An Application for Reconsideration

- by -

ICN Consulting Inc. carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International CaregiversNetworks.ca
("ICNC")

- 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 No.: 2014A/62

DATE OF DECISION: December 16, 2014

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
Ai Li Lim	counsel for Maria Tagirova and Anna Baranova
Jean Walters	counsel for Attorney General of British Columbia
Michelle Alman	counsel for the Director of Employment Standards

OVERVIEW

1. This is an application by ICN Consulting Inc., carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International Caregivers Network.ca ("ICNC"), pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of a decision by a Member of the Tribunal, BC EST # D024/14, dated April 16, 2014 (the "Original Decision").

2. The Original Decision dismissed an appeal by ICNC of a determination issued by a Delegate (the "Delegate") of the Director of Employment Standards dated May 3, 2012 (the "Determination"), which had allowed complaints filed by Maria Tagirova and Anna Baranova (collectively, the "Complainants") against ICNC.

3. The Delegate found ICNC had contravened sections 10 and 12 of the *Act* and owed $2,273.97 to the Complainants. The Delegate also imposed two $500.00 administrative penalties for the contraventions, for a total payment order against ICNC of $3,273.97.

4. Pursuant to section 36 of the *Administrative Tribunals Act* (which applies to the Tribunal by virtue of 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.

5. Having reviewed the material before me, which includes the Determination and Reasons for Determination, the record supplied pursuant to subsection 112(5) of the *Act*, documents and submissions delivered in the appeal proceedings, the Original Decision, ICNC's application for reconsideration, the submissions of the other parties in response to ICNC's application, and ICNC's final reply submission, I find I can decide this matter based on these written materials, without an oral or electronic hearing.

FACTS

6. The litigation history of this matter is summarized at paragraph 5 of the Original Decision. The factual background is set out at paragraphs 12 – 22.

7. As the Member noted in paragraph 13 of the Original Decision, he based his factual summary on the findings of fact made by the Delegate in the Determination. He also acknowledged that ICNC challenged many of those findings, and that he would address those challenges later in the Original Decision.

8. I adopt the factual summary set out in the Original Decision appreciating that ICNC continues to challenge some of the factual findings in the Determination in its application for reconsideration. Those challenges will be addressed below in the course of addressing ICNC's individual grounds for reconsideration.

POSITIONS OF THE PARTIES

9. ICNC's application for reconsideration asserts that the Tribunal should reconsider the Original Decision because the Member made 15 reviewable errors. Its application sets out the 15 alleged reviewable errors and makes submissions with respect to each of them.

10. The respondent parties submit, in essence, that ICNC's application does not raise questions of fact, law or principle which warrant reconsideration of the Original Decision. They submit that the application merely asks the Tribunal to re-hear the arguments and re-weigh the evidence considered and addressed by the Member in the Original Decision, or to consider arguments that could have been raised on the appeal but were not. They submit, therefore, that the application does not meet the Tribunal's test for reconsideration and should be dismissed. Alternatively, they make submissions with respect to the 15 alleged errors, denying that reviewable errors were made or that they provide a basis for interfering with the Original Decision.

11. In its final reply submission, ICNC states that it has decided not to respond to the submissions of the respondent parties in substance, and indicates that it relies on the submissions made in its application, with some corrections relating to references it had made to documents and other materials appearing in the record.

ANALYSIS

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

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

13. 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.

14. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision (see *Re Middleton*, BC EST # RD126/06).

15. 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 described in section 112 of the *Act*.

16. 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.

17. 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 Member 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 decision which are so important that they warrant reconsideration (see *Director of Employment Standards (re Milan Holdings Inc.)*, BC EST # RD313/98).

18. In the present case, I have concluded that none of the 15 grounds in ICNC's application justifies reconsideration of the Original Decision. The Tribunal's established test for reconsideration is not met as none of the grounds raises a question of law, fact, principle or procedure that warrants a reconsideration.

19. I will address the 15 grounds in the order they are presented in the application. The wording of the 15 headings below reproduces the language in ICNC's application.

I. The Tribunal Member gave no consideration as to whether the Director had jurisdiction to preclude immigration consultants from charging fees for services authorized under the *IRPA*.

20. ICNC's submission under this heading consists of a quoted passage from paragraph 62 of *Gorenshtein v. British Columbia (Employment Standards Tribunal)* 2013 BCSC 1499 (the "Judicial Review Decision"). ICNC has provided no further comments which would explain how the quotation supports its allegation under this heading. I find ICNC's bare quotation of a passage from the Judicial Review Decision does not provide a basis for reconsidering the Original Decision.

21. If ICNC's first ground for review is intended to suggest that the Member did not consider the constitutional issues raised by ICNC in its appeal, a review of the Original Decision refutes this suggestion. In paragraph 38 of the Original Decision the Member refers specifically to ICNC's argument on appeal to the effect that "the provisions of the federal legislation allow ICNC to charge a fee and must prevail over whatever prohibitions are in the *Act* against receiving payment for employing or obtaining employment for a person or providing information about employers". It is clear, therefore, that the Member was alive to the substance of ICNC's argument on this point. The Original Decision then discusses at length, at paragraphs 113-139, the constitutional issues raised by ICNC, including the submission that sections 10 and 12 of the *Act* are incompatible with the federal *Immigration and Refugee Protection Act* ("*IRPA*").

22. In the Judicial Review Decision, the Court states in paragraph 63, the paragraph immediately following the one ICNC quotes:

> It may ultimately be concluded that the provisions of the *ESA*, which prohibit charging fees to persons seeking employment and those which require licensing of employment agencies, can be reconciled with the provisions of the *IRPA*, which allow authorized immigration consultants to charge fees for immigration related services. However, this conclusion requires an analysis of the relevant federal and provincial legislative schemes and a determination that dual compliance is possible. …

23. It follows that the Court did not intend to make any ruling on the merits of the appeal regarding this issue, but left it to the Tribunal to determine the matter on the referral back. That is precisely what the Member did in the Original Decision. He analyzed the relevant federal and provincial schemes in light of the submissions of the parties. He then concluded that "dual compliance" (compliance with both the federal *IRPA* and the provincial *Act*) was possible: see in particular paragraphs 125 – 130 of the Original Decision.

24. I find no error or basis for reconsideration of this analysis. I agree with the reasoning and conclusion in the Original Decision that the fees ICNC charged the Complainants were prohibited by section 10 of the *Act* and were not shown to be in respect of services mandated by federal immigration legislation.

II. The Tribunal Member gave no consideration as to whether Ms. Small and Mr. Flann were "employers" in the meaning of the ESA at the time they received ICNC's "recruitment-related services".

25. ICNC argues that since the recruitment-related services it allegedly provided to Small and Flann occurred before the latter obtained authorization from the federal authorities to hire the Complainants, Small and Flann were not "employers" for purposes of the *Act* at that time. ICNC does not explain why this submission would lead to a conclusion that the Original Decision must be cancelled.

26. The complaints filed by the Complainants under the *Act* were not against Small or Flann as employers but against ICNC for the fees it charged the Complainants in the course of arranging for their employment by Small and Flann. Sections 10 and 12 of the *Act* refer and apply to "persons", not just employers. Accordingly, I find it is irrelevant to the application of those provisions that, at the time ICNC charged fees for providing services, Small and Flann had not yet completed all the steps of the hiring process that ultimately led to their entering into employment contracts with the Complainants.

27. I will address ICNC's argument about the scope of the terms "employer" and "employee" in my discussion of its ground IV, below.

III. The Tribunal Member gave no consideration as to whether Ms. Tagirova and Ms. Baranova were "employees" in the meaning of the ESA at the time they received ICNC's "recruitment-related services".

28. Under this heading, ICNC repeats its argument that was addressed at paragraph 135 of the Original Decision, but it does not explain why the Member's rejection of that argument was flawed. Paragraph 135 of the Original Decision shows that the Member expressly considered and addressed this argument, and I am not persuaded by ICNC's submissions that the Member was incorrect in the conclusions he reached on this issue.

IV. The Tribunal member gave no consideration as to whether the Delegate correctly interpreted the term "employment agency", as that term is defined in the ESA.

29. Section 10 of the *Act* makes no reference to "employment agency". Section 12, however, prohibits the operation of an unlicensed "employment agency". Section 1 defines "employment agency" to mean "a person who, for a fee, recruits or offers to recruit employees for employers".

30. ICNC argues that at the time it provided its services, Small and Flann had not yet formally hired the Complainants. Therefore, it submits, they were not "employers" for the purposes of this definition, and the Complainants were not "employees". ICNC says that means it did not operate as an "employment agency".

31. In my view, it would be absurd to interpret section 12 of the *Act* as applying only where a person receives recruitment services from an employment agency *after* the person has hired the "employee", and so has become an "employer". If that were the manner in which section 12 of the *Act* was to be interpreted, it would mean that it would cease to have application to most, if not all, the recruitment and referral services offered by an employment agency. I find, therefore, that ICNC's submission offers an interpretation of the terms "employer" and "employee" in the definition of "employment agency" that is untenably narrow, and one that cannot be accepted for the purposes of applying section 12.

32. As the Tribunal stated in *McPhee*, BC EST # D183/97:

> The definition of "employer" under the *Act* … is cast in sufficiently broad terms to allow the purposes of the *Act* to be realized and should be given a liberal interpretation. …

33. The *Act* must be interpreted in a broad, liberal, and purposive manner, as befits its status as benefits-conferring legislation (see *Machtinger v. HOJ Industries Ltd.* [1992] 1 SCR 986, and *Rizzo & Rizzo Shoes Ltd.* [1998] 1 SCR 27). Applying this principle, I find that ICNC's activities in relation to the Complainants fall within the definition of "employment agency", and so section 12 applies to ICNC, despite the fact that ICNC provided its recruitment-related services to Small and Flann before they entered into employment relationships with the Complainants. They did so, later, as a result of the services provided by ICNC, and that is sufficient to render ICNC an "employment agency" for the purposes of the *Act*.

34. ICNC also submits that the recruitment services provided to Small and Flann were provided without charge. The thrust of ICNC's submissions are directly contrary to the findings of fact made by the Delegate, with which the Member in the Original Decision rightly did not interfere. Moreover, as the Member noted in the Original Decision, at paragraph 146, ICNC's argument on this point on appeal made selective use of the evidence in the record, and did not address other factual material supporting the Delegate's conclusion that ICNC provided employment agency services for a fee.

35. In my opinion, the same can be said of ICNC's submissions on this point on this application. It appears ICNC is merely repeating the arguments it presented, unsuccessfully, on appeal. I am in no better position on this application for reconsideration to disturb the Delegate's findings of fact. I also agree that ICNC has not addressed the other material in the record that the Delegate referred to which supported her findings.

36. I find this ground does not raise a basis for reconsidering the Original Decision.

V. The Tribunal member erred by endorsing the Director's statement that federal immigration legislation does not purport to regulate the business of employment agencies.

37. Under this heading, ICNC quotes a passage from the Original Decision at paragraph 122 to the effect that the Member agrees with the Determination that federal immigration legislation does not purport to regulate the business of employment agencies. ICNC then refers to the Citizenship and Immigration Canada website, asserting that the site sets out rules for recruiters in the Live-In Caregivers Program, including rules relating to payment of recruitment fees.

38. ICNC does not explain how this observation provides a basis for reconsideration of the Original Decision. The federal government may, as ICNC asserts, regulate recruiters in the Live-In Caregivers Program to a degree. However, that does not raise a serious question as to the correctness of the conclusion of the Member on the constitutional issues. As noted by the Attorney General of British Columbia in her July 7, 2014, submission (at paragraph 6):

> Under constitutional doctrine, the fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out provincial action in respect of the subject… The Attorney General submits that the onus was on the Applicants to establish its assertion that the Parliament intended to exclude provincial legislation. The Applicant did not do so. The evidence provided by the Attorney General was to the opposite effect – Parliament's intention, and the intention of the federal government, is that it did not intend to legislate to the exclusion of the province and, in fact, specifically intended for provincial employment legislation to apply.

39. ICNC's submissions under this heading do not raise a reviewable error or any other basis for reconsidering the Original Decision.

VI. The Tribunal Member erred by not providing an analysis of the relevant federal and provincial legislative schemes before he stated that dual compliance with the IRPA and the ESA is possible.

40. Under this heading, ICNC notes that, at paragraph 126 of the Original Decision, the Member stated there is "no evidence that it is not possible for a person to comply with the *Act* and still provide the immigration services contemplated in the *IRPA* and *IRPR*…." ICNC argues that it is "not clear, how ICNC could possibly comply with both the federal and provincial legislative schemes, and carry on with its immigration business if the Delegate has come to the conclusion that ICNC has contravened s. 10 of the *ESA*…."

41. In paragraphs 113 – 139 of the Original Decision, the Member provided an extensive analysis of the relevant federal and provincial legislative schemes before concluding that dual compliance was possible. I agree with and adopt this analysis. Nothing ICNC raises under this heading leads me to conclude the Member failed to provide a required analysis or otherwise committed a reviewable error in reaching this conclusion.

42. ICNC's argument under this heading is premised on the assertion that it charged only for immigration-related services and not for employment-related services, but that was not the finding of the Delegate, and that finding of fact was upheld on appeal. ICNC contravened the *Act* because, as the Delegate found, it charged the Complainants fees for finding them employment.

43. As the Member concluded in the Original Decision, federal immigration legislation does not require or authorize immigration consultants to charge fees to job seekers in order to assist them to find employment.

VII. The Tribunal Member gave no consideration as to whether the Provincial Court finding, created an estoppel or rendered the matter *res judicata*. Also, the Tribunal did not consider if the Director had jurisdiction to fine ICNC for a fee that was upheld by the Provincial Court.

44. ICNC's submission under this heading consists of a quoted passage from paragraph 68 of the Judicial Review Decision in which the chambers judge made certain comments with respect to a previous decision of the Tribunal in these proceedings – not the Original Decision. ICNC does not state that in its appeal it argued the matters referenced in paragraph 68 of the Judicial Review Decision. In these circumstances, the assertion that the Member gave no consideration to these matters does not provide a basis for reconsideration. A decision-maker cannot be faulted for not considering a matter that was not raised before him or her.

45. ICNC did raise these issues with the Delegate and she concluded that the Provincial Court decision did not preclude her from continuing her investigation pursuant to the *Act*. As noted, ICNC did not appeal this aspect of the Determination. In these circumstances, it would offend the purposes of promoting the fair treatment of employees, and providing efficient disposition of complaints – purposes that are mandated in section 2 of the *Act* – to permit ICNC to raise these issues at the reconsideration stage of these proceedings.

46. If I am wrong, and these issues can be raised now, I am of the view that the decision of the Provincial Court referred to in the Judicial Review Decision does not constitute a bar to the subsequent proceedings before the Delegate, for two separate reasons.

47. In order for a prior judicial decision to create an issue estoppel, or a finding of *res judicata*, the parties to the decision, or their privies, must be the same as in the subsequent proceeding (see *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44). Here, the parties in the Provincial Court proceeding were not the same as the

parties before the Delegate: neither Baranova nor the Director was a party in the Provincial Court proceeding.

48. Second, and in any event, it appears from the reasons of the Provincial Court that no notice of a constitutional question was delivered to the Attorney General of British Columbia before the Provincial Court made its decision. As counsel for the Attorney General noted in her submission, a decision has no precedential value where constitutional findings are made in the absence of the requisite constitutional notice (see *Eaton v. Brant County Board of Education* [1997] 1 SCR 241).

VIII. The Tribunal Member erred by finding that there was no error of law in the fact that the Delegate had altered the Complainants' testimonies.

49. Under this heading, ICNC quotes paragraphs 144 – 148 of the Original Decision and takes issue with the Member's rejection, in those paragraphs, of ICNC's argument that the Delegate mis-stated the evidence of the Complainants in the Determination.

50. In paragraph 144 of the Original Decision, the Member noted that ICNC submitted the Delegate "fabricated evidence" by finding in the Determination that the Complainants had testified ICNC had indicated the fee included help finding employment in Canada. In paragraph 146, the Member referred to other evidence in the record where the Complainants alleged ICNC had indicated the fee was for finding employment. He also noted other documents which supported the same conclusion. Considering the evidence as a whole, the Member rejected ICNC's argument that the Delegate had fabricated or altered the Complainants' evidence.

51. The submissions of ICNC under this heading do not persuade me the Member made a reviewable error.

52. If, as I infer, ICNC is arguing that the Delegate erred in law in stating that the Complainants were told in conversations with a principal of ICNC that fees would be charged for providing help to find employment in Canada, when in reality they were told that in a different conversation, then I am of the view that this raises a distinction without a substantive difference and does not assist ICNC in demonstrating that the Original Decision is flawed. The fact remains that ICNC communicated to the Complainants that fees would be charged for help in finding employment. There is no doubt that was the position taken by the Complainants throughout, and it was open to the Delegate to make a finding that confirmed that assertion. That, in fact, is what the Delegate did.

53. In any event, as the Member indicated in paragraph 146 of the Original Decision, there was other evidence, apart from the Complainants' testimony, that supported the conclusion that ICNC charged a fee for finding them employment. ICNC's disagreement with the way the Delegate characterized the Complainants' testimony does not provide a basis for reconsidering the Original Decision's conclusion that the Delegate did not err in finding ICNC had breached section 10 when it charged a fee for assisting the Complainants to find employment.

IX. The Tribunal Member erred by endorsing the Director's erroneous application of the 'best evidence' rule.

54. Under this heading, ICNC argues that receipts submitted by the Complainants and accepted by the Delegate as the best evidence available of the amounts paid by them to ICNC are "irrelevant" in the sense that they do not constitute any evidence, let alone the best evidence, supporting a finding that the Complainants made these payments to ICNC.

55. ICNC further states: "We insist that the Tribunal look at the documents in question and confirm that these receipts are relevant to the case". ICNC does not provide any further submissions explaining how this request provides a basis for reconsidering the Original Decision, and I find it does not.

56. The bank receipts constituted "some", rather than "no", evidence of the payments made. As such, the Delegate was entitled to rely on them. The weight to be given to the evidence was for the Delegate to decide, and the Member was right to decline to interfere with the Delegate's weighing of the evidence and findings of fact. ICNC's arguments establish no reviewable error of law by either the Delegate or the Member.

X. The Tribunal Member failed to address the fact that the Delegate modified Mr. Flann'[s] testimony.

57. ICNC's submission under this heading states:

> ICNC showed in its appeal and final reply submissions that the Director's Delegate Ms. Walsh modified Mr. Flann's evidence – see ICNC's appeal, para. 89 – 91, and ICNC's final reply, paras. 79 – 83. However, the Tribunal Member Stevenson did not address that point of contention.

58. Reconsideration is not an opportunity to re-argue the appeal before a different panel of the Tribunal. It is an opportunity to argue why the decision on the appeal should be reconsidered. Here, the only basis for reconsideration of the Original Decision raised is the assertion that the Member "did not address" ICNC's argument that the Delegate "modified Mr. Flann's evidence".

59. In considering this assertion, I note that decision-makers are not required to expressly address in their decisions every piece of evidence and every argument raised before them. Bearing that in mind, I find the Member sufficiently addressed the numerous issues and allegations ICNC raised with respect to the Delegate's treatment of the evidence and factual findings, including the allegation that the Delegate "modified" witness testimony: see paragraphs 153 – 154 of the Original Decision.

60. Accordingly, I am not persuaded ICNC's submission under this heading provides a basis for reconsidering the Original Decision. This ground, like other grounds, asserts an error or failing which would not warrant reconsideration of the Original Decision even if it were established. An application for reconsideration must do more than allege failings or flaws in an original decision which in themselves would not raise a serious question as to the correctness or fairness of the decision as a whole. The application must raise, and make a case, that there is a question of fact, law, principle or procedure flowing from the Original Decision that is of sufficient importance to warrant reconsideration.

XI. The Tribunal Member gave no consideration to the fact that both Complainants concealed from the Director the fact that they had appointed Ms. Gorenshtein to act as their paid immigration representative.

61. Under this heading, ICNC alleges the Member did not consider its argument that the Complainants "concealed" from the Delegate that they had appointed Tatiana Gorenshtein to act as their immigration representative.

62. I find, however, that the Member effectively addressed this argument in his acceptance of the factual findings of the Delegate. Those findings make it clear that the Complainants did not "conceal" their relationship with ICNC. Rather, they filed complaints demonstrating that they disagreed with ICNC's position that the fees they were charged were for immigration-related services only.

63. The Member also effectively addressed this argument when he upheld the Delegate's finding that, contrary to ICNC's claim that the services it charged the Complainants for were immigration-related only, the services ICNC provided and charged for were also for employment-related services.

64. ICNC also makes what appears to be a new allegation that the Complainants contravened section 40(1)(a) of the *IRPA*. This new allegation provides no basis for reconsideration. Apart from the significant problem that it does not appear to have been raised earlier in these proceedings, the claim of a contravention of the *IRPA* by the Complainants is not a matter I have jurisdiction to decide.

XII. The Tribunal Member erred by endorsing the Director's assessment of the Complainants' credibility.

65. ICNC takes issue with a passage in the Original Decision where the Member noted that ICNC challenged the Delegate's assessment of the credibility of the Complainants, and then rejected that challenge. The Member stated that after reviewing the Determination, the material in the record referred to by ICNC, and ICNC's appeal submission, he agreed with the Delegate that any discrepancies advanced by ICNC were "exaggerated, not significant and/or not central to the claim" (Original Decision, paragraph 155).

66. ICNC takes issue with this finding. I have reviewed ICNC's submissions in that regard and am not persuaded they reveal any reviewable error in the Original Decision relating to the manner in which the Member dealt with this aspect of the appeal.

67. ICNC repeats its discrepancy arguments with respect to the Complainants' testimony as to a telephone conversation they allegedly had with ICNC's Michael Gorenshtein. However, the finding that the services ICNC provided included employment-related services was not based solely on the Complainants' testimony about this telephone call. It was based on the entirety of the evidence concerning the nature of the services ICNC provided.

68. In these circumstances, I find no basis to reconsider the Original Decision in ICNC's submission under this heading.

XIII. The Tribunal Member did not address the issue raised by ICNC that it was very unreasonable for the Director to say that communications between Mr. Flann, ICNC and Ms. Baranova reasonably indicated an understanding or intention of Mr. Flann.

69. Under this heading, ICNC complains that the Member did not address an issue it says it raised impugning a factual finding in the Determination. Assuming for the purpose of this decision that ICNC did raise this disagreement in its appeal submission and the Member did not expressly address it, I find this does not establish a basis for reconsidering the Original Decision. As noted earlier, it is well-established that an administrative decision-maker is not required to expressly address every piece of evidence and every argument that is presented to him or her. ICNC does not submit the outcome of the case turned on its disagreement with this particular finding of fact, and it is clear on review of the material before me that it did not.

70. The Member expressly stated in the Original Decision (at paragraphs 153 – 154) that he did not accept ICNC's many challenges to the factual findings of the Delegate, and he gave an explanation for that conclusion. I find ICNC's disagreements with the Delegate's findings of fact were sufficiently addressed by the Member in the Original Decision, and ICNC's submissions under this heading do not provide a basis for reconsideration.

XIV. The Tribunal Member gave no consideration to the fact that on Ms. Tagirova's request the Delegate decided to abandon a common fact-finding meeting for all the parties.

71. ICNC says it raised this issue in its final reply submission and complains that the Member did not address it. However, final reply is an opportunity to reply to the submissions of the other parties in relation to the appeal, not to raise new issues. When issues are raised for the first time in final reply, the other parties have no opportunity to respond to them, creating the potential for unfairness if they are addressed.

72. In any event, I cannot accede to ICNC's complaint because it does not establish a basis for a conclusion that ICNC was denied a fair hearing. The *Act* gives the Director significant latitude in determining how an investigation will be conducted, and it does not require a common fact-finding meeting.

73. To the extent ICNC also complains about the length of time the Delegate took to complete her investigation, I agree with the conclusion of the Member that ICNC has not shown "how the length of time taken by the delegate interfered with their opportunity to know the case against them, to present their evidence, and to be heard by an independent decision maker" (Original Decision, paragraph 177).

XV. The Tribunal Member failed to address the fact that [in] the 14 months before the second investigation was completed and the Determination was issued, the Counsel for the Director stated in the Court that ICNC's case was similar to Prince George Nannies case.

74. ICNC's submissions about what counsel for the Director said in Provincial Court were addressed in the Original Decision at paragraphs 181 – 190. I agree with the Member's analysis of these submissions, and in particular his conclusion that there was no basis in the submissions made by ICNC to conclude that counsel's comments established the Director had prejudged the validity of the complaints against ICNC.

75. I find ICNC's submissions under this heading in its application for reconsideration merely establish that it does not agree with the Member's conclusion on this issue, but do not persuade me that the conclusion, or more importantly the Original Decision as a whole, should be reconsidered.

SUMMARY AND CONCLUSION

76. Reconsideration under s. 116 of the *Act* is discretionary, and an applicant must meet a well-established test before the Tribunal will reconsider a decision or order. This burden is justified, given the importance of finality, and timely decision-making, in the employment standards appeal context.

77. Having reviewed ICNC's submissions in its application for reconsideration, I find they do not meet the Tribunal's established test for reconsideration. As indicated above, none of ICNC's 15 grounds raises any significant questions of law, fact, principle or procedure flowing from the Original Decision which would warrant reconsideration. I find the Original Decision sufficiently addresses ICNC's arguments on appeal and I find no reviewable error in the analysis and conclusions reached by the Member. Nothing in ICNC's application persuades me the Original Decision was wrongly decided, or raises any significant issue that would warrant reconsideration. Accordingly, the application is denied.

ORDER

78. Pursuant to section 116 of the *Act*, the Original Decision is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal