

An appeal

- by -

Think Projects Inc. carrying on business as Lloyd Talent
(“Lloyd Talent”)

- 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.: 2015A/137

DATE OF DECISION: December 18, 2015

DECISION

SUBMISSIONS

Thomas Gusway

on behalf of Think Projects Inc. carrying on business as
Lloyd Talent

OVERVIEW

1. This is an appeal filed by Think Projects Inc. carrying on business as Lloyd Talent (“Lloyd Talent”), pursuant to subsection 112(1)(b) of the *Employment Standards Act* (the “*Act*”) and it concerns a Determination issued by a delegate of the Director of Employment Standards (the “delegate”) on October 21, 2015. Lloyd Talent says that the Determination, ordering it to pay a \$500 monetary penalty under section 98 of the *Act* for having contravened section 12 of the *Act* (operating an unlicensed talent agency), should be cancelled because the delegate failed to observe the principles of natural justice in making the Determination.
2. At this juncture, I am considering whether the appeal should be summarily dismissed as having no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*). In adjudicating this matter, I have reviewed the Determination, the delegate’s “Reasons for the Determination” issued concurrently with the Determination (the “delegate’s reasons”), the subsection 112(5) “record” that was before the delegate when she issued the Determination, and the appellant’s submission prepared by its president and sole director, Mr. Thomas Gusway.

THE DETERMINATION

3. According to the factual summary set out in the delegate’s reasons (and none of these facts is contested), Lloyd Talent held a talent agency licence issued effective October 14, 2014, that was valid until its expiration on October 13, 2015. The Employment Standards Branch received a renewal application on October 16, 2015, that was signed by Mr. Gusway.
4. It is important to note that the Employment Standards Branch’s October 2, 2014, letter accompanying the October 14, 2014, licence renewal specifically indicated that the licence would expire on October 13, 2015, and further stated “[t]he Employment Standards Branch does not send out renewal notices”. Lloyd Talent was advised to “please ensure that you submit your application to the address below to have your licence renewed at least 30 days before your licence expires”.
5. The delegate left a voice mail message for Mr. Gusway on October 19, 2015, and the following day this telephone call was returned by Ms. Lissa Lloyd who identified herself as the firm’s “owner”. Ms. Lloyd was the person to whose attention the Branch’s October 2, 2014, letter was addressed. Ms. Lloyd conceded that the firm had been continuously operating a talent agency during the relevant time frame but had been tardy in filing a renewal application because, unlike in previous years, Lloyd Talent never received a “reminder” e-mail from the Employment Standards Branch (recall that the Branch’s October 2, 2014, letter expressly stated that no “renewal reminder” would be sent).
6. Since Lloyd Talent was operating as a talent agency without a proper licence issued under section 12 of the *Act* as and from October 14, 2015, the delegate levied a \$500 monetary penalty by way of the Determination now under appeal.

REASON FOR APPEAL

7. Mr. Gusway notes that Lloyd Talent is one of the first talent agencies, if not the first, to be licensed in the province. The firm has never failed to apply for a timely renewal of its licence and that, in this instance, its failure “did not occur because of disrespect of the Ministry or a planned non-remittance”. Mr. Gusway notes that other ministries that license various firms and persons offer a “3-day grace period” and submits that the \$500 penalty is “draconian” and “excessively harsh and severe”.

8. Mr. Gusway’s submission, apparently referring to the \$100 licence renewal fee, continues:

Attached BC Government documentation for other ministries demonstrates penalties for late payment of at most 10%. This determined penalty is 500%. ...

Though other instances there normally exists at least a 3-day grace period which we would fall in, I do understand that in government practice this may not be possible. However 500% is not in support of small business with a history of compliance and support. [sic]

...

I agree that we lapsed in our responsibility to remit our yearly payment, however our past history, our past support, the fact that we paid immediately once we discovered the lapse, and I hope a desire for the ministry to support small business in BC would make a decision to this appeal which would be fair. [sic]

I submit this appeal to either remove this determination or to reduce the penalty to a maximum of 10% to be in alignment with other penalties for late payment by other BC ministries.

9. Lloyd Talent’s material includes information confirming that the Ministry of Finance typically levies a 10% penalty (of the amount due and absent misconduct such as persistent non-payment or fraud) for late tax remittances payable under certain provincial taxation statutes. Mr. Gusway also submitted an October 16, 2015, e-mail to another delegate with whom Lloyd Talent had formerly dealt seeking information about its licence renewal and he also provided the ensuing e-mail stream that essentially confirmed the Branch’s practice not to send renewal notices and confirming that licensees bear the burden of filing timely renewal applications.

FINDINGS AND ANALYSIS

10. At the outset, I should note that this appeal is predicated on the “natural justice” ground of appeal. There is nothing in the appellant’s material that directly speaks to this issue. Lloyd Talent says that it did not receive a “reminder” notice, as it apparently had in previous years, but there is nothing in either the *Act*, or the accompanying regulations, that imposes such an obligation on the Employment Standards Branch. I also wish to reiterate, as discussed above, that Lloyd Talent had express notice that it was solely responsible for ensuring that it filed a timely renewal application. In effect, it had “notice” as and from the date its licence was renewed.

11. I am fully satisfied that Lloyd Talent did not intentionally fail to submit a timely renewal application and that its failure was inadvertent. However, a monetary penalty issued under the *Act* is not a criminal charge – there is no requirement for the Director of Employment Standards to prove *mens rea* (or guilty intent) as is the case where the Crown alleges a person has committed a criminal offence. The Director’s evidentiary burden is merely to show that there was a contravention of applicable provision of the *Act*, in this case section 12. The \$500 monetary penalty is akin to an “absolute liability offence”; that is, an offence that does not leave open a “due diligence” defence (see *R. v. Pontes*, [1995] 3 SCR 44). Further, even if the latter defence were open to Lloyd Talent, I am not persuaded that Lloyd Talent exercised all due diligence in this case. In regard to the

section 12 contravention, there really is absolutely nothing to argue – Lloyd Talent concedes its contravention.

12. There is nothing in the *Act*, or in any of the accompanying regulations, that gives the Director of Employment Standards the discretionary authority to relieve against a failure to comply with section 12. Similarly, the Tribunal has no such jurisdiction. The amount of the penalty, in this case \$500, is mandated by section 29 of the *Employment Standards Regulation*. And in any event, even if I had the discretionary authority to substitute a lesser amount, given the facts of this case, I would not do so particularly since Lloyd Talent was given express notice regarding its obligation to apply, in a timely manner, for the renewal of its talent agency licence. However, the point is moot since I have no such discretionary authority.
13. Lloyd Talent rightly notes that the administrative penalty imposed in this case is five times the licence renewal fee. However, that fact, standing alone, does not, in my view, make the penalty “draconian”. It must be remembered that the penalty regime reflects the fact that the provisions of the *Act* are largely subject to voluntary compliance. The penalty regime was deliberately designed to provide a significant financial incentive for persons to comply with those provisions. Undoubtedly, this is an expensive learning episode for the appellant although, I expect, it is one that will not likely recur in future years. Lloyd Talent should take notice that a second contravention within a 3-year period will result in a \$2,500 penalty.

ORDER

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

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal