



An appeal

- by -

Yun Chuen Lam
(“Mr. Lam”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2014A/154

DATE OF DECISION: January 9, 2015

DECISION

SUBMISSIONS

Yun Chuen Lam

on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Yun Chuen Lam has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on October 14, 2014. In that Determination, a delegate of the Director determined that there had been no contravention of the *Act* and decided that no further action would be taken.
2. Mr. Lam appeals the Determination contending that the delegate failed to comply with principles of natural justice.
3. These reasons are based on Mr. Lam’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. The background facts are fully set out in *Lam* (BC EST # D031/13). Briefly, in 2011, Mr. Lam filed a complaint with the Employment Standards Branch alleging that Disternet Technology Inc. (which later changed its name to Mimik Technology) (“Disternet”) had contravened the *Act* by failing to pay all regular wages. The delegate conducted a hearing into Mr. Lam’s complaint on October 7, 2011, and issued a Determination on October 30, 2012. Mr. Lam appealed that Determination, and in the March 14, 2013, decision, the Tribunal remitted the complaint back to the Director for “further investigation on the issue of whether the wage reduction agreement was legally valid and for a fresh determination to be issued.”
5. As noted by the Tribunal Member in referring the matter back, Mr. Lam’s appeal was grounded in the Tribunal’s reconsideration decision respecting a former employee of Disternet, Borisav Maksimovic, whose wages were affected in the same way as Mr. Lam’s were.
6. At issue in both Mr. Maksimovic and Mr. Lam’s complaints was whether Disternet’s decision to reduce their salaries by 50% for an unspecified period of time, the length of which appeared to be dependent on whether and when Disternet acquired additional funding, was a salary deferral or a pay cut.
7. Mr. Lam’s appeal referred to the Tribunal’s reconsideration decision in *Maksimovic* (BC EST # RD046/12) which referred Mr. Maksimovic’s complaint back to the Director to investigate and consider the validity of the “wage reduction.”
8. In a Determination issued November 22, 2013, the Director concluded that the “wage reduction” agreement between Mr. Maksimovic and Disternet was a legally valid agreement and did not contravene the *Act*. The Director ordered that no further action would be taken.
9. Mr. Maksimovic appealed the Second Determination, contending that the delegate erred in law. In dismissing Mr. Maksimovic’s appeal, the Tribunal noted that Mr. Maksimovic was offered the choice to take a severance

package instead of a temporary reduction in salary, an action that constituted sufficient consideration for the wage reduction. (BC EST # D026/14)

10. As Mr. Lam's appeal referred to the Tribunal's reconsideration decision in Maksimovic, the Tribunal Member deciding his appeal sought submissions from the parties on what effect, if any, the Maksimovic reconsideration decision might have on this appeal. The Member noted that

In all material respects the circumstances of Mr. Lam's case relating to the wage reduction agreement are identical to those of Mr. Maksimovic and, as with Mr. Maksimovic's complaint and appeal, the legal validity of the "wage reduction" was not raised or considered during the complaint process.

11. The Tribunal Member noted that Mr. Lam says the similarity between his case and that of Mr. Maksimovic means the decision in Mr. Maksimovic's reconsideration should be applied to his case. Disternet and the Director both contended that each case should be decided on their own facts and that the facts in Mr. Lam's complaint were distinguishable from Mr. Maksimovic's case.
12. The Tribunal Member found that Mr. Lam's appeal should be decided without a consideration of a decision on the issue identified in the Maksimovic reconsideration decision, and remitted Mr. Lam's claim to the Director for a fresh determination after an examination of and decision on the same issue that was being considered for Mr. Maksimovic's claim.
13. This brings us to the present appeal.
14. The delegate invited the parties to submit further relevant evidence and make additional submissions prior to making a new Determination, and indicated that she would rely on the records produced by the parties at the hearing in October 2011, the background, issue, Argument and Evidence portions of the Determination issued October 2012, Mr. Lam and Disternet's submissions to the Tribunal on appeal. As neither party objected to the record or the process, the delegate reproduced the background facts, argument and evidence from the original Determination, including Mr. Lam's term of employment and his rate of pay. The delegate considered the oral evidence given at the October 2011 hearing by Joe Harris, Disternet's former Vice-President of Marketing, and Fay Arjomandi, the co-founder/former President and CEO of Disternet, along with that of Mr. Lam. Mr. Lam also submitted an email from an individual who appeared to be another former employee describing a pay cut and Disternet's need to save money. Disternet contended that it intended to dismiss Mr. Lam prior to his agreement to the wage reduction and that such forbearance from dismissal is adequate consideration for a change to the terms and conditions of employment.
15. The delegate considered the oral evidence of the parties and, applying the *Faryna v. Chorny* ([1952] 2 D.L.R. 354) test for the assessment of credibility, found Mr. Harris and Ms. Arjomandi's evidence more consistent, coherent and reasonable. She concluded that their evidence, which was that Mr. Lam agreed to a 50% pay cut in light of Disternet's funding issues, to be more probable in light of the company's financial state. The delegate also found that the payroll records supported Disternet's position. The delegate also found Mr. Lam's evidence "seriously and significantly lacking in pertinent details concerning his conversations and agreement with Ms. Arjomandi."
16. The delegate concluded that Mr. Lam's "vague" testimony was insufficient to establish his wage claim and determined he was not entitled to additional wages. The delegate found nothing in the submissions on the referral back to alter her findings or analysis concerning Mr. Lam's wage reduction or entitlement to any further wages. She accepted Disternet's position that forbearance from dismissal was adequate consideration and concluded that the agreement was legally valid.

Argument

17. Mr. Lam says that the Determination contains a number of factual errors, including his term of employment and his rate of pay. As I understand Mr. Lam's argument, these factual errors are so serious that they undermine the basis for the Determination.
18. Mr. Lam also asserts that although the Tribunal referred the matter back for further investigation, the investigation was only conducted with Mr. Maksimovic, that his case was not considered and he was not involved. He says he was not given any opportunity to present his view and was not given a fair hearing.
19. Mr. Lam further submits that although he submitted an email establishing that there was no "town hall" meeting to discuss a wage reduction, this email was not considered by the delegate.
20. In conclusion, Mr. Lam asserts that the delegate was "careless, irresponsible and unprofessional" and biased and asks that the matter be referred back to a new delegate.

ANALYSIS

21. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
22. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
23. I find that Mr. Lam has not demonstrated a denial of natural justice, or, for that matter, any other ground of appeal.

Error of Law

24. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA) the British Columbia Court of Appeal set out the following elements as constituting an error of law:
 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
25. Upon the referral back, the delegate advised the parties that she would be relying on the relevant facts, evidence and analysis contained in her original determination unless she heard otherwise from the parties. The original determination contained Mr. Lam's rate of pay and term of employment. Mr. Lam did not object to those findings, either during the first appeal or when invited to do so by the delegate on the referral

back. Consequently, I am only able to conclude that the delegate acted on undisputed facts with respect to those issues.

26. Furthermore, although Mr. Lam asserts that the delegate did not contact him, the record indicates otherwise. Mr. Lam was invited to provide any additional evidence he felt important. Contrary to Mr. Lam's argument, the delegate considered the email from another employee Mr. Lam submitted in her analysis.
27. Mr. Lam has failed to demonstrate that the Director committed a palpable or overriding error, or failed to observe the principles of natural justice in making the Determination.
28. Having reviewed the Determination, the record and the submissions, I find that the delegate offered Mr. Lam the opportunity to present his case and respond to Disternet's material. I also find that she fully considered all of the material before her. Furthermore, Mr. Lam has not persuaded me that the delegate erred in concluding that he was not entitled to additional wages.
29. I dismiss the appeal.

ORDER

30. Pursuant to section 115 of the *Act*, I order that the Determination, dated October 14, 2014, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal