An Application for Reconsideration

- by -

ICN Consulting Inc. carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International Caregiversnetwork.ca

("ICN")

- 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/124

DATE OF DECISION: November 27, 2012

DECISION

SUBMISSIONS

Tatiana Gorenshtein	on behalf of ICN Consulting Inc. carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International Caregiversnetwork.ca

INTRODUCTION

1. This is an application filed by ICN Consulting Inc. carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International Caregiversnetwork.ca ("ICN") under section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of Tribunal Decision No. BC EST # D101/12 issued on September 27, 2012, by Tribunal Member Roberts. ICN filed an appeal of a Determination issued against it about five weeks after the statutory appeal period had expired and Tribunal Member Roberts refused ICN's section 109(1)(b) application to extend the appeal period. ICN now applies for reconsideration of that decision.

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 ICN's application. On the other hand, if the application fails to pass the first stage, it will be summarily dismissed. I am adjudicating this matter based on ICN's written submissions filed in support of its reconsideration application. I have also reviewed the voluminous material that forms the backdrop to this dispute (more fully discussed under "Prior Proceedings", below).

PRIOR PROCEEDINGS

4. There is a long and somewhat tortuous history to this matter. The story begins with two unpaid wage complaints filed on August 19 and November 29, 2008, respectively. Over the course of the next four years, this dispute was the subject of two separate Determinations, one B.C. Provincial Court trial, two B.C. Provincial Court motions, two appeals to the Tribunal and the present application for reconsideration.

5. Ms. Maria Tagirova and Anna Baranova (the "complainants") are friends who, in 2007, were residing in Moscow, Russia. They hoped to come to Canada to work as live-in caregivers under the federal government's "Live-in Caregiver Program" and entered into a contract with ICN in order to facilitate that process. Under these contracts, the complainants each agreed to pay ICN a total of $3,000 ($U.S.) under the following payment schedule: $500 at signing; $1,000 upon Service Canada issuing a favourable "Labour

Market Opinion" under the Live-in Caregiver Program; and three $500 instalment payments upon their arrival in Canada.

6. Both Ms. Tagirova and Ms. Baranova arrived in Canada in August 2008 and commenced working as live-in caregivers. After arriving in Canada they filed complaints alleging they paid ICN fees in order to obtain employment in Canada contrary to section 10 of the *Act*. Their complaints were investigated and on December 21, 2009, a Determination was issued against ICN in favour of the complainants. ICN appealed this Determination. During the course of her investigation, the Director of Employment Standards' delegate interviewed the complainants' Canadian employers but did not provide a summary of this evidence to ICN, so that it might respond to it, prior to issuing the Determination. On appeal, Tribunal Member Hart concluded that this omission constituted a breach of section 77 of the *Act* and, in turn, a failure to observe the principles of natural justice. Tribunal Member Hart cancelled the Determination and referred the two complaints back to the Director so that a new hearing or investigation could be conducted by a different delegate (see BC EST # D050/10, decision issued May 13, 2010). It is important to note that Tribunal Member Hart did not address the underlying merits of the two complaints.

7. In June 2010, ICN filed separate civil claims against both complainants in the B.C. Provincial Court in which it claimed the balance due under the contracts it had entered into with each complainant. Each complainant counterclaimed for the monies already paid under their contacts with ICN. On October 19, 2010, a justice of the peace, sitting under the court's "simplified trial" process (1 hour hearings for amounts up to $5,000) issued a decision in the claim against Ms. Tagirova holding that the arrangement between ICN and Ms. Tagirova did not contravene section 10 of the *Act*. The justice of the peace did not explore whether he had any jurisdiction to interpret and apply section 10 of the *Act* (on the basis that this issue was within the exclusive statutory authority of the Director of Employment Standards). However, in fairness to the justice of the peace, it does not appear that this latter issue was argued before him. In any event, he granted judgment against Ms. Tagirova for the balance due under the contract ($1,524.30 plus court order interest and $176 in costs).

8. The Director of Employment Standards retained legal counsel to appear at the trial of ICN's claim against Ms. Baranova. Based on an excerpt of that proceeding (this was appended to an ICN appeal submission) the Director's counsel argued that the B.C. Provincial Court had no jurisdiction to adjudicate whether the contract contravened section 10 of the *Act* and, apparently on that basis, Provincial Court Judge Chen adjourned the trial so that the Director of Employment Standards could carry out its new investigation as ordered by Tribunal Member Hart. Chen, P.C.J. ordered the Baranova trial adjourned on December 22, 2010.

9. On January 14, 2011, Ms. Tagirova filed a second complaint under the *Act* seeking to recover the funds she was ordered to pay (and I understand she did pay) pursuant to the October 19, 2010, B.C. Provincial Court judgment (the total amount being $1,725.38).

10. The Director's delegate investigated the complainants' original complaints as well as Ms. Tagirova's second complaint and she issued a Determination against ICN on May 3, 2012, along with her "Reasons for the Determination" (the "delegate's reasons"). The delegate concluded that ICN, a company that was formerly a licensed employment agency (until January 29, 2008), was operating as an unlicensed employment agency contrary to section 12 of the *Act*. The delegate further determined that ICN charged fees to both complainants contrary to section 10 of the *Act*. Accordingly, the delegate made an order in favour of each complainant and, in addition, levied two $500 monetary penalties against ICN under section 98 of the *Act*. The delegate denied recovery for each complainant's initial $500 payment as being outside the 6-month recovery period specified in section 80 of the *Act* but did allow recovery of the complainants' other payments

made to ICN save for Ms. Tagirova's $1,725,38 payment made to ICN pursuant to the B.C. Provincial Court judgment. In regard to this latter payment, the delegate determined that she did not have the authority to, in effect, act as an appellate court in regard to this court-ordered payment. While I agree with the delegate in regard to this particular point, it is unfortunate that the B.C. Provincial Court judgment was never appealed because, at least in my view, the Provincial Court judgement should not, as a matter of law, have been issued. In the end result, ICN was ordered to pay Ms. Tagirova $1,131.73 including section 88 interest and Ms. Baranova $1,142.24 including section 88 interest. As previously noted, the delegate also levied two $500 monetary penalties against ICN and thus the total amount payable under the May 3, 2012, Determination is $3,273.97.

11. The deadline for appealing the Determination to the Tribunal – as noted in a text box found at the bottom of the third and last page of the Determination – was June 11, 2012. In addition, information concerning the appeal process was also set out in that same text box. The appeal deadline was undoubtedly calculated in accordance with subsection 112(3)(a) and the "deemed service" provisions set out in section 122 of the *Act*. In fact, the record before me indicates that ICN was served with the Determination on May 4, 2012. The Determination was served on ICN at both its business address and its records and registered office. In addition, the Determination was served on ICN's two principals, Tatiana Gorenshtein and Michael Gorenshtein, at ICN's business office and at the latter individuals' residential address.

12. ICN appealed the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (subsections 112(1)(a) and (b) of the *Act*). Among other things, ICN submitted that the delegate had no jurisdiction to adjudicate the complaints and, in any event, that the Determination was "unreasonable and unfair". ICN filed its appeal on July 17, 2012, some five weeks after the statutory appeal period expired, and thus it was obliged to file an application under subsection 109(1)(b) for an extension of the appeal period.

13. With respect to its application to extend the appeal period, Ms. Tatiana Gorenshtein, on behalf of ICN, stated that she underwent a surgical procedure on June 4, 2012, and that due to post-surgical "pains, drowsiness, dizziness and nausea…I was unable to complete my work on the appeal submission and submit it on time". This assertion was supported by a 1-page letter from her family physician dated June 18, 2012, in which the physician confirmed the June 4th surgery and his subsequent prescription of a narcotic (Percocet). The physician noted that Ms. Gorenshtein "is still recuperating from the surgery and needs pain medication which can cause nausea, drowsiness and dizziness" and that "once she has recovered from the surgery in the next several weeks, she should be able to complete and submit the appeal". Ms. Gorenshtein says she communicated with a named Tribunal staff member on May 31 and June 11, 2012, advising that ICN intended to appeal the Determination. She also submitted that ICN had a "strong prima face case".

14. Tribunal Member Roberts refused the application to extend the appeal period and ICN now applies for reconsideration of that decision.

15. Tribunal Member Roberts identified several factors that militated against an extension of the appeal period. First, Ms. Gorenshtein offered no explanation regarding why the appeal had not been filed *before* her June 4th surgery (recall, INC was actually served with the Determination on May 4, 2012). I might also add that despite the appeal period deadline noted in the Determination, a literal wording of subsection 112(3)(a) would suggest that the 30-day appeal period commenced running May 4, 2012. Second, Tribunal Member Roberts queried why someone other than Ms. Gorenshtein (for example, Mr. Gorenshtein) could not have filed a timely appeal, or why ICN did not engage legal counsel to deal with the matter. Third, despite Ms. Gorenshtein's assertion that she contacted the Tribunal on May 31, 2012, the Tribunal has no record of any such communication on that particular date although the Tribunal's Registry Administrator does recall a

telephone conversation between her and Ms. Gorenshtein "prior to June 11, 2012". The Tribunal's records show that Ms. Gorenshtein contacted the Tribunal on June 11, 2012, which was the last day for filing an appeal as set out in the Determination itself (and the appeal not actually filed until about 5 weeks after that date). Finally, Tribunal Member Roberts was of the view that the appeal, on its face, seemingly was an attempt to reargue points that had already been argued before the delegate; the appeal did not appear to have any *prima facie* merit.

DOES THE RECONSIDERATION APPLICATION PASS THE FIRST STAGE OF THE "MILAN HOLDINGS" TEST

16. The key issue before me is whether the Tribunal erred in refusing to grant ICN's application to extend the appeal period. It should be noted that the Tribunal has the discretionary authority to extend the appeal period. A party does not have an absolute legal right to have an applicable appeal period extended. The Tribunal's discretion to refuse an application to extend the appeal period must, however, be exercised in judicial manner. In other words, the refusal must be based on good faith reasons and the decision-maker should not be actuated by an improper motive or act in a manner that could be fairly characterized as arbitrary. I find that the Tribunal Roberts had more than sufficient reasons for refusing to extend the appeal period.

17. In support of the reconsideration application Ms. Gorenshtein submits that she was "the only person who has the necessary qualifications to deal with the issues raised by this appeal" implying that Mr. Gorenshtein could not have dealt with the matter. This assertion stands in contrast to the fact that Mr. Gorenshtein *was* involved in the matter during the delegate's investigation (see delegate's reasons, page R9).

18. Ms. Gorenshtein says that she was "trying hard to submit the appeal before her surgery date" but does not explain, to my satisfaction (indeed, she offers no explanation whatsoever), why her appeal materials could not have been completed during the 1-month period from May 4 (when the Determination was served) until the date of her surgery. I note that many of the arguments raised on appeal are simply a "repackaging" of the written arguments that were previously provided to the delegates during the two separate investigations that were conducted into the two complaints. Thus, although the appeal materials are extensive, they are largely a "cut and paste" of submissions previously filed.

19. ICN asserts that Tribunal Member Roberts "did not deal with significant issues in the appeal" such as whether the complaints fell within the jurisdiction of the *Act*, whether the Determination was inconsistent with the B.C. Provincial Court judgment issued by Justice of the Peace Armstrong on October 19, 2010, and whether the delegate "fabricated evidence" in the course of her investigation. While it is true that Tribunal Member Roberts did not exhaustively canvass these issues in her reasons for decision, it must be remembered that she was not adjudicating the appeal on its merits. Rather, she was dealing with a much narrower question, namely, whether ICN's application to extend the appeal period should be granted. The criteria that the Tribunal will consider when adjudicating an application to extend the appeal period were set out in *Niemisto* (BC EST # D099/96) and Tribunal Member Roberts specifically addressed these criteria in her reasons for decision (see paras. 27 – 35).

20. With respect to the merits, I agree with Tribunal Member Roberts that ICN's appeal is not, on its face, meritorious. In my view, the Supreme Court of Canada's decision in *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113 (discussed in the delegate's reasons at pages R29 – R30) is a complete answer to ICN's jurisdictional argument. ICN's business operations as an employment agency operating in British Columbia under the provisions of the *Act* do not conflict with the federal *Immigration Act* (the statute that principally governs ICN's operations as an immigration consulting firm). I consider the B.C. Provincial Court decision

of Armstrong, J.P. in the *ICN v. Tagirova* matter to have been wrongly decided as it stands contrary to the B.C. Court of Appeal decision in *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 (leave to appeal to the Supreme Court of Canada refused: 2008 CanLII 53790) and that appears to also be the view of Provincial Court Judge Chen who refused to proceed with the small claims court trial in the *ICN v. Baranova* matter. There is no credible evidence that the delegate "fabricated evidence" in the course of adjudicating the two complaints. ICN disagrees with certain factual findings and factual inferences made by the delegate but there is no credible evidence of "fabrication" which, of course, would be a very serious matter. As such, this allegation requires cogent proof and there is no such evidence before me. Finally, and perhaps most importantly, ICN has simply failed to provide a credible explanation for its failure to file a timely appeal.

21. In my view, ICN's section 116 application does not pass the first threshold of the *Milan Holdings* test. Accordingly, there is no need to seek submissions from the respondents since this application must be refused.

ORDER

22. ICN's application made pursuant to section 116 of the *Act* to reconsider Tribunal Member Roberts' decision (BC EST # D101/12) is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal