An Application for Reconsideration

- by -

Borisav Maksimovic
(the "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 MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2012A/20

DATE OF DECISION: May 14, 2012

DECISION

SUBMISSIONS

Borisav Maksimovic	on his own behalf
Nicola Sutton	counsel for Disternet Technology Inc.
J.R. Dunne	on behalf of the Director of Employment Standards

INTRODUCTION

1. Borisav Maksimovic (the "Applicant") applies, pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of BC EST # D012/12, an appeal decision issued by Tribunal Member David B. Stevenson on January 31, 2012, (the "Appeal Decision").

2. I am adjudicating this application based on the parties' written submissions and, in that regard, I have a very brief (2 paragraphs) submission from the Applicant and 2-page submissions from each of the respondent employer (prepared by its legal counsel) and the Director of Employment Standards.

FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

3. 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*.

4. 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 a Determination and accompanying "Reasons for the 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 Determination, the delegate also levied two separate $500 monetary penalties (see *Act*, section 98) against the Employer.

5. As noted above, 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.

6. The delegate accepted the Employer's evidence, submitted by its co-founder and former president and CEO, reproduced below, regarding the parties' agreement with respect to the reduction in the Applicant's wages (delegate's reasons, page 5):

> …In January 2010 the [Employer's] funds [were] running out and the company could not obtain the next round of financing. As a result [the CEO] decided to give the employees an update on the status of [the Employer's] finances. [The CEO] stated that 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. [The CEO] 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.
>
> [The CEO] stated she met with [the Applicant] and she gave him a choice of the severance package or continue his employment with a salary cut. If [the Applicant] was to continue in employment he was to advise her of the amount of salary cut he could live with. [The Applicant] clearly understood he had a choice to either be terminated at that time and receive his severance package or take a salary cut. [The CEO] stated that 2-3 days later [the Applicant] advised her that he was okay with a 50% salary cut.

7. 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*.

8. In any event, and as noted above, the delegate ultimately concluded, at page 8 of his reasons, 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. The delegate's reasons on this point are reproduced, in part, below (delegate's reasons at page 8):

> …the payroll records entered into evidence by [the Employer] supports [sic] its position of the wage decrease being a reduction and not a deferral…The records indicate other employees took a pay cut and when [the Employer] received further funding they gave pay increases to the employees; however, [the Employer] did not reimburse any wages retroactively for the period in which they had a pay cut.
>
> I find [the Employer's] position was more reasonable or probable in light of all the surrounding circumstances. As a result I find [the Applicant] is not entitled to any further wages for the period of February to September 2010 associated with the wage reduction.

9. 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 (see, for example, *Watson v. Moore Corp.*, 1996 CanLII 1142 (B.C.C.A.); *Francis v. C.I.B.C.*, 1994 CanLII 1578 (O.C.A.); *Hobbs v. TDI Canada Ltd.*, 2004 CanLII 44783 (O.C.A.) and *Braiden v. La-Z-Boy Canada Limited*, 2008 ONCA 464 esp. para. 57). 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.

10. The Applicant appealed the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice (see section 112(1)(a) and (b)). 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. In his appeal documents, the Applicant also alluded to possible "new evidence" relating to the fact that another former employee had apparently filed an unpaid wage complaint seeking recovery of "deferred wages". The Applicant did assert that he was "entitled to deferred wages for the period of January 15, 2010, to September 2010" and this, of course, would be correct if the "wage reduction" agreement were considered to be void for lack of consideration (subject to section 80 of the *Act*).

11. The 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 (see Appeal Decision, paras. 36 – 37).

THE RECONSIDERATION REQUEST

12. As previously noted, the Applicant's challenge to the Appeal Decision is rather brief and is set out, in full, below:

> Section 24 states that there was no reference at the hearing of any other complaints to the Employment Standard [sic] from other employees. However, during questioning I asked [the Employer's CEO during the Applicant's tenure] if there was another complaint, to which she answered that there was none while she was CEO (She resigned before the hearing). I pointed out that there was one. It appears that the director failed to take a note of this answer of [sic; or?] failed to take this fact into consideration. The complaint in question was filed by a former employee, [name omitted]. The hearing on his case was subsequently held, the record must be available to the Tribunal.
>
> Also, I find it strange that the decision is made on witness's testimony, not on the fact that the new contract is not offered as required by law.

13. The Applicant's reference in the first of the above-quoted paragraphs refers to para. 24 of the Appeal Decision where Member Stevenson stated: "Finally, the Director says there was no reference at the hearing of any complaints from other employees of [the Employer] and no other employees were called by either party to give evidence." The Applicant obviously feels that the delegate erred in making this statement, however, the Applicant did not predicate his appeal on the "new evidence" ground (subsection 112(1)(c)); nor did he submit any new evidence, such as a witness statement, from this former employee. Accordingly, even if the delegate did misstate the evidence (and I am not concluding that he did), this matter is wholly inconsequential.

14. The second paragraph of the Applicant's reconsideration submission refers, I believe, to his submission made on appeal that although the parties initially entered into a written employment agreement, this agreement was not amended in writing to reflect the "wage reduction" agreement. While that may be true – and the delegate clearly was alive to the fact that there was no written memorandum or any other documentation relating to

the "wage deferral/wage reduction" agreement – the Applicant is incorrect in asserting that a new written agreement was required by law. Simply stated, there is no such rule of law. However, and this is a point to which I will return, the verbal agreement between the parties regarding the wage reduction arrangement must be a valid agreement in order to be enforced and, among other things, must be supported by consideration.

FINDINGS AND CONCLUSIONS

15. The *Milan Holdings* test (see BC EST # D313/98) governs section 116 applications and establishes a two-stage analytical framework for reconsideration applications. At the first stage, the Tribunal considers whether the application is timely, relates to a preliminary ruling, is obviously frivolous, or is simply a clear attempt to have the Tribunal re-weigh issues of fact that have already been determined. If the application can be so characterized, the Tribunal will summarily dismiss it without further consideration of the underlying merits. On the other hand, if the application raises a serious question of law, fact or principle, or suggests that the decision should be reviewed because of its importance to the parties and/or because of its potential implications for future cases, the Tribunal will proceed to the second stage at which point the underlying merits of the application are given full consideration.

16. The reconsideration panel in *Milan Holdings* was alive to the fact that, on reconsideration, the panel must balance questions of adjudicative expeditiousness, efficiency and finality against circumstances where important questions of fact, law, principle and fairness are at stake (see page 6). Although this application is timely, as it is framed, it simply asks the Tribunal to overturn a finding of fact originally made by the delegate and subsequently confirmed in the Appeal Decision relating to whether or not the parties actually agreed to a "wage reduction" arrangement. *I am not overturning that finding of fact.* On the other hand, the question of whether the "wage reduction" agreement was legally valid has never been adjudicated since none of the parties turned their mind to it and the issue was not raised by the delegate – who might have independently decided to invite submissions from the parties on the point.

17. 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.

18. I note that the Employer was represented by legal counsel at the original complaint hearing and before the Tribunal whereas the Applicant has been unrepresented throughout this entire process. The Supreme Court of Canada has repeatedly recognized that employees are often in a state of vulnerability *vis-à-vis* employers (see, for example, *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701 at para. 95) and this vulnerability may be more acute where there is representational asymmetry. If the Applicant had competent legal representation, I think it reasonable to assume that the consideration issue would have been argued before the delegate and that counsel for both parties would have provided the delegate with all relevant legal authorities. I cannot ignore the fact that one of the stated purposes of the *Act* is to ensure that all employees governed by the *Act* receive the wages that they have earned and the full measure of compensation for length of service to

which they are entitled. This case raises a concern about whether the minimum standards of the *Act* are being appropriately accounted for and does not involve a situation where a *party* has raised an issue that should have been argued before the delegate.

19. The consequences in this case flowing from a finding that the "wage reduction" agreement was void are significant. The Applicant's claim for compensation for length of service would double from what was awarded and, on the face of things, he would be seeking nearly $30,000 in unpaid wages, concomitant vacation pay and section 88 interest less wages actually paid. 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.

20. In light of the truly extraordinary nature of this case, I am persuaded that this application passes the first *Milan Holdings* threshold but I do not think it would be appropriate for the Tribunal to proceed to the second stage and adjudicate the merits of the matter. This issue should be returned to the delegate so that he can receive further evidence and argument and then make an informed decision on the matter.

21. I propose to grant the application to reconsider the Appeal Decision. Section 116(1) of the *Act* states that the Tribunal may reconsider a prior decision "on its own motion" and, to a degree, that is precisely what I am doing here since the consideration issue was not specifically raised by the Applicant in his material. In the circumstances of this case, I think the matter should be returned to the delegate in the interests of fairness to both parties (see section 2(b)). In that latter regard, I do not say that the delegate should inevitably find that the "wage reduction" agreement was void as a matter of law; the Employer must be given a full and fair opportunity to present evidence to show that some benefit (other than continued employment) flowed from the Employer to the Applicant under the "wage reduction" agreement. The "wage reduction" agreement would only be void as a matter of law in the absence of some consideration and, to date, whether there was (or was not) any consideration is a matter that has not been adjudicated.

ORDER

22. Pursuant to section 116(1)(b) of the *Act*, BC EST # D012/12 is varied by deleting the existing text in para. 39 and substituting the following order:

> Pursuant to section 115(1)(b) of the *Act*, I order that Mr. Maksimovic's complaint be referred back to the Director so that the issue of whether the "wage reduction" agreement was a legally valid agreement can be heard and determined.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal