

An appeal

- by -

Sharpe Wysman Inc.
("SWI")

- 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: Shafik Bhalloo

FILE No.: 2011A/162

DATE OF DECISION: December 13, 2011

DECISION

SUBMISSIONS

Sukhjit Lalli on behalf of Sharpe Wysman Inc.

Greg Brown on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Sharpe Wysman Inc. (“SWI”) of a Determination that was issued on September 15, 2011, by a delegate of the Director of Employment Standards (the “Director”). The Determination found that SWI contravened section 12 of the *Act* by operating as an employment agency without a valid licence and imposed on SWI, for the said breach, an administrative penalty of \$500.00 pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”).
2. Sukhjit Lalli (“Mr. Lalli”), the sole director of SWI, appeals the Determination on behalf of SWI on the basis that the Director failed to observe the principles of natural justice in making the Determination.
3. Mr. Lalli is seeking the Tribunal to change or vary the Determination by substituting the \$500 administrative penalty against SWI with a \$60 penalty. However, Mr. Lalli filed the appeal of the Determination with the Employment Standards Tribunal on October 28, 2011, approximately 4 days after the expiry of the time limit for filing the appeal set out in the Determination, namely, October 24, 2011.
4. On October 31, 2011, the Tribunal notified the parties that issue of the timeliness of the appeal would be decided before the parties were asked to respond on the merits of SWI’s appeal.
5. Pursuant to section 103 of the *Act* and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In this case, neither party has requested an oral hearing and, in my view, the preliminary issue of the timeliness of SWI’s appeal may be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUE

6. The sole issue to be addressed in this decision is whether the Tribunal should extend the deadline for requesting an appeal in accordance with the powers of the Tribunal under section 109(1)(b) of the *Act*.

FACTS

7. By way of background, SWI is an employment agency as defined in the *Employment Standards Act* (the “*Act*”) and was issued its first employment agency license by the Employment Standards Branch (the “Branch”) on May 5, 2010, with an expiry date of May 4, 2011.
8. On September 8, 2011, the Branch received a request from SWI to renew its expired employment agency license.

9. On September 9, 2011, the Delegate telephoned SWI and spoke with Mr Lalli who indicated that SWI, after the expiry of its licence on May 4, 2011, was operating as an employment agency and continued to do so at the time of the telephone call. The Delegate also notes that Mr. Lalli was unable to explain why SWI failed to renew its license before it expired except that he had forgotten.
10. Subsequently, on September 15, 2011, the Delegate issued the Determination finding SWI to have contravened section 12 of the *Act* as it operated as an employment agency without a license during the period May 4, 2011, to the date of the Determination. As a result, the Delegate, in the Determination, imposed on SWI a penalty of \$500 for the said breach, pursuant to section 29(1) of the *Regulation*.

SUBMISSIONS OF SWI

11. Mr. Lalli, on behalf of SWI, submits that he does not question the finding in the Determination of contravention by SWI of section 12 of the *Act*. However, he states that he has “a serious concern with the severity of the administrative penalty” imposed on SWI. He states that on September 7, 2011, he realised that SWI had not renewed its employment agency license. This, he states, was an “honest mistake” on the part of SWI “at the end of its first year of trading” when businesses are “learning how to do things for the first time”. Once he realised his oversight he immediately submitted SWI’s application for renewal of the license.
12. Mr. Lalli questions why the Branch did not send out a renewal notice to SWI when other government agencies such as the Ministry of Finance send advance notifications for any upcoming filings. He also submits that if the Branch has a policy not to send out renewal notices then it should have so advised SWI when issuing the initial license to SWI. He notes that when the Branch renewed SWI’s license on September 20, 2011, the Branch, on this occasion, pointed out in its correspondence that it does not send out renewal notices.
13. Mr. Lalli submits that he mailed the Branch a cheque for \$500 in payment of the administrative penalty under the Determination on September 15, 2011, but now wants the fee returned to SWI. He states that a more appropriate penalty, in the circumstances, is \$60.
14. With respect to the late filed appeal of SWI, Mr. Lalli explains that the appeal was due by October 24, 2011, but there was no reason for him to make the appeal prior to October 17, 2011, because his cheque for \$500 was not cashed until then. He was hoping that the cheque would not be cashed because of his conversation with the Delegate in which he expressed his concerns about the severity of the administrative penalty. However, once the Director cashed the cheque on October 17, 2011, he began his work on the appeal, but on October 22, 2011, he injured his back and was “incapable of doing anything until [October 28, 2011]”. He states he called the Tribunal on October 24, 2011, and informed the Tribunal of this. He then returned to work on October 28, 2011, the date he filed the appeal on behalf of SWI.
15. In SWI’s final reply, Mr. Lalli presents a doctor’s note dated November 30, 2011. The doctor’s note indicates that Mr. Lalli “presented with a significant flare up of mechanical back pain on the 4th of November that had been present since two weeks earlier.” The doctor states he gave Mr. Lalli “appropriate therapy” and believes that “it is probable that he would have been compromised in the performance of his work during this period”.
16. I also note that in the final reply, Mr. Lalli challenges the Director’s submissions that SWI is “basing its appeal on evidence already provided to the Delegate” as well as “on evidence not previously provided to the Delegate” as contradictory and “nonsensical” and “brings into doubt the validity of the entire Appeal Response.”

SUBMISSIONS OF THE DIRECTOR

17. The Director submits that SWI had until October 24, 2011, to appeal the Determination but did so four days late on October 28, 2011, without a good reason.
18. The Director further submits that SWI is basing its appeal on evidence already provided to the Delegate and asking the Tribunal to “re-weigh evidence’ previously considered by the Delegate” because it does not agree with the Determination. This is an inappropriate basis for appealing and therefore SWI’s appeal should be dismissed, argues the Director.
19. The Director also contends that SWI is basing its appeal on “evidence not previously provided to the Delegate”, but does not go on to identify specifically what that evidence is. The Director, however, refers to the Tribunal’s decision in *Re Kaiser Stables*, BC EST # D058/97, and states “the employer will not be permitted to rely on evidence that was available and that could have been presented to the investigating officer”.

ANALYSIS

20. As pointed out by the Director, SWI failed to file its appeal of the Determination within the statutory appeal period. The appeal deadline for the Determination was October 24, 2011. However, SWI filed its appeal on October 28, 2011, four (4) days late.
21. This Tribunal has previously indicated that while section 109(1)(b) of the *Act* gives the Tribunal the discretion or authority to extend the time period for requesting an appeal under section 112, the Tribunal will not exercise its discretion under the said section where the appellant does not show a compelling reason for the Tribunal to exercise its discretion. The burden, on a balance of probabilities, is on the appellant to show good reason why the Tribunal should extend the appeal period.
22. In numerous cases the Tribunal has set out a non-exhaustive criteria that it will consider in determining whether to exercise its power, under section 109(1)(b) of the *Act* to extend the time for appealing a determination. These factors include the following:
 1. there is a reasonable and credible explanation for failing to request an appeal within the statutory limits;
 2. there has been a genuine and ongoing *bona fide* intention to appeal the determination;
 3. the respondent party and the Director have been made aware of this intention;
 4. the respondent party will not be unduly prejudiced by the granting of an extension; and
 5. there is a strong *prima facie* case in favour of the appellant.
23. Having said this, in the case at hand, for the reasons stated below, I am not persuaded that there is a credible basis for exercising the Tribunal’s discretion under section 109(1)(b) to extend the appeal period because SWI has failed to discharge the onus to satisfy the criteria or prerequisites delineated above to move this Tribunal to exercise its discretion.
24. First, I do not find Mr. Lalli’s explanation for failing to appeal on behalf of SWI in a timely fashion “reasonable or credible”. I do not think it was reasonable for him to expect the Director not to cash his or SWI’s cheque for the administrative penalty or for him to wait until the cheque was cashed on

October 17, 2011, to make his decision to appeal the Determination. Neither the Delegate nor the Director made any representations to Mr. Lalli to induce him to believe that his cheque for the administrative penalty would not be cashed.

25. As for his medical disability on October 22, 2011, which he states made him unable to file an appeal in a timely fashion (after he had decided to appeal), I note Mr. Lalli, in his written submissions, admits that he returned to work at the office on October 28, 2011, the same day he filed SWI's late appeal. The doctor's note he produces in his final reply is dated November 30, 2011, and in it the doctor refers to Mr. Lalli's attendance at the doctor's office on November 4, 2011, thirteen (13) days after the alleged injury and seven (7) days after he had returned to work. I find it curious that Mr. Lalli did not seek help for his injury that prevented him from filing the appeal on October 24, 2011, until after he had returned back to work and after he had filed his appeal of the Determination.
26. I also note the doctor's note is dated November 30, 2011, and, since it is included in the final reply of SWI, it is likely in response to the Director's appeal submissions of November 22, 2011. The doctor, in the note, states "it is probable that [Mr. Lalli] would have been compromised in the performance of his work during this period". I find the medical note, together with the timing of Mr. Lalli's appointment with the doctor, unconvincing that he was "compromised" or unable because of his alleged injury to file the appeal in a timely fashion.
27. I also note that Mr. Lalli did not have an ongoing *bona fide* intention to appeal the Determination. His intention to appeal only came about on October 17, 2011, when he discovered that the Director had cashed the cheque he sent for payment of the administrative penalty ordered in the Determination. Prior to the late-filed appeal, there is no evidence that Mr. Lalli or SWI intended to appeal the Determination or make the Director aware of any intention to appeal.
28. While granting of an extension in this case, where there has been a delay of four (4) days past the deadline for appealing, will not prejudice the Director, I do not find there is strong *prima facie* case in favour of SWI. More specifically, I note that SWI, in the appeal form, has raised the "natural justice" ground of appeal. In *Re: 607730 B.C. Ltd.* (c.o.b. English Inn & Resort), BC EST # D055/05, the Tribunal explained that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.
29. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party: see *B.W.I. Business World Incorporated*, BC EST # D050/96.
30. Having reviewed the Determination including the section 112(5) "record" and the submissions of Mr. Lalli on behalf of SWI, I find that Mr. Lalli has failed to adduce any evidence in support of the natural justice ground of appeal.

31. I also find that there is no evidentiary basis for SWI to ground its appeal on any of the other permissible grounds of appeal in section 112 of the *Act* - error of law or new evidence. Mr. Lalli has admitted that SWI, for a period, operated without a license and does not challenge that finding in the Determination. He expressly states that he does “not question the contravention itself”. His dispute is with the “severity of the administrative penalty”. The Delegate has no discretion in ordering a different amount of penalty under the *Regulation*, once he concludes that a party has breached a provision of the *Act*.
32. Finally, based on a *prima facie* review of SWI’s evidence adduced in the appeal, I agree with the Director that SWI appears to be rearguing its case, as it is dissatisfied with the ruling in the Determination. This, in my view, is an inappropriate use of the appeal process under the *Act*. An appeal is not to serve as a further opportunity for a party dissatisfied with the Determination to re-argue its case or to take the proverbial “second kick at the can”.
33. Lastly, while the Director, in his submissions, indicates that SWI is presenting new evidence not previously provided to the Delegate, the Director has not identified the “new evidence” but from my review of the submissions of SWI, it would appear that it relates to the evidence of Mr. Lalli explaining why SWI did not renew its license at the time it was expiring. I have reviewed the evidence of Mr. Lalli and related arguments about SWI’s “honest mistake”, new business enterprise and failure to get a reminder from the Branch to renew its license before the expiry date. I do not find the said evidence and related arguments qualify as a strong *prima facie* case in favour of SWI. There is no exception to the employment agency license requirement or its timely renewal under the *Act* when the company is in its first year or makes an honest mistake to renew it when it expires. There is also no statutory requirement for the Branch to send out renewal notices to licensees before expiry.
34. On the basis of the totality of the considerations under section 109(1)(b) of the *Act*, I reject Mr. Lalli’s application on behalf of SWI for an extension of time for appealing the Determination.

ORDER

35. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination issued on September 15, 2011, be confirmed. Pursuant to section 114(1)(b) of the *Act*, the appeal is dismissed.

Shafik Bhalloo
Member
Employment Standards Tribunal