An Application for Reconsideration

- by -

Prince George Nannies and Caregivers Ltd.

- 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: Yuki Matsuno

FILE No.: 2009A/096

DATE OF DECISION: October 21, 2009

DECISION

SUBMISSIONS

Taiho Krahn	on behalf of Prince George Nannies and Caregivers Ltd.
Alan Phillips	on behalf of the Director of Employment Standards

OVERVIEW

1. Prince George Nannies and Caregivers Ltd. ("PG Nannies" or the "Appellant") applies for reconsideration of a decision issued on June 2, 2009 by the Employment Standards Tribunal (the "Tribunal"). This decision (the "Original Decision") was issued with respect to an appeal by PG Nannies of a determination issued by a delegate of the Director of Employment Standards (the "Director") on February 18, 2009 (the "Determination"). The Determination concerned PG Nannies' breach of the *Employment Standards Act* (the "*Act*") in relation to fourteen caregivers to whom PG Nannies rendered services.

The Determination

2. In the Determination, a delegate of the Director (the "Delegate") noted that PG Nannies is licensed to operate as an employment agency under the *Act*. Its current licence expires January 20, 2010 and it has been licensed to operate since November 20, 2005.

3. The Delegate framed the issues to be decided in the Determination as (1) whether PG Nannies charged fees to a person seeking employment, contrary to the provisions of the *Act* and (2) if so, whether wages were owed, and if so how much. Next, the Delegate outlined the operation of PG Nannies as he understood it from information gathered from PG Nannies' representative (Mr. Krahn), information posted on PG Nannies' website, and from documents submitted by PG Nannies. The Delegate noted that PG Nannies enters into a contract with each caregiver, which establishes a contractual relationship between the caregiver and PG Nannies (the "Contract"). The Delegate then laid out most if not all of the Contract, including (1) the services PG Nannies is to provide to the caregiver; (2) the fee to be paid by the caregiver to PG Nannies in exchange for the services; (3) provisions regarding termination of the contract and refunds; and (4) provisions regarding the caregiver's obligation to provide personal information to PG Nannies some of which would be posted on the PG Nannies website to advertise the caregiver's availability for employment. The Delegate also referred to other documents provided by PG Nannies, including an Application Checklist and Agreement and Authorization form, and an Advertising Fee Payment Agreement, both of which dealt with the fees to be paid by the caregivers to PG Nannies.

4. The Delegate then outlined PG Nannies' arguments: (1) that the services it provides to caregivers are not prohibited by the *Act*, those services being: advertising, resume preparation, image consulting, interview preparation, immigration settlement services, and liaison services between the caregiver and the employer; (2) in *Efren (Sonny) R. Serion and Josefina Serion operating as Terrens Nannies,* BC EST # D378/01, the Tribunal distinguished between two agreements, one for obtaining employment and the other for immigration services. Although a limitation issue was determinative, the Adjudicator would have set aside the Determination for the repayment of the fees for the immigration services. Therefore, it could be inferred that services such as advertising, resume preparation, interview preparation, and immigration settlement do not breach the *Act*; and (3) the applicable time period should properly be October 23, 2007 to April 23, 2008.

5. The Delegate noted the provisions of section 10 of the *Act*, which reads as follows:

> (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.

6. The Delegate then made the following findings:

- It is a contravention of Section 10 for a person to charge a fee to a person seeking employment.
- The Contract depicts how PG Nannies operates.
- The applicant caregiver agrees to pay a fee, as set out in the Contract, for PG Nannies to communicate the availability of the nanny for employment. The payment of the fee is a precondition of PG Nannies' attempts to place the applicant caregiver with the employer.
- The Delegate cites several dictionary definitions of "advertise" and notes that the *Act* is silent on the definition of "advertisement". He finds that the fees paid by the caregivers to PG Nannies are not for "advertising" as contemplated by section 10 of the *Act*.
- The applicant caregiver is not "the person who placed the advertisement" as specified by the *Act*; rather, it is PG Nannies that places the details about persons seeking employment for the benefit of its clients on its own website. The "caregiver profile" posted on the PG Nannies website is intended to draw prospective employers as clients into PG Nannies. The profile is not placed on the website by the caregiver.
- Under the guise of charging a fee for "advertising", PG Nannies is charging a fee to the applicant caregiver who is seeking employment. That fee is a placement fee and is contrary to section 10(1)(a) of the *Act*. Any costs incurred by PG Nannies in placing a nanny with an employer are business costs, not to be recovered from the caregiver who is seeking employment.
- Further, there is no evidence of any caregiver requesting to be provided with the following services: resume preparation, image consulting, interview preparation, immigration settlement services, and liaison services between employer and nanny. Nor is there any evidence of a fee schedule outlining the services available and the fee charged for each service. The evidence, instead, points to PG Nannies having "merely "bundled" together a number of activities which it has identified as "services" and then charged a pre-determined, and non-negotiable, fee for this."

- The Delegate found it appropriate to calculate PG Nannies' wage liability, pursuant to section 80 (1) of the *Act*, for the period October 24, 2007 to April 23, 2008. He then went on to find specific amounts owing to each of 14 nannies with whom PG Nannies had contracts during the applicable time period. The Determination also levied an administrative penalty of $500.00 pursuant to section 29 of the *Employment Standards Regulation*.

The Original Decision

7. In the Original Decision, the Tribunal member (the "Member") framed the issues to be decided in this way:

> (i) Did the Director err in law in determining that the fees charged by PG Nannies to the Caregivers for the services it provides falls within the prohibition in Section 10(1) of the *Act* ("No charge for hiring or providing information")?
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> (ii) Did the Director err in law in concluding that the advertising "service" of PG Nannies in the form of the publication on its website of the Caregivers profiles, particulars and pictures does not fall within the exception in Section 10(2) of the *Act*?
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> (iii) Should the Director have apportioned or allowed any part of the fees charged by PG Nannies to the Caregivers for the "services" allowable under the *Act*?
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> (iv) Did the Director err in calculating the wages owing to Ms. Galasi and Ms. Narca?

8. The Member undertook a thorough and exhaustive review of the Determination as well as the positions of the parties. He noted that PG Nannies "does not dispute the accuracy of the evidence as described in Section IV of the Reasons for the Determination" with a few exceptions of which he takes note. The arguments of PG Nannies that were before the Member were as follows: (1) the fees it charged the caregivers for "advertising, resume preparation, image consulting, liaising, and immigration settlement" do not contravene section 10(1) of the *Act* according to the Employment Standards Branch Fact Sheet and Guidelines and *Serions*, supra, which "acknowledged the legitimacy of an agreement for immigration services"; (2) the fees it charges the caregivers is permissible under section 10(2) of the *Act* because it falls under the meaning of "advertising" in that section; that a caregiver entering into a contract with PG Nannies is in effect engaging PG Nannies to place an advertisement, which is not dissimilar to an individual engaging a newspaper to advertise her availability for work; further, just because PG Nannies is an employment agency it is not precluded from providing other services, including advertising; (3) PG Nannies says the fee it charges caregivers is not a placement fee, contrary to the findings in the Determination; instead, the fee is only for advertising and settlement services which are requested by the caregivers and provided before and after placement occurs and nothing in the *Act* disentitled PG Nannies to charge for the services; (4) in the alternative, if some of the fee contravenes the *Act*, a portion of the fee is allowable and therefore the Determination should be varied accordingly; further, PG Nannies should not be disentitled from the fee because it did not use separate contracts for the advertising and settlement services; (5) the Delegate was wrong in finding there was no fees schedule associated with the specific services it provides or an indication of what the services would cost the caregivers – the Contract indicated the fees and the payment schedule; (6) the Delegate was wrong in finding no evidence of caregivers requesting PG Nannies to provide any services – the caregiver's signature on the Contract is evidence that she has requested the services, even though it admits that the caregiver cannot agree "to pay for the services on an itemized basis because the services are not offered as such".

9. The Member notes that he has read and considered PG Nannies' submissions on how it acts in accordance with the purposes of the *Act* and promotes ethical business practices within its industry association. Finally,

the Member outlines PG Nannies' submission that the Delegate made calculation errors with respect to the wages owing to two of the fourteen nannies named in the Determination.

10. After noting the submissions of the respondents (four of the fourteen nannies) and the Director, the Member comes to the following conclusions:

> (1) the Director did not err in law in determining that the fees charged fall within the prohibition in section 10(1) of the *Act*, for the following reasons: there is no contradiction between the Delegate's interpretation and the Fact Sheet and Guidelines; the *obiter* in the *Serions* decision does not go as far as PG Nannies suggests it does in terms of standing for the proposition that it can charge fees for advertising and other services it makes available to the caregivers. The Member was not persuaded that the *obiter* was of persuasive value, given the lack of factual parallels or similarities between the two cases. The Member outlined the principles of statutory interpretation, citing a number of Supreme Court of Canada cases as well as section 8 of the *Interpretation Act*. He concluded, however, that these interpretive principles are applicable only where there is an absence of clear and express language, and that, in the case of section 10(1) of the *Act*, the words are precise and unequivocal;
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> (2) the Director did not err in law in concluding that the advertising "service" of PG Nannies in the form of the publication on its website of information about the caregivers does not fall within the exception outlined in section 10(2). The Member was not persuaded that that the publication of caregivers' profiles on the website constituted advertising as contemplated in section 10(2) – it is not the caregivers who are placing their profiles and information on the website; it is PG Nannies that is doing so in the context of its employment agency business. The Member rejected PG Nannies' assertion that a caregiver, by signing the Contract, is "placing an advertisement" with PG Nannies or engaging PG Nannies' advertising services;
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> (3) the Director should not have allowed any part of the fees charged for "services" allowable under the *Act*. This request by PG Nannies either requests the Member to amend a breaching contract, or to make a new agreement between PG Nannies and the caregivers as a substitute. In the Member's view, this is neither appropriate nor allowable at law; and
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> (4) The submissions of PG Nannies on the recalculations for wages outstanding to two of the nannies were accepted and the Determination varied accordingly.

The Reconsideration Request

11. PG Nannies applies to have the Original Decision reconsidered by the Tribunal.

12. I have before me the submissions of the parties with respect to PG Nannies' request for reconsideration; the Original Decision and the submissions of the parties with respect to the Original Decision; and the Record submitted by the Director pursuant to section 112(5). It is my view that this Reconsideration can be adjudicated solely on the basis of written submissions. I note that I have read and considered all of the submissions and documents; however, I will only outline and address the submissions, arguments, and evidence that are pertinent to the reconsideration decision.

ISSUE

13. When considering an application for reconsideration, the Tribunal must answer two questions:

1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?

2. If so, should the decision be cancelled or varied or sent back to the member?

ARGUMENT AND ANALYSIS

14. The Appellant says the Decision should be reconsidered on the grounds that:

- the Member erred in law in numerous ways;
- the Member was biased and failed to observe the principles of natural justice; and
- new evidence is now available.

15. Section 116 of the *Act* provides the Tribunal with the power to reconsider decisions:

> (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, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

16. The Tribunal has a discretionary power to reconsider decisions, and does so only in very limited and exceptional circumstances. The Tribunal has adopted a two-stage approach to deciding whether the reconsideration power should be exercised (*Milan Holdings Inc.*, BC EST # D313/98 (reconsideration of BC EST # D559/97):

> At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
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> (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay . . . .
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> (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence). . . .
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> (c) Where the application arises out of a preliminary ruling made in the course of an appeal. . . . Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.
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> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their

> importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. . . .
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> After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.

17. The Tribunal's decision in *Zoltan Kiss*, BC EST # D122/96 noted a number of grounds on which a Tribunal ought to reconsider a decision. This is not an exhaustive list of the possible grounds for reconsidering a decision:

- a failure by the Tribunal member to comply with the principles of natural justice;
- some mistake in stating the facts;
- a failure to be consistent with other decisions which are not distinguishable on the facts;
- some significant and serious new evidence has become available that would have led to the Tribunal member to a different decision;
- some serious mistake in applying the law;
- some misunderstandings of or a failure to deal with a significant issue in the appeal; and
- some clerical error exists in the decision.

Alleged errors of law

18. The Appellant argues that the Member erred in law in a number of ways. First, it says the Member erred in law when he confirmed the Delegate's determination that the fees charged by the Appellant for services such as resume preparation, image consulting, liaising, and immigration settlement contravene section 10(1) of the *Act*. The Appellant now argues that a person may pay for advertising and other services as long as it is not a condition of assisting them to find a job. The Appellant says the Contract makes no mention of conditions and says that PG Nannies " 'will' provide the services, with no stipulation." The Appellant further argues in the alternative that even if the fees for these services are found to be conditional on payment for being placed in a job, they should be allowed because they are fair and reasonable considering the circumstances and the results obtained.

19. Second, the Appellant also says the Member erred in law when he confirmed the Delegate's determination that the advertising services of PG Nannies, in the form of the publication on its website of the Caregivers' profiles, pictures and particulars, does not fall within the exception in section 10(2) of the *Act*.

20. The Director's submissions point out that the Original Decision thoroughly considered the arguments and evidence of the parties with respect to these issues. It appears from its arguments on reconsideration that the Appellant, disagreeing with the results of the Original Decision and before that the Determination, seeks to have this panel re-weigh the evidence and re-hear another round of argument. The Appellant does not bring any evidence that the Member erred in making the Original Decision. My review of the Original Decision reveals that the Member considered all of the arguments and evidence before him in finding that the Delegate did not err in determining the fees charged by PG Nannies contravened section 10(1) of the *Act* and further, did not constitute "advertisement" under section 10(2) of the *Act*. I find no error in the Member's Decision on these points.

21. Third, the Appellant says the Member erred in law when he found the Delegate was under no obligation to apportion or allow any part of the fees for services provided to the caregivers by PG Nannies which are allowable under the *Act*. The Appellant argues that the Member should have severed any part of the Contract that was found to be invalid and apportion a monetary value to the advertising, immigration and settlement services provided by the Appellant to the caregivers. The Appellant also says that it was an error for the Member to conclude that severing any invalid or illegal term of the Contract would have amounted to amending a breaching contract or making a new contract between the caregivers and PG Nannies. The Appellant also argues that the Member should have found a collateral agreement comprising the immigration and settlement services in the Contract and, applying *Serions*, above, should have come to the conclusion that those services could properly be paid for by the caregivers under the *Act*.

22. The Director responds that the authority of administrative decision-makers such as the Director and the Tribunal is limited to those powers given to them by their governing statutes, and the *Act* does not give either the power to reform or sever contracts; only the courts can exercise the powers to find a collateral contract or to sever illegal portions of a contract and save what remains. I agree with the Director that the Member was correct in his assessment of the Tribunal's ability to grant the Appellant's request. The Tribunal's enabling statute is the *Employment Standards Act*, specifically Part 12, which confers specific powers on the Tribunal which are limited to matters arising or requiring to be determined in an appeal of a determination or a reconsideration made under the *Act*. The Tribunal is not a court of general jurisdiction: *Canwood International Inc. and James G. Matkin*, BC EST # RD065/09; *J.M.C. Industries Ltd.*, BC EST # D287/03. The Tribunal has no legal authority to grant the demands by the Appellant to sever portions of the Contract and enforce the rest, or to find a collateral agreement. In its Final Reply, the Appellant refers to section 43 of the *Administrative Tribunal Act (*the *"ATA")*, which allows for tribunals to refer questions of law to a court in the form of a stated case. However, in accordance with section 103 of the *Act*, section 43 of the *ATA* does not apply to the Tribunal and therefore the Tribunal does not have the power to refer questions of law directly to the court.

23. Fourth, the Appellant argues that the Member erred in law by failing to differentiate between Citizenship and Immigration Canada's Live-in Caregiver Program and other employment situations, specifically the Temporary Foreign Worker Program. It argues in its Final Reply that the reason why the distinction is important is because the Contract is an immigration services agreement, and that the caregivers paid for immigration related services, not for placing them with a Canadian employer.

24. The Director says in response that the Appellant's belief regarding the different characteristics of the programs does not make the Appellant exempt from the application of the *Act*. Again, the matter of the federal programs was canvassed as part of the Appellant's submissions before the Member, as was the contention that the Contract is for immigration services, so this appears to be another example of an attempt at gaining a "re-weighing" of the evidence. Regardless of what kind of federal program the parties may be involved with in the course of their business, both the caregivers and the Appellant are under the jurisdiction of the *Act* as far as employment matters are concerned, and both the Delegate and the Member properly disposed of the matters that were before them. As stated previously, the Appellant has had the opportunity to canvass the issue of the Contract, the *Act*, and their interpretation before the Member. I see no error in the Original Decision regarding the way in which the Member dealt with these issues.

25. Fifth, the Appellant argues that the Member erred in law by failing to provide reasons for his decision, particularly with respect to the conclusion that the fee charged by the Appellant was a placement fee, as well as his finding that the definitions of "advertising" set out in a BC Court of Appeal case and a Canadian International Trade Tribunal case, put forward by PG Nannies to argue that its services fall within the definition of "advertising" in section 10(2), were not "relevant or necessary to set out here". The Appellant says as well that both the Delegate and the Tribunal "failed to provide any reasons and legal basis for not

apportioning any monetary value to such services", "such services" presumably referring to immigration and settlement services as characterized by the Appellant.

26. In response, the Director cites *R. v. R.E.M., 2008 SCC 51, [2008] S.C.J. No. 52 (Q.L.)*, an appeal from a trial judge's reasons in criminal proceedings, in which the Supreme Court of Canada explains how to assess the adequacy or sufficiency of reasons. In part, the Court says at paragraphs 12 – 19:

> [R]easons help ensure fair and accurate decision making . . .
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> . . . .
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> It follows that courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered. . . .
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> These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show *how* the judge arrived at his or her conclusion, in a 'watch me think' fashion. It is rather to show *why* the judge made that decision. . . . What is required is a logical connection between the "what" – the verdict – and the "why" the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.
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> Explaining the "why" and its logical link to the "what" does not require the trial judge to set out every finding or conclusion in the process of arriving at the verdict . . . .

27. The Director argues that the Member's reasons were sufficient in law and, further, that the standards to be met in a civil case such as the instant one may be less than those set out in *R.E.M.,* which deals with a criminal case.

28. I agree with the Director's submissions. As outlined above, not every finding or conclusion in the process of arriving at a decision has to be laid out in the reasons. In my view, it was sufficient for the Member to deal with the definitions of "advertising" put forward by the Appellant by stating that it was not relevant or necessary to set out. Further, the Member lays out the arguments of the parties and contains clear reasons why he agreed with and found no error with respect to the Delegate's finding that the fee charged by the Appellant was a placement fee. The Member also clearly outlines the arguments with respect to apportioning monetary value to services provided by the Appellant, and outlines why he thinks that would not be correct - that it would amount to amending the Contract or making a new agreement between the parties, and such an action would not be appropriate or allowable in law. The Member's reasons were sufficient and there was no error in law.

29. Sixth, the Appellant argues that the Member erred in law by not acknowledging or mentioning PG Nannies' final reply in the appeal in his decision. The final reply made reference to the Guide to Private Employment Agencies published in 2007 by the International Labour Organization (ILO). The Appellant says that issues raised in the final reply to the appeal deserve a thorough analysis and it is an error in law for the Tribunal Member not to provide such an analysis or give reasons for not doing so.

30. In response, the Director says that the ILO document is a guide, not part of a convention or treaty to which Canada is signatory, and therefore has no legal effect and further says it contains no clear arguments which the Member needed to address in the Original Decision. My view is that the contents of the Appellant's final

reply at the appeal stage had no relevance to the issues to be decided and was properly not referenced by the Member in the Original Decision.

31. Seventh, the Appellant argues that the Tribunal Member erred in law by "neglecting and/or evading its common law obligations to provide guidelines to the parties", thus failing to follow section 2(b) of the *Act* which provides that one of the objects of the *Act* is "to promote the fair treatment of employees and employers". The Appellant's submissions suggest the Member was obliged, in his Original Decision, to provide advertising guidelines and an interpretation of section 10(2).

32. The Director's response is that the Tribunal has no statutory or common law obligations to provide such guidelines and that the Appellant fails to point to any legal principles or case law that indicate a failure to provide the requested guidelines is an error of law. In my view, the Member was both compelled and confined by the *Act* to undertake a review the Determination as requested by the Appellant, and he did so correctly and properly. The review did not require the Member to provide guidelines; the provisions of section 2(b) of the *Act* do not give rise to an obligation to provide guidelines to the application of particular parts of the *Act* at the request of an employer. It was not an error of law for the Member not to provide such "advertising" guidelines as requested.

Alleged bias and failure to observe the principles of natural justice

33. The Appellant argues that the Member was biased, which led to both an error of law and a breach of natural justice principles. The Appellant says the Member erred in law by "not interpreting the Contract fairly and in an unbiased way and by giving unwarranted and unfair deference to the Delegate's one-sided and narrow interpretation" of the Contract. The Appellant says there was a reasonable apprehension of bias with respect to the Member because he quoted a letter received from a caregiver and did not refer to a letter from an employer submitted by the Appellant. The Appellant also says that a petition signed by various members of the industry was also disregarded by the Member. In its final reply, the Appellant says the lack of recognition of the value of the services it provided to the caregivers raises a reasonable apprehension of bias on the part of the Member.

34. The Director says that it is not a breach of the principles of natural justice for a decision to contain only some of the evidence and only summary reasons for disposing of an issue, citing *R.E.M.* With respect to bias, the Director cites *Dusty Investments Inc. d.b.a. Honda North,* BC EST #RD043/99 (reconsideration of BC EST #D101/98) and says: "an allegation of bias in a decision-maker is a serious matter that should not be considered without a foundation of clear evidence. That evidence should permit a reasonably informed, objective observer to find actual bias or a reasonable apprehension of bias."

35. In order to establish bias, the Appellant must show evidence more convincing than the fact that the outcome of the decision was not in its favour, or that the Member did not show sufficient recognition of the value of certain services. In order to be considered, an allegation of bias must have a foundation of clear evidence that would lead to an objective finding of bias or reasonable apprehension thereof. In my view, there is absolutely no indication of bias or any reasonable apprehension of bias here. This argument by the Appellant is groundless.

36. On a related note, the Appellant says the Delegate's characterization of the relationship between the Appellant and the nannies as being one with a significant power imbalance was followed by the Member in the Original Decision. The Appellant objects to this alleged characterization and makes submissions on the issue of whether there was duress, undue influence, or unconscionability in the bargains struck between the caregivers and the Appellant. The Director says in response that there was no mention of a power imbalance

in the Original Decision, and then makes submissions regarding an alternative argument on power imbalance. I have reviewed the Original Decision thoroughly and at no place does the Member mention power imbalance or differential of power between the parties. The notion played no part in the Original Decision and this argument for reconsideration has no merit.

New evidence

37. The Appellant says that new evidence is now available that was not available and/or could not have reasonably been obtained at the time of the decision. The "new evidence" submitted by the Appellant consist of letters from three of the caregivers who are party to this file (being caregivers whose contracts with the Appellant were in effect during the period in question). The Appellant says the reasons why these letters are important is that they confirm the value, in the minds of the caregivers, of the services provided by PG Nannies.

38. The Director says in reply that the "new evidence" is not significant in that it would not have changed the outcome of the appeal had it been available. The Director says that section 4 of the *Act* precludes persons from contracting out of the provisions of the *Act*, so whether or not past client caregivers agreed to the payment under the Contract and are content with it is irrelevant to the Director's obligation to enforce the *Act*.

39. In my view, this evidence is neither significant nor serious, and would not have led the Member to a different conclusion. Although the Appellant may be correct in its characterization of the letters, they are not relevant to the issue that was heard by the Member: the correctness of the Delegate's findings in the Determination, in particular regarding the fees charged by the Appellant to the caregivers and how they fit in with section 10 of the *Act*. As the Director points out, the Director is obliged to enforce the *Act* regardless of any efforts by anyone to contract out of its provisions. The caregivers' thoughts regarding the value of the services provided by the Appellant are not relevant to the disposition of the issue.

CONCLUSION

40. It is clear from the foregoing that in the Appellant's application for reconsideration of the Original Decision does not pass the first stage of the two-stage test outlined in *Milan Holdings*, above. For the most part, the Appellant's primary focus in its application is to have the reconsideration panel "re-weigh" evidence that was already before the Member. The Appellant clearly is taking this approach when it says in its submission, "We again appeal to the Tribunal to make an in-depth analysis of the issues and provide a legal framework and constructive guidelines for the industry for the future." As the word "again" may suggest, the Appellant had a prior opportunity to make these arguments to the Member; before that it had ample opportunity to put forward its case before the Delegate; and, now it is requesting that the Tribunal give the Appellant what it had not been given by the Original Decision or the Determination. The Appellant is attempting to have the reconsideration panel re-weigh the evidence that has already been brought before the Tribunal Member, which approach is characterized in *Milan Holdings*, above, as a factor that weighs against reconsideration.

41. Further, the Appellant has failed to raise "an arguable case of sufficient merit to warrant the reconsideration" touching on "questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases". The Appellant argues at several points in its submission that the implications of the decisions in this case are wide-ranging and will have a large impact on its industry. In this way, the Appellant says, the issues it raises are significant. This may indeed be the case in other forums besides the Tribunal's reconsideration powers under the *Act*. However, in this context, the Appellant has not presented any issues that warrant reconsideration – no error

of law, bias, failure to observe the principles of natural justice, or significant new evidence. In any event, even if I am wrong and the Appellant's appeal should be heard at the reconsideration stage, as outlined in my reasons above I do not find that there were any errors in the Original Decision.

ORDER

42. The application to reconsider the Original Decision is refused. Pursuant to Section 116(1)(b) of the *Act*, I order that the Original Decision (BC EST # D055/09), dated June 2, 2009, be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal