Manitoba

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CASE NO. 64/10/ESC

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

BETWEEN:

HOUSTON RECRUITING SERVICES LTD.,

Employer,

- and –

M.G.,

Employee,

BEFORE: **W. Hamilton, Chairperson**

H. Miller, Board Member

L. Baturin, Board Member

APPERANCES: **K.B., Employer**

M.G., Employee

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

REASONS FOR DECISION

I. Background

This matter came before the Manitoba Labour Board (the "Board") by way of a referral from The Director of Employment Standards (the "Director"), pursuant to Section 110 of *The*

Employment Standards Code (the "*Code*"). The Employee, M.G., disputed a Dismissal Order issued by the Employment Standards Division (the "Division") on February 3, 2010, where his claim for one week's wages in lieu of notice was disallowed. In the brief reasons (Ex. 2) which accompanied the Dismissal Order, the Employment Standards Officer stated:

> "Houston Recruiting Services Ltd employed M.G. under an arrangement whereby M.G. would not have been owed notice of termination pursuant to Section 62(1) (e) of the Employment Standards Code. Therefore, your claim is hereby dismissed."

In his written statement of appeal to the Board (Ex. 1), the Employee asserted as follows:

> "This is my written request to have this matter referred to the Manitoba Labor Board for a hearing of appeal. The Labor Board investigator dismissed my claim for notice based on Section 62(1)(e) of the Employment Standards Act. It is well known that this section allows temporary staffing agencies to conduct business without incurring the obligation to pay notice. The reasons for this exception are obvious based on the nature of the business. However, this exemption is not intended to allow ANY employer to evade the responsibility for notice simply by the expedient of using a temporary help agency as its de facto payroll service. This is exactly what the MHA was doing in my case and even the investigator basically agreed with this analysis. In a phone conversation with me explaining his ruling, he made much of the use of the word "temporary" in the act, arguing that it could be held to apply to an assignment of virtually any duration. I will not go over the precise wording of the section at this point. Suffice it to say that if the investigator's argument is correct, then all an employer has to do is to have all new employees sign a waiver on the date of hiring agreeing that the work is "of a temporary nature" and that neither the employer or the employee is responsible for notice or severance pay. I have no doubt as to how the Labor Board would deal with any private employer who tried to pull this stunt. In fact this is not what the Act says. It is perfectly clear from the Act that when a job lasts for thirty days it is no longer "temporary" and at that point the employer becomes responsible for notice. The exception as given under section 62(1)(e) is clearly intended to cover only situations where a string of short-term, temporary assignments happens to exceed thirty days continuous duration. In that case the agency should not be liable for notice or severance pay. But to allow that

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> exemption to be upheld in this case would simply make a mockery of the Act."

On June 2, 2010, the Board conducted a hearing, at which time both parties appeared and presented evidence and argument. By Order dated June 15, 2010, the Board dismissed the claim of the Employee. In Paragraph 4 of the Order, the Board stated as follows:

> "The Board, following consideration of material filed, evidence and argument presented, is satisfied, on the balance of probabilities, that, in the factual circumstances prevailing in this case, the Employer does not owe the Employee notice or wages in lieu of notice on the basis that the employment relationship between the parties falls within the exemption covered by Section 62(1)(e) of *The Employment Standards Code*. Accordingly, the Employee's appeal is dismissed and the Order of the Employment Standards Division is upheld."

The Employee has requested written reasons for the Board's decision and the Board has issued these Reasons in response to that request.

II. <u>The Factual Context</u>

The Board heard evidence from the Employee and K.B., the President of the Employer, Houston Recruiting Services Ltd. ("Houston"). M.G. also called L.V. who testified under subpoena. At all material times, she was employed as an Administrative Assistant at Manitoba Housing's location at (address removed) in Winnipeg, Manitoba.

Arising out the testimony of all witnesses and the Exhibits filed, there is no dispute on many of the material facts. Prior to distilling the testimony of the witnesses on what may be regarded as more contentious points, these material facts can usefully be summarized as follows:

1. Houston has been in business for a number of years as both a temporary and permanent recruitment/placement service. K.B. has been the president of Houston for some 5 years.

2. One of Houston's clients is the Manitoba Housing Authority ("MHA"). According to K.B., Houston provides temporary staff to the MHA on an "as needed basis". K.B. said that the MHA will require temporary staff at various MHA's locations from time to time. There is no question that an individual hired by Houston and assigned to the MHA, may use and/or be encouraged to use the "temporary assignment" (a term disputed by the Employee) as a potential avenue to seek full-time employment with the MHA should the opportunity present itself and appropriate vacancies emerge at the MHA. K.B. did not dispute that number of individuals who have been referred to the MHA by Houston have been able, under MHA processes, to obtain full-time jobs with the MHA itself but that is not the primary focus of Houston's relationship with this client.

3. In June of 2009, the Employee submitted a resume to Houston seeking employment. In this resume, the Employee identified his work experience and qualifications.

4. The Employee was interviewed by a M.T. of Houston and, as the MHA needed a building superintendent or caretaker on a temporary basis, the Employee was hired by Houston for this assignment at the MHA. As the Employee put it on direct examination "…she (ie: M.T.) hired me to work as a building superintendent at MHA". At the time of this discussion, the Board accepts that M.T. told the Employee that this assignment may constitute "…a path to get on as an employee with MHA" (evid of the Employee). The Employee said he quit his current position and "…took this on as it was a good career move."

5. At the time he was hired by Houston, the Employee and M.T., on behalf of Houston, signed a form of waiver on June 17, 2009 (Ex. 3) which stated as follows:

> "Houston Recruiting Services Ltd. is a staffing service offering temporary employment assignments. Due to the nature of temporary employment, I understand that I will have complete discretion to elect to work or not to work when requested to do so, and that I may exercise this discretion without suffering any negative consequence or penalty. I further understand that in having this right, I am exempt from the notice of termination provisions laid out in s. 61(2) of the *Manitoba Employment Standards Code*. I fully understand the above information, and am signing voluntarily, as certified by my signature below."

6. The Employee was hired at the rate of $10.25 per hour on the understanding that his "assignment at the MHA" would be for 8 hours per day, 40 hours per week, Monday to Friday. According to the Employee he averaged approximately 38.7 hours per week for the time that he was with MHA.

7. Although the date when he started at MHA was somewhat unclear on the evidence, the Board accepts that the Employee first reported to work at MHA on Thursday, June 18 or Friday, June 19 of 2009.

8. The Employee underwent training for two days prior to his first day "…on the job". The Employee worked at the MHA facility on Smith Street. He said (and the Board accepts) that he was furnished with a pager, that he had an office, was provided with a list of daily rounds and, on occasion, called contractors in respect of purchase orders. He was furnished with a ring of keys to all suites in the facility.

9. For approximately four weeks, the Employee reported directly to the MHA location to which he was assigned. On July 8, 2009, the Employee injured his hand (a cut). According to the Employee, he continued to work, although slightly

.../6

impaired, for approximately one other week at the MHA location. The Employee was off work on July 9, 2009 due to his hand injury.

10. The parties agreed that the Employee's final day of work was Monday, July 20, 2009 and he was not paid any wages by Houston after that date.

11. There is no dispute that, for the time he was working, the Employee was paid $10.25 per hour by Houston via direct deposit to the Employee's bank account. From the wages paid to the employee, Houston deducted the normal statutory deductions, inclusive of Income Tax, EI and CPP. The required remissions were made by Houston to the appropriate governmental authorities.

12. There is no dispute that Houston issued a T4 to the Employee and a Record of Employment ("R.O.E.").

13. As to workers compensations claims, Houston processes WCB claims based on information furnished by a client (in this case, the MHA). During the week when the Employee suffered his hand injury (ie: on July 8, 2009) K.B. advised the Board (and the Board accepts) – no dispute being taken with these facts by the Employee – that, for the week of the injury, Houston paid the Employee for 32 hours. The Board accepts that Houston paid the Employee for 8 hours on the day of his hand injury and did not send any bill to MHA. The Employee was off work on July 9, 2009 and a WCB claim for this one day was accepted by Workers Compensation. This is confirmed by a letter of dated July 13, 2009 (Ex. 7) from Workers Compensation to Houston in respect of the identified claim number, the number, the date of injury being July 8, 2009 and the worker's name being "M.G.". In this letter to Houston, the WCB advises:

> "The above worker's claim has been accepted by the WCB. Wage loss benefits in the amount of $57.60 have been approved from July 9, 2009 to July 9, 2009.

Please note this is the final payment."

K.B. said that Workers Compensation payments of this nature are charged to Houston's account and will affect Houston's claims experience with the WCB.

14. On cross examination, K.B. said that the Employee would have been paid for all work performed up to July 20, 2009 on the next regular pay day. At that time, K.B. said that Houston would have prepared an ROE and would have issued a T4 if no other work was available for the Employee. K.B. said this all would have happened before August 10, 2009.

On his direct examination, the Employee said that he went on Workers Compensation for a period of some 3 weeks following July 20, 2009. The Employee said that his physician submitted forms to WCB and that he was on compensation for this period of time, receiving approximately $300.00 per week. This, he said, represented compensation for after tax income. They were not E.I. benefits. The Employee said that he then returned to MHA and met with L.V. on or about August 10, 2009, advising her that he had received clearance to return to work at MHA. According to the Employee, L.V. asked him "…what are you doing here?" The Employee said the period of time for which he received WCB benefits should count to his total period of employment which would have ended on or about August 10, 2009. In the Employee's view, he was still employed by MHA. Upon making a call to M.T. at Houston at this time, the Employee said he was advised by M.T. that he does not receive severance because he was an employee of Houston and was not hired by the MHA. He was advised by M.T. that Houston did not have any other suitable assignment for him at that time.

On cross examination, the Employee did not recall receiving compensation benefits for July 9, 2009 but admitted "…it would not surprise me if I did" (ie: Ex. 7). When it was put to the Employee that Houston's records do not indicate that the Employee was on compensation benefits for any subsequent period of 3 weeks or at all the Employee said he could not explain

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that fact and did not know why Houston would not have records to that effect but he maintained that he was on compensation.

In her evidence, L.V. agreed that, while the Employee was working at the MHA, his supervisor would have been A.R. L.V. said she coordinates temporary employee support and that it was she who contacted Houston for a temporary employee from Houston. She recalled the Employee suffering an injury late in the day on or about July 8, 2009 and that the Employee was not working at the MHA location for sometime thereafter. However, when the Employee did appear at the MHA in early August of 2009, she said "…I was surprised you showed up and you should have worked through Houston on that." L.V. did not recall the Employee asking her whether or not he could come back to work at MHA the next week and added "…no, if you had done so I would have directed you to Houston." L.V. did not recall talking to the Employee about his injury during the intervening period or talking to him of any possibility of moving him from temporary to permanent employment with the MHA. When the Employee asked L.V. whether she recalled him filling in an application for full-time employment she answered "…no". L.V. said that the policy of the MHA is to wait at least 16 weeks before any overtures are made to hire a temporary employee of Houston's as a permanent employee of the MHA. She added "…there is no way I would have ever given you an opportunity to fill out a full-time application."

In answer to a Board member's question, L.V. said that when the MHA needs temporary help because someone is away sick, on vacation or for other reasons then she would simply call Houston advising Houston of the number of temporary employees needed. Houston would then check its roster or it may put an ad in the paper. Individuals then apply to Houston who will, in turn, advise the MHA that it has an employee who will "…fit our need". When an employee engaged in this manner is assigned to a location of the MHA, the employee will be supervised on a day-to-day basis by staff of the MHA. In answer to a Board member's question, L.V. said that she had no knowledge of the Employee being on compensation. This was not her area of her responsibility.

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On his direct examination, K.B. filed documentation regarding temporary employees who have been assigned by Houston to the MHA. These packages were filed as Exs. 4, 5 and 6. This evidence reveals that assignments of a temporary nature from Houston to MHA can involve significant number of hours over a number of weeks, with the MHA submitting time records, on a Houston form, to Houston for payment and billing purposes. The hours of these individuals varied.

K.B. said there were occasions when one or more of these individuals (ie: Exs. 4, 5 and 6) elected to take time off or were sick. This reflected the arrangement with the MHA. For all employees assigned to the MHA on a temporary basis, K.B. said that it is Houston which withholds income tax and other deductions and remits them to the authorities. K.B. said that when Houston knew that the Employee would not be going back to the MHA and that the MHA no longer needed him "…we issued a T4 because this would be beneficial for him to pursue an EI claim if he wished." When an individual is not further engaged due to lack of work then the employee is not fired or terminated in any pejorative sense because if Houston has other suitable work for the individual then it will make inquiries as to whether such a new assignment is acceptable to the individual. After the Employee's hand injury, K.B. said that if Houston had acceptable light duties for the Employee then it would have made an overture to the Employee to this effect.

On cross examination, K.B. admitted that the MHA was a good client of Houston's. He had no recollection of any physician giving the Employee an "okay" to return to MHA. He agreed that it was Houston's obligation to advise an employee that there was no more work available but he said that Houston did tell the Employee this fact on or shortly after July 20th. K.B. said there was no other client who needed the Employee's services at that time. K.B. said that some 17 employees were being supplied to the MHA during this period. Some did not work every day. In fact, employees may simply not show up to work for a client. When it was put to K.B. that this would not make Houston look good, K.B. responded "…I'll give you that."

In answer to a Board member's questions, K.B. said that individuals are often told that there may be a possibility of a permanent hire with a client but added that, after the Employee left the MHA, the MHA reduced its' requirements some months later and Houston had no temporary employees at MHA by then.

III. Position of the Parties

The Employee submitted that for the time he was at MHA he was "effectively working for Manitoba Housing". From this perspective, Houston, as an agency, was simply that - an agency between himself and the "actual employer". Therefore, the actual employer cannot be absolved of its normal responsibilities under the *Code* which, in this case, was the obligation to give notice of termination or wages in lieu thereof.

It was submitted that the basis for the exemption in Section 61(2)(e) of the *Code* was to address situations where temporary placement is done on a day-by-day basis or only for limited periods of a day or two. The exemption, as noted in his appeal to the Board (Ex 3), only covers situations where a string of short term temporary assignments happens to exceed 30 continuous days. The Employee stated that the exemption was never intended to apply to assignments of the nature he undertook for the MHA. This, as the Employee put it, would make a mockery of the *Code* and would afford both Houston and MHA the opportunity to avoid responsibility for severance pay. There was opportunity for abuse. He reiterated that the job at MHA was "sold to me at the outset" and that he may have an "inside track" on more permanent employment with the MHA. He said his time with and the nature of his duties performed at the MHA, reflected the reality that his employment relationship was with MHA. However, the Employee submitted that he did not want his claim or appeal to hinge in any way his argument that he was told that he may have an inside track on permanent employment with the MHA. In the Board's view, this is not surprising, given L.V.'s evidence (see pp.7 & 8 *supra*). What the Employee did emphasize is that when his time on workers compensation is included then he was really on a regular

assignment with the MHA for more than 30 days. In the Employee's view, the term "temporary" employment in Section 62(1)(e) of the *Code* must be interpreted in the context that no notice need be given by either party during the first 30 days of employment. This arises from the reference to 30 days in Section 62(1)(a) of the *Code.* The Employee said his position depends on this 30 day argument. The signing of the waiver (Ex. 3) is of no legal effect because one cannot sign away statutory rights.

K.B. submitted that Houston was, at all material times, the employer of the Employee. Houston paid the Employee, remitted the necessary deductions, and issued a T4 and ROE. It was responsible for the Workers Compensations claim. K.B. relied on the waiver signed by the Employee at the time of hire. He said other employees (ie: Exs. 4, 5 and 6) whom Houston has assigned to the MHA have opted to work or not and the manner in which Houston has administered these arrangements establishes its good faith. It has always honoured the exemption and it applies both ways. The fact that the Employee may feel Manitoba Housing is his employer is not determinative. K.B. said this is not an uncommon feeling.

IV. <u>Analysis</u>

In the normal course, an employer is entitled to terminate the employment of an employee but, when doing so, an employer is bound by Section 61(2) of the *Code* under which it must provide the appropriate period of (minimum) notice prescribed by Section 61(2) of the *Code*, depending on the length of time the individual employee has been in the employ of the employer. In this case, as the Employee had been employed for less than one year, the requisite standard for notice or wages in lieu of notice would have been one week.

<u>However</u>, Section 62(1) of the *Code* enumerates a number of <u>exceptions</u> to the normal requirement to give notice under Section 61. It is not necessary to recite all of these exceptions here. Rather, we have chosen to recite the exceptions listed in subclauses (a) to (e) of Section 62(1) of the *Code*. These provisions provide as follows:

> "62(1) Section 61 does not apply in any of the following circumstances:
> (a) the employee's period of employment with the employer is less than
> (i) the probationary period specified in a collective agreement that applies to the employee, if that period is one year or less, or
> (ii) in any other case, 30days;
> (b) the employment is for a fixed term and terminates at the end of the term;
> (c) the employees is employed for a specific task and for a period not exceeding 12 months, on completion of which the employment terminates;
> (d) the employee is employed in construction;
> (e) the employee is employed under an arrangement by which the employee may choose to work or not to work for a temporary period when requested to work by the employer;" (Emphasis added)

The Employment Standards Division dismissed the Employee's claim for wages in lieu of notice on the basis that sub-clause (e) of Section 62(1), *supra*, applied to the circumstances at hand.

In the Board's view, the plain ordinary and natural meaning to be attributed to sub-clause (e) is clear. Indeed, the Employee candidly acknowledged, in both his written appeal and in his submission before the Board, that one of the purposes of this exemption allows temporary staffing agencies (like Houston) is to conduct business without incurring the obligation to give notice or pay wages in lieu of notice to its employees. The two basic contentions underlying the Employee's appeal are that (i) he was not an employee of Houston and, therefore, it is the MHA which ought to have given him one week's notice and, (ii) the reference to "a temporary period" in sub-clause (e) must, of necessity, be limited to a period of less than thirty days because this ties in with the 30 day exception in sub-clause (a).

An underlying theme of the Employee's submission was his contention that sub-clause (e) may lead to abuse and allow a temporary payroll or employment agency to act as an "interloper" between the real employer and an employee, meaning that notice of termination or wages in lieu thereof need never be given. Quite frankly, the Board is not immune to this

potential problem and arrangements which, on the evidence in a given case, disclose either "bad faith" or the existence of a "colorable device" which is designed to circumvent the minimum obligations prescribed by the *Code* may well lead the Board to find that the true nature of a particular relationship is not reflected in the temporary assignments made by an agency. From this perspective, the Employee's "global concern" (the Board's words) is acknowledged but, equally important, is the fact that the Board has an obligation to assess each case on its own facts. Circumstances of a hypothetical nature which are not before the Board cannot be the fulcrum upon which the Board decides an individual appeal brought before it.

While the Board accepts that one of the purposes of sub-clause(e) is to insulate temporary employment services such as Houston from the obligations under Section 62(1) of the *Code*, the Board also notes that this exception is not expressly limited to temporary employment agencies only. Further, neither is the term "…temporary period" expressly limited or defined. It is a question of fact in any particular case. The key distinction between a period of employment that may be "temporary" from one of "indefinite hire" (whether casual, part-time or full-time) is not defined by reference to a stipulated time period. This is also true of the other exceptions found in sub-clauses (b) and (c) of Section 62(1) where there is no obligation to give notice or wages in lieu of notice prior to the end of a fixed term or the completion of a specific task which takes less than 12 months to complete. Neither of these exceptions are limited in any way, by the 30 day period in sub-clause (a), and in the Board's view, neither is sub-clause (e). Each of the exceptions in Section 62(1) stands independently.

The exception in sub-clause (a) is in the nature of a "probationary" period where an employer is given the opportunity to assess the merits, aptitude or worthiness of a new employee during an initial period of trial and/or assessment. That this is the purpose of sub-clause (a) is reinforced by the reference to a longer probationary period which may be specified in a collective agreement. For individuals not hired into a job covered by a collective bargaining regime, the employer is given a period of 30 days to make this initial "probationary" assessment and is given the right to terminate the employment relationship without notice.

Accordingly, to the extent that the Employee is asserting that the "30 days" referred to in sub-clause (a) ought to be read as a temporal limitation, either expressly or by implication, on the words "…temporary period" in sub-clause (e) cannot be accepted, for to do so would be to add words of limitation which the Legislature did not use.

The Employee approached Houston and submitted a resume to this temporary employment agency seeking whatever employment Houston had available to offer him, reflective of the qualifications and experience detailed in his resume. At the time of his hire, Houston had the Employee sign the express waiver (Ex. 3, *supra*) in which he expressly acknowledged the nature of the arrangement and that the obligation to give notice, either way, did not apply. The Employee clearly understood the nature of this wording and acknowledged, in his own appeal and during his submissions to the Board, that, in respect of temporary employment agencies, the rationale underlying the exemption is understandable and legitimate. He parts company with this acknowledged rationale based of his assertion that his assignment at MHA was more of a regular, recurring nature and that it exceeded 30 days. But, the fact the assignment may exceed 30 days was not unlike other assignments Houston has made to MHA. (Exs. 4, 5 and 6). There was no guarantee or even a promise made that full-time employment with MHA would be the result.

To the extent the worker's compensation issue raised by the Employee is relevant, there was a paucity of evidence to support the Employee's claim that he was in receipt of workers compensation benefits for some 3 weeks prior to his returning to the MHA on or about August 10th. The only objective documentary evidence the Board has of any workers compensation claim came from K.B. (ie: Ex. 7). We accept K.B.'s evidence that this was the only compensation claim which Houston had in its records regarding the Employee. The Employee did not dispute the existence of Ex. 7. No documentary evidence was submitted by the Employee, be it his own medical records or any documents from WCB. This is not a pejorative finding but the Board is left in a quandry on this point.

After assessing the evidence in its totality, the Board was satisfied that the MHA, for *bona fide* business reasons, availed itself of Houston's services and requested a temporary employee from Houston. This was done and there was no evidence that the assignment was for any improper purpose or was it, in any way, a "colorable device", designed to avoid obligations under the *Code*. Rather, in the Board's view, the assignment of the Employee to the MHA reflected an arrangement which fell within the exception contained in sub-clause(e) of Section 62(1). There is no dispute that Houston, based on billings from MHA, directly paid the Employee's wages, made the necessary statutory deductions and remittances, administered a WCB claim in respect of the Employee, and issued a T4 and ROE. The Employee was only actively at work for the MHA from on or about June 19, 2009 to July 20, 2009. This clearly falls within the parameters of what would reasonably constitute a "temporary period". Based on the evidence before it, there is no basis for the Board to find that the arrangement in question was a subterfuge or what one might characterize a "probationary period" in disguise. The fact that one <u>may</u> be able to envisage different factual situations which <u>may</u> lead to a different analysis or conclusion will be addressed by the Board, if and when necessary.

The Board, in all of the circumstances, concluded that:

(a) Houston was the employer of the Employee;

(b) Houston, following the processing of the Employee's application to Houston and the signing of the waiver, assigned the Employee to work with one of its clients, namely the MHA, for a temporary period; and

(c) Having found that the employment was intended to be of a temporary nature, the fact that the employee may have been engaged in his tasks at the MHA's for a period in excess of 30 days does not change this factual characterization. There is no such time limitation in Section 62(1)(e) and such a limitation cannot be read into the exception.

In the result, the Board found that the exception contained in Section 62(1)(e) of the *Code* applied to the factual circumstances of this case. For these reasons, the Board dismissed the appeal of the Employee and upheld the ruling of the Employment Standards Division.

DATED at **WINNIPEG**, Manitoba, this 10th day of August, 2010 and signed on behalf of the Manitoba Labour Board by:

"original signed by"

W.D. Hamilton, Chairperson

"original signed by"

H. Miller, Board Member

"original signed by:

L. Baturin, Board Member

WDH/dm/lo-s