Citation: Overseas Career and Consulting Services Ltd.
and Overseas Immigration Services (Re)
2018 BCEST 64

An Application for Reconsideration

- by -

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

- 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)

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2018A/50

DATE OF DECISION: June 14, 2018

DECISION

SUBMISSIONS

Daniel A. Sorensen	counsel for Overseas Career Consulting Services Ltd. and Overseas Immigration Services Inc.

OVERVIEW

1. Overseas Career Consulting Services Ltd. ("Overseas Career") and Overseas Immigration Services Inc. ("Overseas Immigration") have filed a joint application under section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of an appeal decision issued on April 18, 2018 (2018 BCEST 36, the "Appeal Decision") by Tribunal Member Stevenson (the "Member"). I shall jointly refer to the two "Overseas" firms as the "Applicant".

2. The Member confirmed a Determination issued by Kara L. Crawford, a delegate of the Director of Employment Standards (the "delegate"), on November 24, 2017. Accordingly, the Applicant is liable for $7,721.91 payable to Mohammad Shafy, and a further $1,000 on account of two separate $500 monetary penalties. The sum of $7,721.54 is payable on account of recovery of fees in the amount of $7,545.54 paid contrary to section 10 of the *ESA* ("no charge for hiring or providing information") and section 88 interest. The two penalties were levied based on the Applicant's contraventions of section 10 of the *ESA* and section 3 of the *Employment Standards Regulation* (failure of employment agency to keep certain records).

3. The Applicant says that the Appeal Decision should be cancelled and the matter referred back to the Member or to another panel.

4. In adjudicating this application, I have reviewed the Applicant's submission as well as the entire record that was before the Member when he issued the Appeal Decision.

5. In my view, this application does not pass the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98) and accordingly must be dismissed. My reasons for reaching that conclusion now follow.

6. In the following sections, I will summarize the delegate's reasons, the Appeal Decision, the Applicant's challenge to the Appeal Decision and, finally, my analysis and findings.

THE DETERMINATION

7. As noted above, this matter concerns section 10 of the *ESA*:

> 10 (1) A person must not request, charge or receive, directly or indirectly, from a person seeking employment a payment for
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> (a) employing or obtaining employment for the person seeking employment, or
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> (b) providing information about employers seeking employees.

> (2) A person does not contravene this section by requesting, charging or receiving payment for any form of advertisement from the person who placed the advertisement.
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> (3) A payment received by a person in contravention of this section is deemed to be wages owing and this Act applies to the recovery of the payment.

8. As set out in the delegate's "Reasons for the Determination" issued concurrently with the Determination (the "delegate's reasons"), in late December 2013, Mohammed Shafy (the "complainant"), a Sri Lanka citizen, attended a recruitment seminar at a hotel in Dubai in the United Arab Emirates offered by Overseas Career concerning work opportunities in Canada. The complainant was enticed to the seminar by an Overseas Career advertisement that stated, among other things, "We are in Dubai holding work permit seminars"; "we are recruiting for the following occupations…"; and "guaranteed job allocation". Following the seminar, the complainant paid a $3,000 cash deposit to Overseas Career and signed a "Retainer Agreement" with Overseas Immigration. Pursuant to this agreement, the complainant was to make additional payments of $3,000 and $4,000, respectively, at later points in time when certain events occurred.

9. On November 28, 2016, the complainant paid a further $5,863.54 to Overseas Career and on January 17, 2017, he made another payment of $1,682.00. Thus, the complainant paid Overseas Career the total sum of $10,545.54. As I understand the situation, the complainant was to be employed as a "general farm worker" at an Aldergrove mushroom farm and that his employment would fall under the federal government's Temporary Foreign Worker Program ("TFWP").

10. The complainant arrived in Canada (Toronto International Airport) on March 15, 2017, and "was issued an employer-specific or 'closed' work permit allowing him to work as a farm labourer for Nature Mushroom" (an Aldergrove mushroom farm) [and] he then took a domestic flight to Vancouver arriving on March 16, 2017" (delegate's reasons, page R8). The complaint never worked for Nature Mushroom and on May 15, 2017, filed a complaint with the Employment Standards Branch.

11. "On June 7, 2017, [the complainant] was issued a six month 'open' work permit for TFWs 'at risk'. This new work permit allowed [the complainant] to legally work for any employer in British Columbia [and the complainant] has since secured temporary work in B.C." (delegate's reasons, page R8).

12. The delegate investigated the complaint and this process included an in-person fact-finding meeting held on October 19, 2017, at the Employment Standards Branch's Langley office that was attended by the complainant and his advocate, as well as the principal of both "Overseas" firms and their legal counsel. There is no dispute that the two "Overseas" firms are subject to common direction and control and are "associated employers" as defined by section 95 of the *ESA* and were treated as such in the Determination (delegate's reasons, page R3).

13. The Applicant's principal submission was that it provided "immigration" services and, as such, the fees paid by the complainant were not recoverable as fees paid contrary to section 10 of the *ESA*. The delegate rejected that submission, finding as follows (pages R18 – R19):

> The prohibition in Section 10, as it applies here, can be broken down into constituent elements…a person (which includes a corporation) must not: 1) request, charge or receive, directly or indirectly; 2) from a person seeking employment; 3) a payment; 4) for obtaining employment for the person seeking employment or providing information about employers seeking employees.
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> In this case, the first element of section 10 is satisfied because it is agreed that [Overseas Consulting] received a total of $10,545.54 from [the complainant], in the form of a cash payment of $3,000.00 on December 26, 2013, followed by two electronic transfers between banking institutions on November 28, 2016 and January 17, 2017 respectively.
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> The second element is that the payment must come from a person seeking employment. In this case, [the complainant] wanted to immigrate to Canada and was seeking employment in B.C. to become a TFW, the first step on a pathway to permanent residency, when the parties executed the Retainer Agreement on December 26, 2013. I find that [the complainant] was seeking employment and the second element is satisfied.
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> The third element of section 10 is that there must be a 'payment'. [The Applicant's principal] did not dispute that [the complainant] paid $10,545.54 to [Overseas Consulting]. I am satisfied that the monies exchanged qualify as a payment.
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> The final element of section 10 is that the payment must be in exchange for either obtaining employment for the person seeking employment or providing information about employers seeking employees. [The Applicant's principal] characterized the payment as a fee paid for immigration services received. [The complainant] asserted that the payment was for a job and that any immigration assistance provided was ancillary thereto.
>
> I find that the payment was in exchange for employment…

14. The delegate concluded that Overseas Consulting's initial solicitation of the complainant was in regard to a job opportunity in Canada and that the complainant was induced to sign the Retainer Agreement (and pay fees) based on his understanding that he would enter Canada under the auspices of the TFWP. Further, the delegate held that Overseas Consulting withheld relevant job information from the complainant until early March 2017 and only released it to him after he had paid all of the monies due under the Retainer Agreement. As for the Applicant's claim that it only provided "immigration" services, the delegate held "that [the complainant] independently performed all immigration related tasks, including compiling the personal information necessary to complete his Work Permit Application form in draft" (page R20) and "that Overseas did not supply [the complainant] with most of the services described in the Retainer Agreement…[and the complainant] collected his own personal information necessary to apply for a Visa and Work Permit and provided the CIC [Citizenship and Immigration Canada] forms in draft to Overseas" (page R21). The delegate's reasons continue (pages R21 – R22 and page 23):

> I find that [the complainant] visited the Canadian Embassy on his own to provide his passport and biometric information at CIC's request. I find that [the complainant] made his own travel arrangements and paid for his flight to Vancouver. I find that Overseas did not supply [the complainant] with some of the post-arrival resettlement services contemplated in the Retainer Agreement, including assistance with opening a Canadian bank account, obtaining a social insurance number and cell phone in Canada.
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> I find that Overseas sold [the complainant] a job when it completed the job information on the Work Permit application and submitted it online. I find that Overseas did not disclose

> the job information to [the complainant] unitl [*sic*] March 8 or 9th 2017. I find that Overseas withheld the detailed job information for its own benefit and contrary to the best interests of both [the complainant] and Nature Mushroom. I find that Overseas only communicated with [the complainant] following submission of the Work Permit Application on November 25, 2015 to ensure that it received additional payments for the job information needed by [the complainant] and, to appease [the complainant] who would be speaking to CBSA [Canada Border Services Agency] upon arrival in Toronto. Overseas did not arrange for [the complainant] to travel to B.C., contrary to the terms of the Retainer Agreement, even though it was aware that [the complainant's] Work Permit Application had been approved, [the complainant] had quit his job in the U.A.E. and was waiting to come to B.C. The LMO [Labour Market Opinion – a document an employer requires in order to hire workers under the TFWP] indicates that [the complainant's] travel costs were to be paid for by Nature Mushroom. No evidence was supplied which explains why Overseas and/or Nature Mushroom did not fulfil the terms of the LMO and Retainer Agreement.
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> Once [the complainant] made Overseas aware that he would be arriving in Canada, Overseas finally provided [the complainant] with the LMO, Job Offer and Employment Contract on March 8th or 9th, 2017. I accept [the complainant's] testimony and find that Overseas instructed him to destroy documentary evidence of his relationship with it and to not tell CBSA about the 'assistance' Overseas supplied him with finding a job.
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> …
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> In summary, it is clear that Overseas received a payment of $10,545.54 from [the complainant], who was seeking employment, in order to obtain a job or information about a job in B.C. Overseas therefore contravened section 10 of the Act.

15. Although the complainant paid Overseas Consulting $10,545.54 in total, the delegate held that the first of the three payments ($3,000 paid on December 26, 2013) was not recoverable since it fell outside the section 80 wage recovery period. Accordingly, the delegate made a wage payment order in favour of the complainant for $7,545.54 plus section 88 interest.

THE APPLICANT'S REASONS FOR APPEAL & THE APPEAL DECISION

16. The Applicant appealed the Determination arguing that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see subsections 112(1)(a) and (b) of the *ESA*).

17. More specifically, the Applicant argued that the delegate erred in law in finding that it contravened section 10, asserting that "the services they advertised and provided related solely to immigration services, which they were entitled to charge for". The Applicant further asserted that its "contractual obligations were limited to aiding [the complainant] immigrating to Canada [and] Overseas had no implied or express obligation to use its best efforts to find employment for [the complainant]." The Applicant argued that there would be an "operational conflict" between the federal *Immigration Act* and the *ESA* if it were not entitled to lawfully charge fees "in connection with the submission of an immigration application." The Applicant argued that even if a portion of its fees were implicated by section 10, the delegate erred in awarding all of the fees charged within the section 80 wage recovery period. The Applicant asserted that only the portion of the fees that

were caught by section 10, and were not otherwise related to immigration services, were recoverable under the *ESA*.

18. The Member noted that several of the Applicant's arguments were predicated on "facts" that were not actually found to be facts by the delegate (and that, in some cases, "directly contradict[ed]" the delegate's findings). The Member quite rightly noted (at para. 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."

19. With respect to the Applicant's argument regarding whether the delegate erred in finding a section 10 contravention, the Member noted that the delegate's findings regarding section 10 were "solidly grounded in the evidence" and that the delegate's "finding and conclusions…were strongly compelled by the evidence and were entirely correct" (para. 31). The Member also noted that the errors of law alleged by Applicant regarding the type of services provided by it (*i.e.*, "immigration-" or "employment"-related) "ignores the findings made by [the delegate] that [the complainant] performed all of the immigration related tasks and that Overseas provided no documents showing the fees charged to [the complainant] was [*sic*] for immigration related assistance" (para. 29).

20. The Applicant also argued that the delegate erred in law in finding that it contravened section 3 of the *Employment Standards Regulation* (employment agency records) since "all the information required…to be kept was indeed available in the records provided by Overseas". The Member similarly rejected this argument (at para. 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.

21. The Applicant additionally noted that the monetary penalty relating to the record keeping regulatory requirement was levied against both Overseas firms "but only [Overseas Career] is a licensed Employment Agency [and] as such, if a penalty is to be levied, it should only be levied against [Overseas Career]."

22. With respect to this latter submission (and I agree with the Member that it was a wholly unmeritorious argument), the Applicant's principal (the sole director/officer of each firm) conceded that the two Overseas firms were "associated employers" as defined by section 95 of the *ESA* (see delegate's reasons, page R3). That being the case, the two firms must be treated as a single employer for purposes of the *ESA* and "are jointly and separately liable for payment of the amount stated in a determination". At para. 2 of the Appeal Decision, the Member stated:

> …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*.

23. The Applicant's "natural justice" ground of appeal had two separate components. First, the Applicant maintained that there was a denial of natural justice since the complaint was the subject of an investigation rather than an oral hearing. The delegate had a discretion to investigate the complaint or conduct an oral hearing (see section 76) but the Applicant maintained that "cross-examination is…crucial to ensur[e] that the process is fair" and that since there was no oral hearing where cross-examination could have been conducted, the entire adjudicative process was unfair.

24. The Member noted that the B.C. Supreme Court has affirmed that a party does not have an absolute right to oral hearing of a complaint filed under the *ESA* (para. 37) and then referred to the October 19th fact-finding meeting – a meeting that had many of the elements of an oral hearing: "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" (para. 39). The Member also noted (at para. 42): "…there is nothing in the Determination or the record indicating or even suggesting Overseas was requesting an oral hearing [and that] this argument has obviously evolved after the fact."

25. The second aspect of the Applicant's natural justice argument concerned events that transpired at the October 19, 2017, fact-finding meeting. During the meeting, the Applicant repeatedly referred to documents that were not presented to the delegate at the meeting. I note that the subsection 112(5) record includes a section 85 "Demand for Records" directed to both Overseas firms that was issued on June 12, 2017 – this Demand required the Applicant to produce all relevant records by no later than June 23, 2017. On June 27, the delegate received a request from the Applicant for a further 30 days to produce the records in question. Despite the Applicant's failure to comply with the original Demand, the delegate issued an Amended Demand for Records requiring the Applicant to produce records by no later than July 24, 2017. The importance of timely disclosure was highlighted inasmuch as the delegate expressly stated that she would issue a determination based on the information she then had in hand if the records were not produced by the July 24 deadline. On July 18, 2017, the Applicant's legal counsel wrote to the delegate requesting another "short extension" to document production deadline; yet another extension was granted, to July 31.

26. The fact-finding meeting (described at page R2 of the delegate's reasons) was scheduled for, and held on, October 19, 2017. A "Notice of Fact Finding Meeting" was delivered to the parties on September 28, 2017. This Notice contained extensive instructions regarding the production of documents at the meeting although, apparently, the Applicant maintained at the meeting that there were still other documents that it had not yet produced. As noted in the delegate's reasons, at page R17: "I provided [the Applicant's principal] with an additional day following the fact finding meeting to submit any additional evidence he wished to be considered, including a signed Work Permit Application for [the complainant]. No document of this type was received."

27. The Member rejected the Applicant's assertion that the delegate failed to observe the principles of natural justice when she gave the Applicant one additional day (above and beyond the several extensions that had already been granted, the last of which was arguably granted on a peremptory basis) to produce some additional documentation (para. 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 [the complainant]. 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 [the complainant] to [the Applicant's principal] dated December 1, 2016, which was provided by [the Applicant's principal] to the Director on October 20, 2017.

28. The Member dismissed the appeal under subsection 114(1)(f) of the *ESA* on the basis that it had no reasonable prospect of succeeding.

THE APPLICATION FOR RECONSIDERATION

29. The Applicant's section 116 application is based on the following assertions:

- First, there should have been a "set-off" or some other sort of deduction from the money order issued in favour of the complainant because at least a portion of the fees paid by the complainant were for immigration services and that, absent a deduction, the complainant would be "unjustly enriched";
- Second, and related to the above point, the Applicant maintains that the delegate's findings were "inconsistent" inasmuch as she held that the Applicant failed to provide "some" of the services called for in the Retainer Agreement and that "it is apparent that [the complainant] received at least some immigration related assistance from Overseas". The Applicant says that it is "wholly incongruous to find on the one hand that [the complainant's] payments to Overseas were not for immigration services yet on the other hand that Overseas did not supply [the complainant] with 'some' of the post-arrival resettlement services." Among other things, the Applicant maintains that it "committed time and effort" assisting the complainant with the immigration process and gave him "general assistance, including but not limited to assisting with reviewing application documents, submitting the application, assisting with travel and accommodation arrangements, and communications in relation to the same."
- Third, and this argument was not raised in its appeal documents, the Applicant now says that the delegate relied on a "legally unsupportable principle" when she held, at page R22 of her reasons, when referring to the full prepayment by the complainant for the Applicant's services that "a reasonable person would not expect to pay for a service in full in advance of receiving it".
- Fourth, "the Director breached the principles of natural justice when it provided Overseas with only one day to submit documents that it stated would substantiate the immigration services provided" and that "by providing one-day [*sic*] to submit its documents, Overseas was provided with an illusory right to procedural fairness".

FINDINGS AND ANALYSIS

30. The Tribunal is not obliged to undertake a searching review of each and every section 116 application on its merits. In exercising its statutory discretion to reconsider an appeal decision, and

consistent with the two-stage *Milan Holdings* framework, the Tribunal will first consider whether the application presumptively raises a meritorious case for review. At this stage, the Tribunal will consider whether the application raises important issues of "law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases" (*Milan Holdings*, page 7). If the application does not pass the first stage, it will be dismissed and the Tribunal will not examine, in detail, the underlying merits of the application (the merits are examined in the second stage, assuming the application passes the initial threshold review).

31. In my view, this application is principally an attempt to reargue the case presented on appeal without presenting any compelling new arguments or evidence that would justify so doing. I propose to briefly address each of the Applicant's four arguments, outlined above, in turn.

32. The first and second arguments are primarily grounded in the Applicant's continuing assertion that some or all of its services were in the nature of immigration related services wholly unconnected with the sort of services that are contemplated by section 10 of the *ESA*. As noted in the Appeal Decision (para. 29), this submission ignores the delegate's finding of fact that, fundamentally, the complainant paid fees "in exchange for obtaining employment or information about employers seeking employees in B.C." (page R19). Although the parties' Retainer Agreement expressly states that "there is no placement fees, all services provided are immigration services" [*sic*], I consider this purported waiver of section 10 of the *ESA* to be essentially meaningless. The evidence clearly showed, as the delegate found, that Overseas charged the Applicant fees in exchange for attempting to secure employment for the complainant and for otherwise providing information about employment opportunities in British Columbia. Even if the Applicant provided some pre- or post-arrival services to the complainant, that does not materially change the fundamental nature of the fees paid to the Applicant.

33. Further, the delegate held that the Applicant failed to provide any corroborating documentary evidence that clearly demonstrated that the fees paid were for immigration related assistance. These were findings the delegate was entitled to make based on the evidentiary record before her. The delegate held that the complainant undertook all the key tasks that were necessary in order to obtain his Work Permit and gain lawful entry to Canada (page R20). Finally, the Applicant's present assertions about what immigration services it did provide remain uncorroborated by documentary evidence contained in the record, and in many cases stand in stark contrast to the delegate's findings of fact.

34. The Applicant's third argument was not raised on appeal and, on that basis alone, might be rejected as a proper ground for reconsideration although I will not rest my decision regarding this argument on that fact. Leaving aside this consideration, in my view, the Applicant's argument on this score has at least some presumptive merit in that I do not believe it is tenable to assert, as a general principle, that a reasonable person would not prepay for services to be delivered at some future date. Businesses commonly expect prepayment for goods and services prior to delivery – indeed, internet commerce is built on that very practice – and often that is the only basis that a business is willing to trade with a potential customer. In my view, the delegate clearly overshot the mark when she suggested that a "reasonable person would not expect to pay for a service in full in advance of receiving it" (page R22).

35. Notwithstanding my comments in the foregoing paragraph, in this case, the delegate's comments must be understood in the context of her finding that the Applicant deliberately withheld information and documentation from the complainant regarding his future employment in Canada, so that it was in a better position to collect its full fee as set out in the Retainer Agreement. In other words, by the manner in which the Applicant conducted itself, the complainant was deliberately kept unaware about his future employment situation in order to, as the delegate put it, "ensure that it received additional payments for the job information needed by [the complainant] and, to appease [the complainant] who would be speaking to CBSA upon arrival in Toronto."

36. Finally, and with respect to the delegate's final one-day extension given to the Applicant to produce documents, I endorse the Member's comments regarding this issue. Further, in light of the several extensions that had previously been granted for the production of documents, I believe the delegate would have been fully justified in refusing to grant *any* further extension to produce documents. The Applicant had ample notice and time to produce relevant documents prior to the October 19 fact-finding meeting. I also note, by way of final comment, that the Applicant never submitted the so-called additional documents on appeal as it might have done (see subsection 112(1)(c) of the *ESA*) and has not done so as part of this application, and thus it is impossible to say, as the Applicant now asserts, that these unspecified documents "would have been capable of impacting the Determination".

ORDER

37. The Applicant's application for reconsideration of the Appeal Decision is refused. Pursuant to subsection 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal