Employment Standards TRIBUNAL

An appeal

- by -

Aerotek ULC
("Aerotek")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2014A/54

DATE OF DECISION: June 6, 2014

DECISION

SUBMISSIONS

Katie Ely on behalf of Aerotek ULC

INTRODUCTION

1. On April 25, 2014, a delegate of the Director of Employment Standards (the "delegate") levied a $500 monetary penalty against Aerotek ULC ("Aerotek") pursuant to section 98 of the *Employment Standards Act* (the "*Act*") and section 29 of the *Employment Standards Regulation* (the "*Regulation*"). The penalty was assessed by way of a Determination dated April 25, 2014, and Aerotek now appeals this Determination under subsection 112(1)(b) of the *Act* on the ground that the delegate failed to observe the principles of natural justice in making the Determination.

2. I am adjudicating this appeal based solely on the appellant's written submissions and my consideration of the subsection 112(5) record that was before the delegate when the Determination was made as well as the delegate's "Reasons for the Determination" that were issued concurrently with Determination.

BACKGROUND FACTS AND REASONS FOR APPEAL

3. Based on my review of Aerotek's submissions, the record, and the delegate's reasons, the following appear to be the relevant, and uncontested, facts. The $500 monetary penalty was issued based on Aerotek's contravention of section 12 of the *Act* – this provision requires all employment and talent agencies operating in the province to be licensed. Aerotek apparently operates three employment agencies in the province and had a section 12 licence that was in effect from April 15, 2013, to April 14, 2014. On April 17, 2014, Aerotek filed an application with the Employment Standards Branch to renew this licence. The renewal application, dated April 8, 2014, was apparently mailed on April 10, 2014, (along with a cheque for the $100 licence fee) to the Employment Standards Branch's Lower Mainland office but, as noted above, was not actually received until April 17, 2014 (according to the Branch's date stamp on the form) by which time the previous licence had expired. I should add that the renewal application was processed and a new licence issued effective as and from April 25, 2014, to April 24, 2015.

4. According to Ms. Katie Ely, the appellant's "tax accountant" who submitted the appeal on Aerotek's behalf, the completed application form and licence fee was mailed to the Employment Standards Branch on April 10, 2014 – at which point its current licence had not yet expired. Ms. Ely quite properly notes: "There wasn't anything on the renewal or in the instructions stating that Aerotek ULC would be penalized for the amount of time it took the postal system to deliver the mail or the amount of time it took the Employment Standards dept. to open and process the renewal." On the other hand, there is nothing in the *Act* or in the *Regulation* stating that an employment agency is entitled to operate without a licence or that it is sufficient to merely mail in an application form in order to comply with section 12.

5. Ms. Ely notes that Aerotek has over 400 various business licences and that it "strives for 100% compliance" and now that it knows it is at "the mercy of the postal system and the amount of time it takes Employment Standards to process the renewal" it has now instituted a policy of processing renewals 30 days prior to expiration. Ms. Ely says that Aerotek "made an honest effort to renew our licence on time and did not conspire to operate without a license". Finally, Ms. Ely says that Aerotek is "respectfully requesting the determination against us to be waived" [*sic*].

FINDINGS AND ANALYSIS

6. As noted at the outset of these reasons, Aerotek seeks an order cancelling the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination. However, the reasons offered in support of this ground of appeal do not speak to natural justice principles. In effect, Aerotek says that it made a good faith effort to comply with the *Act* licensing regime but was frustrated in its compliance efforts by postal service delay and administrative delay within the Employment Standards Branch. It does not deny the central fact that it *was* operating an employment agency during the period from April 15, 2014, until April 25, 2014, when a renewal licence was issued.

7. The monetary penalties mandated by section 98 of the *Act*, and the penalty amounts prescribed by section 29 of the *Regulation*, are not matters over which the Director of Employment Standards has any discretion. Once a contravention of the *Act* is proven, the person contravening the statute "is subject to a monetary penalty" and the amount of the penalty is fixed depending on whether it is a first, second or third (or more) contravention within a 3-year period.

8. Thus, this appeal largely turns on whether or not Aerotek contravened section 12 of the *Act*. The record before me – and Aerotek's own submissions – irrefutably show that it knew or should have known that is was operating an employment agency without being licensed during the period from April 15, 2014, to April 25, 2014.

9. Aerotek appeals the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination. However, there is nothing in its appeal submissions that directly speaks to a natural justice issue. I note from the background facts recited in the delegate's "Reasons for the Determination" – issued concurrently with and appended to the Determination – that the delegate spoke with two Aerotek employees (including Ms. Ely) prior to issuing the Determination. The delegate appears to have given Aerotek a full and fair opportunity to explain its position and to provide to the delegate whatever arguments and evidence it wished the delegate to consider. In my view, there is simply nothing in the record that would allow me to conclude that the delegate failed to comply with the principles of natural justice in making the Determination.

10. Aerotek's submissions arguably raise two legal issues. First, it says that it "made an honest effort to renew our licence on time". Arguably, Aerotek is raising a "due diligence" defence. This defence is available when a person is charged with a "strict liability" regulatory offence (see *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, [2013] 3 S.C.R. 756). There are two points to be noted with respect to this issue. The first point is that the monetary penalty imposed by the combined effect of sections 98 of the *Act* and 29 of the *Regulation* is not a strict liability regulatory offence thus giving rise to the due diligence defence. Second, even if I were to conclude that section 98 creates a strict liability offence, on the facts before me, I am not satisfied that the due diligence defence has been made out. The renewal was mailed on Thursday, April 10, 2014, thus leaving only two business days for the renewal to arrive at the Employment Standards Branch before April 14, 2014, when Aerotek's existing licence would expire. A licence renewal is not an automatic process and, in my opinion, Aerotek did not allow for a reasonable period of time for its renewal application to arrive in the mail at the Employment Standards Branch's office, be reviewed and a new licence issued – two business days was not nearly enough time and Aerotek should have known that.

11. Aerotek's second possible legal argument flows from its assertion that it mailed the renewal application on April 10, 2014, and that "there wasn't anything on the renewal or in the instructions stating that Aerotek ULC would be penalized for the amount of time it took the postal system to deliver the mail or the amount of time it took the Employment Standards dept [*sic*] to open and process the renewal". Aerotek appears to be saying

that since its application was mailed before the expiration of its current licence, it fully complied with its section 12 obligations under the *Act*. To an extent, Aerotek appears to be asserting that the "postal acceptance rule" applies here. The postal acceptance is a long standing, but probably now anomalous, rule of contract law. Briefly, the rule states that when the mail is a reasonable mode of delivering an unconditional acceptance of an offer to contract, the acceptance is deemed to have been delivered (thus crystallizing the contract) when the acceptance was mailed, not when it was actually received by the offeror (see *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Company*, 1992 ABCA 204). This is a rule of contract law and has no application to administrative proceedings such as licence applications and renewals under the *Act* – see *Lukaj v. Canada (Citizenship and Immigration)*, 2013 FC 8.

12. The evidence before me unequivocally shows that Aerotek was operating an employment agency without being properly licenced for a short period of time in April 2014. Aerotek knew, or should have known, that it was at that point in contravention of section 12 of the *Act* and, accordingly, a monetary penalty was properly assessed against it. In my view, this appeal has no reasonable prospect of success and thus must be dismissed under subsection 114(1)(f) of the *Act*.

ORDER

13. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed in the amount of $500.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal