An Application for Reconsideration

- by -

Yun Chuen Lam
("Mr. Lam" or "Applicant")

- 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 CHAIR: Brent Mullin

FILE No.: 2015A/25

DATE OF DECISION: March 11, 2015

DECISION

SUBMISSIONS

Yun Chuen Lam — on his own behalf

OVERVIEW

1. Mr. Lam seeks reconsideration of the appeal decision of the Tribunal issued on January 9, 2015: BC EST # D006/15 (the "Appeal Decision"). He does so under section 116 of the *Employment Standards Act*, R.S.B.C. 1996, C.113 (as amended) (the "*Act*").

2. The Appeal Decision dismissed Mr. Lam's appeal of a Determination issued by the Director of Employment Standards (the "Director") on October 14, 2014 (the "2014 Determination"). The 2014 Determination dismissed Mr. Lam's assertions that the *Act* had been breached by his former employer, Disternet Technology Inc. (the "Employer").

3. The initial history of this matter is summarized in paragraphs 4 through 9 of the Appeal Decision as follows:

> The background facts are fully set out in *Lam* (BC EST # D031/13). Briefly, in 2011, Mr. Lam filed a complaint with the Employment Standards Branch alleging that Disternet Technology Inc. (which later changed its name to Mimik Technology) ("Disternet") had contravened the *Act* by failing to pay all regular wages. The delegate conducted a hearing into Mr. Lam's complaint on October 7, 2011, and issued a Determination on October 30, 2012. Mr. Lam appealed that Determination, and in the March 14, 2013, decision, the Tribunal remitted the complaint 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."
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> As noted by the Tribunal Member in referring the matter back, Mr. Lam's appeal was grounded in the Tribunal's reconsideration decision respecting a former employee of Disternet, Borisav Maksimovic, whose wages were affected in the same way as Mr. Lam's were.
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> At issue in both Mr. Maksimovic and Mr. Lam's complaints was whether Disternet's decision to reduce their salaries by 50% for an unspecified period of time, the length of which appeared to be dependent on whether and when Disternet acquired additional funding, was a salary deferral or a pay cut.
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> Mr. Lam's appeal referred to the Tribunal's reconsideration decision in *Maksimovic* (BC EST # RD046/12) which referred Mr. Maksimovic's complaint back to the Director to investigate and consider the validity of the "wage reduction."
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> In a Determination issued November 22, 2013, the Director concluded that the "wage reduction" agreement between Mr. Maksimovic and Disternet was a legally valid agreement and did not contravene the *Act*. The Director ordered that no further action would be taken.
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> Mr. Maksimovic appealed the Second Determination, contending that the delegate erred in law. In dismissing Mr. Maksimovic's appeal, the Tribunal noted that Mr. Maksimovic was offered the choice to take a severance package instead of a temporary reduction in salary, an action that constituted sufficient consideration for the wage reduction. (BC EST # D026/14)

4. For clarity, I will hereinafter refer to the initial determination of the delegate of the Director on October 30, 2012, as the 2012 Determination.

5. The 2014 Determination is summarized in the Appeal Decision as follows:

> The delegate invited the parties to submit further relevant evidence and make additional submissions prior to making a new Determination, and indicated that she would rely on the records produced by the parties at the hearing in October 2011, the background, issue, Argument and Evidence portions of the Determination issued October 2012, Mr. Lam and Disternet's submissions to the Tribunal on appeal. As neither party objected to the record or the process, the delegate reproduced the background facts, argument and evidence from the original Determination, including Mr. Lam's term of employment and his rate of pay. The delegate considered the oral evidence given at the October 2011 hearing by Joe Harris, Disternet's former Vice-President of Marketing, and Fay Arjomandi, the co-founder/former President and CEO of Disternet, along with that of Mr. Lam. Mr. Lam also submitted an email from an individual who appeared to be another former employee describing a pay cut and Disternet's need to save money. Disternet contended that it intended to dismiss Mr. Lam prior to his agreement to the wage reduction and that such forbearance from dismissal is adequate consideration for a change to the terms and conditions of employment.
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> The delegate considered the oral evidence of the parties and, applying the *Faryna v. Chorny* ([1952] 2 D.L.R. 354) test for the assessment of credibility, found Mr. Harris and Ms. Arjomandi's evidence more consistent, coherent and reasonable. She concluded that their evidence, which was that Mr. Lam agreed to a 50% pay cut in light of Disternet's funding issues, to be more probable in light of the company's financial state. The delegate also found that the payroll records supported Disternet's position. The delegate also found Mr. Lam's evidence "seriously and significantly lacking in pertinent details concerning his conversations and agreement with Ms. Arjomandi."
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> The delegate concluded that Mr. Lam's "vague" testimony was insufficient to establish his wage claim and determined he was not entitled to additional wages. The delegate found nothing in the submissions on the referral back to alter her findings or analysis concerning Mr. Lam's wage reduction or entitlement to any further wages. She accepted Disternet's position that forbearance from dismissal was adequate consideration and concluded that the agreement was legally valid. (paras. 14-16)

6. The Appeal Decision notes the following four arguments put forward by Mr. Lam:

1. Mr. Lam says that the Determination contains a number of factual errors, including his term of employment and his rate of pay. As I understand Mr. Lam's argument, these factual errors are so serious that they undermine the basis for the Determination (Appeal Decision, para. 17);
2. Mr. Lam also asserts that although the Tribunal referred the matter back for further investigation, the investigation was only conducted with Mr. Maksimovic, that his case was not considered and he was not involved. He says he was not given any opportunity to present his view and was not given a fair hearing (Appeal Decision, para. 18);
3. Mr. Lam further submits that although he submitted an email establishing that there was no "town hall" meeting to discuss a wage reduction, this email was not considered by the delegate (Appeal Decision, para. 19);
4. In conclusion, Mr. Lam asserts that the delegate was "careless, irresponsible and unprofessional" and biased and asks that the matter be referred back to a new delegate (Appeal Decision, para. 20).

7. In paragraphs 25 through 28, the Appeal Decision dismissed each of these arguments. As a result, it ordered that the 2014 Determination be confirmed (para. 30).

8. In his reconsideration application, Mr. Lam essentially repeats the four arguments noted and answered in the Appeal Decision.

9. Reconsideration of a Tribunal decision falls under section 116 of the *Act*:

> (1) On application under subsection (2) or on its own motion, the tribunal may

(a) reconsider any order or decision of the tribunal, and

(b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

(2) The director or a person named in a decision or order of the tribunal may make an application under this section.

(3) An application may be made only once with respect to the same order or decision.

10. The Tribunal's leading decision interpreting and applying this provision is *Milan Holdings Inc.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). In this decision, the Tribunal explains that it applies a two-stage analytical framework in approaching reconsideration applications. The first stage, or threshold stage, requires that the applicant present "an arguable case of sufficient merit to warrant the reconsideration" (p. 7). This is further explained as follows:

> This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra.* As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society* (BCEST #D199/96, reconsideration of BCEST #D114/96). (p. 7)

11. This approach is consistent with the Supreme Court of Canada's description of Employment Standards legislation as providing "…a relatively quick and cheap means of resolving employment disputes": *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, at p. 496, as cited in *J.C. Creations Ltd.*, BC EST # RD317/03 (Reconsideration of BC EST # D132/03), at p. 11.

12. I do not find that the Applicant has put forth an arguable case of sufficient merit to warrant reconsideration of the Appeal Decision. I do so for the following reasons.

13. As noted, in his reconsideration application Mr. Lam has essentially repeated the four arguments he made in his section 112 appeal of the 2014 Determination. I find the Appeal Decision was correct in its disposition of each of these arguments:

1. in paragraph 25, the Appeal Decision explains the process leading to the 2014 Determination. In it, Mr. Lam was given full opportunity to object to the findings of facts set out in the 2012 Determination. He did not do so. The Appeal Decision was correct to dismiss his first argument on that basis.

   I also find that the disputed facts are not what the decision in the 2014 Determination turned on in any event. The decision turned on factual determinations rendered largely on the basis of credibility determinations in light of the preponderance of probabilities test in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357 (B.C.C.A.); 2014 Determination, pp. 9-11. As well, the 2014 Determination rested upon the determination that the agreement put forward by the Employer constituted a valid legal agreement because there was consideration for it. The Applicant has not contested the legal basis for this determination.

   In short, the Applicant has not provided an argument which would warrant reconsideration of the Appeal Decision on this first basis;

2. the Appeal Decision answers Mr. Lam's second argument by referring to the process which was adopted leading to the 2014 Determination (see in particular paras. 14 and 15 of the Appeal Decision), confirming that the 2014 Determination had in fact considered the e-mail submitted by Mr. Lam: Appeal Decision, para. 26. As well, again the determinations Mr. Lam challenges in this portion of his argument were rendered largely on the basis of credibility determinations. Those

credibility determinations were reached on the basis of both of the submissions of the parties and a day of oral hearing (see the 2012 Determination, p. 4). The 2014 Determination was also rendered on the basis of a legal conclusion regarding the validity of the agreement which the Employer asserted it had reached with Mr. Lam. Mr. Lam has not contested this legal conclusion other than on the process and fact finding bases he has asserted, which have no merit;

3. as a part of his previous argument dealt with immediately above, the Applicant challenges findings of fact in the 2014 Determination on the basis of the e-mail he submitted from a fellow employee. As noted, it is clear that this e-mail and the Applicant's argument in respect to it were considered in the 2014 Determination (see pp. 8-9) and the decision was rendered largely on credibility bases not in Mr. Lam's favour. There is no error in any of that; and

4. in light of the above, it is clear that the Appeal Decision was correct to dismiss the Applicant's fourth argument (which was set out in paragraph 20 of the Appeal Decision and answered in paragraph 28 of the Appeal Decision).

14. Lastly, in his reconsideration application Mr. Lam submits as follows:

- In September, the company began to receive revenue and started hiring full time employees with full wage. I don't think that is legal to have existing employee under pay cut and hiring new employees with full wage. I b[r]ought this up during hearing and there was no clear explanation from Disternet on why that was the case. This was again not mentioned in my determination and it was certainly not being considered by the Delegate of Director of Employment Standards.

- With new employees getting full wage, I should be restored to full wage as well starting from September.

15. This submission cannot be accepted on a number of bases. First, the "pay cut" the Applicant refers to was found to actually consist of a legal agreement between the Employer and the Applicant, which was based on the findings of credibility and fact in the case and a decision that it was a valid legal agreement. Second, the Applicant has not submitted any support for his view that it would not be legal in that circumstance to hire new employees with full wage. Third, and finally, he submits this point was not dealt with in the 2014 Determination, though he brought the point up during the hearing. In my view, this is not an argument which would need to be dealt with in the Determination. The case was properly dealt with in terms of the issues which were considered in the 2014 Determination. It is clear in law that not every argument which can be thought of and made needs to be addressed in a decision: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 and *Construction Labour Relations v. Driver Iron Inc.*, 2012 S.C.C. 65. Accordingly, this last argument of the Applicant also does not present an arguable case of sufficient merit to warrant reconsideration.

ORDER

16. In light of the above, and pursuant to section 116(1)(b) of the *Act*, the application for reconsideration is dismissed.

Brent Mullin
Chair
Employment Standards Tribunal