

An appeal

- by -

Kelly Services (Canada), Ltd.  
("Kelly")

- 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:** Carol L. Roberts

**FILE No.:** 2016A/101

**DATE OF DECISION:** September 14, 2016

## DECISION

### SUBMISSIONS

Byrne Luft

on behalf of Kelly Services (Canada), Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Kelly Services (Canada), Ltd. (“Kelly”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 6, 2016.
2. In the Determination, the Director found that Kelly had failed to comply with section 12 of the *Act* by operating an employment agency without a licence and imposed two administrative penalties in the total amount of \$2,500. The deadline for filing the appeal was July 14, 2016. Kelly’s appeal was filed July 29, 2016.
3. Kelly seeks to have the Determination cancelled. Kelly also seeks an extension of time in which to file the appeal.
4. These reasons are based on Kelly’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

### ISSUE

5. Whether or not Kelly has demonstrated any statutory ground of appeal.

### FACTS AND ARGUMENT

6. Kelly, a British Columbia registered company, operates an employment agency as defined in the *Act*. Mr. Luft, Kelly’s Vice-President and General Manger, submitted a renewal application to the Employment Standards Branch. Although the application was dated May 10, 2016, the Branch did not receive the application until May 30, 2016.
7. Kelly was issued an employment agency licence on May 28, 2015. That licence expired May 27, 2016. After receiving the renewal application on May 30, 2016, a delegate of the Director attempted to contact Mr. Luft by telephone to review the application. On June 2, 2016, the delegate spoke to Ms. Torrance, a Kelly employee. Ms. Torrance explained to the delegate that she was aware of the licence expiry date and was surprised to learn that the application had not been received until May 30, 2016.
8. The delegate concluded that Kelly had contravened section 12 of the *Act* by operating an employment agency without a licence. The delegate further noted that Kelly had contravened the same section of the *Act* in May 2014. In light of the fact that this was Kelly’s second contravention, the delegate imposed a \$2,500 penalty pursuant to section 29 of the *Employment Standards Regulation* (the “*Regulation*”).
9. Kelly seeks to have the penalty cancelled, as the licence renewal application was postmarked May 13, 2016, prior to the expiration of the licence, and any delay in receiving the application was attributable to the postal service not to Kelly. Attached to the appeal is a copy of a cheque dated May 13, 2016, representing the \$100

licence renewal fee. Also attached was a copy of the US postal service stamp (which presumably had been sent to Kelly by the delegate) indicating that the application was mailed May 13, 2016.

10. Kelly also seeks an extension of the time in which to file the appeal, saying that it faxed the appeal to the Branch on July 5, 2016, rather than the Tribunal, in error.

### ANALYSIS

11. Section 114 of the *Act* provides that 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.
12. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
  - the director failed to observe the principles of natural justice in making the determination;
  - evidence has become available that was not available at the time the determination was being made.
13. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds set out in section 112. Having reviewed the section 112 record and Kelly's submissions, I dismiss the appeal.
14. Kelly does not set out any grounds for the appeal, asking only that the penalty assessment be cancelled on the basis that the licence renewal application was mailed before the expiry date.
15. There is no dispute that the licence renewal application was received three days after the expiry of the 2015-2016 licence. As I understand Kelly's appeal, it disagrees with the penalty assessment on the basis that the contravention was unintentional and was the fault of the postal service rather than any failure to act on its part.
16. Kelly has not demonstrated that the Director erred in law in concluding that it operated without a licence for an admittedly short period of time. I find no basis to cancel the penalty assessment.
17. Unfair as it may seem, once a contravention has been found, the delegate has no discretion as to whether or not an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by *Regulation*.

18. I find that this appeal has no prospect of succeeding and the object and purposes of the *Act* would not be served by requiring a response from the other party.
19. The appeal is dismissed.

**ORDER**

20. Pursuant to section 115 of the *Act*, I order the Determination dated June 6, 2016, be confirmed in the amount of \$2,500 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**