

EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act

-by-

Thunder Mountain Drilling Ltd.

(“Thunder Mountain”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/513

DATE OF DECISION: November 6th, 1996

DECISION

OVERVIEW

This is an appeal brought by Thunder Mountain Drilling Ltd. (“Thunder Mountain”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 003555 issued by the Director of Employment Standards (the “Director”) on August 14th, 1996. The Director determined that Thunder Mountain owed Danton Stahls (“Stahls”) the sum of \$3,642.43 on account of unpaid daily and weekly overtime (section 40 of the Act), reimbursement for an unauthorized payroll deduction [section 21(1)], a vacation pay adjustment (section 58) and interest (section 88).

The grounds of Thunder Mountain’s appeal are set out in a letter dated August 28th, 1996 from Barber & Haime, Chartered Accountants, which is appended to the appellant’s appeal form. Barber & Haime’s letter sets out three separate grounds of appeal, namely:

- i) the Determination was signed by Myron Wallace although based on an investigation conducted by Ian MacNeill;
- ii) Thunder Mountain agreed to pay Stahls a living allowance (totalling approximately \$7,500) based on a misrepresentation by Stahls to the effect that he (Stahls) maintained a separate residence in Ontario; and
- iii) that an \$800 payment made to Stahls by the Tunnel and Rockworkers Union, Local 168, ought to be treated as wages paid by Thunder Mountain.

ANALYSIS

Curiously, Thunder Mountain does not take any issue with the specific monetary claims set out in the Determination--daily/weekly overtime and an unauthorized payroll deduction. Indeed, the Reason Schedule to the Determination indicates that “The employer acknowledges that overtime was worked but not paid”. The Determination was based on the employer’s own payroll records; records which are not challenged in Thunder Mountain’s appeal.

Similarly, Thunder Mountain has not specifically challenged the Director's finding that Thunder Mountain contravened section 21(1) of the Act (unauthorized payroll deduction). Thunder Mountain deducted the sum of \$351.33 from Stahls' paycheque on account of an unpaid hydro bill.

Section 21(1) of the Act provides that "...an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages *for any purpose* (emphasis added). Section 21(2) states that an employer must not require an employee to pay any of the employer's business costs (except as permitted by regulation). Section 22 of the Act provides that an employer must honour an employee's written assignment of wages for certain purposes, none of which is relevant here. In my view, if Thunder Mountain wishes to pursue Stahls for payment of this hydro account, it must do so by way of a separate civil action; Thunder Mountain was not entitled to engage in a form of "self-help" by simply deducting the hydro claim from Stahl's wages.

With respect to the three specific grounds raised in Thunder Mountain's appeal (referred to above):

1. I am not able to find any requirement in the Act that a Determination be signed by the investigating officer. Section 79 authorizes the Director to issue a Determination; section 117 permits the Director to delegate the authority to investigate a complaint and issue a Determination to "any person". There is no evidence before me that either Ian MacNeill or Myron Wallace did not have delegated authority to, respectively, investigate and issue a Determination, nor has this particular matter been put in issue by Thunder Mountain.
2. I do not see that the employer has any remedy under the Act with respect to its contention that Stahls improperly received a "living allowance". Section 8 of the Act prohibits certain misrepresentations on the part of an *employer* but there is no similar provision governing pre-contractual *employee* misrepresentations. If, in fact, the employee misrepresented his residency status in order to induce the employer to pay a living allowance (and I am not making any finding in this regard), the employer's remedy lies in a civil action against the employee. In these circumstances, the employer is not entitled to claim a form of "set-off" against wages that are otherwise owing to the employee.
3. An employer is not entitled to a credit for monies that are paid to an employee by a third party; such payments cannot be characterized as "wages" unless the monies are paid by, or on behalf of, the employer for labour or services that have

been performed by the employee for the employer (i.e., for “work” as defined in section 1 of the Act). Thus, the \$800 payment from the Tunnel and Rockworkers Union, Local 168 to Stahls cannot be credited against the wages that the Director determined were owed to Stahls by Thunder Mountain.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 003555 be confirmed in the amount of \$3,642.43 together with any additional interest that may have accrued pursuant to section 88 of the Act..

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal