



Manitoba Labour Board

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Case No. 186/19/ESC

File No. 131712

IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE

BETWEEN:

L.D.,

Employee,

- and -

PENGUIN HEATING & COOLING TECHNOLOGIES INC.,

Employer.

BEFORE:

D.E. Jones, Q.C., Vice-Chairperson

B. Black, Board Member

T. Henderson, Board Member

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

SUBSTANTIVE ORDER

WHEREAS:

1. August 27, 2019, 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 Employee against the above named Employer.
2. In the Reasons for Decision which accompanied the Dismissal Order (the “Order”), the investigating Employment Standards Officer stated as follows:

“Your claim for wages in lieu of notice was investigated. Having reviewed all the information provided, it has been determined there are no additional wages owed.

Therefore, your claim is hereby dismissed.”

3. The Employee disputed the above mentioned Order. Accordingly, the Director of the Division, pursuant to Section 110 of the *Code*, referred the matter to the Manitoba Labour Board (the “Board”).
4. On January 6, 2020, the Board conducted a hearing at which time both parties appeared before the Board and presented evidence and argument.
5. The Board has reviewed the material filed, evidence and argument presented and in particular notes the applicable legislation.

Subsection 23(1) of the *Employment Standards Regulation* (the “*Regulation*”) states that the “employment of an employee who is laid off for one or more periods exceeding, in total, ... 8 weeks within a 16-week period ... is deemed to have been terminated” (Subsection 23(1) goes on to refer to certain exceptions, none of which apply on the facts of this case.)

Subsection 23(2) of the *Regulation* provides that an employee whose employment is deemed to have been terminated is entitled to be paid a wage in lieu of notice, and reads as follows:

23(2) When a lay-off is deemed by subsection (1) to be a termination of employment,

- (a) the employee’s employment is deemed to have been terminated without notice on the first day of the lay-off; and
- (b) the employer must pay the employee a wage in lieu of notice in accordance with section 77 of the *Code*.

In addition, Subsections 61(1), 77(1) and 77(2) of the *Code* provide as follows:

Termination by employer – notice or wage in lieu of notice

61(1) Subject to section 62, an employer who terminates an employee’s employment must

- (a) give the employee notice of the termination

- (i) in accordance with subsection 67(1) (notice period for group termination), if that subsection applies, or
 - (ii) in any other case, in accordance with the applicable notice period in subsection (2); or
- (b) pay the employee a wage in lieu of notice, in accordance with sections 77 (amount of wage in lieu of notice) and 86 (wages to be paid within certain time).

Wage in lieu of notice

77(1) The wage in lieu of notice payable under clause 61(1)(b) must not be less than the wage the employee would have earned during

- (a) the applicable notice period under subsection 61(2) or 67(1); or
- (b) if a termination notice was given for less than the applicable notice period, the portion of the notice period for which notice was not given;

if the employee had worked his or her regular hours of work for the period. (underlining added).

The Code contains the following definition of “regular hours of work”;

“**regular hours of work**” means the hours of work, not exceeding standard hours of work, during which an employee is required by an employer to be present for or engaged in work;

Payment required despite other employment, etc.

77(2) The requirement to pay a wage in lieu of notice under clause 61(1)(b) applies whether or not the employee has obtained other employment during the notice period.

6. After considering fully the material filed, evidence and argument presented, the Board has made the following determinations:
- a. The Employee was employed by the Employer as a call center manager for the period from February 5, 2015 to February 15, 2019 and his rate of pay was fifteen dollars per hour. The Employee’s evidence was that his regular hours of work were Monday to Friday from 8:00 a.m. to 4:00 p.m. with a one-half hour unpaid meal break during the course of each shift. The Employer testified that the normal business hours were from Monday to Friday from 8:30 a.m. to 4:00 p.m., but acknowledged that the Employee may have come in earlier and worked.

- b. The Employer's position is that on February 15, 2019, he met with the Employee to advise him that he was being laid off due to a shortage of work. During the meeting on February 15, 2019, he provided the Employee with a Record of Employment ("ROE") which was dated February 15, 2019. The reason for its issuance was identified in the ROE as "Shortage of Work" and there was no indication on the ROE of the expected day of recall. The Employer cannot recollect if he also provided the Employee with a letter.
- c. The Employee's position is that on February 15, 2019, he was laid off, with no notice of being laid off. He only received the ROE and a pay cheque from the Employer. He did not receive a letter from the Employer.
- d. Between February 15, 2019 and April 4, 2019, there was very little communication between the parties except for a few text messages exchanged on February 23, 24, and March 1, 2019.
- e. The Employer testified that on April 5, 2019, the Employee attended the Employer's business, at which time the Employer offered the Employee a position to return to work for two days per week, which was rejected by the Employee as he had found other employment at a car dealership. Although the Employee confirmed that he had attended the Employer's premise on April 5, 2019, he said it was only to pick up his bonus and a pay cheque to replace the cheque that had bounced. The Employee disputed that the Employer had made him an offer at this time to return to work for two days per week.
- f. The Employer's evidence was that on April 12, 2019, he sent a text message to the Employee and made him the same offer as he had made on April 5, 2019, that being to return to work for two days per week, which the Employee refused. It was the Employer's position that as a result of Employee's refusal, and noting that the Employee had found other employment, that no notice was required from the Employer.
- g. The Employee testified that he went to the Employer's premise on April 12, 2019, and showed the Employer a piece of paper, which the Employer could not recall. It was the Employee's position that he is owed four weeks wages in lieu of notice, regardless of whether or not he had found other employment. Further, he testified that he had been laid off for eight consecutive weeks. In the ninth week, the Employer offered him a part time position with the company to work for two days a week, for four hours per day.

- h. The Board notes the conversation between the Employer and Employee on February 15, 2019. The Board further notes that no other written notice of lay off was given to the Employee at anytime, other than the ROE, dated February 15, 2019. The Board is satisfied that the Employee was laid off by the Employer on February 15, 2019.
- i. The Board has considered the Employer's argument that he offered the Employee limited part time return to work hours in April, 2019. The Board finds that this particular offer does not relieve the Employer of its obligation to pay the Employee the four weeks wages in lieu of notice pursuant to the *Code*.
- j. Accordingly, pursuant to Section 23 of the *Regulation*, the Employee's employment is deemed to have been terminated without notice on February 15, 2019, and the Employer is required to pay the Employee four weeks wages in lieu of notice in accordance with Section 77 of the *Code*.
- k. Based on the foregoing, the Board is satisfied that the Employee is entitled to receive four weeks wages in lieu of notice in the total amount of Two Thousand Two Hundred and Fifty Dollars (\$2,250.00) as reflected on the attached Statement of Adjustment. The appeal of the Employee is allowed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY ORDERS PENGUIN HEATING & COOLING TECHNOLOGIES INC.** to pay to the Director of the Employment Standards Division forthwith:

WAGES:

The amount of Two Thousand, Two Hundred and Fifty Dollars (\$2,250.00), less statutory deductions, being wages in lieu of notice owing to the Employee, L.D.

ADMINISTRATIVE FEE:

An Administrative Fee in the amount of Two Hundred and Twenty-Five Dollars (\$225.00) pursuant to Section 96(1) of *The Employment Standards Code*.

TOTAL:

The total amount being Two Thousand, Four Hundred and Seventy-Five Dollars (\$2,475.00).

DATED at **WINNIPEG**, Manitoba, this 20th day of February, 2020, and signed on behalf of the Manitoba Labour Board by:

“Original signed by”

D.E. Jones, Q.C., Vice Chairperson

“Original signed by”

B. Black, Board Member

“Original signed by”

T. Henderson, Board Member

CJ/sms/lo-s