



An appeal

- by -

Prince George Nannies and Caregivers Ltd.  
("PG Nannies")

- 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.:** 2009A/042

**DATE OF DECISION:** June 2, 2009

## DECISION

### OVERVIEW

1. This is an appeal filed by Prince George Nannies and Caregivers Ltd. (“PG Nannies”) pursuant to Section 112 of the Employment Standards Act (the “*Act*”) of a determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on February 19, 2009 (the “Determination”). The Determination found that PG Nannies contravened Section 10 of the *Act* and ordered the latter to pay a total of \$26,653.68 in wages and interest to fourteen caregivers (the “Caregivers”).
2. The Determination also levied an administrative penalty of \$500.00 against PG Nannies pursuant to section 29 of the Employment Standards Regulation, B.C. Reg 396/95 (the “*Regulation*”).
3. PG Nannies appeals the Determination on the basis that the Director erred in law in making the Determination. More particularly, PG Nannies states that the Director:
  1. erred in law in determining that PG Nannies’ fees for service such as resume preparation, image consulting, liaising, and immigration settlement contravenes Section 10(1) of the *Act*,
  2. erred in law in determining that the advertising service provided by PG Nannies does not fall under the definition of advertising as allowed by Section 10(2) of the *Act*,
  3. failed to apportion any monetary value for services rendered by PG Nannies which are allowable under the *Act*, and
  4. miscalculated the wages owing to two of the Caregivers, namely, Luzviminda Galasi (Ms. Galasi”) and Mila Narca (“Ms. Narca”).
4. PG Nannies is seeking the Tribunal to cancel the Determination or in the alternative, to vary it to allow some or a portion of the fees charged by PG Nannies to the Caregivers.
5. Pursuant to Section 36 of the Administrative Tribunals Act (the “*ATA*”), which is incorporated in the *Act* (S.103) and Rule 17 of the *Tribunals Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this Appeal can 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 issues in this case may be summarized as follows:
  - (i) Did the Director err in law in determining that the fees charged by PG Nannies to the Caregivers for the services it provides falls within the prohibition in Section 10(1) of the *Act* (“No charge for hiring or providing information”)?
  - (ii) Did the Director err in law in concluding that the advertising “service” of PG Nannies in the form of the publication on its website of the Caregivers profiles, particulars and pictures does not fall within the exception in Section 10(2) of the *Act*?

- (iii) Should the Director have apportioned or allowed any part of the fees charged by PG Nannies to the Caregivers for the “services” allowable under the *Act*?
- (iv) Did the Director err in calculating the wages owing to Ms. Galasi and Ms. Narca?

## FACTS

7. PG Nannies was incorporated on June 15, 2005 with Taiho Christopher Krahn (“Mr. Krahn”) and Rebecca Ducusin Krahn (“Ms. Krahn”) as its directors and officers.
8. Since about November 30, 2005, PG Nannies, in accordance with the *Act*, has been licensed to and operates as an employment agency. It last renewed its license to operate as an employment agency for a two-year period commencing on January 20, 2009 and ending on January 20, 2010.
9. The Director received information from a former nanny, who was previously placed through PG Nannies, alleging that the latter was in contravention of Section 10 of the *Act* for charging fees to a person seeking employment. As a result, the Director, pursuant to Section 76(2) of the *Act*, conducted an investigation into the business practices of PG Nannies. The investigation involved a few meetings between the Director’s delegate and Mr. Krahn including an exchange of correspondence, which is included in the Section 112(5) record before me in this appeal. The correspondence includes materials disclosed by PG Nannies in response to the Director’s request as well as other information and submissions of PG Nannies presented by Mr. Krahn.
10. In its Appeal, PG Nannies, with the exception of a few instances, “does not dispute the accuracy of the evidence as described in Section IV of the Reasons for the Determination”. For this reason, and because the Director has thoroughly and cogently summarized the evidence of PG Nannies in the Determination, I propose to delineate this evidence verbatim here. However, in the limited instances where PG Nannies disputes the delegate’s view of the facts or evidence, I will delineate those instances specifically under the heading “Submissions of PG Nannies” later in this decision. Having said this, in Part IV of the Determination, the Director summarizes the evidence of PG Nannies as follows:

### IV. EVIDENCE OF THE AGENCY

The argument and evidence of the Agency were provided by Mr. Krahn, representing the Agency.

The following summarizes the operation of the Agency as derived from interviews with the Agency representative, from information posted on the agency's website ([www.pgnannies.com](http://www.pgnannies.com)), and from documents submitted by the agency to the Branch:

- The agency is in the business of finding employment for individuals seeking work as a family helper or providing services for persons seeking assistance in their daily lives, hereafter referred to as "nanny" or "nannies". Further, although the agency provides its services to males, this document will refer to the nanny as "she" because all of the nannies placed by the agency appear to have been female.
- All of the nannies placed by the Agency originate from the Philippines. Most of the nannies who are placed by the Agency work, or have worked, in locations outside of Canada; primarily Singapore, Taiwan, Hong Kong, or the Middle East. The Agency has a representative in Singapore and other representatives in the Philippines.
- A nanny who wishes to obtain employment through the Agency, may contact the Agency to receive an application form. The nanny can make an application from the Agency's website, or the Agency will mail an application form upon request. The Agency requires that a nanny be proficient in the English language before she is considered for placement.

- Prospective nannies have to meet Immigration Canada requirements before they are permitted to work in Canada. According to the Agency website, a Canadian immigration officer *"interviews the nanny in person, verifying her references, work experience, education, and fluency in English. Each nanny must also pass a medical exam and obtain a police clearance before she is issued a work visa."*
- The application package for the nanny consists of a resume and a transcript of a telephone interview. The Agency representative noted that the "resume" is not a resume in the conventional sense, rather it is a questionnaire that the nanny completes. The personal information includes family history, education completed and self-described personal interests and attributes. This information is posted on the Agency website for prospective employers to view.
- When the nanny applies to the agency she is required to submit a monetary deposit with the application. This is noted on the agency website: *"We charge an industry standard advertising and settlement fee to the nanny, based on market research, as per BC Employment Standards Act section 10 (2) and Federal immigration legislation Advertising and settlement fees are detailed in a contract signed by the nanny at the beginning of her application to PG Nannies."*
- The "contract" referred to on the website is a document titled "Live-In Caregiver Advertising and Settlement Services Fee Agreement", which is the basis of the relationship between the Agency and the applicant nanny.
- Following the signing of the contract, the parties enter into another agreement – the "Advertising Fee Agreement" which establishes the financial commitments of the applicant nanny, and how payment will be made to the agency.
- The agency website notes that employers are charged a fee to obtain the services of a nanny through the agency, the fee, a *"one-time employer fee for an overseas nanny is \$600, \$300 at the start of the process, and \$300 upon delivery of the nanny. For a local nanny (rarely available), our employer fee is \$1000, \$500 up front and \$500 upon delivery. This fee is tax deductible"* (sic).
- Most of the business of the agency is generated from information posted on the Agency website, although some results from advertising in the print media and via word-of-mouth endorsements from employers who have hired nannies through the Agency.
- The material notes that the prospective employer must register with the Employment Standards Branch if they have hired, or are intending to hire a nanny ("domestic worker").
- The nanny arrives in Prince George and often stays "a couple of days" with the principals of the Agency at their residence. During this time the nanny is assessed on her skills, trained and given some time to adjust to her surroundings. At a mutually agreed upon date, the nanny is delivered to the employer's residence to commence employment.
- Following the placement of the nanny, the Agency does a follow-up by telephone with both the employer and the nanny. This is usually done at intervals of 1 week, 1 month, and 3 months following the commencement of employment. The purpose of the follow-up is to identify any issues or concerns the employer or the nanny may have, and resolve them if possible.
- If the employment relationship between the nanny and the employer of the nanny ends prematurely, the principals of the Agency usually allow the nanny to stay in their residence for a period of time.

The Agency enters into a contract with each nanny (the "Contract"). The Contract establishes a contractual relationship between the caregiver and the Agency, and identifies the parties' agreement under the following headings: 1) Services; 2) PG Nannies Fee; 3) Termination and Refunds; 4) Personal Information and Privacy; 5) No Guarantee of Success and 6) General.

The Contract defines a nanny as:

*"... an individual who qualifies for the Live-In Caregiver Program through Citizenship and Immigration Canada and wishes to obtain a Service Canada approved offer of employment from a Canadian employer through the Live-In Caregiver Program in order to be employed as a live-in caregiver in British Columbia. "*

For clarity and completeness, it is necessary to relate the relevant sections of the Contract in their entirety.

The services that the Agency provides the caregiver are set out in Sections 1, 2 and 3 of the Contract:

1. PG Nannies will provide the Caregiver the following services:
  - (a) Advertising services including but not limited to: posting the Caregiver's picture and profile on the PG Nannies website; and producing and distributing detailed promotional packages to prospective employers;
  - (b) resume preparation, image consulting, mock interviews, photo selection and web profile editing;
  - (c) Canadian work visa interview preparation;
  - (d) if necessary, communication with the Caregiver's foreign employer to facilitate the Caregiver's release from employment;
  - (e) Transportation from the Prince George airport to the Krabn's home upon the Caregiver's arrival in British Columbia;
  - (f) Food and lodging in the Krabn's home, including use of the Internet and reasonable long distance expenses associated with telephone calls between the Caregiver and her/his family, during the caregiver's initial 2-3 day decompression and orientation period upon her/his arrival in British Columbia;
  - (g) informal assessment and/or training in Canadian cooking, cleaning, laundry, and basic childcare;
  - (h) Assistance in obtaining a Social Insurance Number; bank account, cell phone, and appropriate cold climate clothing;
  - (i) Familiarize the Caregiver with her/his new city, shopping and public bus routes;
  - (j) Deliver the Caregiver to her/his Canadian employer;
  - (k) Facilitate discussion of employment conditions with the caregiver's employer, including review of a detailed pre-work checklist;
  - (l) Regular follow up with the caregiver to discuss any issues with the caregiver's employer;
  - (m) Weekend food and lodging in the Krabn's home for a period of six (6) months following commencement of the Caregiver's employment in Canada as a live-in caregiver;
  - (n) Working in conjunction with the Multicultural Heritage Society of Prince George and community at large to help the Caregiver receive available support; and
  - (o) Assistance with obtaining accounting advice through a chartered accountant and through Canada Revenue Agency sponsored clinics for tax return preparation;

(the 'Services'). (sic)

2. If the caregiver's employment is terminated without cause, as determined solely by PG Nannies, within the first six (6) months of the caregiver's employment, in addition to providing the Services, PG Nannies will provide the Caregiver with:
  - (a) assistance with the completion of any forms necessary to apply for Employment Insurance; and
  - (b) food and lodging at the Krabn's home during the period of unemployment up to a maximum of six months, on the condition that the Caregiver not unreasonably refuse an Offer of Employment made during the period of unemployment, in which case PG Nannies will have no obligation to continue providing food and lodging to the caregiver.
3. During any such time as the caregiver received food and lodging at the Krabn's (sic) home, the Caregiver will provide the Krabn's with reasonable assistance with household chores. If PG Nannies, at its sole discretion, determines that the Caregiver has failed to provide the Krabn's (sic) with reasonable assistance with household chores, PG Nannies reserves the right to refuse to provide further food and lodging to the caregiver unless the caregiver pays to PG Nannies \$10CDN (ten Canadian dollars) per night. (sic)

The Agency's fee for the "Services" is set out in Section 4 of the Contract, and reads as follows:

4. In exchange for PG Nannies providing the Services, the Caregiver will pay to PG Nannies \$4,000CDN (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")

The fee identified in Section 4 of the Contract (\$4000 CDN) is the fee charged by the Agency as of September 2008. Documents provided by the Agency indicate that on, or about, December 16, 2007, the fee was reduced from \$5500

CDN to \$4600 CDN for those who pay by monthly instalments upon arrival in Canada, or \$4000 CDN for "those who wish to abide by the complete terms of the new agreement." (see, for example: letter dated March 5, 2008 to Jocelyn Dela Cruz from the Agency). Thus, the nanny who chooses to pay the full amount in one payment pays a lower (total) fee than those who choose to pay on a scheduled payment basis.

Sections 5, 6, 7, and 8 of the Contract address "Termination and Refunds", and read as follows:

- 5 *The Caregiver may terminate this Agreement at any time prior to the Caregiver receiving an Offer of Employment by giving PG Nannies 30 days written notice. However no portion of the Fee will be refunded except in the following circumstances, in which case, PG Nannies will refund 50% of the Deposit, being \$500CDN (five hundred Canadian dollars):*
  - (a) *if the Caregiver does not receive an Offer of Employment within two (2) years from the date this Agreement is signed by a representative of PG Nannies;*
  - (b) *if, prior to receipt of an Offer of Employment, the caregiver provides a note from her/his doctor stating that she/he cannot medically proceed with her/his application for the Live-in Caregiver Program; or*
  - (c) *if, prior to receipt of an Offer of Employment, the caregiver has been released from her/his current overseas employment and will not be returning to overseas employment within two (2) years of the date of this Agreement.*
6. *Except in the circumstances described in paragraph seven (7) below, PG Nannies may terminate this Agreement at any time prior to the Caregiver receiving an Offer of Employment, in which case PG nannies will refund 100% of the Deposit, being \$1,000CDN (one thousand Canadian dollars).*
7. *If*
  - (a) *the Caregiver fails to appear at her/his visa interview;*
  - (b) *the Caregiver changes her/his address or other contact information and fails to notify or otherwise maintain contact with PG Nannies;*
  - (c) *the Caregiver is refused a work visa by Citizenship and Immigration Canada due to the Caregiver having provided inaccurate, false or misleading information;*
  - (d) *at any time, it is discovered that the caregiver has a criminal charge or criminal conviction not disclosed to PG Nannies;*
  - (e) *the caregiver is negligent with respect to any duty owed by the Caregiver to PG Nannies or fails to conduct herself/himself with the utmost good faith in respect of her/his dealings with PG Nannies;**PG Nannies may terminate the Agreement and no portion of the fee will be refunded to the Caregiver.*
8. *If the Caregiver has received an Offer of Employment and has paid PG Nannies the Second Instalment, but the Offer of Employment is subsequently cancelled or withdrawn by the Canadian employer before the Caregiver has received her/his Canadian work visa, PG Nannies will refund that portion of the Fee to the caregiver and continue to provide the Services to the Caregiver. However, a further \$1,500CDN (one thousand five hundred Canadian dollars) will be payable to PG Nannies by the Caregiver within five (5) business days from the Caregiver's receipt of a new Offer of Employment.*

Section 9 of the Contract requires the nanny to provide personal information to the Agency, with the understanding that some of the information will be posted on the Agency website for the purposes of advertising the nanny's availability for employment:

9. *The Caregiver consents to the collection, use and disclosure of her/his personal information (including but not limited to all information provided by the caregiver to PG Nannies in her/his PG Nannies Live-in Caregiver Application) by PG Nannies for the sole purpose of advertising the Caregiver's availability for employment as a live-in caregiver in British Columbia. Disclosure will include but may not be limited to posting the Caregiver's personal information on the PG nannies website and publishing the Caregiver's personal information in written materials.*
12. *The Caregiver acknowledges, understands and accepts that PG Nannies does not guarantee in any way that the advertising and related promotional services provided to the Caregiver under the Agreement will result in the Caregiver obtaining employment as a live-in caregiver. Furthermore, the Caregiver acknowledges, understands and agrees that PG Nannies has no responsibility, liability or otherwise should any employment obtained by the Caregiver, by virtue of advertising and promotional services provided by PG Nannies, prove unsatisfactory to the Caregiver.*

In addition to the above, the Agency provided the following documents to the Branch:

1. The names and mailing addresses of individuals who have hired nannies, and the names and mailing addresses of the nannies hired by those individuals (1pg).
2. The Live-In Caregiver Advertising and Settlement Services Fee Agreement (the "Contract") signed on various dates with a number of nannies.
3. The Application Checklist and Agreement and Authorization form (the "Checklist") (1pg): signed on various dates by a number of nannies. Section 1 of the Checklist is titled "Application Checklist" in which the applicant nanny is to check off the following:
  1. *Completed and signed Foreign Live-In Caregiver application form.*
  2. *"Dear Family" letter, hand-written, to your host family in the English language.*
  3. *Bank draft, money order; or certified cheque for \$400 US (payable to Prince George Nannies and Caregivers Ltd.)*
  4. *At least one written employment reference letter from a current or previous employer.*
  5. *At least one written character reference letter from a friend, clergy, doctor; etc.*
  6. *Two copies each of full body shot and passport sized colour photos - smiling.*
  7. *Photos with children you have cared for or your own family, including yourself.*

Section 2 of the Checklist is titled "Agreement and Authorization", and states, in part:

*I understand that I am required to pay a deposit of \$400.00 US Dollars for the advertising services of the Prince George Nannies and Caregivers Ltd. (PGNC), which is payable at the time of registration with PGNC. I understand that this deposit may be partially refundable at the discretion of PGNC. I understand that PGNC's total placement fee, for a foreign caregiver, is \$4000.00 US Dollars. Therefore, once employed in Canada, my balance owing will be \$3600.00 US Dollars, payable to PGNC by salary deduction." (source, for example: Agreement signed by Mila Name)*

The documents provided by the Agency shows the amount required for the deposit and for the total placement fee is variable - the Checklist signed by Jocelyn Bela Cruz dated January 22, 2008 shows the "total advertising fee is \$5500 CDN Dollars, the one signed by Annabelle Oporto is for \$4600.00 as of December 24, 2007.

4. The "Advertising Fee Payment Agreement" (the "Fee Payment Agreement") signed on various dates by a number of nannies.

To effect payment of the amounts established in the Agreement and the Checklist, a subsidiary document is used to detail the nannies' financial obligations to the agency -the Fee Payment Agreement. The name of this document appears to have changed over time. Initially referred to as a "Fee Payment Agreement" (July, 2007) or an "Advertising Fee and Other Charges/Loans Payment Agreement" (July, 2007), the document, in its latest iteration (April, 2008) is referred to as the "Advertising Fee Payment Agreement" (referred to in this document as the Fee Payment Agreement).

The Fee Payment Agreement establishes what fees the nannies are charged for "advertising" as reflected in Section 4 of the Contract. In some cases the "advertising fee" is in US Dollars, and an additional fee of 10 - 18 % is added, apparently to allow for the prevailing exchange rates between the US and Canadian dollar at that time. As a result, the fees charged to each nanny (as reflected in the Fee Payment Agreement) are variable, apparently depending on the date the agreement is signed and the circumstances pertaining to the nanny at that time. The Fee Payment Agreement with some of the nannies includes the cost of airfare in those cases where the Agency has paid the nanny's airfare, and the nanny is to repay that payment.

5. The Register Report (the "report" or "reports") showing the payments made by the nanny to the Agency.
6. Letters from the Agency to: Maria Victoria Arenas, dated March 1, 2008 titled "Updated Application and Fee Agreement" (1pg.); Myziel Cada, dated March 5, 2008 titled "Updated Application and Fee Agreement" (1pg.); Jocelyn Dela Cruz, dated March 5, 2008 titled "Updated Application and Fee Agreement" (1pg.); Luzviminda Galasi, dated December 16, 2007 titled "Reduced Contract" (1pg.); Florentine Landayao, dated December 16, 2007 titled "Reduced Contract" (1pg.); Janet Pigarot, dated December 16, 2007 titled "Reduced Contract" (1pg.); Lina Quiroz, dated March 5, 2008 titled "Updated Application and Fee Agreement" (1pg.); Mary Grace Rejano, dated March 5, 2008 titled "Updated Application and Fee Agreement" (1pg.); Eva Saribay, dated March 5, 2008

titled "Updated Application and Fee Agreement" (1pg.); Francis Tablon, dated December 16, 2007 titled "Reduced Contract" (1pg.); Lailyn Veradio, dated December 16, 2007 titled "Reduced Contract" (1pg.);

7. Domestic Worker Registration forms showing names of the domestic worker/name of the employer and the date submitted to the Branch.
  8. Letter dated April 25, 2008 (1 pg., with attachments consisting of: PG Nannies Live-In Caregiver Advertising and Settlement Services Fee Agreement (5pp.); and PG Nannies Pre-Work Checklist (2pp)).
  9. Letter dated August 29, 2008 (1pg.) with respect to the Branch request to the agency for the production records.
  10. Letter dated September 22, 2008 (1pg.) clarifying the request to produce records.
  11. Letter dated September 24, 2008 (2pp.) with documents provided by the Agency in response to the Branch's request to produce records.
11. In addition to the evidence delineated above, in the Section 112(5) record adduced in this appeal, there is correspondence dated September 24, 2008 (the "Letter") from Mr. Krahn to the delegate, which clearly delineates the position of PG Nannies in the matter. In the Letter, Mr. Krahn, on behalf of PG Nannies, argues that the services PG Nannies provides caregivers for a fee—"advertising, resume preparation, image consulting, interview preparation, immigration settlement services and liaison services (between caregiver and employer)"- is not prohibited by the *Act*. He refers to the decision of the Tribunal in *Re Serions* BC EST #D378/01 in support of this argument.
  12. In *Re Serions* there were two separate written agreements between Ms. Santos and the Serions requiring the former to make two separate payments to the Serions doing business as Terrens Nannies. One agreement was for "locating an employer" for Ms. Santos' sister and another for immigration services to enable Ms. Santos' sister to immigrate to Canada "legally" and obtain a visa. While the determination of the Director that the Serions contravened, *inter alia*, Section 10 of the *Act* was upheld, the order requiring repayment of fees by the Serions to Ms. Santos was set aside as the complaint was out of time. However, the Tribunal, in *obiter*, noted that the delegate failed to distinguish between the two agreements in the case—the immigration agreement and the agreement for securing employment—and went on to state that if its decision to set aside the determination on the basis of the limitation issue is wrong then the determination, as concerns the repayment of wages to the Ms. Santos for the immigration services at least should be set aside suggesting that the immigration services were not caught in the prohibition in Section 10 of the *Act*.
  13. Mr. Krahn also submits in the Letter that the caregivers placed a "high value" on these services and the amount of the fees charged for the services is based on "market conditions".
  14. Mr. Krahn also contended in the Letter (I presume in the alternative in the event that PG Nannies was unsuccessful in persuading the Director that the fees it charged were not prohibited under Section 10 of the *Act*), that the Director first advised PG Nannies of the investigation in this matter on April 23, 2008. Therefore, according to Section 80(1) of the *Act*, PG Nannies exposure for any wages payable to employees in a determination would be limited to the amount that became payable in the period beginning 6 months before the said date, that is, the period October 23, 2008 to April 23, 2009.
  15. On the part of the delegate, it is evident to me that he, in making the Determination, relies significantly on the Live-in Caregiver Advertising and Settlement Fee Agreement (the "Contract") PG Nannies entered into with each of the Caregivers. In particular, the delegate notes that, in the Contract, the payment of the fee for services by the caregiver to PG Nannies is a precondition for the latter to place the applicant caregiver with an employer and this fact is not disputed by PG Nannies.



16. The delegate also notes that PG Nannies liberally uses the phrases “advertise”, “advertising” and “advertisement” throughout the documents, including the Contract, and maintains the fees it charges the Caregivers do not contravene the *Act* because it is “advertising” within the meaning of Subsection 10(2) of the *Act*. However, contends the delegate, PG Nannies is an employment agency and not in the business of advertising and it is not the Caregivers who are placing advertisement on PG Nannies website:

Based on the plain reading of s. 10(2); the purposes of the ESA and the Interpretation Act; and the evidence provided by [PG Nannies]; it is clear the applicant nanny is not ‘the person who placed the advertisement’ as the Act specifies, rather it is [PG Nannies] which has placed details about persons seeking employment for the benefit of its clients on its own website. The ‘advertisement’ is the ‘nanny profile’ on the agency’s website which consists of two photos ... of the nanny along with some personal details.... The ‘caregiver profile’ that is posted on [PG Nanny’s] website is for prospective employers to view and is intended to draw the prospective employers as clients into the agency. The profile is not placed on the website by the nanny.

...

Section 10(2) of the Act allows for advertising costs to be requested of, charged to, or received from the person placing the advertisement. If a person seeking employment contacted a newspaper to advertise her abilities and availability for work, the newspaper would be able to charge that person a fee for providing that service. The person placing the advertisement would be properly charged that fee by the newspaper because revenue derived from advertising is how a newspaper funds its operation. It is the business of the newspaper. The success or lack of success of the advertiser in obtaining employment through the placement of the advertisement is of no importance to the newspaper. The person placing the advertisement is the same person who is paying the fee for that advertisement. In the matter of [PG Nannies] however, it is not an advertising business, it is an employment agency and licensed to operate for that purpose; and, it is [PG Nannies] which is promoting its business on its own website to attract its clients, the prospective employer of the nanny. For [PG Nannies] to charge a fee for ‘advertising’ is a mischaracterization of what it is doing, is contrary to the purposes of the Act and does not protect the interest of employees or persons seeking employment.

Any costs incurred by [PG Nannies] in placing a nanny with an employer are a business cost, not to be recovered from the nanny who is seeking employment. The costs are expected to be recovered from the employer.

17. With respect to services such as resume preparation, image consulting, interview preparation, immigration settlement services and liaison services between caregiver and employer, the delegate notes in the Determination that there is no evidence that these services are requested by any caregiver from PG Nannies.
18. In concluding that PG Nannies operates in breach of Section 10 of the *Act*, the delegate states in the Determination:

There is no evidence of a schedule of fees charged by or paid to [PG Nannies] 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 [that PG Nannies] 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’ [PG Nannies] apparently provides do not reflect the convention understanding of the terms used to identify the services, and a misrepresentation of their intended meaning. [PG Nannies] has misused the terms in order to obscure the following simple fact: [PG Nannies] requires individuals who are seeking employment to pay a fee [to PG Nannies] in order for the agency to help them obtain employment. I find the fees charged by [PG Nannies] are for job placements, and are a contravention of Section 10 of the Act.

19. Having concluded that PG Nannies operates in contravention of Section 10 of the *Act*, the delegate considers Section 80(1)(b) of the *Act* to determine the relevant period for any wages owed by PG Nannies to the Caregivers. According to the delegate, the relevant period for calculating PG Nannies' wage liability is October 24, 2007 to April 23, 2008, as the Director advised PG Nannies of the investigation on April 23, 2008 and Subsection 10(1)(b) provides that the amount of wages an employer may be required by a determination to pay an employee is limited to that amount that became payable in the period beginning six months before the Director first told the employer of the investigation that resulted in the determination.
20. In calculating the wages owed by PG Nannies to the Caregivers, the delegate notes that the best available evidence was PG Nannies' reports pertaining to each caregiver showing the fees paid by each to PG Nannies. The reports in question identify "the opening balance; contract income (deposit monthly payment); contract adjustment, and interest and bank service charges (if, for example, the cheque from the nanny was NSF; or the nanny changed financial institutions without advising the Agency)."
21. The delegate further notes that where the Fee Payment Agreement between the individual caregiver and PG Nannies showed the repayment of the cost of airfare as part of the caregiver's indebtedness, the airfare cost was reduced from the wages owing as the airfare was not recoverable as wages under 10 of the *Act*.
22. The number of Caregivers who made payments to PG Nannies during the material period giving rise to the wage liability of the latter totalled fourteen, according to the delegate.
23. In the Appeal, PG Nannies does not dispute the delegate's calculation of its wage liability with respect to twelve of the fourteen Caregivers (assuming that the Determination in all other respects is correct). The two Caregivers with respect to whom PG Nannies disputes the delegate's calculation of its wage liability are Ms. Galasi and Ms. Narca. The delegate's calculations with respect to both these Caregivers is set out verbatim below:

Name: Galasi, Luzmininda

**Fee Payment Agreement**

"Advertising Fee": \$4600.00

Airfare (if applicable): \$171.02

Total charged by Agency: \$4771.02

"Advertising Fee" as a percentage of Total (above): 96.42%

Payments made (from Register Report)

December 3, 2007	\$425.02
January 21, 2008	\$425.00
February 6, 2008	\$425.00
March 4, 2008	\$425.00
March 28, 2008	\$571.00
April 3, 2008	<u>\$425.00</u>
Payment Total:	\$ 2696.02 (X 96.42% = \$2599.50)

Interest: \$128.51 (X 96.42% = \$123.91)

Total: \$2824.53 (X 96.42% = \$2723.41)

Total wages owed: \$ 2723.41 (96.42% of total)

Name: Narca, Mila

### Fee Payment Agreement

“Advertising Fee”: \$4600.00

Airfare (if applicable): \$252.01

Total charged by Agency: \$4852.01

“Advertising Fee” as a percentage of Total (above): 94.81%

Payments made (from Register Report)

November 26, 2007	\$500.00
December 21, 2007	\$500.00
January 15, 2008	\$500.00
February 18, 2008	\$500.00
March 18, 2008	\$500.00
April 18, 2008	<u>\$500.00</u>
Payment Total	\$3000.00 X 94.81% = \$2844.30

Interest: \$153.96 X 94.81% = \$145.97

Total: \$3153.96 (\$2844.30 + \$145.97)

Wages owed: \$ 2990.27 (94.81% of total)

## SUBMISSIONS OF PG NANNIES

24. In its written submissions filed on March 30, 2009 with its Appeal form, PG Nannies, as previously indicated, agrees with the facts and evidence summarized by the delegate in part IV of the Determination with only few exceptions. These exceptions number six and they are as follows:

1. PG Nannies is in the business of caregiver advertising, recruiting caregivers for employers, and immigration settlement.
2. A caregiver who wishes to receive advertising and settlement services from PG Nannies, may contact PG Nannies to receive an application form.
3. The caregiver cannot make an application from the PG Nannies website but must request an application by mail or from an overseas representative.
4. Citizenship and Immigration Canada requires that a caregiver be fluent in English or French before being considered for the Foreign Live-In Caregiver Program.
5. It is the caregiver's picture, profile and Dear Family Letter, rather than her complete resume, which is posted on the PG Nannies website.

6. The Agreement and Authorization referred to on page R7 of the Reasons was replaced in January 2008 with the Live-In Caregiver Advertising and Settlement Services Fee Agreement (the “Contract”), referred to on page R4, and is no longer in use.
25. In addition to the above, PG Nannies submits that the following facts are material to the issues in its Appeal:
1. Between the periods of September 12, 2005 and April 2, 2008, PG Nannies entered into written agreements with 14 caregivers named in the Determination. The agreements provide that the caregivers pay a fee for the advertising services, and, in some cases, advertising and immigration settlement services of PG Nannies.
  2. During that same time period, PG Nannies entered into a number of contracts with various employers seeking the services of caregivers. With respect to those agreements, PG Nannies charged a fee to the employer of \$500-\$600.
  3. PG Nannies is a licensed employment agency under the ESA and, according to the Determination, has been licensed to operate since November 30, 2005.
  4. PG Nannies displayed the caregivers’ pictures, profiles, and Dear Family Letter (see attached sample) on our website [www.pgnannies.com](http://www.pgnannies.com).
  5. Each of the caregivers named in the Determination obtained employment.
  6. Of the 11 caregivers named in the Determination who have arrived in Canada, each has received post-employment settlement and liaison services from PG Nannies.
26. PG Nannies then advances several arguments in support of its appeal under various headings which I have read and considered and propose to summarize, in part, here.
27. First, PG Nannies contends that the delegate overstates the scope of Section 10(1) of the *Act* in the Determination and contradicts the following passages of the Employment Agency Fact Sheet (the “Fact Sheet”) of the Employment Standards Branch (the “Branch”) and the Interpretation Guidelines Manual (the “Guidelines”) setting out the Branch’s interpretation of the provisions of the *Act* and *Regulation* when he states “it is a contravention of Section 10 of the Act for a person to charge a fee to a person seeking employment”:
- An employment agency may provide other services to persons seeking employment, such as resume writing or interview preparation. An employer, an employment agency or a person seeking employment may pay to advertise a job or their service.
- (Fact Sheet -Employment Agencies)
- Services that are not associated with finding a job or providing information about jobs may be provided for a fee. For example, an employment agency may charge a fee for providing other services such as teaching interviewing skills or helping prepare [sic] resumes.
- (Interpretation Guidelines Manual)
28. PG Nannies then refers to the Tribunal’s decision in *Re Serions, supra*, to argue that the Tribunal there “acknowledged the legitimacy of an agreement for immigration services”. Based on the latter decision and the quoted passages from the Fact Sheet and the Guidelines above, PG Nannies argues that the fees it charged the Caregivers for “advertising, resume preparation, image consulting, liaising, and immigration settlement” do not contravene Section 10(1) of the *Act*.
29. With respect to its second argument, PG Nannies submits that the fees it charged the Caregivers are permissible under Section 10(2) of the *Act*, which provides:

(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.

30. PG Nannies refers to definitions of the word “advertising” in the decisions of the BC Court of Appeal in *Grayson v. Wellington Insurance Co.*, 1997 CanLII 4112 and the Canadian International Trade Tribunal in *Informco Inc. v. Canada (National Revenue)*, 1997 CanLII 11982 to argue that PG Nannies activities fall within the definition of “advertising” and therefore permissible under Section 10(2) of the *Act*. I have read those definitions and do not find them relevant or necessary to set out here.
31. PG Nannies also submits that there is “little difference between our agency and a newspaper” in response to the delegate’s example in the Determination that a newspaper business could charge a fee for advertising service to an individual desiring to place an advertisement when seeking employment. More specifically, PG Nannies contends that a caregiver entering into the Contract with PG Nannies is in effect engaging PG Nannies to place an advertisement not dissimilar to an individual engaging a newspaper to advertise her availability for work. Therefore, argues PG Nannies, the delegate erred in finding that the fee charged by PG Nannies to the caregiver was not for advertising.
32. PG Nannies continues with its comparison to a newspaper business and submits that like a newspaper operation, it charges for advertising as one of the ways of funding its operations.
33. PG Nannies further submits that while the Delegate in the Determination concludes that PG Nannies is an employment agency and not an advertising business, the *Act* does not prevent an employment agency from diversifying and providing other services of the type that PG Nannies provides including advertising. PG Nannies also submits that the *Act* also does not “specify the type of business that may charge for advertising” or that advertising provided in Section 10(2) of the *Act* must “be placed with an advertising agency or in a specific form or media”.
34. With respect to the third argument in its appeal, PG Nannies disputes the delegate’s finding in the Determination that it charges a placement fee to the Caregivers. Instead, PG Nannies admits that it charges a placement fee to the employers who ultimately employ the Caregivers. Further, “[t]he placement fee to the employer facilitates the establishment of an employment relationship”, states PG Nannies. Therefore, argues PG Nannies, the delegate erred in finding that the fee that PG Nannies charged the Caregivers is a placement fee.
35. PG Nannies also submits that the fee it charges Caregivers is only for advertising and settlement services which are requested by Caregivers and provided to the latter before and after placement occurs. PG Nannies then goes on to explain in detail the specific advertising and settlement services it provides, the significant effort it puts into providing them and the value of the same to Caregivers in its view. I have read and considered those submissions and do not propose to delineate them here. They are, in my view, largely reiteration of submissions PG Nannies made during the investigation of the matter by the delegate and they simply buttress those earlier submissions.
36. PG Nannies then reiterates in its submissions that nothing in the *Act* prohibits it from charging a fee to Caregivers for the said services. In the alternative, PG Nannies states that if “some of the fee contravenes the ESA, at a minimum, a portion of the fee is allowable and therefore the judgment should be varied accordingly”.
37. PG Nannies also submits that it should not be disentitled from compensation for the services simply because it “did not insist upon separate advertising and settlement service contracts with the caregivers”.

38. PG Nannies also argues that the delegate is wrong in concluding that there is no fee schedule associated with the specific services it provides or an indication of what the services would cost the Caregivers. According to PG Nannies, the Contract indicates to Caregivers its fees and the schedule pursuant to which they are to be paid.
39. PG Nannies also disputes the delegate's finding that there is no evidence of Caregivers requesting PG Nannies to provide any of these services. According to PG Nannies, a caregiver's signature on the Contract is evidence that she has requested the services, although PG Nannies admits that the caregiver cannot agree, "to pay for the services on an itemized basis because the services are not offered as such."
40. I note that under the headings "Purposes of the ESA" and "The Association of Canadian Nanny Agencies (ACNA)" in its submissions, PG Nannies defends what it does and reiterates that it acts in accordance with the purposes of the *Act* and promotes ethical business practices within its association. I do not propose to reiterate those arguments and submissions here as I do not find them particularly helpful, but I note that I have read and considered them.
41. Finally, PG Nannies submits that the delegate has made an error in calculating the payments made to PG Nannies by Ms. Galasi and Ms. Narca. PG Nannies states that with respect to Ms. Galasi:

The Delegate refers to a payment made March 28, 2008 of \$571, however, that payment was in fact made March 28, 2007. Therefore that payment falls outside the 6 month limitation period (refer to Register Report). Deduct \$571.00 + interest from total.

42. With respect to Ms. Narca, PG Nannies states:

April 18, 2008 payment of \$500 was actually \$402.91 (refer to Register Report). Deduct \$97.09 + interest from total.

## **SUBMISSIONS OF THE RESPONDENTS**

43. The Tribunal received seven identical letters in response to PG Nannies' appeal of the Determination, four of which were executed by individuals who were part of the group of fourteen Caregivers referred to in the Determination and three were not. The Tribunal excluded the letters from the latter in this appeal as well as the names of the same individuals from the list of names and signatures submitted together with these letters.
44. As the identical letters comprise of four short paragraphs, I propose to set out the letter from one of the Caregivers verbatim:

19 April, 2009

Employment Standard Tribunal  
Suite 650 Oceanic Plaza  
1066 West Hastings Street  
Vancouver, B.C. V6E 3X1

Re: Response to appeal by Prince George Nannies and Caregivers Ltd.  
Determination ER # 136-925

Dear Sir or Madam:

This is in response to Prince George Nannies and Caregivers Ltd. appeal of Determination ER # 136-925. We would like to point out that on page 3 of 14 of the letter attached to the appeal

form, paragraph 4 “An employment agency may provide other services...” that the appellant had mixed sentences from two different topics from the Employment Standard Branch Factsheet (charging for other services and advertising). The factsheet clearly outlines that an employment agency cannot charge a person seeking employment any advertising fees, also any discrepancies between written documentation (ie. The ESB Factsheet) and the Employment Standard Act (ESA), that the ESA takes precedent. Any reasonable business person will be familiar with the governing statutes for their industry.

The cornerstone of the appellant’s appeal is the advertisement fees charged to the caregivers. The advertising on the agency’s website is part of a prospectus to the employer. The agency posts the profiles of the potential caregivers on their website to assist the potential employers in selecting potential caregivers. This is not advertising. For the potential caregivers fill out questionnaire and the agency post it on their website. These questionnaires are also available outside of the website to the potential employer.

For the profiles on the agency’s website, to be classified as advertisement, then there needs to have contact information of the caregivers, so that employers can contact the caregivers directly. As if it is now the only way for employers to contact the caregivers is for the employer to contact the agency, then the agency contacts the caregivers. Therefore, it is the agency not the caregiver placing the advertisement on the website. The primary service offered by the agency is employment placement and not advertising.

The contracts signed by the caregivers do not list out in details the services offered and the corresponding fees charged for those services. The caregivers cannot select which services they want the agency to provide. Therefore, the caregivers are limited to one bundle of services regardless if the services are utilized or not.

Yours Truly,  
“ELVIE G. PINGP”

## SUBMISSIONS OF THE DIRECTOR

45. The Director submits that PG Nannies mischaracterizes the findings in the Determination. In particular, the Director states that the Determination found that PG Nannies charges Caregivers one fee for placement and not for any specified services.
46. The Director also notes that there no indication in the evidence adduced in the investigation that a caregiver “has any choice of what (if any) services she wishes to use, nor is there a fee schedule for any of the individual services the agency claims to offer”. According to the Director, each caregiver “pays a flat rate for placement whether or not any of these extra ‘services’ are needed or used”.
47. The Director also submits that the Determination did not make any finding that PG Nannies provided advertising services. Instead, the Director argues that the Determination found the activities which PG Nannies “characterizes as ‘advertising services’ are not advertising as allowed by Section 10(2) of the *Act*”.
48. The Director vigorously disputes PG Nannies’ contention that the delegate overstated the scope of Section 10(1) of the *Act* in the Determination noting that the passages quoted by PG Nannies from the Fact Sheet and the Guidelines are misleading and incomplete. I do not propose to set out those passages here but I will under the heading Analysis.
49. The Director also submits that the decision in *Re: Serions* (which PG Nannies relies upon to advance its position that it can charge legitimately for other services it provides) can be distinguished on the basis that it involved “two separate and distinct agreements” and not a single agreement like the Contract, “which obligates the nannies to pay the agency to find them employment”.

50. In response to PG Nannies' submission that the delegate erred in finding the fees charged by PG Nannies to the Caregivers were not for advertising, the Director submits that the primary business of PG Nannies is an employment agency, as it is licensed as such and operates in that capacity. According to the Director, simply because the caregiver signs the Contract does not mean that she is "placing an advertisement" with PG Nannies.
51. The Director also notes that the "advertising" exception in Section 10(2) of the *Act* "requires that the payment for the advertisement must be 'from the person who placed the advertisement'". In this case, the Director submits that the Caregivers are not the ones placing the advertisement; it is PG Nannies, according to the Contract, posting the nanny profile on its website. According to the Director, this form of advertising is part of the cost of doing business for PG Nannies and should be borne by the latter.
52. The Director further notes that the "advertising" fee is a misnomer as it is truly a fee that Caregivers pay to PG Nannies to have them placed in employment and therefore the fee is a placement fee. This is also evident, according to the Director, in the delegate's finding that PG Nannies "does not attempt to find a placement 'employment' for the nanny until the nanny pays the fee to the agency".
53. With respect to the submissions of PG Nannies pertaining to the variety of services it purports to offer Caregivers, the Director notes that PG Nannies admits that different nannies receive different services. However, states the Director, "they all pay the same fee to the agency because they have no choices available to them". The fee is the same for the nanny who uses some of the services and the nanny who does not. This, according to the Director, supports the conclusion reached in the Determination that the Caregivers are charged a placement fee for matching them with employers and not a fee for any other service offered by PG Nannies.
54. With respect to the submissions of PG Nannies that the delegate erred in making the calculations with respect to wages owed by PG Nannies to Ms. Galasi and Ms. Narca, the Director agrees with the submissions of PG Nannies and accordingly revised the wages owing by PG Nannies to Ms. Galasi and Ms. Narca to \$2,152.86 and \$2,894.61 respectively. I note that neither of these Caregivers has made any submissions opposing the Director's revised numbers.

## ANALYSIS

55. **(i) Did the Director err in law in determining that the fees charged by PG Nannies to the Caregivers for services it provides falls within the prohibition in Section 10(1) of the *Act*?**
56. Section 10 of the *Act* provides:
- 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.
57. In support of its argument that the Director erred in law in determining that the fees charged by PG Nannies to the Caregivers falls within the prohibition in Section 10(1) of the *Act*, PG Nannies quotes passages from



the Branch's Fact Sheet and Guidelines which I have delineated in the part entitled "Submissions of PG Nannies" above.

58. At the outset, it should be noted that neither the Fact Sheet nor the Guidelines is the law. They are both prepared for general information purposes and are not legal documents. In the case of the Fact Sheet there is additionally a direction to the reader that the *Act* and *Regulation* should be referred to for purposes of interpretation and application of law.
59. Having said this, I note that PG Nannies, in the case of the Fact Sheet, whether advertently or not, has juxtaposed selective parts of two different passages and presented them as a single passage in a misleading way, passing it off as the Branch's direction or interpretation on the matter. The passages juxtaposed are reproduced below in their entirety and the parts PG Nannies has excluded are delineated in italics:

#### **Charging for other services**

An employment agency may provide other services to persons seeking employment, such as resume writing or interview preparation. *An employment agency must not require a person seeking employment to use or pay for these other services as a condition of being placed in a job. An employment agency cannot require a person seeking employment to pay for immigration assistance as a condition of being placed in a job.*

...

#### **Advertising**

An employer, an employment agency or a person seeking employment may pay to advertise a job or their services.

*An employment agency may not require a person seeking employment to pay for any form of advertising as a condition of assisting them to find a job.*

60. As for the passage from the Guidelines referred to by PG Nannies, I have produced the missing part in PG Nannies submissions in italics:

Services that are not associated with finding a job or providing information about jobs may be provided for a fee. For example, an employment agency may charge a fee for providing other services such as teaching interviewing skills or helping prepare resumes. *The person looking for a job cannot be required to use these services.*

61. Examining the passages from both documents in their entirety (and not in the selective manner in which PG Nannies presented them), I find no basis for the allegation of PG Nannies that there is any contradiction in the interpretation of the delegate of Section 10(1) of the *Act* and the provisions in question in the Fact Sheet and the Guidelines.
62. As for PG Nannies' reliance on the decision of the Tribunal in *Re Serions, supra*, to advance its argument that under Section 10(1) it can charge fees for advertising and other services it makes available to Caregivers, I am not persuaded that the decision in *Re Serions* goes that far and affords PG Nannies such support. The decision of the Tribunal in *Re Serions* was based on the limitation issue and the comment of the Tribunal pertaining to the immigration agreement and the fees charged thereunder was *obiter*. While I am not required to follow the *obiter* in *Re Serions*, I am not sufficiently persuaded that the *obiter* is of any persuasive value in this case particularly when there may not be any factual parallels or similarities between the two cases. For example, in *Re Serions*, there were two separate agreements setting out separate amounts for each service - one for finding the potential employee employment and another for providing immigration services. In the case of PG

Nannies, all of the services are bundled and a single fee is charged to the caregiver who must pay the fee (whether or not she requires or uses those services) as a precondition to PG Nannies agreeing to place her with an employer. In *Re Serions*, there is not a similar finding noted in the determination and I question whether the Tribunal in *Re Serions* would have, even in *obiter*, come to the conclusion it did, if the services in the employment agreement there were tied to the immigration services and the potential employee prevented from entering into the employment agreement independent of the agreement for immigration services. Therefore, I do not find much, if any assistance, from *Re Serions* in this case.

63. Having said this, in my view, it is necessary, in determining the issue of whether or not the Director erred in law in finding that the fees charged by PG Nannies for services it provides to the Caregivers falls within the prohibition in Section 10(1) of the Act, to review the said section of the *Act* in context of the prevailing principles of legislative interpretation. In this regard, I note that the established approach to statutory interpretation in *Re Rizzo and Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27 was reiterated by Iacobucci, J. in *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559; 2002 S.C.C. 42, at para. 26, citing E.A. Driedger, *Construction of Statutes* (2ed. 1993) at p. 87:

‘Today there is only one principle or approach, namely, the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.’

64. The same approach for legislative interpretation was revisited by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, [2005] S.C.J. 56 at p. 13, para. 10, where the Court, under the heading “General Principles of Interpretation”, stated:

10. It has been long established as a matter of statutory interpretation that ‘the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament’: see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretative process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the Court must seek to read the provisions of the an Act as a harmonious whole.

65. I also note that section 8 of the *Interpretation Act* [R.S.B.C 1996] C.238 offers further interpretive guidance:

#### **Enactment remedial**

8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

66. In addition, in context of an employment legislation specifically, I note the Supreme Court of Canada’s decision in *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 where the majority delineated the interpretive principles applying to employment standards legislation at page 1003:

.... an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to any many employees as possible, is to be favoured over one that does not. In this regard, the fact that many individual employees may be unaware of their statutory and common-law rights in the employment context is of fundamental importance.

67. Having delineated the pertinent sources for interpreting legislation and particularly Section 10 of the *Act*, I agree with the Tribunal in *Re: City of New Westminster*, BC EST #D518/98 (which decision was upheld on Reconsideration at BC EST #D118/99), the interpretive principles can only be considered when there is an absence of clear and express language. In my view, however, in the case of Section 10(1) of the *Act*, the words are precise and unequivocal. The words in Section 10(1) are both mandatory and unambiguous and proscribe anyone from requesting, charging or receiving, whether directly or indirectly, from any person seeking employment a payment for, *inter alia*, obtaining employment for that person.
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*.
70. **(ii) Did the Director err in law in concluding that the advertising “service” of PG Nannies in the form of the publication on its website of the Caregivers profiles, particulars and pictures does not fall within the exception in Section 10(2) of the *Act*?**
71. Subsection 10(2) of the *Act* provides:
- (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.
72. PG Nannies argues that it offers advertising service within the meaning of Section 10(2) of the *Act* to the Caregivers for which it charges its fees under the Contract. Moreover, PG Nannies submits that the Caregivers, by virtue of entering into the Contract with PG Nannies, are placing an advertisement and therefore PG Nannies should be excepted from the proscription in Section 10(1) of the *Act*.
73. In my view, the Director is correct in pointing out that PG Nannies is an employment agency and it is so licensed and operates as such under the *Act*. While I do not have a quarrel with PG Nannies’ position that its publishing of particulars of Caregivers on its website constitutes a form of advertising, I am not persuaded that this qualifies as advertising contemplated in Section 10(2) of the *Act*. It is not the Caregivers that are placing their profiles and related particulars on PG Nannies’ website; it is PG Nannies that is doing so in the context of its employment agency business. PG Nannies, as the Director argues, has to have access to persons seeking employment in order to successfully conduct its business, namely, to provide or match Caregivers to prospective employers. It is PG Nannies business to match Caregivers to employers and the method that PG Nannies uses to place a caregiver with an employer is part of the placement function for which there should not be a charge to the nanny. One of the methods employed by PG Nannies is to

advertise the particulars of the nannies on its website and this, in my view, does not constitute advertising on the part of the caregiver.

74. Moreover, I reject PG Nannies assertion that a caregiver, by virtue of signing the Contract, is “placing an advertisement” with PG Nannies or engaging advertising services of PG Nannies. I do not find any merit in that assertion of PG Nannies. The Contract is truly a placement contract and not an advertising agreement between PG Nannies and the Caregivers. PG Nannies, in its appeal submissions, admits that Caregivers cannot pay for the services that it has bundled in the Contract on an itemized basis because they are not offered as such. The Contract, in my view, is a transparent attempt on the part of PG Nannies to charge placement fees under the guise of advertising fees and I find that the fees charged by PG Nannies are not excepted under Section 10(2) of the *Act*.

75. **(iii) Should the Director have apportioned or allowed any part of the fees charged by PG Nannies to the Caregivers for “services” allowable under the *Act*?**

76. The services for which PG Nannies charged fees to the Caregivers are bundled in the Contract and not separated, as previously indicated. PG Nannies has acknowledged that the Caregivers do not have a choice in picking and choosing any of the services in the Contract and they cannot simply pay only for the services they employ or use but must pay the entire fee, whether or not they utilize any services listed in the Contract. PG Nannies has also admitted that some of the Caregivers used some of the services and others did not, yet I understand they were all charged full fees under the Contract.

77. PG Nannies is contending, in the alternative, that the Director should have apportioned and allowed fees charged by PG Nannies for those services allowable under the *Act*, although, as indicated in the previous section I find the Contract contravenes Section 10(1) of the *Act*. In my view, what PG Nannies is asking is for the Director to effectively amend the breaching Contract or make a new agreement between PG Nannies and the Caregivers in substitution thereof. In my view, it is neither appropriate nor allowable at law for the Director to make new agreements or amend the breaching Contract between PG Nannies and the individual Caregivers allocating specific fees for specific services and determining what each caregiver should be charged for the services they used. Accordingly I reject this ground of appeal of PG Nannies.

78. **(iv) Did the Director miscalculate the wages owing to Ms. Galasi and Ms. Narca?**

79. As indicated previously, the Director agrees with the submissions of PG Nannies regarding the errors in the delegate’s calculations pertaining to the amounts paid by Ms. Galasi and Ms. Narca to PG Nannies and the amounts owed to both these Caregivers by PG Nannies pursuant to Section 10(3) of the *Act*. The Director has recalculated or revised those amounts and, in the case of Ms. Galasi, the Director states that she is owed \$2,152.86 and in the case of Ms. Narca, it is \$2,894.61. Since neither of these Caregivers is disputing those calculations, I take them as accurate and vary the Determination accordingly.

## ORDER

80. Pursuant to Section 115(1)(a) of the *Act*, I order that the Determination dated February 18, 2009 be varied to show that Ms. Galasi is owed \$2,152.86, Ms. Narca is owed \$2,894.61 and the total amount owed by PG Nannies to all of the Caregivers who are the subject of the Determination is \$25,987.47 together with whatever additional interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

81. I also order that the administrative penalty of \$500.00 against PG Nannies in the Determination be confirmed.

---

**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**