



CASE NO. 386/08/ESC

IN THE MATTER OF: *THE EMPLOYMENT STANDARDS CODE*

BETWEEN:

PARAMOUNT STORAGE LTD.,

Employer,

- and -

Thomas Chubaty,

Employee,

BEFORE: C. S. Robinson, Vice-Chairperson

APPEARANCES: Edgar Thiessen, Employer

Thomas Chubaty, Employee

REASONS FOR DECISION

I. Overview

The issue in this case concerns whether Mr. Thomas Chubaty (the “Employee”) is entitled to six weeks of wages in lieu of notice from Paramount Storage Ltd. (the “Employer”). The Employee filed a claim with the Employment Standards Division on June 20, 2008 seeking wages in lieu of notice. On September 15, 2008, Employment Standards issued an Order requiring the payment by the Employer of \$2800.00 wages in lieu of notice plus an administrative fee in the amount of \$280.00. The amount of \$2800.00 represents six weeks’ wages in lieu of notice calculated at the Employee’s average earnings, less one week of wages in lieu that were paid to the Employee by the Employer upon

terminating his employment. The Employer disputed the Order and requested that the Director of Employment Standards refer the matter to the Board for determination.

On February 17, 2009, the Board conducted a hearing at which time both parties presented evidence and argument. In its Order dated February 24, 2009, the Board confirmed the Order of the Employment Standards Division, having concluded that the Employee was entitled to further wages in lieu of notice, beyond that which had been paid by the Employer, in the amount of \$2800.00 and ordered the Employer to pay an administrative fee in the amount of \$280.00. In confirming the decision of the Employment Standards Division, the Board relied upon the provisions of subsection 62(1) of *The Employment Standards Code*, C.C.S.M. c. E110 (the “Code”) and the *Employment Standards Regulation*, R.M. 6/2007.

The Employer has requested reasons for the Board’s decision.

II. Facts

The facts of this matter are reasonably straightforward and may be summarized as follows:

1. The Employee commenced employment with the Employer on November 4, 2002. He worked as a Forklift Operator.
2. He resigned his employment by letter dated November 20, 2007, providing the Employer with two weeks’ notice. His letter of resignation indicated some displeasure with the manner in which he and others were treated by management.
3. Following his resignation, the Employee went to work for another employer. However, shortly after he commenced his new employment, the Employee contacted the Employer and asked if he could return to his former job.

4. The Employee was rehired on January 2, 2008. The period of time between the Employee's resignation and his rehiring is less than two months.
5. The Employer indicated that it decided to rehire the Employee despite some problems it perceived with his attitude and work performance in the past.
6. The Employer says that its Operations Manager, Mr. Gray Watson, advised the Employee when he was rehired that he was starting as a new employee on probation and that he would be treated as a new employee with respect to such matters as vacation entitlement. The Employer did, however, agree that the Employee would be rehired at his former rate of pay. The Employer also submitted that the Employee was warned at the time of his rehiring that his attitude and work ethic would have to improve. No evidence was led as to the duration of any probation period which the Employee was purportedly to serve.
7. The Employee did not agree with the assessment of his attitude or work performance which the Employer said was evident prior to his resignation. He submitted that the Employer would not have agreed to rehire him had his attitude or work been substandard in the past. Moreover, he did not agree with Mr. Watson's evidence that he was advised that he would be starting as a new employee or that he was to serve a probationary period.
8. Subsequent to being rehired, the Employer was not satisfied with the work ethic or attitude of the Employee. The Employer submitted that Mr. Watson and Ms. Monica Fedyshyn, who supervised the Employee, spoke to the Employee several times about the alleged issues.

The Employer submitted documents including two internal notes and an employee review pertaining to the concerns it had respecting the Employee's attitude generally and specifically towards supervision as well as his work ethic.

9. The Employee denied that he was spoken to about his attitude or work habits. He added that he was a helpful and trusted employee who was given the alarm codes and keys to the Employer's premises. He stated that he arrived at work early, stayed late, and showed his supervisor how to perform certain duties. During cross-examination, he questioned Ms. Fedyshyn regarding why she gave him rides to and from work if she felt he was disrespectful towards her. She responded that she was simply trying to be nice.
10. The Employer terminated the Employee on or about June 17, 2008. Mr. Watson said that he told the Employee that he was being dismissed for failing to follow instructions from his supervisor. Mr. Watson added that the Employee was terminated immediately, however he was paid one week of wages in lieu of notice in the amount of \$560.00.
11. The Employee testified that he provided the Employer with a medical note prior to his termination which required the assignment of light duties. He alleged that the Employer advised that it did not have light duties available. He stated that he returned to work and shortly thereafter he was terminated. The Employee alleged that the true reason for his termination was that the Employer considered him to be a liability due to his medical condition.

12. It was not disputed that the Employee worked 40 hours per week at a rate of \$14.00 per hour as set out in the Statement of Adjustment prepared by Employment Standards which accompanied its Order.

III. Analysis

Section 61 of the *Code* provides that an employer who terminates an employee's employment must provide notice or wages in lieu of notice. Pursuant to subsection 61(2) of the *Code*, the amount of notice required varies depending upon the employee's period of employment with the employer. There are exceptions to the requirement to provide notice set out in section 62 of the *Code*. The Employer did not argue that any of the statutory exceptions to the provision of notice applied in the present case. Indeed, by its own admission, the Employer provided the Employee with one week of wages in lieu of notice upon terminating his employment. Moreover, the evidence presented is not sufficient to sustain the conclusion that one of the exceptions to providing notice to the Employee exists in this case.

That said, the Employer took issue with the quantum of wages in lieu of notice that was found to be owing by the Employment Standards Division. Employment Standards concluded that the Employee was entitled to six weeks' wages in lieu of notice. The Employee earned \$560.00 per week. As noted above, the Employer paid him one week of wages in lieu of notice. The Employer submitted that it was not obligated to pay any further wages in lieu of notice to the Employee. The Employee maintained that he is entitled to a total of six weeks wages' in lieu of notice.

The Employee commenced employment with the Employer on November 4, 2002. While he terminated his employment by letter dated November 20, 2007, he was rehired by the Employer on January 2, 2008. Accordingly, he was rehired less than two months following termination of his employment with the Employer. That relatively short period of

time is significant in light of section 24 of the *Employment Standards Regulation*, R.M. 6/2007. The Regulation states the following:

Period of employment

24 The following rules apply in determining an employee's period of employment for the purpose of section 61 of the Code (notice of termination).

Rehiring within two months

5. If an employee is rehired by an employer within two months after termination of his or her employment with that employer, the period between those two periods of employment is to be included in the employee's period of employment for the purpose of any subsequent termination of that employment.

As the duration of time between the two periods of the Employee's employment with the Employer was less than two months, his employment is deemed to be continuous for the purpose of calculating the notice to which he is entitled under section 61 of the *Code*. Thus, the Employee's period of employment is greater than five years and less than ten years. In accordance with subsection 61(2) of the *Code*, employees having that length of employment are entitled to six weeks' notice of termination or wages in lieu thereof.

The Employer submitted that the above-noted provision of the *Employment Standards Regulation* was not applicable in the present case as the Employee resigned his employment and was subsequently rehired. The Employer believes that an employee's period of employment should only be deemed continuous where an employer terminates an employee in the first instance and then rehires them within the two month period contemplated by the *Regulation*. The Board does not agree with that submission. Clearly, section 24 of the *Regulation* does not expressly state that it is applicable only where the initial period of employment is terminated by the employer. Indeed, it applies where the employee is rehired within two months after "termination of his or her employment with that employer". The *Code* specifically contemplates that employment may be terminated by either an employer [section 61] or by an employee [subsection 62.1(1)]. As the application of the rule set out in

section 24 of the *Employment Standards Regulation* is not expressly limited to situations in which an employer terminates an employee, the Board concludes that the provision is meant to apply where either an employer or an employee terminates the employment relationship and the employee is subsequently rehired by the employer within two months.

IV. Conclusion

The Employee is entitled to six weeks' wages in lieu of notice, less one week wages in lieu of notice paid by the Employer. Based upon the Employee's earnings, he is entitled to additional wages in lieu of notice in the amount of \$2800.00 as set out in the Board's Order dated February 24, 2009.

The Board further ordered payment of an administrative fee in the amount of \$280.00 which represents 10% of the amount ordered to be paid. In its letter of appeal, the Employer took issue with the payment of the administrative fee. However, pursuant to subsection 125(3) of the *Code*, where the Board orders the payment of wages (which includes wages in lieu of notice), it "shall require" the payment of administrative costs calculated in accordance with subsection 96(1) of the *Code*.

DATED at **WINNIPEG, MANITOBA**, this 30th day of April, 2009, and signed on behalf of the Manitoba Labour Board by:

CSR:tj

"original signed by"
C. S. Robinson, Vice-Chairperson