



Manitoba Labour Board

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Case No. 149/22/ESC
File No. 136252

IN THE MATTER OF: *THE EMPLOYMENT STANDARDS CODE*

BETWEEN:

**NWC GP INC. as the general partner of
THE NORTH WEST COMPANY LP,**

Employer,

- and -

V.C.

Employee.

BEFORE: D. L. Lewis, Vice-Chairperson
S. Jocelyn, Board Member
S. Oakley, Board Member

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

SUBSTANTIVE ORDER

I. Introduction

1. The Employee was employed by the Employer as a store manager in Northern Manitoba. She commenced her employment on July 19, 2021.
2. The Employee was terminated from her employment on November 23, 2021 for failing to become vaccinated against the COVID-19 virus, which was a requirement of the Employer's Pandemic Return to Work Protocol for all employees required to travel as part of their job. The Employee was required to travel as she could be transferred to another location.

3. The Employee filed a complaint with the Employment Standards Branch (the “ESB”) on November 29, 2021. On May 24, 2022, the ESB issued a Payment of Wages Order to the Employer, in the amount of \$1923.08 and an administration fee of \$192.31 for a total of \$2115.39, for two weeks’ wages in lieu of notice pursuant to section 61 of *The Employment Standards Code* (the “Code”).
4. On May 26, 2022, the Employer filed correspondence with the ESB requesting the matter be referred to the Manitoba Labour Board on the basis that the Employee was terminated for just cause, and therefore no pay in lieu of notice was required to be paid.
5. A hearing was held on December 6, 2022, at the offices of the Manitoba Labour Board. The Employer was represented by C.I., Human Resource Manager, and the Employee appeared on her own behalf.

Evidence

6. At the commencement of the hearing, a package of documents was presented to the Board by agreement of the parties. Both parties agreed that these documents would become evidence in the proceeding. Both C.I. and the Employee took an oath of affirmation, and each made a submission under oath, referring to the documents. This formed the evidence placed before the Board for its consideration.
7. The Employer is a retail organization with stores located in remote and Indigenous communities in Northern Manitoba. During the COVID-19 pandemic, the Employer developed its Pandemic Return to Work Employee Protocol (the “Protocol”) applicable to all company employees.
8. The Employer consulted with representatives of various communities and band chiefs in developing the Protocol. The Employer stated that some of the communities they served had very limited health resources.
9. The Protocol came into effect in July 2021. The Protocol required that employees who were required to travel must be double vaccinated against COVID-19. The Employer also advised the Board that effective from October 2021, federal aviation rules required all air travellers to be fully vaccinated. Most of the communities the Employer served were accessible only by air.
10. By the beginning of November 2021, a Human Resources representative was advised that the Employee was not fully vaccinated and therefore was not compliant with the Protocol. A meeting took place on November 9, 2021 between the Employee and L.D., the Director of Sales for the Manitoba District of the Employer. In the meeting, the Employee was advised that she must be fully vaccinated pursuant to the Protocol. As

a store manager, she was required to travel as part of her duties, as she could be dispatched to any store location as required by the company operations.

11. L.D. provided the Employee with a letter on November 9, 2021, recapping their conversation. The letter advised that the Employee was to obtain her first vaccination by November 23, 2021 and to schedule her second vaccination, and be fully vaccinated by December 23, 2021. The letter went on to state that “Should you advise that you do not wish to receive both COVID-19 vaccinations to meet the expectations set out in the above mentioned policy the Company will reconsider your ability to remain employed with the Company”.
12. The letter was provided to the Employee by email on November 9, 2021, and requested that she review the letter and return a signed copy to the attention of L.D.. On November 10, 2021, the Employee returned the signed copy of the letter to L.D. via email. She stated in her email that, “I will also not be changing my decision against getting the COVID-19 vaccine even if it will affect my employment”.
13. C.I. submitted that the Employer waited until November 23, 2021, which was the date that the Employer had given the Employee to get the first vaccination. This was done to see if she would change her mind. As the Employee would not change her position regarding getting the vaccination she was terminated on November 23, 2021. The letter of termination was provided to the Employee advising that the reason for the termination was a breach of company policy, and that she was being terminated for cause. C.I. asked the Board to overturn the decision of the ESB to award pay in lieu of notice, as the Employer had just cause for terminating the Employee.
14. The Employee advised the Board that she did not take issue with the fact that she was terminated, and that she accepted the decision of the Employer. The issue was the two weeks’ notice. She stated that she interpreted the letter of November 9, 2021 to mean that if she was not vaccinated by November 23, 2021, at that time the Employer would re-evaluate her status. She believed that she would not be terminated, and that the Employer would find a solution such as weekly testing.
15. She advised that being terminated was difficult for her since the Employer provided food and lodging. Pursuant to the letter, the Employer only gave her one week to vacate her premises, and she felt that this was too short of time to find new lodging. She said she was not aware of the Protocol, and that the Employer was aware that she was not vaccinated in August 2021; when she advised L.D. that she would not be able to go to any community that had a vaccination requirement.
16. The Employee also advised that the Federal Government did make an exception to the vaccination requirement for fly-in communities, so that people could get food or go to

medical appointments. She felt that there were other options the Employer could have considered such as assigning her administrative duties in the office.

17. Upon questioning by the Board, the Employee stated that her position was that the letter of November 9, 2021 was unclear as to whether or not she would be terminated if she did not obtain the vaccination by November 23, 2021. She asked that the Order of the ESB providing her with two weeks' pay in lieu of notice be upheld.

Analysis

18. The relevant *Code* provisions relating to just cause are the following:

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).
- (h) when the employment of the employee is terminated for just cause;

19. Under section 61 of the *Code*, an employer who terminates an employee must provide them with notice of termination or wages in lieu of that notice, unless one of the exceptions in subsection 62(1) of the *Code* applies. The onus is on the employer to establish through evidence that the claimed exemption to the *Code* is applicable to the facts presented and, if proven, that those events meet the legal test of just cause.
20. In interpreting and applying subsection 62(1)(h), the Board must also keep in mind that the *Code* is minimum standards legislation, the purpose of which is to provide protection for employees and prevent their exploitation, and that it “must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects” [*The Interpretation Act*, C.C.S.M. c. 180, s.6].
21. The seminal expression of the modern concept of just cause is found in the dissenting opinion of Schroeder, J.A. in *R. v. Arthurs, Ex parte Port Arthur Shipbuilding*

Co. (1967), 1967 CanLII 30 (ON CA), 62 D.L.R. (2d) 342 (Ont. C.A.), rev'd 1968 CanLII 29 (SCC), [1969] S.C.R. 85:

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. (p. 348)

22. In the present case, there is no question that the Employee wilfully ignored the Employer's policy. The Employee advised the Board that she was unaware of the Protocol. However, there is no question that the Employee was made aware of the Protocol in the meeting on November 9, 2021. The Employee refused to become vaccinated thereby breaching the policy. As stated in the excerpt from *R. v Arthurs*, the law recognizes an Employer's right to summarily dismiss an Employee who is guilty of willful disobedience of the employer's orders.
23. The Board finds the Employer's Pandemic Return to Work Protocol, and its requirement for all employees who travel as part of their job duties to be double vaccinated, addressed legitimate operational requirements when it was implemented in July 2021, and in November 2021 when the Employee was terminated.
24. The Board notes that the Employee herself did not take issue with the policy or with the Employer's ability to terminate her employment. The sole issue raised by the Employee is her contention that the letter of November 9, 2021 was unclear that termination of employment would be the consequence of a failure to follow the Protocol.
25. The Board finds that the letter of November 9, 2021, which stated that the Employer would reconsider her ability to remain employed with them should she fail to become vaccinated, was a clear expression of the intent to terminate for failure to comply.
26. This view is reinforced by the Employee's response to the Employer on November 10, 2021, when she returned a signed copy of the letter. She stated in the email accompanying the signed letter that she would not get vaccinated even if it would affect her employment, and further that she did not want to have to leave due to this issue. Clearly the Employee knew her employment was in jeopardy by failing to comply.
27. The Board also notes that in her November 10, 2021 response to the Employer, the Employee was quite adamant that she would not be pressured into getting the vaccine. Despite this communication, the Employer waited until the November 23, 2021 deadline provided in its November 9, 2021 letter before terminating the Employee's employment.

Conclusion

28. Having determined that the Employer's Protocol was developed for legitimate business interests, and that the Employee wilfully breached the Protocol, knowing that the result of the breach would be termination of employment, the Board finds that the Employer has established just cause for termination, pursuant to section 62(1)(h) of the *Code* and is therefore not required to provide pay wages in lieu of notice to the Employee.

29. The appeal of the Employer is allowed and ESB Order 75/22/ER is revoked.

DATED at **WINNIPEG**, Manitoba, this 24th day of January, 2023, and signed on behalf of the Manitoba Labour Board by:

"Original signed by"

D. L. Lewis, Vice-Chairperson

"Original signed by"

S. Jocelyn, Board Member

"Original signed by"

S. Oakley, Board Member

DLL/dh/ps/ejh-s