

An appeal

- by -

Executive Waiter Resources Inc.
(“EWR”)

- 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/104

DATE OF DECISION: October 18, 2017

DECISION

SUBMISSIONS

Christopher Monk

on behalf of Executive Waiter Resources Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Executive Waiter Resources Inc. (“EWR”) has filed an appeal of a Determination issued by Karin Doucette, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on July 13, 2017.
2. The Determination concluded that EWR had contravened section 12 of the *ESA* by operating an employment agency without a valid licence. A \$500.00 administrative penalty was levied against EWR for contravening section 12 of the *ESA*.
3. The total amount of the Determination was \$500.00.
4. EWR has appealed the Determination on the grounds that the Director erred in law in making the Determination, and requests that the Determination be cancelled.
5. In correspondence dated September 13, 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 Delegate and a copy was emailed to EWR on August 24, 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 *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for the Determination, 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 *ESA*, 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 the 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 of 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 *ESA*, 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. EWR operates an employment agency in British Columbia, and was incorporated on March 1, 2001, with Mr. Monk listed as the only director and officer.
11. According to the Employment Standard Branch (the “Branch”) records, an employment agency licence was last issued to EWR on January 16, 2009, expiring on January 15, 2010.
12. In August 2016, EWR’s account with WorkBC was deactivated because WorkBC believed EWR to be an employment agency and an up-to-date licence needed to be submitted to reactivate the account.
13. On June 23, 2017, Heidi Ridder, Office Manager for EWR contacted WorkBC to reopen the account in order to post positions on the WorkBC site. A WorkBC client services officer contacted the Branch to confirm whether EWR required a licence to operate as an employment agency.
14. On June 23, 2017, the Director and Ms. Ridder spoke by telephone and discussed EWR’s operation, and the Director suggested that it appeared to meet the definition of an employment agency, and accordingly should be licenced. Ms. Ridder said that EWR had received a letter from the Branch indicating that this may not be the case; a copy of the letter was requested by the Director.
15. The letter was received by the Branch on June 28, 2017. This letter, dated March 16, 2009, was signed by J.R. Dunne, Delegate of the Director of Employment Standards, and reads, in part:
- I have enclosed information from our Interpretation Guideline Manual regarding the definition of “employment agency”. It appears that the type of work you are engaging may not meet the definition of “employment agency” and therefore would not require a licence. Please review this information carefully before making your application next year.
16. By way of a written submission received by the Branch on July 10, 2017, Ms. Ridder stated that she had spoken by telephone with Mr. Dunne in 2009, and their conversation included a detailed review of the questionnaire included with an Employment Agency Licence renewal. At the conclusion of the conversation, Mr. Dunne told Ms. Ridder that EWR did not fit the guidelines of an employment agency.
17. Ms. Ridder and Mr. Monk stated that EWR did not apply for the renewal of an employment agency licence after 2009 because of the communication from Mr. Dunne.

18. Following discussions with the Director during this investigation, Mr. Monk renewed the employment agency licence for EWR on July 4, 2017.
19. The Determination confirmed that EWR did contravene section 12 of the *ESA* by operating an employment agency without a current licence, and found the contravention date to be July 13, 2017.
20. A mandatory administrative penalty was imposed for the contravention of section 12 of the *ESA* 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

21. Mr. Monk submits that the Director erred in law in making the Determination and levying the fine of \$500.00 in the specific circumstances described.
22. Mr. Monk argues that EWR complied with the licencing requirements for employment agencies for over 13 years, as EWR “always believed itself to be an Employment Agency from our first day of operation”.
23. The sole reason for not continuing to renew the employment agency licence after January 16, 2009, was the March 16, 2009, letter from Mr. Dunne and a subsequent telephone conversation between Mr. Dunne and Ms. Ridder. Mr. Dunne was, during this timeframe, a delegate of the Director of Employment Standards.
24. Mr. Monk stressed that neither he nor Ms. Ridder ever took the position that EWR did not fit the definition of an employment agency, but rather this position was put forward by Mr. Dunne. EWR “just did what we were told to do”.
25. The Director is not in a position to confirm, deny or refute the claim of EWR that Mr. Dunne verbally confirmed by telephone the contents of the March 2009 letter, and that Mr. Dunne said that EWR did not meet the definition of an employment agency and accordingly, it was no longer necessary for EWR to continue renewing this licence.
26. Given the available evidence, consisting of a flawless track record of licencing compliance for over 13 years and until Mr. Dunne’s March 16, 2009, letter, it is more probable than not that Mr. Dunne “confirmed his concerns” and advised EWR by telephone that it did not need to renew the employment agency licence in the future.
27. As EWR has always acted in good faith and has always striven to be compliant with all of its legal business obligations, Mr. Monk asks that the Tribunal waive the \$500.00 penalty.

ANALYSIS

28. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which states:

- 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.

29. 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.
30. 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.
31. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
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.
32. EWR alleges that it did not renew its employment agency licence after January 16, 2009, because of advice received from Mr. Dunne, a delegate of the Director of Employment Standards.
33. EWR’s argument raises a type of defence known as officially induced error of law; the underlying purpose of this defence is to remedy the unfairness that results when a prudent and diligent person relying on a government authority for advice finds himself prosecuted for following that advice.
34. This argument was addressed within the Determination, and the Director described the letter from Mr. Dunne as “merely suggesting” that based on the information provided in 2009, the Agency may not need a licence. The content of the follow up phone conversation between Mr. Dunne and Ms. Ridder is of little value as evidence, as the Director was simply not in a position to respond to allegations about what a Branch employee might have said in a 2009 telephone conversation.
35. Although Mr. Monk argues that the evidence and timeline supports the conclusion that it is “more probable than not” that Mr. Dunne advised EWR that it did not need to renew the employment agency licence in 2009, this does not, as pointed out by the Director, change the employment agency status of EWR in 2017, or alter the limited value of the evidence of the reported telephone conversation of 2009.
36. Mr. Monk argues that he and EWR have believed from the outset that EWR is an employment agency. However, when it was suggested in 2016 by the WorkBC client services officer that EWR was an employment agency and could not use the WorkBC services until an up-to-date licence was submitted, EWR took no further steps to follow up and confirm whether the company was, as they believed, an employment agency requiring a licence under the *ESA*. No explanation has been provided as to why EWR continued to rely on the information received in 2009 rather than the advice received in 2016.
37. Ultimately Mr. Monk argues that that the Director should not have levied a \$500.00 penalty since EWR did not intentionally breach the licencing requirements under the *ESA*. This may be so, however, the facts

before me show that EWR did contravene section 12 of the *ESA* and that it was properly penalized for the contravention. There is nothing in the *ESA* requiring the Director to prove that the appellant intended to breach the *ESA* for a breach to have occurred.

38. The Tribunal has determined that administrative penalties imposed for contraventions of the *ESA* are “absolute liability” offences, as opposed to “strict liability” offences, and a defence of due diligence is not available to an employer for a contravention: *Punjab Labour Supply Ltd.* (BC EST # D392/98).
39. The ‘defence’ of officially induced error of law as it relates to non-compliance with the *ESA* has been considered by the Tribunal in *Canwest Countertops Ltd.*, (BC EST # D016/99) and *Gulbranson Logging Ltd.* (BC EST # D337/97). In each case the defence was rejected as inapplicable. “Officially induced error of law” cannot preclude the enforcement of the provisions of the *ESA* but rather is limited to a defence to a quasi-criminal charge, or a regulatory offence, specifically, a prosecution under an applicable statute. EWR is not facing any charges but rather, a mandatory monetary penalty has been applied.
40. I find no error of law in the Determination. The conclusion reached by the Director on the section 12 issue followed an analysis of the evidence presented by the party during the complaint process, and is rationally supported by the facts and law. While I appreciate that EWR disagrees with the conclusion, it has not shown that any of the factual findings and conclusions were made without any evidence at all, were perverse or inexplicable, or that the Director misapplied the law or the *ESA* relating to section 12.
41. 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 *ESA* so long as there are no other contraventions of the *ESA* within the previous three years.
42. In the circumstances EWR has breached a requirement the *ESA*. The appropriate mandatory administrative penalty is properly imposed.
43. EWR has not met the burden of showing an error of law in the Determination; there is no reasonable prospect of the appeal succeeding. The appeal is dismissed on this basis.
44. It is appropriate to exercise my discretion under section 114(1) and dismiss the appeal. The purposes and objects of the *ESA* are not served by requiring the Director to respond to it as there is no reasonable prospect that the appeal will succeed.

ORDER

45. Pursuant to section 115(1) of the *ESA*, the Determination dated July 13, 2017, is confirmed in the amount of \$500.00, plus any interest might have accrued since the date of issuance.

Marnee Pearce
Member
Employment Standards Tribunal