Applications for Reconsideration

- by -

Maria Tagirova

- and –

Anna Baranova

(Collectively, the "Applicants")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE Nos.: 2015A/173, 2015A/174, 2015A/175 & 2015A/176

DATE OF DECISION: April 11, 2016

DECISION

SUBMISSIONS

Juliana Dalley	counsel for Maria Tagirova and Anna Baranova
Tatiana and Michael Gorenstein	on their own behalf
Mica Nguyen	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application brought by Maria Tagirova and Anna Baranova (the "Applicants") pursuant to section 116 of the *Employment Standards Act* (the "*Act*"). The Applicants challenge a decision of the Tribunal issued on November 12, 2015, under BC EST # D121/15 (the "Final Appeal Decision").

2. The Final Appeal Decision followed a joint appeal by Michael and Tatiana Gorenshtein, also known as Michael and Tatiana Gorenstein (collectively, the "Gorenshteins"), of determinations issued by a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on April 27, 2015 (the "Determinations").

3. The Determinations ordered the Gorenshteins, in their capacity as directors and/or officers of ICN Consulting Inc., carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International CaregiversNetwork.ca ("ICN"), to pay the sum of $2,486.79 in wages and interest for the Applicants.

4. I have before me the Gorenshteins' Appeal Form and submissions, the Delegate's Determinations and Reasons for them, the record delivered to the Tribunal by the Director pursuant to section 112(5) of the *Act*, an initial decision of the Tribunal in the appeal proceedings issued on September 9, 2015, under BC EST # D092/15 (the "First Appeal Decision"), further submissions in the appeal delivered to the Tribunal on behalf of the Applicants and the Director, the Final Appeal Decision, the application for reconsideration and supporting submissions, as well as submissions from the Director and the Gorenshteins.

5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

FACTS

6. I adopt the relevant facts set out in detail in paragraphs 2 – 13 of the Final Appeal Decision. A brief summary follows.

7. On May 3, 2012, the Director issued a determination against ICN (the "Corporate Determination") in which the company was ordered to pay wages found to be owed to the Applicants pursuant to section 10 of the *Act* in the amount of $2,273.97.

8. ICN appealed the Corporate Determination, unsuccessfully. It was also unsuccessful in subsequent applications to the Tribunal pursuant to section 116 of the *Act*, and to the Supreme Court of British Columbia by way of judicial review. I understand from the materials tendered by the parties that ICN has filed an appeal of the judicial review judgment with the British Columbia Court of Appeal, and that a hearing of the appeal is scheduled for later this year. I am unaware that any judgment has been rendered in that appeal.

9. In the meantime, the Delegate issued the Determinations against the Gorenshteins personally. They were issued pursuant to section 96 of the *Act*. Section 96 operates so as to assist the Director in collecting amounts found to be owed in determinations like the Corporate Determination. Subsection 96(1) reads:

> 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.

10. The Gorenshteins appealed the Determinations on several grounds. In the First Appeal Decision, the Tribunal summarily dismissed all the grounds of appeal, save for one, on the basis that they had no reasonable prospect of succeeding. The ground of appeal that the Tribunal was not disposed to dismiss summarily was an assertion by the Gorenshteins that the Delegate had calculated their personal liability incorrectly. The Tribunal requested, and subsequently received, further submissions regarding this discrete issue. It then issued the Final Appeal Decision.

11. In the Final Appeal Decision, the Tribunal noted that ICN's liability under the Corporate Determination arose from an application of section 10 of the *Act*. Section 10 reads as follows:

> 10 (1) A person must not request, charge or receive, directly or indirectly, from a person seeking employment a payment for
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> (a) employing or obtaining employment for the person seeking employment, or
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> (b) providing information about employers seeking employees.
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> (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.
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> (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.

12. The nub of the issue that concerned the Tribunal was captured in paragraphs 20 and 21 of the Final Appeal Decision, which reads:

> 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 the 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).

> 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?

13. The Tribunal decided that the Determinations had been issued without statutory authority. The substance of the Tribunal's rationale for this conclusion appears in the following excerpts from paragraphs 35 – 37 of the Final Appeal Decision:

> 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*).
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> 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*.
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> ...[I]n 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.

14. Alternatively, the Tribunal decided that if the Gorenshteins were liable to pay the Applicants wages pursuant to section 96 of the *Act*, the amount owing could be calculated having regard to the monthly wage rate established in any employment contract entered into by an ultimate employer and the Applicants or, if no such contract was entered into, the amount paid in fees by the Applicants to ICN in any two month period.

15. In the result, the Tribunal cancelled the Determinations.

ISSUES

16. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

DISCUSSION

17. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 of the *Act*, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

18. The reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

19. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112 of the *Act*.

20. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.

21. 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 Tribunal 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 appeal decision which are so important that they warrant its reconsideration.

22. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

23. In my opinion, a reconsideration of the Final Appeal Decision is warranted. The Applicants have raised important issues regarding the procedure followed by the Tribunal, and the proper interpretation of sections 10 and 96 of the *Act*.

24. A ground for reconsideration asserted by the Applicants is that the Tribunal issuing the Final Appeal Decision acted unfairly, and erred in law, when it decided that section 96 provided no statutory authority for the imposition of personal liability on the Gorenshteins for payment of the wages found to be owed in the Corporate Determination. The Applicants argue that the only issue that was to be addressed in the Final Appeal Decision was whether the Delegate had calculated the Gorenshteins' personal liability incorrectly. They say that the Gorenshteins did not dispute that personal liability could be imposed on them under section 96 of the *Act*. Accordingly, the hearing was unfair because the appeal was decided based on the consideration of a legal question that was not raised by the parties, with the result that the Applicants had no adequate opportunity to research and prepare submissions concerning the matter.

25. I decline to accept the Applicants' argument on this point. While it can be said that the Gorenshteins' submissions in the appeal were directed to the method the Delegate employed to calculate their personal liability under section 96, the broad basis for their appeal was that the Delegate had erred in law in applying that section to them when she issued the Determinations. In my view, the issue of the application of section 96 to the Gorenshteins was, therefore, before the Tribunal in the appeal proceedings, and so it was open to the Tribunal, when faced with the question of the liability of the Gorenshteins personally under that section, to consider whether the section could be employed to impose liability on them at all, as a matter law.

26. I am also of the opinion that it is incorrect to say the Applicants had no notice from the Tribunal that the application of section 96 to the Gorenshteins was a matter of concern. In paragraphs 44 and 46 of the First Appeal Decision, the Tribunal said this:

> 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.
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> ...
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> 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.

27. It is clear from these comments that there were several matters of concern relating to the application of section 96 on which the Tribunal was seeking submissions. One of them was a concern that there might be a "gap" in the *Act* which might lead the Tribunal to conclude that section 96 could not be relied upon, at all, for the purpose of imposing personal liability on the Gorenshteins in the circumstances presented. In my view, there was, therefore, ample notice to the Applicants in the First Appeal Decision that this was a legal issue to which the Tribunal was alive, and that it would be addressed once the Tribunal gave consideration to any further submissions received. Moreover, the Final Appeal Decision, at paragraph 30, alludes to the fact that counsel for the Applicants did, indeed, deliver a submission containing a legal rationale for the imposition of personal liability on the Gorenshteins pursuant to section 96 of the *Act*.

28. In the circumstances, I am not persuaded that the Tribunal acted unfairly, or otherwise erred in law, when it addressed the issue of the Gorenshteins' personal liability under section 96 in the Final Appeal Decision.

29. A second argument advanced by the Applicants is that the Tribunal erred in law in the Final Appeal Decision when it concluded that section 96 did not impose personal liability on the Gorenshteins for the wages found to be owed to the Applicants by ICN in the Corporate Determination.

30. The Applicants rely on the statement of the Supreme Court of Canada in *Rizzo v. Rizzo Shoes* [1998] 1 SCR 27 to the effect that statutory interpretation cannot rest on the wording of legislation alone. Instead, a contextual analysis must be employed, to ensure that the words are read in a way that is in harmony with the objects of the statute. The Applicants also refer to section 8 of the British Columbia *Interpretation Act*, which requires that an enactment "must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

31. I agree entirely with these statements of principle.

32. The core of the Applicants' contention, however, is that the Tribunal fell into error by applying a literal analysis of the words in subsection 96(1), and failing to apply the language in a manner that was in accord with the broader scheme, objects, and purpose of the *Act* as benefits-conferring legislation.

33. The Applicants submit that since subsection 10(3) of the *Act* deemed the unlawful fees paid to ICN to be "wages", and because the existence of "wages" means there must be an "employer", it follows that ICN must be the Applicants' "employer" for the purpose of applying section 96 of the *Act*.

34. I disagree with this submission.

35. It is important to remember that subsection 10(3) *deems* the fees paid by the Applicants to ICN to be "wages" for the purposes of the *Act*. This is important, in my view, because it leads me to conclude that an obligation in respect of "wages" imposed by section 10 need not arise, out of necessity, from an employment relationship. Indeed, in this case it clearly did not.

36. The effect of subsection 10(3), in this case, was to render ICN liable to repay, as "wages", the fees paid by the Applicants. In my opinion, it did not, in addition, require one to conclude that the Applicants were the employees of ICN.

37. The definition of "employee" in section 1 of the *Act* contains several listed items. While the use of the word "includes" expresses an intention that the definition is to be viewed expansively, the focus is on persons who either are, or are expected to be, performing work for others. The section 1 definition of "work" states that it "means the labour or services an employee performs for an employer...." There is, in my view, nothing in these definitions which suggests that the term "employee" must include persons like the Applicants in this case, who have become entitled to deemed "wages" under subsection 10(3), but who did not perform any work for ICN and, indeed, were never expected to perform any work for that company.

38. The definition of "employer" has a similar focus. It includes a person "(a) who has or had control or direction of an employee, or (b) who is or was responsible, directly or indirectly, for the employment of an employee."

39. Subsection 96(1) of the *Act* states plainly that officers and directors are not personally liable for "wages", standing alone, but "wages of an *employee of the corporation*". If one interprets this phrasing in light of the definitions in section 1 to which I have referred, the inference to be drawn is that the "wages" officers and directors are personally liable for are those that are payable to a person who is an "employee" as defined. In my opinion, it would subvert the definition of "employee" in section 1 of the *Act* if persons such as the Applicants, who in no compelling way can be construed to fall within its ambit, were to be deemed to be employees pursuant to section 96 merely as a result of a finding that they are owed monies deemed to be "wages" under subsection 10(3).

40. The manner in which section 96(1) is phrased also supports the meaning I have ascribed to it. In particular, the use of the word "earned" in the subsection suggests that the "wages" referred to in it are payable in return for "work". The liability for wages that "should have been paid" can be construed to refer to the obligation of an employer to pay employees' wages on prescribed paydays as set out in section 17 of the *Act*, or on the termination of employment as stipulated in section 18. In addition, the formula for the calculation of the personal liability of officers and directors – up to two months' unpaid wages – implies an ongoing

employment relationship based on the performance of work in return for the payment of wages, and not a scenario where the "wages" are fees paid by a person seeking employment under section 10.

41. I am also of the view that the liability imposed by section 96(1) should be narrowly construed. The Applicants argue that such an approach is inconsistent with the tenor of recent authorities and undermines the remedial purpose of the *Act*. However, in paragraph 32 of the Final Appeal Decision, the Tribunal expressly acknowledged that the *Act* should be interpreted in a broad and generous manner so that its protections might be extended to as many employees as possible, in keeping with its status as benefits-conferring legislation. Despite this, the Tribunal decided, correctly in my opinion, that a narrow construction of subsection 96(1) was necessary because it creates an extraordinary exception to the general principle that officers and directors of corporate bodies are not personally liable for corporate debts. Several other decisions of the Tribunal have supported this interpretation (see *Archibald*, BC EST # D090/00; *Tsai*, BC EST # D065/01; *Winters*, BC EST # D543/02; *Holt*, BC EST # D022/07; *Landy*, BC EST # D096/10; and *Taubeneck*, BC EST # D006/12). Moreover, it is obvious from a reading of section 96, and the *Act* as a whole, that the legislature did not intend to make officers and directors liable, in a general way, for all the "wages" owed by a corporation. The two months' wage limit is in itself a restrictive provision, and subsection 96(2) establishes other exemptions.

42. For the reasons I have set out, I am not persuaded that the Tribunal's interpretation of subsection 96(1) that appears in the Final Appeal Decision is incorrect, either because it is inconsistent with an appreciation of the remedial nature of the statute, or at all.

43. There are other matters alluded to in the submissions delivered by the parties which I will now address.

44. In a submission delivered at my request, the Gorenshteins assert that there are no unpaid wages in this case. This submission seeks to challenge the validity of the Corporate Determination, a question which is not properly before me.

45. The Gorenshteins also submit that it is an abuse of process for the Applicants to be represented by counsel, allegedly without charge, while the Gorenshteins have represented themselves. They argue that this state of affairs has resulted in unnecessary litigation, and excessive expense.

46. While one might hope that all litigants would receive the benefit of legal advice, the mere fact that one party is represented, and another is not, is no evidence of an abuse of process. Moreover, while the proceedings involving these parties have been protracted, I am not persuaded that a bare assertion of abuse by the Gorenshteins is sufficient to outweigh the general principle that parties have the right to access the procedures made available to them within the statutory regime established by the *Act*.

47. A submission on this application received from the Delegate refers to its request made to the Tribunal during the appeal proceedings that the Determinations be cancelled. The request was based on the Delegate's advice that as ICN had deposited the wage amounts found to be owed into the Director's trust account there was no longer a statutory purpose for the Determinations.

48. On this point, I agree with the reply submission of the Applicants. Notwithstanding the wages have been deposited, the Applicants' counsel advises that none of the money has been paid to the Applicants. She asserts, and I can only assume, that the reason for this is that ICN's appeal in the Court of Appeal has yet to be decided on the merits. In that sense, at least, the wages remain unpaid.

49. More importantly, the Applicants' challenge to the Final Appeal Decision has raised a serious question relating to the appropriate interpretation of sections 10 and 96 of the *Act*, which may be said to transcend the immediate concerns of the named parties in this proceeding. Put differently, the Applicants have raised a question of law which is so significant that the Final Appeal Decision must be reconsidered for correctness, not only because of its importance to the parties, but also because it may have implications for future cases.

50. For these reasons I decline to accede to the request of the Delegate to cancel the Determinations on the basis that the wages owed have been deposited into the Director's trust account.

ORDER

51. Pursuant to section 116 of the *Act*, I order that the Final Appeal Decision, BC EST # D121/15, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal