

**Manitoba Labour Board**

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**Case No. 35/09/ESC**

**File No. 98935**

**IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE**

**BETWEEN:**

**KILDONAN VENTURES LTD. t/a  
KILDONAN AUTO & TRUCK PARTS,**

**Employer,**

**- and -**

**A.B.,**

**Employee.**

**BEFORE:**

**G. Wood, Vice-Chairperson**

**L. Baturin, Board Member**

**J. Witiuk, Board Member**

**This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.**

**SUBSTANTIVE ORDER**

**WHEREAS:**

1. On December 3, 2008, pursuant to Section 96(1) of *The Employment Standards Code*, the Director of the Employment Standards Division of the Department of Labour and Immigration, ordered that the amount of Two Hundred Ninety Seven Dollars (\$297.00) being wages owing by the Employer to the Employee(s), be paid to the Director of the Employment Standards Division of the Department of Labour and Immigration by the Employer and further required the payment of the administrative fee in the amount of One Hundred Dollars for a total owing of Three Hundred Ninety Seven Dollars (\$397.00).
2. The Employer having disputed the payment of the above-mentioned amount, the Director of the Division, pursuant to Section 110 of the *Code*, referred the matter to the Board.
3. This matter was scheduled to proceed to hearing on May 5, 2009. On April 28, 2009, the Employee requested an adjournment of the hearing, due to personal reasons. The Board, following consideration of the Employee's request and noting that the Employer did not

oppose the request, granted the adjournment. This matter was rescheduled to proceed to hearing on July 7, 2009, as agreed to by both parties.

4. On July 7, 2009, the Board conducted a hearing at which time both parties appeared before the Board, the Employee being represented by a representative. At the commencement of the hearing, the Employer advised the Board that he had personally served the Employment Standards Division with the Subpoena issued by the Board. Although there was an Officer from the Employment Standards Division observing the hearing, she was not in a position to deal with the Subpoena served on the Division. As such, the Employer was seeking an adjournment of the hearing. The Board accepted the Employer's statement that he personally served the Employment Standards Division with the Subpoena although the identity of the person served was not made known to the Board. Having noted that there was no representative from the Employment Standards Division present to deal with the matter, the Board granted the Employer's request and adjourned the matter until August 12, 2009.
5. Subsequent to the July 7, 2009 hearing, the Board re-issued the Subpoena, in blank, consistent with the original request of the Employer. Further, the Board determined the following:
  - a) Should the Employer decide to serve the Employment Standards Division with the Subpoena, the Employer was reminded that Section 121 of *The Employment Standards Code* stated that an Employment Standards Officer is not a compellable witness and that the validity of the Subpoena may be challenged by the Director of the Employment Standards Division;
  - b) Given the foregoing, a copy of the Board's letter was forwarded to the Director of the Employment Standards Division for his information, in the event that the Division was served with the re-issued Subpoena;
  - c) If the Division intended to challenge a Subpoena issued by the Board at the request of a party to any proceeding as herein, then the Division, if it so decided, was entitled to challenge the validity of the Subpoena by giving notice to the Board and sending a representative to the scheduled hearing to make representations in that regard. The Board would then decide the matter.
6. On July 27, 2009, the Employee, through his representative, filed correspondence with the Board advising that the Employee disputed the calculations in the Order issued by the Employment Standards Division and was seeking additional monies from the Employer. Subsequently on August 5, 2009, the Board was in receipt of the Employer's response.

7. On July 30, 2009, Counsel for the Director of the Employment Standards Division, advised the Board that the Director of the Employment Standards Division had confirmed that no one was served with a Subpoena or with any conduct money in relation to this matter. Further, Counsel confirmed that in the event the Employer was to serve an Employment Standards Officer with the Subpoena, that the Director would challenge the Subpoena by relying on Section 121 of *The Employment Standards Code*.
8. On August 10, 2009, a representative on behalf of the Employer requested an adjournment of the hearing, for personal reasons relating to a principal of the Employer. On August 10, 2009, the representative for the Employee filed documentation with the Board opposing the adjournment request. The Board, following consideration of the material filed, granted the adjournment request, in these particular circumstances, and adjourned the hearing until November 9, 2009 at 9:30 a.m.
9. On September 17 and September 21, 2009, the Board was in receipt of two letters from the Employee requesting an adjournment of the hearing from 9:30 a.m. on November 9, 2009 until 1:30 p.m. The Employer did not oppose the request. The Board, following consideration of the Employee's request and noting that the Employer did not oppose the request, granted the adjournment. This matter was postponed until 1:30 p.m. on November 9, 2009, as agreed to by both parties.
10. On October 27, 2009, the Board was in receipt of written submissions filed by Counsel for the Director of the Employment Standards Division regarding the validity and enforceability of any Subpoena served on an Employment Standards Officer.
11. The Board, by way of letter dated November 2, 2009, advised Counsel for the Director of the Employment Standards Division, the Employer and the Employee, that Subpoenas are issued at the request of a party to a proceeding before the Board. Any challenges to the validity of such Subpoenas and/or the compellability of an individual can be argued as a preliminary issue at the commencement of the proceedings.
12. The hearing reconvened on Monday, November 9, 2009 at 1:30 p.m., at which time both parties appeared before the Board, the Employee being represented by a representative. Counsel for the Director of the Employment Standards Division appeared before the Board to challenge the validity of the Subpoena served on the Officer by the Employer.
13. At the commencement of the hearing, the Board considered two preliminary issues. The Board heard argument on the first preliminary issue concerning the compellability of an Officer of the Employment Standards Division. Subsequently, the Board considered a further preliminary issue concerning a request by the Employee that he be allowed, at this stage, to appeal the Order issued by the Employment Standards Division.

14. The Board, following consideration of material filed and argument presented, DETERMINED the following:
- a) after hearing submissions from Counsel from the Employment Standards Division, the Employer and the Employee, concerning the compellability of an Officer of the Employment Standards Division the Board determined, pursuant to Section 121 of *The Employment Standards Code*, that the Officer was not compellable as a witness in the proceeding;
  - b) after hearing submissions from the Representative for the Employee concerning the request by the Employee that he be allowed to appeal the Order issued by the Employment Standards Division and claim further wages, the Board determined that the Employee not having appealed the Order of the Employment Standards Division within the specific time period, in accordance with Section 110(1.1) of the Code, was without jurisdiction to hear an appeal from the Employee at this stage. Accordingly, the request of the Employee was denied.
15. The Board then advised the parties that it would hear evidence on the merits of the Employer's appeal.
16. The Employer advised the Board that, given the ruling on the non-compellability of the Employment Standards Officer, the Employer did not intend to call any evidence in support of its appeal.
17. Having confirmed with the Employer that it was aware that the Board would be issuing a final Order, the Board, in the absence of any evidence from the Employer, the onus being on the Employer, determined that the appeal be dismissed.

**T H E R E F O R E**

The Manitoba Labour Board **HEREBY ORDERS KILDONAN VENTURES LTD. t/a KILDONAN AUTO & TRUCK PARTS** to pay to the Director of Employment Standards Division of the Department of Labour and Immigration, forthwith:

**WAGES:**

The amount of Two Hundred Ninety Seven Dollars (\$297.00) being wages owing the Employee, A.B., representing reimbursement for an unauthorized deduction.

**ADMINISTRATIVE FEE:**

An Administrative Fee in the amount of One Hundred Dollars (\$100.00) pursuant to Section 96(1) of *The Employment Standards Code*.

**TOTAL:**

The total amount being Three Hundred Ninety Seven Dollars (\$397.00).

**DATED** at **WINNIPEG**, Manitoba, this 9<sup>th</sup> day of December, 2009, and signed on behalf of the Manitoba Labour Board by:

*“Original signed by”*

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**G. Wood, Vice-Chairperson**

*“Original signed by”*

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**L. Baturin, Board Member**

*“Original signed by”*

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**J. Witiuk, Board Member**

CJ:tj/rb-s