

**Case No. 136/09/ESC**  
**File No. 99671**

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

**BETWEEN:**

**OMNI FACILITY SERVICES CANADA LIMITED,**

**Employer,**

**- and -**

**Matheos J. Alert,**

**Employee.**

**BEFORE:**

**C. S. Robinson, Vice-Chairperson**

**Y. Milner, Board Member**

**S. Taylor, Board Member**

**SUBSTANTIVE ORDER**

**WHEREAS:**

1. On April 6, 2009, pursuant to Section 95 of *The Employment Standards Code*, the Director of the Employment Standards Division of the Department of Labour and Immigration, by order, 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 July 28, 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) as credibility findings are required to be made in respect of a number of factual issues in this case, the Board has adopted the guidelines distilled in the seminal case of *Farnya v. Chorney*, [1952] 2 DLR 353 (B.C.C.A.), (O'Halloran, J.), particularly the principle noted at page 357:

... 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 the probabilities which a practical and informed person would reasonably recognize as reasonable in that place and in those conditions;

- b) the documentation submitted by the Employee in support of his claim for overtime [see Exhibits 3 and 5] contained errors and included hours during which he was not performing duties on behalf of the Employer (for example meal breaks and time spent doing lawn and garden maintenance at the home which the Employer provided at no cost to him) which raised serious questions regarding its reliability, and further, the explanations offered by the Employee in his testimony regarding the hours claimed were not, "... in harmony with the preponderance of probabilities which a practical and informed person would reasonably recognize as reasonable in that place and in those conditions ...";
- c) the Board accepts that the more accurate recording of the hours worked by the Employee during the relevant period are reflected in Exhibit 4 and in the payroll records of the Employer's payroll service [Exhibit 10]. The Board further accepts, on the balance of probabilities, that the Employee advised the Employer's General Manager, Mr. Dusan Drazic, when he worked more than the standard hours of work set out in the *Code* and that Mr. Drazic recorded the hours reported by the Employee, including overtime hours, on Exhibit 4. The Board notes that Employee was paid for 86 hours of overtime during the period of his claim. The Employee was also provided with extra compensation by the Employer at the conclusion of his employment in consideration of the Employee's report that the working conditions had been difficult;

- d) in the result, the Employee has not satisfied the Board, on the balance of probabilities, that any further overtime wages or other compensation is owed to him. Accordingly, the Employee's appeal is dismissed;
- e) the Employer's request that the Board award costs to the Employer, pursuant to Subsection 125(5) of the Code, is dismissed as the Board is not satisfied that the necessary conditions permitting it to award costs are evident in this case.

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

**WAGES:**

The Manitoba Labour Board **HEREBY DISMISSES** the claim of Matheos J. Alert.

-and-

**COSTS:**

The Manitoba Labour Board **HEREBY DISMISSES** the Employer's request to award costs to the Employer, pursuant to Section 125(5) of *The Employment Standards Code*.

**DATED** at **WINNIPEG**, Manitoba, this 14<sup>th</sup> day of August, 2009, and signed on behalf of the Manitoba Labour Board by:

"original signed by"

\_\_\_\_\_  
C. S. Robinson, Vice-Chairperson

"original signed by"

\_\_\_\_\_  
Y. Milner, Board Member

"original signed by"

\_\_\_\_\_  
S. Taylor, Board Member

CJ:tj

.../4

## 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.