

Case No. 47/09/ESC

File No. 99642

IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE

BETWEEN:

**2127423 MANITOBA LTD.
t/a LONDON LIMOS,**

Employer,

- and -

Yaroslav Tovaryanskyy,

Employee.

BEFORE:

W. D. Hamilton, Chairperson

V. Becker, Board Member

I. Giesbrecht, Board Member

SUBSTANTIVE ORDER

WHEREAS:

1. On January 21, 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 Three Thousand Five Hundred and Twenty Dollars (\$3,520.00) 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 Three Hundred Fifty Two Dollars (\$352.00) for a total owing of Three Thousand Seven Hundred Eighty Two Dollars (\$3,782.00).
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 May 13, 2009, the Board conducted a hearing at which time both parties appeared before the Board and presented evidence and argument, the Employee being represented by a representative. The Employee attended the hearing with his own independent interpreter.

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4. During the hearing, the parties agreed that the only issue is whether the Employee quit his employment or whether the Employer terminated the employment of the Employee. Further, the parties agreed that in the event the Board determined that the Employee was entitled to wages in lieu of notice then the Employee was entitled to the equivalent of four weeks notice and that the amount of Three Thousand Five Hundred and Twenty Dollars (\$3,520.00) recorded on the Statement of Adjustment, would be the correct amount.
5. The Board, following consideration of material filed, evidence and argument presented, made the following determinations:

- a) when deciding whether an employee has “quit”, the following well accepted principles are to be applied to the prevailing factual circumstances:

“A resignation by an employee has both a subjective element (the intention to resign) and an objective element (an act or acts resulting from the intention to resign). In order for a resignation to take place the employee must subjectively intend, voluntarily and without coercion, to quit and the employee’s actions must demonstrate objectively that she has in fact quit”.

[JMJ Fashions Inc., and L. Espiritu (2008), Case No. 55/08/ESC at p. 11]

- b) as the appellant, the Employer bears the onus of proof to satisfy the Board, on the balance of probabilities, that the Employee, quit his employment, in which case the Employer would not be required to give the required notice of termination or wages in lieu thereof under Section 61(1) of the *Code*;
- c) taking into account all of the surrounding factual circumstances, including, but not limited to, the fact that the Employee continued to perform work for the Employer on August 21 and 22, 2008, and was paid for that work subsequent to August 19, 2008, this being the date when the Employer asserts the Employee quit, the Board is not satisfied that the Employer has established, on the balance of probabilities, that the Employee quit on August 19, 2008;
- d) in the result, the Employer’s appeal is dismissed and the Employee is entitled to receive Four (4) weeks wages in lieu of notice from the Employer as reflected on the Statement of Adjustment prepared by the Employment Standards Division in the amount of Three Thousand Five Hundred and Twenty Dollars (\$3,520.00).

T H E R E F O R E

The Manitoba Labour Board **HEREBY ORDERS 2127423 MANITOBA LTD. t/a LONDON LIMOS**, to pay to the Director of Employment Standards Division of the Department of Labour and Immigration, forthwith:

WAGES:

The amount of Three Thousand Five Hundred and Twenty Dollars (\$3,520.00) less statutory deductions, being wages in lieu of notice owing the Employee, Yaroslav Tovaryanskyy.

ADMINISTRATIVE FEE:

An Administrative Fee in the amount of Three Hundred Fifty Two Dollars (\$352.00) pursuant to Section 96(1) of *The Employment Standards Code*.

TOTAL:

The total amount being Three Thousand Seven Hundred Eighty Two Dollars (\$3,782.00)

DATED at **WINNIPEG**, Manitoba, this **1st** day of **June, 2009**, and signed on behalf of the Manitoba Labour Board by:

"W.D. Hamilton"

W. D. Hamilton, Chairperson

"V.W. Becker"

V. Becker, Board Member

"Irene Giesbrecht"

I. Giesbrecht, Board Member

CJ:tj

NOTES

1. **Appeal of board order re unpaid wages**
130(1) A person who is a party to a final order of the board made under this Code in respect of a matter referred to the board under section 110 may appeal the order to The Court of Appeal.

2. **Appeal of the Board Decision or Order to Court of Appeal**
 - a. Leave to appeal required
130(2) An appeal may be taken only on a question of law or jurisdiction and by leave of a judge of The Court of Appeal.

 - b. Time for application for leave to appeal
130(3) An application for leave to appeal shall be made within 30 days after the day the order is made or within such further time as a judge may allow.

3. **Board and director entitled to be heard**
131 The board and the director are each entitled to be heard, by counsel or otherwise, on the argument of an application for leave to appeal and on an appeal.

4. **Applicant to file proof of payment to the director**
130(4) If a person that files an application for leave is not an employee and is required, under the order that is the subject of the application, to pay money to the director, the person shall file with the application evidence that he or she has complied with subsection 125(4).

5. Evidence of compliance with an Order of an Acknowledgment of Receipt from the Employment Standards Division indicating that the amount stated in the Order has been deposited in the "*Province of Manitoba Wages Trust Account.*" *The Employment Standards Division will only accept certified cheques, money orders or cash. Personal cheques will not be accepted unless certified. Please make cheques, etc. payable to "**The Province of Manitoba Wages Trust Account.**"*

REASONS FOR DECISION

It is the policy of the Manitoba Labour Board that where a party to the proceedings is adversely affected by an Order or by a decision of the Board, within ten (10) calendar days of the date on which the Board's Order or decision was signed that party may request the Board in writing to furnish written reasons for its Order or decision. The Board then may consider such request for reasons for its Order or decision and shall notify the requesting party as to whether reasons will be provided.

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