

Citation: OpenMind Management Consultancy Inc. (Re)  
2019 BCEST 60

An appeal

- by -

OpenMind Management Consultancy Inc.  
("OpenMind")

- 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)

**PANEL:** Maia Tsurumi

**FILE NO.:** 2019/21

**DATE OF DECISION:** June 19, 2019

## DECISION

### SUBMISSIONS

Ranjeeta Mendiratta on behalf of OpenMind Management Consultancy Inc.  
Tara MacCarron delegate of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), OpenMind Management Consultancy Inc. (“OpenMind”) has filed an appeal of a determination (the “Determination”) issued by Tara MacCarron, a delegate of the Director of Employment Standards (the “Delegate”), on March 5, 2019. In the Determination, the Delegate found that OpenMind contravened section 12 of the ESA. In the result, she ordered OpenMind to cease contravening the ESA and to pay \$500 in an administrative penalty.
2. OpenMind appeals the Determination on the grounds that the Delegate failed to observe the principles of natural justice in making the Determination. OpenMind seeks to have the Determination cancelled.
3. This decision is based on the submissions made by OpenMind in its Appeal Form, the sub-section 112(5) record (the “Record”), the Determination, the Reasons for the Determination (the “Reasons”), and submissions I requested from the Delegate and OpenMind about whether OpenMind was given express notice that it was under investigation for operating without a licence, which could result in a finding that OpenMind violated the ESA.

### ISSUE

4. The issue before the Employment Standards Tribunal is whether the Delegate failed to observe principles of natural justice in making the Determination.

### ARGUMENT

5. OpenMind submits that the Delegate failed to observe principles of natural justice in making her Determination. Specifically, OpenMind says that:
  - a. during the time its employment agency licence had lapsed, it did not technically do any business; and
  - b. during the period when its employment agency licence had lapsed it was moving offices and did not have a confirmed new office address.
6. OpenMind wants the Tribunal to cancel the Determination.

## THE FACTS AND ANALYSIS

### Background

7. OpenMind operates an employment agency as defined by the *ESA*. It is a company incorporated in British Columbia. Its owner and managing director is Ranjeeta Mendiratta (“Ms. Mendiratta”).
8. OpenMind was issued an employment agency licence under the *ESA* on January 30, 2018. This licence expired on January 29, 2019.

### Issues Before the Delegate

9. The issue before the Delegate was whether OpenMind contravened section 12 of the *ESA* by operating an employment agency without a valid licence.

### Evidence Relied on by the Delegate

10. On February 21, 2019, OpenMind submitted a “Renewal Application for Employment Agency Licence” (the “Application”) to the Employment Standards Branch (the “Branch”). The form was signed on February 20, 2019.
11. The Delegate said that, as part of the licence renewal process, she conducted a brief interview with OpenMind’s representative, Ms. Mendiratta. The Delegate also stated that she conducted an investigation as to whether OpenMind had operated an employment agency without a valid employment agency licence and issued her Determination on March 5, 2019.
12. In preparation for the interview with Ms. Mendiratta, the Delegate reviewed Branch records and found that there was a period of time when OpenMind did not possess a valid employment agency licence between January 29 and February 21, 2019.
13. The Delegate spoke with Ms. Mendiratta to review the details submitted on the Application. The Delegate’s notes of the interview indicate that she raised the issue of the licence expiration with Ms. Mendiratta who confirmed that:
  - a. the Application was submitted late and that OpenMind was operating during the time that its licence had lapsed;
  - b. OpenMind had placed quite a few people in the month of February;
  - c. OpenMind had active postings at the time of the interview; and
  - d. OpenMind forgot that it had to renew its employment agency licence—it was a busy time for OpenMind as it was moving offices and the need to renew the licence “slipped through the cracks.”
14. During the telephone call with Ms. Mendiratta, the Delegate said that she was imposing a \$500 penalty for breach of section 12 of the *ESA*.

15. The Delegate found that OpenMind contravened section 12 of the *ESA*. Section 12 provides that a person must not operate an employment agency without a licence.

#### ANALYSIS

16. OpenMind submits that the Delegate failed to observe principles of natural justice because:
- a. it was “not really active in the market from [the] last week of January until the whole [of] February”;
  - b. when the licence expired, OpenMind knew that it would be moving soon to new premises and did not yet have a “confirmed registered address”;
  - c. OpenMind was not clear about how it would change its address on the licence once its move was completed; and
  - d. OpenMind “technically did not have any business with the company from the third week of January until actually the end of February.”
17. An appeal is not a re-hearing of the matter and is not another opportunity to give one’s version of the facts. Sub-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. Below, I consider whether there was a breach of natural justice.

#### *Breach of Natural Justice*

19. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure that parties know the case made against them, are given an opportunity to reply to the case against them, and have its case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27.
20. Procedural fairness requirements in administrative law are functional, and not technical, in nature. They are also not concerned with the merits or outcome of the decision. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65.
21. In *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, the Supreme Court identified a non-exhaustive list of factors that “should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances.” The factors are:
- a. the nature of the decision being made and the process followed in making it;

- b. the nature of the statutory scheme and the terms of the statute under which the administrative decision was made;
- c. the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated;
- d. the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances;
- e. the choice of procedures made by the administrative-decision maker and its institutional constraints. Important weight must be given to the choices of procedures adopted by the decision-maker and its institutional constraints:

*Baker v. v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at paras. 23 – 28.

- 22. Regarding the nature of the decision made here, while the Delegate was initially dealing with a licence renewal application, the specific matter in issue in this appeal is the decision of the Delegate, following her investigation, about whether or not OpenMind was operating without a licence and in contravention of the *ESA*.
- 23. The process here involved the Delegate reviewing OpenMind’s licensing records and conducting a brief telephone interview.
- 24. Turning to the statutory scheme and the terms of the statute pursuant to which the Branch operates, the *ESA* involves the ongoing regulation of licence holders. The authority under the *ESA* is broad and includes overseeing licensing of employment agencies and investigative powers to ensure compliance with the *ESA* and its regulations. The *ESA* does not require a complaint to have been made for an investigation to occur: sub-section 76(2). The Director also has considerable powers to compel persons to answer questions and order disclosure, as well as powers of entry and inspection: sections 84 – 85. However, if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond: section 77.
- 25. The importance of this decision to OpenMind is on the low end of the scale. On the one hand, the finding that OpenMind contravened section 12 of the *ESA* means that OpenMind will be subject to a much higher fine if it contravenes section 12 again within three years from the date of the present contravention. On the other hand, \$500 is not a large sum.
- 26. There was no evidence in the Record as to the legitimate expectations of OpenMind, but section 77 of the *ESA* is clear that the Director must make reasonable efforts to give a person under investigation an opportunity to respond if an investigation is conducted under Part 10.
- 27. Finally, the choice of procedure here was within the discretion of the Delegate. The *ESA* does not require a hearing (section 84) and Branch decisions are made in a dynamic and fluid environment.

28. I requested submissions from the Delegate and OpenMind as to whether or not OpenMind was given express notice that it was under investigation (a distinct process from the licence renewal process) for operating without a licence, which could result in a finding that OpenMind violated the *ESA*. In response, the Delegate said that during her phone interview with Ms. Mendiratta the following occurred:
- a. the Delegate reviewed the responsibilities and obligations of OpenMind as an employment agency, which included a licensing requirement;
  - b. Ms. Mendiratta said that she did not know she was required to have a licence and that OpenMind's renewal application had been submitted after OpenMind's previous licence had expired; and
  - c. the Delegate explained that operating without a licence was a contravention of the *ESA* and discussed the administrative penalty.
29. According to the Delegate, she felt that OpenMind was appropriately informed that the Branch was assessing whether OpenMind had violated the *ESA*.
30. OpenMind's submissions reiterated what it said on appeal. It admitted that it was aware that it had to renew its licence but said that it delayed doing so because it had not yet confirmed its new registered address and technically did not have any business from the third week of January to the end of February.
31. Despite the wording of my request for submissions, I acknowledge that the regulatory scheme does not require express notice of investigation. However, what I was trying to ascertain were the circumstances in which OpenMind provided its response to the investigation, and in particular, whether it was given reasonable notice of the investigation before it responded.
32. Balancing the above *Baker* factors, I conclude that there was no breach of procedural fairness. In the circumstances, OpenMind was given reasonable notice that the Delegate was investigating it for a breach of the *ESA* regarding its failure to renew its licence. My decision is based on my conclusion that the importance of the decision to OpenMind regarding the breach of the *ESA* was on the low end of the scale and the fact that the Delegate has broad authority under the *ESA* with respect to the conduct of investigations and the choice of procedure.
33. In my view, it would have been preferable if the Delegate had confirmed with Ms. Mendiratta that OpenMind was under investigation before the Delegate received submissions from OpenMind regarding the lapse in its licence. However, not doing so was not a breach of natural justice in the circumstances of this case.

### *New Evidence*

34. In its Appeal Form, OpenMind made further evidentiary submissions. I cannot take these submissions as evidence.
35. An appeal is decided on the record before the Delegate. The only exception to this is if there is new evidence available that was not available at the time the Determination was being decided: *ESA*, sub-section 112(1)(c).

36. The Tribunal in *Bruce Davies et al.* provided guidance on how the Tribunal applies sub-section 112(1)(c):

This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence...[The evidence] must meet four conditions:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably culpable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue:

*Bruce Davies et al.*, BC EST # D171/03 at p. 3.

37. None of OpenMind's submissions in its Appeal Form meets the Tribunal's test for admitting fresh evidence.

### *Error of Law*

38. Even though OpenMind did not rely on an error in law in this appeal, I have considered whether there was any such error.

39. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined a question of law in the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:

- a. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
- b. a misapplication by the decision-maker of an applicable principle of general law;
- c. where a decision-maker acts without any evidence;
- d. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
- e. where the decision-maker is wrong in principle.

40. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 Bcest 5 at para. 36.

41. I find that the Delegate did not err in law in determining that OpenMind was in breach of section 12 of the *ESA*. She correctly applied the law to the evidence before her.

*Summary*

42. In summary, I find that OpenMind was provided with reasonable notice about the investigation and thus there was no breach of procedural fairness. Neither was there an error of law.

**ORDER**

43. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination, dated March 5, 2019, be confirmed.

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**Maia Tsurumi**  
**Member**  
**Employment Standards Tribunal**