



An appeal

- by -

Unimaxx Networks Inc.
(“Unimaxx”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2012A/82

DATE OF DECISION: September 20, 2012

DECISION

SUBMISSIONS

Mark Epstein	counsel for Unimaxx Networks Inc.
Andrew Wallwork	on his own behalf
Terry Hughes	on behalf of the Director of Employment Standards

INTRODUCTION

1. On June 7, 2012, a delegate of the Director of Employment Standards (the “delegate”) issued a Determination and accompanying “Reasons for the Determination” (the “delegate’s reasons”) under section 79 of the *Employment Standards Act* (the “Act”) ordering the appellant, Unimaxx Networks Inc. (Unimaxx), to pay its former employee, Andrew Wallwork (“Wallwork”), the total sum of \$18,404.61 on account of unpaid regular wages (section 17), concomitant vacation pay (section 58) and section 88 interest (the “Determination”). Further, and also by way of the Determination, the delegate levied two separate \$500 monetary penalties against Unimaxx thus bringing the total amount due under the Determination to \$19,404.61.
2. On July 16, 2012, Unimaxx filed an Appeal Form with the Tribunal; however, the appeal was incomplete and the deficiencies were subsequently rectified by way of further documents filed on July 27, 2012. Since the deadline for filing a complete appeal was July 16, 2012, (see subsection 112(3)), Unimaxx now applies for an extension of the appeal period pursuant to subsection 109(1)(b) of the *Act*. *These reasons for decision address this latter application.*
3. I am adjudicating this application based on the parties’ written submissions and in that regard I have submissions from Unimaxx and Mr. Wallwork although the latter’s submission does not expressly address the timeliness issue. The delegate has not filed a submission speaking directly to this application for an extension of the appeal period although the delegate did file the subsection 112(5) “record” that was before him when he was making the Determination. Mr. Wallwork’s brief submission was filed on September 11, 2012, at 6:20 PM by electronic mail and thus, in accordance with the Tribunal’s *Rules of Practice and Procedure* (Rule 15), was deemed to have been received on September 12, 2012. The final deadline for filing a reply submission was September 7, 2012. As previously noted, the submission is not responsive to the issue of the late appeal filing and, in any event, does not raise any new matters. Since it is only a reply submission, I have agreed to receive and consider it but having said that, I must also note that it is not relevant to the issues I am addressing in these reasons.

FACTUAL BACKGROUND

4. Unimaxx is an information technology company that provides, among other things, business internet and website development, hosting and maintenance services. Mr. Wallwork commenced working for Unimaxx under a 5-page “Sub-Contractor Agreement” signed on October 23, 2008. The agreement was for a 1-year term (although there was an early termination provision) and provided for a \$30 hourly rate or, alternatively, “a fixed price based on projects” [sic]. Although this agreement apparently expired on October 22, 2009, it would appear that the parties essentially continued working under this agreement even after it had nominally expired. Pursuant to this agreement, Mr. Wallwork invoiced Unimaxx for his services and, apparently, there

were no payment problems until about April 2010, when his invoices fell into significant arrears. Mr. Wallwork ceased working for Unimaxx in October 2010, and on October 29, 2010, he filed an unpaid wage complaint under the *Act* in which he claimed that he was actually employed by Unimaxx and was entitled to unpaid wages in the amount of \$16,521.25 plus \$672.85 in vacation pay for a total amount of \$17,194.10.

5. The delegate who investigated Mr. Wallwork's complaint ultimately made the following findings:
 - Mr. Wallwork was "an employee as contemplated by the *Employment Standards Act* (delegate's reasons, page R14);
 - "Mr. Wallwork worked continuously from April 1, 2010 to mid October 2010 and was not paid for most of the hours he worked" (delegate's reasons, page R15);
 - During the applicable 6-month wage recovery period (see section 80), Mr. Wallwork worked and invoiced a total of 560.75 hours at an agreed \$30 per hour rate but had not been paid for these hours (for a total unpaid regular wage claim of \$16,822.50) (delegate's reasons, page R16);
 - In addition, Mr. Wallwork was entitled to 4% vacation pay on this latter amount for a total unpaid wage claim of \$17,541 plus \$863.61 in section 88 interest (final entitlement = \$18,404.61; delegate's reasons, page R16);
 - Finally, although Unimaxx claimed that it was entitled to an unspecified "offset" reflecting damages that it claimed from Mr. Wallwork arising from, so far as I can tell, some sort of negligence claim, the delegate quite rightly rejected this claim as there is no provision for such employer claims in the *Act* (delegate's reasons, page R16).
6. I might parenthetically add, in regard to this latter point, that if Unimaxx wishes to pursue a damages claim against Mr. Wallwork, it will have to file that claim in either the B.C. Provincial Small Claims Court (for a claim up to \$25,000) or in the B.C. Supreme Court (this court has unlimited monetary jurisdiction).
7. On July 16, 2012, Unimaxx's legal counsel's office filed an Appeal Form indicating that Unimaxx was appealing the Determination based on all three statutory grounds, namely, that the delegate erred in law, failed to observe the principles of natural justice and that Unimaxx now had evidence that was not available when the Determination was being made (see subsections 112(1)(a), (b) and (c)). The boxes on the Appeal Form relating to these grounds were checked off but no further particulars were provided (as required by the Tribunal's *Rules of Practice and Procedure* and as stated on the Appeal Form). Rather, the following notation was handwritten on the bottom of the Appeal form (seemingly by a staff member in Unimaxx's counsel's office):
 - we would like to appeal the attached Determination.
 - we would like to ask for an extension of submission of our written reasons and argument for the appeal based on the following reasons:
 - a computer virus at Unimaxx knocked out the system and we did not have access to historical records needed to prepare the argument
 - by the time the virus was fixed at Unimaxx, Mark Epstein the lawyer was on an extended leave of absence from the office. He is due back on July 23/12.

Thank you for your consideration.

8. On July 17, 2012, the Tribunal's Appeals Manager wrote to Unimaxx's legal counsel's office and advised that Unimaxx's written reasons supporting its grounds of appeal, all relevant documents and arguments relating to the application to extend the appeal period be filed by no later than July 27, 2012. On July 27, 2012, Unimaxx's legal counsel filed the requested material.

REASONS FOR FILING A LATE APPEAL

9. The statutory deadline for appealing the Determination was July 16, 2012, and this date was included in a text box at the bottom of the second page of the Determination. Although Unimaxx, through its legal counsel's office, filed an Appeal Form on July 16, 2012, this document did not include any information whatsoever supporting the three asserted grounds of appeal. This situation has now been rectified by way of legal counsel's July 27, 2012, submission. I will turn to the reasons supporting the appeal grounds later on in these reasons.
10. With respect to the initial late filing, counsel says that Unimaxx received the Determination and the delegate's reasons in mid-June 2012, and that upon receipt the intention was to seek a legal opinion regarding a possible appeal. Apparently, due to some sort of computer virus, Unimaxx was unable to access its records and by the time the situation was rectified its legal counsel (the same counsel who now appears for Unimaxx in this matter) was "on an extended leave of absence [and was] not due back until July 23, 2012". Counsel met with Unimaxx representatives on July 25, 2012, and filed the necessary documents with the Tribunal on July 27, 2012. Thus, as matters now stand, the appeal was perfected less than 2 weeks after the statutory appeal period expired and, of course, Unimaxx's intention to appeal was communicated by the appeal deadline in the form of an (albeit incomplete) Appeal Form.

FINDINGS AND ANALYSIS

11. Section 109(1)(b) applications to extend the appeal period are not granted as a matter of course even where, as is the situation here, there was only a comparatively modest delay from the date the appeal period expired until a complete appeal was filed with the Tribunal. Commencing with the Tribunal's decision in *Niemisto* (BC EST # D099/96), the Tribunal has consistently taken into account a number of factors when considering whether to extend the appeal period including:
- the reason(s) why the appeal was not filed on time;
 - whether there is evidence of an ongoing *bona fide* intention to appeal that was communicated to the adverse parties;
 - whether other parties would be prejudiced if the late appeal were allowed to proceed;
 - whether the appeal, in any event, is not meritorious and thus granting an extension would be not be in the interests of justice.
12. In the case at hand, I am satisfied that Unimaxx had a *bona fide* intention to appeal and there does appear to be a reasonable explanation regarding why the appeal was about 1.5 weeks late in being perfected. I think it important to note that the Appeal Form (incomplete though it may have been) was filed by the statutory appeal period. The delegate does not appear to oppose an extension and Mr. Wallwork's submission speaks only (and in a most cursory fashion) to the merits of the appeal, not the application to extend the appeal period. Accordingly, there is no evidence before me showing that Mr. Wallwork would suffer any particular prejudice flowing solely from the late filing of a perfected appeal.

13. More troubling, however, is the question of whether this appeal wholly lacks merit. Legal counsel's submissions regarding the grounds of appeal are about 9 double-spaced pages in length. Counsel has not identified any "new evidence" that would fall within the ambit of subsection 112(1)(c). Counsel's submissions purport to address the other two grounds of appeal but, for the most part, these submissions are simply repeated statements of disagreement with findings of fact made, or conclusions drawn, by the delegate. In some instances, I am wholly unable to appreciate the nature of counsel's arguments. For example, counsel asserts that the delegate "erred in law and exceeded its" [sic] jurisdiction by conducting the proceedings pursuant to the Respondent's complaints and discipline policies [sic]." I must confess to having no clear idea about what this latter submission actually means.
14. Mr. Wallwork filed a complaint and the delegate was under a statutory duty to either conduct a complaint hearing or an investigation. The matter was originally scheduled to proceed as a hearing but, at Unimaxx's request, the hearing was adjourned and, ultimately, the matter proceeded by way of an investigation. I have reviewed the section 112(5) record in this matter and it appears that throughout the delegate's investigation, the parties were asked to provide relevant information and supporting documents (and both did so). The two parties were apprised of the nature of the evidence and argument submitted by the other. In short, I am fully satisfied that the delegate complied with the dictates of section 77 of the *Act*: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond."
15. Counsel makes the bald assertion that there was some sort of bias but this allegation is wholly unsupported by any corroborating evidence. Counsel simply asserts: "The Director of Employment Standards erred in law and exceeded their jurisdiction by initiating and conducting the proceedings and a hearing when the Appellant had a reasonable apprehension of bias". Again, I am not quite sure what to make of this submission. There is nothing in the material before me indicating that, prior to the issuance of the Determination, Unimaxx filed some sort of objection with the Director of Employment Standards regarding the delegate's neutrality. As I stated above, once the complaint was filed the Director was under a statutory duty to receive and consider it (see section 76). Counsel has not identified any specific reason why the delegate was, or appeared to be biased, such as personal stake in the outcome, a prior relationship with one of the parties, etc.
16. Similarly, counsel says that the delegate's investigation was not conducted in accordance with the rules of natural justice but does not say how or why the rules of natural justice were contravened in this case.
17. The bulk of Unimaxx's counsel's submission reflects repeated statements of disagreement with findings of fact made by the delegate. However, in order for a factual finding to rise to the status of an error of law, the finding must be wholly lacking in any evidentiary foundation. A simple statement of disagreement with a finding of fact does not amount to a proof of legal error. Further, almost all of the disputed facts relate to the delegate's ultimate conclusion that Mr. Wallwork was not, in fact, an independent contractor (despite the parties' written agreement) but, rather, was an employee and thus entitled to the benefit of the *Act's* wage protection provisions. Before the delegate, Unimaxx did not seriously contest (and it does not now) the fact that it failed to pay Mr. Wallwork's outstanding invoices. Thus, the only substantial dispute between the parties is whether the delegate erred in law in determining that Mr. Wallwork was an "employee" as defined in section 1 of the *Act*. The question of Mr. Wallwork's status could be characterized as a question of "mixed fact and law" in the sense that it calls for the delegate to "apply a legal standard to a set of facts" (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 26). In my view, the delegate correctly identified the governing legal principles including, most cogently, the definitions of "employee" and "employer" contained in section 1 of the *Act*. Thus, in order for the delegate to have erred in law, he must have made a "palpable and overriding error" in interpreting the evidence as a whole relating to the issue of Mr. Wallwork's status (*i.e.*, was he employee or independent contractor?).

18. The parties' extensive evidence and arguments relating to Mr. Wallwork's status are set out at pages R2 – R9 of the delegate's reasons. The delegate's analysis and findings regarding this issue are set out at pages R9 – R15 of his reasons. In my view, the only rational conclusion to be drawn from the totality of the evidence and arguments before the delegate is that Mr. Wallwork was an employee rather than a true independent contractor. Although Mr. Wallwork was apparently identified as an independent contractor – and his compensation was structured to reinforce that status – when one more closely examines the evidence, as the delegate did, this relationship was clearly an employment relationship. Without repeating in detail the points set out in the delegate's reasons, I will note that Mr. Wallwork was an integral cog in Unimaxx's business carrying out duties that would be typically carried by employees; he was servicing Unimaxx's clients, not his own; he had no real risk of loss or opportunity to profit; and although he did use some of his own tools (such as his own personal vehicle and a personal computer), he also made extensive use of Unimaxx's tools and equipment, he worked out of their offices and even had business cards that almost certainly associated him in the minds of Unimaxx's clients as a Unimaxx employee. He had office keys and an electronic pass card that granted him after-hours access to Unimaxx's offices. Unimaxx exercised significant control over his work.
19. In my opinion, this appeal has no reasonable prospect of success. Quite apart from the fact that this appeal was not filed in a timely manner and, for that reason alone, could be dismissed (see subsection 114(1)(b)), I consider this appeal to be wholly lacking in merit and thus could equally be dismissed under subsection 114(1)(f) of the *Act*.

ORDER

20. Unimaxx's section 109(1)(b) application to extend the appeal period in this matter is refused. Pursuant to subsections 114(1)(b) and (f) of the *Act*, this appeal is dismissed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal