



An appeal

- by -

Dave Laucek; Beri McLennan operating as Canadian Plumbing and Rooter

- 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.:** 2001/403

**DATE OF HEARING:** September 14, 2001

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

## DECISION

### APPEARANCES:

Dave Laucek	On behalf of himself and Berri McLennan
Niel Thompson	On his own behalf

### OVERVIEW

This is an appeal by Dave Laucek (“Laucek”) and Berri McLennan (“McLennan”) who jointly operate a business known as Canadian Plumbing and Rooter (referred to herein collectively as “the employers”) pursuant to Section 112 of the Employment Standards Act (the “*Act*”) from a Determination dated May 04, 2001 by the Director of Employment Standards (the “Director”).

Niel Thompson (“Thompson”) was hired by the employers in May 2000 and worked for them until October at which time the employment was terminated. Thompson claimed for wages owed together with compensation for length of service. The Director found that Thompson was not entitled to compensation because he had terminated his own employment. This aspect of the Director’s determination was not appealed. However the Director found that there were wages owing in the amount of \$770.64 (plus interest). The main reason for wages to be owing was because the employer had failed to pay for the minimum daily hours of work required under the *Act*.

Laucek and McLennan had taken the position that because Thompson was paid on a commission basis he was not entitled to the minimum daily hours of work. However during the appeal they withdrew that argument but they submit that the Director failed to take into account the total wages paid to Thompson and they submit that in total Thompson was paid more than the minimum required by law or as calculated by the Director.

### ISSUES

The issue in this case is largely factual and comes down to a calculation of the wages owed and the totality of wages paid by the employers.

### FACTS AND ANALYSIS

I must first note that many of the facts in this case were difficult to ascertain because neither the employers nor the employee kept proper records of hours worked. It was also difficult to ascertain a proper hourly rate of pay because of the commission structure. The Director’s delegate carefully and correctly analysed these issues and took into account that the legislation puts the onus on the employers to keep proper records and not on the employee.

While there appears to be still some uncertainty between the parties about what work was performed and on what basis, I accept, and at the hearing the parties accepted, that the delegate calculated the amount of wages owing as accurately as possible under the circumstances. The substantial issue that remained in question, however, was the amount of wages actually paid by the employer to Thompson.

During the investigation McLennan provided the delegate with a detailed two page summary of all the jobs done and wages paid based on an hourly rate and on commission. It appears that Thompson was paid an hourly wage when helping Laucek and a commission wage when working on his own. The employer kept work sheets or invoices for every job done and these sheets showed who worked on the job and the basis of pay. However in many cases these sheets did not show how many hours were worked. But it is clear on those cards that there were many situations in which Thompson worked for less than 4 hours and was paid for less than 4 hours.

I was told at the hearing that the original cards were not submitted to the delegate but Laucek maintained that when the summary was sent in that they offered to provide any further information that the delegate might need. Based on the summary the delegate quite correctly found that there was a failure to pay the minimum 4 hours on many days. The delegate then prepared a worksheet showing the additional wages owing based on the 4-hour minimum and issued a determination accordingly.

It was not until after they received the determination that Laucek and McLennan pointed out to the delegate that, although they did not have proper payroll records, they did have all their cancelled cheques to show that they had paid Thompson in excess of the total amount required by law and by the determination. The employers claim that they did not keep payroll records as such because of the commission payment structure.

It is a principle well established by the Tribunal that the employer must cooperate with the Director at the investigative stage and will not generally be allowed to produce documents at the appeal stage that were not previously provided to the Director. However, in this case, I am satisfied that there was no intent by the employers to withhold the cancelled cheques from the Director's delegate as they felt they had provided sufficient information by way of the summary. I am satisfied that the employers had maintained from the beginning that sufficient payment had been made and that this argument did not arise simply for the purpose of the appeal. I am satisfied with the employers' *bona fides* in this regard.

The summary of hours work and jobs performed seems to have been accepted by the Director's delegate and, at the hearing, Thompson conceded that it was in all likelihood reasonably accurate. That summary shows that Thompson earned and was entitled to be paid \$2,046.85. The delegate found that, because of the failure to pay the 4-hour minimum, there was additional wages owing of \$770.64. This means that the total wages owed to Thompson including statutory holidays and vacation pay was \$2, 817.49.

The employers produced cancelled cheques that totalled \$3,640.71. Thompson conceded at the hearing that he had received those cheques and that they represented payment of wages. The discrepancy of what appears to be an overpayment seems to arise because of a system of advances paid and some rent payment advanced to Thompson. This is not a forum for the recovery of any overpayment.

While I still have some concerns about whether all of the work performed by Thompson has been properly accounted for (especially in light of the apparent overpayment) I am satisfied that the employers have established that they have paid Thompson sufficient wages for all of the work shown on the summary together with the extra wages found owing by the Director. Thompson did not submit any evidence of work performed over and above the work shown in the employer's summary.

I am satisfied that the employers have met the onus of persuading me that sufficient funds have been paid to Thompson to meet the statutory minimums as calculated by the Director in addition to all hours of work performed during Thompson's employment. Therefore I conclude that the determination should be cancelled.

## **ORDER**

I order, under section 115 of the *Act*, that the Determination dated May 4, 2001 is cancelled.

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