

An appeal

- by -

Wanke Developments Ltd.
("Wanke")

- 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: Norma Edelman, Vice-Chair

FILE No.: 2002/120

DATE OF DECISION: May 23, 2002

DECISION

OVERVIEW

This is an appeal by Wanke Developments Ltd. ("Wanke" or the "Appellant") under Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination, which was issued on March 1, 2002 by a Delegate of the Director of Employment Standards. The Determination found that Wanke owed Norbert Deleurme ("Deleurme") wages in the amount of \$966.08, including interest. Wanke appealed the Determination on March 13, 2002. In effect, it seeks to have the Determination cancelled.

ISSUE TO BE DECIDED

Has Wanke shown that the Determination is incorrect such that it should be cancelled?

FACTS AND ANALYSIS

Deleurme filed a complaint at the Employment Standards Branch claiming Wanke owed him wages for work performed between May 1, 2001 and June 30, 2001.

The Delegate found that Deleurme was an employee of Wanke and was owed wages in the amount of \$966.08 including interest. She said Wanke did not dispute Deleurme's claim that he performed 137 hours of work nor did it object to her conclusion that he was an employee for the purposes of the *Act*. Rather, Wanke took the position that Deleurme agreed to supply certain labour in exchange for a reduction in his rent. The Delegate said Wanke provided no documentation to show that Deleurme provided written authorization for Wanke to deduct rent from his wages.

Alfred Wanke ("A.Wanke"), on behalf of Wanke, filed an appeal of the Determination on March 13, 2002. In his appeal A. Wanke says as follows:

I must appeal this determination as it does not take into account the fact that Mr. Norbert Deleurme did in fact receive value, in the form of rent and electricity, in exchange for work done. Mr. Deleurme occupied the premises at 9225 Firehall Frontage Rd. for 6 months (from mid-May 2001 to mid-November 2001) with the understanding that he must pay rent in the amount of \$500 each month, exclusive of utilities. While he did in fact do work for me he did not at any time pay any rent. Prior to the installation of the electrical service at the site I provided Mr. Deleurme with a generator and once the BC Hydro service was available (in early July) he was asked, more than once, to transfer the service into his own name. He refused to do so and it became apparent that he seemed to have no intention of doing so. It was only when the service was finally disconnected in November by my office staff, that he vacated the premises. I have no forwarding address for Mr. Deleurme otherwise I would give him the enclosed invoice for outstanding rent and BC Hydro bills. As you can see, the amount owed to me by Mr. Deleurme for rent and BC Hydro bills exceeds the amount I have been ordered to pay him by the Director of Employment Standards. I trust you will make a fair decision and thank you for your consideration.

Enclosed with the appeal was a copy of an invoice addressed to Deleurme showing he owes Wanke \$3,816.11 for rent and hydro, as well as various hydro bills. A. Wanke says Deleurme should be ordered to pay him money.

The Delegate and Deleurme were invited to reply to the appeal.

Deleurme says he should be compensated for at least \$966.08. He further says he never had water or sewer for 5 1/2 months that he lived at Wanke's premises and that is why he refused to pay rent. He further said that Wanke told him to repair the dwelling and to keep track of his hours.

In her reply, the Delegate said that Wanke has not raised any arguments with respect to the conclusion that Deleurme was an employee or with respect to the amount of wages owed to him as outlined in the Determination. She says the appeal deals solely with the issue of whether Wanke should be permitted to withhold the wages owed to Deleurme in order to satisfy monies Deleurme allegedly owes Wanke for rent and utilities.

The Delegate says the dispute as to whether or not Deleurme owes Wanke rent and monies for utilities does not fall within the jurisdiction of the *Act*. Further, Deleurme does not agree that he owes these monies; Wanke has not provided sufficient evidence to support the conclusion that these monies are indeed owed by Deleurme; and Wanke has not provided any evidence that a judgment has been rendered from the proper authority regarding this issue. The Delegate also says that, if Deleurme does owe the monies, which he disputes, Section 21 of the *Act* prohibits an employer from withholding wages for any reason, including unauthorized deductions. No deductions of any kind can be made without the employee's written authorization, except for income tax, CPP, and EI, or a court order to garnishee a employee's wages. Section 22 of the *Act* allows an assignment of wages to meet a credit obligation, but the assignment must be in writing. Wanke has not provided any evidence that Deleurme provided written authorization to deduct rent or utility payments from his wages. For these reasons, the Delegate says the appeal should be dismissed.

The parties were given an opportunity to make a final reply to the submissions of the Delegate and Deleurme. Only A. Wanke replied. He says at no time did he ever consider Deleurme to be his employee, with the exception of the 5 hours of work he did for him at the Bayview Estates development and he was paid for this work.

The burden is on the Appellant, Wanke, to show that a Determination should be cancelled, varied or referred back for further investigation. In this case I am not satisfied that Wanke has met that burden.

A. Wanke says Deleurme only worked 5 hours and he never considered him to be an employee. However, I am not satisfied that Deleurme only worked 5 hours. Nor do I accept that Deleurme is not an employee for the purposes of the *Act*. Neither of these positions were taken by the Appellant during the investigation process or, for that matter, when A. Wanke filed his appeal. Moreover, A. Wanke has provided no evidence to support these positions. Accordingly, I accept that Deleurme was an employee of Wanke and that he worked 137 hours as found by the delegate.

Section 20 of the *Act* requires that wages be paid in Canadian currency. The *Act* does not allow work to be in exchange for rent or utilities. Further, the mandatory language of Section 21 prohibits an employer from withholding wages from an employee for any purpose with some limited exceptions such as payroll deductions for CPP, EI and Income Tax. Rent and utilities are not included in these exceptions. Although Section 22(4) of the *Act* allows an employer to made deductions or withholdings from wages for a credit obligation, an employer can only do so if it receives a written assignment from the employee. If Deleurme had provided Wanke with a written authorization to makes deductions or withholdings from his wages to meet a credit obligation, such as rent or utilities, then (in the absence of any evidence that

Deleurme was coerced) it may be the case that the deduction or withholding by Wanke would not be a violation of the *Act*. However, there is no written assignment in this case. Under the *Act* an employer is not permitted to exercise a "self-help remedy" by withholding pay or making payroll deductions to satisfy an employer's claim against an employee. (see 550635 *BC Ltd. (c.o.b. Jack's Towing)* BC EST # D100/01). An employer's remedy is to proceed in the courts if it has a claim against an employee.

For the above reasons, I find that the Delegate has made no error in the Determination and the appeal is dismissed.

ORDER

I order under Section 115 of the *Act* that the Determination dated March 1, 2002 be confirmed.

**Norma Edelman, Vice-Chair
Adjudicator
Employment Standards Tribunal**