

An appeal

- by -

Happy A & M Enterprises Inc.
(“Happy”)

- 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: Shafik Bhalloo

FILE No.: 2017A/4

DATE OF DECISION: February 20, 2017

DECISION

SUBMISSIONS

Wei Cheng

on behalf of Happy A & M Enterprises Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Happy A & M Enterprises Inc. (“Happy”) has filed an appeal of the Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 25, 2016.
2. The Determination found that Happy contravened section 12 of the *Act* for failing to operate an employment agency without a current license and imposed an administrative penalty in the amount of \$2,500 pursuant to section 29 of the *Employment Standards Regulation* (the “*Regulation*”) as this was a second breach by Happy of the same provision of the *Act* within 3 years.
3. Happy’s appeal alleges the Director erred in law and breached the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was being made. Happy is seeking to have the Tribunal change or vary the Determination or cancel it.
4. In correspondence dated January 6, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any of them pending a review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed.
5. The section 112(5) “record” (the “Record”) was provided to the Tribunal by the Director on January 11, 2016, and a copy of the Record was delivered to Happy, who was given the opportunity to object to its completeness. Happy did not object to the completeness of the Record but made further substantive appeal submissions. Accordingly, the Tribunal accepts the Record as complete.
6. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the Appeal and written submissions of Happy and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the appeal without a hearing of any kind, for any of the reasons listed in that subsection. If satisfied the appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director will be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed.

ISSUES

7. Did the Director err in law or fail to observe the principles of natural justice in concluding that Happy had contravened section 12 of the *Act*? Is there new evidence that that would justify the Tribunal in varying or cancelling the Determination?

THE FACTS AND FINDINGS OF THE DIRECTOR IN THE DETERMINATION

8. Happy is a company incorporated under the laws of British Columbia on July 16, 2005, and operates an employment agency under the name A-Care Home Support Services & Nanny Agency.
9. A corporate search of Happy conducted by the delegate on November 24, 2016, shows that Wei Cheng (“Ms. Cheng”) and Michael R. Lee (“Mr. Lee”) are directors of Happy and Ms. Cheng is, additionally, an officer of Happy acting as its president.
10. According to the records of the Employment Standards Branch (“Branch”), Happy was issued an Employment Agency License under the *Act* on September 23, 2015. This license expired on September 22, 2016.
11. On November 23, 2016, Happy delivered An Application for Employment Agency License form to the Branch to renew its Employment Agency License. The application was signed by Happy’s president, Ms. Cheng, on November 18, 2016.
12. Subsequently, a delegate of the Director conducted an investigation to determine whether Happy contravened the *Act* by operating an employment agency without a valid license. As part of her investigation, the delegate reviewed the Branch’s database to verify previous license history of Happy. She also reviewed Happy’s website and found that Happy provides non-medical hands-on assistance with activities of daily living for older adults and adults living with disability or other chronic conditions. Happy also provides postpartum care for families with new babies and recruits both local and international caregivers. Happy’s website also provided a detailed fee schedule.
13. Subsequently, on November 24, 2016, the delegate telephoned Ms. Cheng, who was identified as the President of Happy on the license renewal application, at the cell phone number provided in the application. During her telephone conversation with Ms. Cheng, the delegate states that Ms. Cheng acknowledged that Happy had been licensed since 2006. She also said that she was aware of the September 22, 2016, expiry date of the employment agency licence of Happy, but the application to renew the license had been submitted late. She explained that it was an administrative oversight as she had been out of the country from September 25 to November 9, 2016. However, she advised the delegate that during her absence, Happy had not really been operating but a staff member was expected to go into the office at least once a week. The delegate states that she then asked Ms. Cheng why Happy had not renewed its license prior to the September 22 expiry date and Ms. Cheng responded that she had been busy recruiting a new staff member for Happy. The delegate also notes that Ms. Cheng went on to further comment that it was an unrealistic expectation that she close down the business completely until Happy’s license was processed. The delegate found this response to be inconsistent with Ms. Cheng’s earlier statement that Happy’s business was not operating during her absence.
14. The delegate notes that she called Happy’s business number and confirmed that there was someone working in the office that provided her with information about the services the agency could provide for a client. More particularly, the delegate states she learned that Happy provides both temporary and short-term placements as well as long term placements.
15. In the circumstances, the delegate concluded that Happy was operating an employment agency contrary to section 12 of the *Act* after its license had expired on September 22, 2016. The delegate also reviewed the branch’s database for Happy’s previous licensing history and discovered that Happy had previously contravened the same section and that the current contravention was within three years of the first

contravention. Accordingly, pursuant to section 29 of the *Regulation*, the delegate levied an administrative penalty of \$2,500 against Happy in the Determination.

APPEAL SUBMISSIONS OF HAPPY

16. In her written submissions attached to Happy's appeal, Ms. Cheng advances the following arguments and related documentary evidence:
- During her absence from Vancouver, from September 25 to November 9, 2016, when she was overseas in China "to look for other business opportunities", Ms. Cheng contends that Happy was not conducting "any agency related activities" and did not earn any "fee" which she contends is a requirement under the definition of "employment agency" in the *Act*. In support of her submission, Ms. Cheng attaches Happy's Business Account Statements with the Royal Bank of Canada for the period September 9 to October 11, 2016, and October 11 to November 10, 2016. The statements show that there was a single deposit of \$1,500 after the expiry of the Agency License on September 22 that occurred on November 3, 2016, which Ms. Cheng claims she instructed Mr. Lee to deposit for rental payment to the Landlord. There are not any other bank statements for the period November 10, 2016 to November 23, 2016, the date when the renewal application of Happy's license was received by the Branch. Ms. Cheng also provides three select pages of her mobile phone records. The first one is a single page, numbered 22 of 31 pages, from a bill dated October 3, 2016. It contains a record of 23 calls, 17 calls are undated but look like they precede September 25; 5 calls are from September 25 and one is on September 29. The second page is from a phone bill dated November 3, 2016, and it is the 5th of 14 pages. The rest of the pages are not disclosed. It does not contain any call records but contains only the monthly charges for the bill period summarized. The last page is from a telephone bill dated November 3, 2016, and it is numbered 8 of 14 pages. It shows a partial record of calls - 7 outgoing calls from Vancouver and 1 incoming call and 1 voicemail - on three dates, namely, October 5, 6 and 7, 2016.
 - Ms. Cheng submits that, since the beginning of September, she was trying to hire an employee for her home support business but her employment agency business had slowed down and she and her associates decided "we don't want to renew the employment agency license until [she] came back after the trip".
 - Ms. Cheng argues that the delegate "implanted an idea with her subjective opinion" in concluding that she (Ms. Cheng) said to her (the delegate) that she submitted the renewal application for employment agency late due to an oversight. Ms. Cheng states she told the delegate she planned "to leave the country by the end of September" to do business in China and she and her associates "had prepared to shut down couple [of] business activities" but decided to maintain the corporate "head office space" and arranged for an employee to attend the office in October for 7 hours per week to attend to some duties such as bookkeeping, phone calls and mailings.
 - Ms. Cheng then explains why she did not close her office at Cambie Street and terminate her "marketing sources" when she went on her trip to China. She states that Happy has two different services that include an employment agency that recruits employees for employers and a service that provides home support healthcare services directly to clients. Therefore, although Happy did not operate the employment agency business during the period she was away, she needed to keep her office open on Cambie Street for all other businesses and required employees to perform "mostly administrative works" in those businesses. More particularly, in

addition to the health care support business, she states she also ran, under the corporate vehicle from the Cambie Street address, “e-commerce business, pet food & supplies retail store, and so on”.

- Ms. Cheng also submits that when the delegate called the agency, she spoke with the “receptionist for the company providing home support services” and this individual is not listed on the Employment Agency Application form and therefore not a representative for the employment agency business of Happy. In the circumstances, the delegate “misidentified the ‘representative of the agency’”.
- As for Happy’s website the delegate viewed during her investigation, Ms. Cheng states that she has not renewed the website domain for two years and she is not paying anyone to host the website for over a year. She does not know why the website is displaying the information it is but she is unable to change it.
- As for any advertisements (presumably for the employment agency business) on the internet, Ms. Cheng states that they were “posted some time ago” and “will disappear until they run off automatically”.
- Ms. Cheng admits that Happy has advertising in a Chinese magazine with an annual contract.
- Ms. Cheng has enclosed copies of both the 2016 and 2017 Business licenses of Happy that sets out its trade name A-Care Home Support Services & Nanny Agency with an address at Cambie Street in Vancouver. She has also attached the Certificate of Incorporation of Happy dated July 16, 2004. She additionally attached a letter from Happy’s landlord, dated December 10, 2016, with the subject heading “2017 Rental Statement”, requesting either 12 post-dated cheques for rental payments for 2017 or alternatively, a complete Pre-Authorized Debit Plan form.

17. In her subsequent submissions in response to the Director’s record, Ms. Cheng makes further additional arguments:

- Before Happy submitted its application (presumably the renewal application) for the employment agency license, her receptionist at work called the Branch to ask if Happy needed “to submit an extra document in order to officially terminate the previous license before [submitting] the new application”. In support of this submission, Ms. Cheng has cut and pasted a telephone record of 5 calls purportedly made by Happy’s receptionist to the Branch with the first call being November 15 and the rest on November 18, 2016.
- Ms. Cheng has also cut and pasted in her submissions her telephone record for November 24 to show that she spoke with the delegate. She explains the circumstances when she took a call from the delegate. She states she was with a friend shopping which is not particularly material.
- In the balance of her submissions, she submits she told the delegate, when speaking to her over the phone that an employment agency license was not necessary for Happy to have while she was absent from Vancouver and on her trip to China as she was not able to find any staff to take care of her agency before she left, despite her attempts to recruit staff since the beginning of September 2016. She contends that the delegate appears to have mistaken her explanation.
- Ms. Cheng also submits that she explained to the delegate, when the latter asked why previous to this occasion Happy was also late in renewing its employment agency application, that she “didn’t have any experience about late renew[al] application last time” but this time she knew that the “license is only valid for 12 month[s]” but she found it was “NOT NECESSARY” for

her to maintain or renew her license as her “agency business would break up for at least 50 days”.

ANALYSIS

18. Section 112(1) of the *Act* provides that a person may appeal the 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; and
- (c) evidence has become available that was not available at the time the determination was being made.

19. The burden is on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds listed in section 112(1) above.

20. As indicated above, Happy’s appeal is based on the “error of law”, “natural justice” and the “new evidence” grounds of appeal in section 112(1)(a)(b) and (c) of the *Act*.

21. I will address each ground of appeal under separate headings below.

(i) Error of law

22. In *Gemex Developments Corp. v. British Columbia (Assessor) of Area #12 – Coquitlam*, [1998] B.C.J. No. 2275, the BC Court of Appeal defined error of law inclusively as follows:

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. In this case, Ms. Cheng argues that during the period she was away from Vancouver and in China, when Happy’s employment agency licence had expired, Happy was not operating its employment agency business and it did not qualify within the meaning of “employment agency” as defined by section 1 of the *Act*, particularly because it did not make any money as evidenced by its bank statements. She also submits that the select few pages of her mobile telephone records adduced in the appeal show that she and/or Happy were not involved in the employment agency business during the period the license had expired.

24. Section 1 of the *Act* states:

“employment agency” means a person who, for a fee, recruits or offers to recruit employees for employers;

25. Section 12 of the *Act* provides:

Employment and talent agencies must be licensed

12 (1) A person must not operate an employment agency or a talent agency unless the person is licensed under this Act.

26. I do not find the delegate to have misinterpreted or misapplied either section 1 or section 12 of the *Act*. Simply because Happy's bank account does not show significant financial transactions between September 9 and November 10, 2016, the period covered by the two statements produced in the appeal, is not determinative that Happy ceased operating as an employment agency. It is not a requirement of the definition of "employment agency" in section 1 of the *Act* that the agency must be taking in money at all material times. An agency may be slow in its business but still operate with staff and continue to advertise and market its services.

27. In the case at hand, after the Branch received Happy's Application for Employment Agency License on November 23, 2016, the delegate began her investigation reviewing Happy's website and found that Happy provides non-medical hands-on assistance with activities of daily living for older adults and adults living with disability or other chronic conditions. Happy also provides postpartum care for families with new babies and recruits both local and international caregivers. Happy's website also provided a detailed fee schedule.

28. Subsequently, on November 24, 2016, as previously indicated, the delegate telephoned Ms. Cheng on her cell phone number provided in the Employment Agency License application. During that call, the delegate states that Ms. Cheng acknowledged that Happy had been licensed since 2006 and she was aware of the September 22, 2016, expiry date of Happy's Employment Agency Licence, but the application to renew the license had been submitted late. She explained that it was an administrative oversight as she had been out of the country from September 25 to November 9, 2016. However, she advised the delegate that during her absence, Happy had not really been operating but a staff member was expected to go into the office at least once a week. The delegate states that she then asked Ms. Cheng why Happy had not renewed its license prior to the September 22 expiry date and Ms. Cheng responded that she had been busy recruiting a new staff member for Happy. The delegate also notes that Ms. Cheng went on to further comment that it was an unrealistic expectation that she close down the business completely until Happy's license was processed. The delegate found this response to be inconsistent with Ms. Cheng's earlier statement that Happy's business was not operating during her absence. While Ms. Cheng, in her appeal submissions, contends that the delegate misunderstood her evidence, I have no reason to doubt the delegate's summary of the evidence of Ms. Cheng during the phone call between them of November 24, 2016. I find the delegate's notes of the call in the Record are consistent with her summary of the telephone call in the Determination.

29. I find, based on the evidence the delegate obtained in her call with Ms. Cheng together with the evidence the delegate obtained from calling Happy's office from the person who answered the call (according to Ms. Cheng, a receptionist who was not a named representative of Happy on the Employment Agency License application) and described the services Happy provides, it was open for the delegate to conclude that Happy was carrying on business as an employment agency without a current license contrary to section 12 of the *Act*.

30. While Ms. Cheng is disputing the delegate's findings or conclusions of fact that Happy was operating as an employment agency during the material time its Employment Agency License had expired, the Tribunal has consistently stated that that the grounds of appeal listed in section 112 of the *Act* 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. In *Britco Structures Ltd.*, the test for

establishing an error of law on this basis is stringent and requires the appellant, in this case Happy, to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Ms. Cheng has not shown such an error of law and therefore, I must defer to the findings of fact made by the delegate.

31. In summary, I do not find Happy or Ms. Cheng have persuaded me the delegate erred in law within the meaning of error of law as defined in *Gemex, supra*.

(ii) Natural Justice

32. Happy has checked off the natural justice ground of appeal in the Appeal Form contending that the Director failed to observe the principles of natural justice in making the Determination. The Tribunal, in *Imperial Limousine Service Ltd.* (BC EST # D014/05), explained the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given opportunity to respond to the evidence and arguments presented by an adverse party: (See *B.W.I. Business World Incorporated*, BC EST #D050/96.)

33. Based on my review of the Reasons, including the Record and the written submissions of Ms. Cheng, I am not persuaded that there is any evidence of a breach of natural justice on the part of the Director or the delegate in making the Determination. I find that Happy has made a bare assertion that the Director breached the principles of natural justice in making the Determination and failed to adduce any cogent evidence in support of this ground of appeal. Therefore, I do not find there is any basis to disturb the Determination on this ground of appeal either.

(iii) New Evidence

34. Happy also appeals the Determination on the basis of the new evidence ground of appeal. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, (BC EST # D171/03), the Tribunal delineated four conjunctive requirements that must be met before new evidence will be considered. More particularly, the appellant must establish that:

- (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.

35. In this case, Ms. Cheng's purported new evidence in the form of select, very few personal mobile phone records and Happy's limited period bank statements and business licenses and incorporation certificate and cut and pasted records of telephone call to the Branch purportedly by an employee of Happy in November 2016 and the letter from Happy's landlord all of which I have referred to above are *either* evidence that, with the exercise of due diligence, could have been produced to the delegate during the investigation and prior to the Determination being made *or* not material to the issue arising in the complaint or lacking potential probative value in the sense that, if believed, it could on its own, or when considered with other evidence, have led the delegate to a different conclusion.
36. I also find that Ms. Cheng is effectively challenging the delegate's findings of fact and her submissions in support of that challenge do not constitute new evidence. As indicated previously, the Tribunal does not have jurisdiction over questions of fact, unless of course the matter involves errors on findings of fact which may amount to an error of law which I have already determined is not the case here.
37. Therefore, I find Happy's appeal fails on the new evidence ground of appeal as well.
38. Lastly, I find the delegate, after reviewing Happy's previous licensing history and discovering that Happy had contravened section 12 before and that the current contravention was within three years of the first contravention, correctly levied an administrative penalty of \$2,500 against Happy pursuant to section 29 of the *Regulation*. I find no reason to interfere with this mandatory penalty.
39. For all of the above reasons, I find there is no reasonable prospect that this appeal can succeed and I dismiss it.

ORDER

40. Pursuant to section 115 of the *Act*, I confirm the Determination issued on November 25, 2016, and I dismiss this appeal pursuant to section 114(1)(f) of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal