

EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act

-by-

John Rice, Kelly MacPherson and Nick Bolwyn
operating as N.J.B. Contracting

(“NJB”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/147

DATE OF DECISION: April 30th, 1996

DECISION

OVERVIEW

This is an appeal by John Rice, Kelly MacPherson and Nick Bolwyn operating as N.J.B. Contracting (“NJB”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 001109 issued by the Director of Employment Standards (the “Director”) on February 12th, 1996.

In the absence of any contrary evidence from the employer, the Director determined that Dave Ferreira (“Ferreira”) was engaged by NJB as an installer at an hourly rate of \$9.00. The employer paid Ferreira at an hourly rate of \$7.00 for the hours he worked during the period October 5th to 13th, 1995 and thus there was a balance owing to Ferreira. The total amount payable pursuant to the Determination is \$211.23 including interest.

PARTIES’ POSITIONS AND ANALYSIS

Ferreira maintains that he was hired at an hourly rate of \$9.00 and that this figure was specifically discussed during an employment interview with Messrs. Rice and Bolwyn. In the material filed in support of his original complaint and filed with the Employment Standards Tribunal, Ferreira stated that the \$9.00 hourly rate was specifically agreed to by Mr. Rice on behalf of NJB. Further, Ferreira also stated that it was Mr. Rice who approved Ferreira’s overtime. Mr. Rice has not filed any reply to either of these two allegations.

The written submission filed with the Tribunal by NJB was signed by Mr. Bolwyn. In this undated letter Mr. Bolwyn acknowledges that the \$9.00 rate was discussed with Ferreira and that Mr. Ferreira was told that he could “expect” to be paid \$9.00 per hour so long as “he was capable of what he said he knew as far as work was concerned”. Tellingly, there is no specific suggestion that Ferreira was engaged at a rate of \$7.00 per hour.

The main contention of NJB appears to be that Ferreira was not a particularly competent employee. I quote once again from Bolwyn’s letter: “If Mr. Ferreira had proved to me that he was worth \$9.00 @ hour, he would have been paid \$9.00 @ hour”. While Ferreira’s competence would be relevant to the issue of whether or not NJB had just cause to terminate (an issue that does not arise in this case), Ferreira’s competence stands separate and apart from his contractual entitlement to a particular hourly wage for work that has already been performed for NJB.

If NJB is of the view that Ferreira has caused it to suffer damage as a result of some negligence on his (Ferreira’s) part, then NJB is free to pursue that claim in another forum.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 001109 be confirmed in the amount of \$211.23.

“Kenneth Wm. Thornicroft”
Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal