

An appeal

- by -

Design Group Staffing Inc.
(“DGSI”)

- 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.: 2014A/38

DATE OF DECISION: May 16, 2014

DECISION

SUBMISSIONS

Lori Roulston

on behalf of Design Group Staffing Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Design Group Staffing Inc. (“DGSI”) has filed an appeal of a determination issued by the Director of Employment Standards (the “Director”) on March 26, 2014 (the “Determination”). In that Determination, the Director found that DGSI was operating an employment agency without a licence in contravention of section 12(1) of the *Act*, and assessed a \$500.00 monetary penalty under section 98 of the *Act* for this contravention.
2. DGSI appeals the Determination on the sole ground that the delegate failed to observe the principles of natural justice in making the Determination.
3. Section 114(1) of the *Act* and Rule 22 of the Employment Standards Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) permit the Employment Standards Tribunal (the “Tribunal”) to dismiss all or part of an appeal without seeking submissions from the other parties. I have decided that this appeal is an appropriate case for consideration under the said provisions of the *Act* and *Rules*. Accordingly, this appeal will be decided based on the Reasons for the Determination (the “Reasons”), DGSI’s written submissions and my review of the section 112(5) “record” that was before the Director at the time the Determination was made. If I am satisfied that DGSI’s appeal has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal may invite the Director to file reply submissions on the appeal, and DGSI may be afforded an opportunity to make a final reply to those submissions, if any. If the appeal is not meritorious, it will be dismissed.

ISSUE

4. The sole issue in this appeal is whether the Director failed to observe the principles of natural justice in making the Determination.

THE FACTS

5. Based on the online corporate search of DGSI conducted by a delegate of the Director on March 20, 2014, DGSI is a company incorporated under the laws of Alberta on December 21, 1976, and registered in British Columbia as an extra-provincial company on March 17, 1992.
6. DGSI is in the business of operating employment agencies as defined in the *Act*.
7. An “employment agency” is defined in section 1 of the *Act* as follows: “Employment agency means a person who, for a fee, recruits or offers to recruit employees for employers.”
8. Section 12(1) of the *Act* states “A person must not operate an employment agency ... unless the person is licensed under this Act.”

9. On March 3, 2013, DGSI was issued an employment agency licence by the Employment Standards Branch (the “Branch”) although the Reasons mistakenly show the date as March 3, 2014.
10. Pursuant to section 9 of the *Employment Standards Regulation* (the “*Regulation*”) the licence is valid for a period of one year after the date on which it is issued, in this case March 2, 2014. However, DGSI did not apply to the Branch to renew its license before it expired. The Branch only received DGSI’s application on March 19, 2014, after the expiry of the license. As a result, the Branch conducted an investigation to determine whether DGSI contravened the *Act*.
11. As part of her investigation, on March 20, 2014, the delegate of the Director contacted Kristina Morse (“Ms. Morse”), a Branch Manager for DGSI, and the latter confirmed to the delegate that DGSI was carrying on business as Design Group, Talentcor and Inteqna, from the 333 Seymour Street location in Vancouver and as Talentcor from a second location at 1124 Fort Street in Victoria.
12. Ms. Morse also explained to the delegate that DGSI’s late application for license renewal was due to an oversight because the person who renewed DGSI’s business licences mistakenly believed that renewing the business licences would also renew the employment agency licence under the *Act*.
13. While the Branch approved DGSI’s application for an employment agency license for all enterprises DGSI operated from both the Vancouver and Victoria locations commencing March 27, 2014, the delegate also issued the Determination finding that DGSI was operating an employment agency without a valid licence after it expired on March 2, 2014, and issued DGSI a mandatory administrative penalty of \$500.00, pursuant to section 29(1) of the *Regulation*, for contravention of section 12 of the *Act*.

SUBMISSIONS OF DGSI

14. Lori Roulston (“Ms. Roulston”), the Office Manager and Executive Assistant to the CFO of DGSI, filed written submissions on behalf of DGSI in the appeal. In her submissions, Ms. Roulston submits that DGSI’s head office is located in Edmonton, Alberta, and, unfortunately, the Vancouver Branch Administrator of DGSI sent the renewal application for the employment agency licence and a cheque request to the Edmonton office of DGSI at the end of February 2014. This caused its late arrival. She also notes that DGSI’s Vancouver Branch Administrator had renewed the yearly municipal licences for the City of Vancouver and the City of Victoria, but “since no renewal notices are sent out from BC Employment Standards, she had assumed all licences were up to date”. However, when the Branch Administrator realized that the expiry date for the employment agency licence “was coming up, the application and cheque request was sent to [the] Head office in Edmonton, Alberta”.
15. Ms. Roulston further submits that DGSI is a Canada-wide company with 25 offices across Canada and has to renew several provincial and municipal licences in many provinces and cities on an annual basis. She submits that “[t]he Province of British Columbia is the only province in Canada that does not send out automatic business licence renewals as a courtesy to companies that help in the growth of the British Columbia economy.” She states that DGSI’s offices are located in both Vancouver and Victoria, and both these Cities send to DGSI business licence renewals yearly before the expiry date so that DGSI is not late in renewing business licences.
16. She further submits that DGSI is a law-abiding company and because of this “administrative error”, DGSI was only “less than a month late” in renewing its employment agency licence. Ms. Roulston asks that the Tribunal take into consideration DGSI’s “good standing” and refund the administrative penalty DGSI paid pursuant to the Determination.

17. Ms. Roulston goes on to conclude her submissions by suggesting that a renewal notice for employment agency license should be sent out yearly with the added option of paying for the licence online.

ANALYSIS

18. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds only:
- (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. In this case, as indicated, DGSI contends 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.)

20. The burden is always on the appellant to persuade the Tribunal that there is an error in the determination. In this case, based on my review of the Reasons, including the section 112(5) “record” and the written submissions of Ms. Roulston, I am not at all 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 DGSI 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.
21. Although not invoked by DGSI in its appeal, I have also considered and find there is no evidentiary basis for DGSI to ground its appeal on any of the other permissible grounds of appeal in section 112 of the *Act* – error of law or new evidence.
22. Lastly, I note that DGSI does not dispute the delegate’s finding that it operated, albeit for a brief period after the expiry of its employment agency license on March 2, 2014, without a valid license and thereby contravened section 12 of the *Act*. Instead, it appears to argue, in Ms. Roulston’s submissions, that the Tribunal should take into consideration mitigating factors in its case and vacate the administrative penalty. These mitigating factors, according to Ms. Roulston, include: (i) an “administrative error” on the part of the employee in charge of renewing the DGSI’s employment agency license who mistakenly believed that by renewing the business license of DGSI the employment agency license was also renewed; (ii) “the filing of the yearly license was less than a month late”; and (iii) DGSI’s otherwise “good standing”.
23. I do not find DGSI’s or Ms. Roulston’s submissions raise any reviewable error in the Determination or give this Tribunal a basis to cancel the administrative penalty or the Determination. Once the delegate finds a contravention of the *Act*, there is no discretion as to whether an administrative penalty can be imposed.

Section 98 of the *Act* (set out below) is instructive in this regard and governs the imposition of monetary penalties where a Director makes a determination against a person and imposes a requirement under section 79. This section uses mandatory language and there is no discretion in the Director to do otherwise:

Monetary penalties

98 (1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.

(1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.

24. Further, section 29(1) of the *Regulation* sets out a schedule of monetary penalties and the Director has no discretion in changing those penalties.

25. In the circumstances, I find that the delegate has not made any reviewable error in the Determination and, I find, pursuant to section 114(1)(f) of the *Act*, that this appeal has no reasonable prospect of succeeding, and I dismiss it.

ORDER

26. Pursuant to section 115 of the *Act*, I order that the Determination, dated March 26, 2014, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal