

Case No. 137/09/ESC
File No. 99388

IN THE MATTER OF: *THE EMPLOYMENT STANDARDS CODE*

BETWEEN:

MATRIX ENVIRONMENTAL SOLUTIONS LTD.,
Employer,

- and -

Ahmad Nia,
Employee.

BEFORE: **W. D. Hamilton, Chairperson**
Y. Milner, Board Member
L. Sigurdson, Board Member

SUBSTANTIVE ORDER

WHEREAS:

1. On March 4, 2009, pursuant to Section 96 of *The Employment Standards Code*, the Director of the Employment Standards Division of the Department of Labour and Immigration, ordered that the amount of Seven Thousand Six Hundred Fifteen Dollars and Fifty Cents (\$7,615.50), 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 administration fee in the amount of Seven Hundred Sixty One Dollars and Fifty Five Cents (\$761.55) for a total owing of Eight Thousand Three Hundred Seventy Seven Dollars and Five Cents (\$8,377.05).
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 September 8, 2009, the Board conducted a hearing at which time both parties appeared before the Board and presented evidence and argument.
4. Either at the outset of or during the course of the hearing, the parties agreed to the following:
 - (a) the Employer stipulated that it owed the Employee the sum of \$2,784.10 (as recorded in the Statement of Adjustment) for the month of June 2008;
 - (b) the terms and conditions of the employment relationship between the Employer and the Employee were contained in an Employment Agreement effective March 24, 2004 (Exhibit No. 2);
 - (c) Article 4.1 of the Employment Agreement states as follows:

“In consideration for the performance by the Individual of his Duties, the Company will pay to the Individual during the term of this Agreement an amount (the “**Base Amount**”) equal to \$30,000.00 per annum, or such other amount as the Company and the Individual may from time to time agree, payable bi-monthly in arrears, plus the Commission, if any, set out on Schedule “A” hereto.” (Emphasis added);
 - (d) the following were features of Schedule “A” of the Employment Agreement:
 - (i) The Employee was not entitled to be paid any commission(s) (or any bonus, as the Employer characterized of the remuneration scheme) unless the Employee, in any given month, met the threshold sales figure (comprised of both direct and indirect sales) of \$10,000.00 in total.
 - (ii) If the \$10,000.00 threshold was met in any month then the Employee was to receive a defined percentage of the sales made in various categories, as follows:
 - Direct sales – 10%
 - Discounted direct sales – 7.5%
 - Medications and miscellaneous – 3%
 - Other – 1%

The Board notes that this agreed upon percentage structure is reflected in the Employment Standard Division’s calculations for the month of June 2008, to which the Employer agreed at the hearing.

- (e) The Employer acknowledged that the amounts described as commissions on the Statement of Adjustment for the months from October, 2006 to June of 2008 were correct and reflected the commission/bonus payments actually made to the Employee for each of those months. Therefore, the Board accepts that the Employee met the threshold requirement of \$10,000.00 in sales for each of those months and was entitled to receive commissions in accordance with the formula set out above. There was a dispute over commissions for July, 2008 and this will be addressed in Paragraph 5.
5. The Board, following consideration of the material filed, the evidence and argument presented by the parties, made the following determinations:
- (a) The Board is satisfied that the remuneration scheme which existed between the Employer and the Employee was one of base salary and commissions. Article 4.1 of the Employment Agreement specifically refers to “commissions” as part of the regular compensation scheme and the Board finds that the payments made each month to the Employee were based upon a measurable and structured formula and the percentages payable for the different categories of sales reflected commissions payable to the Employee for sales generated by him. Whether one wishes to characterize this remuneration structure as a “bonus” or a “commission” is of no particular consequence and the Board is satisfied that the Employee was compensated, based on a commission structure and any “commissions” payable under such a structured scheme represented a key component of the Employee’s total compensation for work performed on behalf of the Employer, and, as such,, fall within the definition of wages in the *Employment Standards Code* (the “Code”).
- (b) Section 1(1) of the *Code* defines wage to mean:
- “... except where otherwise provided in this *Code* or prescribed by regulation, compensation for work performed that is paid or payable to an employee by his or her employer, and includes
- (a) salary, commission or compensation in any other form, whether measured in time, piece or otherwise, and ...”
(Emphasis Added)
- (c) Any vacation allowance payable under Sections 39(2) and 44(2) of the *Code* is to be based on the appropriate percentage “... of the wages earned” by an employee in the applicable time period and, by reason of the definition of “wage” (see above) vacation allowance is to be paid on commissions which

form part of an employee's regular compensation. The only exceptions as to what payments do not fall within the term "wages" for the purposes of calculating vacation allowance is defined in Sections 39(1) and 44(1) of the *Code*, in that wages, for vacation allowance purposes, does not include overtime wages; any wage in lieu of notice payable under Clause 61(1)(b) of the *Code* or other vacation allowance.

- (d) The Employer relied on Section 40 of the *Code* in respect of its position that vacation allowance was not payable on the commissions. The Board is satisfied that Section 40 has no application in these circumstances as this Section does not define what is included or excluded from the definition of "wages" for vacation pay purposes. Rather, Section 40 establishes a positive entitlement and confirms that the payment of a bonus or other pecuniary benefit by an employer does not affect the employee's" ... entitlement to an annual vacation or vacation allowance." Accordingly, the operative provisions for the purposes of determining the Employee's entitlement to vacation allowance for the months of October 2006 to July of 2008 are Sections 39 and 44 of the *Code*, incorporating, as they do, the definition of "wage" from Section 1(1) of the *Code*.
- (e) As to the dispute over whether commission is owing for the sales concluded by the Employee for the month of July 2008, the Board is satisfied that, while he was in the employ of the Employer during that month, he was responsible for generating at least the threshold amount of \$10,000.00 in sales and was therefore entitled to commission, at the appropriate rate(s). The Board is satisfied that the Employee quit his employment with the Employer on or about July 18, 2008, and, by the time that he left, had been responsible for generating sales in excess of \$10,000.00. While the Board recognizes that there is some dispute between the parties over some accounts and invoices for the month of July 2008, the General Ledger produced by the Employer for the month of July 2008 (Exhibit No. 3) reveals that, even after discounting the "Invoices/Accounts" which the Employer asserts were not properly claimable by the Employee – i.e. those marked by the Employer in green on Exhibit No. 3 -, there still remains an undisputed amount of sales generated by the Employee which exceeds \$10,000.00 for that month. Exhibit No. 3 (as adjusted above) coincides with the commission calculations reflected in the Statement of Adjustments for the month of July 2008. Based on the evidence before it, the Board is satisfied, on the balance of probabilities, that commissions in the amount of \$2,043.20 for the month of July 2008 are properly claimable by the Employee.

6. Based upon the foregoing determinations, the Board is satisfied that the Employee is entitled to the wages and vacation wages in the total amount of Seven Thousand Six Hundred Fifteen Dollars and Fifty Cents (\$7,615.50), as recorded in the Statement of Adjustment prepared by the Employment Standards Division. The appeal of the Employer is dismissed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY ORDERS, Matrix Environmental Solutions Ltd.** to pay to the Director of the Employment Standards Division of the Department of Labour and Immigration, forthwith:

WAGES:

The amount of Seven Thousand Six Hundred Fifteen Dollars and Fifty Cents (\$7,615.50) less statutory deductions, being wages and vacation wages owing the Employee, Ahmad Nia.

ADMINISTRATIVE FEE:

An Administrative Fee in the amount of Seven Hundred Sixty One Dollars and Fifty Five Cents (\$761.55) pursuant to Section 96(1) of the *Employment Standards Code*.

TOTAL:

The total amount being Eight Thousand Three Hundred Seventy Seven Dollars and Five Cents (\$8,377.05).

DATED at **WINNIPEG**, Manitoba, this 21st day of September, 2009 and signed on behalf of the Manitoba Labour Board by

"W.D. Hamilton"
W. D. Hamilton, Chairperson

"Y. Milner"
Y. Milner, Board Member

"L. Sigurdson"
L. Sigurdson, Board Member

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.