

Manitoba Labour Board

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Case No. 51/09/ESC

File No. 98664

IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE

BETWEEN:

INVEST HOTELS GP XV LTD.,

Employer,

- and -

L.C.,

Employee.

BEFORE:

A. Blair Graham, Q.C., Vice-Chairperson

C. Lorenc, Board Member

R. Bayer, Board Member

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

SUBSTANTIVE ORDER

WHEREAS:

1. On September 29, 2008, pursuant to Section 95 of *The Employment Standards Code* (the “Code”), the Director of the Employment Standards Division of the Department of Labour and Immigration dismissed the complaint by the above named Employee against the above named Employer.
2. The Employee, having disputed the above-mentioned Dismissal Order, the Director of the Division, pursuant to Section 110 of the *Code* referred the matter to the Board.
3. On November 16, 2009, the Board convened a hearing at which time both parties appeared before the Board. Also appearing, at the outset of the hearing, was the Workers Compensation Board of Manitoba (the “WCB”), represented by their Senior Counsel.

4. Senior Counsel on behalf of the WCB made a preliminary motion before the Board to quash a subpoena dated September 9, 2009 (the Subpoena), which had been issued at the request of the Employer and served upon K.R., an employee of the WCB, on October 30, 2009. The Subpoena required K.R. to attend before the Board on November 16, 2009 to give evidence in these proceedings on behalf of the Employer.
5. Senior Counsel for the WCB referred the Board to Section 62 of *The Workers Compensation Act*, R.S.M., 1987, c. W200 (the “WCA”), which states:

Board and employee not to be witnesses

62 None of the following persons is a compellable witness in a civil action or other proceeding to which the board is not a party respecting any document or information obtained, received or made under this Act or regulations, and may not be compelled to produce such documents:

- (a) a member of the Board of Directors or a medical review panel;
 - (b) an appeal commissioner;
 - (c) the Fair Practices Advocate;
 - (d) a worker adviser;
 - (e) an employee or agent of the board.
6. Senior Counsel for the WCB then presented argument in support of the motion quashing the subpoena, and the representative of the Employer presented argument in opposition to the motion to quash the subpoena.
 7. After considering the submissions of the WCB and the Employer, the Board concluded that Section 62 of the WCA is applicable to these proceedings, and specifically concluded that these proceedings fall within the phrase “or other proceeding” in Section 62 of the WCA. The Board granted the motion of the WCB and ordered that the Subpoena be quashed, whereupon K.R. and Senior Counsel for the WCB were excused and did not participate further in the hearing.
 8. Thereafter, the hearing proceeded on the merits of the Employee’s appeal from the dismissal of her claim. The Employee and the Employer both presented evidence and argument, the Employee being represented by a representative.

9. During the hearing, it became clear that the primary contentious issue between the parties related to events which occurred on May 8, 2008, and specifically whether the Employer terminated the Employee's employment without notice, or whether the employee quit or effectively resigned from her employment on that date. All of the witnesses who testified at the hearing presented their evidence in a candid and forthright manner. The Board is satisfied that the differing accounts of what happened on May 8, 2008 are a result of the different understandings of the discussions which took place, and not as a result of a lack of honesty on the part of any of the individuals who testified at the hearing.
10. The Board, following consideration of the materials filed, and the 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 action must demonstrate objectively that she has in fact quit.

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

- b) Taking into account all of the surrounding factual circumstances, including but not limited to:
- i) the employee's lengthy record of meritorious service;
- ii) her stated desire as at May 8, 2008 to keep working for the Employer;
- iii) her belief that she had been dismissed by the Employer;
- iv) the absence of any evidence she intended to quit or resign; and
- v) the letter written by the Employer dated May 16, 2008 (Exhibit 7 in these proceedings), which stated in part:

In view of the circumstances, we have no alternative but to terminate your employment with Delta Winnipeg effective May 8, 2008,

the Board is satisfied on the balance of probabilities that the Employee did not quit or resign her employment but rather was terminated from her employment by the Employer effective May 8, 2008.

11. As of May 8, 2008, the Employee had worked for the Employer since August, 1987, a period in excess of 20 years. For most of that period, she worked on a full-time basis (40 hours per week) as a Housekeeper. Accordingly, pursuant to Section 61 of the *Code*, on May 8, 2008, the Employee was entitled to 8 weeks notice of termination or the payment of a wage in lieu of notice in accordance with Section 77 of the *Code*. The Employee received no notice of termination, and therefore the Employer is obliged to pay her a wage in lieu thereof.
12. Having determined that the Employee, who had more than 20 years of service with the Employer, was terminated from her employment by the Employer on May 8, 2008, the operation of Section 61 of the *Code* clearly entitles the Employee to 8 weeks notice of termination or wage in lieu thereof. However, the determination of the specific sum of money which is actually owed by the Employer to the Employee is more challenging, because the Employee was on a return-to-work program as of May 8, 2008, and was not working a 40 hour week.
13. The Employee sustained a work related injury to her back in 2002, which caused her to be off work for approximately 9 months. She reinjured her back in November, 2006. After some delays, it was ultimately determined that the Employee was entitled to receive Workers Compensation (WC) benefits as a result of the injury which she sustained in November, 2006. She was off work continuously until November, 2007, when she returned to work on modified duties (Housekeeping Support), but on restricted hours. While performing those modified duties, she continued to receive WCB benefits, which were reduced by the amounts being paid to her by the Employer.
14. The Employee was unable to return to work on a full-time basis performing modified duties in Housekeeping Support. Accordingly, a return-to-work program was undertaken in the spring of 2008 with the support and approval of the WCB. Pursuant to those arrangements, the Employee was to return to work, and to be trained to perform the duties of a different position, a Service I Operator (Receptionist). While being trained in that position, she was working on a part-time basis, namely 12 hours a week, and was being paid by the Employer for those hours of work at the rate of \$11.94 per hour. She was also continuing to receive WCB benefits which were reduced by the amounts being paid to her by the Employer.
15. The final question to be determined by this Board is whether the Employee is entitled to a wage in lieu of notice calculated on the basis of a 12 hour week (the actual hours being worked by the Employee at the time of the termination of her employment), or a 40 hour week (the full-time hours she had typically worked prior to the November, 2006 injury).

16. Section 77 of the *Code* states:

Wage in lieu of notice

77 The wage in lieu of notice payable under clause 61(1)(b) must not be less than the wage the employee would have earned during

- (a) the applicable notice period under subsection 61(2) or 67(1); ...

if the employee had worked his or her regular hours of work for the period. (underlining added)

The *Code* contains the following definition of “regular hours of work”:

“**regular hours of work**” means the hours of work, not exceeding standard hours of work, during which an employee is required by an employer to be present for or engaged in work;

17. Had the Employee not been injured, her regular hours of work as a Housekeeper would have been 40 hours per week. However, while on the return-to-work program, her regular hours of work, (i.e. the hours she was required by the Employer to be present for and engaged in work), were substantially less. Given the above-noted provisions of the *Code*, the Board has concluded that the Employee’s regular hours of work in May of 2008 were 12 hours per week, namely the hours which the Employee was being required to work by the Employer in May, 2008.
18. The Board has therefore determined that the Employee is entitled to receive 8 weeks wages in lieu of notice of the termination of her employment from the Employer, calculated on the basis of the Employee working 12 hours a week at the rate of \$11.94 per hour. The sum of money owing by the Employer to the Employee for a wage in lieu of notice is therefore One Thousand One Hundred Forty Six Dollars and Twenty Four Cents (\$1,146.24).

T H E R E F O R E

The Manitoba Labour Board **HEREBY ORDERS INNVEST HOTELS GP XV LTD.,** to pay to the Director of Employment Standards Division of the Department of Labour and Immigration, forthwith:

WAGES:

The amount of One Thousand One Hundred Forty Six Dollars and Twenty Four Cents (\$1,146.24) less statutory deductions, being wages in lieu of notice owing the Employee, L.C.

ADMINISTRATIVE FEE:

An Administrative Fee in the amount of One Hundred Fourteen Dollars and Sixty Two Cents (\$114.62) pursuant to Section 96(1) of *The Employment Standards Code*.

TOTAL:

The total amount being One Thousand Two Hundred Sixty Dollars and Eighty Six Cents (\$1,260.86).

DATED at Winnipeg, Manitoba, this 21st day of December, 2009, and signed on behalf of the Manitoba Labour Board by:

“Original signed by”

A. Blair Graham, Q.C., Vice-Chairperson

“Original signed by”

C. Lorenc, Board Member

“Original signed by”

R. Bayer, Board Member

CJ:tj/rb-s