

DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTION 2-75 and 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT



Oleksii Plesak

COMPLAINANT/EMPLOYEE

-AND-

All Tech Windows Inc., and Directors Tetiana Zozulia and Andrii Zozulia

APPELLANT/EMPLOYER

DATES OF HEARING: November 3, 2020

PLACE OF HEARING: Regina, SK

LRB FILE: No. 127-20

WAGE ASSESSMENT: No. 1-000435

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INTRODUCTION

This matter was heard before me on November 3, 2020 at Regina, Saskatchewan.

I am satisfied there has been compliance with subsections 2-74(6), 2-75(2) and 2-75(3) of *The Employment Standards Act* (the 'Act'). Therefore, I have determined that I do have jurisdiction to hear this matter.

Jas McConnell, Employment Standards Officers represented the Department of Employment Standards.

Complainant/Employee, Oleksii Plesak, attended and gave sworn evidence on his behalf.

Ms. Tatara Noff attended as an interpreter for the employee to translate Russian to English and English to Russian for the purposes of the hearing.

The Appellant/Employer, Andrii Zozulia, Director attended in person and gave sworn evidence on behalf of the company All Tech Windows Inc.

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Peter Abrametz attended by way of telephone and was the lawyer for the Company and directors.

The Wage Assessment was prepared pursuant to the Saskatchewan Employment Act s.s.2014 c.s-15.1, herein after referred to as "The Act" is for \$1,645.15.

I. PRELIMINARY MATTERS

Mr. McConnell, Employment Standards Officer advised that the original wage assessment had been amended from the original amount to \$1,645.15.

The amendment came about as he had received information from the employer after issuing the initial wage assessment.

Mr. McConnell reviewed the service documentation confirming service of the wage assessment was on July 22, 2020 and that the department received the Notice of Appeal and required deposit on August 4, 2020.

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Mr. McConnell advised that the amended wage assessment was based on employee records, Employee Exhibit #1, as he had not received any records from the employer until after he had issued the original wage assessment.

II. DISPUTE

The employer is taking the position that Mr. Plesak, was not an employee of the Corporation but an independent contractor with the Corporation.

The employer also disputes the wage assessment calculations and time sheet records.

III. EVIDENCE OF THE EMPLOYER

Andrii Zozulia was sworn and gave evidence on behalf of the Corporation as Director of All Teach Windows Inc. as follows:

That Mr. Plesak, worked for the Corporation for approximately 2 weeks in 2019. His rate of pay was \$17.00 per hour and he was

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paid for the work done, although there may be a small amount owing to him.

That Mr. Plesak was taken on as an independent contractor. The employer does not have employees as he does not have enough on-going work to retain employees so uses independent contractors.

When Mr. Plesak came to work, he used his car and brought a tape measure to use at work and was paid \$17/hour for the hours per day that he worked.

Under cross examination the Employment Standards Officer referred the defendant to Employer Exhibit #1 which was a calendar prepared by the Corporation for these proceedings.

Mr. Zozulia confirmed that the calendar and notations thereon was created after July 28, 2020, after the employee had met with the Employment Standards Officer on this file.

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The employer had no other records relating to Mr. Plesak nor any records pertaining to the hours he worked nor any of the other documents required by The Act.

That Mr. Plesak was hired as a helper to assist with the installation of windows and other work done by the Corporation for commercial or residential buildings.

The tools that the employee worked with as a helper would include a prybar, drill, tape measure, drop sheet, broom, shovel, vacuum, and a hammer. These tools were used to assist in removing and installation of windows, cleaning up as well as loading the items and tools on and off the Corporation's trailer.

The Director, Andrii Zozulia gave instructions to Mr. Plesak as to the work, working conditions, hours of work (start and end times), where to go to work and on occasion picked him up to take him to work.

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The employer confirmed that the customers of the Corporation did not know that Mr. Plesak was a subcontractor, and thought that All Tech Windows Inc. were who the customer was dealing with.

Mr. Plesak had no opportunity to make a profit or a loss with respect to the work he did for the Corporation. He was paid \$17/hour when he worked with the Corporation.

During the period that Mr. Plesak worked with the Corporation there were jobs in Saskatoon where the employer would drive with Mr. Plesak to Saskatoon in the morning and return in the evening. Some days they worked up to 14 hours including travel to Saskatoon and return. The employee was not paid for travel. On one occasion they stayed the night in Saskatoon.

When working in Regina the job required working from 8am to 5pm.

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The employer stated that they worked 6 days a week Monday to Saturday but never Sundays.

IV. EVIDENCE OF THE EMPLOYEE

The employee, Mr. Plesak, was sworn and gave the following evidence:

That he was looking for work and became aware that the Corporation may require assistance and contacted Mr. Zozulia.

They discussed rate of pay and agreed upon \$17.00 per hour. The employer stated that Mr. Plesak may have work 12-hour days on some occasions, in particular when working in Saskatoon.

Mr. Plesak worked as helper assisting in replacing windows and doing other work relating to repairing and improving houses, installing, and removing windows, cleaning up and loading the trailer before and after work.

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Mr. Plesak kept track of his hours and created a calendar of his hours entered as EE#1.

EE#1 shows that he worked Sundays during the period he was with the Corporation.

His last day of work was August 2, 2019. He had commenced work on July 25, 2019 and worked every day during that period.

The employee left the job because he was not being paid by the Corporation.

Under cross examination by Mr, Abrametz, it was confirmed that the employee was paid \$1,864.00 by the Corporation.

Mr. Plesak confirmed that there was a job relating to parging the concrete around a house that he worked on for 2 days, August 1 & 2, 2019. With respect to the parging job both parties agreed

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that Mr. Oleksii would be paid 70% of the monies earned on the job and 30% would be paid to the Corporation. The amount to be paid for the parging job was \$600.00.

The terms relating to the parging job were agreed to by both parties and the work was completed on August 1 & 2, 2019 with Mr. Plesak working 8 hours on each of the two days. These hours have been claimed on the wage assessment as employment hours at the rate of \$17/hour.

Mr. Plesak also stated that he had worked Sundays as set out in EE#1.

V. ANALYSIS/DECISION

The employer says that Mr. Plesak was an independent contractor.

With the exception of the two days August 1 & 2, 2019 the evidence does not bear this out.

The test for an independent contractor is set out in Director of Labour Standards v. Acanac Inc. 2013 SKQB21.

That case sets out the criteria to look at to determine if an individual was an independent contractor or an employee:

1. Control
2. Ownership of tools
3. Chance of Profit
4. Risk of Loss

Control – The Corporations evidence was that the employer decided where the employee went to work, when he started and when he stopped work for the day, as well as, what he did when at work.

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Ownership of Tools – with the exception of a measuring tape the employee was provided with all the tools for his work by the Corporation.

Chance of Profit & Risk of Loss – The employer's evidence was that the employee did not have opportunity for Profit or Loss.

As a result, I find that "on the ground" conduct shows that Mr. Plesak was an employee not a subcontractor.

The workdays August 1 & 2, 2019 are an exception to this finding. The evidence of both parties regarding these days was, that the work done by Mr. Plesak, was that of a subcontractor.

The work done by Mr. Plesak was parging concrete around a house. During this job Mr. Plesak had total control over the job of when to work, how to work, and was to be paid 70% of the total payment for the work with the Corporation retaining 30% of the job.

In the Labour Standards Audit Sheet (LSO Exhibit #1), 8 hours were claimed for each day (August 1 & 2, 2019), for a total of 16 hours @ \$17/hour. (16 hours x \$17.00 = \$272.00) which was included in the wage assessment.

Mr. Zozulia, the employer also objects to the amount of the wage assessment, saying that the hours worked by the employee are too high. That is, the employee did not work the hours claimed in the wage assessment.

Section 2-38 of The Act requires the employer to keep records in accordance with this section and provide the same to the Employment Standards Officer when requested. This was not done. The only record the employer provided was a report of hours worked, which report was created a year after the work had been done, and only after the wage assessment had been issued by Employment Standards.

As the employer records were not available, the Employment Standards Officer used the employee's records of time worked to complete the audit sheet and arrive at the wage assessment amount.

I accept the employees' evidence as to hours worked, including the Sunday hours claimed.

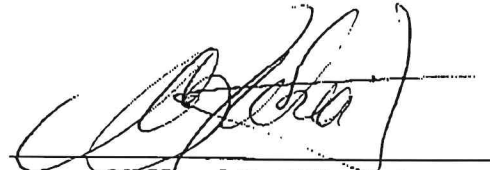
I find that with the exception of the two days (August 1 & 2), Mr. Plesak was an employee and not an independent contractor.

VI. CONCLUSION

The Wage Assessment is varied by subtracting the two days of independent contractor work (August 1 & 2 = \$272) to \$1,373.15.
 $(\$1,645.15 - \$272.00 = \$1,373.15)$

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Dated at Moose Jaw, in the Province of Saskatchewan, this 6th, of
November 2020.

A handwritten signature in black ink, appearing to read "Clifford B. Wheatley", is written over a horizontal line.

Clifford B. Wheatley
Adjudicator

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The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of

The Saskatchewan Employment Act (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at <http://www.saskatchewan.ca/>.

Right to appeal adjudicator's decision to board

4-8(1) An Employer, Employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

- (a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
- (b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

- (a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;
- (c) the notice of appeal filed with the director of employment standards pursuant to Part II;
- (d) any exhibits filed before the adjudicator;
- (e) the written decision of the adjudicator;
- (f) the notice of appeal to the board;
- (g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

- (a) affirm, amend or cancel the decision or order of the adjudicator; or
- (b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

(2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards has the right:

(a) to appear and make representations on:

- (i) any appeal or hearing heard by an adjudicator; and
- (ii) any appeal of an adjudicator's decision before the board or the Court of Appeal;

and

(b) to appeal any decision of an adjudicator or the board.