Employment Standards TRIBUNAL

An appeal

- by -

Borisav Maksimovic
("Mr. 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 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2014A/22

DATE OF DECISION: April 22, 2014

DECISION

SUBMISSIONS

Borisav Maksimovic on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Borisav Maksimovic ("Mr. Maksimovic") has filed an appeal (the "Appeal") of a determination issued by the Director of Employment Standards Branch (the "Director") on November 22, 2013 (the "Second Determination"). In the Second Determination, the Director concluded, after investigation, that the "wage reduction" agreement between Mr. Maksimovic and his former employer, Disternet Technology Inc. ("Disternet"), was a legally valid agreement, and did not breach the *Act*. Accordingly, the Director ordered that no further action would be taken in the matter.

2. Mr. Maksimovic appeals the Second Determination contending that the Director's delegate erred in law. Mr. Maksimovic is seeking the Employment Standards Tribunal (the "Tribunal") to change or vary the Second Determination and find the "wage reduction" contravened the *Act*, which would then have the effect of almost doubling his claim for compensation for length of service and significantly add to his claim for unpaid wages and corresponding vacation pay and interest.

3. I have determined this Appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the Appeal based solely on my review of the Reasons for the Second Determination (the "Reasons"), the written submissions of Mr. Maksimovic, and the "record" that was before the delegate when the Second Determination was being made, including the decisions in prior proceedings. If I am satisfied that the Appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, Disternet and the Director may be invited to file further submissions. Conversely, if I find that the Appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

4. The sole issue in this Appeal is whether the Director erred in law in making the Second Determination.

BACKGROUND AND REVIEW OF PRIOR PROCEEDINGS

5. The factual background and prior proceedings leading to this Appeal are thoroughly reviewed by the Tribunal in the Reconsideration Decision (BC EST # RD046/12) as follows:

> The Applicant was employed as a "senior hardware engineer" with Disternet Technology Inc. (the "Employer") from April 13, 2009, to September 20, 2010. On October 6, 2010, he filed a complaint alleging that he was owed regular wages (section 18) and compensation for length of service (section 63). He also claimed an entitlement to purchase certain stock options, however, this claim was ultimately dismissed since it was not a claim for "wages" under the *Act*.
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> The complaint was referred to a delegate of the Director of Employment Standards (the "delegate") who heard evidence and argument from both parties on April 18, 2011. The Employer had legal representation at the complaint hearing but the Applicant appeared on his own behalf. The delegate subsequently issued [the First] Determination and accompanying "Reasons for the [First] Determination" (the "delegate's reasons") on November 4, 2011, ordering the Employer to pay the Applicant $1,116.10 as

compensation for length of service (including 4% vacation pay) and section 88 interest. By way of the [First] Determination, the delegate also levied two separate $500 monetary penalties (see *Act*, section 98) against the Employer.

…the delegate dismissed the Applicant's claim as it related to his right to purchase certain stock options. The delegate also dismissed the Applicant's claim that he was entitled to recover a 50% shortfall in his wages that accrued from January 15 through to September 2010. On this point, the parties were in fundamental disagreement. The Applicant maintained that he had only agreed to a "wage deferral" (since the Employer was in severe financial difficulty) to be recaptured at a later point in time when new corporate financing had been secured. The Employer, on the other hand, took the position that the parties' agreement was for a 50% wage reduction, not a deferral, and that the only promise was that the Applicant's former wage would be reinstated (but not retroactively) if and when new financing was in place. The parties' agreement, whatever it might have been, was never reduced to writing.

The delegate accepted the Employer's evidence, submitted by its co-founder and former president and CEO … regarding the parties' agreement with respect to the reduction in the Applicant's wages….

In January 2010, the Applicant was earning $54,000 per annum and there is nothing in the material before me to indicate what sort of "severance package" was offered to him at this time. It appears that the details of the 'severance package' were not discussed in any detail, however, clearly, his section 63 entitlement for compensation for length of service (separate and apart from any other claim he might have had at common law for "severance pay in lieu of reasonable notice") would have been based on his $54,000 annual salary. I note that his section 63 award for compensation for length of service was based on the reduced $27,000 per annum salary. The delegate did not address, in his reasons, whether the unilateral wage reduction constituted a substantial alteration of a condition of employment within section 66 of the *Act*.

In any event, and as noted above, the delegate ultimately concluded…that the most probable scenario was the Applicant had been offered the choice of a termination with some unstated amount of severance pay, or a 50% wage reduction, and he opted for the latter.…

Since the delegate calculated the Applicant's compensation for length of service based on the reduced wage, this latter finding was doubly consequential for both parties. The delegate did *not* explore, given his finding that the parties' agreement was to *reduce*, rather than *defer*, the Applicant's wages, whether this agreement was void as a matter of common law for want of consideration….I should note that the fact a "consideration" argument was not raised in the complaint hearing is not particularly surprising since this is a somewhat technical legal point and, so far as I am aware, neither the Applicant nor the delegate, has any legal training. Further, the Applicant never raised any "consideration" argument on appeal – his argument was solely that the delegate erred in finding that there was a mutual agreement to cut, rather than defer, his wages. Similarly, the Applicant has not raised any "consideration" issue on reconsideration.

The Applicant appealed the [First] Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice …. His fundamental objection was that the delegate should not have concluded, on the evidence before him, that there was a "wage reduction" rather than a "wage deferral" agreement….

The [First] Determination was confirmed by way of the Appeal Decision. As was noted in the Appeal Decision, at para. 35, the Applicant's central concern was not truly about alleged errors of law or natural justice breaches. Rather, he strongly disagreed with the delegate's finding of fact that the parties' agreement was in the nature of a wage reduction rather than a wage deferral agreement. It is not the function of a Tribunal panel, on appeal, to conduct an entirely new evidentiary hearing and come to whatever decision the panel thinks appropriate. The Tribunal's function is much narrower – it must review the disputed finding of fact and determine whether there was a reasonable evidentiary foundation for it. A finding of fact can only be characterized as an "error of law" if the fact-finder had no proper evidentiary foundation for making the finding in the first instance. Tribunal Member Stevenson, in my

> view, rightly concluded that the record disclosed evidence that could justify the disputed finding of fact relating to the parties' agreement ….

6. Mr. Maksimovic applied to the Tribunal under section 116 of the *Act* for a reconsideration of the Appeal Decision of Tribunal Member Stevenson (the "Original Decision"). Tribunal Member Thornicroft, who decided Mr. Maksimovic's reconsideration application, after reviewing the parties' written submissions, went on to conclude that, although timely, Mr. Maksimovic's application sought the Tribunal to overturn a finding of fact, originally made by the delegate and subsequently confirmed in the Original Decision, relating to whether the parties actually agreed to a "wage reduction" arrangement. Member Thornicroft concluded that he was not overturning that finding of fact; however, he observed that the question of whether the "wage reduction" agreement was legally valid had not been adjudicated as none of the parties, at any stage prior to the reconsideration application, turned their minds to it.

7. According to Member Thornicroft, whether or not the "wage reduction" arrangement was a legally-binding contract depended on whether or not there was any consideration given by Disternet to Mr. Maksimovic when he agreed to the wage reduction. Member Thornicroft observed that there was nothing in the material before him that spoke to this issue, and it may be that some other benefit was conveyed to Mr. Maksimovic in exchange for agreement to accept a 50% wage cut, but this matter needed to be investigated or probed further. In varying Member Stevenson's Original Decision and ordering Mr. Maksimovic's complaint to be referred back to the Director in order that the question of whether the "wage reduction" agreement was a legally valid agreement could be heard and determined, Member Thornicroft reasoned as follows:

> In my view, the issue of consideration is sufficiently important that, particularly since it has never been addressed, the matter should be returned to the delegate for further review. It may be that the delegate, perhaps quite unknowingly, has made a serious error in interpreting and applying the applicable legal principles relating to this dispute and although it is very late in the day, I think fundamental fairness dictates that this issue be argued and adjudicated.

8. As a result of the ruling in the Reconsideration Decision, the Director's delegate sought and received submissions from both Mr. Maksimovic and Disternet on the subject of whether the "wage reduction" agreement was a legally valid agreement. After reviewing the parties' submissions on the subject and concluding in the Second Determination that the "wage reduction" agreement was a legally valid agreement, the delegate reasoned as follows:

> The delegate in the [First Determination] made findings of fact which preferred Disternet's version of the events that led to Mr. Maksimovic's wage reduction. On page R5 of the First Determination reasons, the delegate says "Mr. Maksimovic confirmed he was offered a choice to take a severance package instead of a temporary reduction". In the Original Decision, the Member says that Mr. Maksimovic's "central disagreement with the Determination is with the findings of fact made by the Director on the issue of the pay cut". The Tribunal can only overturn findings of fact in a determination if those findings of fact constitute an error of law. The Original Decision does not overturn any findings of fact in the First Determination. The Second Member notes in paragraph 16 of the Reconsideration Decision that the reconsideration application asks the Tribunal "to overturn a finding of fact originally made by the delegate and subsequently confirmed in the [Original Decision] relating to whether or not the parties actually agreed to a "wage reduction" arrangement". The Second Member goes on to state '*I am not overturning that finding of fact*'.…The fact is the First Determination was not cancelled or varied; therefore all findings of fact contained within it stand.
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> The First Determination made a finding of fact that Mr. Maksimovic confirmed he was offered a choice to take a severance package. This supports the Employer's position that it discussed termination of Mr. Maksimovic's employment with him. I accept the Employer's position that consideration was offered in

> the form of forbearance from dismissal. This is adequate consideration. Therefore I find that the agreement was legally valid and no further wages are owed.

9. The delegate also preferred, in the alternative, that if the "wage reduction" agreement was not a legally valid agreement, then no wages were owed to Mr. Maksimovic "as this issue did not take place within the recovery period for Mr. Maksimovic's complaint as established by section 80 of the Act". I do not find it necessary, in this decision, to deal with the delegate's alternative assertion in light of my decision on the penultimate issue of whether the delegate correctly determined the "wage reduction" agreement was a legally valid agreement.

SUBMISSIONS OF MR. MAKSIMOVIC

10. Mr. Maksimovic argues that the "wage reduction" agreement is only "valid if there was other benefit (other than continuous employment offered) to him". He states that "[s]ince it was agreed that no such benefit was offered, the wage reduction [agreement] was invalid".

11. Mr. Maksimovic then goes on to rely upon Member Thornicroft's following reasons at paragraph 17 of the Reconsideration Decision and argues that while Disternet was given an opportunity to present evidence to show "that any other benefit (other than continuous employment) was offered" to him, Disternet failed to provide sufficient evidence:

> Based on the factual record before me, it would appear that the Employer simply made a unilateral decision to cut the wages of some of its employees in an effort to deal with its straitened financial situation. With respect to the Applicant, the wage reduction was put to him on a "take it or leave it basis" – in effect, "accept this wage cut or you will be fired in which case we will pay you some (never specified) severance". Not surprisingly, the Applicant accepted the wage cut. But did he enter into a legally binding contract? In *Hobbs*, *supra*, the Ontario Court of Appeal observed (at para. 32): '…the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms'. Is that not, in essence, what transpired in this case? What, if anything, did the Employer give to the Applicant when he agreed to the wage reduction other than a promise not to summarily terminate his employment? It may be that some other benefit was conveyed to the Applicant in exchange for his agreeing to accept a 50% wage cut but there is nothing in the material before me that speaks to this issue.

12. Mr. Maksimovic concludes his submissions reiterating that "it is undisputed fact that there was no benefit (other than continuous employment) offered" and, therefore, the "wage reduction agreement is invalid".

13. He also disputes the delegate's alternative assertion that if the "wage reduction" agreement was invalid, then the matter was not raised within the recovery period under section 80 of the *Act*. He argues that this issue was not raised by Disternet or the delegate in the original hearing, or by the Tribunal in the Reconsideration Decision nor was it referred back to the Director for consideration in the Reconsideration Decision. Therefore, it should not factor into or be given any weight in the Second Determination and the Tribunal's decision. Notwithstanding, he argues that his complaint was filed within 6 months of the last day of his employment and section 80 of the *Act* only limits wages payable to 6 months before the complaint was filed or his employment terminated. As indicated previously, I do not find it necessary to deal with these submissions in light of my decision with respect to the primary issue of whether the Director erred in law in concluding that the "wage reduction" agreement was a legally valid agreement.

ANALYSIS

14. The primary issue in this Appeal is whether the Director erred in law in concluding that the "wage reduction" agreement between Disternet and Mr. Maksimovic was a legally valid agreement. Mr. Maksimovic contends that the Director erred in concluding the agreement was legally valid. Relying upon Member Thornicroft's reasons in the Reconsideration Decision (at para. 17), he argues that "it is undisputed fact that there was no benefit (other than continuous employment) offered" to him by Disternet and, thus, the "wage reduction agreement is invalid". I do not think Member Thornicroft's well-considered reasons support the conclusion or assertion advanced by Mr. Maksimovic. Member Thornicroft's reasons simply, but very importantly, identify the issue of the legal validity of the "wage reduction" agreement that none of the parties including the Director considered or dealt with in the earlier proceedings. Member Thornicroft also clearly indicates in his reasons that he was unable, based on the factual record before him, to make any determination on the issue, and that is why he referred the matter back to the Director for adjudication. In the circumstances and also based on the subsequent submissions of the parties on the issue to the delegate, there is undoubtedly a significant dispute between the parties on the question of whether there was consideration from Disternet to Maksimovic to make the "wage reduction" agreement legally valid.

15. Having said this, I note that Member Thornicroft, in the reasons for the Reconsideration Decision, refers to the Ontario Court of Appeal decision in *Hobbs v. TDI Canada Ltd.*, 2004 CanLII 44783 (O.C.A.) and, quotes from the reasons in that decision at paragraph 32 that "…the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms". Member Thornicroft then continues by asking the question whether, in the case at hand, that is what transpired? I do not find Member Thornicroft to be advancing any conclusion on the issue; otherwise, he would not have varied the Original Decision and submitted the issue for adjudication to the Director.

16. I also note the passage from *Hobbs, supra*, Member Thornicroft quotes pertains to the decision of the Ontario Court of Appeal in *Francis v. Canadian Imperial Bank of Commerce*, 1994 CanLII 1578 (O.C.A.). In the *Francis* decision, the employer had made a written offer of employment to the employee, subject to a satisfactory reference. The employee accepted the offer and the satisfactory reference was obtained. However, when the employee arrived for his first day of work, he was given a written employment agreement that provided that the employer could terminate his employment without cause upon giving him one month's notice for each completed year of service, up to a maximum of three months' notice. The employee continued working for the employer thereafter until his employment was terminated some eight years later. The trial judge in this case concluded that the employment agreement was not binding for want of consideration for the modification of the implied term of reasonable notice. The Ontario Court of Appeal upheld the trial judge's decision, concluding that additional consideration was required for such modification.

17. It is important to note that the court in *Hobbs* drew a distinction between *Francis, supra,* and two other cases, namely, the Supreme Court of Canada's decision in *Maguire v. Northland Drug Co. Ltd.,* 1935 CanLII 35 and Ontario Court of Appeal's decision in *Techform Products Ltd. v. Wolda,* 2001 CanLII 8604 (ON CA) stating at para. 37:

> The facts in *Maguire* and *Techform Products* include an important additional circumstance that is not found in the present case. In both those cases, the courts found that the employer had made the promise to the employee to forbear from exercising its right to terminate the employee for a reasonable period, thus enhancing the employee's security of employment.

18. In *Techform Products Ltd., supra,* the Ontario Court of Appeal, in holding that continued employment and implied forbearance from dismissal for a reasonable period is adequate consideration for a change to the terms of employment, distinguished cases where the employer had no clear prior intention to terminate the employment relationship. At paragraphs 25 to 28, Rosenberg J.A. stated:

> [25] In *Watson* [v. *Moore Corp.,* 1996 CanLII 1142 (BC CA), 21 BCLR (3) 157 (C.A.), in a passage relied upon by the trial judge in this case, McEachern C.J.B.C. also addressed the possibility of consideration arising from the employer forbearing to dismiss the employee as the employer otherwise could, under the original contract. He found that where the employer has no clear intention of dismissing the employee prior to the employee signing and returning the contract amendment, the mere refraining at that point from discharging the employee does not furnish consideration for the amendment. This too, is consistent with *Maguire* where the promised forbearance was found to be not so time limited. Rather, the employer in *Maguire* implicitly promised that if the amendment were signed the employee "would not soon be terminated". This forbearance for a reasonable period of time was what constituted the consideration in that case.
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> [26] In my view, this analysis is also consistent with principle. Where there is no clear prior intention to terminate that the employer sets aside, and no promise to refrain from discharging for any period after signing the amendment, it is very difficult to see anything of value flowing to the employee in return for his signature. The employer cannot, out of the blue, simply present the employee with an amendment to the employment contract say, "sign or you'll be fired" and expect a binding contractual amendment to result without at least an implicit promise of reasonable forbearance for some period of time thereafter.
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> [27] *Maguire* is consistent with this analysis. There, on facts very similar to the facts in this case, the majority relied on what they found to be the employer's implicit promise to forbear for a reasonable period of time from exercising its contractual right to dismiss the employee on one month's notice. The continuation of employment on this understanding constituted consideration for the employee's signature. This reasonable forbearance did pass something of value to the employee beyond that which he had under the original contract.
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> [28] In my view, we are obliged to apply the same reasoning to this case. In portions of her reasons not dealing with consideration, the trial judge accepted evidence from the appellant that if the respondent did not sign the ETA his services would be terminated on sixty days' notice. In presenting the ETA to the respondent in the circumstances of this case, the employer must be taken to have tacitly promised to forbear from dismissing the employee for a reasonable period of time thereafter. That promise was in fact fulfilled. The appellant retained the respondent's services for a further four years and terminated those services only when he breached the ETA.

19. I also note that in *Watson, supra,* the BC Court of Appeal, in discussing the matter of consideration by forbearing to dismiss the employee, stated:

> [32] The defendant also relied upon forbearance from dismissing the plaintiff as consideration supporting the agreements….In order to demonstrate forbearance in the context of employment contracts, in my view, an employer must show that it intended to dismiss its employee if he or she refused to sign an employment contract.

20. In this case, neither the Original Decision, nor the Reconsideration Decision, disturbed any findings of facts in the First Determination. In the First Determination, the delegate noted at page 4 that under cross-examination "Mr. Maksimovic confirmed he was offered a choice to take a severance package instead of the temporary reduction".

21. At page 5 of the First Determination, the delegate summarizes the evidence of Disternet's co-founder and former president and CEO, Fay Arjomandi:

> Ms. Arjomandi provided information on the different financing stages and stated Disternet had received the "IRAP" funding. As a result Mr. Maksimovic had received a pay increase from $40,000.00 to $54,000.00 per year. However, the company did not receive the "A" round of financing because of the tough economy. In January 2010 the funds from the "IRAP" funding was running out and the company could not obtain the next round of financing. As a result Ms. Arjomandi decided to give the employees an update on the status of Disternet's finances. Ms. Arjomandi stated she had a town hall type meeting with all the staff and then met one on one to see what each individual wanted to do. Ms. Arjomandi stated she advised the employees they could receive their severance pay or continue their employment with a 50% cut in their salary and take a risk that the company would not get any further financing.
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> Ms. Arjomandi stated she met with Mr. Maksimovic and she gave him a choice of the severance package or continue his employment with a salary cut. If Mr. Maksimovic was to continue in employment he was to advise her of the amount of salary cut he could live with. Mr. Maksimovic clearly understood that he had a choice to either be terminated at that time and receive his severance package or take a salary cut. Ms. Arjomandi stated that 2-3 days later Mr. Maksimovic advised her that he was okay with a 50% salary cut.

22. At page 8 of the First Determination under "Findings and Analysis" the delegate makes the following findings and credibility analysis:

> … Ms. Arjomandi testified the company was running out of funding and gave employees a choice of either being terminated and receiving severance pay or taking a salary cut of around 50% until such time as they received further funding. Ms. Arjomandi stated this was not a deferral of wages but a wage cut. Ms. Arjomandi stated when she met with Mr. Maksimovic she gave him the option and the next day he came to her and advised her he could take a 50% cut in wages.
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> …I prefer the employer's evidence which I found to be more consistent, coherent and reasonable in all of the above areas. In particular, I find Mr. Harris [Disternet's former Vice President of Marketing], on behalf of Disternet, presented forthright and convincing evidence. Although Mr. Harris did not have firsthand knowledge of the meeting that took place between Ms. Arjomandi and Mr. Maksimovic, he did have firsthand knowledge of the events in question that lead [*sic*] to the meeting between Mr. Maksimovic and Ms. Arjomandi. I found Mr. Harris' explanation as to why Disternet could not give the employees a wage deferral a compelling argument that supports the testimony of Ms. Arjomandi.
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> Further, the payroll records entered into evidence by Disternet supports [*sic*] its position of the wage decrease being a reduction and not a deferral, that is, the records support the testimony of Ms. Arjomandi who stated the employees were given a choice of being paid out severance or taking a pay cut. The records indicate other employees took a pay cut and when Disternet received further funding they gave pay increases to the employees; however, Disternet did not reimburse any wages retroactively for the period in which they had a pay cut.
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> I find Disternet's position was more reasonable or probable in light of all the surrounding circumstances. As a result I find Mr. Maksimovic is not entitled to any further wages for the period of February to September 2010 associated with the wage reduction.

23. In this case, while it may be possible for one to come to a different conclusion on the evidence than the delegate reached in the Second Determination, I am unable to conclude that the delegate made any findings or conclusions that are clearly unreasonable or that he erred in law. Based on the section 112(5) record in this appeal including the reasons of the First Determination, I find there is some evidence to support that the facts of this case satisfy the requirements for consideration set out in *Maguire*, *Watson*, and *Techform Products Limited*, *supra*. More particularly, the delegate in the First Determination preferred the evidence of

Ms. Arjomandi over Mr. Maksimovic's. Ms. Arjomandi testified Disternet was "running out of funding and gave employees a choice of either being terminated and receiving severance pay or taking a salary cut of around 50% until such time as they received further funding". She held "a town hall type meeting with all the staff and then met one on one [with each staff] to see what each individual wanted to do" and advised "the employees they could receive their severance pay or continue their employment with a 50% cut in their salary". She also indicated that she met with Mr. Maksimovic and she gave him a choice of the severance package or continue his employment with a salary cut. The delegate also found that Mr. Maksimovic confirmed "he was offered a choice to take a severance package instead of the temporary reduction". I find on the totality of the evidence that Disternet, in the grim financial circumstances it found itself in, intended to exercise its option to dismiss Mr. Maksimovic with some form of severance package if he refused to agree to a wage reduction. Implicit, if not explicit, in the options presented to Mr. Maksimovic is forbearance from dismissal if Mr. Maksimovic agreed to a wage reduction. Mr. Maksimovic, a few days later, returned to Ms. Arjomandi and conveyed to her his choice to accept a wage reduction and Disternet forbore from dismissing him. In the circumstances, I am unable to disturb the delegate's findings of fact and conclusion in the Second Determination that there was "adequate consideration" in the form of forbearance from dismissal and therefore the "wage reduction" agreement was a legally valid agreement.

ORDER

24. Pursuant to section 115 of the *Act*, I order the Second Determination dated November 22, 2013, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal