

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, c.113

-by-

William Wolonchuk operating Aqua Pacific Pools and Spas Ltd.  
(" Aqua Pacific ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	C. L. Roberts
<b>FILE No.:</b>	97/429
<b>DATE OF HEARING:</b>	September 30, 1997
<b>DATE OF DECISION:</b>	October 21, 1997

## DECISION

### APPEARANCES

William Wolonchuk,  
Milton Wolonchuk

For Aqua Pacific Pools and Spas Ltd.

Gerry Omstead

For the Director

Judy Barlow  
Don Thompson

For D. Thompson

### OVERVIEW

This is an appeal by William Wolonchuk operating Aqua Pacific Pools and Spas Ltd. ("Aqua Pacific"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards ("the Director") issued May 9, 1997. The Director found that Aqua Pacific contravened Sections 17, 21, 34, 45, 58 and 63 of the Act in terminating Don Thompson's ("Thompson") employment, and Ordered that Aqua Pacific pay \$1714.74 to the Director on behalf of Thompson.

Aqua Pacific claims that Thompson was not an employee of the company, but an independent contractor. Aqua Pacific also contended that Thompson was not terminated, but that his services as a contractor were no longer needed following the end of the season.

### ISSUE TO BE DECIDED

Whether the Director correctly determined that Thomson was an employee, and wrongfully terminated without payment of wages, vacation pay and mileage.

### FACTS

Thompson commenced work for Aqua Pacific cleaning and maintaining pools and spas for company clients on March 28, 1996. Thompson was paid a mileage allowance for the use of his personal vehicle, and an hourly rate according to the number of hours he worked per day. Thompson's complaint was filed with the Director on January 3, 1997, claiming that he had been fired and that the company wrongfully withheld wages owed to him.

Following a review of the records provided to the Director by Aqua Pacific, the Director determined that Thompson was an employee. This determination was based on the documentation, which showed that Aqua Pacific provided the jobs, decided the rate of pay, made statutory deductions including UIC, CPP and vacation pay and issued a Record of Employment (ROE) to Thompson on November 4, 1996.

Aqua Pacific did not dispute that mileage of 60 kilometres at 12 cents per kilometre had not been paid.

The ROE indicated that Thompson had been terminated due to seasonal work. However, the Director found, on the evidence, that the termination was not due to a seasonal reduction but due to an accident Thompson had with a client's property.

## **ARGUMENT**

Aqua Pacific argued that:

- a) that Thompson was not an employee; and
- b) he had not been fired.

I shall address the arguments in order.

a) William Wolonchuk contended that he had not hired Thompson as an employee, but as a sub contractor. He indicated that he "completed the paperwork", making deductions for CPP and UIC, as a favor to Thompson. He stated that he had not known that the effect of doing so was to change his status into that of an employee. He also acknowledged that Thompson was paid vacation pay, but only because his wages were not very high and "it was only fair" to do so. He also contended that he had not advertised for an employee, did not seek references, and ensured that Thompson had his own vehicle and tools. He also claimed that Thompson could determine his own schedule and was not required to report to work daily.

b) Milton Wolonchuk stated that in October or November 1996, it came to Aqua Pacific's attention that Thompson had caused some damage to a customer's property. M. Wolonchuk stated that he did not fire Thompson, but discussed how Thompson was going to "make good" on the damage he caused. The paycheque was withheld pending a resolution to this issue. The parties did not resolve the matter, as Thompson was of the opinion that Aqua Pacific was responsible for any damage and could cover it through company insurance, given his status as an employee. When the parties failed to reach an agreement, and the cheque was not issued, Thompson filed his complaint.

## **ANALYSIS**

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

I shall first address the issue of whether Thompson was an employee or a general contractor.

Section 1 of the *Act* defines "employee" as including a person...receiving or entitled to wages for work performed for another. An "employer" is defined as including 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.

After considering the factors outlined by the four fold test, the Director determined that Thompson was an employee. I am not persuaded, on the evidence, that this determination was incorrect.

Several common law tests have evolved to determine whether a person is an employee or a contractor. Those tests, which include the 'four-fold' test, the integration test, the and the economic realities test, have all been considered along with the definitions noted above.

Although Thompson did have some control over the time in which the work was done as well as some of his own tools, he did not have specific pool cleaning tools, such as a leaf bagger, vaccum kit and test kit. Those items were provided by Aqua Pacific, although I accept that it was suggested to Thompson that he purchase his own tools. The work was provided by Aqua Pacific. There is no dispute that Thompson did not have a chance of profit, as he was paid an hourly wage, the rate of which was determined by Wolonchuk. Nor did Thompson share a risk in the provision of his services, notwithstanding the dispute which prompted Thompson to file his complaint.

Most critically however, Aqua Pacific issued Thompson regular paycheques, with UIC, CPP and vacation pay deductions, even though W. Wolonchuk indicated that had never made these deductions from contractors in the past, and now states that to do so for Thompson was a mistake.

The evidence is that Wolonchuk has been in business for 35 years, and has operated Aqua Pacific since 1992. During that time, he has hired a number of contractors and employees. He did not pay vacation pay, nor made employer deductions from any of the contractor's cheques in the past. I am not inclined to believe Mr. Wolonchuk's assertions that he was ignorant of his obligations as an employer. If he truly did not know the distinction between an employee and a contractor, it was because he did not inform himself of those distinctions, and his obligations toward each category of worker.

I note that Section 6 of the Act places an obligation on the Employer of informing all employees of their rights. There is a converse burden on the Employer to inform himself of his rights and obligations under the law.

I deny the appeal on this ground.

I shall now turn to the issue of Thompson's termination.

Thompson filed his complaint following Aqua Pacific's refusal to pay him until their dispute over damages was resolved. The Director found that while the Act "does not require an employer to provide notice or pay if the termination is a result of the normal seasonal reduction", the evidence "does not support that the termination was due to a seasonal reduction. The payroll records indicated that the hours of work were reduced due to the season however the reason stated by the employer was due to Mr. Thompson's accident with the clients property." The Director determined there was no just cause for termination and ordered compensation in lieu of notice.

M. Wolonchuk denied that Thompson had been terminated, and indicated that the work had ended due to the end of the season. He also stated that the end of the season coincided with the receipt of several complaints regarding Thompson's performance. There was some inconsistency in the evidence on the issue of whether Thompson was laid off due to the absence of work, customer complaints, or something else. The evidence indicates that the ROE, which was issued

November 4, identified the end of season. Nevertheless, Thompson continued to work past that date.

Even though Aqua Pacific also made reference to complaints they received from customers, W. Wolonchuk denied this was a reason Thompson's work ended. I have reviewed the sole written complaint which was introduced at the hearing. It was written July 12, 1996. A further complaint was apparently made in October or November. I note that Thompson continued to work into December without being advised there was a problem. A further complaint was apparently made in October or November. M. Wolonchuck also denied that Thompson was terminated due to this complaints, but the evidence is that he refused to provide Thompson with his paycheque until their dispute over damages had been resolved.

On the evidence, I am not satisfied that Thompson's work was at an end because it was the end of the season. Even though the Record of Employment was issued November 4, 1996, Thompson continued to work until December 15.

Aqua Pacific also denied that Thompson was terminated, but did acknowledge withholding wages. Section 21 of the *Act* prohibits an employer from doing so for any reason, including any employer's business costs. It provides 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.

In not providing Thompson with his pay, Aqua Pacific was in violation of the Act. I accept that Thompson considered this as constructive or implied dismissal, and filed his complaint

I accept that Thompson was terminated. There being no grounds identified for the termination, I am unable to conclude that the Determination is incorrect, and deny the appeal.

## **ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination be confirmed.



**Carol Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**