

An appeal

- by -

IS2 Workforce Solutions Inc.
("Workforce Solutions")

- 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: Marnee Pearce

FILE No.: 2017A/76

DATE OF DECISION: July 24, 2017

DECISION

SUBMISSIONS

Riyaz Deshmukh

on behalf of IS2 Workforce Solutions Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), IS2 Workforce Solutions Ltd. (“Workforce Solutions”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 2, 2017.
2. The Determination concluded that Workforce Solutions had contravened section 12 of the *Act* by operating an employment agency without a valid licence. A \$500.00 administrative penalty was levied against Workforce Solutions for contravening section 12 of the *Act*.
3. The total amount of the Determination was \$500.00.
4. Workforce Solutions has appealed the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination, and requests that the Determination be cancelled.
5. In correspondence dated June 28, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any party pending a review of the appeal by the Tribunal and, following this review, all or part of the appeal might be dismissed.
6. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy was emailed to Workforce Solutions on June 12, 2017, allowing the opportunity to object to its completeness. No objection has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.
7. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for the Determination (provided to the Tribunal as part of the record), the appeal, the written submissions filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

- 114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
- a. *the appeal is not within the jurisdiction of the tribunal;*
 - b. *the appeal was not filed within the applicable time limit;*
 - c. *the appeal is frivolous, vexatious, or trivial or gives rise to an abuse of process;*
 - d. *the appeal was made in bad faith or filed for an improper purpose or motive;*
 - e. *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
 - f. *there is no reasonable prospect that the appeal will succeed;*

- g. *the substance of the appeal has been appropriately dealt with in another proceeding;*
- h. *one or more the requirements of section 112(2) have not been met.*

8. If satisfied that the appeal or a 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 submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue at this stage is whether the appeal shows there is any reasonable prospect it will succeed.

THE FACTS

10. Workforce Solutions operates an employment agency in multiple provinces, and has been registered in British Columbia as an extraprovincial company on January 13, 2000.
11. According to the Employment Standard Branch (the “Branch”) records, an employment agency licence was issued to Workforce Solutions on January 12, 2016, expiring on January 11, 2017.
12. Riyaz Deshmukh, Senior Vice-President of Workforce Solutions, signed a renewal application for an employment agency licence on January 19, 2017, and it was delivered to the Branch on the same day.
13. On January 19, 2017, the Director was told by Mr. Deshmukh that the person usually responsible for ensuring that the renewal was completed within a timely fashion was away sick and the delay in seeking the renewal was unintentional.
14. On January 19, 2017, Mr. Deshmukh confirmed with the Director that Workforce Solutions continued to operate between January 11 and January 19, 2017.
15. A Determination was initially issued on January 19, 2017, but as it was not sent by registered mail and Mr. Deshmukh had not received the email containing this Determination, it was cancelled and a new Determination dated May 2, 2017, was issued to ensure that Workforce Solutions received the full appeal period as required by the *Act*.
16. The Determination confirmed that Workforce Solutions did contravene section 12 of the *Act* by operating an employment agency without a current licence.
17. The Determination found the contravention date to be January 19, 2017, the last day Workforce Solutions operated without a valid licence under the *Act*.
18. A mandatory administrative penalty was imposed for the contravention of section 12 of the *Act* in the amount of \$500.00, in keeping with a first occurrence and as set out in section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”).

ARGUMENT

19. Mr. Deshmukh has submitted that the delayed renewal of the employment agency licence was not malicious or intentional, but an error arising due to an incorrect date noted in the task planner of the employee responsible for arranging the renewal.
20. Mr. Deshmukh argues that the time between the expiry date and the renewal receipt was only eight days, and the fine of \$500.00 was too high in these circumstances.
21. Mr. Deshmukh noted that Workforce Solutions has never previously been fined for a contravention of the *Act* and with the annual fee only being \$100.00, the fine of \$500.00 was an unfair application of a penalty.
22. Mr. Deshmukh requested that the fine be reduced or waived.
23. Mr. Deshmukh submits that the Director of Employment Standards failed to observe the principles of natural justice in making the Determination and levying the fine of \$500.00 in the specific circumstances described.

ANALYSIS

24. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:
 - 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
 - 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.
25. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have general application and have consistently been applied in considering appeals.
26. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.
27. Mr. Deshmukh's ground for appeal is based on an alleged failure on the part of the Director to observe the principles of natural justice in making the Determination; a party alleging a breach of the principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
28. Sections 76 and 77 of the *Act* confers upon the Director the duty to receive, review, and where appropriate, investigate or adjudicate complaints alleging contraventions of both the *Act* and *Regulation*. Natural justice, in turn, demands that the Director exercise that duty fairly, in good faith, and with a view to the public interest. (*Congregation des temoins de Jehovah de St-Jerome-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2).

29. Fairness, in the context of a hearing or 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).
30. I am not persuaded that the Director was unfair to Workforce Solutions. After the application to renew the employment agency licence was received by the Branch on January 19, 2017, an investigation was initiated into the timeliness of renewal request. There is no suggestion that Mr. Deshmukh was unable to provide further information or respond fully to the questions raised during the investigation.
31. In all, the Director outlined the issues and provided a fair and unbiased forum for resolution. Mr. Deshmukh was given an opportunity to respond to the questions asked concerning the late renewal application. There is no suggestion, and no evidence, of any bias on the part of the decision maker.
32. Mr. Deshmukh has not, for the purposes of this review, met the burden of showing the Director failed to observe the principles of natural justice and this ground of appeal would not be successful.
33. When the facts are clear and the contravention has been found, the Tribunal has consistently held that it has no jurisdiction to relieve against the administrative penalty provisions of the *Act* and *Regulation*. *Re: Marana Management Services Inc. operating as Brother's Restaurant*, BC EST # D160/04; *N & G Retail Inc. operating as Petro Canada*, BC EST # D012/06. This is the case even when the contravention is not purposeful; *Re: C.S.Q. Foods Ltd. operating as Bill Bailey's Family Restaurant*, BC EST # D154/97.
34. The facts are clear and undisputed. Due to an oversight, Workforce Solutions was operating an employment agency without a valid licence in contravention of section 12 of the *Act* on January 19, 2017, the date the renewal application was received.
35. Once the Director finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by *Regulation* – section 29(1)(a) prescribes a mandatory fine of \$500.00 for a contravention of a requirement of the *Act* so long as there are no other contraventions of the *Act* within the previous three years.
36. In the circumstances Workforce Solutions has breached a requirement the *Act*. The appropriate mandatory administrative penalty is properly imposed.
37. It is appropriate to exercise my discretion under section 114(1) and dismiss the appeal. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it as there is no reasonable prospect that the appeal will succeed.

ORDER

38. Pursuant to section 115 of the *Act* I order the Determination dated May 2, 2017, be confirmed.

Marnee Pearce
Member
Employment Standards Tribunal