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Case No. 247/09/ESC
File No. 101072

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

BETWEEN: **POLAR WINDOW OF CANADA LTD.,**

- and –

D.S.,

BEFORE: **W.D. Hamilton, Chairperson**

B. Black, Board Member

J. Malanowich, Board Member

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

SUBSTANTIVE ORDER

WHEREAS:

1. On July 22, 2009, pursuant to Section 95 of *The Employment Standards Code* (the "*Code*"), the Director of The Employment Standards Division (the "Division") of the Department of Labour and Immigration, by order, dismissed the complaint of D.S. against Polar Window of Canada Ltd. ("Polar").

2. In brief Reasons which accompanied the Dismissal Order, the investigating Employment Standards Officer stated as follows:

> "*The claim D.S. filed against Polar Window of Canada Ltd. for earned wages, vacation wages, general holiday wages, and wages in lieu of notice has been investigated and resulted in the following determination:*

> *D.S. was an independent contractor during his tenure with Polar Window of Canada Ltd. Section 2(3) of The Employment Standards Code states:*
>
> *No application to independent contractor*
> *2(3) For greater certainty, this Code does not apply to an independent contractor.*
>
> *Therefore, your claim is hereby dismissed."*

3. D.S., having disputed the Dismissal Order by the filing of an appeal on July 30, 2009, the Director of the Division, pursuant to Section 110 of the *Code*, referred the matter to the Manitoba Labour Board (the "Board").

4. On August 28, 2009, the Board, given the general nature of the appeal filed by D.S., requested that D.S. provide the detailed breakdown of the wages and/or relief that he was claiming from Polar.

5. On November 9, 2009, D.S. provided details of the claims he was making against Polar arising out of his alleged "wrongful dismissal" (without just cause) by Polar. D.S.'s claim requested, *inter alia*, that the Board award him a fair severance package honoring what he claimed was twelve years of service with Polar; paid employment counseling services, as detailed in the particulars; vacation pay for his final year of service; and compensation for wrongful dismissal and hardship in the approximate amount of $45,000.00.

6. On November 17, 2009, in response to the particulars received, the Board advised D.S., with a copy to Polar, as follows:

> *"Please be advised that the first issue that the Board will be required to address is whether or not you were an independent contractor or an employee of Polar Window of Canada Ltd. The Employment Standards Division determined that you were an independent contractor and therefore could not advance any claim as an employee under The Employment Standards Code. In order to advance a claim for wages, vacation wages, general holiday wages or wages in lieu of notice of termination of employment, you will be required to provide the Board with evidence to satisfy it that you were an "employee" of Polar Window of Canada Ltd., at all material times and that the Employment Standards Division erred in finding that you were an independent contractor.*

> *In the event that you establish that you were an "employee' of Polar Window of Canada Ltd., then you are limited to the allowable claims under The Employment Standards Code. In this regard, please be advised that the Board, as a statutory tribunal, can only deal with your claim for wages, general holiday wages, vacation wages, and wages in lieu of notice in accordance with the specific provisions of The Employment Standards Code. In respect of any claim for wages in lieu of notice, an "employee" is limited to the amounts outlined in Section 61(2) of The Employment Standards Code depending on one's length of service (maximum of 8 weeks) and only if none of the exceptions outlined in Section 62(1) apply. The Board does not have the statutory jurisdiction to entertain the other claims you advanced in your letter of November 9, 2009. Those claims would have to be pursued in another forum."*

7. For various reasons, the hearings scheduled in this matter for December 1, 2009, January 14, and 29, 2010 were adjourned.

8. On April 13, and June 16, 2010, the Board conducted a hearing at which time the parties appeared before the Board and presented evidence and argument, both parties being represented by Counsel.

9. At the outset of the hearing, counsel for the parties confirmed that the hearing should be bifurcated in that the Board should first determine whether an employer/employee relationship existed between D.S. and Polar and, depending on the Board's decision on this question, any issue respecting wage claims and quantum could be determined later, if necessary. Counsel agreed that if the Board determined that D.S. was an "independent contractor" then such a finding would be dispositive of the matter before the Board (subject to any appeal) and it would not be necessary for the Board to continue with the hearing on issues relating to quantum. Counsel also agreed that D.S., being the appellant, would proceed to call his case first.

10. Following the conclusion of the hearing on June 16, 2010, another panel of the Board issued a decision on June 23, 2010 in *Knights of Columbus and C.B.* (Case No. 397/08/ESC) ("*Knights*") in which the Board determined that an employer/employee relationship did not exist between the Knights of Columbus and C.B. and that, as a consequence of that finding, C.B.'s claim for wages pursuant to the *Code* was dismissed. In its Reasons in the *Knights case*, the Board extensively reviewed the jurisprudence and legal tests which are to be applied when determining whether an individual is an "employee" (and thereby governed by the *Code*) or is an "independent contractor" (meaning that the individual cannot make any claim under the *Code*). In the *Knights case*, the Board had to determine whether or not C.B.'s appointment as a "general agent" to sell insurance products on behalf of the Knights of Columbus

constituted an employment or independent contractor relationship. Given the relevance of the *Knights case* and the fact that counsel could not have been aware of the *Knights case*, the Board, by letter dated July 5, 2010, forwarded a copy of the *Knights case* to counsel, affording them the opportunity to file written submissions on the relevance/applicability of the *Knights case*, with such submissions to be received by the Board by July 14, 2010. The parties were afforded the opportunity to file replies to the other party's initial submissions by July 23, 2010.

11. On July 14, 2010 counsel for both parties filed their written submissions on the *Knights case*. On July 22, 2010, counsel advised the Board that they would not be filing written replies and were content to have the Board rely on their initial submissions.

12. The Board, following consideration of material filed, evidence and argument presented, determined that the following material facts are relevant to the disposition of this appeal:

    a) Polar manufactures and installs window and door products for its customers;

    b) Polar has two manufacturing facilities in Winnipeg, Manitoba. The manufacturing and installation of products, as well as related office/ support functions, are performed by employees of Polar;

    c) Polar's products are sold to customers by sales agents, fourteen of whom are located in Winnipeg. D.S. was one of these sales agents;

    d) D.S. commenced his relationship with Polar in 1996. For the first six weeks, he was a "trainee" during which time he underwent a standard training and/or familiarization regime with Polar and during which period he was paid a salary as an employee;

    e) Following this initial training period, D.S. became a "sales agent" of Polar and he remained in this capacity until Polar advised him, in writing, on or about November 18, 2008, that it was "…ending our agency relationship with you effective December 17, 2008" (Ex. 13);

    f) Only sales agents sell Polar products to customers. The critical question in this appeal relates to the status of D.S. following the completion of his initial six week period as an "employee-trainee", to the time the relationship was terminated by Polar in November of 2008, a period of some twelve years. The summary of the material facts which follow reflect the essential characteristics of D.S.'s relationship with Polar during this period;

    g) There was never a written contract between Polar and D.S. defining the nature of the relationship;

h) Prior to 2007 or 2008, D.S. sold Polar products to customers under the business name "Schick Enterprises". In 2007 or 2008, D.S. incorporated SD4 Corporation and sold Polar products to customers through this corporate entity;

i) D.S.'s sole source of remuneration (aside from some incentive payments) were the gross commissions which he received from Polar for sales he concluded with customers. D.S., like other sales agents, had the right to sell Polar products to a customer at a price he negotiated directly with the customer, provided that price fell between Polar's PAR price (Ex 9) and the list price (Ex 10). This "minimum-maximum" parameter was unilaterally set by Polar but, within this range, D.S. had the right to negotiate a price with the customer, without obtaining the prior approval of Polar. D.S. received 65% of the amount negotiated above the PAR price with 35% going to Polar. D.S. acknowledged that if he consummated a deal at PAR, which he was entitled to do, then he would receive no commission on that sale;

j) As to the manner in which D.S. functioned:

- he was free to set his own hours and appointments with customers;
- he was not required to report to work on a daily basis to any specific location nor was he required to advise Polar on a daily basis as to his activities;
- he was not required to submit reports or other documents to Polar at regular intervals;
- he was able to determine his own vacation schedule, without obtaining prior approval of Polar, and if he took time off for vacation he was not paid vacation pay which he acknowledged, on cross examination, would represent a loss of (potential) earnings to him because no sales would be concluded;
- he received no general holiday pay;
- he never filed any complaint with Employment Standards regarding any aspect of his compensation scheme over these 12 years;
- he was subject to certain "chargebacks" by Polar on account of such matters as a faulty quotation or a missed component and this would negatively affect his income (see Exs. 17 to 21);
- he was free to hire and did hire his own employees and was responsible for paying them;

- he, like other sales agents, was entitled to sell other product lines so long as these products were not competitive with Polar's direct product line;

- unlike the employees directly employed in the manufacturing and installation of Polar products, D.S. was responsible for arranging his own benefit plans (*eg* sick leave, life insurance, disability). During any period of time when he was sick, D.S. would not receive any income, but was still responsible for any ongoing expenses he incurred. During one absence on account of illness, in 2007, D.S. negotiated, on his own, an arrangement with another agent, under which the other agent would receive fifty percent of the commissions which that agent negotiated with D.S.'s past customers;

- when negotiating a sale with a customer, D.S. would use Polar's standard form contract (Ex 6) and Polar's standard Quotation form (Ex 7). D.S. acknowledged that, except for Polar's disapproval of some contracts D.S. negotiated in Thompson, Manitoba (details unnecessary to recite here), Polar never disapproved of a contract negotiated by him;

- D.S. was responsible, through chargebacks on his gross income, for credit card charges when that method of payment was used by a customer;

- D.S. was responsible for remitting GST to the Government on all sales he completed;

- D.S. was directly responsible for all expenses related to his carrying on as a sales agent. These expenses included his own home office from which he operated; the operation of his own vehicle; providing and maintaining his own computer and cell phone; and paying employees whom he hired to assist him. All of these expenses were taken as business deductions through either D.S. Enterprises or SD4 Corporation. D.S. himself was paid a salary by SD4 Corporation. Polar did not reimburse D.S. for any of these expenses nor did he have to account to Polar for any of them;

- under arrangements with Polar, each agent maintained control over his/her customer base. From this perspective, repeat customers were referred to the initial selling agent to complete the sale or to, at least, be given the opportunity to conclude a sale;

- in respect of mall shows and home shows arranged by Polar, the Board accepts that while sales agents, including D.S., were encouraged to attend such functions, participation in and attendance at such events was not mandatory. If a sales agent actually signed up for a mall or trade show then his/her attendance was expected but if, for some reason, an agent could not attend, then he/she could make arrangements with another sales agent to attend in his/her place.

Further, each sales agent was billed by Polar for that sales agent's proportionate share of the mall expenses incurred by Polar, (borne overall 65% by Polar and 35% by the agents who signed up to participate), based on the number of shifts or tours of duty for which the individual sales agent signed up. See, for example, the invoice sent to Schick Enterprises in 2008 for its share of a mall show (Ex 12). The Board accepts that participation in such events was for the mutual benefit of both Polar and the sales agents;

- Sales agents had a proprietary right to their customers ("book of business") and, had the right to sell their "book of business" (ie: customer lists) to a third party. If an agent sold his agency to an existing Polar agent then no advance notice had to be given to Polar nor was Polar's prior approval required. If an agent sold to a new (unfamiliar) third party then Polar had to be notified of the identity of the purchaser in order to enable Polar to be satisfied that it was "…comfortable with the third party who would be selling our product" (evid of W.M. on behalf of Polar). Aside from this limitation, a sales agent was free to sell his "book of business" at and for a price which the agent negotiated, without any involvement from Polar;

- After his relationship with Polar terminated, D.S., as the sole owner of SD4 Corporation, sold SD4's client list, including "…any further business dealings on a continual basis" and "…any prior commission in SD4's name the said owner shall retain" to two existing Polar agents for an agreed upon purchase price which included GST. (Ex 14). D.S. acknowledged that no portion of this sale price had to be, nor was it, shared with Polar; that Polar was not involved in the negotiations; and that Polar was not a signatory to the sales agreement (Ex. 14). Polar had to be notified of the fact of the sale after the fact, so that Polar could adjust its records;

- That the right of D.S. to sell his book of business was not an isolated event was confirmed by the evidence of "L", a former sales agent of Polar, who confirmed, that, after his relationship with Polar was terminated in 2010, L sold one half of his "customer client list" to each of two existing agents (Ex 16) and that he consummated this sale on his own;

- Agents are not assigned to a specific geographic territory;

- D.S. was not subject to a "non-competition" agreement with Polar and the evidence is that an attempt by Polar to negotiate a post-relationship restrictive covenant was rejected by the sales agents. No such restriction, in fact, exists;

- While agents were encouraged to attend weekly sales meetings, the Board accepts the evidence of W.M. that attendance at these meetings was not

mandatory in that a failure to attend the sales meetings was never the basis for Polar terminating the agency relationship with an agent;

- Annual performance meetings were held by W.M. with the sales agents, which the Board accepts focused on a review of the business of the agency and a discussion of how sales could be improved;

- Although there was some conflicting evidence over the document entitled "Agency Agreement" (Ex 3) and its purpose, D.S. acknowledged that Ex 3 was not presented to him as a contract to be signed and that Polar never used Ex 3 "…as a tool" nor did Polar assert that Ex 3 represented the terms and conditions agreed to between D.S. and Polar;

- Until the relationship was terminated by Polar in 2008, D.S. never challenged his status as an independent contractor in respect of such matters as claiming business expenses and his treatment for tax purposes.

13. In addressing the question of whether D.S. was an "employee" or an "independent contractor", the Board had regard to and applied the following principles and/or criteria:

(a) In *671122 Ontario Ltd. v Sagaz Industries Canada Inc* [2001] 2 S.C.R. 983 *["Sagaz"]*, the Supreme Court of Canada, in a unanimous judgment written by Justice Major, confirmed that there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Rather, all relevant factors touching on the nature of the relationship in dispute must be examined in their totality. At paragraphs 47 and 48 of *Sagaz*, the Supreme Court stated:

> "The central question is whether the person who has been engaged to perform the services is performing them as a <u>person in business on his own account</u>. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. The relative weight of each will depend on the particular facts of the case." (Emphasis added)

(b) In *Knights*, the Board extensively reviewed the jurisprudence in this area, including many of the cases cited by counsel in this case, and, after citing *Sagaz*,

the Board stated that consideration must be given to a number of factors including:

"1. the level of control over the individual's activities;
2. the provision by the individual of his or her own equipment;
3. the hiring by the individual of his or her own helpers;
4. the degree of financial risk taken by the individual;
5. the individual's degree of responsibility for investment and management;
6. the individual's opportunity for profit or risk of loss;
7. other factors." (p. 34)

The "…other factors" in *Knights* included

(i) *exclusivity*, because, in *Knights,* C.D. was contractually bound to devote his full time and attention to the services required under the written agreement with the Knights of Columbus and he was prohibited from engaging in any other business or employment. The Board found that this was the most significant fact favoring "employee" status (although not determinative, in and of itself, at the end of the day). *The Board notes that no such contractual provision existed between Polar and D.S.;*

(ii) the characterization of the relationship in the written contract in *Knights* where it was agreed that nothing in the contract was to be construed to create the relationship of employer and employee. *No such covenant existed between D.S. and Polar;*

(iii) the provision of health and welfare benefits to C.D. by the Knights of Columbus, a factor which favored employment status. *Here, no such benefits were provided by Polar to D.S.;*

(iv) the fact that C.D. filed his tax returns over the years on the basis he was an independent contractor rather than an employee and claimed business expenses on that basis. *The same is true of D.S. in this case.*

The Board expressly adopts the list of factors used in *Knights* and has assessed the facts of the Polar-D.S. relationship in accordance with these factors.

c) After referring to Mr. Justice Twaddle's definition of "control" in *Imperial Taxi Brandon (1983) Ltd.* v. *Hutchinson* (1987) 59 Man R (2^{nd}) 81 (Man CA) and the remarks of the Federal Court of Appeal in *City Water International Inc.* v. *Minister of National Revenue* 2006 FCA350 at para 18, the Board, in *Knights*, stated at page 37 of *Knights*:

> *"…it is apparent that courts accept that one's status as an independent contractor is not affected simply because he or she is not entirely free from restraint. More often than not, independent contractors work within well-defined guidelines or frameworks established by the person or organization by whom they are retained. Furthermore, the fact that an individual agrees to work within those guidelines and to accept another's superintendence over the result and quality of the work product does not necessarily indicate that the individual is controlled to the degree that an employee and employer relationship exists. Rather, control in this context means the right to say when the work will be done and how the individual must do it. If the individual whose status is at issue can determine when and how the activity will be carried out, then the control factor points towards the individual being an independent contractor rather than an employee."*

The Board confirms that the foregoing is the proper perspective to be applied when determining the question of whether Polar exercised "control" over D.S. for the purpose of determining his status.

d) While the fact that D.S. held himself out as an independent contractor for many years for income tax purposes and claimed substantial business deductions is not in and of itself, determinative of the issue, it is nevertheless a relevant factor where the other factors point to the factual conclusion (as here) that D.S. was an independent contractor. These facts are corrorobative of the manner in which Polar and D.S. viewed the relationship, from an objective perspective, over a period of some twleve years following the initial six weeks "trainee/employee" period. Further, D.S. was not subject, during this entire period, to a written agreement with Polar which Polar had insisted must be signed at the outset of the relationship and which defined the relationship as being that of an independent contractor. So, in the absence of a clause defining the *de jure* nature of the relationship, the actual conduct of the parties was more consistent with that of an independent contractor and not an employer-employee relationship.

e) A critical and distinguishing difference between *Knights* and the present case is that, in *Knights*, C.D. did not own his "book of business" or customer list (these remained the property of the Knights of Columbus at all times) and upon termination of that relationship, C.D. was required to return to the Knights "…all books, files, documents, status cards, membership lists, computer hardware, computer software and records of any kind provided to the General Agent" (see p. 7 of *Knights*) whereas, in the instant case, D.S. owned his "book of business" or customer list(s) and was entitled to and, in fact, did sell his business to a third party for valuable consideration, without the prior approval of Polar, upon the

termination of the relationship. Further, D.S. could have expanded his book of business by purchasing all or part of another selling agent's book of business, thereby expanding his chance of profit through his own entrepreneurial skills and business judgment. In the Board's view, this proprietary ownership of the "book of business" is a critical factor supporting the conclusion that D.S. was an independent contractor.

14. The Board, in the context of the materials facts recited in Paragraph 12 and the principles and/or criteria recited in Paragraph 13, **HAS DETERMINED**:

(a) D.S. was not an employee of Polar but, rather, at all material times, was an independent contractor;

(b) In reaching the forgoing conclusion, all of the relevant factors point to the fact that D.S. was a person in business on his own account where his own actions and decisions determined his chance of profit and/or risk of loss. Further, while there was an element of "control" on the part of Polar concerning aspects of the agency relationship, the Board is satisfied that any such control was for the purpose of monitoring the overall success of the agency rather than controlling when and how D.S. carried out any particular tasks for Polar. Within this framework, D.S. was free to develop his own business, control his own expenses, operate his business when he saw fit, hire his own employees, and, at the end of the day, sell his business and retain the sale proceeds for himself;

(c) The Board does not accept D.S.`s alternative submission that he was a "dependent contractor" and that the definition of "employee" in the *Code*, includes "dependent contractor" status. Having found, as a matter of fact, that D.S. was an "independent contractor", Section 2(3) of the *Code* applies and this finding is dispositive of the issue. However, the Board also notes that the term "dependent contractor" is not defined in the *Code* nor is it expressly included in the definition of "employee" in Section 1 of the *Code*. The Ontario authorities referred to by D.S. [namely, *Don Moseley-Williams and Hansler Industries Ltd* (November 6, 2008, Court File No. 04-CV-266146CMI ["*Hansler*"] and *Mckee v. Reed`s Heritage Homes Ltd* [*2009*] *ONCA916* ["*McKee*"]] both acknowledged that the case law does recognize that there is an intermediate category between employee status and independent contractor status, particular in the case of commissioned sales agents who are economically dependent on a "principal, but the category of "dependent contractor" is utilized, as it was in *Hansler* and *McKee*, to determine whether reasonable notice of termination, at common law, had to be given in order to terminate the relationship. The Court, in *McKee*, also drew support for its conclusion from the statutory definition of "dependent contractor" in the *Labour Relations Act S.O.* 1995, c.1., Sch. A, S.1(1). No such statutory definition is found in Manitoba legislation. The *Code* only applies to "employees" and the

Board is obliged to find that an "employment" status exists in order for it to properly assume jurisdiction. The concept of "dependent contractor", for the purpose of finding an implied term, at common law, that reasonable notice of termination must be given has no application to the Board`s jurisdiction under the *Code* when it is called upon to determine whether one or more of the *Code*`s provisions establishing minimum statutory employment obligations has been breached in a given case.

(d) In the result, the Board is satisfied:

a) that an employer-employee relationship did not exist between Polar and D.S.; and

b) consequently, D.S.'s claim and appeal against the Dismissal Order of the Division is dismissed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the claim of D.S.

DATED at **WINNIPEG, Manitoba** this 30th day of September, 2010, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

W.D. Hamilton, Chairperson

"Original signed by"

B. Black, Board Member

"*Original signed by"*

J. Malanowich, Board Member

WDH/dmm/rb-s