

Citation: Overseas Career and Consulting Services Ltd.
and Overseas Immigration Services (Re)
2018 BCEST 36

An appeal

- by -

Overseas Career and Consulting Services Ltd. and
Overseas Immigration Services Inc.
("Overseas")

- of a Determination issued by -

The Director of Employment Standards

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

TRIBUNAL MEMBER: David B. Stevenson

FILE NO.: 2017A/152

DATE OF DECISION: April 18, 2018

DECISION

SUBMISSIONS

Daniel Sorensen

counsel for Overseas Career and Consulting Services Ltd.
and Overseas Immigration Services Inc.

OVERVIEW

1. Overseas Career and Consulting Services Ltd. (“OCC”) and Overseas Immigration Services Inc. (“OIS”), (collectively, “Overseas”) has filed an appeal under section 112 of the *Employment Standards Act* (the “*ESA*”) of a Determination issued by Kara L. Crawford, a delegate of the Director of Employment Standards (the “Director”) on November 24, 2017.
2. To provide context, the Director noted in the Determination it was not disputed that OCC and OIS were associated companies within the meaning of section 95 of the *ESA* and treated them as such in the Determination. While the appeal expresses some concern over the effect on OIS of being associated with OCC as one employer under the *ESA*, the appeal does not contain any indication the Director erred in doing so or seek to challenge the merits of associating the companies under the *ESA*.
3. The Determination found Overseas had contravened Part 2, section 10 of the *ESA* and section 3 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of Mohammad Hassan Mohammad Shafy (“Mr. Shafy”) and ordered Overseas to pay Mr. Shafy wages in the amount of \$7,721.91 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$8,721.91.
4. This appeal is grounded in error of law and failure by the Director to observe principles of natural justice in making the Determination. Overseas seeks to have the Determination cancelled or varied.
5. The Tribunal initially received two Appeal Forms and supporting documents on December 28, 2017. The appeals did not satisfy the requirements of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) and legal counsel on the two appeals was instructed to correct them and refile in accordance with the requirements set out in the *Rules*. Corrected appeals were delivered to the Tribunal on January 3, 2018. Legal counsel was advised in correspondence dated January 12, 2018, that the appeal filed on behalf of Kuldeep Kumar Bansal (“Mr. Bansal”), a director and officer of Overseas, would not be advanced by the Tribunal, and the file would be closed, as there was nothing in the appeal showing a Determination had been issued against Mr. Bansal.
6. This decision addresses only the appeal filed by Overseas.
7. In other correspondence dated January 12, 2018, the Tribunal acknowledged having received an appeal from Overseas and, among other things, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and advised that, following such review, all or part of the appeal might be dismissed.

8. The record has been provided to the Tribunal by the Director and a copy has been delivered to legal counsel for Overseas, as well as to Mr. Shafy, and an opportunity has been provided to object to its completeness. No submission was received from Mr. Shafy. There was a submission from Overseas concerning a perceived absence of material in the record which the Director, in response, indicated had, in fact, been included. The matter was not pursued further and, absent any other objection, the Tribunal accepts the record as being complete.
9. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
- 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
- (a) the appeal is not within the jurisdiction of the tribunal;*
 - (b) the appeal was not filed within the applicable time limit;*
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;*
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
 - (f) there is no reasonable prospect the appeal will succeed;*
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;*
 - (h) one or more of the requirements of section 112(2) have not been met.*
10. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Shafy will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed and what effect, if any, the delay in filing a complete appeal will have.

ISSUE

11. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

12. The appeal submission filed by Overseas sets out a lengthy “Factual Background”, most of which does not conform to, and in some respects, directly contradicts, findings of fact made in the Determination and conclusions drawn from those findings.

13. The findings upon which this appeal will be adjudicated are not the facts as asserted in the appeal submission but those findings and conclusions of facts made in the Determination unless those findings and conclusions are shown to be an error of law.
14. For the purposes of this appeal the key findings and conclusions of fact made in the Determination are:
- (a) Overseas received an amount of \$10,545.54 from Mr. Shafy;
 - (b) Mr. Shafy was a person who wished to immigrate to Canada and was seeking employment;
 - (c) The money in point (a), above, was paid by Mr. Shafy to Overseas;
 - (d) The money was paid in exchange for employment; and
 - (e) Some of the money paid by Mr. Shafy, if found to be wages, fell outside the statutory recovery period.
15. Additional findings that have some bearing on this appeal include the findings that Mr. Shafy performed all the immigration related tasks, that Overseas provided no documents demonstrating the fee charged to and paid by Mr. Shafy was for immigration related assistance and that Overseas did not provide most of the services contemplated by the “Retainer Agreement”.
16. The Director preferred Mr. Shafy’s evidence over that given by Mr. Bansal, finding the former’s answers to questions was “clear and consistent” while the latter was “evasive in that he did not answer questions directly and mainly spoke in generalities”. Mr. Bansal could not explain several matters of some importance to the position taken by Overseas.

ARGUMENT

17. Overseas submits the Director erred in law in finding a contravention of section 10 of the *ESA*, arguing a version of the facts that would make them an immigration consultant and not a person in contravention of section 10.
18. Alternatively, Overseas submits that even if there was a contravention of section 10, the only part of the fee charged to Mr. Shafy that offend the *ESA* was the initial retainer fee, which cannot be recovered as it falls outside the recovery period found in section 80 of the *ESA*.
19. In the further alternative, Overseas submits that even if there is a contravention of section 10 of the *ESA*, Mr. Shafy is only entitled to recover those amounts paid to Overseas that were related to payment for employing or obtaining employment for him and, it is submitted, as “at least a portion” of the amount paid by Mr. Shafy in November 2016 and January 2017 were for immigration services, Overseas is entitled to be paid for those services.
20. Overseas submits the Director exceeded its jurisdiction by finding Overseas could not charge any part of the payments received from Mr. Shafy for “immigration services”. Overseas says the Director failed to “fully recognize and consider” the immigration services provided to Mr. Shafy.

21. Overseas says the Director erred in finding a contravention of section 3 of the *Regulation*, submitting all the information required by section 3 was contained in the records provided by Overseas.
22. Overseas argues the Director failed to observe principles of natural justice by not holding an oral hearing on the complaint and by not allowing Mr. Bansal more time than one day to provide documents substantiating the immigration service provided by Overseas to Mr. Shafy.

ANALYSIS

23. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

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 made.*

24. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

25. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

26. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] BCJ No. 2275 (BCCA):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

27. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the Director committed an error of law on this facts, Overseas is required to show the findings of fact and the conclusions reached by the Director on the facts were inadequately supported, or

wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. Carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26 – 29.

28. Overseas has not succeeded in meeting this burden.
29. Overseas suggestion that it should be awarded 'some' amount for immigration services ignores the findings made by the Director that Mr. Shafy performed all of the immigration related tasks and that Overseas provided no documents showing the fees charged to Mr. Shafy was for immigration related assistance.
30. I find Overseas has failed to show there was any error of law made by the Director.
31. The findings of fact were solidly grounded in the evidence that was before the Director and the conclusions reached from the facts were soundly reasoned in the Determination. I add, based on my assessment of the evidentiary foundation, the findings and conclusions made by the Director were strongly compelled by the evidence and were entirely correct.
32. This appeal does nothing more than seek an alternative result based on an assertion of an alternative factual reality that is not supported by the record or the analysis in the Determination.
33. I reject the contention the Director had no jurisdiction over Mr. Shafy's complaint. The Director has jurisdiction over matters alleged to contravene provisions of the *ESA*.
34. I also reject the suggestion there was no breach of section 3 of the *Regulation*. Overseas contends that all the information required by that section was available in the records provided to the Director by Overseas. The submission made by Overseas does not indicate where, within the records provided by them, this information might be found nor does it provide any argument on why and how this information satisfies the requirements of section 3.
35. In respect of the "natural justice" arguments, I find, once again, that Overseas has not satisfied the burden imposed when seeking to advance this ground of appeal.
36. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. I also find Overseas has not succeeded in meeting this burden.
37. Section 77 of the *ESA* and the principles of natural justice require the parties have the opportunity to know the case they have to meet, the opportunity to present their own evidence in respect of the complaint and the opportunity to respond to the evidence and arguments presented by an adverse party: see *Imperial Limousine Service Ltd.*, BC EST # D014/05. Neither section 77 of the *ESA* nor principles of natural justice require or provide an absolute right to an oral hearing before the Director, or before the Tribunal: *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. It follows that a party has no absolute right to cross-examine any other party providing evidence to the Director.

38. In this case the Director conducted a fact finding meeting on October 19, 2017, notice of which was given to the parties in correspondence dated September 28, 2017. The Notice required each of the parties to prepare and provide copies of “any documents you intend to rely on”. Both of the parties attended the fact finding meeting with legal counsel and each provided in excess of 100 pages of documents upon which they intended to rely.
39. The fact finding meeting appears to have been conducted as a relatively open discussion with the Director giving the parties ample opportunity to present evidence, make submissions concerning their respective positions and to respond to the evidence and arguments of the other party.
40. The appeal submission of Overseas lists several reasons why an oral hearing, including cross-examination, was required. I am not persuaded any of the matters listed required, as a matter of natural justice, an oral hearing or that any of the matters were not sufficiently addressed during the fact finding meeting. There is nothing in any aspect of the process that indicates the fact finding meeting was not effective in providing Overseas with the opportunity to present its case and answer Mr. Shafy. Put another way, there is no indication that the only effective process to provide Overseas with the procedural protection required by the rules of natural justice would have required an oral hearing, including cross examination.
41. In my view, there was no breach of natural justice in the Delegate conducting a fact finding meeting rather than holding an oral hearing.
42. I note here there is nothing in the Determination or the record indicating or even suggesting Overseas was requesting an oral hearing. This argument has obviously evolved after the fact.
43. There is no basis for the argument that the Director failed to observe principles of natural justice by providing Overseas with one day to submit documents it said would substantiate the immigration services provided to Mr. Shafy. There are assertions of fact made in this argument that are not supported by anything in the record and I do not accept them. The only reference in the record to material being provided following the date of the fact finding meeting relates to a single e-mail from Mr. Shafy to Mr. Bansal dated December 1, 2016, which was provided by Mr. Bansal to the Director on October 20, 2017.
44. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1) (f) of the *ESA*.
45. I do not need to address the consequence of the failure to deliver a complete and correct appeal within the statutory appeal period.

ORDER

- ^{46.} Pursuant to section 115 of the *ESA*, I order the Determination dated November 24, 2017, be confirmed in the amount of \$8,721.91, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal