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Case No. 246/09/ESC

IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE

BETWEEN:

WONG'S DYNASTY LTD.
t/a WONG'S ASIAN BISTRO,

Employer,

- and -

S.S.,

Employee,

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

APPEARANCES: **D.W., the Employer**
S.S., the Employee

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

REASONS FOR DECISION

Part I - Background

The Employer, Wong's Dynasty Ltd. t/a Wong's Asian Bistro, filed a timely request that this matter be referred to the Manitoba Labour Board (the "Board") for a hearing following receipt of an Order issued by the Employment Standards Division ("Employment Standards") dated June 30, 2009. The Order required the Employer to pay wages in lieu of notice to the Employee, S.S., in the amount of $480.00 plus an administration fee of $100.00. The matter was referred to the Board on August 25, 2009. The Board conducted a hearing on February 4, 2010 at which time both parties appeared and presented evidence and argument. D.W. appeared on behalf of the Employer. S.S. appeared on his own behalf.

The procedural history of this case is unusual and protracted. S.S.'s brief employment with the Employer ended on February 15, 2007. He filed a complaint with Employment Standards on February 22, 2007 seeking unpaid wages and wages in lieu of notice. However, Employment Standards apparently misplaced his original complaint and he therefore filed a second one on March 14, 2007. The complaint was investigated by J.K., an Employment Standards Officer working in Thompson, Manitoba. Following the complaint being filed, the Employer agreed to pay S.S. $515.52 in previously unpaid wages by cheque dated April 19, 2007. Regarding the remaining issue of wages in lieu of notice, D.W. stated that J.K. informed him in July of 2007 that the Employee's claim for wages in lieu of notice was going to be dismissed and the matter was therefore concluded. D.W. said he was shocked to receive the Order dated June 30, 2009 requiring him to pay wages in lieu of notice to the Employee along with an administrative fee.

The grounds upon which the Employer seeks revocation of the Order are as follows:

1. Employment Standards acted improperly and beyond its jurisdiction when it re-opened the Employee's complaint file and issued an Order nearly two years after verbally advising the Employer that the matter was concluded and the complaint was dismissed;

2. The Employee worked from January 29, 2007 to February 15, 2007 and the *Code* provided that notice of termination was not required within the first 30 days of employment (unless there was specific written agreement to the contrary, which was denied); and

3. The Employee abandoned his position and was not terminated by the Employer as alleged.

The Employee disputed the assertions of the Employer and requested that the Order be confirmed and that the appeal of the Employer be dismissed.

It should be noted that subsequent to the conclusion of S.S's employment, *The Employment Standards Code* (the "*Code*") was amended by *The Employment Standards Code Amendment Act*, S.M. 2006, c. 26. The amendments, including substantial changes to the notice

provisions of the *Code*, did not come into force until April 30, 2007. This case must be considered on the basis of the *Code* as it existed at the time of the employment.

Part II – <u>Evidence</u>

The evidence adduced by the parties differed in a number of material respects. In particular, the Board heard contradictory testimony regarding when the employment began and how it ended.

D.W. stated that the Employee commenced employment on January 29, 2007 and worked his final shift on February 15, 2007. The Employee worked as a Kitchen Helper for which he was paid $8.00 per hour. Having tested the Employee's cooking skills, D.W. did not feel that the Employee was capable of being a cook and he remained a Kitchen Helper for the duration of his employment.

Computer generated payroll records submitted by the Employer, purporting to cover the period from January 1, 2007 to February 28, 2007, indicate that the Employee worked twelve shifts from January 29, 2007 to February 15, 2007. During cross-examination, D.W. disagreed with the suggestion that S.S. actually commenced employment in November of 2006. He maintained that the Employee only worked for him for approximately 65 hours during 17 days of employment as indicated on the Employer's payroll records. The Employer utilizes a computer system to track hours worked by employees. D.W. denied that S.S. worked any hours beyond those reflected in the payroll records that were submitted. He insisted that the Employer has paid S.S. all wages owing. As the Employer utilized the services of a payroll company, D.W. denied that he ever made cash payments to S.S. When asked in cross-examination if he had ever withheld two weeks of wages from the Employee, he replied that he did not think that he had done so.

According to D.W., the Employee complained incessantly that his pay was inadequate and he repeatedly threatened that he was going to complain to the "Manitoba Labour Board". D.W.

emphasized that these complaints "did not happen once or twice, but many, many times". He stated that the Employee "disappeared" after his last shift on February 15, 2007 and did not return to work the next day, or thereafter, as scheduled. D.W. said that he unsuccessfully attempted to locate the Employee in order to provide him with his "last cheque". He testified that subsequent to February 15, 2007 he contacted the Employee's landlord who advised that she had "kicked him out".

D.W. testified that he paid the Employee his "last wage" in the amount of $515.52 in April of 2007. Subsequently, in July of 2007, the Employment Standards Officer, J.K., allegedly informed him that S.S.'s Employment Standards' complaint was concluded. Notwithstanding J.K.'s declaration, the parties did not receive a Dismissal Order. Subsequently, another Employment Standards Officer issued the Order appealed from on June 30, 2009. Following receipt of the Order, D.W. requested documentation from Employment Standards' files relating to the Employee's complaint. As a result of that request, D.W. was provided with a copy of a "Dismissal Order" relating to "File 94402" dated July 16, 2007. The Order is not signed by the Employment Standards Officer (J.K.) on the space provided for her signature. The "Dismissal Order" refers to "attached reason(s)". Those "Reasons for Decision" refer to "Section 67(2)" of the *Code*, subsection (e) of which provided that notice is not required where the "employee acts in a manner that constitutes wilful misconduct or disobedience or wilful neglect of duty that is not condoned by the employer"1. J.K.'s reasons go on to state that the "Employee refused to cook stating that he was not paid enough to cook". Like the "Dismissal Order", the attached "Reasons for Decision" were not signed by J.K. in the space provided for her signature. A "Final Report" was attached to the "Dismissal Order" and "Reasons for Decision" which indicates that the issue of "Unpaid Wages" was investigated and that $515.52 was collected.

1 The Board notes that section 67(2) of the *Code* is not applicable to the present case in any event as it only applied in circumstances where an employer terminated or intended to terminate 50 or more employees within a period of four weeks. That is not the situation here. Had the Employment Standards Officer believed that the Employee acted in a manner which constituted wilful misconduct or disobedience or wilful neglect of duty, the correct statutory reference would have been section 62(2)(h) rather than 67(2)(e) of the *Code*.

D.W. acknowledged that the "Dismissal Order" and "Reasons for Decision" dated July 16, 2007 were not served upon him in 2007 and that he was only provided with a copy of the unsigned documents following his request for documentation in 2009. Apparently, these documents remained on the Employment Standards' file. There is no evidence that the Employee ever received the "Dismissal Order" and "Reasons for Decision". Nor is there any evidence that S.S. was told that his complaint was going to be dismissed.

S.S. testified on his own behalf. He said on or about November 11 or 12, 2006, he responded to an ad the Employer placed with "Canada Manpower" seeking a cook. For his part, D.W. was unable to recall any specifics relating to the ad. S.S. testified that D.W. hired him and he commenced working on November 14 or 15, 2006. He recalled that he was hired at least in part to assist the Employer with the preparation of a "Canadian cuisine" menu. According to S.S, D.W. directed him to prepare a new menu featuring "Canadian cuisine" or about December 10, 2006. During cross-examination, D.W. denied that claim and explained that his restaurant primarily serves Asian food. When presented with a copy of a document which the Employee asserted was the draft menu, D.W. claimed that he had never seen it before. In addition to working on the menu, S.S. said that he performed general kitchen duties along with some maintenance and cleaning.

S.S. said he was paid on a bi-weekly basis. He testified that following his first two weeks of employment, D.W. told him that the Employer had a right to withhold the first two weeks of an employee's wages. While expressing doubt that this was accurate, S.S. continued working for the Employer. Following the fourth week of employment, D.W. finally paid him. However, S.S. said that he repeatedly asked D.W. for the first two weeks of wages which D.W. steadfastly refused to pay. Ultimately, S.S. said that he inquired with the "Labour Board" or "Employment Standards" about the issue of his withheld pay and was told that he "had to wait for 90 days" to claim those wages2.

2 The Board notes that this is inaccurate – section 86(1) of the *Code* provides that earned wages shall be paid at least semi-monthly and within 10 working days after the expiration of each pay period.

S.S. claims to have been paid on February 15, 2007 at which time he again asked D.W. for the first two weeks of his wages that had been withheld by the Employer. He testified that he informed D.W. that he had discussed the issue with the "Labour Board". According to S.S., later that evening, D.W. approached him and said: "consider this your last day". As a result, he believed that his employment had been terminated and he did not return to work. Following the termination of his employment he attempted to contact D.W. regarding the earned wages that remained outstanding, however D.W. did not reply to his messages. As a consequence, he filed a claim with Employment Standards on February 22, 2007. S.S. denied that D.W. tried to contact him following the termination and he added that he was not evicted by his landlord as alleged by the Employer.

S.S. says that D.W. paid him in cash out of the restaurant's register. The cash payments were not accompanied by a statement of earnings and deductions (as required by section 135(4) of the *Code*) and S.S. could not say whether or not income taxes were deducted from his earnings. The only occasion that he received a cheque was when the Employer paid him $515.52 in April 2007 following his complaint to Employment Standards.

S.S. noted that his work schedule varied, however he estimated that he worked between 30 and 33 hours per week for the Employer. He recalled working a lot of hours for the Employer during the period in and around Christmas of 2006. He referred to a calendar from December of 2006 on which he recorded hours worked for the Employer as well as another business with which he was employed. While the calendar refers to both employers by name, it does not indicate for whom the specific shifts were worked. S.S. could not recall which entries applied to this Employer. During cross-examination, S.S. indicated that he filled in the calendar to track his hours worked at both of the jobs that he held at the time. He conceded that the calendar was confusing but noted that he produced it a long time ago for the singular purpose of keeping personal track of when he had worked.

The Employee also called T.P. as a witness. T.P. was S.S.'s landlord until April of 2007. She testified that S.S. commenced employment with the Employer at the "beginning of

November". On most days, she drove S.S. to work and picked him up at the end of his shift. T.P. recalled assisting S.S. when he prepared the "Canadian cuisine" menu as requested by D.W. In December of 2006 she and her family dined at the Employer's restaurant and she witnessed S.S. working there on at least two occasions. T.P. recollected that S.S. told her that D.W. directed him not to return to work. She denied speaking with D.W. about S.S.'s whereabouts following the termination of his employment or telling D.W. that S.S. had been "kicked out" of his rental unit. The Employer elected not to cross-examine the witness.

Part III – <u>Analysis</u>

The Employer submitted that Employment Standards acted improperly in issuing the Order dated June 29, 2009 given that J.K., the Employment Standards Officer originally assigned to the file, advised in July of 2007 that the "case was closed". Despite what the Employment Standards Officer may have said to D.W. regarding the status of the case, no Order relating to this matter was issued by Employment Standards until June 29, 2009. Section 95 of the *Code*, provides that an Officer "who investigates a complaint and determines that no contravention of this *Code* has occurred <u>shall dismiss the complaint by order</u>". The fact that a draft "Dismissal Order" was prepared by the Employment Standards Officer is irrelevant given the fact that it was not served upon the parties in accordance with the *Code,* section 136 of which prescribes the manner in which service may be effected.

The suggestion of the Employer appears to be that S.S. was also aware in July of 2007 that the Employment Standards Officer intended upon dismissing his claim for wages in lieu of notice and that he unreasonably delayed in appealing that decision. D.W. referred the Board to section 60(6) of the *Code* which directs that complaints must be filed within six months "after the date of the lay-off or termination". He does not believe that the Employee complied with this provision. The Board does not agree. It is clear that the Employee complied with section 60(6) of the *Code*. The parties agree that the employment ended on February 15, 2007. The Employee filed his complaint on February 22, 2007 (and again on March 14, 2007) which is well within the time frame set out in the legislation.

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The time limit for appealing a decision of Employment Standards by requesting that a matter be referred to the Board for a hearing is set out in section 110(1.1) of the *Code*:

> **When request must be made**
> 110(1.1) A request under subsection (1) must be filed with the director, along with written reasons for the request,
>
> (a) within 30 days after the order is served on the person, in the case of an order made under subsection 96.1(1) (compensation or reinstatement); and
>
> (b) within seven days after the order is served on the person, in the case of any other order;
>
> or within any further time that the director may allow.

Again, D.W. suggests that S.S. should have appealed J.K.'s verbal indication that his claim was going to be dismissed. Apart from the fact that there is no evidence that S.S. was ever so advised, the Board notes that only orders that are finalized and served upon the parties in accordance with the *Code* may be referred to the Board for a hearing. The time frame for requesting that the matter be referred to the Board commences when "the order is served on the person". A verbal declaration by an Employment Standards Officer regarding the status of a file or an indication as to the disposition of a complaint does not equate to the issuance of a lawful and properly served Order. Moreover, the "Dismissal Order" that the Employer retrieved from the Employment Standards' files is obviously not a proper Order. Apart from being unsigned, it was, as noted above, never served upon the parties.

The failure of Employment Standards to issue a more timely Order in this case is most regrettable. Nevertheless, ultimately the present Order was issued on June 29, 2009. That is the only Order issued and served on the parties in this case. Any delays or administrative failings on the part of Employment Standards in the present case cannot operate to disentitle the Employee to such wages or wages in lieu of notice to which he may be entitled pursuant to the provisions of the legislation. As such, the Board does not accept the Employer's position that Employment Standards did not have the authority to issue the Order dated June 29, 2009 or that the Employee failed to exercise his rights in a timely manner and in compliance with the *Code*.

Turning to the merits of the complaint, the Employer submitted that the period of employment was less than 30 days and, as such, neither party was required to provide notice of termination in accordance with section 61 of the *Code*. In the alternative, the Employer asserts that it did not terminate S.S. but that he abandoned his position and is not entitled to wages in lieu of notice on that basis. S.S. responded that the period of employment was far in excess of 30 days and that D.W. indicated to him that his employment was terminated. Clearly, faced with vastly differing evidence regarding the length of the period of employment and the manner in which that employment concluded, the Board must make credibility determinations.

The standard of proof to be applied in this case is proof on the balance of probabilities test. This standard requires the Board to consider whether it is more likely than not that the events occurred as alleged. As the Supreme Court of Canada recently indicated in *F.H. v. McDougall*, [2008] 3 S.C.R. 41, evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test, however there is no objective standard by which sufficiency is measured. Findings of fact are based upon an overall view of all the evidence along with observation and assessment of the credibility of witnesses.

Assessing credibility is not an exact science. This Board has consistently referred to the following passage from the seminal case of *Faryna v. Chorney*, [1952] 2 D.L.R. 353 (B.C.C.A.) wherein Justice O'Halloran stated:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. 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 readily recognize as reasonable in that place and in those conditions.

Having applied the foregoing principles set out above, the Board accepts the evidence adduced by the Employee.

The Board accepted S.S.'s evidence as being truthful and rejected D.W.'s recollections. S.S. made a positive impression with the Board in the manner in which his evidence was given and the overall consistency of his factual account of the events. He provided detailed descriptions of the circumstances of his hiring, his employment duties, the manner in which he was paid, and the events leading to the termination of his employment. In comparison, the Board found D.W. provided something short of fulsome answers to a number of questions and that his evidence was not in harmony with the preponderance of probabilities.

The Board also considered the fact that S.S's evidence was corroborated by T.P. She recalled that S.S. was hired by the Employer in November and that she saw him working at the restaurant when she attended there for meals with her family in December. She refuted D.W's evidence that he spoke to her following the termination of S.S.'s employment or that she evicted him from his rental unit. The Board notes that the Employer had an opportunity to cross-examine T.P. on her evidence but elected not to do so. The Board considered T.P. to be a credible witness who testified is an honest and straightforward manner.

The Board is satisfied, on the balance of probabilities, that S.S. commenced employment with the Employer in November of 2006 and that D.W. terminated his employment without notice on February 15, 2007. The Board further accepts that the Employee worked approximately 30 hours per week and that the Employer paid him in cash until the issuance of the cheque in April of 2007 long after the termination of the employment. Furthermore, the Board did not accept that the Employer's payroll records were complete or accurate.

On the basis of the foregoing, the Board rejected the Employer's submission that it was not obligated to provide the Employee with notice as the termination occurred within the first 30 days of the employment. I conclude that S.S.'s employment was in excess of 30 days in duration and, therefore, the exception to providing notice set out in section 62(d) of the *Code* is not applicable. Moreover, the Board is satisfied that none of the other exceptions to providing notice of termination set out in section 62 of the *Code* have been shown to apply in this case.

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Furthermore, the Board does not accept that the Employee abandoned his position. S.S. was terminated by the Employer without notice on February 15, 2007.

The Employee was entitled to one pay period of notice of termination or pay in lieu thereof in accordance with section 61 of the *Code* (as it read in February of 2007). The Board accepts that the Employee was paid on a bi-weekly basis and that he averaged 30 hours of work per week at the rate of $8.00 per hour.

The Order of Employment Standards dated June 30, 2009 is hereby confirmed. The Employer shall pay wages in lieu of notice to the Employee in the amount of $480.00 plus $100.00 for administrative costs in accordance with the *Code*.

DATED at **WINNIPEG,** MANITOBA, this 8th day of March, 2010, and signed on behalf of the Manitoba Labour Board by:

"Original signed by"

C. S. Robinson, Vice-Chairperson

CSR:tj/rb-s