



An appeal

- by -

ICN Consulting Inc. carrying on business as Caregivers.ru also known as Nannies
for Hire, also known as International Caregiversnetwork.ca
(“ICN”)

- 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: Carol L. Roberts

FILE No.: 2012A/61

DATE OF DECISION: September 27, 2012

DECISION

SUBMISSIONS

Tatiana Gorenshtein	on behalf of ICN Consulting Inc.
Ai Li Lim, Staff Lawyer, West Coast Domestic Workers' Association (WCDWA)	on behalf of Ms. Baranova and Ms. Tagirova
Mary Walsh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by ICN Consulting Inc. (“ICN”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued May 3, 2012.
2. On August 19, 2008, and November 29, 2008, respectfully, Maria Tagirova and Anna Baranova (“the employees”) filed complaints with the Director alleging that ICN had contravened sections 10 and 12 of the *Act* in charging them a fee for providing information about employers and/or obtaining employment for them.
3. On December 21, 2009, a delegate of the Director issued a Determination concluding that ICN had contravened sections 10 and 12 of the *Act* and found that the employees were entitled to wages. On May 13, 2010, following an appeal by ICN, the Tribunal cancelled the Determination and referred the matter back to the Director to be dealt with by a different delegate. (BC EST # D050/10).
4. In June 2010, ICN commenced civil proceedings in British Columbia Provincial Court against Ms. Tagirova to obtain payment of the remaining contract fee. In response, Ms. Tagirova asserted that the contract contravened section 10 of the *Act*, rendering the contract void. She counter-claimed for the return of the fees already paid to ICN. The Court concluded that ICN had not breached section 10 and that the contract was enforceable. The Court decided that the charges for services rendered were charges for consulting services ancillary to the goal of securing a visa for Ms. Tagirova under the Live-In Caregiver program (LICP) and the fact that obtaining a labour contact was a requirement under the immigration process did not make it synonymous with obtaining employment. ICN also commenced proceedings against Ms. Baranova in British Columbia Provincial Court for payment of the contract fee. Ms. Baranova also disputed the claim and counter-claimed for the fees paid to ICN. The Court has adjourned those proceedings.
5. On January 14, 2011, Ms. Tagirova filed a second Employment Standards complaint alleging that the amount the Court ordered her to pay ICN contravened section 10 of the *Act*, and sought recovery of the amount she had paid to date.
6. Following an investigation, the Director’s delegate determined that ICN operated as an employment agency as defined by the *Act* without an employment agency licence in contravention of section 12 of the *Act*. The Director’s delegate further found that the fees paid by the employees to ICN contravened section 10 of the *Act*, and constituted wages owing.

7. The Director dismissed ICN's argument that the Director should refuse to investigate the complaints because their business fell under federal jurisdiction and because the matter had already been decided. The delegate determined that the complaints fell within the jurisdiction of the *Act* and that the matter had not been already decided. The delegate also refused to exercise her discretion to stop investigating the complaints on the grounds that the matter had been resolved or the complaints were frivolous or not made in good faith.
8. The delegate concluded that the employees were entitled to wages and accrued interest in the total amount of \$2,273.97. The delegate also imposed two administrative penalties in the amount of \$500 each for contraventions of sections 10 and 12 of the *Act*, for a total amount payable of \$3,273.97.
9. The deadline for filing an appeal of the Determination was 4:30 pm on June 11, 2012. ICN submitted its appeal on July 17, 2012, alleging that the Director erred in law and failed to observe the principles of natural justice in making the Determination. Ms. Gorenshtein alleges that the Decision is "unreasonable and unfair. No jurisdiction".
10. This decision addresses only the timeliness of ICN's appeal and is based on the section 112(5) "record", the written submissions of the parties, and the Reasons for the Determination.

ISSUE

11. Whether or not the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

FACTS AND ARGUMENT

12. Ms. Gorenshtein claims that she advised the Tribunal on May 31, 2012, of ICN's intention to file an appeal and to explain that she was to undergo a surgical procedure on June 4, 2012. She contends that on June 11, 2012, she sent a fax to the Tribunal setting out ICN's intention to file the appeal. She says that she also spoke with the Tribunal administrator to explain that she was experiencing post-surgery pains, drowsiness, dizziness and nausea and as a result, was unable to complete the appeal submission. She asserts that she was told that all of the appeal documents would have to be submitted at one time. Ms. Gorenshtein included a note from her family physician confirming that, following a surgical procedure on June 4, 2012, she was prescribed a narcotic for pain. The physician further indicated that the narcotic could cause nausea, drowsiness and dizziness.
13. Ms. Gorenshtein contends that ICN at all times intended for the appeal to be submitted in advance of the appeal deadline and that she had communicated her intention to appeal the Determination to the Tribunal before the deadline had expired. She argues that ICN has a strong *prima facie* case for various reasons, including ICN's prior successful appeal to the Tribunal on the same matter, a conflict between the Director's Determination and the decision of the Provincial Court as well as other jurisdictional and other legal issues.
14. The delegate contends that ICN has given no compelling reasons which warrant extending the time period in which to file an appeal. The delegate contends that ICN has given no good reason for failing to meet the appeal deadline. She notes that although ICN received the Determination on May 4, 2012, well in advance of the appeal deadline, the appeal was not filed until July 18, 2012 [*sic*]. She says that ICN has given no reasons for not submitting the appeal form and a request for an extension for submitting the reasons.
15. In reply, Ms. Gorenshtein states that ICN always intended to appeal the Determination and notified the Tribunal of its intention before the appeal deadline.

16. The Director also submits that the appeal has little chance of success. The Director takes the position that all of the arguments and evidence were considered within the original investigation and the submission is merely an attempt to re-argue the case on its merits.
17. Counsel for the employees also contends that there are no compelling reasons to grant ICN an extension in which to file an appeal. She says that ICN filed its appeal more than 5 weeks after the appeal deadline, explaining that the lateness of the appeal was caused by a surgical procedure on June 4, 2012. Counsel for the employees notes that ICN has directors and staff members other than Ms. Gorenshtein who could have completed and delivered the appeal, or, alternatively, used its resources to obtain outside assistance. Counsel submits that ICN did not use its time or resources to prioritize submitting the appeal within the statutory time limit. Counsel further notes that ICN was aware of its circumstances and resource constraints by May 31, 2012, and ought to have organized its resources in such a way to meet the deadline.
18. Counsel for the employees also submits that ICN does not have a *bona fide* and genuine intention to file an appeal. Rather, she submits that it is the continuation of a pattern of conduct on the part of ICN that has unreasonably prolonged the dispute's resolution. She notes that ICN commenced civil proceedings against the employees in contravention of both the *Act* and case law. She says that, pursuant to section 82 of the *Act*, once a Determination is made requiring payment of wages, an employee may not commence civil proceedings to recover those wages unless the employee has obtained the Director's consent. She further notes that although ICN was successful in its action against Ms. Tagirova, the judge at Ms. Baranova's proceeding held that the Provincial Court did not have jurisdiction over Employment Standards disputes and adjourned ICN's proceedings against both Ms. Tagirova and Ms. Baranova. Counsel says that, in spite of Ms. Baranova's decision, ICN commenced new civil proceedings against the employees, arguing that the Employment Standards Branch was taking too long to resolve the dispute. The claim was dismissed on the grounds that the Provincial Court had already adjourned the case.
19. Counsel for the employees contends that ICN has made unsubstantiated accusations of evidence fabrication and abuse of process against Ms. Baranova in both the civil proceedings and the Employment Standards claim. She submits that the current appeal is on grounds that have already been litigated.
20. In reply, ICN disputes counsel's characterization of the court proceedings. Ms. Gorenshtein alleges that counsel has misrepresented the facts, that the civil proceedings were not adjourned and that the court did not decide that it had no jurisdiction over Employment Standards matters.
21. Counsel for the employees says that although Ms. Gorenshtein may have contacted the Tribunal's registry to communicate her intention to appeal, she never informed the employees about her intention.
22. Finally, counsel for the employees says that both employees will be unduly prejudiced by the granting of an extension given that the dispute spans a period of almost four years, a period during which ICN has "engaged in improper and intimidating tactics". She says both the delay and the tone of the dispute have caused the employees significant prejudice. She submits that two separate Employment Standards determinations have found in the employees' favour, with the first overturned solely on procedural fairness grounds. She says that the second Determination was carefully investigated and reasoned, addressed all the issues raised in the case and reached similar conclusions as the first Determination.
23. Finally, counsel for the employees argues that ICN has not established that it has a strong *prima facie* case, providing reasons that are vague and unsupported by facts.

ANALYSIS

24. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
25. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
26. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
27. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
1. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 2. there has been a genuine, ongoing *bona fide* intention to appeal the determination;
 3. the respondent party as well as the director has been made aware of this intention;
 4. the respondent party will not be unduly prejudiced by the granting of an extension; and
 5. there is a strong *prima facie* case in favour of the appellant.
- These criteria are not exhaustive.
28. I am not persuaded that the Tribunal should exercise its discretion and extend the time period for requesting an appeal.
29. The record demonstrates that ICN received the Determination on May 4, 2012. Although Ms. Gorenshtein says that she underwent a surgical procedure on June 4, 2012, she gives no explanation for ICN's failure to file an appeal before that day, a full month after ICN received the Determination. Furthermore, the record demonstrates that ICN has two directors, either of whom presumably could have prepared the appeal documents. Finally, as counsel for the workers notes, Ms. Gorenshtein does not explain why, in light of her upcoming surgical procedure, ICN could not have engaged counsel or sought assistance in preparing the appeal so that it could have been filed in a timely fashion.
30. I am not persuaded that ICN has demonstrated a genuine and ongoing and *bona fide* intention to file the appeal by the statutory deadline. Although Ms. Gorenshtein asserts that she telephoned the Tribunal on May 31, 2012, there is no evidence ICN contacted the Tribunal to indicate its intention to appeal the Determination until June 11, 2012, which was the last date the appeal could be filed. Furthermore, there is no evidence either the Director or the employees were aware of ICN's intention to file an appeal until notified by the Tribunal.
31. While I accept that the employees will be somewhat prejudiced if an extension is granted, I am unable to find that there will be undue prejudice given that much of that delay they have experienced to date is unrelated to this specific appeal.
32. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law
- the director failed to observe the principles of natural justice in making the determination; or
- evidence has become available that was not available at the time the determination was being made

33. I am not persuaded that ICN has a strong *prima facie* case on any of the statutory grounds of appeal. As this Tribunal has repeatedly pointed out, the Appellant has the burden of demonstrating one of the grounds of appeal.
34. I find the delegate's decision to be well reasoned and thorough. The delegate reviewed the material before the first delegate as well as additional evidence provided by the parties. She reviewed the court decisions and addressed all of the issues raised by ICN. ICN's appeal submissions consist of extensive and comprehensive arguments that appear to be nothing more than a restatement of the position it took before the two delegates during the investigation. An appeal is not an opportunity to re-argue a case already made.
35. Finally, I note that the original complaints were filed in 2008, approximately four years ago. Since then, no fewer than five decisions have been issued, two by the Director, two by the Provincial Court and one by the Tribunal. The protracted nature of the proceedings undermines the objective of providing for fair and efficient procedures for resolving disputes. In my view, ICN has failed to provide any compelling reasons why the deadline should be extended.

ORDER

36. Pursuant to section 109(1)(b) of the *Act*, I deny the application to extend the time for filing an appeal.

Carol L. Roberts
Member
Employment Standards Tribunal