

An appeal

- by -

Florian R. Napat  
("Napat")

- 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:** Margaret Ostrowski, Q.C.

**FILE No.:** 2009A/099

**DATE OF DECISION:** September 29, 2009

## DECISION

### SUBMISSIONS

Florian R. Napat	on his own behalf
Megan Roberts	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Napat pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) from a Determination issued by a delegate of the Director of Employment Standards on June 16, 2009. In that decision, the Director found that Maritime Services Ltd. (“Maritime”) had not contravened the *Act* by failing to pay compensation for length of service, an employer’s liability described in section 63 of the *Act* which requires an employer to pay an employee an amount for length of service up to a maximum of eight weeks (section 63(2)(b)) unless the employee terminates the employment, retires from employment, or is dismissed for just cause (section 63(3)(c) of the *Act*).
2. The Tribunal has reviewed the Determination, the submissions of the parties and the section 112(5) record and has determined that a decision can be made without an oral hearing as there are written submissions from the parties setting out their respective positions.
3. Napat has appealed the Determination of the Director on Appeal Form 1 on the grounds that the Director failed to observe the principles of natural justice in making the Determination. In a submission dated September 8, 2009, Napat stated that the Director erred in law when the Director failed to consider evidence that Maritime did not honour the conditions of the application for leave of absence which included the continuation of deductions such as CPP, EI and medical and health benefits (and more particularly the employee’s contributions to Blue Cross). Napat therefore argued that by failing to meet the conditions of the leave of absence, Maritime triggered termination in early November 2008. In that submission and in his appeal, he included a copy of a letter from Blue Cross dated December 18, 2008. As this letter was not tendered at the time of the hearing on June 3, 2009, implied in the presentation of this document is that this is new evidence that Napat wishes the panel to consider.<sup>1</sup>

### ISSUE

4. The issues to be determined by the Tribunal are as follows:
  - a. Is the evidence that Napat tendered, evidence that was not available at the time the Determination was made and if so, is that new evidence sufficient to justify the Tribunal to vary or cancel the Determination under appeal or to refer the matter back to the Director?
  - b. Did the Director fail to observe the principles of natural justice in making the Determination?
  - c. Did the Director err in law?

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<sup>1</sup> Regarding the adoption of a liberal view of grounds of appeal, I refer to the analysis in *Triple S. Transmission Inc.*, BC EST # D141/03

## BACKGROUND

5. Napat was employed by Maritime, which operates a marine product and service business in metro Vancouver, as a Life Raft Technician since August 27, 1996. It was agreed by Napat and Maritime that: Napat had received all wages earned up to the last day of work performed; on November 19, 2008, Napat initiated a request to Maritime (and Great West Life Insurance) to withdraw his pension plan contributions accrued through his employment; and under section 63 of the *Act*, if he is found to be entitled to compensation for length of service, his entitlement would be \$4,728.44 (eight weeks regular wages).
6. Napat was in the process of buying a house and he completed a Leave Application Form requesting a Leave of Absence without pay from October 10, 2008 to February 28, 2009. Napat said that his Leave of Absence was refused and that he was told that he was being laid off for shortage of work. He said that he was told that his medical benefits would continue and that he would receive a Record of Employment (“ROE”) in three weeks. The Director in the Determination found that he preferred the evidence of Mr. Roy that Napat was not laid off or terminated in October 2008 but was on an unpaid vacation leave as initiated by him and supported by the signed and approved Leave Application Form.
7. Napat and his wife had committed to buying a particular property and needed a down payment for the purchase. He devised a plan such that he could withdraw his pension plan contributions made to Great West Life; however he was informed by the Great West Life that in order to qualify to withdraw funds, he was required to be “retired, deceased or terminated”. Napat said that he asked Mr. Roy at Maritime for a “temporary termination” in order to qualify for the receipt of the pension funds. Napat said that this was agreed to and was a private arrangement between himself and Mr. Roy. He attended at the Maritime office on November 19, 2008, signed a “Notice of Member Termination” required for the pension fund withdrawal, and he said he signed another document without reading it as he had his glasses on and was tired. He said he was given a copy of that document and his ROE which was dated November 19, 2008 and indicated by code A that his reason for dismissal was “shortage of work”. In January, 2008, Napat said that he discovered that he had signed a resignation letter on November 19, 2008 and protested to Mr. Roy that he had not really quit but was expecting to return to work on February 28, 2009. Napat’s position is that he did not quit but was terminated by Mr. Roy and therefore is entitled to compensation for length of service.

## ANALYSIS

8. Pursuant to amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are limited to the following as set out in section 112(1):
  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.
9. Napat has appealed on ground (b) on his Appeal Form 1. In his submissions he has also stated that the Director erred in law (ground (a)) and he has submitted new evidence (ground (c)) showing that employer contributions to Blue Cross had ceased. I will deal with ground (c) first, that is, is there evidence now available that was not available at the time the determination was made that should be considered in this appeal. If I so find, then such evidence can be used in my analysis on the remaining grounds.

## 1. New Evidence

10. In *Davies et al (Merilus Technologies Inc.)* BC EST # D171/03, the Tribunal set out the following test regarding the ground for “new evidence”:

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions: (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made; (b) the evidence must be relevant to a material issue arising from the complaint; (c) the evidence must be credible in the sense that it is reasonably capable of belief; and (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

11. I adopt the test set out in the above decision as a reasonable statement of a standard to follow in the analysis of whether to accept the newly tendered evidence.
12. The evidence tendered by Napat as new evidence, that is, the letter from Pacific Blue Cross dated December 18, 2008, was submitted after the date of the Determination. There was no explanation given by Napat why such evidence, that is, that his employer benefit coverage with Pacific Blue Cross was no longer in effect since November 2008, was not available before the rendering of the Determination. Accordingly I find that on this count, this new evidence fails to meet a condition for the admission of new evidence and accordingly cannot be considered. Furthermore, even if I did consider the substance of this evidence, I take note that this evidence was submitted to support Napat’s position raised in the appeal that this failure by the employer to pay the Blue Cross premiums triggered his termination in early November. The evidence itself is not conclusive that there was a failure to meet the conditions of the leave (leave which Napat denies was granted to him) – there is evidence that Napat left the employ of Maritime on November 19, 2008 and it could be that fact rather than the event in October that triggered the ceasing of the plan coverage; that is, there is no evidence how and when Pacific Blue Cross coverage ceases. I therefore find the evidence is not conclusive of any central issue.

## 2. Errors of Law

13. The *Act* does not provide for an appeal based on errors of fact and the Tribunal does not consider such appeals unless such findings raise an error of law (*Britco Structures Ltd.*, BC EST # D260/03). Napat in his submissions discusses several alleged errors of fact, such as whether he quit his position on November 19, 2008, which is not a basis for appeal unless an error of law is shown. The Tribunal has adopted the following definition of “error of law” set out 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;
  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 be reasonable be entertained; and
  5. adopting a method of assessment which is wrong in principle.
14. Napat alleges that the Director erred in law when the Director failed to consider evidence that Maritime did not honour the conditions of the leave application that it would continue deductions such as CPP, EI and medical and health benefit during the leave period. As evidence of this, Napat in his appeal submissions states that Maritime “broke” the conditions of the leave application when the contributions to Blue Cross ended in November. I have reviewed the documents carefully from the hearing and noted the Pacific Blue Cross letter of December 18, 2008, submitted as new evidence at this appeal (and dealt with in paragraphs 9, 10 and 11 above) is not there. I see nowhere in the submissions for the hearing nor any reference in the Determination that Napat was taking the position that he was terminated in early November because of the failure of Maritime to pay Pacific Blue Cross. I find that this is a new argument raised by Napat after the Determination and was not before the Director at the time of the Determination. Accordingly, the Director could not have made an error of law on this issue.

### **3. Failure to Observe Principles of Natural Justice**

15. Natural justice requires that a party has an opportunity to know the case against him or her, and it includes the right to be heard by an unbiased decision maker who has heard the evidence, and the right to receive reasons for the decision. The onus is on the appellant who has alleged a breach of natural justice to persuade the Tribunal on a balance of probabilities that there was a denial of natural justice.
16. I have reviewed the submissions of Napat and find no evidence and, *a fortiori*, no argument by Napat of such a breach of natural justice. There is no evidence that Napat has been denied a chance to defend this case in a fair manner.

### **ORDER**

17. Pursuant to section 115 of the *Act*, I order that the Determination dated June 16, 2009, be confirmed.

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**Margaret Ostrowski, Q.C.**  
**Member**  
**Employment Standards Tribunal**