



Manitoba Labour Board

Suite 500, 5th Floor - 175 Hargrave Street, Winnipeg, Manitoba, Canada R3C 3R8
T 204 945-2089 F 204 945-1296
www.manitoba.ca

CASE NO. 306/08/ESC

IN THE MATTER OF: *THE EMPLOYMENT STANDARDS CODE*

BETWEEN:

5614547 MANITOBA LTD. t/a VIKING HOTEL, **Employer,**

- and -

Pam Isfeld, **Employee,**

BEFORE: C. S. Robinson, Vice-Chairperson

S. Oakley, Board Member

D. Sutton, Board Member

APPEARANCES: B. Kravets, Employer

P. Isfeld, Employee

REASONS FOR DECISION

I. Background

The issues in the case concern whether or not the Employee, Ms. Pam Isfeld, was entitled to wages in lieu of notice pursuant to section 62(1) of *The Employment Standards Code* (the “Code”) and general holiday wages for March 20, 2008 (Good Friday). The Employee’s claim was dismissed by the Employment Standards Division on July 16, 2008. The Employment Standards Officer provided brief reasons for the decision which indicate that “Ms. Isfeld terminated her position, therefore there are no outstanding wages”. The Employee disputed that decision and requested that the Director of Employment Standards refer the dismissal of her claim to the Manitoba Labour Board for a hearing.

Ms. Isfeld maintains that she worked for the Employer, 5614547 Manitoba Ltd., trading as the Viking Inn, and that her employment was terminated without notice. The Employer insists that when it purchased the Viking Inn, it did not hire Ms. Isfeld. In addition, the Employer says that it offered her employment in a different position but at the same rate of pay and number of hours as she enjoyed under previous ownership, however she rejected this offer of employment. As a consequence, the Employer submitted that it did not owe Ms. Isfeld any wages in lieu of notice.

II. Facts

The facts of this matter are relatively straightforward, though the parties disagree in several material respects as to what occurred. While the Board considered all of the evidence and submissions of the parties, only the central facts are set out herein.

Ms. Isfeld worked at the Viking Inn for approximately 8 years. She commenced employment as a Bartender for approximately 4 ½ years. Following her tenure as a Bartender she became the Night Auditor in which position she worked four days per week (Monday to Thursday) and every second Friday. In this role she performed various tasks including balancing cash receipts, preparing bank deposits, emptying Video Lottery Terminals, sorting bills, completing inventory, and working at the front desk. Ms. Isfeld testified that she worked between 3 ½ to 6 hours per day, and averaged between 35 to 40 hours bi-weekly. She earned \$11.50 per hour at the conclusion of her employment.

Ms. Isfeld testified that the Viking Inn was purchased by new owners effective March 10, 2008. The former owners advised the employees of the sale by way of a Notice dated January 31, 2008 (Exhibit 1) which stated, in part, that the business was expected to transfer to the new owner on March 10, 2008. The Notice goes on to state that “[t]his means that your last day employed by 4811127 Manitoba Ltd. is March 9, 2008” but that it is “understood & agreed that all employees will (sic) re-hired by the incoming owners”. According to Ms.

Isfeld, from March 10 to March 13, 2008, she continued her employment as Night Auditor at the Viking Inn, under the new ownership. She stated that on or about March 11, 2008, she asked one of the new owners/managers (known to her only as “David”) if she “still had a job” and he replied “I don’t know”. Ms. Isfeld further submitted that on Saturday, March 15, 2008, one of the Employer’s managers, namely Jackie Tousignant, telephoned her at her home in the evening to advise that she was being “laid off” and that, effective that date, one of the new owners/managers would be taking on the duties she performed as Night Auditor. Ms. Isfeld testified that Ms. Tousignant stated that there “would possibly be some casual dining room waitressing shifts available” but that she would have to speak with one of the new owners, namely Mr. Boris Kravets, regarding that matter.

Later on March 15, 2008, Ms. Isfeld had a discussion with Mr. Kravets. She testified that he advised her that he was one of 5 members of the new ownership group and that each of them required a position at the hotel. As such, she claims that Mr. Kravets told her that her position of Night Auditor was needed for a member of the ownership group. She further testified that he advised her that “there may be occasional dining room shifts available” and that “possibly in the summer when business picked-up, they may call me back on the weekends”. Ms. Isfeld says that Mr. Kravets informed her that the Employer was not required to provide her with any notice as she had only worked for it for 4 days and that he had been advised that no notice was required during the first 30 days of employment. Several days later, on March 25, 2008, she attended at the workplace to claim her last pay cheque and her Record of Employment. She said that she was paid as “casual labour” and that the Employer refused to issue her a Record of Employment.

Ms. Isfeld testified that she was never placed on the schedule for the dining room, or otherwise, following her conversation with Mr. Kravets on March 15, 2008 nor was she offered any shifts at the Viking Inn following that meeting. Her last day of work at the Viking Inn was March 13, 2008.

Mr. Kravets testified on behalf of the Employer. He confirmed that he was one of 5 owners of the Employer. The ownership group includes himself, his son, two nephews and another individual. Mr. Kravets is the principal owner. He has a 33% interest, while the other owners hold 16 ½ % shares in the business. The new owners took over the Viking Inn on the evening of March 9, 2008.

Mr. Kravets told the Board that the previous owners provided him with an employee list which set out the name of each employee, their position or “status”, and their rate of pay (Exhibit 4). The Employee’s name appears on the list as does her hourly rate of pay. However, there is no indication of her title or position set out therein. Mr. Kravets said that he spoke with the previous owners to clarify what work Ms. Isfeld performed at the hotel and was informed that she did “night cash” and that her hours varied.

Mr. Kravets said that the previous owners refused to allow him to speak to employees until March 9, 2008. Mr. Kravets testified that he asked the previous owners to advise the employees of a meeting at 4:00 p.m. on March 9, 2008 so that the new owners could introduce themselves to the employees. He added that all of the employees were asked to bring their Social Insurance Number and address. He said that the employees would be provided with employment applications to complete and “we would hire them”. Individual meetings were set up with each of the employees and Mr. Kravets. All of the employees, with the exception of Ms. Isfeld, attended the meeting with the new owners on March 9, 2008. Ms. Isfeld’s position is that she was not advised of the meeting and, as a result, she did not attend. Her understanding is that the notice of the meeting was posted on her days off and she was not otherwise informed that a meeting was scheduled.

Mr. Kravets testified that he first heard about Ms. Isfeld three days after he and his partners took possession of the Viking Inn. He stated that he asked Ms. Tousignant what Ms. Isfeld did at the hotel and she replied that she did cash deposits. Mr. Kravets recalled that he

told Ms. Tousignant that “I don’t think we will have this position at the hotel” and that he directed her to advise Ms. Isfeld of his decision and to indicate that Ms. Isfeld could speak with him. During cross-examination however, he testified that Ms. Tousignant approached him after she advised Ms. Isfeld that her position was being eliminated and reported that Ms. Isfeld was upset because her “job disappeared” and it was at that point that he agreed to meet with Ms. Isfeld.

Regardless of the sequence of events leading to the meeting between Ms. Isfeld and Mr. Kravets, they agree that a meeting did occur. Mr. Kravets stated that he confirmed to Ms. Isfeld that they would no longer have the “Night Auditor” position but that they had other positions available and that “maybe you will choose from something you were doing before”. He recalled that he suggested that she could work the same amount of hours as she had been receiving but that her position would be in the dining room or the bar. Mr. Kravets said that he was advised by Ms. Tousignant and the previous owner as to previous positions that Ms. Isfeld had worked at the hotel. He says that Ms. Isfeld rebuffed his offer of employment and told him that the hours were not the same and that she could only work at night as she owned a business. As noted above, Ms. Isfeld’s recollection of the meeting differs from that of Mr. Kravets. She recalled Mr. Kravets mentioning that possibly there might be some occasional dining room shifts available for her. She denied that she was offered the same amount of hours or that Mr. Kravets made any offer of employment beyond his vague assertion of potential occasional shifts in the future. During cross-examination, she further denied that she told Mr. Kravets that she could only work at night as she owned a business. She conceded that she had owned a business from December 2000 to December 2005, but it was not in operation at the time of this conversation in 2008. Mr. Kravets agreed that he did not offer specific shifts or show a proposed schedule to Ms. Isfeld. He testified that the Employer was scheduling shifts day-by-day at that stage. In this regard, he noted that that he was simply telling people if they would be working the following day.

The Employer also took the position that it was not responsible for paying the Employee any wages in lieu of notice as it did not hire her. Mr. Kravets testified that it was agreed in writing between himself and the previous owner that all of the employees of the Viking Inn would be terminated as of the Closing Date of the transaction and that all employees would be paid wages, holiday pay and benefits by the previous owner up to that date. Mr. Kravets said that while the new ownership group to which he belonged “was given the opportunity to re-hire” all of the employees, it was not obligated to do so. Mr. Kravets was critical of the manner in which the previous owners “finished” with the employees. In particular, he did not agree with the Notice sent by the previous owners to all employees which indicated that they would all be re-hired by the incoming owners. Mr. Kravets said that was not the case.

The Employer submitted the Agreement of Purchase and Sale respecting the Viking Inn (Exhibit 3) entered into between Mr. Kravets and the previous owners and directed the Board’s attention to Article 6.01(i) which reads as follows:

Article 6 – Further Conditions Benefiting the Purchaser

6.01 In addition to the provisions contained in Article 3.01, the obligations of the Purchaser and the Permitted Assignee to close the transactions contemplated by this agreement shall also be subject to the following conditions:

i) It is acknowledged that the Vendor has provided the Purchaser with a list of employees with start dates, rates of pay, date of last pay increase, usual hours of work and short job description of their work and any employee benefits, same to be attached as Schedule “C” hereto (the “Employees”). The Vendor shall give notice to all Employees lawfully terminating their employment as of the Closing Date. The Vendor shall pay all wages, accrued holiday pay and benefits up to and including the Closing Date. The Purchaser will submit offers of employment to all of the Vendor’s Employees, with each such offer of employment to be on the same terms and conditions of employment as is the case between the Vendor and each such employee.

Schedule “C” mentioned in this agreement was not provided to the Board. Mr. Kravets did not indicate that the list of employees provided by the previous owners (Exhibit 4) was Schedule “C”. Exhibit 4 does not provide all of the information that Schedule “C” to the above-noted agreement was to provide. Notably, Exhibit 4 does not indicate start dates, dates of last pay increases, employees’ usual hours of work, employee benefits, or a short job description of each employees’ work.

Despite the express terms of the agreement stipulating that the Purchaser was to submit offers of employment to all of the employees on the same terms and conditions of employment as they received from the previous owners, Mr. Kravets maintained that it was not the case that all of the employees, including Ms. Isfeld were to be automatically hired. With respect to Ms. Isfeld in particular, Mr. Kravets insisted that he did not hire her. Indeed, he told the Board: “I never hired her. I never saw her. I never knew of her existence”. He confirmed that she requested a Record of Employment but that he took the position that she had not worked for him. However, he ultimately conceded that she had worked three days for the Employer but that he did not have the opportunity to speak with her at that time.

III. Analysis

As credibility findings are required to be made in respect of a certain material factual circumstances in this case, the Board adopts the guidelines distilled in the seminal case of *Farnya v. Chorney*, [1952] 2 D.L.R. 353 (BCCA), particularly the principle noted at page 357 where the Court stated the following:

... In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would reasonably recognize as reasonable in that place and in those conditions.

The Board determined that Ms. Isfeld testified in a truthful and straightforward manner. We accept her evidence that she worked for the Viking Inn for 8 years and that she

continued to work there following the sale of the business to the new owners. Despite Mr. Kravets' assertion, it is clear that Ms. Isfeld did work several days for this Employer under its new owners and that she received a pay cheque from them for this work. We further accept that she was terminated by the Employer without notice on March 15, 2008. Specifically, the Board is satisfied that Mr. Kravets directed Ms. Tousignant to advise Ms. Isfeld that her position was being eliminated and that possibly occasional dining room shifts might be available to her and Ms. Tousignant did in fact advise Ms. Isfeld that she was being "laid off" in accordance with Mr. Kravets' direction. We further accept Ms. Isfeld's version of the conversation which occurred between her and Mr. Kravets later that evening wherein he confirmed that she was being removed from her position as "Night Auditor" and that occasional dining room shifts might possibly be available in the future.

The Board did not accept Mr. Kravets' recollection of that conversation where it differed from that of Ms. Isfeld and, in particular, we did not find to be credible his assertion that he offered her other work at the hotel at the same number of hours and rate of pay that she previously enjoyed. Accordingly, the Board did not accept Mr. Kravets' assertion that Ms. Isfeld terminated her employment. The Board notes that Mr. Kravets claimed that she advised him that she could not accept the position he was offering as she had a business. However, Ms. Isfeld's evidence, which the Board accepts, is that she did not operate a business at the time and, in fact, had not operated a business for several years.

Clearly, Ms. Isfeld was terminated without notice and the vague assertion that there might be occasional dining room shifts available to her in the future did not amount to a serious or meaningful offer of employment on terms and conditions that were equivalent or superior to those which applied to her prior to the sale of the business. Moreover, she was never placed on the schedule or offered any shifts subsequent to the meeting with Mr. Kravets on March 15, 2008.

In reaching our conclusions respecting credibility and the material factual circumstances of this case, the Board observed that Mr. Kravets' testimony was contradicted in several respects by written documents that he himself tendered. For example, Mr. Kravets testified that he first heard about Ms. Isfeld 3 full days after taking over the Viking Inn. However, that evidence is obviously inaccurate. First, Article 6.01(i) of the Agreement of Purchase and Sale respecting the Viking Inn dated December 1, 2007 (Exhibit 3) acknowledged that the "Vendor has provided the Purchaser with a list of employees with start dates, rates of pay, date of last pay increase, usual hours of work and short job description of their work and any employee benefits". Second, Mr. Kravets said that he was provided with a Viking Inn Employee List (Exhibit 4) that lists Ms. Isfeld and her rate of pay. Third, he testified that he offered her a job in one of the positions that she had worked previously and that he had been given information as to Ms. Isfeld's previous work history with the Viking Inn by Ms. Tousignant and the previous owner. Finally, Ms. Isfeld actually worked at the Viking Inn for several days after Mr. Kravets and his fellow owners took over and he testified that he worked each day at the hotel for the first two weeks upon taking over. In all of the circumstances, Mr. Kravets' claim that he did not know of Ms. Isfeld's "existence" until several days after taking over the operation of the Viking Inn is completely untenable.

Also reflecting upon his credibility was Mr. Kravets' assertion that he did not agree to hire all of the Viking Inn's employees but merely that he "was given the opportunity to re-hire" them if he chose to do so. He added that the previous owners did not finish with the employees properly and that the previous owners misled the employees when they sent a Notice (Exhibit 1) advising that it was "understood & agreed that all employees will (sic) re-hired by the incoming owners". Mr. Kravets maintained that he made no such agreement and had no obligation to employ the employees in spite of the express wording of the Agreement of Purchase and Sale which states that "The Purchaser will submit offers of employment to all of the Vendor's Employees, with each such offer of employment to be on the same terms and conditions of employment as is the case between the Vendor and each such employee". He

had no reasonable explanation as to the discrepancy between his *viva voce* evidence and the provision of the Agreement of Purchase and Sale noted above and simply remarked “that’s how I see it”.

Mr. Kravets told the Board that he did not hire Ms. Isfeld. He ultimately conceded that she did work for the Employer for 3 days but that he did not talk to her. As the Board indicated above, Mr. Kravets terminated Ms. Isfeld’s employment on March 15, 2008. Recent amendments to the *Code* established a graduated notice period based upon an “employee’s period of employment with the employer”. The notice provisions appear in Division 10 of the *Code* and read, in part, as follows:

Termination by employer — notice or wage in lieu of notice

61(1) Subject to section 62, an employer who terminates an employee's employment must

(a) give the employee notice of the termination

(i) in accordance with subsection 67(1) (notice period for group termination), if that subsection applies, or

(ii) in any other case, in accordance with the applicable notice period in subsection (2); or

(b) pay the employee a wage in lieu of notice, in accordance with sections 77 (amount of wage in lieu of notice) and 86 (wages to be paid within certain time).

Notice period — termination by employer

61(2) For the purpose of subclause (1)(a)(ii), the notice period for terminating the employment of an employee is the applicable notice period set out in the following table for the employee's period of employment with the employer.

Period of employment	Notice period
less than one year	1 week
at least one year and less than three years	2 weeks
at least three years and less than five years	4 weeks
at least five years and less than 10 years	6 weeks
at least 10 years	8 weeks

In addition, the *Code* provides for continuity of employment for employees when a business is sold, leased, transferred, merged or which is otherwise disposed. In this regard, section 5 states the following:

Continuity of employment

5. For the purpose of Divisions 2 to 5, 9 and 10 of Part 2 (minimum standards) of this Code, when the business of an employer or a part of the business is sold, leased, transferred, merged or otherwise disposed of whereby the control, direction or management of the business is given to another person, or the business continues to operate under a receiver, the employment of an employee is deemed to be continuous and uninterrupted.

While an employee may be terminated upon the sale of a business, sufficient notice of termination of employment must be provided in accordance with the *Code*. In the present case, the former owners of the Viking Inn advised employees that they would no longer be employed by 4811127 Manitoba Ltd. after March 9, 2008. But they further advised employees that it was understood and agreed that they would be employed by the incoming owners. Indeed, the parties to the Agreement of Purchase and Sale expressly agreed that all of the employees would be offered employment by the new owners on the same terms and conditions of employment as was the case between the employees and the previous owners. Interestingly, section 62(1)(j) of the *Code* specifically contemplates the vendor of a business

not having to provide notice to an employee where he or she is “immediately re-employed in the same business on terms and conditions of employment that, as a whole, are equivalent to or better for the employee than those that applied to the employee before the sale or transfer”. However, where the employee is immediately re-employed in the business, as occurred here, the purchaser of the business is responsible for providing notice if the employment of an employee is ultimately terminated. Far from constituting proper notice of termination of employment, the previous owners’ notice to all employees confirmed that they would be taken on by new owners. Such a notice is confirmation of continuation rather than termination of employment. If Mr. Kravets and his partners wished to terminate Ms. Isfeld, or any other similarly situated employee who worked for the Employer following the sale of the business, the obligation to provide notice of termination or wages in lieu thereof arose.

In the context of this case, section 5 provides that Ms. Isfeld’s employment was continuous and uninterrupted. She worked for the Viking Inn for approximately 8 years which included time both prior to and following the sale of the business. Her employment was terminated by Mr. Kravets without notice and pursuant to section 61(2) of the *Code* she is therefore entitled to six weeks’ wages in lieu of notice. The Board determined that six weeks wages amounted to \$1380.00 and issued an Order to that effect. The Board further determined that she was not entitled to any general holiday wages for Good Friday.

DATED at **WINNIPEG, MANITOBA**, this 17th day of March, 2009, and signed on behalf of the Manitoba Labour Board by:

“original signed by”
C. S. Robinson, Vice-Chairperson

“original signed by”
S. Oakley, Board Member

“original signed by”
D. Sutton, Board Member

CSR:tj