Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Ke "Michael" Ma
("Mr. Ma")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2015A/2

**DATE OF DECISION:** January 19, 2015

# DECISION

## SUBMISSIONS

Ke "Michael" Ma — on his own behalf

## INTRODUCTION

1. This is an application for reconsideration made pursuant to section 116 of the *Employment Standards Act* (the "*Act*"). At this stage, I am considering whether the application passes the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98). If the application does not pass the first stage, the application will be summarily dismissed. Conversely, if the application has presumptive merit, in the sense that, for example, it raises a serious question of law, fact or procedure such that the correctness of the subject appeal decision is reasonably called into the question, the respondent parties will be notified and requested to file submissions (and the applicant will be given a right of reply) so that the merits of the application can be more fully addressed.

## FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

2. The facts relating to this application are as follows. The applicant, Ke "Michael" Ma ("Mr. Ma"), filed a complaint under the *Act* alleging that his former employer failed to allow him to return to the position he held prior to taking parental leave. The essentially uncontested evidence before the delegate (at least on this point) was that prior to his return from parental leave, his employer advised him that due to the firm's severely straitened financial circumstances, it could only offer him part-time, rather than full-time employment (a proposed 40% reduction in working hours). Mr. Ma rejected this proposal and filed his complaint.

3. On August 20, 2014, following a complaint hearing conducted on April 17, 2014, a delegate of the Director of Employment Standards (the "delegate") issued a Determination under section 79 of the *Act* with respect to Mr. Ma's complaint. The delegate concurrently issued "Reasons for the Determination" (the "delegate's reasons) setting out the evidence and argument of the parties tendered at the complaint hearing as well as her conclusions regarding the matters in dispute between the parties.

4. The delegate determined that although his former employer proposed to return Mr. Ma to a lesser position (fundamentally, the same sort of duties but with a 40% reduction in hours and, of course, in pay), the employer's motivation was a *bona fide* desire to deal with difficult business circumstances and the decision regarding Mr. Ma's working hours was not precipitated or motivated in any fashion by Mr. Ma's parental leave (delegate's reasons, page R8-R9). However, the delegate also determined that the proposed reduction in hours/pay constituted a breach of section 66 of the *Act* – and accordingly was a "deemed termination" – thereby triggering Mr. Ma's entitlement to compensation for length of service. Thus, the delegate awarded Mr. Ma compensation for length of service (one additional week's pay beyond the one week's pay previously paid to Mr. Ma) as well as concomitant vacation pay and interest.

5. Mr. Ma appealed the Determination on the grounds that the delegate, and indeed the entire complaint resolution process, was "biased" against him and on the ground that he had probative evidence that was not available when the Determination was being made (subsections 112(1)(a) and (b) of the *Act*). The appeal was summarily dismissed under subsection 114(1)(f) of the *Act* as having no reasonable prospect of succeeding

(see BC EST # D121/14 issued December 4, 2014; the "Appeal Decision"). Mr. Ma now applies to have the Appeal Decision reconsidered.

## FINDINGS AND ANALYSIS

6. The present application appears to be motivated by Mr. Ma's strongly held belief that his former employer breached section 54 of the *Act* by refusing to return him to his former position once his parental leave ended. The delegate had ample evidence before her that allowed her to reasonably conclude that the employer's motivation to reduce Mr. Ma's working hours was not linked in any fashion to the fact that Mr. Ma took a parental leave.

7. Mr. Ma argues in this application, in almost the same fashion as he argued in his appeal submissions, that the dispute resolution process that resulted in the Determination was "unfair", "unreasonable" and "biased". However, for the reasons given in the Appeal Decision (especially at paras. 26 – 36), there is no credible basis for concluding that the delegate failed to observe the principles of natural justice in making the Determination. There simply is no credible evidence in the record showing that the delegate was biased against Mr. Ma or that the complaint resolution process was fundamentally unfair.

8. Mr. Ma now says that it was his intention to also argue on appeal that the Determination was tainted by an error of law. Even though Mr. Ma did not specifically raise this argument in his appeal submissions, the Appeal Decision did address whether the Determination could be quashed on the basis that the delegate erred in law. I agree with the finding in the Appeal Decision (para. 39) that the delegate did not err in law in making certain findings of fact adverse to Mr. Ma's position.

9. Finally, Mr. Ma does not accept that the evidence he proffered on appeal was inadmissible. The so-called "new evidence" was not admissible because it could have been presented to the delegate at the complaint hearing (or, at the very least, prior to the issuance of the Determination) and, in any event, was not shown to be credible and probative (see Appeal Decision, para. 37).

10. Finally, Mr. Ma appears to complain about evidence that his former employer did *not* present to the delegate but this assertion ignores the fact that parties are free to decide what evidence they will or will not present to the delegate. Of course, a party can argue that the other party's failure to present certain evidence should lead the decision-maker to draw an adverse inference but that issue did not arise in this case.

11. The present application, although timely, simply asks the Tribunal to re-weigh the evidence originally provided to the delegate, as supplemented by the arguments presented on appeal, and arrive at a different conclusion. The application, in my opinion, does not raise a serious argument that the Appeal Decision is incorrect either in terms of its legal analysis or in the view the Tribunal Member took of the evidence and arguments submitted on appeal. Had I been the Tribunal Member assigned to adjudicate Mr. Ma's appeal, I would also have summarily dismissed it as having no reasonable prospect of succeeding. There is nothing contained in the present application that causes me to change my view regarding the merits of Mr. Ma's position.

## ORDER

12. Mr. Ma's application for reconsideration of the Appeal Decision is refused. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

**Kenneth Wm. Thornicroft**
**Member**
**Employment Standards Tribunal**