

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Surinder Singh Trehan
("Trehan")

- 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.: 2020/050

DATE OF DECISION: July 27, 2020

DECISION

SUBMISSIONS

Rajesh Soni	counsel for Surinder Singh Trehan
Laurel Courtenay	counsel for the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Surinder Singh Trehan carrying on business as Trehan Consulting Group Inc. (“Trehan”) has filed an appeal of a determination (the “Determination”) issued by Shane O’Grady, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on February 7, 2020. In the Determination, the Delegate cancelled Trehan’s employment agency licence.
2. Trehan appeals the Determination on the grounds that the Delegate failed to observe the principles of natural justice and made an error of law in making his Determination
3. This decision is based on the submissions made by Trehan in its Appeal Form, the sub-section 112(5) record (the “Record”), the Determination, the Reasons for the Determination (the “Reasons”), and submissions from the Director (the “Director’s Submissions”).

ISSUE

4. The issue before the Employment Standards Tribunal (the “Tribunal”) is whether the Delegate failed to observe principles of natural justice in making the Determination and/or erred in law.

THE DETERMINATION

Background

5. Trehan is an employment agency as defined by the *ESA*. On July 17, 2019, the Employment Standards Branch (the “Branch”) received an application (the “Application”) for an employment agency licence from Mr. Surinder Singh Trehan (“Mr. Trehan”). Trehan was issued an employment agency licence under the *ESA* on July 19, 2019, with an expiry date of July 18, 2020.

Issues Before the Delegate

6. The issue before the Delegate was whether Trehan contravened the *ESA* by providing false and misleading information in his application for a licence.

Evidence Relied on by the Delegate

7. On December 7, 2010, the Director issued a determination (the “2010 Determination”) against Canada and USA Immigration Services Ltd. (“CUIS”), Surinder Singh carrying on business as Savvy Pros and Savvy Consultants Inc. (collectively, the “Prior Agency”). The delegate (the “2010 Delegate”) found the entities that made up the Prior Agency were associated employers under section 95 of the *ESA*. The 2010 Delegate found that the Prior Agency contravened section 10 of the *ESA* by directly or indirectly charging the complainant a fee for finding him employment and/or for providing him with information about employers seeking employees. The amount charged was \$12,000.
8. The Tribunal upheld the 2010 Determination and the application for reconsideration was dismissed: BC EST # D058/11; BC EST # RD100/11.
9. Trehan’s Application for an employment agency licence submitted on July 17, 2019, listed Mr. Trehan as the individual who should be contacted with respect to the Application. Mr. Trehan wrote “*Not Applicable*” in response to the following question on the Application:

If you or any of the above-named individuals have been issued an employment agency licence in the past please provide details including the name on the licence, location, and year of licence:
10. Mr. Trehan signed the Application immediately below the following undertaking:

I undertake to comply with the requirements of the *Employment Standards Act*. I understand that this licence may be cancelled if:

 - I make any false or misleading statements in applying for this licence;
 - I do not operate in the best interests of employers and persons seeking employment;
 - I place a domestic with an employer and fail to inform that employer of the requirement to register a domestic with the Employment Standards Branch.
11. The Delegate stated that under section 2 of the *Employment Standards Regulation* (the “*Regulation*”), the Director may issue an employment agency licence only if the applicant has satisfied the Director that the applicant will operate an employment agency in the best interests of employers and persons seeking employment.
12. The Delegate explained that section 4 of the *Regulation* allows the Director to cancel an employment agency licence for any of the following reasons:
 - a. The employment agency makes a false or misleading statement in an application for a licence;
 - b. The employment agency contravenes the Act or Regulation;
 - c. The employment agency is operating or has operated contrary to the best interests of employers or persons seeking employment; or
 - d. The employment agency places a domestic with an employer and does not inform the employer of the requirement to register the domestic with the Branch.

13. The Delegate reviewed Trehan's employment agency licence history and the Application and found that Mr. Trehan provided false and misleading information in the Application. Mr. Trehan was required to disclose in the Application whether or not he was previously issued an employment agency licence by the Branch. The Branch's database showed that Mr. Trehan previously held an employment agency licence issued on December 28, 2009, which expired on December 28, 2010. Also, CUIS, of which Mr. Trehan was a director, held three employment agency licences between September 2, 2003, and June 15, 2007.
14. The Delegate concluded that if the Application had been truthful about Mr. Trehan's past misconduct (i.e. about the 2010 Determination), then Trehan would not have been issued a licence on the grounds that Mr. Trehan failed to satisfy the Director that he would operate an employment agency in the best interests of employers and persons seeking employment. The basis for this was two-fold.
15. First, the 2010 Determination found the Prior Agency, which included Mr. Trehan, charged an individual \$12,000, directly or indirectly for finding the individual employment and/or for providing him with information about an employer seeking employees. The Delegate noted that this kind of act was strictly prohibited by the *ESA*, which has as one of its purposes the promotion of fair treatment of employees. It is not in the best interest of a person seeking employment to be charged money by an employment agency for employment or information about an employer.
16. Second, the Prior Agency had not paid the amount owing to the complainant who was illegally charged the \$12,000. This further indicated that Trehan would not, moving forward, operate an employment agency in the best interests of employers or persons seeking employment.
17. The Delegate ordered the cancellation of Trehan's licence.
18. The Delegate noted that a party is typically provided an opportunity to respond before a determination is made, but, in his view, the extreme circumstances, including Mr. Trehan's past non-compliance with the *ESA*, outstanding monies owed to a complainant and the serious questions about Mr. Trehan's ability or willingness to comply with the *ESA* and *Regulation* and to operate in the best interests of employers or persons seeking employment, made it appropriate to cancel the licence without hearing from Trehan. The Delegate said that Trehan could submit a new application if it wanted an opportunity to respond to the licence cancellation.

ARGUMENT

19. Trehan submits that:
 - a. Mr. Trehan "*mistakenly wrote, 'not applicable'*" in response to the question on the Application about whether he had been issued an employment agency licence in the past; and
 - b. on July 18, 2019, Mr. Trehan informed a delegate of the Director via telephone that he had previously had an employment licence.

20. Trehan submits that the Delegate failed to observe principles of natural justice because:
- a. fairness in the context of an investigation under the *ESA* means that all parties must have the right to notice, the right to be heard, the right to a coherent procedure and the right to a reasoned decision;
 - b. the Delegate did not give Trehan an opportunity to be heard regarding cancellation of his licence;
 - c. there is no basis on which to override principles of natural justice based on “*extreme circumstances*” and the Delegate did not explain on what criteria circumstances are held to be “*extreme*”;
 - d. in the alternative, the circumstances were not “*extreme*”: Mr. Trehan poses no immediate threat to other employers or to its employees or to the prosperity of the province;
 - e. the Determination means substantial and immediate harm to Mr. Trehan and his employees and thus Trehan should have been allowed to make written submissions before the Determination was made; and
 - f. the Delegate’s failure to allow Trehan to respond to the investigation led to the omission of material evidence.
21. Trehan also submits that the Delegate made an error of law because the Delegate exercised his discretion in a matter that was wrong in principle and acted on a view of the facts that could not reasonably be expected.
22. Regarding the Delegate’s exercise of discretion, Trehan says that the *Regulation* uses the word “*may*” so the Delegate had a discretion whether or not to cancel Trehan’s licence. However, the Determination was a disproportionate penalty that was not justifiable given the impact on Trehan and its employees. This was contrary to the vital purpose of the *ESA* to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia.
23. Trehan submits that it mistakenly failed to disclose Mr. Trehan’s previous employment agency licence on its Application and that in a telephone call with the Branch on July 18, 2019, it disclosed that Mr. Trehan had previously held licences. Mr. Trehan admits he had a previous Determination against him for \$12,000 owing to an individual, but says that he lacked the means to satisfy this Order, which is shown by his declaration of bankruptcy on June 16, 2013, and his subsequent discharge on December 13, 2016.
24. Trehan further submits that since his declaration of bankruptcy, Mr. Trehan has sought to regain his economic footing through the creation of his agency, Trehan. Thus, it serves no one to remove Mr. Trehan’s ability to earn income by cancelling his licence.
25. Trehan says that the cancellation of its licence has caused severe economic hardship for its employees, which is contrary to the *ESA*’s purpose of fostering the development of a productive, efficient labour force that contributes to the prosperity of the province. Also, there were less harmful alternatives available to the Delegate than cancelling Trehan’s licence, including a fine.

26. Regarding the Delegate acting on a view of the facts that could not reasonably be entertained, Trehan says that the Delegate relied on the material fact that Mr. Trehan never disclosed that he had previously held employment agency licences, but Mr. Trehan had told the Branch about his previous licences on July 18, 2019.
27. The Director's Submissions addressed Trehan's allegations that the Delegate failed to observe the principles of natural justice and made an error of law; Mr. Trehan informed a delegate of the Branch that he had previously held employment agency licences; and the question of "*extreme circumstances*".
28. The Director acknowledges that Mr. Trehan was not made aware of the investigation into his past licences and therefore had no opportunity to respond. The Director submits that, at a minimum, Trehan should have been notified that the Director was considering cancelling his licence and give the chance to make submissions to the Director. The Director says that the correct disposition of the appeal is to cancel the Determination and refer the matter back to the Director to reinvestigate in a matter that affords Trehan an appropriate degree of procedural fairness. While the Director maintains that the circumstances in this case were egregious, the Director submits that no circumstances, not matter how extreme, warrant a complete denial of natural justice as occurred in this case.
29. Regarding Mr. Trehan's assertion that he informed the Branch that he previously held employment agency licences, the Director submits there is no evidence of this on the Record.
30. Trehan was given an opportunity to reply to the Director's Submissions, but declined to do so.

ANALYSIS

31. 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

32. 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.
33. 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.

34. 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.
35. Regarding the nature of the decision made here, the Delegate was deciding whether Trehan should have its licence cancelled or suspended.
36. The process here involved the Delegate reviewing Mr. Trehan’s licensing records.
37. 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 Director’s 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: *ESA*, 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: *ESA*, sections 84 – 85. The regulatory scheme does not require express notice of investigation, but it does require the Director to make reasonable efforts to give a person under investigation an opportunity to respond if an investigation is conducted: *ESA*, section 77.
38. The importance of this decision to Trehan is substantial given that a licence cancellation means closure of its business.
39. There was no evidence in the Record as to the legitimate expectations of Trehan, 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.
40. Finally, the choice of procedure here was within the discretion of the Delegate. The *ESA* does not require a hearing and Branch decisions are made in a dynamic and fluid environment.

41. The Delegate did not give Trehan an opportunity to respond before he made his Determination because of what he termed “*extreme circumstances*”. These circumstances were: (1) Mr. Trehan’s past non-compliance with the *ESA*; (2) outstanding monies owed to a complainant; and (3) the serious questions about Mr. Trehan’s ability or willingness to comply with the *ESA* and *Regulation* and to operate in the best interests of employers or persons seeking employment. The Delegate also said that Trehan could submit a new application if it wanted an opportunity to respond to the licence cancellation.
42. As explained by *Baker*, the specific procedural rights the duty of fairness requires in any given situation is not determined by the type of circumstances mentioned by the Delegate.
43. Balancing the above *Baker* factors, like the Director, I conclude that there was a breach of procedural fairness. Trehan was not given notice that the Delegate was investigating it and considering cancelling or suspending its licence. There is no indication in the Record, the Reasons or the Director’s Submissions that the Delegate made reasonable efforts to give Trehan an opportunity to respond. In fact, the Delegate expressly notes that he decided not to do so. Given the nature of the decision (a licence cancellation or suspension), the nature of the statutory scheme and the express terms of the *ESA*, the significant importance of the decision to Trehan and its legitimate expectations, Trehan should have been given an opportunity to make written submissions before the Delegate made his Determination.
44. I therefore cancel the Determination. If the Director wishes to investigate this matter, the investigation must be conducted with the appropriate degree of procedural fairness.

Error of law and new evidence

45. As I have found a breach of procedural fairness and am cancelling the Determination, I decline to deal with whether there was an error of law with respect to the merits of the decision and whether Trehan’s new evidence should have been accepted on appeal.

ORDER

46. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination, dated February 7, 2020, be cancelled.

Maia Tsurumi
Member
Employment Standards Tribunal