



An appeal

- by -

James Klassen operating as First Class Fine Plumbing & Heating  
("First Class")

- 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

**ADJUDICATOR:** Cindy J. Lombard

**FILE No.:** 2000/658

**DATE OF HEARING:** December 1, 2000

**DATE OF DECISION:** January 18, 2001

## DECISION

### APPEARANCES:

James Klassen for James Klassen operating as First Class Heating & Plumbing

Margaret Freeman, Robert Gush, Frank Brenner, Stan McLeod

George Turnbull by telephone

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by James Klassen operating as First Class Fine Plumbing & Heating (“First Class”) of a Determination which was issued on September 1, 2000, by a Delegate of the Director of Employment Standards (the “Director”).

The Determination found that the Respondent, George Turnbull (“Turnbull”) was an employee of First Class rather than an independent contractor and as such governed by the *Act* and further that First Class had contravened the *Act* in that Turnbull had not received all wages, regular and overtime, vacation pay, an unauthorized deduction had been made and interest due in the total sum of \$1,549.90 calculated as follows:

#### Regular wages

August 24, 1999 to September 13, 1999

114 hours x \$16.00 per hour \$1,824.00

26.5 hours x \$24.00 per hour \$636.00

Subtotal: \$2,460.00

4% of \$2,460.00 \$98.40

Subtotal: \$2,558.40

Less: Paid September 3, 1999 -\$544.00

Less: Paid September 15, 1999 -\$1,047.00

Subtotal: \$967.40 \$967.40

Unauthorized Deductions: \$500.00 \$500.00

Subtotal: \$1,146.40

Plus interest pursuant to Section 88 \$82.50

Total: **\$1,549.90**

## ISSUES TO BE DECIDED

- 1) Whether Turnbull was an employee of First Klass and as such has the benefit of rights under the *Act* or was he an independent contractor in which case, the *Act* does not apply;
- 2) If Turnbull was an employee of First Klass, was the Determination wrong in its conclusion that Turnbull was entitled to wages, regular and overtime, vacation pay and return of an unauthorized deduction.

## FACTS

Klassen operates a plumbing and heating company. Turnbull worked from August 24, 1999, to September 13, 1999, as a plumber.

Turnbull answered an ad for plumbers placed by First Klass with the Unemployment Office in Kelowna. The ad sought a journeyman plumber: “3<sup>rd</sup> year and 4<sup>th</sup> year apprentice required. Must have own vehicle and hand tools.” As stated by Margaret Freeman (“Freeman”), the office manager, First Klass had been granted a contract for work at Crown West and was in need of nine or ten plumbers at the job site. At this time, Freeman stated that there were three employees on payroll and the balance were paid as independent contractors.

Turnbull was hired at a rate of \$16.00 per hour.

Klassen states that he oversaw all work, which First Klass had in progress, dispatching people to various jobs, showing what work was required to the hired men and checking in on the work from time to time. During Turnbull’s employment, Turnbull worked on Crown West, McKenzie Home and Mongo’s Restaurant projects. Klassen says that he told Turnbull that the hourly rate of \$16.00 per hour was conditional on proving that his experience warranted that hourly rate. Turnbull supplied his own hand tools but larger tools required were provided by First Klass.

There were difficulties. On the McKenzie House project, Klassen says that Turnbull’s work was not done according to the Plumbing Code and had to be redone e.g. the fixtures were reversed. Klassen says that Turnbull agreed to a time reduction on his salary of four hours because of the inadequate work and that his hourly rate was reduced to \$12.00 per hour but he was thereafter paid at a rate of \$14.00 per hour as Turnbull was not qualified to do rough-in plumbing. Turnbull denies this agreement. Klassen further states that at that time Turnbull admitted that he did not have much experience because he had been in prison for a long time.

On the Mongo’s Restaurant job, Klassen says that Turnbull was responsible for a flood and damage to the next door restaurant and further that during that job he was not working all hours that were recorded. Turnbull says that the flood occurred because he had to tap into

the water service at the restaurant next door. He states that when he turned on the water, he checked all of the crimps and there were no leaks. Turnbull denies claiming for hours not worked but says instead that there were times that he was not on the site because he was running errands for supplies.

## OVERVIEW

1. Employee vs Independent Contractor: Was Turnbull an employee of First Klass and as such has the benefit of rights under the Act or was he an independent contractor in which case, the Act does not apply;

Section 1 of the *Act* sets out the definition of “employee” and “employer” as follows:

“employee” includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- (c) a person being trained by an employer for the employer’s business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall;

“employer” includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

The traditional test used by the Courts to distinguish between an employee/employer relationship and that of an independent contractor has centered on the question of the degree of control exercised by the person to whom the work is being done for over the person doing the work. Important but not all-inclusive factors are:

- 1) Does the employer have the control or direction of the employee in the sense of a traditional master/servant relationship?
- 2) To what extent is the person integrated into the business?
- 3) Was Turnbull in business for himself or working for First Klass who has the chance of profit or loss?
- 4) Who owns the tools?
- 5) Was Turnbull required to perform general work or to complete a specific job at which time his relationship with First Klass was to come to an end.

See, for example, Re: *Castlegar Tax (1988) Ltd.*, (1991) 84D.L.R.(4<sup>th</sup>), 58B.C.L.R. (2d), 341 (B.C.S.C.)

*Montreal (City) vs Montreal Locomotive Works Ltd.* [1947], D.L.R. 161; 3W.W.R., 748 (P.C.)

In this case the facts support a finding of a traditional employer/employee relationship. Turnbull was paid a regular hourly wage for regular daily hours that he was expected to be available to work at various projects for First Klass. First Klass provided the larger tools. First Klass oversaw the work of Turnbull and paid him. Turnbull had no chance of profit or loss. Turnbull says that he did not do other work for anyone else during the term of his employment. Furthermore, when hired, Turnbull's employment was indefinite in that he was told he would be working for First Klass as long as work came in. Turnbull was not hired to work at one specific project at which time his relationship with First Klass ended but was to work at whatever project to which First Klass directed him to work at. In this case, during the short term of Turnbull's employment, he worked at three different sites.

In conclusion, Turnbull was an employee and therefore entitled to rights available under the *Act*.

2. If Turnbull was an employee of First Klass, was the Determination wrong in its conclusion that Turnbull was entitled to wages, regular and overtime, vacation pay and return of an unauthorized deduction?

Turnbull was hired at an hourly rate of \$16.00 per hour and there is no evidence that Klassen and Turnbull agreed to reduce his hourly wage.

As determined by the Director, Turnbull worked a total of 140.5 hours during his employment of which 114 hours were regular time and 26.5 overtime. Turnbull says that he did not authorize a deduction of \$500.00 as a contribution for damages caused by the flood but says that he did agree to take off five hours from his claimed hours at the Mongo's job. To his credit during this job when the owner, Stan McLeod, offered to pay him directly to do work surreptitiously on the weekend at \$16.00 per hour cash instead of the \$40.00 per hour he was obligated to pay First Klass under his contract, Turnbull turned him down. In his evidence, Stan McLeod was evasive saying that he "might have made such an offer".

Taking into account the 5 hours, which Turnbull says that he agreed to deduct, wages and vacation pay are recalculated as follows:

109 hours x \$16.00 per hour =	\$1,744.00
26.5 hours x \$24.00 per hour =	<u>636.00</u>
	\$2,380.00
4% vacation pay	<u>95.20</u>
	\$2,475.20

Brought forward... \$2,475.20

Less amounts paid by First Klass		
September 3, 1999	\$544.00	
September 15, 1999	<u>\$1,047.00</u>	
	\$1,591.00	
		<u>-\$1,591.00</u>
		\$884.20

Plus interest pursuant to  
Section 88 of the *Act* to  
be calculated.

It should be noted that the Director erred in adding in the \$500.00 deduction as it had already been taken into account in deducting only the net funds received in the September 15, 1999 cheque (i.e. \$1,047.00 instead of \$1,547.00) as a credit for monies paid by First Klass.

#### **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination with respect to Turnbull be varied to order that James Klassen operating as First Klass Fine Plumbing & Heating pay to Turnbull the sum of \$884.20 plus interest pursuant to Section 88 of the *Act* to be calculated.

**CINDY J. LOMBARD**

**Cindy J. Lombard**  
**Adjudicator**  
**Employment Standards Tribunal**