

An appeal

- by -

Metro Living Zine Inc.,  
carrying on business as Metro Living Zine Talent Agency  
("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.:** 2017A/45

**DATE OF DECISION:** July 19, 2017

## DECISION

### SUBMISSIONS

Angela Krewenchuck	on behalf of Metro Living Zine Inc., carrying on business as Metro Living Zine Talent Agency
Kathleen Horan	on behalf of the Director of Employment Standards

### OVERVIEW

1. According to section 12(1) of the *Employment Standards Act* (the “*Act*”), no person should operate an employment agency or talent agency in British Columbia, unless appropriately licensed.
2. A “talent agency” is defined in section 1 of the *Act* as any “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. On February 24, 2017, a delegate of the Director of Employment Standards (the “Director”) issued a determination according to section 79 of the *Act* in which Metro Living Zine Inc., carrying on business as Metro Living Zine Talent Agency (the “Appellant”) was found to have operated a talent agency without a valid licence and, as such, required to pay an administrative penalty according to section 89(1).
4. The Appellant now seeks to cancel the Determination on the basis that,
  - (a) the Director erred in law;
  - (b) the Director failed to observe the principles of natural justice; and
  - (c) evidence has become available that was not available at the time the Determination was being made,each a permitted basis for appeal under section 112(1) of the *Act*.
5. Having reviewed the Determination, and having considered:
  - (a) the Record of the Director (to which the Appellant raised no objection, despite the fact that it does not appear to me to comply with section 112(5) of the *Act*);
  - (b) submissions from the Appellant received on April 6, 2017 and June 6, 2017; and
  - (c) submissions from the Director received on May 19, 2017,

I conclude that this appeal should be dismissed.

### THE FACTS AND ANALYSIS

6. To find a contravention of section 12, the Director must establish that the Appellant, for a fee and without a licence, engaged in activities falling within the scope of what the *Act* says is a talent agency.

7. According to the Determination:
- (a) the talent agency licence issued to the Appellant on January 29, 2016, lapsed on January 28, 2017;
  - (b) an application to renew the talent agency licence was not submitted to the Employment Standards Branch until February 21, 2017; and
  - (c) the Appellant operated as a talent agency, without a licence, between January 28, 2017 and February 24, 2017.
8. The Appellant's argument in this appeal may be summarized as follows:
- (a) the Appellant acted in good faith, making every effort possible to speak to the Employment Standards Branch concerning renewal of the talent agency licence, starting in about December 2016, but was thwarted (my word) by an inability to speak to the correct person or to find out the date by which the licence was to be renewed;
  - (b) the Director erred in concluding that the Appellant operated a talent agency after January 28, 2017, because it did not actually procure employment for any actors, performers, extras, or technical creative film personnel.
9. In that the Record does not include a copy of the expired talent agency licence, it is important to note that the Appellant does not take issue with the Director's finding that the talent agency licence issued in January 2016 expired at the end of January 2017.
10. I address, below, each ground of appeal advanced by the Appellant.
- The Director erred in law.*
11. Where an appeal is advanced on the basis that the Director erred in law, it is the Appellant's burden to convince the Tribunal that:
- (a) a section of the *Act* has been misinterpreted or misapplied;
  - (b) an applicable principle of general law has been misapplied;
  - (c) the Director has acted in the absence of evidence;
  - (d) the Director has acted on a view of the facts that can not reasonably be entertained; or
  - (e) the Director has adopted a method of assessment that is wrong in principle.
- (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA) at paragraph 9).
12. As best as I can glean from the Appellant's submissions, I understand it to argue that, because it did not actually procure employment for any actors, performers, extras, or technical creative film personnel, it could not have been operating as a talent agency, and the Director's conclusion otherwise is wrong – that is, an error of law.
13. Certainly, the Director acknowledges in the Determination that the Appellant did not actually obtain work for persons listed in the Appellant's roster.

14. In my view, however, the Appellant fails to grasp what the *Act* considers to be a “talent agency”. Procuring employment is one part of what a talent agency does, but it is not the only part. Under the *Act*, a talent agency also offers or promises to procure employment.
15. In submissions to this Tribunal, the Appellant admits that it has “been recruiting talent and building a database” since receiving the talent agency licence in 2016. The agreement that prospective talent is asked to sign, a copy of which is included in the Record, appoints the Appellant as agent on an exclusive basis and for a two-year term (albeit, terminable on thirty days’ written notice), and it sets out the basis upon which a fee is to be paid. All of this, in my view, is tantamount to an offer to procure employment, for a fee.
16. I accept without reservation that the Appellant did not intend to operate without a licence. However, to the extent that it admits to engaging in specific activities falling within the definition of “talent agency”, I do not agree that the Director has erred in law by finding a contravention of section 12 of the *Act*.

*The Director failed to observe the Principles of Natural Justice.*

17. 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).
18. 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).
19. I can discern nothing in the Appellant’s submissions suggesting that, as it relates to the Determination, the principles of natural justice have been ignored. Although the timeline was abbreviated, information set out in the Determination and the Record lead me to conclude that the Appellant was given notice, an opportunity to be heard, and, ultimately, a reasoned, albeit brief, decision.
20. It is fair to say that the Appellant believes itself to be the victim of procedural unfairness because, despite efforts to act in good faith, it says that it was unable to obtain information from the *Employment Standards Branch* relating to renewal of the talent agency licence and was prevented as a result from making application for renewal in a timely fashion.
21. I have no reason to doubt the Appellant’s veracity, but evidence of intent does not help the Appellant. The Tribunal has repeatedly concluded that breach of section 12 of the *Act* is not mitigated by the Appellant’s lack of intent, mistake, or inadvertence. If the Director establishes a contravention, an administrative penalty must follow.
22. Ultimately, I find no basis upon which to conclude that the principles of natural justice have been violated, as it relates to the Determination.

*Evidence has become available that was not available at the time the Determination was made.*

23. 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 must not, with the exercise of due diligence, have been discoverable or presentable to the Director before to the Determination;

- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that it could, if believed, have led the Director to a different conclusion on the material issue.

24. If any one of the four tests is not passed, the appeal fails.
25. In this instance, the “new evidence” appears take the form of, firstly, the Appellant’s submission that it tried to contact the Employment Standards Branch in 2016 concerning renewal and, secondly, eleven pages of telephone records allegedly supporting those efforts.
26. In my view, this evidence could have been produced before the Determination was made and, in any event, is neither relevant nor possessing high or any probative value. It does not satisfy the first, second, or fourth part of the *Davies* test and the appeal on this ground must fail.

*Conclusion*

27. I have concerns about the state of the Record submitted in this appeal. It is clearly missing a copy of the expired talent agency licence, a copy of electronic mail correspondence sent to the Appellant on February 22, 2017, and a proper transcript or note of the telephone conversation that took place on the same day, all of which is referenced in the Determination.
28. To the extent that the Appellant does not object to the Record or, seemingly, to the facts set out in the Determination, I do not believe that my ability to properly judge this appeal is adversely affected.
29. The Appellant acknowledges engaging in activities fitting squarely within the definition of what it is that a talent agency does, at a time when the Appellant’s licence was void. Even though it intended no wrongdoing, the Appellant’s contravention of section 12 has been established.
30. For these reasons, and despite misgivings I have about the completeness of the Record, I decline to interfere with the Determination.

**ORDER**

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

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**Rajiv K. Gandhi**  
**Member**  
**Employment Standards Tribunal**