

An appeal

- by -

Integral Artists Inc.
(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/143

DATE OF DECISION: January 11, 2016

DECISION

SUBMISSIONS

Ben Silverman	on behalf of Integral Artists Inc.
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 a “talent agency” as a person who, for a fee, engages in the occupation of offering to procure, promising to procure or procuring employment for actors, performers, extras or technical creative film personnel.
3. Integral Artists Inc. (the “Appellant”) had a talent agency licence, issued on November 1, 2014, which expired on October 31, 2015. An application to renew the licence was not submitted until November 2, 2015.
4. In a determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 3, 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 evidence has become available that was not available at the time the determination was being made, one of the permitted grounds for appeal under section 112(1)(c) of the *Act*.
6. For the reasons that follow, the appeal is dismissed.

THE FACTS AND ANALYSIS

7. In considering this appeal, I have reviewed the Determination, the materials originally filed by the Appellant on November 4, 2015, the Director’s Record (the “Record”) submitted on November 6, 2015, and submissions received from the Director on November 27, 2015.
8. In *Davies et. al.*, BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict, four part test before any exercise of discretion to accept and consider fresh evidence:
 - (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 capable 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.

9. In this instance, the “fresh evidence” consists of an electronic mail message dated November 3, 2015, sent to Ben Silverman (“Mr. Silverman”), the Appellant’s director and officer, from his partner, Nigel Mikoski (“Mr. Mikoski”), advising him that as of October 31, 2015, the Appellant was no longer licenced as a talent agency (the “Mikoski Message”).
10. To be admitted, the Mikoski Message must satisfy each part of the *Davies* test.
 - (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;*
11. Considering the date of the Mikoski Message, I am prepared to find that the first part of the *Davies* test has been satisfied.
 - (b) *The evidence must be relevant to a material issue arising from the complaint.*
12. To find that there has been a contravention of section 12 of the *Act*, the Director must establish that the Appellant, for a fee and without a licence, engaged in the occupation of offering to procure, promising to procure, or procuring employment for actors, performers, extras or technical creative film personnel.
13. The Appellant’s lack of intent, mistake, ignorance of the law, or inadvertent error does not mitigate or excuse a breach.
14. Accepted at face value, the Mikoski Message lends credence to Mr. Silverman’s assertion that he was unaware of the lapse. Regrettably, however, what Mr. Silverman did or did not know is irrelevant to the question of whether or not the Appellant operated a talent agency without a licence.
15. Given the foregoing, it is not necessary for me to consider the third and fourth part of the *Davies* test. However, in passing, I say that the Mikoski Message would have also failed the fourth part of the *Davies* test - it would not have led the Director to a different conclusion.
16. I agree with submissions of the Director; the Mikoski Message confirms what is already clear in the Record - Mr. Mikoski, then a director of the Appellant, did know about the expiration date. That he may have failed to communicate that to Mr. Silverman or otherwise failed to make timely application for a renewal of licence is not a matter to be addressed by the Tribunal.
17. When questioned by the Director’s delegate, Mr. Silverman acknowledged that the Appellant was operating as a talent agency in the period between lapse and renewal (or reissue) of its talent agency licence. He does not take a contrary position in this appeal.

ORDER

18. Accordingly, I dismiss the appeal and confirm the Determination, in accordance with section 115(1)(a) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal