

An appeal

- by -

Azucena Furman
carrying on business as T.R.U.E. North Immigration Consulting
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Rajiv K. Gandhi

FILE No.: 2015A/127

DATE OF DECISION: January 11, 2016

DECISION

SUBMISSIONS

Azucena Furman	on her own behalf, carrying on business as T.R.U.E. North Immigration Consulting
Christina Ewasiuk	on behalf of the Director of Employment Standards

OVERVIEW

1. Section 12(1) of the *Employment Standards Act* (the “*Act*”) provides that a person must not operate an employment agency or talent agency unless the person is licensed.
2. Section 1 of the *Act* defines an “employment agency” as a person who, for a fee, recruits or offers to recruit employees for employers.
3. Azucena Furman carrying on business as T.R.U.E. North Immigration Consulting (the “Appellant”) had an employment agency licence, issued on August 14, 2014, which expired on August 13, 2015. An application to renew the licence was not submitted until August 24, 2015.
4. In a determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 28, 2015 (the “Determination”), the Appellant was found to have contravened section 12 of the *Act*.
5. The Appellant now seeks to cancel the Determination on the basis that the Director failed to observe the principles of natural justice.
6. Section 76(2) of the *Act* permits the Director to conduct an investigation to ensure compliance with the *Act*. Section 77 of the *Act* requires the Director to make reasonable efforts to give a person under investigation an opportunity to respond.
7. Natural justice demands that, at all times, the Director must act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2).
8. Fairness, in the context of a hearing or an investigation under the *Act*, means that all parties involved must have the right to notice, the right to be heard, the right to a coherent procedure, and the right to a reasoned decision (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05 at paragraph 15).
9. For the reasons that follow, I am referring this matter back to the Director for further investigation, according to section 115(1)(b) of the *Act*.

THE FACTS AND ANALYSIS

Evidence

10. In considering this appeal, I have reviewed the Determination, the materials originally filed by the Appellant on October 1, 2015, the Director’s Record (the “Record”) delivered on October 7, 2015, submissions from

the Appellant received on October 8, 2015, and, finally, submissions received from the Director on November 27, 2015.

11. With respect to the Appellant's submissions, I make the following comments:
 - (a) The Appellant does not object to the Record.
 - (b) The Appellant's submissions include what, to me, appears to be "new" evidence in the sense that it was not provided to the Director during the investigation or before the Determination.
 - (c) I have not considered any such new evidence; rather, I have reviewed only that evidence included in the Record.

The Determination

12. To find that there has been a contravention of section 12 of the *Act*, the Director must establish that the Appellant recruited or offered to recruit employees for employers, for a fee and in the absence of a valid licence. The Appellant's lack of intent, mistake, or inadvertent error does not mitigate or excuse a breach.
13. In this instance, the Director concluded that the Appellant contravened section 12 of the *Act* because:
 - (a) the Appellant placed an advertisement on the WorkBC website on July 13, 2015 (the "Advertisement"), which remained active following expiry of her licence;
 - (b) between August 13, 2015, and August 28, 2015, while the Appellant was without a licence, the Appellant's website (the "Website") was operational and able to provide and receive information specific to the business of operating an employment agency;
 - (c) the Director found it to be "unlikely" that the Appellant would turn away any individual contacting her in response to the Advertisement; and
 - (d) the Director found it to be "unlikely" that the Appellant would refuse other business opportunities.

Error in Law

14. In her appeal, the Appellant does not argue any error in law under section 112(1)(a) of the *Act*. Nevertheless, I point out that the *Act* does not confer upon the Director the right to penalize someone for something they might do, and to the extent that the Director has found a contravention of section 12 because of something the Director thinks the Appellant is unlikely to refrain from doing (that is, turning away a response to the Advertisement, or refusing other business opportunities), I find that the Director has erred in the application of section 12 of the *Act*.

Natural Justice

15. The Appellant does say that the Director failed to observe the principles of natural justice in making the Determination – a permitted ground for appeal under section 112(1)(b) of the *Act*.
16. The Director submits that the Appellant was "sufficiently notified and aware of its responsibilities under the Act and was afforded natural justice throughout the application process". I am not clear if the Director is referring to the application for the original, lapsed, application, or the renewal application. Either way, the application for a licence or to renew a licence is distinct from an investigation conducted by the Director

according to section 76 of the *Act*, and the Director's submissions do not answer the question of whether or not the principles of natural justice were observed in the Director's investigation with respect to the Appellant's compliance with section 12.

(a) *The Conversation*

17. According to the Determination, the Director's delegate had a single conversation with the Appellant on August 27, 2015, prior to issuing the Determination. There is no transcript or note of that conversation, at least any that are in the Record, as should have been included according to guidelines previously established by the Tribunal (*Director of Employment Standards, Re: ProTruck Collision & Frame Repair Inc.*, BC EST # RD100/15 at para. 24).
18. As such, it is not possible to say whether or not the Appellant was invited to provide further response or to provide any additional information that might be relevant to the Director's investigation prior to issuance of the Determination. Frankly, I cannot even say that the Appellant was properly advised during the conversation that the Director was conducting an investigation, given that - according to the Determination - the conversation appears to have taken place in the context of the Appellant's application to renew her licence.
19. What I am able to determine is that between the conversation and the point at which the Determination was typed, signed and issued, there is less than one working day.
20. At the very least, "the Delegate must provide an opportunity to the parties to provide information and to consider and respond to important allegations, on a critical matter in issue, before the Delegate issues a determination." (*Island Scallops Ltd.*, BC EST # D198/02, at page 7).
21. Even if the Director told the Appellant she was being investigated and during the August 27, 2015 conversation invited the Appellant to make representations or to provide information relevant to the Director's investigation, less than twenty-four hours from notice to Determination is not what I would call a "reasonable effort", within the meaning of section 77 of the *Act*. It is not consistent with the requirements of natural justice.

(b) *The Advertisement*

22. At the time the Advertisement was posted, the Appellant was properly licenced. The Director's finding in support of a section 12 contravention appears to arise out of the Appellant's failure to cancel the Advertisement. According to the Determination, the Appellant appears to have said the Advertisement was unexpired. I do not know if she means to say that she would not or could not cancel the Advertisement. In her submissions, the Appellant says that she could not.
23. If she would not, then in my view a contravention of section 12 would be clear. If she could not, there exists at least a possible argument to say that there was no contravention of section 12. Absent a proper record of the August 27 conversation between the Appellant and the Director's delegate, I cannot say with certainty what submission was made. In the interests of ensuring procedural fairness, the Appellant should have an opportunity to make her case to the Director.

(b) *The Website*

24. It is not possible to conclude from the Record or any of the submissions that the Director's delegate broached the subject of the Website with the Appellant during the August 27, 2015, conversation. The Record contains no evidence with respect to the Website, and the Determination does not say how the Website contravenes section 12 of the *Act* - only that it does. This too, in my view, is a failure to comply with section 77 of the *Act*, and a failure to observe the principles of natural justice.
25. The Website should be put to the Appellant, and the Appellant should have an opportunity to make representations to the Director – prior to any determination – whether or not the Website did in fact constitute a contravention of section 12 of the *Act*.
26. For the removal of all doubt, I make no finding of fact with respect to whether or not the Appellant has contravened section 12 of the *Act*. That is for the Director to determine, after proper consideration of the evidence and any response which might be offered by the Appellant.

ORDER

27. The appeal is allowed. The Determination is cancelled and, under section 115(1)(b) of the *Act*, this matter referred back to the Director, for further investigation.

Rajiv K. Gandhi
Member
Employment Standards Tribunal