An Application for Reconsideration

- by -

LoveAgain Network Inc. carrying on business as eloveagain.com
("LoveAgain")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2012A/116

DATE OF DECISION: November 8, 2012

DECISION

SUBMISSIONS

Eric Bernal and Neil Hain	on behalf of LoveAgain Network Inc. carrying on business as eloveagain.com

INTRODUCTION

1. This is an application filed by LoveAgain Network Inc. carrying on business as eloveagain.com ("LoveAgain") under section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of Tribunal appeal decision BC EST # D105/12 issued on October 5, 2012 (the "appeal decision"). By way of the appeal decision, Tribunal Member David B. Stevenson confirmed a Determination issued against LoveAgain on June 5, 2012, ordering it to pay its former employee, Terri A. Goss ("Goss"), the sum of $3,301.15 in unpaid wages and a further $1,000 in monetary penalties under section 98 of the *Act* (the "Determination"). Thus, the total amount payable under the Determination is $4,301.15. LoveAgain says that the appeal decision should be cancelled.

2. Section 116 of the *Act* gives the Tribunal a *discretionary* authority to reconsider an appeal decision. In *Director of Employment Standards Milan Holdings Inc. et al.*, BC EST # D313/98, the Tribunal established a two-stage process for addressing reconsideration applications. At the first stage, the Tribunal considers whether the application is timely, relates to a preliminary ruling, is obviously frivolous, or is simply a clear attempt to have the Tribunal re-weigh issues of fact that have already been determined. If the application can be so characterized, the Tribunal will summarily dismiss it without further consideration of the underlying merits. On the other hand, if the application raises a serious question of law, fact or principle, or suggests that the decision should be reviewed because of its importance to the parties and/or because of its potential implications for future cases, the Tribunal will proceed to the second stage at which point the underlying merits of the application are given full consideration.

3. At this juncture, I am dealing with only the first stage of the *Milan Holdings* test. If I am satisfied that the application passes the first stage, the Tribunal will advise the respondents and seek their submissions regarding the issues raised by the application. On the other hand, if LoveAgain's application fails to pass the first stage, it will be summarily dismissed.

4. I am adjudicating this matter based on LoveAgain's written submissions filed in support of its application. I have also reviewed the original section 112(5) record that was before the delegate, the delegate's "Reasons for the Determination" (the "delegate's reasons"), as well as the material that was before Tribunal Member Stevenson.

5. Prior to the adjudication of its appeal, LoveAgain applied for a section 113 suspension of the Determination. On August 10, 2012, Tribunal Member Roberts issued written reasons for decision ordering that the Determination be suspended provided LoveAgain deposited the full amount of Ms. Goss's unpaid wage claim including interest ($3,301.15) with Director by no later than August 20, 2012 (BC EST # D080/12). It is my understanding that LoveAgain did deposit the funds as directed by Tribunal Member Roberts' order. In its reconsideration application, LoveAgain applied for a continuation of the suspension order pending the adjudication of its section 116 application. I will deal with the continued suspension request after having first addressed whether the application passes the first stage of the *Milan Holdings* test.

FACTUAL BACKGROUND

6. LoveAgain provides an online counselling service for individuals who are dealing with the consequences of matrimonial breakdown. Ms. Goss was engaged to work, under a written agreement, as a company sales representative in late January 2010. This agreement was drafted by Mr. Neil Hain, a LoveAgain principal and a practising lawyer.

7. Ms. Goss filed an unpaid wage complaint regarding her April and May 2010 wages and a delegate of the Director of Employment Standards (the "delegate") presided at a complaint hearing held on February 24, 2012, and on June 5, 2012, the delegate issued the Determination and his accompanying reasons.

8. The delegate addressed several separate issues including: i) whether the complaint was timely (section 74); ii) whether Ms. Goss was an "employee" or an "independent contractor"; and iii) her unpaid wage entitlement. Each of these issues was determined in Ms. Goss's favour.

9. LoveAgain appealed the Determination on the grounds that the delegate erred in law (subsection 112(1)(a)) and failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)). LoveAgain had two principal arguments on appeal both relating to the delegate's jurisdiction to adjudicate her unpaid wage complaint. First, it alleged that the complaint was untimely; second, it alleged that she was not an "employee" as defined in section 1 of the *Act*. Although LoveAgain did not specifically appeal the Determination under subsection 112(1)(c), the "new evidence" ground, it did submit some evidence (contained in two "statutory declarations") that was not part of the record before the delegate.

10. On October 5, 2012, Tribunal Member Stevenson issued the appeal decision. He concluded that portions of the two statutory declarations were not admissible under subsection 112(1)(c) since this evidence did not pass the test set out in *Davies et al.* (BC EST # D171/03). With respect to the question of Ms. Goss's status (*i.e.*, was she an employee or independent contractor?), Tribunal Member Stevenson found that the delegate did not err or otherwise breach the principles of natural justice when he rejected the parties' written agreement (it stated that she was an independent contractor) as being determinative of Ms. Goss's status. Member Stevenson concluded that the delegate did not ignore relevant evidence in determining that Ms. Goss was an "employee" as defined in section 1 of the *Act* and that he had turned his mind to the relevant legal criteria governing this issue.

11. On appeal, LoveAgain noted that the delegate, in the course of his reasons (see page R2 – R3), referred to an online advertisement for a "sales manager" position with the company rather than the actual advertisement to which she responded (for an "independent sales consultant" position). It was conceded that this document was not submitted to the delegate at the complaint hearing. Although the delegate erred in referring to this document, Tribunal Member Stevenson was not satisfied that this was a consequential error (para. 53):

> [LoveAgain] says the on-line advertisement relating to the job Ms. Goss took was the only such document in evidence. A copy of that document is in the "Record" and is also attached to Mr. Hain's statutory declaration. I have accepted the particular document referred to by the Director in the Determination was not placed in evidence. What I do not accept, and is not explained in the appeal, is how reference to that document rather than the one specifically applying to the job Ms. Goss applied for should have any effect on the Determination. No reason has been expressed by [LoveAgain] and none is apparent. The two advertisements are virtually identical in content. It is a logical inference that whatever the Director said about one would also apply to the other and that the view of the Director of the job description in one would be the same in the other. It would make no sense, considering the stated purpose found in section 2(d), to cancel a Determination on an error that is more technical than substantive, which has not been

> shown to have any effect on the result in the Determination and which, on any reasoned view of the evidence, would not alter or change any part of the penultimate finding made in Determination.

12. As for LoveAgain's argument regarding the timeliness of the complaint, Tribunal Member Stevenson concluded that the delegate's determination that the complaint was timely was essentially a factual conclusion concerning when the parties' employment relationship actually ended. Since Member Stevenson concluded that there was evidence before the delegate supporting his finding that the relationship did not end before June 10, 2010, the delegate's finding that the complaint was timely did not amount to an error of law. Thus, as previously noted, Member Stevenson confirmed the Determination.

THE APPLICATION FOR RECONSIDERATION

13. On October 18, 2012, LoveAgain filed a timely reconsideration application. The application consists of the Tribunal's Form 2 to which is appended a 14-page memorandum. The critical arguments set out in the memorandum are reproduced below. LoveAgain's first line of attack concerns the question of Ms. Goss's status:

> 2) The [appeal decision] fails to follow principles of nature [sic] justice as the member refused to allow or consider parts of the statutory declarations filed by [LoveAgain] in support of its appeal that speaks to the merits of the Determination. [LoveAgain] says that in doing so, the Tribunal has for all practical purposes made the appeal process meaningless. A critical issue in the appeal was whether the Complainant was an independent contractor and whether the Director ignored or failed to consider evidence, recorded in [LoveAgain's] statutory declarations, demonstrating that he acted on a view of the facts that could not be reasonably entertained.

14. I note that this argument was essentially reiterated in the third and fourth paragraphs of its memorandum and further amplified in its seventh paragraph where LoveAgain referred to a previous Tribunal decision that concerned the "employee versus independent contractor" issue:

> 7) The analysis and result reached in the [appeal decision] is completely inconsistent with that of a previous leading Tribunal Decision (BC EST#D040/03, Kelsy Trigg) indistinguishable on their critical facts. [sic]

15. LoveAgain's fourth and sixth arguments concern the matter of the online advertisement to which Ms. Goss responded. As noted above, although the delegate's reasons referred to a "sales manager" advertisement, rather than the actual "independent sales consultant" advertisement, Tribunal Member Stevenson did not consider this error to be consequential.

> 4) The [appeal decision] fails to follow principles of nature [sic] justice by concluding that [LoveAgain] failed to explain in the appeal how the Director's reference to information not in evidence should have any effect on the Determination. The explanation was set out at length in the written argument before the Tribunal.
>
> 6) A fair hearing cannot proceed where the Director relies on information (in this case a job advertisement not in evidence or applicable to the Complainant) when considering if that document reflects the true nature of the parties [sic] relationship. The member's characterization that such an error is 'technical' demonstrates the Tribunal's failure to appreciate the seriousness of this issue.

16. LoveAgain's fifth assertion relates to the timeliness of Ms. Goss's unpaid wage complaint:

5) The [appeal decision] fails to follow principles of natural justice by failing to provide any reasons, analysis or refer to evidence in support of its decision that [LoveAgain's] position that the complaint was untimely is without merit.

FINDINGS AND ANALYSIS

17. LoveAgain's application, whether one addresses the points as alleged legal errors or natural justice breaches, is predicated on three central assertions. First, it says that that Ms. Goss's complaint was untimely and, accordingly, the delegate should have summarily dismissed it. Second, it says that Ms. Goss was not an employee but, rather, an independent contractor and, as such, was not entitled to the benefit of the wage protection provisions of the *Act*. Third, it says that the delegate's reliance on a document not in evidence (*i.e.*, the "sales manager" online advertisement) was a critical error that should have resulted in the Tribunal cancelling the Determination. I will address each of these issues in turn in order to determine if any or all of these matters raises an issue of sufficient importance to justify proceeding to the second stage of the *Milan Holdings* analysis.

The Timeliness of the Complaint

18. Subsection 74(3) of the *Act* states that a written complaint must be filed with the Employment Standards Branch "within 6 months after the last day of employment" although this limitation period is not necessarily an absolute bar to a complaint being adjudicated on its merits (see *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553). This latter point is important to note since LoveAgain, in both its appeal and reconsideration submissions, relies on Tribunal decisions that predate and have now been very considerably narrowed, if not effectively overruled by, the B.C. Court of Appeal's decision in *Karbalaeiali.* In any event, the delegate concluded that Ms. Goss's complaint was filed within the 6-month time limit. Her complaint was filed on December 6, 2010, and LoveAgain's position was that Ms. Goss essentially abandoned her position at the end of March 2010 whereas Ms. Goss maintained that her last day of work was June 10, 2010.

19. LoveAgain's evidence in the complaint hearing was that Ms. Goss could not have been working after the end of March 2010 because there was no record of her accessing two critical tracking tools during this period, namely, a client tracking software program and a toll-free telephone number used to communicate with actual and potential clients. As is recorded in the delegate's reasons, at pages R8 – R9, the delegate noted that whether an employee is actually working is not necessarily determinative of whether there is an ongoing employment relationship.

20. LoveAgain concedes that it did not terminate her employment at the end of March 2010 or, so far as I can tell, at anytime. LoveAgain says that Ms. Goss "resigned" from her position on May 30, 2010, but she never submitted a resignation letter or any other document evincing that intention and LoveAgain never confirmed any sort of cessation in the parties' relationship at that time (or at anytime thereafter). I note that if Ms. Goss's employment did end as of March 2010, LoveAgain should have issued her a "record of employment" under the federal *Employment Insurance Act*. If LoveAgain was terminating Ms. Goss's employment, under the *Act* and absent just cause (and LoveAgain has never alleged it had just cause for dismissal), LoveAgain was required to provide written notice of termination or compensation for length of service in lieu of written notice under section 63 of the *Act*. However, there is nothing in the record indicating that LoveAgain ever issued a record of employment or otherwise complied with section 63 of the *Act*. Article 6.1 of the parties' written service agreement gave LoveAgain the right to terminate Ms. Goss's services with or without cause for, among other things, failing to fulfill her obligations under the agreement but, so far as I can determine, LoveAgain never issued a termination notice under this provision.

21. The delegate determined, based on the evidence before him, that LoveAgain never formally terminated Ms. Goss's employment – and LoveAgain does not contest this finding – and that Ms. Goss's evidence was consistent with her position that she did not formally end her working relationship with LoveAgain until after a June 10, 2010, telephone conversation with Mr. Hain regarding unpaid monthly fees for April and May 2010. On the evidence, that finding was open to the delegate and, in my view, Tribunal Member Stevenson quite correctly dismissed LoveAgain's appeal on this issue.

22. Insofar as the reconsideration application is concerned regarding this issue, the application is nothing more than an undisguised attempt to reargue a point that has already been heard and decided and there is nothing in the material before me indicating that the delegate's finding was unreasonable. Indeed, on the evidentiary record before me, my view is that the delegate's decision on the timeliness of the complaint was correct.

Employee or Independent Contractor?

23. LoveAgain argued before the delegate, and again on appeal, that Ms. Goss was an independent contractor rather than an "employee" as defined in section 1 of the *Act*. This issue was, of course, critical since true independent contractors are not entitled to access the *Act*'s unpaid wage protection provisions. The parties' working relationship was governed by a written "Agency (Independent Consulting) Agreement" and this agreement unequivocally states that Ms. Goss would be an independent contractor and not an employee. Ms. Goss would be paid a monthly "service fee" and sales commissions without deduction for income taxes or other normal payroll deductions. She was required to cover, at least in part, her own operating expenses and was working away from LoveAgain's offices.

24. On the other hand, this agreement does reflect more than a passing amount of control by LoveAgain over Ms. Goss's activities. She had stringent reporting obligations, was obliged to make not less than 65 telephone sales calls each day in addition to mandated e-mail communications, she was bound by a strict non-competition clause that was effective during the term of the agreement, and her position was stated to be one "of significant trust and responsibility". I note that Ms. Goss used certain LoveAgain tools and equipment (a toll-free line; software) in order to carry out her duties and, at all times, she was dealing with LoveAgain's clients and potential clients and not her own. She did not collect money from clients on her own behalf but only on behalf of LoveAgain (who would then pay her a commission the following month on those sales). At all times she was an integral part of LoveAgain's business rather than independently operating her own separate business. I find it difficult to understand how Ms. Goss's position was in any meaningful way different from any other sales representative employed by a firm to market its services. In the language of section 1 of the *Act*, she "performed work normally performed by an employee".

25. There is no doubt that LoveAgain deliberately structured the relationship between Ms. Goss and itself as a "contractor" relationship but the law is crystal clear that form never triumphs over substance when dealing with this sort of dispute. Parties cannot, by the simple rubric of a contractual declaration, exclude the application of the *Act* to their relationship. In my view, the delegate did not consider the "wrong" legal test but rather correctly directed his mind to the statutory definition of "employee" and applied the criteria set out in that definition to the evidence at hand. Clearly, and standing alone, some of the evidence submitted by LoveAgain supported a finding that Ms. Goss was an independent contractor; however, the delegate was bound to consider the totality of the evidence in light of the statutory considerations and, in that regard, I am in complete agreement with Tribunal Member Stevenson that the delegate's ultimate conclusion that Ms. Goss was an employee was reasonable especially in light of the Supreme Court of Canada's dictate that employment standards legislation be given a large, liberal and remedial interpretation (see *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986 and *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27). I might add that given the evidence before the delegate – and even further considering the new evidence that LoveAgain submitted on

appeal (and I will address this issue more fully later on in these reasons) – I am of the view that the only rational conclusion to be drawn in this case was that Ms. Goss was an employee as defined in section 1 of the *Act* throughout her tenure with LoveAgain.

26. In its reconsideration application, LoveAgain raises two other matters that also touch on the "employee v. independent contractor" issue. One concerns some additional evidence that LoveAgain submitted on appeal and the other concerns whether Tribunal Member Stevenson unreasonably ignored or misapplied a prior Tribunal decision. I shall now briefly deal with these two matters.

27. The first relates to Tribunal Member Stevenson's treatment of the two "statutory declarations" that were submitted as attachments to LoveAgain's appeal form. These declarations were made by Mr. Hain and Mr. Eric Bernal, also a LoveAgain principal. Both men testified at the complaint hearing and their declarations, in general terms, summarize the adjudicative history of this matter and, primarily, set out their recollections about what transpired at the hearing. At least to a degree, the declarations appear to constitute an attempt to supplement the evidence they provided at the complaint hearing.

28. Although LoveAgain did not appeal the Determination on the "new evidence" ground (subsection 112(1)(c)), Tribunal Member Stevenson turned his mind to whether the declarations were admissible on appeal and, if so, for what purpose. His analysis is set out in the appeal decision and I agree with that analysis. That said, even if I were to consider the declarations without qualification (and Ms. Goss apparently takes issue with many of the assertions contained within them), I cannot conclude that they call into question the correctness of the delegate's finding with respect to the "employee v. independent contractor" issue. As I noted earlier, there were some aspects of the parties' relationship that were consistent with an independent contractor relationship but, considering *all* of the evidence (and even taking into account the disputed facts in the declarations), I am fully satisfied that the delegate's conclusion that Ms. Goss was an employee was correct. I am not persuaded that the delegate, or Tribunal Member Stevenson, ignored relevant and cogent evidence insofar as the matter of Ms. Goss's status was concerned.

29. LoveAgain says that the appeal decision is "completely inconsistent" with the Tribunal's *Trigg* decision (cited above) and that this decision is "indistinguishable on [the] critical facts". Tribunal Member Stevenson addressed the *Trigg* decision at paragraphs 47 – 50 of the appeal decision. In this latter case, the Director's delegate initially determined that Ms. Trigg was an independent contractor and the Tribunal confirmed this determination. There are important observations in the Trigg decision that are germane to this case including the following: in examining the true nature of the parties' relationship, the decision-maker must "look beyond the language used by the parties" (page 5); she was not subject to any consequential control (page 5); a "written agreement will only be given weight provided that it properly reflects the relationship between the parties" (page 6); Ms. Trigg was not subject to a non-competition clause during the currency of the agreement (page 6); and Ms. Trigg undertook a "financial risk" under the terms of her arrangement with the firm to whom she was providing senior project management services (page 6). The *Trigg* decision stands as an appeal decision, issued based on the evidence presented in that case, that was never reconsidered and, in my view, it was a very close case that turned on its particular facts. In my view, LoveAgain's assertion that the facts of the present case are "indistinguishable" from those in *Trigg* is a gross overstatement. I do not consider the *Trigg* decision to constitute any sort of binding precedent insofar as the present case is concerned. I do not consider that Tribunal Member Stevenson erred in law, fact or principle regarding his treatment of the *Trigg* decision.

30. I now turn to the point raised by LoveAgain's reconsideration application dealing with the online advertisement to which Ms. Goss responded.

The Online Advertisement

31. The delegate, at pages R2-R3 of his reasons and under the heading "Background", set out an "Independent Sales Manager" job posting that LoveAgain posted online and he indicated that Ms. Goss had responded to this advertisement. It now seems clear that, in fact, this advertisement was not posted until September 6, 2010, well after Ms. Goss's employment ended. Ms. Goss responded to an advertisement (marked as Exhibit 2 at the complaint hearing) for an "Independent Sales Consultant" position. The delegate, at page R8 of his reasons under the heading "Findings and Analysis", and after extensively referring to the terms of the parties' written agreement, made the following findings:

> I find Loveagain [sic] to be an "employer" within the meaning of the Act. I find that Ms. Goss was its "employee". Specifically, I find Ms. Goss is a person who is "entitled to wages for work performed for another". Although the contract suggests Ms. Goss is independent consultant [sic], there is no evidence to suggest she was operating a consulting business either to Loveagain [sic], or to anyone else. Ms. Goss's duties were solely related to selling Loveagain [sic] advertisements. She was assigned a territory and instructed as to what her duties were. The sales of advertisements are integral to the business of Loveagain [sic]. Without sales Loveagain [sic] has no business. *I find Loveagain's [sic] online job posting, which sought a "Sales Manager" to provide a more apt description of the true relationship between Loveagain [sic] and Ms. Goss.* (my *italics*)

32. The above-italicized sentence represents the only reference in the delegate's findings that mentions the "Sales Manager" online advertisement. In its reconsideration application, LoveAgain notes that the "Sales Manager" advertisement was not in evidence before the delegate; that the delegate erred in making a factual finding based on a document not in evidence; and that Tribunal Member Stevenson erred in characterizing the advertisement as being "virtually identical in content" to the actual "Independent Sales Consultant" advertisement to which Ms. Goss responded.

33. This matter was addressed a paras. 52-54 of the appeal decision and Member Stevenson's critical findings are set out in para. 53 (also reproduced in full, above):

> …I have accepted the particular document referred to by the Director in the Determination was not placed in evidence. What I do not accept, and is not explained in the appeal, is how reference to that document rather than the one specifically applying to the job Ms. Goss applied for should have any effect on the Determination. No reason has been expressed by [LoveAgain] and none is apparent. The two advertisements are virtually identical in content. It is a logical inference that whatever the Director said about one would also apply to the other and that the view of the Director of the job description in one would be the same in the other. It would make no sense, considering the stated purpose found in section 2(d), to cancel a Determination on an error that is more technical than substantive, which has not been shown to have any effect on the result in the Determination and which, on any reasoned view of the evidence, would not alter or change any part of the penultimate finding made in Determination.

34. I think it important to closely examine the context of the delegate's reference to the online advertisement. First, the reference follows the delegate's determination that the parties were in an employment relationship and that finding was largely based on an examination of the parties' written agreement. Second, the advertisement was not, of course, the actual contract between the parties and its evidentiary value is, in my view, quite limited. The most cogent evidence regarding the parties' actual relationship is the contract itself and evidence relating to Ms. Goss's actual duties and responsibilities while carrying out the terms of that contract. Third, the delegate merely observed that the advertisement appeared to accurately characterize her tasks. Fourth, I have carefully scrutinized the two advertisements and the critical portion of both advertisements is the "job description" (itself a term that suggests an employment relationship) section. Other than a reference to an "Independent Sales Manager" versus an "Independent Sales Consultant"

position, the enumerated "responsibilities" *are identical*, as Tribunal Member Stevenson observed, save that the former advertisement includes one further duty relating to the recruitment of additional sales staff. In sum, I consider the delegate's erroneous reference to the "Independent Sales Manager" advertisement to be wholly inconsequential.

35. In my view, none of the issues raised by LoveAgain in its reconsideration application passes the first stage of the *Milan Holdings* test. Accordingly, there is no need to seek submissions from the respondents since this application must be refused. In light of this decision, LoveAgain's application to continue the suspension is moot.

ORDER

36. LoveAgain's application made pursuant to section 116 of the *Act* to reconsider the appeal decision is refused. The Tribunal's order issued on August 10, 2012, (BC EST # D080/12) suspending the Determination is no longer in effect.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal