

**Manitoba Labour Board**

Suite 500, 5<sup>th</sup> Floor - 175 Hargrave Street  
Winnipeg, Manitoba, Canada R3C 3R8  
T 204 945-2089 F 204 945-1296  
[www.manitoba.ca/labour/labbrd](http://www.manitoba.ca/labour/labbrd)

**Case No. 200/09/ESC**

**File No. 101006**

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

**BETWEEN:**

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

**Employer,**

**- and -**

**J.S.,**

**Employee.**

**BEFORE:**

**W. D. Hamilton, Chairperson**

**P. Labossiere, Board Member**

**G. Rodgers, Board Member**

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

**SUBSTANTIVE ORDER**

**WHEREAS:**

1. On May 19, 2009, 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 Five Hundred (\$500.00) 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 (\$100.00) for a total owing of Six Hundred Dollars (\$600.00).
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. On October 21, 2009, the Board conducted a hearing at which time both parties appeared before the Board and presented evidence and argument.

4. The Board, following consideration of material filed, evidence and argument presented, made the following determinations:
  - a) There is no dispute that the Employee commenced employment with the Employer on October 20, 2008, as a Delivery Driver; that on or about November 5, 2008, the Employee, during the course of his employment, was involved in an accident with an Employer's vehicle for which he was determined to be at fault by MPI and that the deductible under the Employer's Insurance Policy to repair damage to the vehicle was Five Hundred Dollars (\$500.00);
  - b) The Employer does not dispute that the Employee is owed the net sum (after deductions) of Five Hundred Ninety Dollars and Eighty Eight Cents (\$590.88), on account of wages earned and vacation pay owing (Exhibit 3) up to his last day of employment;
  - c) At the time of his hire on October 20, 2008, the Employee signed a document entitled "Employment and Responsibility Agreement" between the Employer and himself (Exhibit 2), which stated, in part, that the Employer has a blanket authorization without the need for individual instruction per incident, and is hereby instructed to withhold wages or make claim if wages do not exist for the cost of seven enumerated items, including:
    - "1) Damage to company property and/or vehicles and the insurance deductible for the cost of such repairs if insurance exists, including any surcharges".
  - d) The Board accepts that the Employee called a representative of the Employer enquiring as to why he had not received his last pay cheque and that the Employee was invited to attend and agreed to attend at the Employer's offices on December 5, 2008 to receive his cheque. There was a cheque prepared for the Employee, dated December 5, 2008, for Five Hundred Ninety Dollars and Eighty Eight Cents (\$590.88) (Exhibit 3). After discussions with the representative of the Employer, the cheque was cashed by the said Employer's representative with the Employer's own cashier and that representative returned with Five Hundred Ninety Dollars and Eighty Eight Cents (\$590.88) in cash to meet with the Employee. The Board accepts the Employee's evidence that he was advised, at that time, that he was responsible for paying the Five Hundred Dollars (\$500.00) deductible. The representative of the Employer retained Five Hundred (\$500.00) from the cash amount and gave the Employee the remaining amount of Ninety Dollars and Eighty Eight Cents (\$90.88);

- e) Thereafter, the Employee filed a complaint with the Employment Standards Division claiming that there had been a wrongful deduction from wages owing to him;
  - f) The Employer's position is that the Employee voluntarily cashed the cheque at the Employer's premises and voluntarily paid the Employer Five Hundred Dollars (\$500.00) for the accident deductible. The Employer asserts that, in such circumstances, it did not make an unauthorized deduction from the Employee's pay and that he received and cashed his paycheque which only had the normal deductions taken therefrom;
  - g) The Board finds, on the balance of probabilities, that it was the Employer's policy and intent to have the Employee be responsible for paying any insurance deductible in the event the Employee caused damage to one of its vehicles. This is corroborated by Exhibit 2 (*supra*) which the Employee signed at the time of hire. While the Employer did not rely on the purported blanket authorization contained in Exhibit 2, the existence of Exhibit 2 is corroborative of the intent/policy of the Employer. *The Board notes that to the extent such an agreement, signed at the time of hire, is contrary to or inconsistent with provisions of the Code or the Regulation made thereunder, the agreement is unenforceable [See Sections (3)(3) and (4)(1) of the Code.]* The witness who testified on behalf of the Employer stated "...We wanted him to pay the deductible". The Board accepts the Employee's evidence that, after the cheque was cashed, the Employer retained (withheld) the sum of Five Hundred Dollars (\$500.00) on account of the deductible and that, on the December 5, 2008, the Employee felt compelled to pay the deductible.
5. In the context of the factual determinations summarized in the preceding paragraph, the Board, following further consideration of material filed, evidence and argument presented, **DETERMINED**:
- a) In cases of this nature, where there is no dispute that wages are otherwise properly owing to an employee for work performed, the Board has no authority under the *Code* to authorize any deduction, off-set or restitution order from the wages earned by the Employee. This arises from Section 19(1) of the *Employment Standards Regulation* (the "Regulation"), which provides as follows:

**19(1)** An employer must not deduct any amount from the wages payable to an employee except as required by federal or provincial law or as permitted by a court order or subsection (2).

Further, Section 19(2)5 states, as follows:

**19(2)** The following rules apply in determining what may be deducted from a payment of wages:

5. An employer must not deduct any amount to cover any cost or loss arising from faulty work of the employee or damage caused by the employee.

The other provisions of the Regulation relevant to the disposition of this appeal are as follows:

**19(2)**

*Deduction for direct benefit to employee*

1. An employer may, with the employee's consent, deduct an amount for something provided as a direct benefit to the employee which the employee was not required to obtain or was not required to obtain from the employer.

**19(3)** An employer must not require an employee, or a prospective employee as a condition of employment, to purchase a uniform described in rule 3 of subsection (2) at his or her own expense or to pay any other amount that the employer is prohibited by subsection (2) from deducting from a payment of wages.

**19(4)** If an employer requires an employee to pay for something contrary to subsection (3), and the employee has paid for it, the amount paid is deemed to be a wage owing by the employer to the employee."

(Emphasis added)

- b) Notwithstanding what transpired on December 5, 2008 (i.e. the Employee endorsing the cheque, having it cashed on the Employer's premises with the Employer retaining Five Hundred Dollars (\$500.00) in cash), these facts do not affect the true characterization of the events, namely, that the Employer did deduct monies from wages otherwise due and owing to the Employee, contrary to Sections 19(1); 19(2)5, 19(3) and 19(4) of the Regulation. The Board is satisfied that the Employee did not voluntarily consent to a deduction which would be of a direct benefit to himself and further, that the Employer, in effect, required the Employee to pay the \$500.00 deductible (contrary to Section 19(2)5) meaning the amount retained by the Employer is ... deemed to be a wage owing by the employer to the employee";

- c) In arriving at its conclusion, the Board also applied the general law applicable in circumstances of this nature, namely, that an employer cannot unilaterally determine the liability of an employee or the quantum of damages and then seek to deduct any such amount from wages owing to the Employee. In this regard, the decision of *Kodiak Parking Services Limited* and *Kowalson*, (a decision of the County Court of Winnipeg, dated April 22, 1981), is instructive, particularly the comments of the Court at pages 5 to 7 thereof. The principles applied by the Board in *St. John's Aqua King Swim Club Inc. trading as Winnipeg Wave Swim Club* and *Robert Novak* (Case No. 488/05/ESC) dated May 18, 2006, at paragraph 4(d) and in *Alias Autobody Limited* and *Serhiy Osipov* (Case No. 110/06/ESC) dated July 11, 2006 at Para 5(a) are to similar effect;
- d) While the Employer may be able to seek recovery or restitution in other forums, the Board, being a statutory tribunal whose jurisdiction is limited by the provisions of the Code, and having regard to the factual findings made by the Board, the Board dismisses the appeal of the Employer and confirms the Order of the Employment Standards Division that the Employee is entitled to be paid the sum of Five Hundred Dollars (\$500.00), as recorded in the Statement of Adjustment prepared by the Employment Standards Division.

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

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

**WAGES:**

The amount of Five Hundred Dollars (\$500.00) being wages owing the Employee, J.S.

**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 Six Hundred Dollars (\$600.00).

**DATED at Winnipeg, Manitoba, this 29<sup>th</sup> day of October, 2009, and signed on behalf of the Manitoba Labour Board by:**

*“Original signed by”*

\_\_\_\_\_  
**W. D. Hamilton, Chairperson**

*“Original signed by”*

\_\_\_\_\_  
**P. Labossiere, Board Member**

*“Original signed by”*

\_\_\_\_\_  
**G. Rodgers, Board Member**

CJ:tj/rb-s