Manitoba

Manitoba Labour Board
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Case No. 11/10/ESC
File No. 97076

IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE

BETWEEN:

KREVCO LIFESTYLES INC.,

Employer,

- and -

G.H.,

Employee.

BEFORE: W. D. Hamilton, Chairperson

J. Malanowich, Board Member

M. Wyshynski, Board Member

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

SUBSTANTIVE ORDER

WHEREAS:

1. On November 4, 2009, pursuant to Section 96 (1) of the *Employment Standards Code, (*the *"Code")* the Director of the Employment Standards Division of the Department of Labour and Immigration, ordered that the amount of Three Thousand Two Hundred Ninety Three Dollars and Eighty Three Cents ($3,293.83) 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 payment of the administrative fee in the amount of Three Hundred Twenty Nine Dollars and Thirty Eight Cents ($329.38) for a total owing of Three Thousand Six Hundred Twenty Three Dollars and Twenty One Cents ($3,623.21). [the "Order"]

2. The Order determined that the Employee was owed overtime for the period May 17, 2007 to November 18, 2007 in the gross amount of $4,331.37 and that after receiving a credit of

$1,037.54 for an overpayment of vacation pay the net amount owing to the Employee was $3,293.83.

3. As the Employee disputed the Order, the matter was referred to the Board by the Director of the Division pursuant to Section 110 of the *Code*.

4. The Employer did not appeal the Order.

5. In general terms, the Employee's appeal (Exhibit 1) relates to his contentions that the Order, as reflected in the Statement of Adjustment (Exhibit 2) and accompanying Spreadsheet (Exhibit 3), was in error because it did not accurately reflect the amount of overtime worked by the Employee; it failed to award him 30 days wages in lieu of notice to which the Employee claimed he was entitled under a written contract of employment with the Employer and, finally, the Order did not award him a pro-rata share of a "bonus" incentive to which he was entitled under the written contract of employment with the Employer. The total amount claimed in Exhibit 1 was $25,581.33 (revised at the conclusion of the hearing). In the result, the Employee requested that the Board vary the Order to reflect the foregoing claims.

6. On May 18 and May 19, 2010, the Board conducted a hearing at which time both parties appeared before the Board and presented evidence and argument, the Employee being represented by Counsel.

7. The Board has determined that the issues raised in this appeal must take into account the following material facts and/or principles which emerged from the evidence, namely;

   (a) By an Asset Purchase Agreement (Exhibit 9) effective as of March 16, 2007, the Employer purchased the assets and property of Diamond Waterworks Inc. ("Diamond"), which had carried on business in Brandon, Manitoba;

   (b) The principal shareholders of Diamond were the Employee (20%), his brother B.H. (50%), and W.L. (30%). The ownership interest of each shareholder was the subject of evidence of the hearing;

   (c) It was a term of the Diamond Asset Purchase Agreement that the Employee, B.H. and W.L. would each enter into an employment agreement with the Employer. The defined purpose of these agreements was to effectively transfer the goodwill of Diamond's business by having the Employee (and the other two shareholders of Diamond) continue in an employment capacity and to use his/their best efforts to introduce the Employer to the customers, suppliers and industry contacts of the purchased business;

   (d) The employment agreement between the Employee and the Employer (Exhibit 4) contained the following terms and conditions:

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i) The initial term of the Agreement was for a fixed term of twelve (12) months commencing March 16, 2007 and terminating on March 15, 2008, subject to an extension on terms mutually agreeable to the parties *(not relevant here)* or until one of the parties gave thirty (30) days written notice to terminate [Article 2.1 of the Agreement].

ii) Articles 2.2 and 2.3 of the Agreement stated in part as follows:

2.2- On or before the last day of each month, the Employer shall pay to the Employee an amount, calculated for the previous month in accordance with the remuneration formula as follows:

a) The Position of Service Manager (Brandon Division) with a Salary of $43,000,00 per year;

b) Car Allowance is re-imbursed at 40 cents per KM when using personal vehicles, for Business related reasons and a Log must be kept;

c) Paid holidays for three (3) weeks on advance notice and approval of Employer;

d) Re-imbursement of all <u>approved</u> business related expenses upon submission of a expense report;

e) A share of the yearly team/store bonus being one (1) percent of gross sales on to the first $2 million, and then (4) percent on gross sales above $2 million. The amount of team/store bonus will be distributed to Brandon employees prorata quarterly (based on a percentage of annual of sales) in accordance with an allocation formula as determined by C.G. and/or the senior management of Krevco Lifestyles Inc. with input from B.H.;

f) Company Health and Dental benefits will be offered to all Brandon Employees of Krevco Lifestyles Inc. in accordance with the benefits offered to all Winnipeg Employees on a shared cost basis between the Employee & Employer. Subject to any applicable policy limitations with the exception of the waiting period for admission to program which will be waived for the undersigned. Benefit costs sharing of 50%/50% between Employer and Employee shall apply.

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2.3 The Employee agrees that he shall be present in at the location included the definition of the Purchased Business or out on service and or sales related calls and available to provide consulting expertise 7.5 hours per day. The Employee will work as required during and after store hours, in his management function, except for when the Employee is ill or disabled to a maximum of one (1) sick day per month before a per diem amount is deducted on a per diem basis in portion to the sum received in 2.4 hereof. The Employee agrees to coordinate extended periods away from the office with the upper management of Employer, as required." (Emphasis Added)

iii) Article 3.2 of the Agreement stated, as follows:

This Agreement is conditional upon the Employee continuing to meet the requirements of the Asset Purchase Agreement and the Non CDS Agreement. Notwithstanding these Agreements, and anything herein contained the Employer may terminate this Agreement without notice upon the happening of any one or more of the following:

a) the Employee materially breaches any provision of this Agreement or any material policy, practice or procedure of the Employer;

b) the death of the Employee;

c) the incapacity of the Employee by reason of illness or mental or physical disability, whereby the Employee has been unable or unwilling to perform his duties under this Agreement for an aggregate of one (1) month during any period of the Term of this Agreement;

d) The Employer having to terminate the Employee's engagement hereunder *for just cause, which term shall include, without limitation,* drunkenness, drug addiction, dishonesty or the conviction of the Employee of an offence under a criminal statute;

e) In the event that this Agreement is terminated as provided in this paragraph, the Employee shall receive from the Employer such compensation as he shall be entitled to up to the time of such termination, but shall not be entitled to any further compensation whatsoever"; (Emphasis added)

e) In response to an inquiry by the Board, the parties agreed that the Agreement could be terminated by either party, at any time during its term, on thirty (30) days notice unless one of the conditions in sub-clauses (a) to (d) of Article 3.2 entitled the Employer to terminate the Agreement without notice;

f) The Employee commenced employment under the Agreement on or about March 16, 2007 and remained in the employ of the Employer until on or about November 19, 2007 when his employment was terminated by the Employer without notice for breaching his obligations under Article 3.2 of the Agreement;

g) The Board accepts that the Employee kept track of his daily hours in a diary (Exhibit 5) the contents of which were the subject of scrutiny on the direct and cross-examinations of both the Employee and W.L. Until on or about October 16, 2007, the Employee submitted his hours on the Employer's payroll forms, (see Exhibits 6 and 7) based on the hours recorded in Exhibit 5. During this period, with some minor exceptions, he was not paid overtime notwithstanding the fact that, for a majority of the days, his own recorded hours of work exceeded 7.5 hours per day;

h) On October 16, 2007, the Employer received an email from W.L., who, by that time, was the Store Manager in Brandon. This email was sent on the instructions of R.M., the Chief Financial Officer of the Employer and it stated:

> "G.H., there is no Banked hours, your schedule is 8-5 1 hr lunch, if you work through your lunch great but there is no banked time, under your contract extra hours are greatly appreciated but you are not required to work them, where the rewards come in under the 1% of Total sales in which Head Office will decide upon the distribution of this in which you will receive a percentage. We might move your schedule to working 2 Saturdays and 2 days off through the week each month. For the time being Mon- Friday."

i) B.H., who had been hired under an employment agreement almost identical to the Agreement, had his employment terminated at the end of August, 2007 by the Employer whereupon the Employee was required to report to W.L., who assumed the role of Store Manager at that time;

j) At the time B.H.'s employment was terminated by the Employer, the Board accepts that, due to ongoing disputes regarding various commercial matters arising out of the Asset Purchase Agreement, the Employer advised B.H. that he was not allowed on the Employer's Brandon premises and further, the Board finds that this fact was made known to other Brandon employees, including the Employee, by W.L. at a staff meeting;

k) The Board is satisfied that the Employee released certain Employer files to B.H. in November, of 2007. In this regard, the Employee allowed B.H. onto the Brandon site to review certain files after normal business hours, when other employees were not present. There is no dispute that B.H. removed these files from the Brandon office and took them home. On cross-examination, the Employee admitted that he never sought approval from the Employer or any of its management representatives including W.L., to allow B.H. to access these documents nor did he ever advise the Employer of the request of B.H. to access these documents. The Employee admitted on cross-examination that "… in hindsight, I should have".
The Employee also admitted that he notified B.H. in advance when it was convenient for the latter to come to the Brandon office at a time when W.L. would not be present at the store (see Exhibit 10). The Employee's evidence that arranging such a meeting between he and B.H. after hours was done as a "…. convenience" was not, in the Board's opinion, a satisfactory or reasonable explanation. All parties agreed that the files taken from the Brandon office by B.H. were the property of the Employer under the Asset Purchase Agreement;

l) Based on the factual findings in sub-paragraph (k), the Board is satisfied that the Employer has met its onus to establish that the Employee was in breach of Articles 3.2(a) and (d) of the Agreement and was therefore not entitled to 30 days notice of termination from the Employer;

m) as to the "bonus" referred to in Article 2.3(e) of the Agreement, the Income Statement for the Brandon Division covering the fiscal year of the Employer, i.e., December 1, 2006 to November 30, 2007 (Exhibit 13) established that, as at November 30, 2007, the total gross sales for the Brandon Division was $1,536,676.78. The Board accepts the evidence of the Employer that the central administrative costs of the Employer for any fiscal year (see Exhibit 17) are charged back to each division of the Employer, of which the Brandon site is one, based on that Division's contribution to total revenue for the fiscal year in question. After allocating the appropriate percentage of central administration costs to the Brandon Division [i.e. the Employer said this amounted to $234,000.00 based on 11.77% x $2,038,727.64-see Exhibit 17] the net income shown on Exhibit 13 for the Brandon Division as at November 30, 2007, in the amount of $20,298.04 become, according to the Employer, a loss, meaning that the Brandon Division had no net income and/or profit for the fiscal year December 1, 2006 to November 30, 2007.

n) The Board accepts the Employer's evidence (through R.M.) that no bonus was paid to any Brandon employee for the fiscal year ending November 30, 2007 because the Employer decided that bonuses would not be paid unless the Brandon Division was profitable. Further, the Employer's position is that other

Brandon employees beyond the Employee, B.H. and W.L. [all of whom had the equivalent of Article 2.2(e) of the Agreement in their individual employment agreements] were also entitled to share in the "yearly team/store bonus", based on an allocation formula as determined by senior management [see Article 2.2 (e) of the Agreement]. R.M. testified that the senior management team of the Employer, of which she is a member, decided that bonuses would only be paid if the Brandon Division was profitable and she also testified that, if any bonuses were to be paid, all Brandon employees were potentially entitled to participate in the distribution because a number of former Diamond employees were kept on by the Employer (see the Employee List under Schedule 8.2 of the Asset Purchase Agreement.).

8. In the written submission filed by counsel for the Employee at the conclusion of the hearing, the Employee's claims were distilled as follows:

i) Overtime for the period May 19, 2007 to November 19, 2007 (after crediting the sum of $1,951.00 received by the Employee from the Employer through Employment Standards in September of 2008)	$ 7,170.68
ii) 1/3 share of the total bonus payable -i.e.-1 % of gross sales of $1,536,76.78, based on the rationale/assumption that each of the Employees, B.H. and W.L. should or would have shared any bonus equally	$ 5,122.25
iii) 30 days pay in lieu of notice	$ 3,583.33
Total Claim	$15,876.26
Less Amount Awarded in Order	$ 3,293.83
Net Claim	$12,582.43

9. When assessing the Employee's claims, the Board applied the following principles:

a) When calculating entitlement to overtime at the rate of time and one half, the proper template is to use 7.5 hours per day (37.5 hours per week) as the standard hours of work because, under the Agreement, the Employee was contractually entitled to a term or condition of employment which exceeded the minimum standards prescribed by the *Code* [see Sections 3(2) and 4(2) of the *Code*];

b) Similarly, the terms of the Agreement governed in respect of vacation pay (6% or 3 weeks) and notice of termination (i.e. 30 days) notwithstanding the fact that these benefits exceeded the minimum standards which would otherwise be applicable under the *Code;*

c) As to any "bonus" entitlement under Article 2.2(e) of the Agreement, the Board is satisfied that, in accordance with the plain and ordinary meaning to be given to the words used in this Article, the phrase "gross sales" cannot be equated to the terms "net income"; "net profit" or " profitability". The latter terms are distinct concepts in the commercial and accounting sense because "gross sales" is a measurable amount and is not affected by costs or expenses. However, recognizing this difference in meaning does not, in and of itself, answer the Employee's claim for an equal pro-rata share (1/3) of a bonus based on "gross sales" because the other conditions in Article 2.2(e) affecting entitlement to part of a bonus do not point to this conclusion (see Para 10).

10. The Board, following consideration of material filed, evidence and argument presented and in the context of the findings and principles contained in paragraphs 7, 8, and 9, made the following determinations:

Overtime Wages:

a) The basis for determining the Employee's entitlement to overtime is to be based on daily hours of 7.5 and weekly hours of 37.5, which is consistent with Article 2.3 of the Agreement (Exhibit 4) where the Employee's daily hours are defined as 7.5 hours per day;

b) The Board is satisfied, on the balance of probabilities, that the Employee's record of hours contained in Exhibit 5 is substantially correct and shall be the basis for calculating the Employee's entitlement to overtime for the period May 22, 2007 to October 16, 2007;

c) As to the Employee's claim for overtime hours after October 16, 2007, the Board is satisfied that this claim is to be disallowed because, on that date, the Employee received a written directive from management clarifying his hours of work, including a directive not to work extra hours beyond the parameters of 8:00 a.m. to 5:00 p.m., Monday to Friday, with one hour for lunch (Exhibit 8). The Board finds that, from and after October 16, 2007, there was no authorization, express or implied, for the Employee to work overtime. Therefore, the hours of work for the Employee have been adjusted to reflect 7.5 hours per day or the hours actually worked by the Employee for the period October 17, 2007 to November 19, 2007, whichever hours are the lesser for the days falling within that period;

d) In the result, the Employee is entitled to receive Seven Thousand Three Hundred Ninety Nine Dollars and Thirteen Cents ($7,399.13), as reflected on the attached Statement of Adjustment.

Vacation Wages:

a) The Employee is entitled to receive vacation wages for the period May 22, 2007 to November 19, 2007, in the amount of One Thousand One Hundred Ninety Six Dollars and Sixty Six Cents ($1,196.66);

b) The Employee acknowledged, through Counsel, that he was paid vacation wages, as follows:

Week of July 21, 2007	$826.92
Week of August 4, 2007	$826.92
Paid in September, 2008 as vacation pay through Employment Standards Division	$616.08
TOTAL VACATION WAGES PAID:	$2,269.92

c) The Employee was overpaid vacation wages in the amount of One Thousand Seventy Three Dollars and Twenty Six Cents ($1,073.26), as reflected on the attached Statement of Adjustment.

Wages in Lieu of Notice:

a) The claim of the Employee for Thirty (30) days in lieu of notice is disallowed:

b) On the credible evidence before the Board, the Board is satisfied, on the balance of probabilities and for the reasons recited in Paragraphs 7 (k) and (l) *supra,* that the Employee breached Article 3.2 of the Agreement, thereby allowing the Employer to terminate the Agreement without notice;

c) In the result, the Employee is not entitled to receive wages in lieu of notice and this portion of his claim is dismissed.

Bonus Wages:

a) the Board is not satisfied, on the evidence before it, that the Employee has established an entitlement to any pro-rata share of the bonus referred to in Article 2.2 of the Agreement and therefore dismisses this claim;

b) the Board to allow the Employee's claim for Five Thousand One Hundred Twenty Two Dollars and Twenty Five Cents ($5,122.25) as a bonus, based on the suggested one third allocation of 1% of the gross sales, as recorded in Exhibit 17, would call for speculative judgments to be made by the Board regarding the meaning and scope of the terms "...yearly team/store bonus" and the phrase "…distributed to Brandon employees" and would require the Board to abrogate to itself the express discretion reserved to "…C.G. and/or the senior management" of the Employer, with input from B.H. and determine the " allocation formula" and the criteria relating thereto. The evidence before the Board is that no employee received any bonus for the 2007, even on a quarterly basis, and that other Brandon employees might be entitled to share in a bonus (if paid). Further, any "allocation formula" developed by those persons given this responsibility under Article 2.2(e) does not require that any allocation of the bonus must be made equally among those employees who may be entitled to share in the "team/store" bonus. Even if the Board focused only on the Employees, B.H. and W.L., the fact is that each of their former shareholdings in Diamond differed and, on the evidence before the Board, their individual responsibilities, length of actual employment, and individual circumstances were different and for the Board to decide on a 1/3-1/3-1/3 sharing (as the Employee's claim invited the Board to find) would constitute a departure from the criteria in Article 2.2.(e) of the Agreement and require the Board to exercise the discretion specifically vested in others by the parties to the Agreement;

c) In the result, the Employee has not satisfied the Board that he is entitled to receive bonus wages and this portion of his claim is dismissed.

Total:

The total amount owing to the Employee by the Employer is Six Thousand Three Hundred Twenty Five Dollars and Eighty Seven Cents ($6,325.87)

T H E R E F O R E

The Manitoba Labour Board **HEREBY ORDERS KREVCO LIFESTYLES INC.,** to pay to the Director of the Employment Standards Division of the Department of Labour and Immigration, forthwith:

WAGES:

The amount of Six Thousand Three Hundred Twenty Five Dollars and Eighty Seven Cents ($6,325.87) less statutory deductions, being overtime wages owing the Employee, G.H.

ADMINISTRATIVE FEE:

An Administrative Fee in the amount of Six Hundred Thirty Two Dollars and Fifty Nine Cents ($632.59) pursuant to Section 96(1) of *The Employment Standards Code.*

TOTAL:

The total amount being Six Thousand Nine Hundred Fifty Eight Dollars and Forty Six Cents ($6,958.46).

DATED at **WINNIPEG**, Manitoba, this 26th day of July, 2010, and signed on behalf of the Manitoba Labour Board by:

"Original signed by"

W. D. Hamilton, Chairperson

"Original signed by"

J. Malanowich, Board Member

"Original signed by"

M. Wyshynski, Board Member

CJ:tj/rb-s