

An appeal

- by -

Janet O'Dell

- 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: Maia Tsurumi

FILE NO.: 2020/066

DATE OF DECISION: July 8, 2020

DECISION

SUBMISSIONS

Janet O'Dell

on her own behalf carrying on business as Vancouver
Island Dental Agency

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Janet O’Dell carrying on business as Vancouver Island Dental Agency (“*VIDA*”) has filed an appeal of a determination (the “*Determination*”) issued by Amanda Lipinski, a delegate (the “*Delegate*”) of the Director of Employment Standards (the “*Director*”) on March 24, 2020. In the *Determination*, the *Delegate* found *VIDA* contravened section 12 of the *ESA* and imposed a \$500 administrative penalty.
2. *VIDA* does not specify the statutory grounds for its appeal.
3. I have decided that this appeal is appropriate for consideration under sub-section 114(1) of the *ESA*. Under sub-section 114(1), the Employment Standards Tribunal (the “*Tribunal*”) has the discretion to dismiss all or part of an appeal, without a hearing, for any of the following reasons:
 - (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 that 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.
4. Pursuant to sub-section 114(1)(f), I dismiss the appeal and pursuant to sub-section 115(1)(b), I confirm the *Determination*. My decision is based on the submissions made by *VIDA* in its Appeal Form, the sub-section 112(5) record (the “*Record*”), the *Determination* and the Reasons for the *Determination* (the “*Reasons*”).

ISSUE

5. The issue before the Tribunal is whether the appeal should be allowed.

THE DETERMINATION

Background

6. VIDA is an employment agency as defined by the *ESA*. It is a sole proprietorship registered in the name of Janet O'Dell ("Ms. O'Dell"). On February 13, 2020, VIDA submitted a Renewal Application for Employment Agency Licence (the "Application") to the Employment Standards Branch (the "Branch"). VIDA was issued an employment agency licence under the *ESA* on February 5, 2019, with an expiry date of February 5, 2020.

Issues Before the Delegate

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

Evidence Relied on by the Delegate

8. The Delegate reviewed the Branch's employment agency licence database and verified VIDA's previous licence history, including the fact that VIDA's previous licence expired on February 5, 2020.
9. The Delegate also reviewed VIDA's website to confirm the nature of VIDA's business, in particular, whether it fell within the *ESA*'s definition of an employment agency. Sub-section 1(1) of the *ESA* defines an employment agency as "*a person who, for a fee, recruits or offers to recruit employees for employers.*" VIDA's website indicated its business was to provide staffing, recruitment and employment agency services to the dental industry. VIDA's website had a link to its Facebook page, which had job listings. Based on VIDA's website and Facebook page, the Delegate found VIDA was an employment agency under the *ESA*.
10. The Delegate then had a brief interview with Ms. O'Dell on February 27, 2020. During the interview, the Delegate informed Ms. O'Dell that VIDA was under investigation for operating without a valid licence, which could result in an administrative penalty. Ms. O'Dell told the Delegate that the Application was submitted late because she was not entirely certain when the licence expired. Ms. O'Dell also said that although she continued to offer employment agency services, she had not placed any employees since the middle of October 2019.

The Determination

11. On the basis of the evidence described above, the Delegate found that VIDA violated section 12 of the *ESA* by operating as an employment agency without a licence between February 5 and 26, 2020.

ARGUMENT

12. In its Appeal Form, VIDA did not specify its statutory grounds of appeal. However, it submitted that:
 - (a) its Application was submitted after its employment agency licence had expired;

- (b) its Application was submitted five days late, in part because of issues with the fax number listed on the Branch's website;
- (c) this is VIDA's first infraction under the *ESA*;
- (d) it is in its last year of business, in part because of COVID-19, and in part because it has not had any new contracts or temporary days;
- (e) it was not aware it had to shut down its Facebook pages while it was unlicensed;
- (f) in March 2019, Ms. O'Dell had major surgery for two diseases, which have caused her massive chronic pain and clinical depression, and which have affected her memory;
- (g) some of the Facebook listings were either "*repetitive due to no active members*" or repeated from previous advertisements;
- (h) Ms. O'Dell has lost her employment because of COVID-19 and paying the administrative penalty would take food away from her and her family; and
- (i) between February 5 and 11, 2020 specifically, and also "*for a long time*", VIDA had not recruited any employees or have any requests from employees.

ANALYSIS

13. 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.

Breach of natural justice

14. 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 their case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27.
15. There was no breach of procedural fairness. VIDA was given notice that the Delegate was investigating it for operating without a licence and VIDA had an opportunity to respond.

Error of law and new evidence

16. There was no error of law. Also, the new evidence submitted on appeal is not evidence I can consider in deciding this appeal. Further, even were I to consider the new evidence provided on appeal, there would be no basis on which to cancel or vary the Determination.

17. Section 12 is contravened when an employment agency operates without a licence and VIDA acknowledged to the Delegate, and on appeal, that it operated after its licence expired and before it was issued a new licence on February 27, 2020. I note that in relation to VIDA's submission that the Application was submitted five days late, the key issue for section 12 is whether a person is operating an employment agency when they are not licensed. As VIDA's licence expired on February 5, 2020, it had to have submitted and received a new licence by that date in order to continue operating. The Application was not due on that date.
18. Based on her review and research and on VIDA's admission that it breached section 12, the Delegate found VIDA violated section 12 by operating without a licence. Once she came to that determination, she had to impose the \$500 mandatory administrative penalty for the breach: *Kimberley Dawn Kopchuk (Re)*, BC EST # D049/05. Section 29 of the *Employment Standards Regulation*, B.C. Reg. 396/95 states that if the Director determines that a person has contravened a requirement under the *ESA*, there is a fine of \$500 (unless certain circumstances apply that increase the fine to \$2,500 or \$10,000).
19. In summary, the Delegate reasonably found a violation of section 12 and she had no discretion about imposing the \$500 administrative. Therefore, whether or not this was VIDA's first infraction is not a relevant consideration on appeal and neither are the other submissions by VIDA that: (1) it was in its last year of business; (2) it was not aware it had to shut down its Facebook page while it was unlicensed; (3) Ms. O'Dell's surgery; (4) the effect of some of the Facebook listings; (5) it had not placed any clients or had any contracts for a long time; (6) paying the penalty would cause hardship; and (7) COVID-19 considerations.
20. While these are sympathetic circumstances, they cannot factor into my decision on appeal for two reasons. First, they do not indicate any error in law as the violation of section 12 was admitted and the resulting penalty was mandatory. Second, the submissions that were not before the Delegate do not meet the test for my receiving them on appeal as new evidence. 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). The Tribunal in *Bruce Davies et al.* provided a test for whether new evidence should be accepted on appeal:

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.

21. VIDA's submissions do not meet the Tribunal's test for admitting new evidence. With an exercise of due diligence, VIDA could have provided this information to the Delegate before the Determination was made.

ORDER

22. Pursuant to section 114(1)(f) of the *ESA* I find this appeal has no reasonable prospect of success and pursuant to section 115(1)(b), I order the Determination, dated March 24, 2020, confirmed.

Maia Tsurumi
Member
Employment Standards Tribunal