IN THE SUPREME COURT OF BRITISH COLUMBIA

Re *Judicial Review Procedure Act*
Administrative Tribunals Act and
Employment Standards Act

Citation: *Prince George Nannies and Caregivers Ltd. v. British Columbia (Employment Standards Tribunal),* 2010 BCSC 883

Date: 20100623
Docket: 0936153
Registry: Prince George

Between:

Prince George Nannies and Caregivers Ltd.

Petitioner

And

Employment Standards Tribunal, Director of Employment Standards, Jocelyn Dela Cruz, Luzviminda Trinidad Galasi, Florentina Aranque Landayao, Milagros Barcoma Narca, Annabelle Balunan Oporto, Janet Diamante Pigarot, Elvie Gamez Pingi, Wilma Caoile Rabot, Mary Grace Rejano, Eva Donna Saribay, Verenice Dedace Soquena, Francis Tablon, Florida Mariano Tadeja and Lailyn Lusterio Veradio

Respondents

Before: The Honourable Mr. Justice Sewell

On judicial review from: The Employment Standards Tribunal Decisions # DO55/09 dated June 2, 2009 and # RD106/09 dated October 21, 2009

Reasons for Judgment

For the Petitioner:	Taiho Krahn (Self-Represented)
Counsel for the Respondent, Employment Standards Tribunal:	David W. Garner
Counsel for the Respondent, Director of Employment Standards:	Michelle J. Alman
Place and Date of Hearing:	Prince George, B.C. June 9, 10 and 11, 2010
Place and Date of Judgment:	Prince George, B.C. June 23, 2010

INTRODUCTION

[1] The petitioner Prince George Nannies and Caregivers Ltd, which I will refer to as PG Nannies, applies pursuant to the *Judicial Review Procedure Act* RSBC 1996 Ch. 241(the *JRPA*) for an order setting aside Decisions (the Decisions) of the Employment Standards Tribunal (the Tribunal) dated June 2, 2009 (the Original Decision) and October 21, 2009 (the Reconsideration Decision) and for an order remitting the subject matter of the Decisions back to the Tribunal for reconsideration in accordance with the decision of the Court.

BACKGROUND

[2] PG Nannies operates an agency which provides services to Pilipino nannies and caregivers (Caregivers) who wish to move to Canada and work in the Prince George area. It is an employment agency as that term is defined in the *Employment Standards Act,* RSBC 1996 Ch. 113 (the *Act*). The company operates by requiring prospective Caregivers to enter into what is called a Live-In Caregiver Advertising and Settlement Services Fee Agreement (the Agreement). Pursuant to the Agreement PG Nannies agrees to provide the Caregivers with a number of services, none of which expressly includes finding or assisting to find employment. Each Caregiver must pay a deposit of $1000 upon making application to subscribe for PG Nannies services, a further $1500 within 5 business days of the Caregiver's receipt of an offer of employment as a caregiver and a further $1500 in three equal monthly instalments after commencement of her employment.

[3] Sometime in 2008, a former client of PG Nannies made a complaint to the Director of Employment Standards (the Director) that PG Nannies was violating the provisions of s. 10 of the *Act.* Section 10 provides as follows:

> No charge for hiring or providing information
>
> **10** (1) A person must not request, charge or receive, directly or indirectly, from a person seeking employment a payment for
>
> (a) employing or obtaining employment for the person seeking employment, or
>
> (b) providing information about employers seeking employees.

> (2) A person does not contravene this section by requesting, charging or receiving payment for any form of advertisement from the person who placed the advertisement.
>
> (3) A payment received by a person in contravention of this section is deemed to be wages owing and this Act applies to the recovery of the payment.

[4] The Director initiated an investigation under s. 76(2) of the *Act* and on February 18th, 2009, an authorized delegate of the Director made a determination (the Determination) that PG Nannies had acted in contravention of s. 10(1) of the *Act* by charging a fee for assisting Caregivers to find employment. The essential finding made in the Determination is found at page R13 and is as follows:

> There is no evidence that any of the services apparently offered by the Agency have been requested by any nanny. There is no evidence of a schedule of fees charged by, or paid to the Agency for any services it may/may not provide. There is no evidence of an itemized list of services available and the fees charged for each service such that an applicant nanny could choose one service and not another. The evidence is the Agency has merely 'bundled' together a number of activities which it has identified as "services" and then charged a pre-determined, and non-negotiable, fee for this. I find the "services" the Agency apparently provides do not reflect the conventional understanding of the terms used to identify these services, and are a misrepresentation of their intended meaning. The Agency has misused the terms in order to obscure the following simple fact: the Agency requires individuals who are seeking employment to pay a fee to the Agency in order for the agency to help them obtain employment. I find the fees charged by the Agency are for Job placements, and are a contravention of Section 10 of the Act.

[5] The Determination went on to order that PG Nannies pay back fees paid by Caregivers to it in the amount of $27,163.58 and assessed an administrative penalty of $500 pursuant to s. 29(1) of the Regulations passed pursuant to the *Act.*

[6] Being dissatisfied with the Determination, PG Nannies appealed to the Tribunal on March 30, 2009. The errors alleged in the appeal were set out as follows:

> We respectfully submit that the Delegate for the Director erred in:
>
> determining that PG Nannies' fee for services such as resume preparation, image consulting, liaising, and immigration settlement contravenes section 10 (1) of the Employment Standards Act ("ESA"),

> determining that advertising services provided by PG Nannies do not fall under the definition of advertising as allowed by section 10 (2) of the ESA,
>
> falling to apportion any monetary value to services rendered by PG Nannies which are allowable under the ESA, and
>
> calculating the wages owing to Luzviminda Galasi and Mila Narca (see section 8).

[7] The right to appeal is found in s. 112(1) of the *Act* and is in the following terms;

> **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.

[8] On June 2, 2009 a panel of the Tribunal delivered the Original Decision, which dismissed the appeal. The panel dealt with each of the errors alleged by PG Nannies. It found that PG Nannies had clothed the fees it charges for placement services as a fee for advertising and other services it had bundled into its contract. It held that such bundling did not change the nature of the fees, which it affirmed were placement fees proscribed by s. 10(1) of the *Act.*

[9] The panel also rejected PG Nannies' submission that the delegate had erred in deciding that s. 10(2) did not apply to the fees because the placing of information about Caregivers on PG Nannies' website could not be said to be advertising by the Caregivers but was in fact advertising by PG Nannies. In dealing with this issue the panel pointed out and relied on the fact that Caregivers were not permitted to pay for the bundled services on an itemized basis. The panel repeated its finding that the contracts were truly placement contracts and concluded its analysis of this alleged error by finding that the contract was a transparent attempt on the part of PG Nannies to charge placement fees under the guise of advertising fees. As the fees were not in fact or substance paid for advertising the panel held that s. 10(2) had no application.

[10] The panel rejected the apportionment argument on the basis that to do so would be to rewrite the Agreement and in effect make a new agreement which in part complied with s. 10 of the *Act.* Before me, PG Nannies abandoned any argument that the fees should be apportioned.

[11] Finally the panel corrected what was acknowledged to be an error in assessing the amount of fees to be refunded under the *Act and* reduced the amount PG Nannies was required to repay to Caregivers to $25,987.47 plus statutory interest, while affirming the administrative penalty.

[12] Section 116 of the *Act* permits the Tribunal to reconsider a decision either on its own motion or on application of the Director or a person named in a decision or order of the Tribunal. It is in the following terms:

> **116** (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
>
> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
>
> (3) An application may be made only once with respect to the same order or decision

[13] On July 20, 2009 PG Nannies applied for reconsideration of the Original Decision. The grounds on which such reconsideration was sought were that the Tribunal had erred in confirming the Director's Determination that its fees contravened s. 10 of the *Act,* in concluding that the services provided by it were not advertising services permitted under s. 10(2) of the *Act*, and in determining that the Director was under no obligation to allocate the fee among the various services provided by PG Nannies to Caregivers.

[14] In its submission on the reconsideration application PG Nannies submitted a table which was designed to demonstrate that its Caregiver clients utilized over 80% of the services set out in the Agreement. On behalf of PG Nannies Mr. Krahn relied very heavily on this table in his submissions before me. The Director objected to PG

Nannies relying on this table before me. However I have concluded that the table was part of the record before the Tribunal on the reconsideration application. The reconsideration panel made no order excluding the table from its consideration. I have therefore concluded that I can consider the table, along with the rest of the record, in reaching my decision in this matter.

[15] On October 21, 2009 the Tribunal issued the Reconsideration Decision in which it refused the application for reconsideration and affirmed the Original Decision. I note in passing that in so doing it does not appear to have followed the requirements of 116 of the *Act*. I think it is clear that a review panel may either decline to reconsider the decision or reconsider it. It is only if it decides to reconsider the decision that it may act pursuant to s. 116 (1) (b). However a review of the Reconsideration Decision as a whole makes it clear that the reconsideration panel refused to reconsider the Original Decision. While the practical consequences to PG Nannies are identical, the nature of the Reconsideration Decision does have implications for the scope of review under the *Administrative Tribunals Act* SBC 2004, Ch. 45 (the *ATA*), to which I will return later in these reasons.

[16] As indicated above, PG Nannies brings this application for judicial review seeking an order setting aside both the Original Decision and the Reconsideration Decision. The parties agree that this Court does not have jurisdiction to review the Determination and no such review is sought before me.

PETITIONER'S GROUNDS FOR SEEKING JUDICIAL REVIEW

[17] In this proceeding PG Nannies was represented by its president and principal, Mr. Krahn, who is not a lawyer. While Mr. Krahn was able to articulate his arguments clearly, he did not always use the same vocabulary that a lawyer representing PG Nannies might have. In my summary of his arguments I may therefore use somewhat different terminology from that used by Mr. Krahn. In so doing I do not intend to change the grounds he argued, but only to use my own language to analyse the issues which arose before me.

[18] As I understand it, PG Nannies makes three essential points in support of the orders it seeks. It submits that the Tribunal exceeded its jurisdiction because

> (a) its application of the general law of contract to the construction of the Agreement was so incorrect as to be patently unreasonable;
>
> (b) its interpretation of ss. 10(1) and (2) is patently unreasonable because it ignores the services provided by PG Nannies;
>
> (c) it failed to comply with the duty to give adequate reasons for its decision.

STANDARD OF REVIEW

[19] Before considering the issues raised by PG Nannies I must address the appropriate standard of review to be applied in reviewing the Decisions.

[20] Section 103 of the *Act* provides that, *inter alia,* ss. 55 to 58 of the *ATA* apply to the Tribunal. The *Act* contains a strong privative clause, s. 110, which provides as follows:

> **110** (1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.
>
> (2) A decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[21] The appropriate standard of review is therefore determined by s. 58 of the *ATA* which provides;

> Standard of review if tribunal's enabling Act has privative clause
>
> **58** (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a

> privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

[22] I must not therefore interfere with the Tribunal's decision on a question of fact, law or the exercise of discretion unless I conclude that any such decision is patently unreasonable. To find patent unreasonableness in reviewing an exercise of discretion I must find that the Tribunal acted in one of the ways specified in s. 58(3).

[23] On decisions of law or fact I must accord the Tribunal's decision a very high degree of deference. In *Victoria Times Colonist v. Communications, Energy and Paperworkers Union* 2009 BCCA 229, the Court applied the decision of the Supreme Court of Canada in *Canada(Minister of Immigration) v. Khosa* 2009 SCC12, stating at paras. 7 and 8:

> **7** After her decision was delivered the Supreme Court of Canada gave reasons in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, conflating the "patently unreasonable- unreasonable" dichotomy into one standard of reasonableness, under which there is a range of deference. It was not immediately clear what impact, if any, *Dunsmuir* would have on the statutory retention of the patently unreasonable standard for provincially enabled administrative tribunals in British Columbia under the *ATA*. That uncertainty has been resolved, in my view, by the reasons of Justice Binnie, for the majority, in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, where he wrote (at para. 19):
>
> - [19] Generally speaking, most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them, such as the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, can only sensibly be interpreted in the common law context because, for

> example, it provides in s. 58(2)(*a*) that "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable". The expression "patently unreasonable" did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of *indicia* of patent unreasonableness are given in s. 58(3). Despite *Dunsmuir*, "patent unreasonableness" will live on in British Columbia, but the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s. 58 was and is directing the B.C. courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention. [emphasis in original]
>
> These observations are technically *obiter* as the decision under appeal in *Khosa* was a matter within federal jurisdiction but the discussion of the *ATA* was considered, and divided the Court. I think that we are obliged to follow Justice Binnie's majority observations as the present state of the law.
>
> **8** The appellant takes issue with commentary on the post-*Dunsmuir* interpretation of the patently unreasonable standard under the *ATA* in *Manz v. Sundher*, 2009 BCCA 92, at paras. 35 and 36. The appellant argues that *Manz* purports to freeze that standard as it was applied pre-*Dunsmuir*. I do not accept that rigid interpretation of *Manz*, but in any event the decision must be viewed in the light of *Khosa* which directs an interpretation of the *ATA* statutory criteria in the context of general principles of administrative law.

[24] I think it sufficient for the purposes of this proceeding to state that in reviewing the Decisions I should afford them a very high degree of deference and set them aside only if I am satisfied that the Tribunal exceeded its jurisdiction by making a decision that cannot be reasonably be supported by the record and the *Act.* With that standard in mind I turn to a review of the grounds advanced by PG Nannies.

INTERPRETATION OF THE AGREEMENT

[25] PG Nannies submits that the Original Decision was patently unreasonable in that it failed to give effect to the plain meaning of a contract (the Agreement) freely entered into between consenting parties. It submits that the Original Decision upheld the Determination, which was based on a fundamentally flawed application of the law of contract. Mr. Krahn argued that the Agreement makes it clear that the Caregivers who contract with PG Nannies are contracting only for the provision of

the services specified in paragraph 1 on the Agreement and that none of those services are in any way prohibited by s. 10 of the *Act.* In his submission the Determination and the Tribunal's Decisions upholding it constitute a patently unreasonable decision that cannot be rationally supported, because they are fundamentally inconsistent with the law of contract.

[26] In PG Nannies submission the Agreement's references to job placement do not define the services it provides to Caregivers but merely set out circumstances in which the Caregivers may be required to pay or excused from payment of fees for services. Paragraph 4 of the Agreement is in the following terms:

> **PG NANNIES FEE**
>
> 4. In exchange for PG Nannies providing the Services, the Caregiver will pay to PG Nannies $4000CDN (four thousand Canadian dollars), inclusive of GST, payable as follows:
>
> (a) $1,000CDN (one thousand Canadian dollars) with the submission of the PG Nannies Live-in Caregiver Application (the Deposit);
>
> (b) $1,500CDN (one thousand five hundred Canadian dollars) within five (5) business days from the Caregiver's receipt of an Offer of Employment (the "Second Instalment");
>
> (c) $1,500CDN (one thousand five hundred Canadian dollars) within the first three (3) months of the Caregiver's employment in Canada under the Live-In Caregiver Program, payable in the form of three (3) post-dated cheques each in the amount of $500CDN (five hundred Canadian dollars).
>
> (the "Fee').

[27] PG Nannies submits that payment of the Fee is a "non promissory" or "contingent" condition precedent and that the Tribunal failed to recognize this in the Original Decision. The Tribunal summarized its findings on this argument at paras. 68 and 69 of the Original Decision as follows:

> **68.** In the case at hand, I find that PG Nannies has clothed the fees it charges for a placement service proscribed under Section 10(1) of the *Act* as a fee for advertising and other services it has bundled in the Contract. In my view, clothing a placement fee as a fee for advertising or other services, does not change the nature of the fees.
>
> **69.** If PG Nannies, as in the Re: *Serions* case, *supra*, had separated the agreement for advertising or other services it provides from the placement service and not bundled them in a single agreement and further allowed the

> Caregivers to decide what services they wanted to engage or not engage PG Nannies for and not make the placement of Caregivers contingent on paying a single fee whether or not the Caregivers use those services then I would be more inclined to find merit in the submissions of PG Nannies. However, where the placement service, as in this case, is bundled with other services effectively tying the hands of Caregivers who want to obtain a placement to pay the fees, whether or not they use those other services (and some admittedly do not use all or some of the services charged for all the same) then it is difficult to be persuaded that PG Nannies is doing anything but charging fees to the Caregivers for the placement service. Accordingly, I do not find that the Director erred in law in determining that the fees PG Nannies charges the Caregivers for advertising and other services it provides is prohibited in Section 10(1) of the *Act*.

[28] In his submissions to me, Mr. Krahn relied on the decision of Mr. Justice Bouck in *Allan v. Connellan* (1997) 50 BCLR (3d) 239 in support of his argument that a Court can review a tribunal's decision on the standard of correctness if it reaches its conclusion on an incorrect determination of the general law. However the tribunal in that case was not protected by a privative clause similar to the one contained in the *Act.* I therefore do not think that *Allan v. Connellan* has application to the issues before me.

[29] Generally, interpretation of a contract is a question of mixed law and fact. My task is not to substitute my view of the correctness of the Tribunal's analysis for that of the Tribunal. Rather I must determine whether the decision was one which was within a reasonable range of outcomes. As I understand the reasoning of the delegate in the Determination and the Tribunal in the Original Decision, they both concluded that in substance the Caregivers were paying a fee for placement services. It seems to me that this was a conclusion that someone interpreting the Agreement could reasonably reach. In the course of his submissions Mr. Krahn conceded that PG Nannies had an implied obligation to use its best efforts to find employment for its Caregiver clients. This admission is certainly consistent with the way in which payment of the "Fee" was structured and the surrounding circumstances or factual matrix in which the Agreement was executed.

[30] Accordingly, I cannot see any basis for saying that this conclusion of the Original Decision was outside of a range of reasonable outcomes. I therefore find

that this ground does not raise an issue on which I should interfere with the Decisions.

DID THE TRIBUNAL MISINTERPRET OR FAIL TO GIVE ADEQUATE REASONS FOR ITS APPLICATION OF S. 10(2) of the *ACT*

[31] Before the Tribunal PG Nannies argued that the services for which it charged a fee consisted largely of advertising and immigration counselling. It maintained that s. 10(2) of the *Act* expressly exempted charges for advertising from being considered to be a fee for obtaining employment or providing information about employment.

[32] The Tribunal rejected this submission and upheld the reasoning in the Determination that the services being provided by PG Nannies did not constitute the placing of advertising on behalf of the Caregivers. In making this decision the Tribunal agreed with the reasoning of the Determination to the effect that it was in fact PG Nannies and not the Caregivers that was advertising when PG Nannies placed information about the Caregivers on its website and otherwise made the Caregivers' availability known to its employer clients.

[33] The Tribunal gave its reasons for so concluding at paras. 72 to 74 of the Original Decision. PG Nannies submits that these reasons demonstrate that the Tribunal did not apply the proper test for statutory construction mandated by the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.* [1998]1 SCR 27 and the cases which have followed that decision, including *Canada Trustco Mortgage v. Canada* 2005 SCC 54.

[34] I can see no merit in this argument or in the related argument that the Tribunal did not give adequate reasons for its construction of s. 10 (2) of the *Act.* In my view the reasons given by the Tribunal clearly and succinctly set out its decision on this point and the reasons for that decision. In that portion of its reasons dealing with s. 10 (1) the Tribunal demonstrated a clear understanding of the rules of statutory interpretation. It was not required to repeat those rules when it addressed s. 10 (2).

[35] I do not think it is necessary to say anything more on this issue as I have concluded that the construction of the Act was a question of law on which the Tribunal had exclusive jurisdiction and its decision on that question was one which was within a reasonable range of outcomes. Accordingly, as the Tribunal was acting within its jurisdiction there is no basis for me to interfere with its decision on this ground.

THE TRIBUNAL FAILED TO GIVE ADEQUATE REASONS GENERALLY

[36] Before me PG Nannies submitted that in numerous respects the Tribunal had failed to explain or give adequate reasons for reaching the conclusions it did. An example of such a submission was the criticism of the Tribunal's failure to address the dictionary definitions of advertising placed before it by PG Nannies.

[37] However I think that this submission erroneously equates the fact that the Tribunal did not agree with a submission to a failure to adequately set out its reasons. The Tribunal was obligated to give reasons. I think that to be adequate the reasons had to set out what the Tribunal decided and why it did so. The reasons did not have to explain every step in the Tribunal's reasoning or deal with every submission made by PG Nannies in support of its position.

[38] My review of the Original Decision has satisfied me that the Tribunal's reasons were not only adequate but in fact fully explained the basis on which it reached the decisions it did. When the Tribunal did not address particular arguments it did so because it considered those arguments to be irrelevant or unnecessary to the issues it was called upon to decide. For example the Tribunal did not find the definitions of advertising to be helpful to the question of whether s. 10 (2) was applicable to the circumstances of the matters before it.

THE RECONSIDERATION DECISION

[39] In giving these reasons I have focused on the Original Decision. I have done so because in the Reconsideration Decision the Tribunal refused to reconsider the Original Decision. The Tribunal was exercising a discretion in deciding whether to

reconsider the Original Decision. The elements I must address in considering whether the Reconsideration Decision was patently unreasonable are therefore set out in s. 58 (3) of the *ATA.* In my view none of the grounds set out in s. 58 (3) are applicable to the Reconsideration Decision. Accordingly there is no basis on which to intervene in that decision.

DISPOSITION

[40] The petition is therefore dismissed.

[41] In accordance with their standard practice neither the Tribunal nor the Director of Employment Standards seeks costs of this proceeding. None of the other named respondents took any steps in the proceeding. I therefore order that there be no costs awarded to any party.

"The Honourable Mr. Justice Sewell"