Employment Standards TRIBUNAL

Appeals

- by -

Tatiana Gorenshtein also known as Tatiana Gorenstein, Director/Officer of ICN Consulting Inc. carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International CaregiversNetwork.ca

("Ms. Gorenshtein")

and

Michael Gorenshtein also known as Michael Gorenstein, Director of ICN Consulting Inc. carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International CaregiversNetwork.ca

("Mr. Gorenshtein")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE Nos.: 2015A/73 & 2015A/74

DATE OF DECISION: September 9, 2015

DECISION

SUBMISSIONS

Tatiana Gorenshtein — on her own behalf

Michael Gorenshtein — on his own behalf

OVERVIEW

1. I have before me a joint appeal filed by Tatiana Gorenshtein also known as Tatiana Gorenstein, a Director/Officer of ICN Consulting Inc. carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International CaregiversNetwork.ca ("Ms. Gorenshtein") and Michael Gorenshtein also known as Michael Gorenstein, a Director of ICN Consulting Inc. carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International CaregiversNetwork.ca ("Mr. Gorenshtein") pursuant to subsections 112(1)(a) and (b) of the *Employment Standards Act* (the "*Act*"). Ms. and Mr. Gorenshtein (the "appellants") are appealing essentially identical determinations that were separately issued against them on April 27, 2015, under subsection 96(1) of the *Act*: "A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee."

2. Ms. Gorenshtein's appeal is Employment Standards Tribunal File No. 2015A/73 and Mr. Gorenshtein's appeal is Employment Standards Tribunal File No. 2015A/74. In light of the fact that the two Section 96 Determinations are essentially identical, and that Ms. and Mr. Gorenshtein have filed a joint appeal submission, I am issuing a single set of reasons for both appeals.

3. The appellants "request that the Tribunal cancel the Determinations".

4. At this juncture, I am considering whether one or both of these appeals should be summarily dismissed, in whole or in part, as having no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*). I have reviewed the appellants' submission as well as all of the relevant background material that was before the delegate (*i.e.*, the subsection 112(5) "record", portions of which are discussed in greater detail, below) when she issued the Section 96 Determinations.

BACKGROUND FACTS

5. There is a lengthy procedural history relating to the present appeal proceedings. On May 3, 2012, a determination was issued against ICN Consulting Inc. carrying on business as "Caregivers.ru". ICN Consulting Inc. also carried on business using the trade names "Nannies for Hire" and "International CaregiversNetworks.ca". For ease of reference I shall refer to ICN Consulting Inc. as "ICN" and to the May 3, 2012, determination issued against it as the "Corporate Determination".

6. By way of the Corporate Determination, ICN was ordered to pay its former employees, Anna Baranova and Maria Tagirova (the "complainants"), the sum of $2,273.97 on account of unpaid wages and interest. These wages were determined to be owing in accordance with section 10 of the *Act*:

> 10 (1) A person must not request, charge or receive, directly or indirectly, from a person seeking employment a payment for

(a) employing or obtaining employment for the person seeking employment, or

(b) providing information about employers seeking employees.

(2) A person does not contravene this section by requesting, charging or receiving payment for any form of advertisement from the person who placed the advertisement.

(3) A payment received by a person in contravention of this section is deemed to be wages owing and this Act applies to the recovery of the payment.

7. Further, and also by way of the Corporate Determination, two separate $500 monetary penalties were levied against ICN based on its contraventions of sections 10 and 12 (operating an employment agency without being licensed) of the *Act*. Thus, the total amount of the Corporate Determination was $3,273.97.

8. As previously noted, there is a lengthy history to this matter. This history is succinctly summarized at para. 5 in BC EST # D024/14, a decision by Tribunal Member Stevenson issued on April 16, 2014, in which he confirmed the Corporate Determination:

> This file has a fairly lengthy history at the Employment Standards Branch and the Employment Standards Tribunal (the "Tribunal") which, for the purposes of completeness, I will briefly summarize. As indicated above, the Determination at issue in this appeal was issued on May 3, 2012. There had been an earlier Determination on complaints filed by Ms. Baranova and Ms. Tagirova issued on December 21, 2009, that was cancelled by the Tribunal in BC EST # D050/10, with the complaints being referred back to the Director for a new hearing or investigation before a different delegate. The complaints were investigated and the May 3, 2012, Determination issued. There was an appeal of the Determination by ICNC which was filed late and dismissed by the Tribunal on that basis in BC EST # D101/12. A reconsideration of that decision was sought by [ICN] and denied by the Tribunal in BC EST # RD128/12. Judicial review of the Tribunal's decisions, BC EST # D101/12 and BC EST # RD128/12, was sought by [ICN] and Tatiana Gorenshtein ("Mrs. Gorenshtein") and, in a decision rendered on August 19, 2013, the British Columbia Supreme Court set aside the Tribunal's decisions and referred ICNC's appeal of the May 3, 2012, Determination back to the Tribunal for consideration on its merits.

Appeal of the Corporation Determination (BC EST # D024/14)

9. ICN appealed the Corporate Determination and, among other challenges, alleged that it should be cancelled on constitutional grounds. With respect to its constitutional arguments, ICN alleged, firstly, that the Director of Employment Standards had no jurisdiction over ICN since its immigration consulting business was solely under federal jurisdiction. Secondly, it argued that the *Act* did not apply to the employment relationships between ICN and the complainants: "…Ms. Baranova and Ms. Tagirova were Russian nationals who signed their contracts with [ICN] and received all of the services listed in the contracts while they were still residing in Russia, before they came to Canada [and thus the Corporate] Determination is an improper attempt to extend the application of the *Act* to other countries." (Tribunal Member Stevenson's April 16, 2014 decision, para. 40).

10. In addition to its constitutional arguments, ICN asserted that the Corporate Determination was tainted by several errors of law including errors relating to finding, interpreting and applying the evidence that was before the delegate who issued the Corporate Determination. ICN also asserted that the delegate was, or reasonably appeared to be, biased against it and erred in making certain credibility findings in favour of the complainants. Finally, ICN also advanced several separate matters that were all said to constitute separate breaches of the principles of natural justice.

11. Ultimately, Tribunal Member Stevenson rejected all of ICN's reasons for appeal and, accordingly, he dismissed ICN's appeal in its entirety and confirmed the Corporate Determination. ICN subsequently applied for reconsideration of Tribunal Member Stevenson's appeal decision.

Reconsideration of the Corporate Determination Appeal Decision (BC EST # RD129/14)

12. ICN applied, under section 116 of the *Act*, for reconsideration of Tribunal Member Stevenson's appeal decision and this application was heard and decided by Tribunal Member Groves. He issued his reasons for decision with respect to ICN's reconsideration application on December 16, 2014 (BC EST # RD129/14).

13. ICN argued that Tribunal Member Stevenson made fifteen separate "reviewable errors". Among other things, ICN argued that Tribunal Member Stevenson erred in his treatment of ICN's constitutional arguments and, in particular, in rejecting the argument that its business was governed solely by federal law which authorized it to charge certain fees (which were held to be impermissibly charged under section 10 of the *Act*) to the complainants under the federal *Immigration and Refugee Protection Act*. ICN argued that the complainants were not "employees" under the *Act* and that, in any event, it was never their "employer" and never operated as an "employment agency" as defined in the *Act*. ICN also argued that Tribunal Member Stevenson erred in not overturning certain findings of fact made the delegate and, in particular, credibility findings made in favour of the complainants. ICN also advanced several other arguments in favour of its position that Tribunal Member Stevenson's decision should be cancelled.

14. Reconsideration applications are evaluated utilizing a two-stage framework commonly known as the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # RD313/98). Tribunal Member Groves summarized this test as follows (para. 17):

> The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Member in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the decision which are so important that they warrant reconsideration (see *Director of Employment Standards (re Milan Holdings Inc.)*, BC EST # RD313/98).

15. As noted above, ICN argued that Tribunal Member Stevenson made fifteen separate "reviewable errors". Tribunal Member Groves separately addressed each and every one of these arguments and found all of them to be wholly lacking in merit. That being the case, he was not satisfied that ICN's application passed the first stage of the *Milan Holdings* test (at para. 77):

> Having reviewed [ICN's] submissions in its application for reconsideration, I find they do not meet the Tribunal's established test for reconsideration. As indicated above, none of [ICN's] 15 grounds raises any significant questions of law, fact, principle or procedure flowing from the Original Decision which would warrant reconsideration. I find the Original Decision sufficiently addresses [ICN's] arguments on appeal and I find no reviewable error in the analysis and conclusions reached by the Member. Nothing in [ICN's] application persuades me the Original Decision was wrongly decided, or raises any significant issue that would warrant reconsideration. Accordingly, the application is denied.

16. In their materials filed in support of the present appeals, the appellants noted that on February 11, 2015, they (although I presume it was, in fact, ICN) applied for judicial review of both Tribunal Member Stevenson's appeal decision and Tribunal Member Groves' reconsideration decision. The appellants indicated that this review was scheduled for hearing on June 29 and 30, 2015. I understand that the judicial review application

was heard in the B.C. Supreme Court and that on July 10, 2015, Justice Silverman issued oral reasons dismissing the application with costs. It is also my understanding that on July 31, 2015, a notice of appeal was filed in the B.C. Court of Appeal with respect to Justice Silverman's decision. However, as matters now stand, the appeal and reconsideration decisions, both of which confirmed the Corporate Determination, constitute final orders with respect to ICN's unpaid wage liability to the complainants.

The Section 96 Determinations

17. On April 27, 2015, a delegate of the Director of Employment Standards (henceforth referred to as the "delegate") – and not the same delegate who issued the Corporate Determination – issued two essentially identical determinations against the present appellants, Ms. Tatiana Gorenshtein and Mr. Michael Gorenshtein, under subsection 96(1) of the *Act* each in the amount of $2,486.79 on account of unpaid wages and interest owed to the two complainants. The delegate also concurrently issued "Reasons for the Determination" and these two sets of reasons are virtually identical save for the unique information relating to either Ms. or Mr. Gorenshtein detailed in each set of reasons.

18. The delegate subsequently issued two "Determination Corrigendum" with respect to each of Ms. and Mr. Gorenshtein. The delegate issued these corrected determinations in accordance with section 123 of the *Act*: "A technical irregularity does not invalidate a proceeding under this Act." The first was issued on June 25, 2015, and simply corrected the name of the present appellants from "Gorenshtein" to "Gorenstein". It is my understanding that this correction was made because the delegate learned that both appellants had recently formally changed their surname from the former to the latter. I note that the appellants, in their Appeal Form and in their attached memorandum setting out their reasons for appeal, identified themselves as Tatiana and Michael Gorenshtein. In all other respects, the corrected determinations were identical to those originally issued. The delegate's reasons were also amended to reflect this change.

19. The second corrected determinations were issued on July 20, 2015, and simply corrected an incorrect statutory reference in both the determinations and the accompanying reasons. The two determinations issued against the appellants were amended to show that the unpaid wages were originally determined to be owing to the complainants – consistent with the Corporate Determination – under section 10 (charging a fee for hiring or providing information), rather than 18 (payment of wages on termination of employment), of the *Act*. Further, the delegate's reasons were also amended to indicate that the two administrative penalties levied against ICN were based on its contraventions of sections 10 (charging a fee for hiring) and 12 (operating unlicensed employment agency) of the *Act* rather than section 18 (payment of wages on termination) and section 46 of the *Employment Standards Regulation* (failure to produce payroll records on demand). In all other respects the two Section 96 Determinations, and accompanying reasons, were identical to the original determinations as amended on June 25, 2015. It should also be noted that this latter amendment addressing the statutory basis for levying monetary penalties against ICN, while correcting an obvious clerical error, was essentially a moot point since, as is discussed further, below, the delegate ultimately determined that neither appellant was personally liable for the administrative penalties levied against ICN.

20. The Section 96 Determinations corrected as of June 25, 2015, were sent to the appellants on that same date. The Section 96 Determinations corrected as of July 20, 2015, were sent to the appellants on July 21, 2015.

21. The delegate's reasons indicate that Ms. Tagirova's unpaid wage claim is for $1,230.33 including section 88 interest accrued up to the date of the Section 96 Determinations and that Ms. Baranova's unpaid wage claim is for $1,256.76 including accrued interest.

22. It will be recalled that two separate monetary penalties were levied against ICN in addition to the unpaid wages and interest awarded to the complainants. Corporate directors and officers may be held liable for such penalties under subsection 98(2) of the *Act*: "If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty." The delegate did not impose any administrative penalties on either appellant under subsection 98(2) because there was "insufficient evidence that [Ms. or Mr. Gorenshtein] authorized, permitted or acquiesced in the contraventions of [ICN]. For this reason I find [Ms. or Mr. Gorenshtein] is not personally liable for the administrative penalty."

23. There are essentially three preconditions to the imposition of personal liability under subsection 96(1) of the *Act*. First, the individual must have been "a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid". Second, the liability is "capped" at "2 months' unpaid wages for each employee" of the corporation. Third, none of the conditions (in effect, statutory defences) set out in subsection 96(2) of the *Act* applies.

24. As recounted in the delegate's reasons, both Ms. and Mr. Gorenshtein were recorded in the BC Corporate Registry as ICN directors (Ms. Gorenshtein was also recorded as an officer) when the complainants' unpaid wage claims crystallized. The delegate also attached wage calculations to her reasons showing the amount owing to each complainant as being below the 2-month wage liability ceiling. The record before me clearly shows that none of the subsection 96(2) defences is applicable and the appellants have not raised any subsection 96(2) defence in their submission.

25. By way of summary of the Section 96 Determinations, the delegate concluded, based on records on file with the BC Corporate Registry, that both appellants were ICN directors (and in the case of Ms. Gorenshtein, she was also an officer) when the complainants' unpaid wage claims crystallized. As of the date of issuance, ICN had not paid the amounts due under the Corporate Determination and, accordingly, separate determinations were issued against the appellants under subsection 96(1) of the *Act*. The delegate found that the unpaid wage amounts were less than the 2-month wage liability ceiling. There is nothing in the record before me to indicate that any of the subsection 96(2) defences would apply. On this latter point, as previously noted, the appellants do not assert that any of the latter defences is applicable.

REASONS FOR APPEAL

26. The appellants filed a single Appeal Form to which was attached a 7-page memorandum of argument outlining the factual history and setting out their arguments in support of their appeal of the Section 96 Determinations. The appellants assert that the delegate erred in law (subsection 112(1)(a) of the *Act*) and also failed to observe the principles of natural justice in making the determinations (subsection 112(1)(b) of the *Act*).

27. I will provide a fuller analysis of the appellants' reasons for appealing, below, under the heading "Findings and Analysis"; however, briefly, the appellants say that the delegate erred in law and breached the principles of natural justice in finding that ICN contravened section 18 of the *Act* and section 46 of the *Employment Standards Regulation* and, in any event, "has calculated the Appellants' personal liability incorrectly". Finally, the appellants say that the Section 96 Determinations "have been made contrary to the Tribunal's decision in BC EST # D050/10".

FINDINGS AND ANALYSIS

28. The appellants' arguments in support of their appeal are set out under three separate subheadings in their 7-page memorandum. In my view, two of the appellants' arguments are wholly misconceived and have no reasonable prospect of succeeding. That being the case, those two parts of these appeals must be summarily dismissed under subsection 114(1)(f) of the *Act*. As will be seen, I am seeking further submissions from the parties regarding the appellants' other argument and will issue a final decision on that issue once those submissions have been filed.

29. I will address each of the appellants' three arguments advanced in support of these appeals but, before doing so, I wish to outline some of the key legal principles that govern an appeal concerning a determination issued under section 96 of the *Act*.

Section 96 Determinations

30. As noted above, there are three fundamental preconditions that must be satisfied before a determination is properly issued under section 96 against a corporate officer or director and these preconditions also define the permissible parameters for any appeal of such a determination. First, it must be established that the individual was either a director or officer of the corporate employer when the employee's unpaid wage claim crystallized. This question does not arise in these appeals; indeed, the appellants conceded their status in their written argument: "…the Appellants are husband and wife, and they were the only owners, directors, and employees of their company ICN Consulting…". Quite apart from this admission, the record clearly shows that the appellants were ICN directors at all material times.

31. Second, the individual's wage liability is capped at no more than "2 months' unpaid wages for each employee". This statutory limitation is an issue in these appeals and, in my view, is one that requires further investigation.

32. Third, subsection 96(2) creates certain statutory exceptions, or defences, to the general subsection 96(1) personal liability ascribed to corporate directors and officers. I see nothing in the record that would support any of the subsection 96(2) defences and the appellants do not argue that any one of those defences applies here.

33. To a degree, the appellants wish to reargue the wage liability of ICN which has now been finally determined. The Tribunal has repeatedly ruled that it will apply the doctrine of issue estoppel, absent extraordinary circumstances that do not apply here, and refuse to revisit the question of the employee's unpaid wage entitlement in an appeal of a determination issued under subsection 96(1). In other words, an argument challenging the correctness of the underlying determination of the corporation's unpaid wage liability – *i.e.*, the foundation for the unpaid wage liability ascribed to the corporate director/officer – will not be entertained (see, for example, *Steinemann*, BC EST # D180/96 and *Neudorf*, BC EST # D076/07). If there is an alleged error in the original determination of the corporation's unpaid wage obligation, the appropriate mechanism to address that question is through an appeal of the determination issued against the corporation. Indeed, that is what occurred here – ICN appealed the Corporate Determination and then, when that appeal was dismissed, it applied for reconsideration (again unsuccessfully). ICN then applied for judicial review in the B.C. Supreme Court of both the appeal and reconsideration decisions. ICN's application for judicial review was dismissed by way of oral reasons from the bench and ICN has now filed a notice of appeal in the B.C. Court of Appeal.

34. I now turn to the appellants' arguments made in support of their appeals.

Appellants' Reasons for Appeal

35. The appellants advanced three separate reasons (one of which has two separate components) in support of their appeals in the memorandum appended to their Appeal Form.

36. First, the appellants state: "The Delegate made an error in law and/or failed to observe the principles of natural justice by deciding that [ICN] has contravened Section 18 of the [*Act*] and Section 46 of the [*Employment Standards Regulation*]." This reason for appeal must be summarily rejected. First, it is a ground of appeal that relates to the Corporate Determination, and does not raise an issue that is relevant to an appeal of a determination issued under subsection 96(1) of the *Act*. I note that Tribunal Member Stevenson observed, at para. 21 of his reasons for decision in the appeal of the Corporate Determination: "The delegate's calculation of the wages owing to each complainant has not been appealed". Second, as noted above, ICN's liability to the two complainants was not fixed under section 18 of the *Act* nor was ICN penalized for having contravened section 46 of the *Employment Standards Regulation*. ICN's unpaid wage liability flowed from section 10 of the *Act* (unlawful fee for hiring) and it was penalized for having contravened this latter section as well as section 12 of the *Act* (operating an unlicensed employment agency). In my view, this reason for appeal is wholly unmeritorious and must be summarily dismissed under subsection 114(1)(f) of the *Act* as having no reasonable prospect of succeeding. While this ground of appeal was undoubtedly triggered by a typographical error contained in the originally issued Section 96 Determinations, that clerical error was inconsequential and has now been corrected.

37. The appellants' second reason for appeal is as follows: "The Delegate has calculated the Appellants' personal liability incorrectly". A question concerning whether the "2-months' unpaid wages" (maximum) liability imposed on a corporate director or officer has been correctly calculated is a proper ground of appeal regarding a determination issued under subsection 96(1). The delegate determined that Ms. Tagirova's monthly wage was $1,020.50 and that Ms. Baranova's monthly wage was $1,042.46. For each complainant, the total amount of the unpaid wages awarded was less than the 2-month threshold, namely, $1,020.50 plus interest for Ms. Tagirova, and $1,042.46 plus interest for Ms. Baranova. The appellants say that Ms. Tagirova's average monthly wage was $170.08 and that Ms. Baranova's average monthly wage was $208.49. If one accepts the appellants' monthly wage figure for each complainant, the Section 96 Determinations must be varied since, for each complainant, the unpaid wage award exceeds the "2-months' unpaid wages" ceiling.

38. In evaluating this reason for appeal, it is important to review the basis for the issuance of the Corporate Determination. The complainants were originally living in Russia and eventually came into contact with ICN (initially through a third-party website) as they both desired to work in Canada as live-in caregivers. Ultimately, both found employment – through ICN – as live-in caregivers in Canada with separate families. ICN's liability to the complainants was fixed under section 10 of the *Act*. For ease of reference, I have reproduced subsection 10(1):

> 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.

39. The delegate determined (Reasons for the Corporate Determination, page R23): "Having reviewed the evidence, I find it clearly indicates that at least some (if not the main) services [ICN] provided fall within the scope of providing assistance with finding employment and/or information about employers seeking employees."

40. Subsection 10(3) of the *Act* states: "A payment received by a person in contravention of this section is deemed to be wages owing and this Act applies to the recovery of the payment." The delegate determined that Ms. Tagirova made four separate payments to ICN. However, she also determined that the first payment was made outside the statutory wage recovery period (see section 80) and that the fourth payment was made pursuant to a B.C. Provincial Court (Small Claims) order and, as such, neither payment was recoverable. The delegate determined that Ms. Tagirova paid $600 USD on February 28, 2008 and a further $450 USD on the same date. The delegate converted these payments to Canadian funds and thus ordered ICN to pay Ms. Tagirova $1,020.50 plus section 88 interest (see delegate's reasons, pages R37 – R38).

41. With respect to Ms. Baranova, the delegate determined that she made three payments, the first of which was outside the statutory wage recovery period. Ms. Baranova made a second payment of $580 USD on June 3, 2008, and a further $450 USD on June 16, 2008. The delegate ordered ICN to pay Ms. Baranova $1,042.46 in Canadian funds (converted from $1,030 USD) plus section 88 interest (see delegate's reasons, pages R39 – R40).

42. Although the amounts ICN was ordered to pay to the complainants were deemed to be wages (and are recoverable as wages) under subsection 10(3) of the *Act*, the complainants actually worked for (and were paid by) two separate families. Subsection 96(1) states that a corporate director or officer or is liable for "up to 2 months' unpaid wages for each employee". The delegate made the following findings with respect to the personal liability of Ms. and Mr. Gorenshtein to Ms. Tagirova (page R4):

> [ICN] was found in the Corporate Determination to have contravened Section 10 of the Act. As such, it was determined the fees totalling $1,020.50 paid by Ms. Tagirova to [ICN] on February 28, 2008 were wages and recoverable under the Act.
>
> As it was found in the Corporate Determination Ms. Tagirova paid a total of $1,020.50 in fees to [ICN] within the month of February 2008, I find this amount is a reasonable indicator of one month's wages for the purposes of determining the two months' wage liability pursuant to Section 96 of the Act.

43. The delegate made essentially identical findings, adjusting for the different amount in question, with respect to the personal liability of Ms. and Mr. Gorenshtein to Ms. Baranova (page R5):

> [ICN] was found in the Corporate Determination to have contravened Section 10 of the Act. As such, it was determined the fees totalling $1,042.46 paid by Ms. Baranova to [ICN] on June 3, 2008 and June 16, 2008 were wages and recoverable under the Act.
>
> As it was found in the Corporate Determination Ms. Baranova paid a total of $1,042.46 in fees to [ICN] within the month of June 2008, I find this amount is a reasonable indicator of one month's wages for the purposes of determining the two months' wage liability pursuant to Section 96 of the Act.

44. The present appeal presents an issue that, so far as I can determine, the Tribunal has never addressed, namely: "How does one calculate the 2-months' unpaid wage liability ceiling where the director or officer is held liable based on their status with a corporation that was an employment agency rather than an employer *per se*, and that did not pay any wages to the individual in question for 'work' performed for the agency directly?" The delegate simply held that the fees paid to ICN was "a reasonable indicator of one month's wages for purposes of determining the two months' wage liability pursuant to Section 96 of the Act" but did not explain *why* this was a reasonable – and more importantly, a legally correct – approach.

45. I acknowledge that the *Act* is largely, if not completely, silent on this point. However, the delegate seemingly simply concluded that since the impugned fees were paid, in each case, within a single calendar month, the total amount of the fees paid thus constituted a "monthly wage" for purposes of calculating the appellants'

section 96(1) liability. The delegate did not explain how she arrived at this result or what provisions of the *Act* might have dictated such a result. I am of the view that the appellants were entitled to a reasonable explanation regarding *how* the *Act* authorized the delegate to conclude that the amount of the fees paid in a calendar month constituted "one month's wages" for purposes of fixing their subsection 96(1) liability (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817). I am unable to understand why the delegate made her decision and thus I cannot determine whether her conclusion is within a range of acceptable outcomes (see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708).

46. It may be that there is a gap in the *Act* and a determination simply cannot be issued against a corporate director or officer in a situation such as the present case. It may be that the wages paid by the actual persons who employed the complainants is a proper foundation for determining the amount of the director's/officer's liability. There may be other possibilities and I express no view about how the matter should be resolved. I am seeking further submissions with respect to this matter.

47. The appellants' third reason for appeal is framed as follows: "The Determinations have been made contrary to the Tribunal's decision BC EST # D050/10." This latter decision was issued on May 13, 2010, by Tribunal Member Hart and by way of this decision, a determination issued against ICN on December 21, 2009, in favour of the complainants (in the amount of $2,169.02 on account of unpaid wages and interest plus two $500 monetary penalties), was cancelled. Tribunal Member Hart's formal order reads as follows:

> 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.

48. ICN, represented by Ms. and Mr. Gorenshtein, argued that the delegate was, or appeared to be, biased. Tribunal Member Hart rejected this assertion (at para. 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." ICN also argued that the delegate failed to make full and proper disclosure consistent with her obligation under section 77 of the *Act* and Tribunal Member Hart held in ICN's favour on this point (at paras. 42 and 43):

> 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.
>
> 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 [ICN] 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 [*sic*]. 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).

49. The appellants actually advance two separate points under the subheading that refers to Tribunal Member Hart's decision and the first point actually has nothing to do with Tribunal Member Hart's decision. First, they say:

> The Delegate was fully aware that the Appellants are husband and wife, and they were the only owners, directors, and employees of their company ICN Consulting. And somehow, the Delegate exercised her

> discretion in a way that resulted in the issuance of two Determinations, and the total amount of wages owing by the Appellants became more than two times greater than the amount found to be owed on the original [Corporate Determination] dated May 3, 2012.

50. This argument can be easily and summarily rejected. While it is true that the combined amount of the two Section 96 Determinations does exceed the amount owed under the Corporate Determination, it does not follow that the amounts actually due under the Corporate Determination have "doubled". As matters presently stand, the effect of the Section 96 Determinations is to make each of Ms. and Mr. Gorenshtein jointly and severally liable for the amount due under the Corporate Determination (as adjusted for additional section 88 interest), but the Director of Employment Standards cannot collect, in total, one penny more than the amount fixed by the separate Section 96 Determinations (plus additional accrued interest). Thus, for example, to the extent that the Director is able to collect monies from Ms. Gorenshtein on account of her personal liability under the Section 96 Determination issued against her, Mr. Gorenshtein's ultimate liability under the Section 96 Determination issued against him is accordingly reduced on a dollar for dollar basis. If the Director were to collect the full amount of the unpaid wages and interest owed to the complainants from Ms. Gorenshtein, Mr. Gorenshtein's liability under the Section 96 Determination issued against him would be reduced to zero.

51. The appellants' second argument relating to Tribunal Member Hart's decision is as follows:

> More importantly, the Determinations were made by the Delegate of the Director [name omitted] of whom, in the Tribunal's finding, it would not be reasonable to expect that "she could free her mind her perceptions of the evidence and the findings of fact she made". (see Decision BC EST # D050/10)…
>
> The fact that the same Delegate who once was found by the Tribunal to be unsuitable to deal with the Appellants' case was making determinations against the Appellants again, ordering each Appellant to pay exactly the same amount she had found they owed in her annulled determination, and thus confirming her own decision made in December 21, 2009 calls into question the legitimacy of these Determinations.
>
> The Appellants submits [*sic*] that it was in violation of the principles of natural justice, as well as contrary to the Tribunal's decision BC EST # D050/10 to assign Delegate [name omitted] to make determinations concerning the Appellants, which required using the Delegate's discretion. In Appellants' submission [*sic*], the Delegate when using her discretion could not free from her mind her perceptions of the evidence and the findings of fact she made.

52. The delegate who issued the Section 96 Determinations now under appeal before me also issued the ICN corporate determination issued on December 21, 2009, that was cancelled by Tribunal Member Hart. As noted above, Tribunal Member Hart ordered that the matter "be referred back to the Director of Employment Standards for a hearing or new investigation by a different delegate" and, indeed, a different delegate investigated the two complaints and issued the Corporate Determination that was eventually confirmed by Tribunal Member Stevenson (a decision that was subsequently confirmed on reconsideration and again by the B.C. Supreme Court on judicial review).

53. The findings made by this different delegate formed the basis of the wage liability fixed by the Section 96 Determinations. However, the delegate who issued the Section 96 Determinations did not make any *new* findings regarding the complainants' unpaid wage entitlements. Rather, these latter amounts were accepted for purposes of fixing the present appellants' liability under subsection 96(1). The delegate who issued the Section 96 Determinations was legally obliged to accept the unpaid wage determinations made by way of the Corporate Determination consistent with the principles of *res judicata* and issue estoppel. The key findings made with respect to the appellants' liability under subsection 96(1) concerned their status *vis-à-vis* ICN (and the appellants do not dispute their status) and the calculation of the 2-month wage ceiling (a matter that I have now referred back to the Director for further investigation). The delegate who issued the Section 96

Determinations did not make an independent, or indeed *any*, assessment of the *complainants'* unpaid wage entitlements. The delegate's task was to determine the portion of the complainants' unpaid wages (as previously fixed by the Corporate Determination) *that was payable by the appellants* under section 96. I am not persuaded that there was any breach of the principles of natural justice flowing from the fact that the delegate who issued the Section 96 Determinations was the same delegate who issued the first corporate determination against ICN that was later cancelled by Tribunal Member Hart.

Summary

54. The appellants have raised three separate arguments (the third of which has two components) in support of their appeal of the Section 96 Determinations issued against them. The appellants' first argument that the delegate erred in law and/or breached the principles of natural justice in "deciding that [ICN] has contravened Section 18 of the [*Act*] and Section 46 of the [*Employment Standards Regulation*]" is both factually and legally misconceived. This argument is entirely devoid of merit and must be summarily dismissed as having no reasonable prospect of succeeding.

55. The appellants' second argument concerns the calculation of the "2-month wage liability ceiling". With respect to this issue, I have found that the delegate failed to issue any reasons whatsoever to support her conclusion that the total amounts paid by each complainant to ICN ($1,020.50 by Ms. Tagirova in February 2008 and $1,042.46 by Ms. Baranova in June 2008), being fees improperly collected under section 10 of the *Act*, could be characterized as equivalent to one month's wages for purposes of calculating the appellants' subsection 96(1) maximum unpaid wage liability. I am seeking further submissions regarding this matter and will issue a final decision after these submissions have been filed.

56. The appellants' third argument concerns Tribunal Member Hart's decision issued on May 13, 2010, (BC EST # D050/10) where she cancelled an earlier corporate determination issued against ICN on December 21, 2009, and ordered a new hearing or investigation before a different delegate. In my view, neither of the appellants' two arguments advanced under this third reason for appeal has any reasonable prospect of succeeding and, therefore, must be summarily dismissed.

ORDERS

57. The appellants' reasons for appeal identified in its appeal submissions under the following subheadings:

> "I. The Delegate made an error in law and/or failed to observe the principles of natural justice by deciding that [ICN] has contravened Section 18 of the [*Act*] and Section 46 of the [*Employment Standards Regulation*]"; and
>
> "III. The Determinations have been made contrary to the Tribunal's decision in BC EST # D050/10"

are both summarily dismissed under subsection 114(1)(f) of the *Act* as having no reasonable prospect of succeeding.

58. The following issue, identified in the appellants' appeal submissions as follows:

> "II. The Delegate has calculated the Appellants' personal liability incorrectly"

is not, at this juncture, being summarily dismissed under subsection 114(1)(f) of the *Act* and I am directing that the parties provide further submissions with respect to this issue. The Tribunal will notify the parties by

letter regarding the timetable for the delivery of further submissions with respect to this matter and I will issue supplementary reasons for decision once these further submissions have been filed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal