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: November 12, 2015

DECISION

SUBMISSIONS

Tatiana Gorenshtein	on her own behalf
Michael Gorenshtein	on his own behalf
Natalie Drolet	counsel for Maria Tagirova and Anna Baranova
Mica Nguyen	on behalf of the Director of Employment Standards

OVERVIEW

1. This is a joint appeal filed by Tatiana Gorenshtein also known as Tatiana Gorenstein, a Director/Officer of ICN Consulting Inc., and Michael Gorenshtein also known as Michael Gorenstein, a Director of ICN Consulting Inc. The appeal is filed pursuant to subsections 112(1)(a) and (b) of the *Employment Standards Act* (the "*Act*").

The Corporate Determination and Related Proceedings

2. On May 3, 2012, a determination was issued against ICN Consulting Inc. carrying on business as "Caregivers.ru", "Nannies for Hire" and "International CaregiversNetwork.ca" ("ICN"). I shall refer to this determination as the "Corporate Determination". 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 section 88 interest.

3. The complainants' 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.

4. 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.

5. ICN unsuccessfully appealed the Corporate Determination (see BC EST # D024/14 issued April 16, 2014) and ICN's section 116 reconsideration application was refused (see BC EST # RD129/14 issued December 16, 2014). ICN then applied for judicial review of the Tribunal's decisions in the B.C. Supreme Court. Justice Silverman dismissed this latter application in oral reasons issued on July 10, 2015. On July 31, 2015, ICN filed a notice of appeal in the B.C. Court of Appeal and I understand that the hearing of this appeal has not yet been scheduled.

The Section 96 Determinations and the Present Appeal Proceedings

6. 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 under subsection 96(1) of the *Act*, each in the amount of $2,486.79, on account of unpaid wages and section 88 interest owed to the two complainants. Subsection 96(1) of the *Act* provides as follows: "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." 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. I shall refer to these determinations as the "Section 96 Determinations".

7. On June 4, 2015, Ms. and Mr. Gorenshtein (the "appellants") appealed the essentially identical determinations separately issued against them. 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 appellants have filed a joint appeal relating to both determinations, I am issuing a single set of reasons relating to both appeals. These reasons should be read in conjunction with my September 9, 2015, reasons issued in this same appeal (BC EST # D092/15, see below).

8. The appellants advance three basic reasons for appealing the determinations issued against them. 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". The appellants' third reason for appealing the Section 96 Determinations was stated 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. Member Hart referred the matter back to the Director for a new hearing or investigation. Subsequently, the Corporate Determination was issued.

9. On September 9, 2015, I issued reasons for decision (BC EST # D092/15) summarily dismissing the first and third of the appellants' reasons for appeal. In summarily dismissing the appellants' first reason for appeal, I stated the following (at para. 36):

> …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 [BC EST # D024/14]: "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…

10. As previously noted, I also summarily dismissed the appellants' third reason for appeal (see paras. 47 – 53 of my September 9, 2015, decision). In my view, this reason for appeal (which had two subcomponents) had no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*).

11. The appellants' second reason for appeal concerned the calculation of their personal liability under subsection 96(1) of the *Act*. At paras. 44 – 46 of my September 9 decision, I made the following observations relating to this reason for appeal:

> 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.
>
> 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).
>
> 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.

12. I issued the following order with respect to this reason for appeal (see para. 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.

13. I now have the respondent parties' submissions in hand and, accordingly, am issuing my reasons for decision relating to this third ground for appealing the Section 96 Determinations.

THE DETERMINATION – SECTION 96 LIABILITY

14. By way of the Corporate Determination, ICN was ordered to pay the complainants the total sum of $2,273.97 on account of unpaid wages and interest. It is important to note that this latter sum was ordered to be paid under section 10 of the *Act* (reproduced above) and not on the basis that ICN was the complainants' "employer". However, as set out in subsection 10(3), the fees the complainants paid to ICN were deemed to be, and were recoverable as, "wages" under the *Act*.

15. As detailed in the calculation schedule appended to the Corporate Determination, Ms. Tagirova filed her complaint on August 19, 2008, and thus the section 80 "wage recovery" period spanned the period from

February 20 to August 19, 2008. Ms. Tagirova made four payments to ICN but the first was made outside the wage recovery period. The fourth payment was made pursuant to a B.C. Provincial Court order and thus the delegate held that she was "unable to reverse the court award within this determination or under the Act". Ms. Tagirova made a $600 (U.S.) payment and another $450 (U.S.) payment, both on February 28, 2008. The two payments made in U.S. currency were converted to $1,020.50 in Canadian funds.

16. Ms. Baranova filed her complaint on November 29, 2008, and thus the section 80 "wage recovery" period spanned the period from May 30 to November 29, 2008. Ms. Baranova made three payments to ICN but the first was made outside the section 80 wage recovery period. Ms. Baranova made a $580 (U.S.) payment on June 3, 2008, and another $450 (U.S.) payment on June 16, 2008. The two payments made in U.S. currency were converted to $1,042.46 in Canadian funds.

17. Thus, the recoverable payments made by each complainant, deemed to be "wages" under subsection 10(3) of the *Act*, were all made in a single month – February 2008 (Ms. Tagirova) and June 2008 (Ms. Baranova).

18. The delegate's rationale for holding the appellants personally liable to each complainant is set out, below:

> Complainant: Maria Tagirova
>
> [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…
>
> The amount of wages found owing to Ms. Tagirova in the Corporate Determination is $1,020.50. As this amount does not exceed two months' wages, I find [each appellant] is personally liable for the full amount of the Corporate Determination plus interest to Maria Tagirova totalling $1,230.33.

19. The delegate applied the identical reasoning in finding each appellant personally liable to Ms. Baranova in the total amount of $1,256.76:

> Complainant: Anna Baranova
>
> [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…
>
> The amount of wages found owing to Ms. Baranova in the Corporate Determination is $1,042.46. As this amount does not exceed two months' wages, I find [each appellant] is personally liable for the full amount of the Corporate Determination plus interest to Anna Baranova totalling $1,256.75.

THE PARTIES' SUBMISSIONS

20. Section 10 of the *Act* speaks to the liability of the person (which, of course, could include a corporate person) who charges a fee for "employing or obtaining employment for the person seeking employment" or who "provid[es] information about employers seeking employees". Where the "person" who receives a fee contrary to section 10 is a corporation, there is nothing in the provision that specifically addresses whether

officers and directors of that corporation are also required to and, if so, to what extent, reimburse the person paying the fee where the corporation does not do so. Although subsection 10(3) states that payments made in contravention of subsection 10(1) are "deemed to be wages", and recoverable as such, there is nothing in section 10 that deems the party receiving the payments to be an "employer" for purposes of the *Act*. I should also reiterate that the appellants have not been held liable under section 10 as the "persons" who received the impugned payments; their liability is solely derivative based on their status as directors/officers of the person who did receive the fees (*i.e.*, ICN).

21. Subsection 96(1) of the *Act* creates a personal limited unpaid wage liability for directors and officers of an employer corporation and although subsection 96(4) extends this liability to directors and officers of any "associated employer" under section 95, section 96 is silent as to directors and officers of corporations held liable under section 10. Thus the conundrum posed by the present appeal: What is the statutory basis for holding such directors and officers liable and how does one determine the quantum of their liability?

The Appellants

22. The appellants submit that the delegate did not correctly calculate their section 96(1) liability. The appellants note that if the payments were averaged out over, say, a six-month period, their personal liability would be much lower.

23. The appellants also say that the section 88 interest component has not been correctly calculated, however, I do not see any merit to the appellants' argument on this point. The appellants say that the delegate did not properly account for the fact that for a period of time the Director was holding ICN funds in trust. However, a section 88 interest calculation is made independent of whether funds are held in the Director's trust account although, when funds are paid out of trust, any earned interest will be accounted for and properly credited to the party initially depositing the funds.

24. However, there is a much more fundamental issue to be addressed, namely, that identified at para. 44 in my September 9, 2015, reasons: "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?" Accordingly, I directed the parties to file written submissions of this question.

25. The appellants did not file any further submission beyond that appended to their original Appeal Form (the crux of which I summarized, above).

The Director

26. With respect to the question of calculating the monthly wage for purposes of subsection 96(1), the Director says "one possible way could be to calculate the complainants' average wages paid by the actual employer who used the appellants' services to find the complainants as employees". The complainants were hired under the auspices of the federal government's "Live-in Caregiver Program" and, as such, their employment was governed by the terms of a Labour Market Opinion issued by Service Canada. Under the terms of this latter document, each complainant was supposed to be paid an $8 hourly wage for a 40-hour workweek. Thus, according to the Director, the 2-month wage ceiling would be $2,773.34, an amount less than the amounts payable under the Section 96 Determination issued against each of the appellants.

27. However, the Director has not made any specific submission with respect to the more fundamental question, namely: How can subsection 96(1) apply in the present case given that ICN was not the complainants' *employer*?

28. Despite the Director's position that the wages payable under each Section 96 Determination falls within the 2-month unpaid wage liability ceiling, the Director nevertheless submits that the determinations should be cancelled. Noting that Section 96 is a "collections mechanism", the Director says that "[s]ince the issuance of the [Section 96 Determinations], [ICN] has deposited the wage amounts into the Director's Trust account" and, accordingly, the "Director submits there is no longer a statutory purpose for the [Section 96 Determinations]." That being the case, "the Director requests the [Section 96 Determinations] be cancelled".

The Complainants

29. Legal counsel for the complainants submits that the unpaid wage liability fixed by the Section 96 Determinations was correctly calculated. Counsel says that while the fees paid "were never earned", "there was a time when they should have been paid" and that this point was immediately when they were initially paid by the complainants to ICN. Counsel says that since the fees were unlawfully received by ICN, and as such were deemed to be "wages", they were immediately payable by ICN to the complainants.

30. While the foregoing submission speaks directly to ICN's liability, it does not address the appellants' personal liability. In this regard, counsel says that subsection 96(1) should be interpreted in a large and liberal manner consistent with section 8 of the B.C. *Interpretation Act*. Counsel also refers to the purposes set out in section 2 of the *Act* and says that imposing personal liability on corporate directors and officers will ensure that "employees in British Columbia receive at least basic standards of compensation and conditions of employment" (subsection 2(a)) and that it will "promote the fair treatment of employees" (subsection 2(b)).

31. With respect to the actual calculation of the director/officer liability in a particular case, counsel says that the calculation should not be based on the wages paid by the actual employer of the live-in caregiver but, rather, simply based on the amount of the fees actually paid. Counsel did not make a specific submission regarding the calculation of the 2-month ceiling but seems to be suggesting that so long as the fees were paid within a 2-month period they are wholly recoverable: "The payments in question in this case should have been paid over a period of time of a duration less than 2 months".

FINDINGS AND ANALYSIS

32. Although, in general, the provisions of the *Act* should be interpreted in a broad and generous manner so that its protections are extended to as many employees as possible, consistent with its status as benefits-conferring legislation (see *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27), it must be remembered that section 96 is an exceptional provision in that it creates a form of statutory vicarious liability. Accordingly, the Tribunal has consistently held that the section 96 director/officer liability provision must be strictly construed. In *Archibald*, BC EST # D090/00, the Tribunal observed (at page 5):

> Both our Court of Appeal and the Supreme Court of Canada have repeatedly stressed that employment standards legislation, being "benefits-conferring" legislation, should be interpreted in a "broad and generous manner" [*cf. e.g.*, *Helping Hands Agency Ltd. v. B.C.* (1995), 131 D.L.R. (4th) 336 (B.C.C.A.); *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986; *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27]. On the other hand, our Court of Appeal and the Supreme Court of Canada have both recognized that the imposition of a personal unpaid wage liability on corporate officers and directors is an extraordinary exception to the general principle that directors and officers are not personally liable for corporate debts. Accordingly, while the *Act* as a whole is to be interpreted in a broad and generous fashion, the provisions

> imposing a personal liability on corporate directors and officers should be narrowly construed [see *e.g.*, *Barrette v. Crabtree Estate*, *supra.*; *Re Westar Mining*, *supra.*; *Jonah v. Quinte Transport (1986) Ltd.* (1994), 50 A.C.W.S. (3d) 435 (Ont. S.C.)].

33. See also: *Tsai*, BC EST # D065/01; *Winters*, BC EST # D543/02 (reconsideration refused: BC EST # RD179/03); *Holt*, BC EST # D022/07; *Landy*, BC EST # D096/10; and *Taubeneck et al.*, BC EST # D006/12.

34. It is important to examine the precise language of subsection 96(1): "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". The appellants undeniably were ICN directors and officers when the complainants paid the impugned fees. However, the strict wording of the subsection also requires that each of the complainants was "an employee of the corporation". The complainants were *never* employed by ICN – their employment relationships were with the persons who engaged them as live-in caregivers. ICN acted as an intermediary with respect to those latter employment relationships but it has never been determined that ICN acted as an *employer*. ICN's liability flows from section 10 but the appellants have not been fixed with liability under section 10; rather, the appellants' liability is said to flow from subsection 96(1).

35. There is nothing in section 96 that extends subsection 96(1) liability to directors and officers of corporations held liable under section 10 of the *Act*. If the Legislature had intended to extend such liability it could have done so expressly – as it did with respect to directors and officers of corporations that are "associated employers" under section 95 (see subsection 96(4) of the *Act*) and, in a more limited sense, for directors and officers of talent agencies (see subsection 96(2.1) of the *Act*).

36. Of course, it would be open to the Legislature to extend subsection 96(1) liability to directors and officers of corporations held liable under section 10 but it has not done so. That being the case, I do not think it appropriate for the Director or this Tribunal to stretch the language of subsection 96(1) to past the breaking point in order to create the sort of liability that is reflected in the Section 96 Determinations. In the absence of express statutory language, I am of the view that, as the *Act* is presently written, directors and officers of corporations held liable under section 10 of the *Act* cannot be held personally liable for such amounts under subsection 96(1) of the *Act*.

37. Subsection 10(3) of the *Act* deems that fees paid in contravention of subsection 10(1) are "wages" and are recoverable under the *Act*. Part 11 of the *Act* sets out the various enforcement mechanisms that are open to the Director to recover unpaid "wages" crystallized into a determination and these include a lien priority provision (section 87), garnishing orders (sections 89 – 90), seizure of assets (sections 92 – 93), enforcing the determination as a B.C. Supreme Court order (section 91), common employer declarations (section 95), proceeding against a "successor employer" (section 97), and proceedings against corporate directors and officers (section 96). However, in my view, it does not follow that simply because section 10(3) of the *Act* deemed the impugned payments in this case to be "wages", and therefore subject to the full panoply of enforcement mechanisms available to the Director under Part 11 of the *Act*, the directors and officers of the corporation subject to section 10 liability (*i.e.*, the appellants) are also personally liable for those "wages" under subsection 96(1). There is nothing in either section 10 or section 96 that deems a corporation liable under the former provision to be an "employer" of the persons who paid the impugned fees. The personal liability of directors and officers fixed by subsection 96(1) of the *Act* is predicated on those individuals being (either in fact or by operation of the *Act*) to be directors and officers of either the "employer", or in the limited circumstances of subsection 96(2.1), of the talent agency.

38. Accordingly, for the reasons given above, it is my judgment that the Director has no present statutory authority to issue a determination under subsection 96(1) of the *Act* against directors and officers of a corporation that has contravened subsection 10(1) of the *Act*.

39. If I am incorrect, in the above conclusion, it must then be determined how the "2-month unpaid wage" liability ceiling is determined. The Director submits that, in this case, the wages fixed by the Labour Market Opinion issued by Service Canada should be utilized to determine the monthly wage. Although the Director does not advance this submission, presumably where the employment relationship did not take the form of a live-in caregiver arrangement, the monthly wage would be determined based on the employment contract between the person paying the section 10(1) fees and their ultimate employer.

40. As previously noted, I am unable to accept that section 10(1) liability extends to the directors and officers of the corporation receiving the impugned fees; however, if such liability does extend, it seems to me that the only sensible mechanism for determining the 2-month wage liability ceiling under subsection 96(1) is to utilize the monthly wage rate fixed by the actual employment contract between the person paying the fees and their ultimate employer.

41. Of course, subsection 10(1) liability is not predicated on there being a resulting employment contract and, in fact, whether the person paying the fee ultimately secures employment is entirely irrelevant (see, for example, *City of New Westminster*, BC EST # D518/98). Thus, if there is no employment contract, how is the 2-month wage liability to be determined? Counsel for the complainants says that since the fees paid are "wages", any fees paid within a 2-month period are recoverable. This suggestion strikes me as a reasonable default position where there is no employment contract.

ORDER

42. Pursuant to subsection 115(1)(a) of the *Act*, the Section 96 Determinations are both cancelled.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal