

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

David Lightle

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2022/182

DATE OF DECISION: November 1, 2022

DECISION

SUBMISSIONS

David Lightle on his own behalf

OVERVIEW

1. This is an appeal by David Lightle (“Mr. Lightle” or the “Appellant”) of a decision of a delegate of the Director of Employment Standards (the “Director”) made August 12, 2022 (the “Determination”).
2. On January 27, 2020, Mr. Lightle filed a complaint with the Director alleging that West Coast Marine Terminals Ltd. (“WCMT”) had contravened the *Employment Standards Act* (the “ESA”) in failing to pay him his full entitlement to compensation for length of service.
3. The Director followed a two-step process in making the Determination. One delegate of the Director (the “investigative delegate”) corresponded with the parties and gathered information and evidence. Once that process was complete, the investigative delegate prepared a report (the “Investigative Report”) which was sent to the parties for review and comment. WCMT provided a response to the investigative delegate; however, Mr. Lightle did not respond to the Investigation Report. The investigative delegate provided WCMT’s response to Mr. Lightle, which he replied to. The matter was then assigned to a second delegate (the “adjudicative delegate”) who assumed responsibility for reviewing the responses and replies and issuing the Determination.
4. In the Determination, the adjudicative delegate determined that there had been no contravention of the *ESA*, that no wages were outstanding and that no further action would be taken.
5. Mr. Lightle appeals the Determination, contending that the Director erred in law and failed to observe the principles of natural justice.
6. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I found it unnecessary to seek submissions from WCMT or the Director.
7. This decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submissions, and the Determination.

ISSUE

8. Whether the Appellant has established grounds for interfering with the Director’s decision that there had been no contravention of the *ESA*.

BACKGROUND AND ARGUMENT

9. WCMT owns land in, and provides dock facilities near, Gold River, B.C. The site was originally owned by Muchalat Industries Ltd. (“Muchalat”). Lightle Management Services Ltd. (“LMS”) was created to assist Muchalat in managing the business. LMS also provided payroll services to Muchalat. Mr. Lightle, along with his parents Mr. R. Lightle and Ms. Lightle, are co-owners and directors of LMS.
10. Mr. Lightle worked at the facility as a site manager for approximately 15 years. He performed his services through LMS and was paid for his work by LMS. In July 2018, WCMT purchased the site from Muchalat. Kent O’Neill, one of the directors of WCMT, directed the Lightles and LMS to “continue operating as they had been, and [that] they would work out the specifics later.” (Determination, p. R5). Mr. Lightle continued to be paid for his work by LMS.
11. On August 31, 2019, WCMT ended its relationship with Mr. Lightle and LMS. However, WCMT brought Mr. Lightle back to work on September 1, 2019, for two to four weeks to perform some final work, following which the relationship between the parties ended.
12. Mr. Lightle contended that LMS provided payroll and security services to WCMT and that he provided the remainder of the site management services to WCMT directly. He argued that, while performing work as a site manager, he was a WCMT employee. WCMT contended that Mr. Lightle was an employee of LMS, a company he partially owned, and that his work managing the site was part of the services that WCMT paid LMS for.
13. The adjudicative delegate considered the test for determining whether a person is an employee, including *ESA* definitions and common law tests. She found that the facts were “challenging,” as some factors indicated the presence of an employment relationship while others weighed against such a relationship.
14. The adjudicative delegate noted that Mr. Lightle was one of the owners of LMS. While she accepted, based on the information before her, that there had been a contract for services between LMS and Muchalat, that contract was not in evidence before her. Consequently, she found it difficult to assess whether, in working as a site manager, Mr. Lightle performed that work as a director of LMS, as an employee of LMS, or as an employee of WCMT.
15. The adjudicative delegate found it relevant that even though there had been a contract for services between Muchalat and LMS, there was no separate contract between Muchalat and Mr. Lightle. She further noted that when WCMT took over the Gold River site, Mr. O’Neill instructed Mr. Lightle to continue operating as they had been.
16. The adjudicative delegate further wrote as follows:

In a situation where one corporation contracts with another to provide services, one would expect that if the director of that corporation began providing services to the other, the director would be doing so pursuant to that contract or agreement. It would be reasonable for the company receiving the services from the director to believe that they were receiving those services pursuant to that contract. One would expect that if the parties intended to create a second, separate relationship (such as an employment relationship), they might set out their mutual expectations and responsibilities in a second, separate contract. I do not mean to say that

there can never be an employment relationship in these circumstances; however, absent any clear evidence about what services specifically were contemplated in the agreement between Muchalat and LMS, I find it difficult to accept that Muchalat intended to have an employment relationship with Mr. Lightle independent and separate from their working relationship through LMS. (Determination, p. R5-R6)

17. The adjudicative delegate noted that while Mr. Lightle asserted that his employment relationship with WCMT was separate from that of LMS's relationship with WCMT, he provided no evidence regarding the services that were originally agreed upon in the initial contract between Muchalat and LMS. The adjudicative delegate further noted that the name of the company - Lightle Management Services - indicated that it provided management services, not simply security services and payroll, as he asserted.
18. The adjudicative delegate further noted that LMS's sole business was to provide ongoing, long-term services on the Gold River site on behalf of the owner as there was no evidence they provided any services to any other landowner or had any other businesses. Consequently, the adjudicative delegate found that the services provided by LMS and Mr. Lightle were highly integrated into WCMT's operations.
19. After WCMT assumed responsibility for the site, Mr. O'Neill sought Mr. Lightle's assistance in understanding the operations, including information on tenant leases, security, electricity and accounting. Mr. Lightle's response to Mr. O'Neill included information on contracts and leases on site, referring to some clients being billed directly by him while others were billed by LMS. The adjudicative delegate found that the "phrasing suggests that Mr. Lightle viewed LMS as a separate entity, independent from his own work as a site supervisor," noting that one entry indicated that LMS was responsible for "any labour or maintenance needs." The adjudicative delegate found that some elements of the report suggested that Mr. Lightle viewed himself separate and independent from LMS, while other elements suggested that he viewed himself as part of LMS. (Determination, p. R7)
20. The adjudicative delegate also considered LMS invoices and payroll documents, noting that workers, including Mr. Lightle, were treated as employees in LMS payroll system even though it remained unclear whether they were employees of LMS or WCMT.
21. The adjudicative delegate considered the evidence of a former shareholder of WCMT and a former director of Muchalat, both of whom stated that they assumed or believed that Mr. Lightle was an employee. The adjudicative delegate noted however, that because neither was involved in hiring, paying or managing Mr. Lightle or contracting with LMS, their evidence was of limited value.
22. The adjudicative delegate next considered the common law test regarding direction and control and noted Mr. Lightle's argument that Mr. O'Neill exercised a high degree of control over him while Mr. O'Neill contended that Mr. Lightle worked relatively independently. The adjudicative delegate found evidence in support of both arguments. She found that Mr. Lightle had "quite a lot of responsibility as [a] site manager, and had the independence to make significant decisions on his own." She also found that Mr. Lightle "reported out to Mr. O'Neill regularly, in detail, and often received instructions from Mr. O'Neill – not only about what to do, but how to do it." (Determination, p. R9)

23. The adjudicative delegate also wrote that:
- ...one of the most compelling factors in favour of an employment relationship is that Mr. Lightle tried to take a vacation, but Mr. O'Neill refused the request because he was away that week and needed Mr. Lightle on site. The ability to tell a worker that they cannot take time away from work points to a high degree of direction and control. However, it is also not unreasonable for a landlord to require its management company to provide services to tenants and clients as needed – and those services would be most needed when the landlord's representative is away from the site. ... Once again, the high degree of integration between WCMT's operations and LMS's services make this assessment difficult. (Determination, p. R10)
24. The adjudicative delegate found that Mr. Lightle's hours worked were reported to WCMT by Ms. Lightle on behalf of LMS, along with the hours worked by the other employees.
25. The adjudicative delegate noted that after WCMT purchased the site, Mr. Lightle continued to use his personal email address for his work as site manager, signing email correspondence as "Site Operations Manager of WCMT" and included WCMT's logo in his email signature. She further noted that Mr. O'Neill instructed Mr. Lightle to use the email address "manager@wcmtterminals.com," which Mr. Lightle did thereafter. (Determination, p. R11)
26. Finally, the adjudicative delegate noted that after WCMT decided to part ways with LMS and Mr. Lightle, Mr. Lightle, LMS, and Mr. R. Lightle were parties to a "Mutual Release of All Claims" agreement, with Mr. R. Lightle signing off on behalf of himself and LMS, and Mr. Lightle signing only on his own behalf.
27. After considering all these factors the adjudicative delegate concluded that when Mr. Lightle performed work for WCMT, he did so "in the capacity of a director of LMS – and perhaps also an employee of LMS – but not as an employee of WCMT." (Determination, p. R12)
28. Having concluded that Mr. Lightle was not an employee of WCMT, the adjudicative delegate found that he was not owed any wages.
29. Mr. Lightle argues that the adjudicative delegate erred in concluding that he was not an employee. He contends that the fact that he was a 1/3 director of LMS "has no bearing on [his] role as a direct employee." He argues that he was under direct orders from Mr. O'Neill, and that LMS was responsible for security and payroll, neither of which were his responsibility. He says he has no security qualifications and that his time had to be approved and verified with timesheets.

ANALYSIS

30. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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 being made.

31. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the determination. I am not persuaded that Mr. Lightle has met that burden. Not only has Mr. Lightle made no submissions on why the adjudicative delegate's decision was in error, apart from asserting that it was wrong in law because he was only one of three directors of LMS, he also has made no submissions on how the Director breached the principles of natural justice. I find no basis, on a review of the record and the Determination, to interfere with the Determination.

Error of Law

32. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C. A.):
- a) a misinterpretation or misapplication of a section of the Act;
 - b) a misapplication of an applicable principle of general law;
 - c) acting without any evidence;
 - d) acting on a view of the facts which could not reasonably be entertained; and
 - e) adopting a method of assessment which is wrong in principle.
33. In making her decision, the adjudicative delegate considered the definition of "employer" and "employee" under the *ESA*, as well as the common law test. She turned her mind to the issue of "whose business is it," and considered factors including whether the worker has the chance of profit or bears the risk of loss, whether or not the work performed is integral to the business and whether the worker was engaged to perform a specific, time-limited job or the parties were engaged in an ongoing relationship.
34. The adjudicative delegate fairly noted that there were factors in favor of a finding that Mr. Lightle was an employee and others which were in favor of finding that he was not. In concluding that Mr. Lightle was performing work for WCMT in the capacity of a director of LMS rather than an employee of WCMT, the adjudicative delegate relied, in particular, on the fact that Mr. Lightle was a director and co-owner of LMS; that there was a contract of services between LMS and Muchalat but no evidence of any independent agreement between Mr. Lightle and Muchalat; that LMS was a management services company and that when WCMT asked LMS to provide an estimate of the cost of their services, LMS included Mr. Lightle's labour in that estimate. The adjudicative delegate found that while other factors pointed to an employment relationship, those factors were less compelling and could be "reasonably interpreted as the natural consequence of the high degree of integration between LMS and WCMT, and the role that LMS was expected to play in its management of the Gold River site." (Determination, p. R12)
35. Given that there was no evidence of any separate employment contract between either Mr. Lightle and Muchalat or Mr. Lightle and WCMT, and in light of all of the other factors considered by the adjudicative delegate, I am unable to conclude that the adjudicative delegate erred in law. I find that the Determination was based on a view of the facts that could reasonably be entertained.

Natural Justice

36. Mr. Lightle has also asserted that the Director failed to observe the principles of natural justice in making the determination.
37. The Tribunal has articulated the principles of natural justice in *Imperial Limousine Service Ltd.*, BC EST # D014/05, as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (See *BWI Business World Incorporated* BC EST #D050/96).
38. Mr. Lightle had many opportunities to communicate with the Director, including the opportunity to respond to the investigative delegate's Investigation Report. Mr. Lightle has not advanced any evidentiary basis that would support a finding by the Tribunal that the Director failed to comply with principles of natural justice.
39. I dismiss the appeal under section 114 (1)(f) of the ESA as I find that there is no reasonable prospect that the appeal will succeed.

ORDER

40. Pursuant to section 115 of the *ESA*, I confirm the Director's Determination dated August 12, 2022.

Carol L. Roberts
Member
Employment Standards Tribunal