the process implemented by the Director in the proceedings leading to the Determination. In the Reasons for the Determination, the Director stated that in order to protect the complainants' privacy the body of the Reasons would only contain general information relating to both of them, while the information and calculations specific to each of them would be set out on separate summary sheets. The Director said that each complainant would receive the summary sheet referable to his own complaint, while Suncoast would receive the summary sheets generated in respect of both complaints.
51. Prior to Anthony's making this application for reconsideration of the Final Appeal Decision, neither he nor any other party asserted a claim that the record was incomplete, or that any party should have received other parts of the record delivered to the Tribunal which the Tribunal did not disclose to that party for the purposes of the appeal.
52. As I have stated, whether the Tribunal should have disclosed the Hug Materials to all the parties is a question that Anthony has raised for the first time on this application for reconsideration. However, it is a question for another day. The question today is whether they are properly before me as part of the record for purposes of reconsideration.
53. In my opinion, the record for the purposes of this section 116 application for reconsideration is the record that was before the Tribunal at the time that the Final Appeal Decision was made. That record included the Hug Materials. As noted above, the Tribunal's practice is to only provide each employee with the information in the record that pertains to her or him, in order to respect privacy rights. Anthony did not object when advised of this practice by the Tribunal's December 31, 2015 letter, sent during the appeal process. However, he now does seek disclosure of this aspect of the record (the Hug Materials) for purposes of reconsideration.
54. The privacy concerns relating to the Hug Materials, and the documents and information relating to Hug in the Supplementary Materials, have been assuaged as a result of the Tribunal's receiving Hug's consent to the disclosure to Anthony of all the material generated relating to his complaint during the Director's investigation, on the referral back, and in the appeal proceedings.

55. The Director and Suncoast assert that Hug's entitlement to wages and the potential effect of the farm worker exemption on his claim are not relevant when a decision is made regarding Anthony's complaint. They also say it is speculative that the Hug Materials, and the documents and information relating to Hug in the Supplementary Materials, might be relevant to Anthony's complaint and appeal.
56. However, the decision of the Tribunal in *Super Save*, noted earlier, discusses the material that should form the record when relevance is being considered. The Tribunal decided that the Director's conclusion regarding the relevance of documents is not the appropriate governing principle. The Tribunal said this:

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.

57. While the Tribunal in *Super Save* was commenting on the principles applicable to which documents should be included in the section 112(5) record, I find the same principles apply with respect to the record for purposes of the section 116 reconsideration process. As indicated in this passage, the test for inclusion is whether the document was available to be considered, not whether it was actually relied upon in making the determination. Here, the Hug Materials were available for consideration by the Tribunal Member who made the Final Appeal Decision. Privacy concerns, which might otherwise have precluded their inclusion, have been assuaged in this case. I find the Hug Materials are therefore part of the record for purposes of this reconsideration process and may be relied upon as such.
58. The Supplementary Materials that were generated for the Director on the referral back were not delivered to the Tribunal during the appeal process. They did not, as a consequence, form part of the record that was before the Tribunal Member when the Final Appeal Decision was made. I find they do not, therefore, form part of the record on the section 116 application for reconsideration.
59. That said, the Tribunal has the power to admit documents which are not part of the record where appropriate. Here, I discern that Anthony may wish to incorporate references to the Supplementary Materials in his submissions on the merits of the application for reconsideration. The Director takes the position that it is “consistent with the administrative law principles of procedural fairness and natural justice” for the Supplementary Materials to be disclosed to the parties, and the Director has delivered them to the Tribunal for that purpose. In the circumstances, I exercise my discretion to direct that the Supplementary Materials be disclosed to the parties, if that has not already occurred, and I permit the parties to rely on them in making their submissions during this process.

ORDER

60. Pursuant to the *Act*, I find that the record on this application for reconsideration is the material that was before the Tribunal at the time the Final Appeal Decision was made, which includes the Hug Materials. I further exercise my discretion under the *Act* to order and direct that the Supplementary Materials be disclosed to the parties, if that has not already occurred. Finally, I order and direct that the parties may rely on the Hug Materials and the Supplementary Materials in making their submissions during this reconsideration process.
61. Having issued these reasons, I invite Anthony to provide any further submissions on the merits of the application, should he wish. The Respondents will have an opportunity to make a response submission to Anthony's submissions in due course.

Robert E. Groves
Member
Employment Standards Tribunal