



Citation: ProGrade Staffing LLP (Re)
2021 BCEST 30

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

ProGrade Staffing LLP
("ProGrade")

- 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: David B. Stevenson

FILE No.: 2021/016

DATE OF DECISION: April 6, 2021

DECISION

SUBMISSIONS

Patrick Stegner

on behalf of Prograde Staffing LLP

OVERVIEW

1. ProGrade Staffing LLP (“ProGrade”) has filed an appeal under section 112 of the *Employment Standards Act* (the “ESA”) of a determination issued by Maureen Earl, a delegate of the Director of Employment Standards (the “Director”), on January 22, 2021 (the “Determination”).
2. The Determination found ProGrade had contravened section 12 of the *ESA* and ordered ProGrade to pay an administrative penalty in the amount of \$500.00, which is the total amount of the Determination.
3. In this appeal ProGrade says the Director erred in law in making the Determination. ProGrade also relies on new evidence becoming available that was not available when the Determination was being made. ProGrade seeks to have the Determination cancelled.
4. In correspondence dated February 22, 2021, the Tribunal acknowledged having received an appeal. Among other things, the correspondence requested the section 112(5) record (the “record”) from the Director and indicated that no submissions were being sought from the Director pending a review of the appeal by the Tribunal.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to ProGrade, which has been given an opportunity to object to its completeness.
6. ProGrade filed a submission that included a document that was not included in the record. Apart from this document, which I shall address later in this decision, there has been no argument that the record is otherwise incomplete, and I accept it is complete.
7. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made and any material accepted for inclusion in the appeal. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*

- (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 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.*

8. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

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

THE FACTS

10. ProGrade operates an employment agency as that term is defined in the *ESA*. On December 14, 2020, ProGrade made an application for an Employment Agency Licence to the Employment Standards Branch (the “Branch”). ProGrade had no existing licence at the time of the application.

11. An investigation of the application was conducted by the Director, which included a discussion with Patrick Stegner (“Mr. Stegner”), a Partner of ProGrade, who acknowledged in the discussion that ProGrade had posted job advertisements prior to applying for the licence. Mr. Stegner also indicated to the Director that ProGrade would be hiring for any and all industries, that ProGrade had posted for technical jobs in the previous three months and would eventually like to expand into hiring for the construction and oil industries.

12. The Director concluded the facts demonstrated a contravention of section 12 of the *ESA*, found the contravention date to be January 11, 2021, and imposed an administrative penalty in the amount of \$500.00.

THE APPEAL

13. The appeal is entirely grounded in the assertion of fact by ProGrade that at the time of the application, and up to the date of the appeal, it had only one client and the effect that might have on the requirement for ProGrade to have an Employment Agency Licence.

14. Mr. Stegner, who represented ProGrade in the appeal, acknowledged ProGrade had assisted his brother in a search for an Executive Assistant, but his brother had signed no contract and was not a client at the time.

15. ProGrade had posted four job vacancies for one client. ProGrade has included a copy of the contract with this client and seeks to have this material considered as new evidence.
16. Mr. Stegner says the Director never asked how many clients ProGrade had.
17. ProGrade argues the *ESA* does not require an employment agency to be licenced if it has no more than one client and the Director made an error based on the incorrect assumption that ProGrade had more than one client.

ANALYSIS

18. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 112 (1)** *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.*
19. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
20. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.
21. ProGrade has grounded this appeal in error of law and evidence becoming available that was not available when the Determination was being made. The latter ground of appeal is commonly described as the “new evidence” ground of appeal.

Error of Law

22. The Tribunal has adopted the following definition of “error of law” set out by 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 [in *Gemex*, the legislation was the *Assessment 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.

23. The grounds of appeal under the *ESA* 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.

24. Section 12 of the *ESA* reads:

- 12** (1) *A person must not operate an employment agency or a talent agency unless the person is licenced under this Act.*
- (2) *Subsection (1) does not apply to a person operating an employment agency for the sole purpose of hiring employees exclusively for one employer.*

25. In this appeal ProGrade does not dispute the facts, but argues the Director did not acquire all the relevant facts and, in failing to do so, misapplied the provisions of section 12 of the *ESA* to the facts acquired by the Director and so committed an error of law.

26. I shall accept, for the purposes of this appeal, that ProGrade had one client at the time it applied for the licence.

27. I do not, however, accept that fact is relevant and do not agree the Director made an error of law in the circumstances. The exclusion in subsection (2) of section 12 to the licencing requirements found in subsection (1) of section 12 applies only to a person whose "sole purpose" in operating an employment agency is to hire "exclusively" for one employer. The exclusion does not say it applies to an employment agency which has only one "client". The information provided during to the Director during the investigation indicated quite clearly that ProGrade was not an employment agency that fell within subsection (2).

28. The facts as provided to the Director demonstrate the objective of ProGrade was to recruit for "all industries" and for a number of different kinds of jobs: see summary of the January 12, 2020 telephone discussion at page 15 of the record. The following statement in the appeal submission affirms what was said to the Director:

We applied for the agency license with the assumption that our business would eventually grow and at some point in the future we would have more than 1 client.

29. That statement and the one made to the Director in the January 12 telephone discussion put the argument to rest. The assertion of fact that grounds this appeal – that ProGrade had only one client at the time the licence application was made (and for the three months leading up to the application) – is irrelevant because the facts did not show that ProGrade's "sole purpose" in operating the employment agency was to hire employees exclusively for that one employer.

New Evidence

30. ProGrade has submitted material that is not found in the record, and would be an addition to it.

31. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the

proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

32. I am not persuaded to exercise my discretion to accept or consider the “evidence” included by ProGrade with their appeal and find against accepting or considering it, as the evidence is neither “new” nor, for the reason provided above, probative, in the sense that it is relevant to an issue in dispute.
33. I find the appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the Director to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

34. Pursuant to section 115 of the *ESA*, I order the Determination dated January 22, 2021, be confirmed in the amount of \$500.00.

David B. Stevenson
Member
Employment Standards Tribunal