Citation: ProGrade Staffing LLP (Re)
2021 BCEST 48

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

ProGrade Staffing LLP
(the "applicant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2021/038

DATE OF DECISION: May 20, 2021

DECISION

SUBMISSIONS

Patrick Stegner — on behalf of ProGrade Staffing LLP

INTRODUCTION

1. This is an application filed by ProGrade Staffing LLP (the "applicant") under section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of 2021 BCEST 30, issued on April 6, 2021 (the "Appeal Decision"). By way of the Appeal Decision, the Tribunal confirmed a $500 monetary penalty issued against the applicant on January 22, 2021 by Maureen Earl, a delegate of the Director of Employment Standards (the "delegate"). On this latter date, the delegate issued the penalty Determination and her accompanying "Reasons for the Determination".

BACKGROUND FACTS

2. An "employment agency" is defined in section 1(1) of the *ESA* as meaning "a person who, for a fee and for employers, recruits or offers to recruit employees, except employees (a) who are foreign nationals, as defined in the *Temporary Foreign Worker Protection Act*, and (b) to whom recruitment services, as defined in that Act, must be provided in accordance with that Act." Section 12(1) of the *ESA* states that a person "must not operate an employment agency or a talent agency unless the person is licensed under this Act". However, section 12(2) states that a person is *not* required to obtain a licence if they are "operating an employment agency for the sole purpose of hiring employees exclusively for one employer". This latter statutory dispensation lies at the heart of this dispute.

3. Following the receipt of an application for an employment agency licence (filed on December 14, 2020), the delegate contacted the applicant's principal in order to obtain further information relating to the licence application. Prior to contacting the applicant, the delegate undertook a brief online search, noting the following: "Due diligence searches have shown this company has been conducting business before their initial EA licence application. Screenshots taken of job ads on LinkedIn saved to the Searches tab. There are 3 screenshots of several jobs advertised within the last 3 months."

4. The applicant was approved for an employment agency licence, but was also advised that a $500 monetary penalty would be issued. This penalty was issued by way of the January 22nd Determination.

5. On appeal, the applicant maintained that it was not operating an unlicensed employment agency during the relevant time frame because it had only one client. The Tribunal, in the Appeal Decision, rejected this submission holding (at paras. 25 – 29):

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

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).

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.

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.

THE RECONSIDERATION APPLICATION – FINDINGS AND ANALYSIS

6. The applicant maintains, as it did on appeal, that it was not required to comply with section 12(1) of the *ESA* because it had only one client. The applicant's submission on reconsideration also contains the following assertions:

- "… I lost my job due to Covid and rather than do nothing and collect benefits I decided to be productive and create a company that will contribute to myself and the entire Vancouver community. My brother owns a company and mentioned I could advertise for a position as a way to test the waters to see if this idea is even going to work. We never had a contract and he was never an actual client. After I determined this is going to work, there is interest I applied for my business [*sic*] license and started looking for a real client."

- "…there is no need for a business [*sic*] license if you only have one client. To be completely honest here, I only discovered this after I was issued a fine and read all of the rules. So I have by luck alone not broken any rules."

- "Its [*sic*] not the fine that I'm concerned about here, its [*sic*] the principle that I'm falsely by punished for something I did not do and being punished for being creative and not just taking the easy government assistance. Canada should be assisting, promoting creative thoughts and ideas, not punishing them."

7. The section 112(5) record includes the original licence application (which includes a questionnaire) in which the applicant stated that it would be recruiting in the "Tech, Financial" industries. In this application, the applicant also indicated that it would be offering the following services: "Sourcing and recruitment services for clients and candidates" (my underlining). The section 112(5) record also includes a summary of a telephone conversation between the delegate and the applicant's principal on January 12, 2021 which includes the following notations:

- "ER [Employer] will be hiring for any and all industry but right now it's more technical and would eventually like to hire for the oil and construction industries";
- "We then went over question 8 regarding mandatory penalty starting at $500 and I advised him I noted he had been conducting business before he was licensed to do so";
- "He asked if the penalty could be waived because they were new. I advised I did not have the ability to waive the penalty."

8. The applicant clearly meets the statutory definition of an "employment agency" and, indeed, does not argue otherwise. However, if an agency's only or "sole" purpose is to recruit employees for a single employer, it need not be licensed. This exemption does not turn on the number of clients that an agency may have; rather, the section 12(2) exception requires a relationship of exclusivity between the agency and a particular employer. I am prepared to accept for purposes of this application, as did the Member on appeal, that during the relevant time period, the applicant was only recruiting potential employees on behalf of a single client (although, the evidence on this point is somewhat equivocal). But, critically, there is nothing in the record to show that the applicant had any sort of *exclusive* arrangement with this one client.

9. This was a start-up business and, in its early days, it may have had only one client. Nevertheless, as evidenced by the conversation recorded in the delegate's notes, the applicant was not operating a "single-client" agency but, instead, was prepared to take on assignments from as many clients as it could handle from certain industries, such as high technology, finance, oil and construction. The applicant's licence application did not indicate that the agency was anticipated to be a "single-client" agency (i.e., hiring exclusively for one employer). In fact, the application expressly stated that it would *not* be a single-client agency, describing the business as "sourcing and recruitment services for clients and candidates" (my underlining).

10. I entirely endorse the reasoning set out in the Appeal Decision. In my view, this application does not, even on a *prima facie* basis, raise a serious challenge to the correctness of the Appeal Decision. On that basis, this application fails to pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98) and, accordingly, must be dismissed.

ORDER

11. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal