

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:** David B. Stevenson

**FILE No.:** 2012A/145

**DATE OF DECISION:** March 14, 2013

## DECISION

### SUBMISSIONS

Yun Cheun Lam	on his own behalf
Nicola Sutton	counsel for Disternet Technology Inc.
Rod Bianchini	on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision addresses an appeal by Yun Chuen Lam (“Mr. Lam”) made under Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 30, 2012.
2. The Determination was made in respect of a complaint filed by Mr. Lam who alleged his former employer, Disternet Technology Inc. (“Disternet”), had contravened the *Act* by failing to pay regular wages.
3. The Determination found Disternet had not contravened the *Act*, no wages were outstanding and no further action would be taken.
4. In this appeal, Mr. Lam submits the Director failed to observe principles of natural justice in making the Determination by not addressing the legality of the “wage reduction” on which his claim is based. Mr. Lam’s appeal refers to a reconsideration decision of the Tribunal, *Borisav Maksimovic*, BC EST # RD046/12, which varied an appeal decision of the Tribunal involving Mr. Maksimovic and Disternet, BC EST # D012/12, to refer the complaint in that case back to the Director for the purpose of investigating and considering the legal validity of the “wage reduction” that is also at the core of Mr. Lam’s complaint.
5. In the circumstances of this case, and in light of the reconsideration decision involving Mr. Maksimovic, I found it appropriate to seek the views of the parties on what effect, if any, the *Maksimovic* reconsideration decision might have on this appeal.

### BACKGROUND

6. Disternet operates a software development company. Mr. Lam was employed as a “Senior Project and Quality Assurance Manager” with Disternet from August 4, 2009, to February 18, 2011. The Determination indicates he commenced his employment at a base salary of \$50,000 a year. Salary increases were contingent on Disternet reaching certain financial milestones under the Industrial Research Assistance Program (“IRAP”).
7. Mr. Lam’s complaint was filed on March 21, 2011, and sought to recover approximately \$25,000.00 in unpaid wages.
8. This claim related to an agreement made between Mr. Lam and Fay Arjomandi (“Ms. Arjomandi”), the president and CEO of Disternet, in January 2010 to reduce his salary by 50% for an unspecified period of time (the wage reduction agreement), the length of which appears to have been dependent whether and when the company acquired further funding.

9. It was Mr. Lam's position that he had only agreed to a temporary "wage deferral" (since Disternet was in severe financial difficulty at the time) to be recaptured when further funding was acquired. The position of Disternet was that the agreement was for a 50% wage reduction, not a deferral, and there was no promise or representation he would be paid back the wages he agreed to have cut from his salary.
10. The Director conducted a complaint hearing on October 7, 2011, and received evidence and argument from Mr. Lam and representatives of Disternet.
11. Mr. Lam testified on his own behalf. Ms. Arjomandi and Joe Harris ("Mr. 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.
12. The Director preferred the evidence of Disternet on this point, for the reasons set out in the Determination, and denied Mr. Lam's claim.

### **REASONS FOR THE APPEAL AND THE RESPONSES**

13. As indicated above, this appeal is grounded in the decision of the Tribunal on the reconsideration application of *Borisav Maksimovic*, BC EST # RD046/12. Briefly, Mr. Maksimovic was also an employee of Disternet whose wages were affected in the same way as Mr. Lam's. He had filed a complaint that, on the wage recovery issue, was similarly denied in a Determination of the Director. He filed an appeal of that Determination. The appeal was dismissed. He filed a reconsideration application. In the reconsideration decision, Tribunal Member Thornicroft questioned the validity of the wage reduction agreement – raising a concern whether the agreement was void as matter of law for want of consideration – and, finding that question had never been raised or considered at any level of the process, varied the appeal decision to refer the complaint back to the Director to have that question heard and determined.
14. 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.
15. On February 13, 2013, I sought the views of the parties on what effect, if any, the Maksimovic reconsideration decision might have on this appeal.
16. In response to the February 13, 2013, correspondence, 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.
17. Counsel for Disternet and the Director have both replied to the invitation in the February 13 correspondence. Their positions are nearly identical.
18. Counsel for Disternet says the reconsideration decision is not a final decision and should have no effect on Mr. Lam's appeal. Counsel submits each case must be decided on its own facts and, while cases that are indistinguishable on their facts should be decided in the same way, the facts in Mr. Lam's case are not indistinguishable from those in Mr. Maksimovic's case.
19. The Director takes the same position as Disternet.

20. In sum, both Disternet and the Director say Mr. Lam's appeal should be considered separately and on its own merits.

## ANALYSIS

21. I don't disagree that Tribunal Member Thornicroft's decision is not, in the sense of deciding Mr. Maksimovic's claim, a "final" decision; however, the concern in this decision is not about the final result of either Mr. Maksimovic's or Mr. Lam's claims, but about the process for addressing Mr. Lam's appeal. Nor do I disagree that each of Mr. Maksimovic's and Mr. Lam's claims should be considered separately, but a reconsideration panel of this Tribunal has said the decisions on Mr. Maksimovic's claim never considered the legal validity of the wage reduction agreement and, in light of that omission, must be returned to the Director for an examination of that issue. The decision on this point was a final decision. Notwithstanding any differences in the specific facts of Mr. Lam's case and that of Mr. Maksimovic, the central concern identified in the reconsideration decision is also present in this case: the issue of the legal validity of the wage reduction agreement was never raised in the complaint process or addressed in the Determination.
22. I am not persuaded by the submissions of either counsel for Disternet or the Director that Mr. Lam's appeal should be decided without a consideration of and decision on the issue identified in the *Maksimovic* reconsideration decision. In my view, having the same issue being addressed in the context of Mr. Maksimovic's claim decided contemporaneously for Mr. Lam's appeal is the most fair and efficient procedure. It simplifies both the submission and decision-making processes for the parties.
23. Accordingly, the objectives of fairness, efficiency and finality in decision making under the *Act* dictate Mr. Lam's claim also be remitted back to the Director for a fresh determination after an examination of and decision on the same issue that is being considered for Mr. Maksimovic's claim. This result generates the best potential for uniformity and consistency in the resulting decisions, objectives that are both important to the integrity of the process and generally desirable.

## ORDER

24. Pursuant to section 115 of the *Act*, I order the Determination dated October 30, 2012, be cancelled. Mr. Lam's complaint is remitted 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 in light of that investigation.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**