MANITOBA LABOUR BOARD
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CASE NO. 25/09/ESC

IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE

BETWEEN:

FRONTIER MANAGEMENT INC.,
t/a FRONTIER SUBARU,

Employer,

- and -

S.P.,

Employee,

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

S. Taylor, Board Member

B. Black, Board Member

APPEARANCES: **D.T., for the Employer**

S.P., Employee

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

REASONS FOR DECISION

I. Overview

The issue in this case is whether the Employer, Frontier Management Inc., trading as Frontier Subaru, owes the Employee, S.P., wages in lieu of notice. The Employee filed a claim with the Employment Standards Division on July 24, 2008 alleging that all wages in lieu of notice owing to him by the Employer had not been paid. By Order dated December 2, 2008, Employment Standards ordered the Employer to pay wages in lieu of notice to the Employee in

the amount of Four Thousand Five Hundred Fifty Nine Dollars and Two Cents ($4,559.02) along with an administrative fee of Four Hundred Fifty Five Dollars and Ninety Cents ($455.90).

The Employer requested that the matter be referred to the Manitoba Labour Board (the "Board") for a hearing. It is the Employer's position that the Employee was terminated for having engaged in "wilful misconduct" and that he was accordingly not entitled to notice or wages in lieu thereof. The Employee denied that he had acted in a manner that constituted "wilful misconduct" and asked that the Board confirm the Order issued by Employment Standards.

The Board conducted a hearing on April 27, 2009 at which time the Employer and the Employee appeared and submitted evidence and argument.

II. Facts

The Board considered all of the material filed and the evidence and argument of the parties. A summary of the facts relevant to the disposition of this case are as follows:

a) Frontier Management Inc. operates automobile dealerships including Frontier Subaru.

b) The Employee is an automotive technician. He commenced employment with the Employer in 1995. A break in his service occurred in 1998, following which the Employee returned to work with the Employer at its Frontier Toyota dealership. In 2004, the Employer requested that the Employee transfer to its Frontier Subaru dealership and he did so.

c) The Employer terminated the Employee on or about July 21, 2008. The Employer submitted that the Employee was terminated for having engaged in "wilful misconduct". D.T., General Manager/Vice-President of the Employer, testified that the Employee acted outside of the Employer's best

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interest by "soliciting and procuring" the Employer's customers by completing work, for which he received financial compensation, on a customer's vehicle at the Employee's home on his off-duty hours. In so doing, D.T. stated that the Employee was essentially competing against the Employer for the business of one of its active customers. She added that the work in question was completed by the Employee at a fraction of what the Employer charges for his time at the dealership.

d) D.T. said that she and the Employer's Service Manager, G.F., met with the Employee to review the allegation with him. She said that the Employee admitted that he had performed work on the individual's car outside of the dealership and that he understood what he did was wrong. He apologized and asked for the Employer's forgiveness.

e) D.T. said that she regarded the Employee as highly efficient and productive; however she was of the view that she had no choice other than to terminate his employment. She added that she did not consider any options short of termination as she felt that the employment relationship had been irreparably damaged and that a more lenient approach might leave the unwelcome impression with her remaining staff that the Employer condoned such conduct.

f) G.F. testified that the Employee acknowledged during the meeting that he did work on the customer's vehicle outside of the dealership. G.F. added that, in his opinion, the Employee had not intended any harm to the Employer, but that his conduct was nevertheless against company policy. He confirmed, however, that the Employer had no written policy prohibiting such conduct and he conceded that he did not personally advise the Employee of such a policy and he could not say if the Employee was ever advised of the

existence of such a policy or rule. G.F. candidly acknowledged that he believed that the alleged conduct of the Employee "started innocently" and that the Employee had not acted deliberately.

g) Although the Employer did not have a written policy prohibiting automotive technicians from performing work on individuals' automobiles during their off duty hours, D.T. testified that it is a well-known rule in the automotive industry that such conduct is prohibited. She stated that the Employer had been overly trusting and "naïve" in failing to create a formal written policy prohibiting automotive technicians from engaging in such work for private gain with the Employer's customers during their off-duty hours.

h) The Employer paid the Employee two weeks' pay in lieu of notice upon termination of his employment. D.T. stated that a payroll clerk employed by the Employer advised that the Employer was required to pay two weeks' notice to the Employee. Subsequently, the Employer's Controller told D.T. that the payroll clerk had erred and that notice or pay in lieu thereof was not required in the circumstances. Nonetheless, as D.T. had already advised the Employee that the Employer would provide two weeks of pay in lieu of notice, she felt bound by her word and paid the money despite having determined that she did not have a legal obligation to pay that amount.

i) The Employee testified regarding the situation that resulted in his dismissal. He said that in June of 2008, he received a telephone call from a friend who inquired about whether he would be prepared to provide some advice to another individual regarding a performance upgrade that person wished to make to his Subaru vehicle. He told his friend to have the other individual call him. He spoke to the individual over the telephone. That person owned a Subaru vehicle which he had not purchased from the Employer. The person

advised the Employee that he had purchased some after-market parts for his vehicle on the internet that he wished to install in order to improve the automobile's performance characteristics. The Employee testified that the Employer does not sell the after market parts purchased by the individual in question. The Employee added that the individual wished to do the work himself as he considered himself to be something of a "backyard mechanic". The individual met with the Employee and asked if the Employee would help him put the parts on the vehicle. The Employee agreed. The Employee said they planned to do the work together, however the individual he was assisting was unexpectedly called away to work and the Employee simply completed the work on his own. He did not use tools belonging to the Employer. The modification took approximately six hours. When the individual returned, he offered the Employee $180.00 on account of the work he had completed on the vehicle. The Employee accepted the money. He added that he was having a difficult time financially at the time given the recent death of his father and the resulting funeral expenses.

j) The Employee said that he did not know that the individual whom he assisted was a customer of the Employer. As noted above, the individual did not purchase the vehicle in question from the Employer. However, the Employer submitted 13 Invoices made out to the individual respecting service performed at the Employer's service department. Of those 13 Invoices, the Employee's technician number appears only once. On that occasion, the Employee appears to have spent ½ an hour checking on a noise being emitted by the vehicle for which service the Employer did not charge the customer.

k) The Employee stated that he believed that the type of work he performed for the individual was not a service that the Employer was prepared to offer its customers. His evidence was that the Employer had done such work from

time to time in the past; however, a problem had occurred with one such job that resulted in a considerable loss to the Employer. He testified that he did not feel that the Employer would be willing to do that type of work as a result. The Employer did not refute the Employee's evidence that it had previously experienced a problem with the kind of vehicle modification work performed in this case. The type of work performed is also problematic in terms of a customer's continuing entitlement to warranty coverage and, in the Employee's opinion, such modifications are frowned upon by the vehicle manufacturer.

l) D.T. testified that the vehicle manufacturer has not placed restrictions upon its dealers regarding the type of work performed by the Employee for the individual in question. She acknowledged that the Employer must advise customers as to the potential impact on the manufacturer warranty if such modifications are undertaken and that has resulted in less work of this kind being done. D.T. maintained that the work done by the Employee on his own time was the kind of work that was promoted and performed by the Employer.

m) The Employee said that he did not enter into an agreement with the individual by which he would receive money in exchange for performing private automotive service. There is no evidence that the Employee offered his services to the individual (or anyone else) in contemplation or even hopes of receiving financial consideration in return. He added that when he agreed to give the individual a hand, he did not feel that he was engaging in misconduct or harming the Employer. He said that he was just trying to be helpful to someone acquainted with one of his friends.

n) The Employee stated that he answered the Employer's questions honestly about the matter when questioned and that he asked for a second chance when the Employer indicated how seriously it viewed his conduct.

o) The issue before the Board is whether the Employer owes the Employee wages in lieu of notice in the amount of Four Thousand Nine Five Hundred Fifty Nine Dollars and Two Cents ($4,559.02), plus the requisite administrative fee. The parties agreed that the accuracy of this amount as calculated by the Employment Standards Division is not in dispute.

III. Analysis

The Employer submitted that the Employee is not entitled to receive wages in lieu of notice because the Employee was guilty of "wilful misconduct". 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*. In this case, the relevant provision, as submitted by the Employer, is subsection 62(1)(h).

Section 62(1)(h) of the *Code* states as follows:

Exceptions to notice requirements
62(1) Section 61 does not apply in any of the following circumstances:

(h) the employee acts in a manner that is not condoned by the employer and that

(i) constitutes wilful misconduct, disobedience or wilful neglect of duty, or

(ii) is violent in the workplace, or

(iii) is dishonest in the course of employment;

The Employer bears the onus of satisfying the Board that one of the exceptions to providing notice or pay in lieu thereof listed in subsection 62 of the *Code* is applicable. As noted by the Court of Appeal of Manitoba in *Convergys Customer Management Inc. v. Luba* (2005), 252 D.L.R. (4th) 457 at paragraph 27:

> … Once it has been established that an employee was dismissed without notice, the onus shifts to the employer who seeks to take advantage of the exceptions. To do so, the burden is upon the employer to put forward evidence from which the Board can conclude that the conduct that caused the employer to terminate the employment of the employee without notice was wilful.

See also the Board's application of this principle in *Leonard W. Carlson, trading as Len's Auto Service - and - Richard Stickles* (2006), M.L.B.D. 86/06/ESC, leave to appeal dismissed by the Court of Appeal [2006 MBCA 66].

In *Nygard v. Baron*, [2005] M.L.B.D. No. 3, the Board considered the employer's position that the employee in that matter had engaged in "wilful neglect of duty". The Board commented upon the Code's use of the term "wilful" as follows commencing at paragraph 23:

> 23. The use of the term "wilful" in section 62(h) of the *Code* suggests that an employer seeking to rely on the exception must demonstrate that the employee acted in a manner which was voluntary or intentional. Counsel for the Director submitted an excerpt from *Black's Law Dictionary* (5th ed.) which defines the term "willful", in part, as follows:
>
> > Willful. Proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary.
> >
> > An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law ....
> >
> > Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.

> Acts that are merely careless, neglectful, thoughtless, heedless or inadvertent are not, in and of themselves, sufficient to justify termination without the notice required. Rather, the Board must be satisfied that the employee's behaviour in that regard was also "wilful".
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> 24. Counsel for the Director referred to authorities which concerned the terms "wilful misconduct", "wilful neglect of duty", "disobedience", and "insubordinate". Of particular relevance is the Ontario Labour Relations Board decision in *Wal-Mart Canada Corp. and Gray* [2002] O.E.S.A.D. No. 219. In that case, Vice-Chairperson McKee adopted the reasoning set out in several other Board decisions including *The Aylmer Express Ltd*., October 31, 1985 which provides:
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> > The "misconduct" or "neglect of duty" referred to in the *Act* is preceded by the term "wilful". Therefore, it is not sufficient merely to show that an employee was indifferent, casual, thoughtless or neglectful in the performance of, or in the omission to perform, his or her duties or responsibilities. These acts or omissions must be the product of some deliberate or intentional act. The employee must consciously and deliberately engage in some positive act of misconduct or deliberately refrain from performing duties or responsibilities that he or she was required to perform.

In *FCL Enterprises Co-Operative (c.o.b. Marketplace in North Kildonan) v. K.B.M.*, [2008] M.L.B.D. No. 21, Chairperson Hamilton noted that the "Board is entitled to find the requisite degree of "wilfulness" (i.e. synonymous with "deliberate," "malicious" or "intentional" as opposed to "unthinking" or "spur of the moment") based on reasonable inferences from the evidence as a whole".

In order to discharge the onus of proving that an employee has acted with the requisite degree of wilfulness as set out in subsection 62(1)(h) of the *Code*, an employer must satisfy the Board that the employee consciously and deliberately engaged in acts or omissions which he or she knew, or ought reasonably to have known, were wrongful or forbidden.

The evidence adduced at the hearing does not support the conclusion that the Employee's conduct was wilful or deliberate or that he knowingly engaged in conduct which he understood

to be prohibited by the Employer. On the balance of probabilities, the Board was satisfied that the Employee innocently attempted to assist an individual with work that he honestly and in good faith believed the Employer was not actively promoting or performing. There is no evidence that the Employee solicited private automotive repair work to be performed for his personal benefit on his off-duty hours. The Employee did not set out to compete with the Employer for service work of active clients in undertaking to assist the individual in the present case. It was only after the individual was called away and the Employee completed the work on his own that he was offered compensation which he accepted. In addition, there is no evidence that the Employee acted in a manner which may be characterized as being dishonest in the course of his employment.

As G.F. conceded, it does not appear that the Employee deliberately intended to harm the Employer and that the circumstances suggest that he acted innocently in agreeing to assist someone who wanted to perform the vehicle modification work himself. The Board is not satisfied based upon the evidence adduced in this case that the Employer has established that the Employee possessed the requisite degree of wilfulness to engage in a wrongful or prohibited act. Moreover, the Board notes that when confronted with the allegation, the Employee honestly responded to the Employer's questions and offered his apology.

In consideration of all relevant evidence and the submissions of the parties, the Board determined that the exception to providing notice to an employee set out in subsection 62(1)(h) of the *Code* does not apply in the present case. The Employer did not satisfy the Board that the Employee engaged in "wilful misconduct" or in any other manner contemplated by subsection 62(1)(h) of the *Code*. As the Employee's consecutive period of employment was greater than five years but less than ten years, he was entitled to six weeks' pay in lieu of notice pursuant to subsection 61(2) of the *Code*. The Employer provided two weeks of pay in lieu of notice to the Employee at the time of his termination. Accordingly, a further four weeks' pay in lieu of notice remains owing to the Employee in the amount of Four Thousand Five Hundred Fifty Nine Dollars and Two Cents ($4,559.02) as reflected in the Order attached hereto. In addition,

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pursuant to subsection 125(3) of the *Code*, the Board ordered payment of administrative costs calculated in accordance with subsection 96(1) of the *Code* in the amount of Four Hundred Fifty Five Dollars and Ninety Cents ($455.90).

DATED at **WINNIPEG**, MANITOBA, this 12th day of May, 2009, and signed on behalf of the Manitoba Labour Board by:

"Original signed by"

C. S. Robinson, Vice-Chairperson

"Original signed by"

S. Taylor, Board Member

"Original signed by"

B. Black, Board Member

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