

An appeal

- by -

John Klevinsky operating as Global Painting  
("Klevinsky" or "Employer")

- 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:** Paul E. Love

**FILE No.:** 2003A/211

**DATE OF DECISION:** December 10, 2003

## DECISION

### SUBMISSIONS

John Klevinsky

on behalf of himself

### OVERVIEW

This is an appeal by an employer, John Klevinsky operating as Global Painting ( “Employer” or “Klevinsky”), from a Determination dated June 17, 2003 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). The Delegate chose to conduct an oral hearing, where Klevinsky appeared, but where the complainant Mark Hickey (“Employee”) did not appear at the oral hearing. One of the issues for hearing was whether Mark Hickey was an employee, but the issue on appeal was the amount the Delegate found for the painting of a third house. Klevinsky had hired Hickey to paint three houses. The work that Hickey performed was deficient for the third house. Klevinsky sought to reduce the amount owing to Hickey for deficiencies in the work performed. While I accept that Klevinsky established that the work performed by Hickey was deficient, and that Klevinsky was bound to correct the deficiencies of Hickey, Klevinsky was not entitled to charge this business cost against the wages otherwise owing to Hickey. This was a deduction for business costs, and prohibited by section 21 of the *Act*. I am not satisfied that the Delegate erred in his calculation of amounts owing to Hickey.

### ISSUE:

Did the Delegate err in calculating the amount of wages owing to Hickey by failing to reduce the amount by taking into account the time required to correct deficiencies in Hickey’s work?

### FACTS

This appeal proceeds by way of written submissions. The Delegate filed the record, but filed no submissions. The complainant, Mark Hickey, did not file a submission.

This matter proceeded before the Delegate by way of an oral hearing on April 9, 2003. Hickey filed a complaint under the *Act*, but did not attend the hearing before the Delegate. The Employer did attend the hearing. The Delegate proceeded to hear from the Employer, apparently questioned the Employer, and determined that Hickey was an employee, and was entitled to the sum of \$473.90. The Delegate purports to have used the evidence of the Employer, and the Employee’s complaint, written documents submitted after the complaint was filed, and a self-help kit. The Delegate appeared to prefer the oral evidence of Klevinsky, over the written complaint and self help kit of Hickey.

It is not necessary to set out any of the disputes between the parties, save and except those related to monies owing for the painting of the 3<sup>rd</sup> house. This is the only issue raised by Klevinsky in his appeal.

The Delegate found:

Klevinsky confirmed Hickey was to be paid \$360.00 for work on the 3<sup>rd</sup> house. The house was to be completed in 3 days at 8 hours per day. Klevinsky multiplied the 24 hours needed by \$15.00/hr for a total of \$360.00. Klevinsky under questioning confirmed that Hickey did complete the majority of the work but the deficiency list was still outstanding. Klevinsky was frustrated Hickey did not perform the work and was being pressured by the general contractor to complete the job. Klevinsky tried to get Hickey to complete the work and told him he would be paid after the deficiency was satisfied.

Hickey provided no testimony and stated in writing he worked 44.5 hours. On the balance I accept that Hickey worked at least 3 days on the 3<sup>rd</sup> house. Klevinsky own testimony confirms the job was almost done. I find Hickey is owed the wages promised on the 3<sup>rd</sup> job. Based on \$15.00/hr Hickey is owed 24 hours x \$15.00/hr = \$360.00 plus an additional \$76.00 for the 2<sup>nd</sup> job as stated above for a total of \$436.00. It is noted Klevinsky did not supply any evidence vacation pay was paid as per the act. In addition to the wages owed 4% vacation pay will be added on the total wages paid and owed.

Mark Hickey was hired for three painting jobs. On the third painting job Hickey claims that he did three days of work. Klevinsky claims that Hickey did only 5 hours of work, and that Hickey is entitled to the sum of \$75.00. Klevinsky submitted a letter from the general contractor you indicated that Hickey was rarely on the job site, and that there was a long list of deficiencies which required 19 hours of work to complete. The deficiencies appear to relate primarily to a failure to paint and caulk moldings, window sills, door frames.

In a submission to the Branch dated November 17, 2002 Klevinsky stated:

I contacted Mr. Hickey and informed him that the work was not satisfactory and I was forced to terminate the contract for substandard work and missing his allotted deadline. I also informed him that there would be penalties based on his substandard work, which is a common practice for contracting. If the work is below the standard and the contract is not complete. In every instance where I trusted him to work unsupervised I found the work to be sub standard, and had to be done over, or work he said he had finished was incomplete.

On Saturday Nov 2002, I again called Mr. Hickey and told him we would get together and go over the list of grievances presented and signed by the contractor. I also told him to present me his social insurance number along with an invoice for the 360.00 dollars based on the time he was given to finish the job and appropriate deductions would be applied based on the contractors list of problems. I also told him he would receive a list signed by the contractor verifying the problems with Mr. Hickey's work.

**John Klevinsky's Argument:**

Mr. Klevinsky submits that there has been a breach of natural justice. The Employer disputes the amounts in the determination. The Employer submits that Mr. Hickey did not work on the third job, and the work done on earlier jobs was deficient. The Employer submits:

My main concern lies with the third job in which [the Delegate] states that I admitted Mr. Hickey completed the majority of the work. There has apparently been a misunderstanding concerning this statement. My contention -as verified by the letter of deficiencies, and by second letter stating Mr. Hickey was never on the job site-is that Mr. Hickey never completed the majority of the work.

The total agreed upon time as stated in the determination is true Mr. Hickey was given a total of 3 days to complete the job, at 8 hours per day. The fact is he was never on the job and did not do the work. Out of the 24 hours allotted to the job 19 hours of work was not completed. My contention is that Mr. Hickey spent no more than 5 hours total on the 3<sup>rd</sup> job as reflected in the 19 hours of work not done. The two letters I have signed by the contractor Mr. Barns states that Mr. Hickey was never on the job site, and there was 19 hours of work not done. Therefore Mr. Hickey should receive appropriate compensation, 5 hours x \$115.00 per hour for a total of \$75.00. And not the \$350.00 as stated in the determination.

## ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employer, to demonstrate an error such that I should vary or cancel the Determination.

Section 112 (1)(b) of the *Act* provides for an appeal on grounds that:

- (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 made.

The Employer, in this appeal, appears to accept the finding that Mark Hickey was an employee, but challenges the amount which the Delegate found to be due and owing to Hickey. I note that Hickey did not appear at the hearing. The Delegate had some documents from Hickey and the benefit of oral evidence from the Employer. I note that the Delegate found Klevinsky to be a credible witness.

I note that Klevinsky has not filed an appeal on the basis that Hickey is an employee, the appeal is filed on the basis that the amount calculated by the Delegate was incorrect. In his submission to the Delegate dated November 17, 2002 (recited above), Klevinsky sought an invoice from Hickey for \$360.00, and intended to pay Hickey a portion of that money, adjusted for deficient work performance.

I note Klevinsky asked me to infer from the length of the deficiency list, and the time required to correct deficiencies (19 hours), and the total amount of time required for the job (24 hours), that Hickey only performed 5 hours for work. I accept Klevinsky's view that the work was done in a sloppy manner, and I accept that the list of deficiencies noted by the contractor required substantial effort to correct by Klevinsky. With deficiencies on construction projects, it may often require more time to correct sloppy work, than to have done the job correctly at the outset. While Klevinsky's argument is attractive, I cannot conclude that only 5 hours work was done, because it took 19 hours to correct the sloppy work done. It is apparent that in this case, some work was performed by Hickey, and done carelessly. Some work was not done by Hickey. The Delegate had the advantage of hearing the oral evidence tendered by Klevinsky and decided the case on the basis of Klevinsky's evidence. The Delegate's best estimate of the amount of work was 24 hours, because that was the amount of work allotted for the project, Klevinsky asked for an invoice, and would have paid some money to Hickey (less deficiencies), but did not pay any monies because Hickey wanted cash.

There is no right in the *Act* to withhold wages because an employee performed sloppy work. Correction of sloppy work, or work deficiencies, was clearly a cost of doing business for Klevinsky. Hickey was an

employee not a contractor. Under Klevinsky's contractual arrangements, with the general contractor it appears that he was required to make good the work of Hickey. Section 21 of the *Act* reads as follows:

- 21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
- (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
- (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

Klevinsky may have another claim against Hickey, in another forum, but the Tribunal has no jurisdiction to set off any employer claim for an employee's defective work, against wages owed to the employee. It is clear that some work was performed, and Klevinsky was prepared to recognize that some work was performed when he asked Hickey for an invoice. Deductions for correcting work deficiencies are prohibited by section 21 (1) of the *Act*: *Gustavson, BCEST #D 101/96*.

For the above reasons, I therefore confirm the Determination.

## **ORDER**

Pursuant to s. 115 of the *Act* the Determination dated June 17, 2003 is confirmed.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**