

An appeal

- by -

Abco Building Maintenance Ltd.

- 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:** John M. Orr

**FILE No.:** 2002/291

**DATE OF DECISION:** March 11, 2003

## DECISION

### APPEARANCES:

Kelvin A. Scheuer

Counsel on behalf of Abco Building Maintenance Ltd.

Paul Rai

On his own behalf and on behalf of Kuljit Rai

### OVERVIEW

This is a further hearing to clarify some issues arising out of an appeal by Abco Building Maintenance Ltd. (“Abco”) pursuant to section 112 of the *Employment Standards Act* (“the Act”) from a Determination dated May 3, 2002 by the Director of Employment Standards (“the Director”).

Abco operated a building maintenance business and employed Paul and Kuljit Rai to perform maintenance services on a number of buildings. A dispute arose over the alleged failure to pay overtime. There were some other issues in relation to compensation for length of service, vacation and statutory holiday pay which were not involved in the appeal.

The appeal was heard on August 30 and October 7, 2002 and a decision was issued October 16, 2002 in which the matter was referred back to the Director. The Director’s delegate is seeking clarification in relation to the reference back.

Written submissions were requested from the parties but the delegate was still unable to establish the information he required. Accordingly a continuation of the hearing of this appeal was scheduled.

### FACTS AND ANALYSIS

Despite the failure of the employer to keep records of daily hours worked, having heard the evidence presented by Abco and the submissions made by the parties at the previous hearing, I was satisfied that there was very little disagreement between the parties as to the factual underpinnings of this somewhat unusual employment contract.

I found that while the contract was unusual it met or exceeded all the minimum requirements of the *Act*. I found that the employment contract provided that Paul and Kuljit Rai agreed to provide maintenance service to a number of buildings. I found that the parties agreed in advance as to the appropriate number of hours required to do the work. If the work were completed in fewer hours the Rai’s would still receive the full contracted wage amount. It was stipulated that no amount of work should be done that exceeded the contracted hours.

I concluded that it was specifically agreed that no extra payment would be made over and above the contracted amount and that the Rais could not incur overtime wages without the consent or acquiescence of the employer. I found that the Rais were to be paid on the basis of certain “runs” that had been submitted in evidence and that where the contracted amounts for each “run” of buildings inherently exceeded the 40 hours per week they should have attracted the overtime provisions of the legislation. I gave one example where one “run” called for 65 hours per week. And therefore, twenty-five hours should

have been paid at the overtime rates. But, I concluded that no time in excess of the 65 hours should be paid.

During the original hearing it became apparent that the Abco bookkeeper had applied a formula that effectively paid the inherent overtime at straight time and not at the overtime rates. This was contrary to the legislation. It was clear that some wages were indeed owing to the Rais. The inherent overtime for each of the Rai's was only paid at straight time and not at overtime rates and I concluded that this matter should be referred back to the Director in order to complete the calculation of wages owing based on the nature of the evidence presented at the original hearing.

Following the referral back it seems that there was some further disagreement as to what work constituted a "run" as described in my decision.

The parties attended for a further hearing in front of me to establish what was intended as a "run". Following submissions and hearing from the director's delegate I clarified that the "run" was the schedule of work set out in Appendix "B" to the Determination. The Director's delegate confirmed that he would now be able to calculate the wages owing in accordance with the terms of the original decision.

## **ORDER**

Pursuant to section 115 of the Act I order that this matter is again referred back to the Director.

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**