

An appeal

- by -

ICN Consulting Inc., carrying on business as Caregivers.ru, also known as Nannies
for Hire, also known as International CaregiversNetwork.ca
("ICNC")

– 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)

and

An application for suspension

- by -

ICN Consulting Inc., carrying on business as Caregivers.ru, also known as Nannies
for Hire, also known as International CaregiversNetwork.ca
("ICNC")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: Carol-Ann Hart

FILE No.: 2010A/15 & 2010A/16

DATE OF DECISION: May 13, 2010

DECISION

SUBMISSIONS

Tatiana Gorenshtein and Michael Gorenshtein	on behalf of ICNC
Chi-Young Lee	on behalf of Anna Baranova and Maria Tagirova
Mica Nguyen	on behalf of the Director of Employment Standards

OVERVIEW

1. ICN Consulting Inc., carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International Caregivers Network.ca (“ICNC” or “the Appellants”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), appeals a Determination of the Director of Employment Standards (“the Director”) issued on December 21, 2009 (the “Determination”).
2. Following an investigation, the Delegate of the Director (the “Delegate”) determined that ICNC had contravened sections 10 and 12 of the *Act*. The Delegate ordered that ICNC pay wages and accrued interest in the total amount of \$2169.02. The Delegate also imposed a penalty of \$500.00 for each of the contraventions under section 29(1)(c) of the *Employment Standards Regulation* (the “*Regulation*”) in the total amount of \$1000.00.
3. ICNC has filed an appeal contending that the Delegate failed to observe the principles of natural justice in conducting the investigation and making the Determination, and that she erred in law in making the Determination. ICNC seeks to have the Determination cancelled.
4. ICNC has also requested that the Tribunal suspend the effect of the Determination pursuant to section 113 of the *Act*. ICNC deposited the total amount required to be paid under the Determination with the Director. The Director agreed to the suspension of the Determination pending the outcome of the appeal. Pursuant to section 113(2) of the *Act*, the Determination is suspended pending the outcome of this appeal.
5. The Tribunal may hold any combination of written, electronic and oral hearings - see section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s.103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*. In this case, no one has made a request for any particular type of hearing. After reviewing all of the material before me, I have concluded that the appeal can be properly addressed through the written documentation and submissions.

ISSUES

6. 1. Did the Delegate fail to observe the principles of natural justice in making the Determination?
7. 2. Did the Delegate err in law in making the Determination?

THE FACTS

8. ICNC was incorporated on January 2, 2004, with Tatiana Gorenshtein listed as a director and officer, and Michael Gorenshtein listed as a director. ICNC held an employment agency license through the Employment Standards Branch from January 2004 until January 2008, when it was not renewed.
9. The Determination dealt with complaints filed by Maria Tagirova (on August 19, 2008) and Anna Baranova (on November 29, 2008) under section 74 of the *Act* alleging that ICNC had contravened the *Act* by charging a fee for providing information about employment.
10. The Delegate conducted an investigation and concluded that the fee collected by ICNC from Maria Tagirova and Anna Baranova (the “Respondents”) was for securing employment in Canada, in contravention of section 10 of the *Act*. The Delegate further concluded that ICNC was operating as an employment agency, as defined by the *Act*, without a valid employment agency license, and had thereby contravened section 12 of the *Act*.

THE RECORD AND SUBMISSIONS

11. ICNC makes the following allegations on appeal:
 1. The Delegate’s finding that ICNC contravened section 10 of the *Act* was based on no evidence.
 2. The Delegate erred in law in her application of the “best evidence” rule, and determining the date of the contravention.
 3. The Delegate failed to observe the principles of natural justice in determining that ICNC had contravened section 10.
 4. The Delegate misinterpreted the *Act* and incorrectly applied section 12 of the *Act* by concluding that ICNC is operating as an employment agency without a valid employment agency license.
 5. The Delegate failed to observe the principles of natural justice in determining that ICNC had contravened section 12 by:
 - a. failing to let ICNC know that a new issue was being introduced and being decided;
 - b. failing to disclose evidence she found relevant;
 - c. failing to provide ICNC with an opportunity to respond to that evidence prior to issuing the Determination.
12. ICNC provided extensive and detailed submissions in which it contended that the Delegate did not act in accordance with the principles of natural justice; did not have jurisdiction to adjudicate the complaints; ignored relevant facts and evidence; made errors of fact and law in the Determination; failed to interview relevant witnesses; and took an unreasonable amount of time to adjudicate the claims. The Appellants essentially request that the entire matter be re-examined. They also allege that the Delegate was biased, and inappropriately preferred the evidence of the Respondents.
13. The Respondents and the Director provided very thorough submissions responding to each of the allegations and concerns raised by the Appellants. The extensive record that was before the Delegate at the time the Determination was issued (the “Record”) was provided by the Director.

14. For the sake of brevity, and because of the conclusions I have reached regarding the allegation that the Delegate failed to act in accordance with the principles of natural justice, I have not referred to the Record and the submissions in detail in this decision on the appeal. I have, however, carefully reviewed and considered all of the documentation which was submitted.

ANALYSIS

15. Section 112(1) of the *Act* provides that an appeal may be made to the Tribunal from a Determination of the Director based on 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.
16. The Appellants allege that the Director erred in law and did not observe the principles of natural justice in this case.

Did the Delegate fail to observe the principles of natural justice in making the Determination?

17. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the 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 his 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 to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated*, BC EST # D050/96).

Allegations of Bias

18. In their submissions the Appellants alleged that the Delegate was biased in favour of the Respondents. The Director and the Respondents replied that there was no evidence to support the allegations of bias or any appearance of bias made by the Appellants.
19. Allegations of bias are very serious, and should not be made only on the basis of suspicions or impressions. In order for an allegation of bias to be substantiated, the onus is on the party making the allegation to establish on a balance of probabilities that, consciously or unconsciously, the decision maker against whom the allegation of bias is made would not decide the matter in a fair and impartial manner. (See: *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, *Re Gallagher (c.o.b. Mid Mountain Contracting)*, BC EST # D124/03, and *Re Khabazian-Isfabani*, BC EST # D105/06; confirmed, BC EST # RD013/07).
20. In *Valente v. The Queen* [1985] 2 S.C.R. 673, the Supreme Court of Canada wrote at page 685 that “impartiality” refers to: “a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case”.
21. The Appellants have not put forward any evidence to establish that the Delegate was not impartial, or had the appearance of being biased in conducting the investigation and making the Determination. I dismiss the allegations of bias.

Non-disclosure of Evidence Obtained by Delegate in Interviews During Investigation

22. In conducting an investigation and adjudicating the complaints of the Respondents, the Delegate had a duty to observe the principles of natural justice and procedural fairness. The Tribunal considered what is required in order to ensure that the requirements of natural justice are met in *CCD Corporate and Career Development Inc.*, BC EST # D068/04 as follows:

The law takes a flexible approach to what constitutes a form of hearing sufficient to meet the requirements of natural justice. The question as to what is required depends on the facts and circumstances of each case and the subject matter under consideration (*Knight v. Indian Head School Division* (No. 19), [1990] 1 S.C.R. 653). For instance, the rules of natural justice do not require that there always be an oral or in-person hearing. An exchange of written materials may suffice (*Mobil Oil Canada Ltd. v. Canada Newfoundland Offshore Petroleum Board* (1994), 21 Admin. L.R. (2d) 248 (S.C.C.)). What is required is that the parties must know the case being made against them and be given an opportunity to reply. They must be given a fair opportunity to correct or controvert any relevant and prejudicial statement (*Emery v. Alberta (Workers Compensation Board, Appeals Commission)*, 2000 ABQB 704).

23. The Delegate provided to the parties copies of all documents received from the parties and the witness, and gave them the opportunity to respond before issuing the Determination. However, the Delegate did not disclose the records of the interviews of the Respondents and the two witnesses (Oxana Small and Wayne Flann) to the Appellants. The Delegate did inform the Appellants that she had conducted those interviews, but she did not advise the Appellants of the evidence she had obtained during the interviews. The Delegate conducted the interviews in-person and by telephone, and she also conducted an interview with the representatives of ICNC.
24. Was there an obligation on the part of the Delegate to disclose to the Appellants the evidence she obtained from the interviews of the Respondents and the witnesses?
25. In particular, the Appellants take issue with the non-disclosure by the Delegate of the following evidence, as set out in two paragraphs of the Determination:

Para. 11: The complainants stated when they received the contract and promissory note they grew concerned because the contract did not explicitly state that the fee was for finding employment. The complainants stated they contacted ICNC about their concerns and was (sic.) assured by the agency that the fee was for finding employment in Canada as well as what was stated on the contract. The complainants advised they accepted ICNC's verbal assurance and each signed the contract and promissory note with ICNC.

Para. 12: The complainants stated the sole reason why they chose ICNC over other companies was because ICNC assured the complainants the agency could help them find employment. There were many immigration consultants and lawyers in Moscow which provided immigration consultancy for around \$500 USD; however, their services did not include help with finding employment. The complainants stated that they did not pay the fee for the services listed on the contract because they have the English skills and abilities to do the immigration paperwork themselves since the forms are accessible over the internet. The complainants had tried on previous occasions to search for overseas employment opportunities on their own by using the Internet; however, they had no success. The complainants advised the true reason they paid the agency the fee was because ICNC provided the service of finding the complainants employment...

26. The Delegate explained in her submissions for the appeal that she had not disclosed the record of the oral evidence of the Respondents because it did not substantially differ from the Respondents' written submissions which had previously been provided to ICNC. According to the Delegate, the records of the

witnesses' interviews had not been disclosed because the witnesses had merely confirmed what ICNC had already conceded. The Delegate asserted that none of the evidence received from the interviews of the Respondents and the witnesses had been relied upon in making the findings in the Determination.

27. In the written submissions filed on behalf of the Respondents, the Respondents maintained that the Delegate had made a reasoned analysis and conclusions in the Determination. After receiving their contracts, the Respondents had contacted the Appellants and received verbal assurances that the payment was made for securing an employer. Although the initial complaints filed by the Respondents contained only basic details, they did indicate that the Appellants had notified the Respondents that the fee for securing an employer was \$3000.00 USD. The allegations of the Appellants did not involve the introduction of new issues, or relate to issues which were material to the Delegate's Determination. The Appellants were given an opportunity to respond to the heart of the issues brought forth by the Respondents.
28. At paragraph 65 of the Determination, the Delegate wrote that it was undisputed that the contracts between ICNC and the Respondents did not explicitly state that the fee paid by the Respondents was for obtaining employment or providing information about employment. The Delegate continued to set out the central issue before her as follows:
- The task before me is to determine the merits of the complainants' allegations that the true nature of the fee is for the assistance of finding employment although the contract does not explicitly state this.
29. The evidence outlined in paragraphs 11 and 12 of the Determination relates directly to the task which the Delegate indicated she had set out to accomplish. All of the information contained in those paragraphs was provided by the Respondents to the Delegate during interviews, which were conducted privately.
30. Section 77 of the *Act* provides that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation the opportunity to respond.
31. When the Director chooses to conduct an investigation, it is not unfair or inappropriate for the Delegate to meet with and interview the parties and witnesses separately. However, in this context, pursuant to section 77 of the *Act* and the rules of natural justice, the Delegate will be required to put to a party which is adverse in interest the important and relevant points of the oral evidence to afford that party the opportunity to respond.
32. In order to ensure that ICNC had a reasonable opportunity to know and respond to the case made against it, the Delegate should have made ICNC aware of the information contained in paragraphs 11 and 12 of the Determination which was provided orally to the Delegate by the Respondents.
33. The Delegate maintained that she had not relied on any new evidence obtained from the interviews in making the findings in the Determination. In the document dated March 9, 2010, entitled Director's Appeal Response Submissions, the Delegate wrote that the findings in the Determination were based on "*documents, records and email correspondences*" and other evidence from Internet websites.
34. However, the Delegate did find it important and relevant to outline the evidence obtained from her interviews of the Respondents in paragraphs 11 and 12 of the Determination. The Delegate also gave weight to the oral evidence of the Respondents from their interviews in assessing credibility and making her findings against ICNC at paragraph 80 of the Determination, where she wrote in part as follows:

I accept that the complainants were verbally assured by ICNC that the fee they paid was for securing employment in Canada and this was the sole reason they paid the amounts listed. I find that the true intent of the fee is to assist the complainants to obtain and secure employment.

35. In the Determination, the Delegate did not provide any rationale as to why she had decided not to share with ICNC the documentation of (or the key information obtained during) the fact-finding interviews with the Respondents and the witnesses. All of the interviews took place many months before the Determination was issued. The Delegate conducted her interview with the representatives for the Appellants, Michael Gorenshtein and Tatiana Gorenshtein, on November 4, 2008; and the interviews with the Respondents were held on December 3, 2008 (Maria Tagirova) and January 10, 2009 (Anna Baranova). The Delegate's meetings with the witnesses were also held well prior to the Determination being issued. The Delegate interviewed Wayne Flann on May 8, 2009; and Oxana Small on November 7, 2008, and January 23, 2009. The Determination was issued on December 21, 2009.

36. It therefore does not appear that time constraints or efficiency of the investigative process were the reasons for not communicating the information provided by the Respondents or the witnesses to ICNC for reply. It is clear that the Delegate turned her mind to this issue, however, because contained in the Record is a letter dated August 4, 2009, which she wrote to the Appellants to advise them of the names of the witnesses she had interviewed.

37. The Tribunal stated as follows in *Wilkinson*, BC EST # D017/06:

The purpose of the law of natural justice and procedural fairness is not to fetter decision-making, but to assist it. The law reflects the time-tested reality that giving both sides a fair chance to know and respond to the other party's case not only leads to a process that is seen as legitimate in the eyes of both parties, but also leads to better decisions, as there is nothing like the self-interest of one party to point out weaknesses or frailties of the evidence of the other.

38. The Appellants were not provided with the opportunity to be fully aware of the case being made against them and to be given a fair opportunity to refute relevant statements against their interests. The representatives for the Appellants had the impression that the Delegate had been hiding something from them. They wrote in their submission for the appeal that the evidence as outlined in paragraphs 11 and 12 of the Determination, "*appears from nowhere in the Determination*".

39. Given the importance of the terms of the contracts in place between the parties, the Delegate had an obligation to put to ICNC the key points of the oral evidence of the Respondents, as outlined above. This was necessary in order to ensure that "reasonable efforts" were made to give ICNC the opportunity to respond, as required under section 77 of the *Act*. In accepting the evidence of the Respondents without giving ICNC a chance to respond, the Delegate failed to act in accordance with the principles of natural justice.

40. The Supreme Court of Canada has held that where there has been a breach of the rules of natural justice, it is not necessary to ascertain whether the breach affected the result of the hearing (See *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, and *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471).

41. In *Cardinal, supra*, the Court wrote as follows, at para. 23:

I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which

finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

42. The failure of the Delegate to provide all of the relevant evidence to the Appellants and ensure that they had the opportunity to fully respond resulted in an unfair procedure, as it related directly to her finding that the written contracts signed by the parties included additional terms based on verbal representations made by Michael Gorenshtein and Tatiana Gorenshtein on behalf of the Appellants.
43. As I set out above, I do not find that the Delegate demonstrated actual bias or that there was an appearance of bias when the Delegate made the Determination. However, because the Delegate made findings of fact and credibility against ICNC and in favour of the Respondents, it would not be reasonable to expect that, if she were now called upon to re-visit the Determination, she could free from her mind her perceptions of the evidence and the findings of fact she made. For this reason, it is my view that a new hearing or investigation should be conducted by another delegate of the Director (See *Baum Publications Ltd*, BC EST # D90/05).

Allegation that Delegate Failed to Inform Appellants of the Scope of the Investigation

44. ICNC maintains that the Delegate failed to observe the principles of natural justice by not advising them that she was considering the matter of whether ICNC was operating as an employment agency. ICNC argues that the Delegate should have provided them with the opportunity to respond to all of the evidence in this regard prior to making the Determination.
45. The Delegate replied that she had communicated to the Appellants that she was investigating whether there had been a contravention of s. 12 of the *Act*. The Respondents maintained that the Appellants had made it clear by the evidence they had presented and in their submissions that they understood that the Delegate was adjudicating the matter of whether s. 12 had been contravened.
46. The Delegate's handwritten notes on the Record indicate that she had advised the Appellants in a telephone conversation with Ms. Gorenshtein that she was also investigating the issue of whether ICNC had contravened s. 12 of the *Act*.
47. I am satisfied that the Appellants were aware that the Delegate was investigating whether ICNC had contravened both sections 10 and 12 of the *Act*. The Delegate did not fail to act in accordance with the requirements of natural justice in terms of informing the Appellants of the scope of her investigation.
48. In addition to the issues I have set out above, the Appellants have also raised many other concerns and issues regarding the Determination. In some of these instances, errors in the Determination have been acknowledged by the Delegate in the Director's submissions. Because I have decided to refer the complaint of the Respondents back to the Director for a new hearing or investigation before another delegate, it is not necessary for me to render a decision on the remaining issues.

ORDER

- ^{49.} I order pursuant to Section 115 of the *Act*, that the Determination dated December 21, 2009, is cancelled and the complaints of the Respondents be referred back to the Director of Employment Standards for a hearing or new investigation by a different delegate.

Carol-Ann Hart
Member
Employment Standards Tribunal