

Citation: Blue Max Lighting and Emergency Equipment Ltd. (Re)  
2024 BCEST 59

EMPLOYMENT STANDARDS TRIBUNAL

An appeal  
pursuant to section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

- by -

Blue Max Lighting and Emergency Equipment Ltd.

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Kenneth Wm. Thornicroft

**FILE No.:** 2024/019

**DATE OF DECISION:** June 19, 2024

## DECISION

### SUBMISSIONS

Paul Roxburgh

legal counsel for Blue Max Lighting and Emergency Equipment Ltd.

### INTRODUCTION

1. This is an appeal filed by Blue Max Lighting and Emergency Equipment Ltd. (“appellant”) pursuant to sections 112(1)(a) and (b) of the *Employment Standards Act* (“ESA”). The appeal is in relation to a Determination issued by Mathew Osborn, a delegate of the Director of Employment Standards (“delegate”) on January 16, 2024. The delegate also issued his “Reasons for the Determination” (“delegate’s reasons”) on January 16, 2024.
2. The appellant says that the delegate erred in law and failed to observe the principles of natural justice in making the Determination
3. In my view, this appeal is entirely without merit and, that being the case, must be dismissed.

### THE DETERMINATION

4. According to the delegate’s reasons, the appellant operates a business that sells, installs, and maintains equipment used in emergency vehicles. A former employee (“complainant”) filed a complaint claiming unpaid wages and section 63 compensation for length of service. A central issue before the delegate was whether the complainant was an “employee” as defined in section 1(1) of the *ESA*, or an independent contractor as defined in the common law. If the complainant were an independent contractor, he would not be entitled to a wage payment order under *ESA*.
5. The delegate determined that the complainant was an “employee” as defined in the *ESA*. Having determined that the complainant was an employee, the delegate then turned to his unpaid wage claim. The delegate determined that the complainant earned \$48,311.62 during the wage recovery period, but was only paid \$36,067.10, leaving an amount due to the complainant of \$12,244.52. The delegate also awarded the complainant an additional \$273.48 on account of the 2021 Labour Day statutory holiday (the complainant worked on that day).
6. The complainant resigned his employment. However, this resignation was triggered by the appellant’s continual failure to pay him all of his earned wages. Applying section 66 of the *ESA*, the delegate determined that, in law, the appellant effectively terminated the complainant’s employment. Thus, the delegate awarded the complainant 8 weeks’ wages as section 63 compensation for length of service (\$7,292.32).
7. Finally, the delegate added section 58 vacation pay to the complainant’s earned wages during the wage recovery period (at 6%) totalling \$6,306.03, and section 88 interest in the amount of \$1,052.81. Accordingly, the total amount awarded to the complainant under the Determination was \$27,169.16.

8. The appellant has not challenged the delegate's unpaid wage calculations, or his finding in relation to section 66. Of course, if the complainant was not, in fact, an "employee" for purposes of the *ESA*, the wage payment order in his favour would be cancelled since the delegate would not have had any jurisdiction to issue it.
9. Apart from the unpaid wage payment order, the delegate levied six separate \$500 monetary penalties against the appellant based on its demonstrated contraventions of sections 17 (regular payment of earned wages), 18 (payment of wages on termination), 28 (failure to keep payroll records), 46 (statutory holiday pay), 58 (vacation pay), and 63 (compensation for length of service) of the *ESA*. Thus, the appellant's total liability under the Determination is \$30,169.16.

### **GROUND OF APPEAL**

10. In a memorandum attached to its Appeal Form, the appellant asserted that during the course of the complaint investigation process, the delegate "failed to request evidence of the Complainant that would show he is a contractor." In particular, the appellant says that the complainant's income tax returns and related documentation should have been obtained.
11. The section 112(5) record includes a BC Registry Services search regarding the appellant. In this document, David Stuart Kunicki is identified as the appellant's sole director. In separate submissions dated March 22 and May 6, 2024, the legal counsel who filed this appeal identified himself as the lawyer for Mr. Kunicki (not the appellant) and asserted that he writes to the Tribunal "in that capacity." Mr. Kunicki is not a party to this appeal and, that being the case, I query whether these two submissions are properly before me.
12. In any event, as attachments to the March 22, 2024, submission, counsel submitted a number of documents "to support the fact the [complainant] was a contractor...and not an Employee." In the May 6, 2024, submission, counsel questioned why the complainant's tax records were not included in the section 112(5) record. The simple answer to this latter query is that the complainant's tax records were never submitted to the Employment Standards Branch during the complaint investigation process, and thus could not be included in the record.
13. I note that the appellant has *not* appealed the Determination under section 112(1)(c) – the so-called "new evidence" ground of appeal – and has not provided any argument regarding why the additional documents that were submitted on appeal are admissible. So far as I can determine, none of these documents was ever provided to the Employment Standards Branch during the complaint investigation process, and none is included in the section 112(5) record.

### **FINDINGS AND ANALYSIS**

14. I consider this appeal to be entirely without merit. The complaint was investigated by an Employment Standards Branch officer who prepared an "Investigation Report", dated October 27, 2023 ("Report"). In the Report, the officer summarized the information that had been provided by both the complainant and the appellant, and he appended a list of the relevant documents to the Report. The Report was forwarded to both parties for their review and comment. Specifically, the officer asked the parties to review the report and to provide any further documents that either party wished to have included in the record:

If you feel that previously sent documents that are not listed in the report are relevant and should be included, please identify the documents in your written response and explain why they should be included. Documents that are not listed in the report and that you have not identified as relevant in your written response may not be considered in making the determination.

The appellant did not provide any further documents and did not ask the officer to obtain the complainant's income tax records. In fact, the appellant did not submit any response to the officer's Report. I consider the appellant's argument that the investigating officer, or the delegate, should have independently acted to obtain the complainant's tax records to be unmeritorious.

15. Further, even assuming that the complainant's tax records had been obtained, and showed that he filed his income tax returns as an independent contractor, that does not necessarily undermine the delegate's determination that the complainant was an "employee" for purposes of the *ESA*. There is no evidence before me that a court or tribunal of competent jurisdiction has ever determined that the complainant was an independent contractor. Further, as the Tribunal has repeatedly stressed, a finding that an individual is an employee under a separate statutory scheme from the *ESA* does not determine the individual's status under the *ESA*. The delegate's analysis of the "employee versus contractor" issue is set out at pages R3-R6 of his reasons. I endorse and adopt the delegate's analysis regarding this issue, and his finding that the complainant was an "employee" as defined in section 1(1) of the *ESA*. I note that the appellant has wholly failed to explain how or why the delegate fell into legal error in his treatment of this issue.
16. I find that the records that were submitted on appeal are not admissible. The appellant has not explained why the documents would be admissible in light of the *Davies* criteria (see *Davies et al.*, BC EST # D171/03). Indeed, the appellant did not make any argument whatsoever with respect to the admissibility of the documents that were submitted on appeal. These latter documents have little, if any, probative value, and all were either available, or the information contained in some of documents was available, at the time the Determination was being made.
17. To summarize, there is nothing in the appellant's submissions to suggest that the delegate erred in law or failed to observe the principles of natural justice in making the Determination.

## **ORDER**

18. Pursuant to subsections 114(1)(f) and 115(1)(a) of the *ESA*, this appeal is dismissed, and the Determination is confirmed as issued in the total amount of \$30,169.16, together with whatever further interest that accrued under section 88 of the *ESA* since the date of issuance.

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