

An appeal

- by -

Van Gogh Talent Inc.
("VGT")

- 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)

PANEL: Shafik Bhalloo

FILE NO.: 2019/18

DATE OF DECISION: April 24, 2019

DECISION

SUBMISSIONS

Nancy van Gogh

on behalf of Van Gogh Talent Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Van Gogh Talent Inc. (“VGT”) has filed an appeal of a determination issued by Stefan Jankowski, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”), on February 15, 2019 (the “Determination”). The Determination found that VGT was operating a talent agency without a valid licence contrary to section 12 of the *ESA*. Pursuant to section 98(1) of the *ESA* and section 29(1) of *Employment Standards Regulation* (the “*Regulation*”), the Director imposed on VGT an administrative penalty in the amount of \$500.00 for the contravention.
2. VGT appeals the Determination contending that the Director failed to observe the principles of natural justice in making the Determination. VGT is seeking the Tribunal to cancel the Determination.
3. On March 5, 2019, the Tribunal acknowledged receipt of VGT’s appeal and notified the Director that submissions on the merits of the appeal are not requested from the Director at this time. However, the Tribunal asked the Director to provide the Tribunal with the section 112(5) record (the “Record”) that was before the Director at the time the Determination was made.
4. On March 21, 2019, after receiving the Record from the Director, the Tribunal sent a copy of the Record to VGT and provided the latter an opportunity to object to its completeness by April 4, 2019. VGT did not object to the completeness of the Record and the Tribunal accepts it as complete.
5. On April 9, 2019, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed under section 114(1) of the *ESA*. If all or part of the appeal is not dismissed, the Tribunal would seek submissions from the Director on the merits of the appeal. VGT will then be given an opportunity to make a final reply to those submissions, if any.
6. In this case I will make my decision whether there is any reasonable prospect that the appeal will succeed based on my review of VGT’s submissions, the Record, and the Reasons for the Determination (the “Reasons”).

ISSUE

7. The issue in this appeal is whether there is any reasonable prospect that VGT’s appeal will succeed.

THE FACTS

8. VGT is a company incorporated in British Columbia on March 8, 1999, and operates a talent agency as defined in section (1) of the *ESA*.

9. Nancy van Gogh (“Ms. van Gogh”) is the sole director of VGT and she is also its president and owner.
10. VGT was issued a talent agency license under the *ESA* on January 27, 2018, with a stated expiry date of January 26, 2019.
11. On January 29, 2019, the delegate received a voicemail message from Ms. van Gogh explaining that she had forgotten to renew VGT’s talent agency licence for VGT and wanted to know the quickest way to get the expired licence renewed. The delegate returned Ms. van Gogh’s call and discussed with her the renewal process for talent agency licenses. He told her that according to the records of the Employment Standards Branch (the “Branch”), VGT’s previous talent agency had expired on January 26, 2019. He then asked her if VGT had been operating since the expiry date and she replied in the affirmative that the agency had been operating.
12. On the same date, January 29, 2019, Ms. van Gogh submitted to the Branch VGT’s application for the renewal of its expired talent agency license. The delegate determined that VGT had contravened section 12 of the *ESA* by operating a talent agency without a valid licence since January 26, 2019, to January 29, 2019, the last day VGT operated without a valid license under the *ESA*.

SUBMISSIONS OF VGT

13. Ms. van Gogh makes written submissions on behalf of VGT. By way of a preamble to her submissions, she points out that she is the sole owner and operator of VGT since 1986. The company has been in “good standing” for three decades in what is a difficult, “up and down business”. She states she has “managed to stay afloat in the toughest of times” and there is “very little financial reward for the work” she does. VGT operates “in the red” most years, but she works very hard on behalf of her actors.
14. Having said this, she notes that she has never had any fines levied against her by the Branch. Her “routine” for renewing VGT’s license has been “a notation on [her] calendar in December to make the payment” in January. However, this time around she missed the note to herself because she went with her husband to Toronto to be with his mother who was very ill and subsequently passed away. She only returned to Vancouver just before Christmas and missed the note to herself to pay for the license renewal.
15. She then goes on to argue that the Branch does not issue invoices or an email to agencies requesting or reminding that payment is due. She states that “[t]his practice of not issuing invoices or notices of any kind [by the Branch] is unlike any other entity requiring payment from a company or individual.” While she acknowledges that the Branch’s “paperwork informs” parties that no reminder will be issued, she took “measures to try to remember, a year later, that the payment will be due” but states that she “can’t condone that after not issuing an invoice” the Branch levies VGT a penalty of \$500 for “being merely two days late with a renewal payment”. She states she immediately paid the renewal fee on January 29, 2019, and VGT’s license was reinstated on January 30, 2019. She apologizes for the error and states she will do her best to be sure it will never happen again. She states this would not have happened but for the “personal life crisis” she encountered in her life - the death of her mother-in-law.
16. She concludes by suggesting that a “group email system reminder and warning” should be instituted by the Branch to remind agencies about renewing their licences.

ANALYSIS

17. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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 being made.
18. The Tribunal has repeatedly stated that 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 on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).
19. The grounds of appeal listed in section 112(1) do not provide for an appeal based on errors of fact, and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
20. Having delineated some broad principles applicable to appeals, in this case, as previously noted, VGT appeals the Determination on the sole ground that the Director breached the principles of natural justice in making the Determination.
21. Principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd.* (c.o.b. English Inn & Resort), BC EST # D055/05).
22. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *B.W.I. Business World Incorporated*, BC EST #D050/96)
23. Having reviewed the Determination including particularly the Record and the submissions of Ms. van Gogh, I do not find that VGT has discharged its burden to persuade the Tribunal that there is an error in the Determination on the natural justice ground. I find that VGT has simply checked off the "natural justice" ground of appeal in the Appeal Form without providing more. I also find that there is sufficient evidence in the Record and the Reasons showing that the delegate of the Director afforded VGT the procedural rights contemplated within the meaning of natural justice in *Imperial Limousine Service Ltd.* and *607730 B.C. Ltd.* (c.o.b. *English Inn & Resort*), *supra*. Therefore, I dismiss the natural justice ground of appeal.

24. Having said this, I have also considered VGT's appeal under the error of law ground of appeal under section 112(1)(a), although not checked-off by VGT on the Appeal form nor raised by Ms. van Gogh in her written submissions.
25. The Tribunal has adopted the following definition of error of law delineated in the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the 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.
26. In this case, the Director relied upon the relevant provision of the *ESA*, section 12 of the *ESA*, in making the Determination. Section 12(1) states:
- Employment and talent agencies must be licensed***
- 12** (1) A person must not operate an employment agency or a talent agency unless the person is licensed under this Act.
27. Section 12 uses mandatory language. It requires that one “must” not operate a talent agency without a license under the *ESA*. There is *no discretion* in the Director to overlook this requirement. In this case, VGT's license expired on January 26, 2019, and Ms. van Gogh admitted to the delegate that the agency had been operating since the expiry date. Whether VGT operated for two days or four days without a license is immaterial. What is material is that it operated for any period at all without a license or with an expired license.
28. It is immaterial to the Director's decision whether Ms. van Gogh paid for the license renewal “immediately” after learning of her error as it is immaterial that she has never been fined before. It is also immaterial that VGT has been in “good standing for over 30 years” and there is “very little financial reward for the work [Ms. van Gogh] does” and VGT “operates in the red” most years. None of these factors mitigates or excuses VGT's contravention of section 12 of the *ESA*.
29. While I sympathize very much with Ms. van Gogh's personal circumstances with the loss of her mother-in-law a few weeks before the expiry of VGT's license, this too is not a relevant consideration in the circumstances. I reiterate, the language of section 12(1) does not afford the Director any discretion where a person operates a talent agency without a license. Once a breach of section 12(1) is found, section 98(1) of the *ESA* requires that a mandatory administrative penalty be imposed for the contravention. The penalty amounts are delineated in section 29(1) of the *Regulation*. While Ms. van Gogh may find the penalty amount in VGT's case to be “unfair and excessive”, the Director has no discretion in changing the penalty amounts.
30. In the result, I find that there is no basis for a finding of an error of law in this case. The delegate did *not* misinterpret or misapply section 12 of the *ESA*, and his conclusion that VGT contravened section 12 of the

ESA is amply supported in the facts. Therefore, I find that this appeal has no reasonable prospect of success and, thus, must be dismissed under subsection 114(1)(f) of the *ESA*.

31. As for Ms. van Gogh's suggestion to the Branch to adopt a "group email system reminder and warning" to agencies to renew their license before it expires, this is a policy question beyond the scope of this Tribunal to weigh in on. I do, however, note that the Branch did, when renewing VGT's license previously, in a form letter, dated January 3, 2018, inform VGT:

Your license will expire on January 26, 2019. The Employment Standards Branch does *not* send out renewal notices. Please ensure that you submit your application to the address below to have your license renewed at least 30 days before your license expires.

ORDER

32. Pursuant to subsection 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination is confirmed in the amount of \$500.00.

Shafik Bhalloo
Member
Employment Standards Tribunal