



An appeal

- by -

Borisav Maksimovic
("Maksimovic")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2011A/178

DATE OF DECISION: January 31, 2012

DECISION

SUBMISSIONS

Borisav Maksimovic	on his own behalf
Nicola Sutton	counsel for Disternet Technology Inc.
Jim R. Dunne	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Borisav Maksimovic (“Maksimovic”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 4, 2011.
2. The Determination was made in respect of a complaint filed by Maksimovic who alleged his former employer, Disternet Technology Inc. (“Disternet”), had contravened the *Act* by failing to pay regular wages, compensation for length of service and stock options.
3. The Determination found that Disternet had contravened the *Act* by failing to pay Maksimovic compensation for length of service and ordered Disternet to pay Maksimovic an amount of \$1,116.10, an amount which included wages, concomitant vacation pay and interest. The Director also imposed administrative penalties on Disternet under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00. The total amount of the Determination was \$2,116.10.
4. Some of Maksimovic’s claim for regular wages was satisfied by Disternet before the Determination was issued, but his claim for wages covering a period from January 2010 to September 2010 was denied. The rejection by the Director of this part of the wage claim is the subject of this appeal.
5. Maksimovic says the Director erred in law and failed to observe principles of natural justice in denying his claim for the January 2010 to September 2010 period.
6. The Tribunal has a discretion whether to hold an oral hearing on an appeal: see Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. None of the parties seeks an oral hearing on this appeal. In this case, the Tribunal has decided an oral hearing is not necessary and this appeal can be decided on the submissions and the material submitted by all of the parties, including the section 112 (5) Record filed by the Director.

ISSUE

7. The issue raised by the appeal is whether Maksimovic has shown the Director erred in law or failed to observe principles of natural justice in making the Determination.

THE FACTS

8. I will only refer to the facts and findings of fact in the Determination that relate to the subject matter of this appeal.
9. Initially, the Determination provides some background information. Disternet operates a software development company. Maksimovic was employed by Disternet as a Senior Hardware Engineer from April 13, 2009, to September 20, 2010. His base salary started at \$40,000 a year and was increased effective June 1, 2009, to \$54,000 a year. Salary increases were contingent on Disternet reaching certain financial milestones under the Industrial Research Assistance Program (“IRAP”).
10. The Director conducted a complaint hearing and received evidence and argument from Maksimovic and representatives of Disternet.
11. The Determination describes Maksimovic’s wage claim which is the subject of this appeal as a claim for “reimbursement of 50% of his wages for the period of January 15, 2010, to September 2010.
12. This claim related to an agreement made between Maksimovic and Fay Arjomandi (“Arjomandi”), the president and CEO of Disternet, in February 2010 to reduce his salary by 50% for an unspecified period of time, the length of which appears to have been dependent whether and when the company acquired further funding.
13. It was Maksimovic’s position that the reduction was a deferral, to be repaid when further funding was acquired; the position of Disternet was that it was a pay cut, which would be revisited if and when further funding was acquired.
14. The Director heard evidence from both parties on this point. Maksimovic testified on his own behalf. Arjomandi and Joe Harris (“Harris”), the former vice-president of marketing, testified for Disternet. The evidence need not be restated here; it is summarized in the Determination. The evidence conflicted on the central point – whether the wage reduction was a deferral or a pay cut. The Director preferred the evidence of Disternet on this point, for the reasons set out in the Determination, and denied this part of Maksimovic’s claim.

ARGUMENT

15. Maksimovic says the Director erred in law by failing to find Disternet had contravened section 27 of the *Act* by failing to provide him with wage statements during the period January 15, 2010, to September 2010, or ordering Disternet to provide them.
16. Maksimovic says the Director’s decision on his claim for reimbursement of wages breached principles of natural justice. On this issue, Maksimovic submits the Director failed to observe principles of natural justice by referring to and relying on the evidence of Harris in making a decision on the central point. He argues that Harris was not at the meeting between him and Arjomandi and could not have known what was discussed or agreed. He says it would have been more reasonable for the Director to have concluded there was an agreement to defer as it was the company’s practice to update the Employment Agreement whenever there was change in terms of employment, which would have occurred if there had been a wage cut and not a deferral. He also says the Director should have given more effect to the failure of Disternet to issue wage statements during the period of the reduction.

17. Maksimovic's argument refers to complaints by other employees against Disternet and the experience of other employees regarding the wage cut.
18. Disternet and the Director have responded to the appeal.
19. Disternet, through legal counsel, submits the appeal has no reasonable prospect of success and should be dismissed under section 114 of the *Act*. I will note here that I am not persuaded to do that.
20. In any event, counsel says no error of law has been shown by the Director not making a Determination in respect of the employer's records and says the Director's reliance on the evidence given by Harris does not demonstrate a failure to observe principles of natural justice in making the Determination. Counsel says the Director observed principles of natural justice in the circumstances of the case – Maksimovic was provided with an opportunity to be present his case and to meet the case presented by Disternet. Counsel says it was simply a case of the Director being faced with conflicting evidence, preferring some evidence over other evidence and making findings of fact accordingly. Counsel submits the findings made by the Director had some evidentiary foundation and the Tribunal does not overturn such findings of fact simply because there is another possible interpretation of the evidence than was selected by the Director.
21. Counsel says Maksimovic is seeking to have the Tribunal revisit this aspect of his complaint and change the result without providing any evidence showing there was an error of law in the Determination. Counsel says the Determination was based on findings of fact made after a careful assessment of the evidence and the Tribunal has no authority to review such findings unless they amount to an error of law and Maksimovic has not met the burden of establishing there was such an error.
22. The Director says Maksimovic has not shown there was any error of law by failing to order Disternet to issue wage statements from January 15, 2010, through September 2010; there was no dispute between the parties that was peculiar to the wage statements and consequently no probative value to obtaining them. As the Director made no finding in the Determination in respect of the wage statements, no penalty was assessed.
23. The Director says Maksimovic's argument of a failure to observe principles of natural justice, looked at in context, is more properly characterized as an alleged error of law that goes to how the evidence provided by Harris was used by the Director. In that respect, the Director says the Determination is clear in stating that Harris' evidence was a compelling argument supporting the evidence of Arjomandi, but was not the only evidence relied on.
24. Finally, the Director says there was no reference at the hearing of any complaints from other employees of Disternet and no other employees were called by either party to give evidence.

ANALYSIS

25. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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 made.*

26. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
27. An appeal to the Tribunal under Section 112 is not intended as an opportunity to either resubmit the evidence and argument that was before the Director in the complaint process or submit evidence that was not provided during the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions. An appeal under the *Act* is intended to be an error correction process, with the grounds of review identified in section 112 and the burden of persuasion being on the appellant to identify the error on one of those grounds.
28. Maksimovic has alleged the Director committed an error of law by not ordering Disternet to issue wage statements and imposing an administrative penalty for their failure to issue them over an extended period.
29. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
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.
30. The short answer to this ground of appeal is that this matter was never dealt with in the Determination; the Director found no contravention of the *Act* and imposed no requirement in respect of the wage statements. The design of the administrative penalty scheme under Section 29 of the *Regulation* provides mandatory penalties where a contravention is found by the Director in a Determination issued under the *Act* and a requirement under section 79 of the *Act* is imposed: see section 98. Accordingly, there was no foundation in this case upon which to impose an administrative penalty relating to the wage statements. I am not persuaded by anything in the appeal that a failure by the Director to conduct a searching analysis of the facts, find all contraventions arising from those facts and impose a penalty with respect to each is an error of law. I am not pointed to any provision of the *Act* or *Regulation* that would place such a requirement on the Director, particularly where, as it was here, the issues before the Director in the complaint do not show there was any relevance to making a finding concerning the alleged contravention.
31. If Maksimovic is suggesting the Tribunal, on its own motion, should address this matter, we cannot and will not do that. In *Kimberly Dawn Kopchuk*, BC EST # D049/05 (Reconsideration denied, BC EST # RD114/05), the Tribunal conducted an extensive analysis of the application by the Director of the administrative penalty scheme. Of the several points made in that decision, one was that the Tribunal has no jurisdiction to find contraventions of the *Act*. A second point made in that decision is that nothing in the *Act* or *Regulation* requires the Tribunal to remit a Determination back to the Director on the basis that other contraventions may have occurred, in order to give the Director a second chance to decide whether to find further contraventions, with further ensuing penalties, and in the absence of a statutory requirement it would not further the purposes of the *Act* to do so.

32. I am able to address Maksimovic's natural justice ground without the need for much analysis. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWT Business World Incorporated*, BC EST # D050/96.

33. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. Natural justice does not require the decision maker to accept everything each party says – that would be absurd and make the process unworkable – nor does it prohibit the decision maker from accepting the position of one party and rejecting the position of the other so long as reasons are provided for the choice made and those reasons are based on relevant considerations, which I find they were in this case. In deciding the merits of the complaint, the Director has to make some choices between the competing positions of the parties. The choices were made and the reasons for those choices were explained in the Determination. Maksimovic may not like the choices made, but on the face of the information provided to the Tribunal in this appeal Maksimovic was provided with the opportunity required by section 77 of the *Act* and the principles of natural justice to present his position and to respond to the position presented by Disternet.
34. The burden is on Maksimovic to provide some evidence in support of its allegation of denial of natural justice. I find that he has not met that burden in the circumstances of this case. This ground of appeal is dismissed.
35. However, in reality, this appeal is not so much about an error of law concerning the wage statements or with concerns about natural justice. While it is not specifically identified in the appeal, Maksimovic's central disagreement with the Determination is with the findings of fact made by the Director on the issue of the pay cut. In that respect, the *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The error of law must be apparent on the face of the Determination and the material on file or arise out of evidence that is allowed under section 112(1) (c).
36. A fair reading of the Determination supports the submission of the Director, that the decision on the central point was not based exclusively on Harris' evidence, but on assessment of all the evidence leading to a finding that the position of Disternet was more reasonable and probable in the circumstances. The decision of the Director was not made without any evidence nor was it based on a view of the facts that was unreasonable or perverse.
37. The Determination sets out the facts relating to this issue, provides a reasoned analysis of them and reaches a conclusion. Whether some other conclusion was available is irrelevant to this appeal. To reiterate, in order for the Tribunal to set aside the findings made here, Maksimovic is required to establish that the challenged findings flow from an error of law within the definition adopted by the Tribunal, and set out above. On that definition, Maksimovic has not shown the Director made any error of law in the findings made on the matter of the pay cut. It is clear from an examination of the Determination that there was evidence on the matter from both parties, the Director acknowledged the evidence of both parties and explained the reasons for

accepting the position of Disternet. In my view, the choice made was one which could reasonably be made on the evidence.

38. For the above reasons, the appeal is dismissed.

ORDER

39. Pursuant to section 115 of the *Act*, I order the Determination dated November 4, 2011, be confirmed in the amount of \$2,116.10, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal