

Case No. 89/16/ESC

File No. 122751

IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE

BETWEEN:

DAUPHIN CONSUMERS COOPERATIVE LTD.,

Employer,

- and -

Q.C.,

Employee.

BEFORE:

C.S. Robinson, Chairperson

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

SUBSTANTIVE ORDER

WHEREAS:

1. On February 1, 2016, pursuant to Section 95 of *The Employment Standards Code* (the “Code”), the Director of the Employment Standards Division, by Order, dismissed the complaint by the above named Employee against the above named Employer.
2. The Employee having disputed the above-mentioned Order, the Director of the Division, pursuant to Section 110 of the *Code*, referred the matter to the Manitoba Labour Board (the “Board”).
3. On July 20, 2016, the Board conducted a hearing at which time both parties appeared before the Board and presented evidence and argument.
4. The issue to be determined in this case is whether the Employer had “just cause” to terminate the employment of the Employee and, as such, was not obligated to provide to the Employee notice, or wages in lieu thereof, of the termination.

5. The Board, following consideration of the material filed and the evidence presented, has determined that the following facts are relevant to the disposition of this matter:
- a) The Employer operates retail businesses in the Parkland area, including the Ste. Rose Building Centre. The core function of the Building Centre, as described in documentation submitted to the Board, is “to provide goods and services to the members for their building needs, general merchandise and farm supplies”.
 - b) The Employee commenced employment with the Employer in October of 2013 in the position of Building Centre Manager. During his relatively brief tenure with the Employer, the Employee received comprehensive training. That training included exposure to policies, TRC reports, delivery and estimate procedures, inventory controls, and loss prevention/fraud.
 - c) The wide-ranging duties and responsibilities of the position are set forth in a detailed job description. These duties include: managing and leading other employees; asset management; ensuring that all invoices and paper work are done in a timely and accurate manner in accordance with policy and procedure; and adhering to loss prevention policies. The Employee testified that eight employees reported to him.
 - d) Following an investigation which included discussions with the Employee, the Employer terminated the employment of the Employee without notice or wages in lieu thereof on September 8, 2015.
 - e) The investigation commenced when the Employer was informed of a potential discrepancy involving a transaction with which the Employee was involved. The Employer’s General Manager, Credit/Human Resource Manager and Controller were involved in the investigation.
 - f) The General Manager presented evidence regarding the findings of the investigation. He testified that a customer had approved a quote for certain construction materials. The Employee agreed to deliver the materials to the customer on August 14, 2015. The amount of the quote was \$339.70 and the customer paid the full amount in cash directly to the Employee upon delivery. Testimony regarding the denominations of the currency provided to the Employee by the customer differed as between the parties. The General Manager testified that the customer advised the Employer that she paid with \$20 banknotes exclusively. The Employee recalled that the customer paid with two \$50 banknotes and the balance with \$20s.
 - g) The Employee failed to follow the proper procedure in dealing with the quote. Once approved, the quote should have been utilized to create an invoice and that invoice ought to have been processed through the Employer’s cash register prior to delivery of the materials by the Employee.

- h) The Employee failed to deposit or otherwise bring to the workplace the money provided by the customer for the delivered goods prior to being confronted with the discrepancy by the Employer. He testified that he called one of his employees upon receipt of the customer's cash payment in order to advise that he had received cash on delivery and that he would bring the cash to the store following his vacation which was scheduled to commence the following day. The Employee testified that following the delivery, he placed the cash received from the customer in his freezer for safe keeping with the intention of properly depositing it upon his return from vacation.
- i) The Employee was on vacation from August 15, 2015 to August 23, 2015.
- j) Following his return from vacation, the quote provided to the customer for which payment was received was deleted from the Employer's computer system. During the investigation, the Employee was questioned about the deletion of the quote. The Employee initially denied that he was at work on the day that the quote had been deleted, but later admitted that he had attended briefly. He denied knowing how to delete a quote, but ultimately told the Employer that if he had deleted it, he had no recollection of doing so.
- k) When confronted by the Employer about the issue of the money, the Employee stated that he had simply forgotten to bring the money in and that he could retrieve it immediately from his home. The General Manager testified that he accompanied the Employee to his home to retrieve the money. The Employee retrieved cash of various denominations from his freezer and provided it to the General Manager. The General Manager counted the funds and determined that it was less than the full amount paid by the customer. After successive attempts to provide the correct amount, the Employee ultimately provided more than was owed. The General Manager returned the overage and kept the \$340.00 that was owed. The cash provided by the Employee to the General Manager was in various denominations. At the hearing, the Employee acknowledged that he had not segregated his personal funds from the money which he had received from the customer.
- l) Following receipt of the money, the General Manager immediately terminated the Employee citing inappropriate handling of the Employer's assets and a breach of trust.
- m) The Employee testified that he simply forgot to return the money to the Employer. In support of this claim, the Employee indicated that his memory had been negatively affected at the time in question due to certain personal circumstances. He denied any intention to misappropriate funds. However, the Employee acknowledged that he had failed to follow certain policies and/or procedures and that his actions merited a disciplinary response short of termination.

6. In addressing the issue of whether the employment of the Employee was terminated for just cause, the Board had regard to the following principles and/or criteria:
- a) Subsection 61(1) of the *Code* provides that an employer who terminates an employee's employment must provide notice of the termination or wages in lieu of notice. The amount of notice or wages in lieu varies depending upon the length of the employee's period of employment as set out in the table included in subsection 61(2) of the *Code*. However, section 62 of the *Code* provides for legislated exceptions to the requirement to provide notice. In the present case, the Employer relies upon Clause (h) of subsection 62(1) of the *Code*. Under this provision, an employer does not have to provide notice of termination or wages in lieu of notice where it establishes that there was "just cause" to terminate the employment. This provision recognizes that there are circumstances in which it would be unreasonable or inequitable for an employer to extend transitional employment or wages in lieu as a result of the conduct or capacity of the employee.
 - b) Once it has been established that an employee was dismissed without notice, the onus shifts to the employer who seeks to take advantage of the exceptions. In the context of the exception set forth in subsection 62(1)(h) of the *Code*, the burden is upon the employer to put forward evidence from which the Board can conclude that the employer had just cause to terminate the employment of the employee.
 - c) The seminal expression of the modern concept of just cause is found in Schroeder J.A.'s dissenting opinion in *Regina v. Arthurs, Ex parte Port Arthur Shipbuilding Co.* (1967), 62 D.L.R. (2d) 342 at p. 348 (Ont. C.A.), revd 70 D.L.R. (2d) 693 (S.C.C.) which states: "If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of willful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee".
 - d) Determining whether "just cause" exists requires a contextual approach and an examination of the specific circumstances surrounding the alleged conduct. Underlying this approach is the principle of proportionality, meaning that an effective balance must be struck between the seriousness of the employee's misconduct and the penalty imposed by the employer.
 - e) The application of the contextual approach to just cause consists of three steps: 1) determining the nature and extent of the employee's misconduct, if any; 2) considering the surrounding circumstances including the circumstances of the employee and those of the employer; and 3) deciding whether dismissal is warranted based on a consideration of whether the dismissal is a proportional response to the misconduct.

7. The Board, following consideration of material filed, evidence and argument presented, and in the context of the facts as summarized in paragraph 5 and the principles and/or criteria referred to in paragraph 6 above, has determined as follows:
- a) The Employee failed to follow established policy/procedures of which he was aware in delivering product to a customer and receiving payment for same without having created and processed an invoice for the transaction. Furthermore, the Employee failed to remit the money received from the customer until he was confronted by the Employer about the matter.
 - b) The failure to follow procedure and the manner in which the Employee handled cash owed to the Employer constitutes serious misconduct. Having considered all of the surrounding circumstances and contextual factors, including the Employee's explanation for his behavior and the stress that he was under at the time, the Board is satisfied that immediate termination was a proportional response to the misconduct.
 - c) In the result, the Board finds that the Employer has established, on the balance of probabilities, that the Employee's employment was terminated for just cause and, as a result, the Employee was not entitled to notice of termination, or pay in lieu thereof, in accordance with subsection 62(1)(h) of the *Code*.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the claim of Q.C.

DATED at **WINNIPEG**, Manitoba, this 2nd day of August, 2016, and signed on behalf of the Manitoba Labour Board by:

“Original signed by”

C.S. Robinson, Chairperson

CSR/lo/lo-s