

An appeal

- by -

Child Link Services Inc. and Childline Identification Services Inc.  
("Child Link" and "Childline", respectively)

- 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

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 2003A/119 and 2003A/120

**DATE OF DECISION:** July 8, 2003

## DECISION

### OVERVIEW

This decision addresses two appeals made pursuant to Section 112 of the *Employment Standards Act* (the “Act”), one by Child Link Services Inc. (“Child Link”) and the other by Childlinc Identification Services Inc. (“Childlinc”), of a Determination issued on March 13, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Determination associated Child Link and Childlinc under Section 95 of the *Act* and concluded the associated entity had contravened the *Act* in respect of the employment of Brian Brecht, Darren Caulfield, Chad Ellsworth, Ryan Frischolz, Desiree Jones, Bryan King, Amy Smart and Nicola Smith (collectively, the “complainants”) and ordered the associated entity to cease contravening and to comply with the *Act* and to pay an amount of \$19,099.58.

Child Link and Childlinc have filed separate appeals and raised separate grounds of appeal. Child Link alleges the Director erred in law, failed to comply with principles of natural justice in making the Determination and that evidence has become available that was not available at the time of the Determination. Childlinc alleges the Director erred in law and failed to comply with principles of natural justice in making the Determination.

Child Link and Childlinc have requested an oral hearing. There is, however, nothing in the appeal that indicates an oral hearing is necessary and the Tribunal has decided the appeal can be properly addressed through written submissions.

### ISSUE

The issues raised by the appeal are:

1. Whether the Director erred in law in finding the complainants were employees of the associated entities for the purposes of the *Act*;
2. Whether the Director failed to comply with principles of natural justice in making the Determination by making findings against Child Link without evidence and contrary to the available evidence;
3. Whether the Director failed to comply with principles of natural justice in making the Determination by making findings against Childlinc without notice to that entity; and
4. Whether the Tribunal should accept new evidence which Child Link and Childlinc say was not available at the time of the Determination.

## FACTS

The complainants filed complaints with the Director alleging they had not been paid wages by their employer, which was variously described in the complaints as Childlinc Services Inc., Childlinc and Child Link Services Inc. The Determination set out the following background and facts not in dispute:

Child Link Services Inc. and Childlinc Identification Services Inc. (Child Link) are in the business of providing an Identification Program/Registry. Child Link mainly generates business via door-to-door solicitation and pays employees based on the number of families signed on to the program.

Brian Brecht, Darren Caulfield, Chad Ellsworth, Ryan Frischolz,, Bryan King, Amy Smart, Nicola Smith and Desiree Jones (the Complainants) worked for Child Link providing registry/enumeration type services at various times as stated in the attached calculation sheets.

The Determination considered and decided three issues: whether the complainants were employees; if so, whether they were owed wages; and whether Child Link and Childlinc were associated entities for the purposes of the *Act*.

The putative employer was represented by Michael Brett, who confirmed to the Director he was at one point a director/officer of Child Link. He stated he intended to resign as a director, but the papers were never filed. The record includes two corporate searches done by the Director on Child Link and Childlinc. The search information for Child Link shows three directors, Jama Ali, Mr. Brett and Ibrahim R. Dahir. Mr. Ali and Mr. Brett are also listed as officers. The search information for Childlinc shows two directors, Mr. Brett and Evan Brett. The searches provided information on file in the Corporate Registry as at February 27, 2003.

The Director associated Child Link and Childlinc for the following reasons:

- information received indicated Child Link and Childlinc were in the same business;
- both companies shared a common director, Michael Brett;
- Michael Brett and Ali Jama had been identified by all of the complainants as directors;
- information received indicated that Child Link had started a process to dissolve;
- Child Link and Childlinc conducted business through each other; and
- there was a legislative purpose for associating Child Link and Childlinc.

A number of the complainants had signed an “Independent Contractor Agreement” with another entity, which was identified in the contract as “The Childlinc to Safety and Education Association”. The record indicates the foregoing entity was a “not-for-profit corporation” incorporated in Ontario. The Determination examined the relationship between the complainants and the associated entities and concluded the complainants were employees under the *Act* and the associated entities were the employer.

The Director noted that no payroll records were kept by the associated entities. Based on an analysis of the available information, the Director found it probable each of the complainants worked 6 hours a day, five days a week during their term of employment.

Additional material has been provided with the appeal. This material consists of a provincial certificate of incorporation for Childline Information Services Inc., a document which appears to be a Notice of Directors for Child Link., a corporate search for Child Link (providing information as at March 27, 2003) and a letter of resignation from Child Link., dated May 23, 2002, signed by Mr. Brett.

## ARGUMENT AND ANALYSIS

Subsection 112(1) of the *Act* sets out the grounds for appeal to the Tribunal:

- 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
  - (b) *the director failed to observe the principles of natural justice in making the determination;*
  - (c) *evidence has become available that was not available at the time the determination was made.*

The burden is on Child Link and Childline to show an error in the Determination. An appeal to the Tribunal is not a re-investigation of the complaint nor is it simply an opportunity to re-argue positions taken during the investigation or fill in perceived evidentiary gaps. Child Link and Childline have indicated their appeals are grounded, in part, on new evidence becoming available that was not available at the time of the Determination (see paragraph 112(1)(c) of the *Act*). This ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. New evidence which an appellant seeks to submit with an appeal will be tested against the following criteria:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

The certificate of incorporation for Childline is not new evidence. The date of incorporation for Childline is in the record. The corporate search information on Child Link provided to the Director on March 6, 2003, and placed on the record, shows Mr. Brett as a director and officer of Child Link as of February 27, 2003. The corporate search filed with the appeal, which was acquired on April 3, 2003 and showing information as at March 27, 2003, shows different information and is inconsistent with the information in the record. It shows Mr. Brett as an officer of Child Link but not as a director. No explanation for that discrepancy is provided in any of the appeal submissions. The letter dated May 23, 2002, which purports to be Mr. Brett's resignation as an officer of Child Link, is inconsistent with both corporate searches.

In any event, neither piece of information is relevant to the issues raised in these appeals as there is no issue at this time of Mr. Brett's liability as a director or officer of Child Link and Childlinc. The same applies to the document which appears to be a notice of change of directors for Child Link. As none of the new evidence satisfies the test for allowing new evidence, I will not consider it in this appeal.

I reject the argument that the Director erred in law in concluding the complainants were employees under the *Act*. Child Link and Childlinc raise several arguments in support of this ground of appeal. Mainly, these arguments amount to little more than a challenge to findings of fact made by the Director and a re-assertion of allegations of fact that were not accepted by the Director during the investigation. I shall comment on each of them.

Child Link and Childlinc say the complainants were recruited and hired to work on a contract basis for commission. They signed independent contractor agreements to work on commission. The Director correctly states that persons cannot contract out of the requirements of the *Act*, that whether a person is an employee under the *Act* is decided on an assessment of the relationship between that person and the putative employer, tested against the definition of employee in the *Act* and its objects and purposes, aided by tests developed at common law for assessing the relationship under consideration. There is no magic to the complainants being employed on a pure commission basis. The *Act* contemplates that persons employed on a pure commission basis can be employees. Like any other employee, a commissioned employee is entitled to be paid minimum wage. The amounts found owing to the complainants, in the absence of any other record, was based on a reasonable assessment of hours worked, paid at minimum wage.

Child Link and Childlinc acknowledge placing ads for persons to work "piece rate compensation", but assert there was no evidence stating those persons would be paid \$14.75 an hour. Even if I agree to that assertion (one which is not supported by the material on the record) it is completely irrelevant to whether Director erred in finding the complainants were employees under the *Act* or to any other issue raised in the appeals.

Child Link and Childlinc say that Mr. Brett gave evidence that all materials used by the complainants were provided to them at their expense and says there is no "independent" evidence to the contrary. The Director found that the employer owned all of the equipment and provided all the materials necessary to perform the work. There was evidence from the complainants to support this finding. The suggestion by Child Link and Childlinc is that none of the evidence provided by the complainants was worthy of belief. No basis for such an assertion has been established.

Child Link and Childlinc say the assertion by the Director that the method of payment and terms of employment were set by Child Link and Childlinc is unsupported by the evidence. That suggestion flies in the face of any rational view of the evidence, which includes the so-called "Independent Contractor Agreement" and the evidence from the complainants.

Finally, Child Link and Childlinc say the finding that the complainants "did not assume any risk" is wrong because some of the complainants travelled, at their own cost, to Vancouver in response to the ads placed by Child Link. There are two responses to that argument. First, it does not conform to the available evidence. Many of the complainants indicated they were asked to pay a \$100.00 deposit on a plane ticket on the assurance that money would be reimbursed to them. Second, the comment about "risk of loss" relates to the risk of losing the costs invested in the business. It does not relate to costs an

individual may incur to acquire a job, which appears to be the sole reason for any of the complainants to have bought a plane ticket to Vancouver.

Child Link and Childlinc say the Director ignored evidence that one or more of the complainants was in control of Child Link Services Inc. The issue before the Director was whether the complainants were employees of Child Link and Childlinc. Mr. Brett alleged that three of the complainants “became and signed on as directors of the organization” and that “most” of the complainants “not only controlled the business which they now seek compensation from, but also handled the money for that business”. Those two comments, and reiterations of those comments, amount to the “evidence” which it is now suggested the Director ignored. It would take considerably more information than has been provided by Mr. Brett to show the Director erred or that any of the complainants were sufficiently “in control” of the business that they ceased being employees under the *Act*.

As noted above, the burden is on Child Link and Childlinc to show the Director erred in finding the complainants were employees and they have failed to satisfy that burden.

Childlinc also argues the Director failed to comply with principles of natural justice in making the Determination. Childlinc argues that the Director associated Child Link and Childlinc without notice to Childlinc and without providing any opportunity to that entity to give evidence or make submissions on that matter. In reply, the Director submits:

Mr. Brett was very aware of the investigation and the potential personal liability.

That submission misses the point entirely. This aspect of the appeal has nothing to do with the investigation of the complaints against Child Link or the potential personal liability of Mr. Brett as a director and/or officer of that corporation and everything to do with fairness in the process. I can see nothing in the record notifying Mr. Brett that the Director was contemplating associating Childlinc with Child Link. On the face of the material, there appears to be some evidence and some valid arguments against a finding under Section 95 of the *Act* which Mr. Brett was unable to provide or raise because of the procedure adopted by the Director.

I agree with this aspect of the appeal. The decision to associate the two entities is set aside.

Childlinc has asked that the issue of association be referred back to the Director and that Childlinc be given the opportunity for a full hearing on this issue. It is appropriate to refer the matter back to the Director, but I am unable to instruct the Director how the matter will be handled. Suffice to say the Director must provide the parties with an opportunity to be heard on this issue and otherwise comply with principles of natural justice.

In the circumstances, it is not appropriate to cancel the Determination against Child Link or to refer any matter in the Determination affecting that company back to the Director. I find that Child Link is the employer of the complainants and exercise my authority under Section 115 of the *Act* to vary the Determination to show the name Child Link as the employer, confirm that the complainants are employees of the employer under the *Act* and refer the issue of whether Child Link and Childlinc are associated entities under Section 95 of the *Act* back to the Director. The Director has the authority following further investigation to vary the Determination to include Childlinc if that is justified by the further investigation.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated March 13, 2003 be varied to show the employer as Child Link Services Inc., that the varied Determination be confirmed in the amount of \$19,066.58, together with any interest that has accrued pursuant to Section 88 of the *Act*, and the issue of whether Child Link Services Inc. and Childline Identification Services Inc. are associated entities under Section 95 of the *Act* be referred back to the Director.

---

**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**