

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Simply Recruiting Inc.
("SRI")

- 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.: 2020/118

DATE OF DECISION: October 23, 2020

DECISION

SUBMISSIONS

Pauline Chhabra

as a director of Simply Recruiting Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Simply Recruiting Inc. (“SRI”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 8, 2020 (the “Determination”). In that Determination, the Director found SRI was operating an employment agency without a valid licence contrary to section 12(1) of the *ESA* and imposed an administrative penalty in the amount of \$500.00 for the contravention.
2. SRI appeals the Determination, contending that the Director failed to observe the principles of natural justice in making the Determination.
3. In correspondence dated August 19, 2020, the Tribunal notified the Director that it had received SRI’s appeal and was enclosing the same for informational purposes only. The Director was advised that no submissions on the merits of the appeal were being sought at the time. The Tribunal also requested from the Director to provide a copy of the section 112(5) record (the “Record”).
4. On August 28, 2020, the Tribunal received the Record from the Director and forwarded a copy of it to SRI. SRI was provided an opportunity to object to the completeness of the Record, but did not submit any objections. Accordingly, the Tribunal accepts the Record as complete.
5. On September 25, 2020, the Tribunal sent correspondence to the parties advising them that a panel had been assigned to decide the appeal.
6. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other party. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the Determination, the Reasons for the Determination (the “Reasons”), SRI’s appeal submissions, and my review of the Record when the Determination was being made. If I am satisfied that SRI’s appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *ESA*, the Tribunal will invite the Director to file reply submissions on the merits of the appeal. SRI will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

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

FACTS

8. SRI, a company incorporated in B.C. on May 29, 2018, operates an employment agency as defined in the *ESA*, having been issued an employment agency licence on June 14, 2019. The licence expired on June 20, 2020.
9. The Employment Standards Branch (the “Branch”) received a renewal application from SRI on June 22, 2020, signed by Pauline Chhabra (“Ms. Chhabra”), a director of SRI. The Branch conducted an investigation to determine whether SRI contravened the *ESA* by operating an employment agency without a valid licence.
10. In the Reasons, the Director notes that on June 24, 2020, she contacted Ms. Chhabra to discuss SRI’s licence renewal application submitted on June 22, 2020. During the conversation, according to the Director, Ms. Chhabra acknowledged that the application to renew the employment agency licence had been submitted late and was an administrative oversight. She did not feel comfortable going into the Branch’s Richmond office to submit the renewal application in person due to the COVID-19 virus. However, the Director noted that licence renewal forms could be submitted online, by email and by fax to any Branch location. The Director also notes that Ms. Chhabra indicated that SRI did not fill any job roles since the onset of COVID-19 in March, but that it had continued to operate after June 20, 2020. In the result, the Director concluded that SRI contravened section 12 of the *ESA* for operating an employment agency without a valid licence and issued a mandatory administrative penalty of \$500.00 in accordance with section 98(1) of the *ESA* and section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”).

SUBMISSIONS OF SRI

11. In her appeal submissions on behalf of SRI, Ms. Chhabra states:

The license for our company expired on June 20, 2020 which falls on a Saturday. On Wednesday, June 17th at 11:30 pm I fainted and hit my head on the hardwood floor of the apartment I live in. I called the nurses line on Thursday June 18th [*sic*] and was advised to go to the ER to ensure I did not have a concussion as this had never happened to me before (disclosure ER report). Due to hitting my head, I had a severe headache for days following the incident. As soon as I felt better, I submitted the application on the first business day, Monday, June 22, 2020.

I shared this information with [the Director] and she did not take any of this into consideration when she processed our application the first business day following the June 20, 2020 renewal date. It was referred to as an administrative oversight in the determination which is not the case.

This is the first of any late payments in my professional accounting career. I have held an accounting designation in the province of BC since 2008 and pay my dues annually on time. I have a high credit score because I always pay things in advance or on time.

The reason for the late renewal was due to a health situation that happened that was outside of my control and this was not factored into the determination despite my long conversation outlining what happened to [the Director].

We have not filled any roles since March and this payment of \$500 is financially significant for our company at this time. I did pay the penalty immediately but I hope you reconsider the determination in light of the facts shared.

12. Ms. Chhabra also attaches a copy of the “Emergency Documentation” (the “Report”) pertaining to her visit to the hospital emergency department which appears to have been printed on the same date as her visit to the hospital, namely, June 18, 2020. The Report is not contained in the Record and appears to have been adduced for the first time in the appeal of the Determination.
13. In the Report, the examining doctor stated that Ms. Chhabra “collapsed yesterday evening around 12 midnight” on the way to the bedroom. He stated that “[s]he apparently was unconscious for a very brief period of time. When she came to she was feeling okay apart from a right-sided pain in her head. The headache did develop or gradually over the next day. There has been no nausea or vomiting. She denies any visual changes. There has been no neurologic symptoms.” In the “Impression/Plan” section of the Report, the doctor stated “No serious cause found” and recommended “rest, fluids” and directed her to “[r]eturn to ER if getting worse” and to “[a]void over-stimulation for the next few days in terms of head injury”.

THE RECORD

14. Chronologically, the Record contains an email dated June 14, 2019, from Tameen Imran (“Mr. Imran”), an officer at the Branch, to Ms. Chhabra when SRI previously renewed its employment agency licence. In that email, Mr. Imran attaches the licence with the expiry date of June 20, 2020, and informs Ms. Chhabra that the Branch does not send out renewal notices and adds: “Please ensure that you submit your application to have your licence renewed at least 30 days before your licence expires.”
15. The Record also contains email correspondence between Ms. Chhabra and Mr. Imran in 2020. More particularly, on May 27, 2020, Ms. Chhabra writes to Mr. Imran: “Is there a way I can renew [the employment agency licence] online as I don’t feel comfortable coming into the office or know if it is open.” On the same date, about a half-hour later, Mr. Imran responds by email to Ms. Chhabra advising that “[a]n in-person application is not required for employment agency licences. You can simply fill out the attached application form and then email it to: ESBDataIntegrity@gov.bc.ca.” He further adds that a \$100.00 non-refundable fee will need to be paid and she could complete the payment authorization form that can be faxed or mailed to the Licensing & Registry Clerk at the fax number or mail address provided in the email.
16. On June 3, 2020, Ms. Chhabra emails Mr. Imran inquiring if she could pay the \$100.00 fee by calling in with her credit card information, once she completes her renewal licence application. Mr. Imran responded the next day, on June 4, advising her that “we only process payments either through mail or fax.”
17. There appears to be no email exchange between Ms. Chhabra and Mr. Imran after June 4, 2020, until on June 22, after SRI’s employment agency licence had expired. On June 22, 2020, Ms. Chhabra emails Mr. Imran attaching SRI’s licence renewal application. In the email, she says that the only option she thinks she has for making payment, at this stage, is “to provide information in person to the Richmond office if they are open”. On June 23, 2020, Krystal Roberts (“Ms. Roberts”), a Data Integrity Clerk with the Branch,

emails Ms. Chhabra and advises her that she was forwarded SRI's employment agency application for entry in the Branch's database. She also advises Ms. Chhabra that "due to current social distancing parameters in place", she could take her licence fee payment over the phone. Based on the receipt issued by the Branch to Ms. Chhabra contained in the Record, it appears that Ms. Chhabra paid the fee, over the phone, on June 23, 2020.

18. On June 24, 2020, the Director emails Ms. Chhabra advising her that SRI's employment agency licence renewal had been approved and attaches the new licence. The email also advises Ms. Chhabra that the new licence will expire on June 21, 2021, and that the Branch does not send out renewal notices and she should ensure that her application for renewal of the licence is sent at least 30 days before the licence expires. She further advises Ms. Chhabra that since SRI was operating without a licence, contrary to the *ESA*, a contravention notice will be sent to her by registered mail.
19. The Record also contains the Branch's Workflow Sheet documenting, among other things, notes of the telephone call between the Director and Ms. Chhabra on June 24, 2020. In these notes, the Director records that Ms. Chhabra said she "fell on Tuesday, and was intending to renew her licence on Friday". It also states that Ms. Chhabra "was in Emergency room the Tuesday before the licence expired". While not much turns on this, in her appeal submissions, Ms. Chhabra states that she fell on "Wednesday, June 17th at 11:30 pm" and attended the hospital on Thursday, June 18, 2020. The notes also record that Ms. Chhabra "advised she just waited too long and says [SRI has] not filled any roles since March and that business has slowed." The notes also state that Ms. Chhabra said "[SRI] was still conducting business and that business is picking up", but "financially they are suffering."
20. The Record also contains an email from the Director to Ms. Chhabra, dated June 24, 2020, wherein the former advises the latter, among other things, that "[r]egardless of COVID, the Richmond office was open" and Ms. Chhabra could have called the office to see if she could attend to renew the licence. The Director also states in the email that there was also an online option to renew the licence, which Ms. Chhabra did use to renew SRI's licence, but two days after it had expired. The Director concludes her email by advising Ms. Chhabra that she reviewed SRI's case with her Team Lead and the \$500.00 "penalty will not be waived."
21. In response to the Director's email, Ms. Chhabra, on the same date, emails the Director and said that "[e]ven with the [Branch] office being open, I did not feel comfortable going in and having a concussion last week for which I have medical reports did not help". She also states that financially, SRI has "not had any revenue since before Covid started in March" and she feels the Branch is not considering any of these factors in levying a penalty. She requested to speak with "someone" as SRI is "not in a position to freely pay \$500".
22. On June 25, 2020, the Director replied to Ms. Chhabra and confirmed that the "contravention penalty of \$500 is mandatory" and that the "Branch does not have the ability to waive this penalty". She provided Ms. Chhabra the email address of her Team Lead to speak with.

ANALYSIS

23. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds only:
- (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.
24. The Tribunal has consistently said that the burden is on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds set out in section 112(1) of the *ESA*. The appellant must establish a cogent evidentiary basis for the appeal. In this case, as indicated, SRI contends that the Director failed to observe the principles of natural justice in making the Determination. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal explained 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 *BWI Business World Incorporated* BC EST #D050/96.)
25. Based on my review of the Determination, the Reasons, the Record and SRI's appeal submissions, I am satisfied that SRI was afforded natural justice and dismiss the appeal.
26. I also find the correspondence between Ms. Chhabra and Mr. Imran of the Branch and the notes of the conference call between the Director and Ms. Chhabra on June 24, 2020, contained in the Branch's Workflow Sheet in the Record, quite telling. In his June 14, 2019 email to Ms. Chhabra attaching the previously renewed employment agency licence of SRI, Mr. Imran informs Ms. Chhabra that the Branch does not send out renewal notices and encourages her to ensure that she submits her application for licence renewal at least 30 days before it expires. On May 27, 2020, Ms. Chhabra was aware that SRI's employment agency licence was coming up for renewal. She emailed Mr. Imran on that date and informed him that she was not comfortable coming to the Branch office to renew the licence. Mr. Imran replied to her advising that she need not renew the licence in person; there was an option by mail, fax and online. She then emailed him on June 3, 2020 to inquire if she could pay the \$100.00 licence renewal fee by telephone, once she completed her renewal licence application. Mr. Imran replied on June 4, 2020 advising her that "we only process payments either through mail or fax." Thereafter, there is no email exchange with Mr. Imran until June 22, 2020, after the licence had expired. There is no evidence of what efforts, if any, Ms. Chhabra made to renew the licence between June 4, 2020 and before her accident on June 17, 2020.

27. However, after the expiry of SRI's licence and its subsequent late renewal, the Director had a call with Ms. Chhabra on June 24, 2020. The Director recorded her notes of the call in the Branch's Workflow Sheet and stated that Ms. Chhabra said to her that "she just waited too long [to renew the licence]". The notes also indicate that Ms. Chhabra told the Director about her fainting and hurting her head. While nothing really significant turns on this, the timing of the accident in the notes appears to be wrong. Considering the evidence consisting of the exchanges between Ms. Chhabra and Mr. Imran and Ms. Chhabra and the Director, I find it was open to the Director to conclude that Ms. Chhabra's late renewal was "an administrative oversight".
28. While the Director did not address the accident of Ms. Chhabra in any detail in the Reasons, I do not find this would have changed the Determination. There is not sufficient or any evidence in the Record, including in the Report, that would persuade me that Ms. Chhabra's injury prevented her from renewing SRI's employment agency licence in a timely fashion. While the Report would *not* likely qualify as new evidence under the first of the four-part test for admitting new evidence on appeal set out in *Re Merilus Technologies Inc.* (BC EST # D171/03), because it existed on June 18, 2020, and could have been presented to the Director during her investigation or prior to the Determination, there is nothing in the Report that says or suggests that Ms. Chhabra was prevented from renewing the licence due to her injury of June 17.
29. Having said this, I now turn to the administrative penalty imposed on SRI. The provision governing licensing of employment agencies is section 12 of the *ESA*. It states:
- Employment and talent agencies must be licensed***
- 12 (1) A person must not operate an employment agency . . . unless the person is licensed under this Act.
30. Section 12 uses mandatory language. It requires that one "must" not operate an employment agency without a licence under the *ESA*. There is *no discretion* in the Director to overlook this requirement. In this case, SRI's licence expired on June 20, 2020, and Ms. Chhabra does not dispute that SRI continued operating after the licence expired. Whether SRI operated a day or two without a licence and whether it filled any positions or not is immaterial. What is material is that it operated for any period at all without a licence or with an expired licence.
31. It is also immaterial to the Director's decision whether this is the first time in Ms. Chhabra's professional accounting career that she has made a late payment or that she has held an accounting designation in B.C. since 2008 and always paid her accounting dues on time. It is also immaterial that she has a high credit score or that "[the] payment of \$500 is financially significant for [SRI] at this time". None of these factors mitigate or excuse SRI's contravention of section 12 of the *ESA*.
32. While I sympathize very much with SRI's business or financial circumstances, I reiterate that the language of section 12(1) does not afford the Director any discretion where a person operates an employment agency without a licence. 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. Chhabra may find the penalty amount in SRI's case unaffordable or excessive, the Director has no discretion in changing the penalty amounts.

33. In the result, I find that there is no basis for interfering with the Director's Determination. Therefore, I find that this appeal has no reasonable prospect of success and, must be dismissed under subsection 114(1)(f) of the *ESA*.

ORDER

34. 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