



An appeal

- by -

Gertruida Petronella Cornelia Enns a.k.a. Trudy Enns operating as
A Magic Mist Ceiling Cleaning
("Enns")

-and by-

Jeffrey Charters
("Charters")

- 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: C. L. Roberts

FILE No.: 2000/804 and 2000/805

DATE OF HEARING: February 26, 2001

DATE OF DECISION: March 5, 2001

DECISION

APPEARANCES:

On behalf of Gertruida Enns:	G. Enns
On behalf of the Director:	Written submissions only
On behalf of Jeffrey Charters:	J. Charters

OVERVIEW

This is an appeal by both Gertruida Petronella Cornelia Enns a.k.a. Trudy Enns operating as A Magic Mist Ceiling Cleaning ("Enns") and by Jeffrey Charters ("Charters"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued November 3, 2001.

The Director found that Mrs. Enns contravened Sections 28,36(1), 44, 45, 46(1) and 58(1) of the Act in failing to pay Mr. Charters wages, vacation pay, statutory holiday pay, and compensation for length of service, and Ordered that Mr. Enns pay \$4,071.29 in wages, compensation and interest to the Director on Mr. Charters' behalf.

Both parties appeal the decision. Mrs. Enns argues that Mr. Charters is not owed compensation for length of service. Mr. Charters argues that he is entitled to outstanding wages.

ISSUES TO BE DECIDED

At issue is whether the Director's delegate erred in determining Mr. Charters' entitlement to compensation for length of service, and whether he erred in rejecting Mr. Charters' evidence of the hours he worked.

FACTS

Mr. Charters worked for Mrs. Enns as a carpet and ceiling cleaner from November 16, 1998 until April 30, 2000. Mr. Charters also rented a house from Mrs. Enns, and had the use of the company van for work purposes.

Initially, Mrs. Enns paid Mr. Charters on a commission basis, and because of that, did not maintain a record of his hours of work. She also did not pay him vacation or statutory holiday pay, as she considered the commission to be inclusive of those entitlements.

It would be fair to say that the employment relationship ended acrimoniously. The parties have been, or are currently involved in other unrelated civil disputes.

There is evidence that, during the month of April, there was a discussion about changing Mr. Charters' method of remuneration from commission to salary. The parties had not reached an agreement on when the change would occur or the amount of pay by May 1, when Mrs. Enns appeared at the Charters' residence to collect the rent cheque and to deliver a paycheque representing salary, as opposed to commission wages. Mrs. Enns alleges that Mrs. Charters presented her with a statement of outstanding holiday pay and vacation pay, and demanded payment, stating that, if she did not, "Mr. Charters would not appear for work tomorrow" or words to that effect. She alleges that Mr. Charters had intended to quit in any event and set up his own company.

There is no dispute that Mr. Charters did not appear for work. Mrs. Enns claims that she attempted to contact Mr. Enns on several occasions, and that he refused to answer his phone. She arranged to have scheduled cleaning done by another cleaner. She then claimed that she called the Employment Standards Branch for advice, and was told that, although it appeared that Mr. Charters had quit, she should give him two weeks working notice. She then claims that she was then able to contact Mr. Charters, and asked him for the cleaning equipment from his van. There is no dispute that Mr. Charters returned the keys to the van that day. At the same time, Mr. Charters asked Mrs. Enns for his holiday pay.

Mr. Charters alleges that, during the May 1 dispute over wages, Mrs. Enns said "we can't work under these conditions" or words to that effect, and told him to leave the house. He agrees that he did not work on May 2, because "what was he supposed to do after she had kicked us out of the house".

Mrs. Enns takes the position that Mr. Charters quit, Mr. Charters alleges that he was fired. Both parties agree that Mrs. Enns never said to Mr. Charters that he was fired, and that Mr. Charters never told Mrs. Enns that he quit.

Mr. Charters told the delegate that Mrs. Enns repossessed the van, so that he could not do his work. Mrs. Enns advised the delegate that the van was taken away, but told him that Mr. Charters could have come to her premises to pick it up for work every day.

The delegate concluded that the use of the company van had been a condition of Mr. Charters' employment. He concluded that, by taking away the van, Mrs. Enns had contravened section 67(2), and, since Mr. Charters was unable to work out his notice period, he was entitled to compensation for length of service.

Mrs. Enns did not maintain a record of hours worked, and did not produce payroll records as required by the *Act*. The delegate reviewed Mr. Charters' day timer that he provided as evidence of hours worked, and found that, because the relationship between the parties had ended acrimoniously, and Mr. Charters' estimated hours that he worked was made subsequent to his

complaint being filed with the Employment Standards Branch, that it was not the best available evidence of hours worked. Accordingly, the delegate reviewed Mr. Charters' daytimer, and concluded that he worked 4 hours per day throughout the course of his employment. The delegate calculated Charters' wage according to the definition of regular wage, and applied that to the days he worked to determine his outstanding wages.

ARGUMENT

Mrs. Enns argues that Mr. Charters quit his employment on May 2, and that she ought not to be liable for length of service compensation. She argued that she did not take the van away, but that Mr. Charters returned it to her because he had quit.

Mr. Charters argues that he gave the delegate his day timer with all of the actual jobs identified on it, and that those had been made contemporaneously. He claims that only after the dispute did he go back and put in his estimate of hours, but that the time was based on his experience of how long it took to do each type of job, and the bookings that were reflected in the book. He argues that he told the delegate to compare the daily diary with Mrs. Enns' invoices, and that the delegate advised him that Mrs. Enns refused to give them to him. Mrs. Enns says that the delegate never asked her for the invoices, but that, if he had, he would have had access to them. She produced them at the hearing, and contended that they reflected the bookings reflected in day timer as well as those jobs identified by Mr. Charters.

In his written submission, the Director's delegate said

As stated in the Determination, Mr. Charters advised during an interview that the hours noted in his day planner are his best recollection of hours he worked which was compiled after submitting his complaint to the Employment Standards Branch. Mr. Charters day planner is not a contiguous daily record of hours worked, it is his best estimate of hours worked compiled well after the days were worked.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that neither party has met the burden.

I shall deal with each appeal separately.

Is Mrs. Enns required to pay compensation for length of service?

At issue is whether Mr. Charters quit or was fired.

I accept that Mr. Charters did not work on May 2. There are two versions of what happened on the evening of May 1. I accept that there was a verbal altercation between the parties, leading to a fundamental breakdown of the relationship. I accept that neither party could have, or would have wanted, the relationship to continue.

Although Mrs. Enns argued at the hearing that Mr. Charters quit, she told the delegate that she had given Mr. Charters two weeks notice of his termination, and that he could have come to her home to pick the van up. Mr. Charters told the delegate that he received two weeks notice of termination, but he was unable to work because Mrs. Enns took his van away. At the hearing, he testified that he was fired the evening of May 1, and did not try to go back to work.

I find that Mrs. Enns, in unilaterally changing the conditions of Mr. Charters' employment from commission wages to salary, constituted constructive dismissal. Although there had apparently been some discussion about changing the terms of the employment relationship, Mr. Charters had not agreed to any of the changes before they were imposed upon him.

Furthermore, although Mr. Charters acknowledged that Mrs. Enns did not use the words "you're fired", he assumed, from her words and her actions, including the unilateral change of the employment relationship and the termination of his tenancy, that he had been fired.

The following day, acting on that assumption, he returned the van, gave the keys to Mrs. Enns, told her that he wanted his name removed from the insurance, and asked for his holiday pay. There was another incident between the parties regarding the return of the van during as a result of which the RCMP were contacted, and Mr. Charter's name was removed from the insurance coverage shortly thereafter. The actions of Mr. Charters are consistent with an assumption that he had been fired. I find no basis for disturbing the delegate's conclusion on this point.

Did the delegate err in calculating Mr. Charters' wages?

The delegate found Mr. Charters' evidence to be unreliable because of the breakdown in their relationship. I find no error in this conclusion. However, Mr. Charters says that he only inserted the hours, not the actual jobs he performed after the fact, and the delegate ought not to have rejected his day timer out of hand. He contended that it ought to have been compared to Mrs. Enns' invoices.

I have had the opportunity to review Mr. Charters' daytimer with Mrs. Enns bookings. Some records are consistent in places, although Mr. Charters' daytimer indicates that he started a job booked for 9:30 at 8:00. On other days, Mrs. Enns' book reflects a job to commence at 9:00 a.m. and Mr. Charters' shows the job performed at 10:00 a.m. I accept that some of Mr. Charters' identification of jobs are similar to Mrs. Enns', but that the hours are not accurately noted. I find no basis for disturbing the delegate's conclusion that the records were unreliable. However, he did not reject them altogether. Using his best judgement, the delegate credited Mr. Charters with 4 hours of work on days he did not work, and days he performed less than 4 hours. I am unable to conclude this is in error, arbitrary, or unfair to Mr. Charters.

I deny Mr. Charters' appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated November 3, 2000 be confirmed, along with whatever interest may have accrued since the date of issuance.

C. L. ROBERTS

C. L. Roberts
Adjudicator
Employment Standards Tribunal