

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

- by -

John Zajc Operating
Norstar Int. Dev. Ltd.
("Norstar")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 95/037

DATE OF DECISION: February 16, 1996

DECISION

OVERVIEW

This is an appeal by John Zajc operating Norstar Int. Dev. Ltd. (“Norstar”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 000230 issued by the Director of Employment Standards (the “Director”) on November 28, 1995. The Determination was issued following complaints by Sean Evans (“Evans”) and Devin Paul Unger (“Unger”), former employees of Norstar. In this appeal Norstar claims that neither person is owed wages.

I have completed my review of the written submissions made by the parties, including the information provided by the Director.

FACTS

Evans and Unger were employed by Norstar to work at a fishing resort in Namu Bay, BC

Evans was employed as a Cleanup Crew Person/Fishing Guide. On June 9, 1995 he submitted a complaint to the Employment Standards Branch (“ESB”) concerning the non-payment of wages.

Unger was employed as a Carpenter. The ESB received a complaint from him on June 29, 1995 concerning the non-payment of wages.

On November 28, 1995, Michael Fu (“Fu”), a delegate of the Director issued a Determination in the amount of \$1,274.79. The Reason Schedules attached to the Determination contain the following information:

Employee: Sean Evans

Amount Owed: \$274.79

Reason: Mr. Evans was promised \$2,000 per month as his salary and was expected to work all days whilst in Namu Bay, BC The total days he spent in the work site was 13 days. Thus he is entitled to $\$2,000 \times 12 \times 13 \div 365 = \854.79 . He was paid \$580.00. The total amount of wages owing is \$274.79.

Since Mr. Zajc has failed to provide payroll records to support his explanation as required by the Employment Standards Act, this determination is issued accordingly.

Employee: Devin Paul Unger

Amount Owed: \$1,000.00

Reason: Mr. Unger has worked for 15 days at \$100.00 per day and earned a total of \$1,500.00. He is permitting the deductions of \$320 (store bill) and \$180 (food bill) from his pay cheque. The total amount of wages owing is thus \$1,000.00

The employer submitted that the father of the complainant, Mr. Paul A. Unger owes him money whilst under his employ. However, this would be a separate issue and could not be considered in this complaint which is filed by Mr. Devin Paul Unger.

Regarding the cost of the air fares for the complainant, this is within the definition of wages under the Employment Standards Act. Any disputes over who should be responsible for the expenditure is contractual in nature and our Branch have no jurisdiction over it.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Evans and Unger are owed wages by Norstar in the amount calculated by the Director.

ARGUMENTS

In its appeal dated December 21, 1995, Norstar states the reasons for the appeal are:

For Evans:

This matter needs to be resolved by police and supreme court. I have every intention to have it heard by and dealt with litigation - see you in court.

For Unger:

Unjust decision by Tribunal. Totally one-sided ruling with no consideration that employee cannot rip off employer at their will.

In a submission received by this Tribunal on February 5, 1996, John Zajc ("Zajc") of Norstar states Evans was overpaid \$160.00 (\$10 x 16 hours) and owes Norstar \$520.00 for airfare because he only worked 8 days and a person must work 6 weeks in order for Norstar to pay airfare. Regarding Unger, Zajc states that he owes Norstar a total of \$740.00 for airfare.

In letters written to Fu in September 1995, Zajc states that Evans worked for \$10.00 per hour and it is his policy to pay an employee \$80 per day for the first 2 weeks and \$100.00 per day after 6 weeks. He states that if Evans' salary was \$2,000.00 per month, he didn't work for the full 2 weeks to qualify for a 2 week salary. Zajc also states that he was in Namu Bay for 2 days and during this time Evans was either shooting seals or wandering around town scavenging for valuables. He claims Evans owes him money for airfare and damages. Regarding Unger, Zajc concedes he owes him \$1,300.00 (for 13 days work) but he states he has no alternative but to deduct certain debts (including food, airfare, phone bill and store bills) owed by Unger and a Mr. Paul Unger. The deductions amount to \$1,500.73.

In his complaint to the ESB and in a submission received by this Tribunal on January 26, 1996, Evans states Zajc promised to pay him \$2,000.00 per month, for all hours worked, and not \$10.00 per hour. He said he would not have accepted a job at \$10.00 per hour, plus pay for food and airfare to get to Namu Bay from Delta, when he already had a job which paid \$13.00 per hour. Evans states he worked each day from February 22, 1995 to March 6, 1995.

On March 22, 1995, Evans wrote to Zajc asking for his wages. Shortly thereafter, Zajc sent a letter to Evans stating that Evans had not provided him with a time sheet and so he got one from the foreman. Zajc further states that Evans' rate of pay was \$10.00 per hour and he worked a total of 72 hours (Feb. 22-24, no work; Feb. 25-26, repair house 8 hours each day; Feb. 27-28, March 1-5, cleaning main house 8 hours each day - work done on other houses). According to Zajc, the total owed to Evans is \$720.00 - \$140.00 for food = \$580.00. On April 2, 1995, Evans replied to Zajc stating he worked from February 22, 1995 to March 6, 1995 at a rate of pay of \$2,000.00 per month. Regarding Zajc's statement about time sheets, Evans stated that time sheets were never provided and he followed Zajc around from February 22-24, doing as he said, and had he known that Zajc did not consider this to be work, he would have quit on February 24, 1995.

In his complaint to the ESB, Unger states he received \$1,200.00 from Zajc for the period May 11, 1995 to May 24, 1995 and is owed for the period May 25, 1995 to June 12, 1995. He submitted a record of his days and hours of work. He claims his rate of pay was \$100.00 per day and he is owed \$1,500.00 less the deductions outlined by Fu for a total of \$1,000.00. He will not agree to any other deductions as they had nothing to do with his contract.

ANALYSIS

The onus in this appeal rests with the appellant, Norstar. I conclude that Norstar has not met the onus of proving that Evans and Unger are owed anything less than the amount of wages calculated by the Director's designate.

Unger claims he is owed \$1,500.00 for 15 days of work, less \$500.00 for certain deductions that he will accept, for a total of \$1,000.00. He provided a record of his days and hours of work. Although required under Section 28 of the *Act* to keep payroll records, Norstar did not provide any payroll records, including a record of Unger's days and hours of work. As well, Norstar concedes that Unger is owed \$1,300.00 for 13 days of work less deductions in the amount of \$1,500.73. In the absence of any records provided by Norstar, I accept the records of Unger and conclude he is owed \$1,000.00. Sections 21 and 22 of the *Act* prohibit an employer from withholding wages from an employee without their authorization for any reason, except for income tax, CPP, UIC and a court order to garnishee the employee's wages. This means Norstar cannot make any deductions beyond those agreed to by Unger.

I further conclude that Evans is owed \$274.79 by Norstar. I prefer, on balance, the information provided by Evans regarding his rate of pay and days of work to that provided by Zajc. I give the following reasons. First, there is no dispute that Evans was at the work site effective February 22, 1995 to at least March 5, 1995. Second, the information provided by Zajc was often inconsistent and contradictory. For example, in his submission to this Tribunal he states Evans worked 8 days, but in his letter to Evans he states Evans worked 9 days. In a letter to Fu he states that his policy was to pay \$80.00 per day for the first two weeks of work and \$100.00 per day after 6 weeks, yet he indicates the wage rate for Unger was \$100.00 per day and it appears Unger worked less than 5 weeks. Third, Zajc claims in his letter to Evans that he received a time sheet for Evans from the foreman but he did not provide the time sheet or any payroll records on Evans to this Tribunal in order to substantiate his position or contradict Evans' position. As indicated above, there is an obligation under the *Act* on the employer to accurately maintain payroll records for each employee. In this case, the absence of such records is supportive of Evans' claim. Fourth, in his submission to this Tribunal, Zajc claims Evans was over paid by \$160.00. The fact that this matter was never previously brought up by Zajc causes me to doubt the validity of the claim.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 000230 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal

February 16, 1996

Date

NE:jel