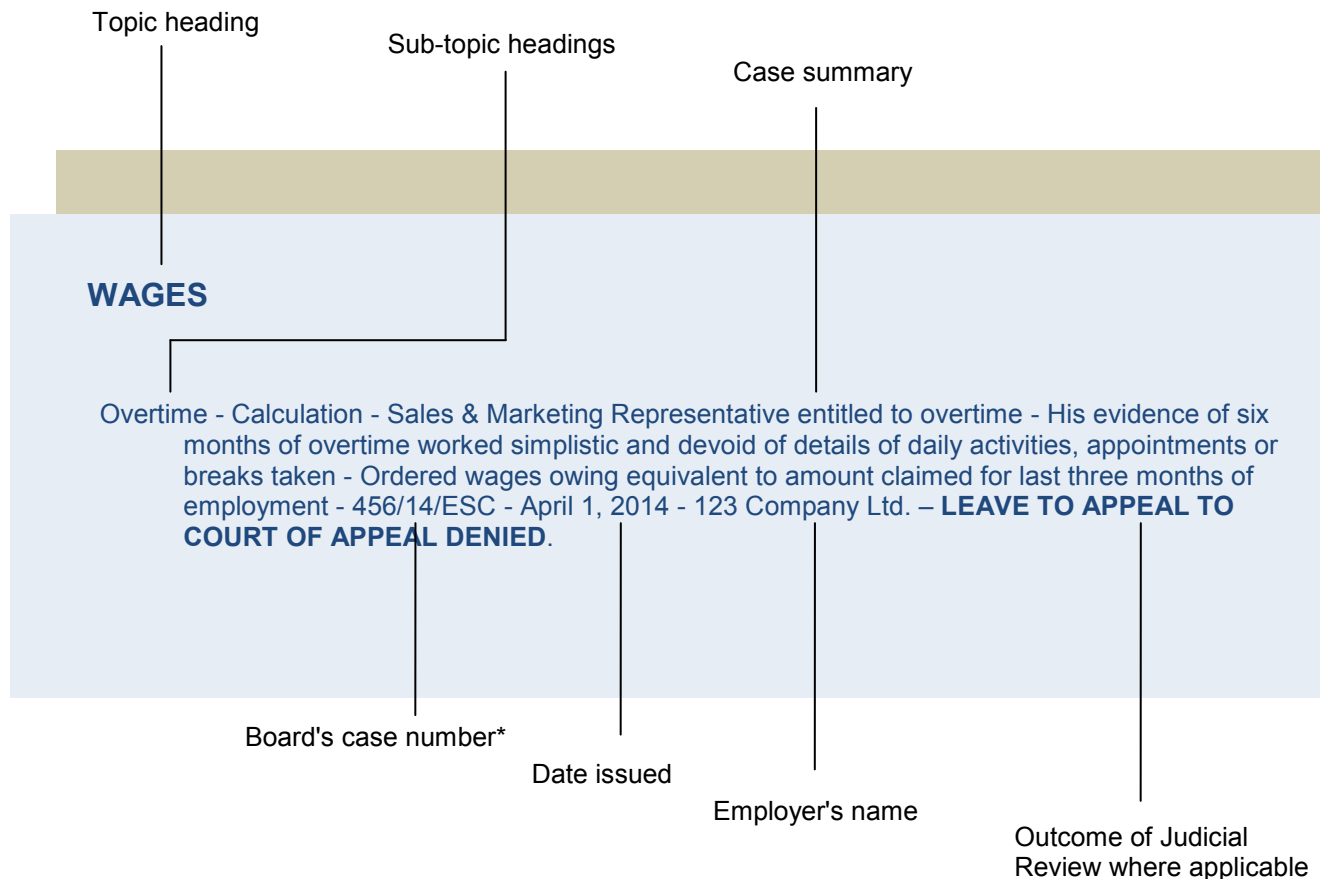


THE EMPLOYMENT STANDARDS CODE

This index includes summaries for Written Reasons for Decisions and Substantive Orders issued by the Manitoba Labour Board between January 1, 1984 and March 3, 2014, pursuant to *The Employment Standards Act*, *The Employment Standards Code* and *The Payment of Wages Act*.

HOW TO FIND A DECISION



To obtain further information on a specific decision, contact the Manitoba Labour Board at mlb@gov.mb.ca, 204-945-3783, or 500 - 175 Hargrave Street, Winnipeg MB R3C 3R8. The full text of Written Reasons and Substantive Orders issued since January 2007 are available on the Board's website <http://www.gov.mb.ca/labour/labbrd/decision/index.html>. The full text of all Board decisions are available on-line through the LexisNexis Quicklaw service. In addition, some decisions have been published in the Canadian Labour Law Reporter, in the Canadian Labour Relations Boards Reports and at CanLii.org.

* Case numbers, which are underlined, provide a hyperlink to the full text decision that has been posted on the Manitoba Labour Board's website

ADMINISTRATIVE PENALTY

Deposit Reduction - Employer ordered to pay \$9,500 Administrative Penalty - It disputed penalty and requested reduction of deposit claiming it suffered prejudice as penalty far exceeded overtime owed and no individual orders issued ordering payment – Held Board has no discretion as to amount of Penalty as its jurisdiction limited to confirming or revoking penalty - Right to issue Penalty not affected by employee not filing complaint or Division not issuing specific order - Board did not accept Employer suffered prejudice resulting from penalty far exceeding overtime owed - Purpose of administrative penalty to ensure compliance with statutory obligations - Employer had not filed objective financial data to establish payment of full deposit would create undue financial hardship – While payment inconvenient that was consequence of normal deposit requirements - Grounds for appeal raised factual issues to be addressed at hearing on its merits - Inappropriate for Chairperson to comment further as Chairperson expressly prohibited from hearing appeal as he heard application to reduce the deposit - Application to reduce deposit dismissed - 78/10/ESC - November 10, 2010 - AAR-Auto List of Canada (1999) Inc.

Employer appealed Notice of Administrative Penalty – Director of Employment Standards Division submitted Employer failed to file timely appeal and bank account was garnished to satisfy penalty – Held Board had no jurisdiction to extend time to file an appeal – Substantive Order - 98/11/ESC - October 13, 2011 - Sterling O & G International Corporation.

Service – Employer appealed Notice of Administrative Penalty arguing he did not receive Order - Employment standards officer went to Employer's home to effect personal service – Home did not have two doors nor mailbox - Officer wedged Order between door and frame in compliance with director of Employment Standard Division's directive that service could be accomplished by placing document in mailbox or between doors – Held officer did not follow directive because Order was neither left in mailbox nor between doors - Board was not satisfied Employer validly served with Order – Board's jurisdiction on merits of appeal of penalty limited by Section 138.2(6) of *The Employment Standards Code* to confirm or revoke penalty - Notice of Administrative Penalty revoked and Appeal allowed – Substantive Order - 98/11/ESC - October 13, 2011 - Sterling O & G International Corporation.

ADMINISTRATIVE PENALTY

Reduction - Notice of Administrative Penalty for \$7,500 issued to Employer for 15 separate incidents for alleged failure to pay general holiday pay – Employer requested Board’s Chairperson reduce deposit required - Employer noted no individual orders had been issued ordering payment of general holiday pay – Held subsection 138.2(6) of *The Employment Standards Code* limited Board’s jurisdiction on merits of administrative penalty appeal in that Board must confirm or revoke penalty - Board did not have jurisdiction to vary penalty or to set it aside and make new order - Fact that individual employee had not filed complaint or that Employment Standards Division had not issued specific order for unpaid wages did not affect right of Director to issue Notice of Administrative Penalty – Application dismissed – Substantive Order - 237/11/ESC - November 24, 2011 - 3422640 Manitoba Ltd. t/a Greencut Environmental Services.

(Next Section: Sec. 1.6)

APPEALS

Officer appeals Order for payment of wages and vacation wages owing after business placed in receivership arguing he resigned prior to closure of store - Held not liable for unpaid severance wages, but liable for unpaid vacation wages up to and including date of resignation - Section 5 of ***The Payment of Wages Act*** considered -827/91/PWA - April 20, 1993, Parviz Javahery, General Drugs Ltd. – **MOTION FOR ORDER DISMISSING LEAVE TO APPEAL GRANTED.**

Employer appealed Order issued by Employment Standards Division that \$297 in wages was owed to Employee - Prior to hearing but eight months after Order issued and Employer's appeal filed, Employee filed correspondence with Board disputing calculations in Order and sought additional monies - Board denied Employee's request as appeal not filed within time period specified in Section 110(1.1) of *Employment Standards Code* - Substantive Order - 35/09/ESC - December 9, 2009 - Kildonan Ventures Ltd. t/a Kildonan Auto & Truck Parts - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Notice of Appeal - Employment Standards Division ordered Employer to pay wages in lieu of notice but determined no overtime wages were owed - Employee appealed Order regarding overtime - At commencement of Board hearing, Employer made application for leave to appeal Order in favour of wages in lieu of notice - Board denied application because Employer failed to file written Notice of Appeal specifying grounds for appeal and because allowing Employer to appeal could cause substantial prejudice to Employee, who had come to hearing not knowing he would be required to deal with issue of entitlement to wages in lieu of notice - Substantive Order - 210/11/ESC - July 11, 2012 - Brousseau Bros. Ltd. t/a Super Lube.

(Next Section: Sec. 3.0)

Sec. 3.0-E1

CHARTER OF RIGHTS AND FREEDOMS

Board held that *The Construction Industry Wages Act* does not offend the *Canadian Charter of Rights and Freedoms* - 1357/88/PWA - April 17, 1989 - Jet Roofing
– LEAVE TO APPEAL TO COURT OF APPEAL GRANTED IN PART; APPEAL DISMISSED.

CHECK-OFF

Whether dues deducted by an employer came within the definition of wages under ***The Payment of Wages Act*** - 400/87/PWA - March 14, 1988 - Norman Gunn, Gunn Installations – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL DISMISSED.**

Sec. 3.2-E1

COLLECTIVE AGREEMENTS

Security Guards on rotating shifts entitled to overtime pay – Collective agreement takes precedence over government regulation - 1248/88/PWA - January 9, 1990 - Province of Manitoba, Manitoba Government Services.

(Next Section: Sec. 3.5)

CONSTRUCTION INDUSTRY

Municipal employee, who operated heavy equipment from time to time, claimed that he was entitled to be paid according to **The Construction Industry Wages Act** - Applicability of the **Act** to a Municipality discussed - 195/85/PWA - July 16, 1985 - Rural Municipality of East St. Paul.

Employee involved in the installation of plumbing and heating fixtures in residential and commercial buildings entitled to wages according to **The Construction Industry Wages Act** - 492/85/PWA - November 29, 1985 - Four Seasons Electrical Mechanical Contractors Ltd.

Employee waited until termination to file a complaint requesting payment of wages according to **The Construction Industry Wages Act** - Claim for wages limited to 30 days - 492/85/PWA - November 29, 1985 - Four Seasons Electrical Mechanical Contractors Ltd.

Employees fail to complain within 30 days of receiving wages at a lower rate as outlined in **The Construction Industry Wages Act** - Claim for wages allowed - Subsections 14(1), 14(2) and 14(4) on **The Construction Industry Wages Act** considered - 581/85/PWA - December 11, 1985 - Skinners Wet 'n Wild and 65683 Manitoba Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; MATTER ADJOURNED.**

Director of Employment Standards may on his accord or on receipt of a complaint proceed to determine whether an employer has failed to pay wages according to **The Construction Industry Wages Act** - Subsection 8(3) of **The Payment of Wages Act** discussed - 581/85/PWA - December 11, 1985 - Skinners Wet 'n Wild and 65683 Manitoba Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; MATTER ADJOURNED.**

Machine drywall taper's wages governed by **The Construction Industry Wages Act** - 492/86/PWA - November 7, 1986 - Executive Drywall Co., Brian D. McCaskill.

Employer claims employees voluntarily entered into an agreement to work for less than the minimum wage required under **The Construction Industry Wages Act** - 581, 582/86/PWA - January 26, 1987 - Frank Andrews, Andrews Contracting.

An employee, through accepting a lower rate, is not barred from advancing a claim for payment of wages as stipulated by legislation - Subsection 14(2) of **The Construction Industry Wages Act** applied - 1032/86/PWA - May 11, 1987 - Sunset Plumbing & Heating Ltd.

Board classifies employees involved in the installation of transmission line towers as general labourers under the Rural Building Construction Wages Schedule - 675/86/PWA - October 22, 1987 - M. W. Orbanski Ltd.

Board determines whether a sub-contractor who was responsible for paying a worker, was an employer within the contemplation of that term in **The Construction Industry Wages Act** - 910/87/PWA - May 16, 1988 - R. J. MacDonald Plumbing & Heating.

CONSTRUCTION INDUSTRY

Employer cannot pay employees a flat rate or blended rate instead of rates specified under ***The Construction Industry Wages Act*** - Recovery period restricted to three months as Employees must accept responsibility for non-compliance with minimum wages - ***The Construction Industry Wages Act*** and ***The Fair Wage Act*** discussed - 212/88/PWA - April 30, 1991 - Con-Pro Industries Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Based on factors Board established to determine the classification of workers under ***The Construction Industry Wages Act***, Board finds that some of the classifications determined by Employment Standards Division were in error - 212/88/PWA - April 30, 1991 - Con-Pro Industries Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Nature of the work performed fell within the classification of journeyman rather than labourer - ***The Greater Winnipeg and Major Construction Wages Schedule, M.R. 347/88, Schedule B of The Construction Industry Wages Act*** considered - 1198/90/PWA - June 7, 1991 - Douglas Loghas, Cambridge Builders, Cleaners & Managers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Board held where Employees laid off with no date of recall, termination of employment occurred and notice was required - Exemptions under subsection 39(2) of the ***Act*** did not apply as production work not construction work, and collective agreement did not contain specific conditions for termination - Section 39 of ***The Employment Standards Act*** considered - 174/91/PWA - October 21, 1991 - Display Fixtures, Division of Westfair Foods Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED IN PART; APPEAL DISMISSED.**

Work performed on 32,000 square foot building which was one of six or seven in a 165,000 square foot expansion project properly assessed at the wage rate for major building construction projects as per ***Greater Winnipeg and Major Building Construction Wage Schedule*** - 69/93/PWA - February 4, 1994 - 285525 Alberta Ltd., t/a Alberta Custom Steel Buildings – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

On-site maintenance and repair duties fell within the scope of ***The Construction Industry Wages Act*** - Employee entitled to wage of journeyman electrician - 1009/93/PWA - August 17, 1994 - Safeway Electric Co. Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Order for wages owing limited to three months because Employee knowingly worked six months at lower wage and waited until termination to make claim for underpayment - 1009/93/PWA - August 17, 1994 - Safeway Electric Co. Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Constitutional Challenge - Board held that constitutional challenge regarding section 5(1) of ***Manitoba Regulation 194/91*** should be handled by the courts - 849/94/PWA - January 18, 1996 - Linda Tyndall t/a 2890675 Manitoba – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

CONSTRUCTION INDUSTRY

Rate of pay - Employee employed in excess of one year should be classified as general construction labourer, not unskilled labour - Board held Employee underpaid and should be paid at the rate set out in ***Greater Winnipeg and Major Building Construction Wage Schedule of Manitoba Regulation 194/91*** - Section 5(1) of ***Regulation 194/91*** need not be considered - 849/94/PWA - January 18, 1996 - Linda Tyndall t/a 2890675 Manitoba – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Document submitted into evidence in which Employee states he was a subcontractor - Board finds Employer altered documents after Employee signed - Held employer/employee relationship existed - Work performed fell within the ***Greater Winnipeg and Major Building Construction Wages Schedule*** under the classification of Construction Labourer - Employer ordered to adjust rate of pay and pay wages owing - 476/97/PWA - May 22, 1998 - G & J Construction, Gursharn Singh.

Document submitted into evidence in which Employee states he was a subcontractor - Board finds Employer altered documents after Employee signed - Fraudulent documents can not be relied on - Held employer/ employee relationship existed - Work performed fell within the ***Greater Winnipeg and Major Building Construction Wages Schedule*** under the classification of Unskilled Labourer - Employer ordered to adjust rate of pay and pay wages owing - 488/97/PWA - May 22, 1998 - Best Country Property & Management Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Rate of Pay - Employer appealed Order to pay \$2,186.02 in wages owing to Employee claiming Employee was hired as construction labourer and was only entitled to applicable wage rate established for Industrial, Commercial and Institutional Construction Sector (I.C.I. Sector) - Board found Employee worked some hours as labourer in I.C.I. Sector and other hours performing snow removal work as equipment operator under Heavy Construction Sector - Heavy construction sector defined in *The Construction Industry Wages Act* to include removal of snow from and blading of highways, roads, railroads, runways or parking lots - Board's determination Employee worked, from time to time, in both I.C.I and Heavy Construction Sectors, and that threshold for overtime and wage rates vary depending upon applicable sector, reflected in Board's calculations of wages owing - Substantive Order - 175/11/ESC - May 25, 2012 - Sterling O & G International.

Unauthorized deductions - Employer not entitled to deduct \$40 from wages owing for damages Employee allegedly caused to skid steer as deduction of that nature prohibited by section 19(2)(5) of *Employment Standards Regulation* - Substantive Order- 83/12/ESC - August 10, 2012 - Toomey Construction.

CONSTRUCTION INDUSTRY

Overtime - Rate of Pay - Employer appealed Order to pay Employee \$4,506 for wages owing - Board satisfied Employee was hired as Construction Worker within the meaning of Part 3 of Industrial, Commercial, and Institutional (ICI) Schedule to *The Construction Industry Wages Act* (CIWA) - Parties had agreed to hourly rate of \$15 - Employee, based on experience and hours worked for Employer not entitled to a top rate of \$20.89 for a General Construction Labourer under Part II of the ICI Schedule as no evidence Employee completed necessary hours as Trainee 1 and Trainee 2 in the General Construction Labourer classification - As work performed fell within ICI Sector, Employee entitled to overtime after 10 hours per day or 40 hours per week - Employment agreement parties signed that Employee to be paid for hours worked at his regular rate and overtime hours to be banked at regular hours unenforceable, as provisions contrary to Sections 14(1) and 14(2) of the CIWA - Employee entitled to \$1,348.65 in wages - Appeal allowed in part - Substantive Order - 83/12/ESC - August 10, 2012 - Toomey Construction.

(Next Section: Sec. 4.2)

DEPENDENT CONTRACTOR

Degree of control exercised over the owner/operators results in lack of independent decision making authority - Found to be dependent contractors as per definition of "employee" in *The Employment Standards Act* - 343/89/PWA - August 29, 1990 - Gelco Express Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Term "dependent contractor" not defined in Employment Standards Code nor expressly included in definition of "employee" in Section 1 of the Code - Substantive Order - 247/09/ESC - September 30, 2010 - Polar Window of Canada.

DISCHARGE

Employer attempts to establish a no notice policy for termination of employment - Compliance with Subsections 35(3) and 35(4) of **The Employment Standards Act** discussed - 555/85/PWA - October 10, 1985 - Izabell's Place Ltd.

Failure of employer to give proper notice - **The Employment Standards Act**, Subsection 35(1) considered - 496/86/PWA - October 23, 1986 - Cineplex Odeon Corporation, Garrick Movie Theatre.

Effect of employer's policy on notice of termination requirements - **The Employment Standards Act**, Subsection 35(3) considered - 491/86/PWA - January 30, 1987 - Inner-Tec Security Consultants Ltd.

Employee terminated without just cause entitled to wages in lieu of notice - 491/86/PWA - January 30, 1987 - Inner-Tec Security Consultants Ltd.

Board determines employee terminated his employment voluntarily - 788/86/PWA - February 18, 1987 - Frank H. Wiley Limited.

Employee terminated for leaving his shift early - Employee alleges that it was unsafe to remain and work alone - Employee's claim for wages in lieu of notice limited to one week - 108, 109/87/PWA/ESA - April 24, 1987 - Canadian Anglo Machine & Iron Works Inc.

Employee terminates his employment without notice after first week of employment - Claim for forfeiture denied - Subsections 35(1) and 35(2) of **The Labour Relations Act** applied - 1133/86/ESA - September 1, 1987 - Kildonan Car and Truck Parts.

Employee implicated in misappropriation of Company's funds terminated without just cause and entitled to wages in lieu of notice - 411/87/PWA - October 9, 1987 - CHC Holdings Ltd., Vacu-Maid Sales.

Claim for wages in lieu of notice denied - Employer's wife not a person with authority to hire, fire, etc. - 864/87/PWA - December 14, 1987 - Symbol Signs.

Employee dismissed without notice entitled to receive wages in lieu of notice - Subsection 35(1)(a) and 35(4) of **The Employment Standards Act** applied - 741, 742, 743/87/PWA - December 15, 1987 - Robertson Family Trust, Delta Management Services.

Employees refuse to do heavy lifting, recognizing the possibility of permanent injury to themselves - Employer not justified in claiming wages in lieu of notice - 977 and 978/87/ESA - January 28, 1988 - Kildonan Auto Parts.

Employee's award of wages in lieu of notice reduced due to her conduct in meeting with Manager - Subsection 39(4)(a) of **The Employment Standards Act** applied - 476/88/PWA - September 1, 1988 - Baaco Pizza, Southwood Foods Inc.

Employee discharged without notice due to improper conduct not entitled to wages in lieu of notice - Subsection 39(4) of **The Payment of Wages Act** applied - 653/88/PWA - September 27, 1988 - MacCosham Storage & Distribution Centres (Winnipeg) Ltd.

DISCHARGE

Employer fails to give proper notice - 599/88/PWA - Oct. 14, 1988 - Stevens & Sons Ltd.

Board finds termination unjust due to lack of evidence to substantiate Employees drinking - Entitled to notice or wages in lieu thereof - 1261/88/PWA - March 9, 1989 - Camp Wasaga Inc.

Employee's conduct not insubordinate or dishonest - Entitled to wages in lieu of notice - Subsection 39(14)(d) of *The Employment Standards Act* considered - 1240/88/PWA - April 11, 1989 - The Royal Winnipeg Ballet – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Failure of Employer to place Employee in alternative position – Terminated without proper notice - Entitled to wages in lieu thereof - 245/89/PWA - April 14, 1989 - Metropol Security Ltd./Securite Metropol Ltee. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Despite Employee consuming alcohol on Employer's premises, entitled to wages in lieu of notice due to employer's unnecessary delay in terminating Employee - Subsections 39(10), (13), and (14) of *The Employment Standards Act* considered - 17/87/PWA - August 17, 1989 - Griffin Canada Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL ALLOWED.**

Claim for forfeiture by Employer - Employee fails to work out notice period - 577/89/ESA - September 29, 1989 - Unisex Scizzors.

"No notice" policy - Whether posting of copy of relevant legislation constitutes a "no notice" policy - Subsection 39(3) and (4), *The Employment Standards Act* considered - 961 and 962/89/PWA - December 28, 1989 - Sasagiu Rapids Lodge.

Individual not a director because no company shares transferred to him, no evidence existed to prove that he was elected as a director, and administratively he was treated as an employee rather than an owner, and he had little responsibility or authority - Claim for wages and vacation wages upheld - However, claim for wages in lieu of notice denied because Employee through poor attendance and negligence of duties effectively abandoned job - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee given numerous warnings regarding his insubordinate behaviour - Not entitled to wages in lieu of notice - 589/90/PWA - November 14, 1990 - Carlton Club – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Continued employment of Employee on 60 day probation subject to certain conditions, breach of which would result in immediate termination - Refusal to meet those conditions along with previous work history sufficient cause to discharge employee without further notice or wages in lieu thereof - Reasons not issued - 1144/90/PWA - February 1, 1991 - INCO Ltd.

Sec. 4.3-E3

DISCHARGE

Employer acted unreasonably when it ordered Employee who had broken his glasses to report for work - Employee did not abandon his job by refusing to work and entitled to wages in lieu of notice - Subsection 39(10) of **The Employment Standards Act** considered - 844/90/PWA - February 14, 1991 - Continental Caterers – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Board held that whether or not the Employee was on duty, "knocking out" a manager amounted to just cause for dismissal - Claim for wages in lieu of notice dismissed - 1159/90/PWA - March 21, 1991 - Kayway Industries Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Board held where Employees laid off with no date of recall, termination of employment occurred and notice was required - Exemptions under subsection 39(2) of **The Employment Standards Act** did not apply as production work not construction work, and collective agreement did not contain specific conditions for termination - Section 39 of the **Act** considered - 174/91/PWA - October 21, 1991 - Display Fixtures, Division of Westfair Foods Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED IN PART; APPEAL DISMISSED.**

In the absence of a policy forbidding employees from performing personal work during work hours or in the absence of previous discipline for tardiness, Employer fails to prove Employee guilty of gross insubordination or dishonesty - No justification for terminating without notice - 751/91/PWA - Jan. 20, 1992 - John A. Flanders Co. Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee terminated without notice after charged with theft, an act he claimed was motivated by his consumption of alcohol - Employee not entitled to wages in lieu of notice because he was warned further problems with alcohol would not be tolerated - 899/91/PWA - Feb. 24, 1992 - Inner-Tec Security Consultants Ltd., trading as Inner-Tec Security Services – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee refusing to return keys to Employer discharged for insubordination properly denied wages in lieu of notice as per section 39 of **The Employment Standards Act** - Employee's claim for overtime denied as hours claimed not authorized, not part of his assigned duties, and were done on own initiative - 818/91/PWA - February 24, 1992 - Dr. Amrit Varma, trading as The Terraces of Tuxedo – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Orderly discharged for threatening to "mess up lives" of management because they moved him to day shift - Board held threats were insubordination as per Section 39 of **The Employment Standards Act** - Discharge justified - Not entitled to wages in lieu of notice - Claim for vacation wages dismissed as supporting documentation showed none owing - 247/92/PWA - September 22, 1992 - Park Manor Personal Care Home Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Unauthorized absence and dishonesty - Board accepts Employee's evidence that he assumed the Employer would call him - Held absence not unauthorized - Due to inadmissibility of videotaped evidence, held assertion of dishonesty without evidence to support it - Claim for wages in lieu of notice allowed - 531/92/PWA - December 2, 1992 - Oshawa Holdings Ltd. t/a The Codville Company – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Sec. 4.3-E4

DISCHARGE

Employee filed claim for wages in lieu of notice - Board dismissed claim finding that Employee not terminated but was placed on lay-off in accordance with the collective agreement - No summary written - 14/93/PWA - August 23, 1993 - University of Manitoba.

Shift supervisor terminated for not following cash control and security policy - Termination could not be upheld as Employee unaware of policy which had been issued after her termination and no evidence she was responsible for loss or theft of deposit - Employee entitled to wages in lieu of notice - 202/93/PWA - November 1, 1993 - Mandolfo Investments (Canada) Inc., Pizza Hut.

Unauthorized deductions - Property Manager fired for theft of rent money - Employer not allowed to withhold wages for restitution without authorization of Employee - Claim for wages owing allowed - 910/93/PWA - February 7, 1994 - Kirkwall Properties Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee fired without notice and wages withheld when night deposit short by \$2,500 - Claim for wages in lieu of notice denied because of "no notice" agreement between the parties - 999/93/PWA - March 9, 1994 - Bewza Hotels.

Employee fired without notice and wages withheld when night deposit short by \$2,500 - Held Employer could not recoup its losses by using a blanket authorization to deduct wages to cover shortages because amount of money missing could not be characterized as a "shortage" - Also held the release for further money owing signed by Employee improperly obtained as Employee forced to sign if wanted money which was lawfully his - Claim for underpayment of wages and vacation wages allowed - 999/93/PWA - March 9, 1994 - Bewza Hotels Ltd.

Hair stylist decided she would not have enough time to completely service client and arranged for another stylist to serve her - Employer believed she had the time and fired her for violating policy to not refuse client unless busy - Paid one week's pay in lieu of notice although paid every two weeks - Held decision not to serve client reasonable and within scope of Employer's policy - Ordered Employer to pay balance of notice period - 461/94/PWA - October 19, 1994 - Aragona Enterprises Ltd – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee discharged for not reporting for work despite request for day-off being denied - Board held she misunderstood Employer and believed she had permission - Claim for wages in lieu of notice allowed - 553/94/PWA - November 9, 1994 - J. & M. Investments Ltd. & Normand Park Car Wash – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer claimed Employee laid off or, in alternative terminated with cause, as per Section 39 of *The Employment Standards Act*, for giving unauthorized bonuses and use of company credit card to employees - Held Employee not laid off as Employer witness stated he was relieved of duties - Held did not exceed authority and conduct not type contemplated by *Act* - Claim for wages owing allowed - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Sec. 4.3-E5

DISCHARGE

Employee laid off indefinitely for sending "impertinent" letter to Employer - Employee claimed terminated without notice - Employer argued termination also justified, as per Section 39 of *The Employment Standards Act*, because Employee breached fiduciary duty by starting rival company - Board held Section 39 not applicable as Employee did nothing prior to termination and the alleged breach did not affect claim under *The Payment of Wages Act* - Ordered Employer to pay wages claimed - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Forfeiture - Employee terminated for theft - Ten days after Employer asked him to return to work, Employee quits without notice due to humiliating treatment by Employer - Filed claim for wages in lieu of notice - Employer filed forfeiture claim - Held first termination without cause as theft allegations not substantiated and second termination without cause as Employee constructively dismissed - Entitled to wages in lieu of notice for either termination - Forfeiture claim dismissed - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee discharged with two weeks notice for causing damage - Next day, Supervisor informed him the owner wanted him off the property - Given lack of testimony by Supervisor, Board concluded the Employer was originally prepared to terminate with notice, but Supervisor later terminated him without notice merely because of opinion expressed by office manager - Claim for wages in lieu of notice allowed - 771/94/PWA - April 13, 1995 - Gateway Packers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Probationary Employee discharged for repeated tardiness - Employee's version of culminating incident not credible - Claim for wages in lieu of notice dismissed - 215/95/PWA - September 28, 1995 - Inner Tec Security Consultants Ltd. t/a Inner Tec Security Services – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Sufficient cause - Employer replaces Brandon crew with Winnipeg crew simply to reduce food and lodging expenses - Terminating employment for the sole reason of economics not sufficient cause to terminate without notice - Claim for wages owing in lieu of notice allowed - 685 & 686/97/PWA - Jan. 30, 1998 - Westman Tree Services Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Just cause - Employee was insubordinate for refusing numerous times to complete inventory - Board found request was reasonable and would not create undue hardship and Employee had been warned failure to comply could result in termination - Employer had just cause to terminate employment - Ruled Employee not entitled to wages in lieu of notice - 106/99/PWA - September 9, 1999 - College Universitaire de Saint Boniface - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Theft - At time of termination, Employer issue wages in lieu of notice and a Record of Employment reflecting "things not working out" - Employer reissued Record of Employment and for first time noted Employee was dismissed for theft of muffins based on allegations of one witness - Board troubled that Employer allowed Employee to work after it became aware of alleged theft - Evidence to substantiate theft fell short of being clear, compelling and cogent - In absence of sufficient explanation for change of mind, Employer should be held to original position - Order for wages in lieu of notice confirmed - 204/07/ESC - Jan. 28, 2008 - Tonya Collins, trading as Lite Stop Foods.

DISCHARGE

Resignation - Company President and Employee on medical leave argue over her return to work - Employee claimed President said if she did not come back immediately he had to "let her go" - On balance of probabilities, Board did not accept Employee's version of events but found she was offended that he would hire someone else - She expressed intention to resign and removed her personal effects from workplace satisfying subjective and objective elements necessary to establish a resignation - Application for wages in lieu of notice denied - 55/08/ESC - July 8/08 - JMJ Fashions.

Employee discharged without notice for submitting false claims for tuition reimbursement - Employee claimed she was not active participant - Based on credible evidence, Employer established Employee was dishonest in her employment - Held Employer entitled to terminate Employee without notice pursuant to Section 62(1)(h)(iii) of *The Employment Standards Code* - Appeal dismissed- 001/09/ESC - April 29, 2009 - Convergys New Brunswick, Inc. t/a Convergys CMG Canada Limited Partnership.

Employee discharged without notice for submitting false claims for tuition reimbursement - Employee asserted Employer decision to terminate her as her services were no longer needed due to impending closure of Employer's offices - Board accepted that Employer's investigation was undertaken in good faith and was completed expeditiously - 001/09/ESC - April 29, 2009 - Convergys New Brunswick, Inc. t/a Convergys CMG Canada Limited Partnership.

Wilful misconduct - Automotive technician terminated for servicing customer's vehicle on off-duty hours - Held Employee innocently assisted individual with work he honestly and in good faith believed Employer was not promoting or performing - Order confirmed for further four weeks wages in lieu of notice - 25/09/ESC - May 12, 2009 - Frontier Management Inc., t/a Frontier Subaru.

Unauthorized Deductions - Employee terminated for theft of company property with criminal charges pending - Employer claimed wages owing be returned as partial restitution - Employer may seek recovery or restitution in other forums, but as per Section 19 of *The Employment Standards Regulation*, Board had no authority to authorize any deduction, off-set or restitution order from the wages earned - Board also applied general law that employer cannot unilaterally determine liability of employee, or quantum of damages and then seek to deduct such amount from wages owing - Substantive Order - 221/09/ESC - October 23, 2009 - Goodway Express.

Resignation - Board considered Employee stated desire to keep working for Employer; her belief she had been dismissed by Employer; absence of evidence she intended to quit or resign; and letter written by Employer stating "we have no alternative but to terminate your employment" - On balance of probabilities Employee did not quit or resign her employment but was terminated by Employer - Substantive Order - 51/09/ESC - December 21, 2009 - Innvest Hotels GP XV.

Sec. 4.3-E7

DISCHARGE

Employee allowed terminated co-worker access to office and to remove files despite Employer's directive that co-worker not allowed on premises – Employee terminated for dishonesty as per employment agreement – Held Employee not entitled to receive wages in lieu of notice - Substantive Order - 11/10/ESC - July 26, 2010 - Krevco Lifestyles.

Employee terminated after second violation of company I.D. policy for selling tobacco to mystery shopper under age of 30 without asking for identification – Board observed shopper at hearing and could not find objectively reasonable basis for Employee's view shopper appeared over 30 – Basing age assessment on subjectivity of employee would make policy unenforceable as every employee could rely on opinion regardless of reasonableness - Held Employee acted voluntarily, intentionally and knowingly – Her actions were not unthinking, careless, neglectful or inadvertent - Employer met onus to establish Employee's actions constituted disobedience and wilful neglect of duty within Section 62(1)(h) of *The Employment Standards Code* – Claim for wages in lieu of notice dismissed – Substantive Order- 157/10/ESC – Nov. 15, 2010 - 7-Eleven Canada.

Just cause vs. wilful misconduct - Employer argued no notice required for Bicycle Courier terminated for cause for losing Client's bank deposit on street - Conduct amounting to "cause" or "just cause" for dismissal at common law or under collective bargaining not necessarily same as conduct justifying termination without notice under *The Employment Standards Code* - Section 62(1)(h) sets out exception to notice if employee acted in manner not condoned by employer and that constituted wilful misconduct, disobedience or wilful neglect of duty - "Wilful" interpreted as being "deliberate", "malicious" or "intentional" - Loss of bank deposit an accident, and Employee made concerted effort to find it – Also, evidence did not support finding that he acted "wilfully" in a verbal exchange with client - Board concluded exception to providing notice did not apply - Employee entitled to wages in lieu of notice - 97/10/ESC - January 5, 2011 - 3526861 Manitoba Ltd. t/a Rene's Courier.

Resignation - Employer submitted Employee left phone message with instructions to lay him off and deduct money he owed off his severance pay - Employee countered that after he yelled at an employee he spoke with operations manager who told him to take time off - Next contact he had with Employer was voicemail in which Employer stated he was not sure there was a point in planning on having Employee return - Employee testified he had been fired in that message - Employer issued final cheque that indicated \$900 deducted for money it alleged Employee took without authorization and \$1200 deducted for advance paid to Employee at beginning of stress leave which was to be paid back when he returned to work - Board found that from Employer's voicemail any reasonable person would conclude Employer fired Employee and Employee had no intention to resign as he was suffering from health issues - Held Employer terminated Employee's employment without notice - Employee entitled to six weeks' notice - As to \$900, Employee gave detailed evidence as to how he received funds from shop managers as payment for services rendered - Employer did not report matter as theft and Employer could have called managers as witnesses to dispute Employee's evidence - Board found Employer provided \$1,200 to Employee without expectation of repayment - Amounts should not be subject to deductions from the sum owing to Employee - Employer's appeal dismissed and Employee's claim upheld - 137/10/ESC - May 26, 2011 - Brousseau Bros. Ltd., t/a Super Lube.

DISCHARGE

Threats and ultimatums - Employer demanded Employee rectify deficiency in his work on his own time and without compensation - If he refused then his employment was terminated - Employee refused to work for no wages and removed himself from workplace given Employer's instruction - Held issuing ultimatum to employee that he perform work for no wages, failing which he would suffer termination of employment was contrary to subsection 4(1) of *The Employment Standards Code* - Employee reasonably concluded his employment was terminated and did not voluntarily terminate his employment - He was entitled to two weeks' wages in lieu of notice - Substantive Order - 111/11/ESC - June 15, 2011 - Detail Woodwork Ltd.

Just Cause - Employer appealed Order to pay Employee wages in lieu of notice claiming it had just cause to terminate Employee's employment because his absenteeism detrimentally affected its operations and jeopardized its relationships with customers and other staff - Employer relied upon section 62(1)(h) of *The Employment Standards Code* - Board employed contextual approach to just cause standard - Board considered nature and extent of employee's misconduct; surrounding circumstances; and, whether termination was proportional response to misconduct - Board found, following Employee's return to work from parental leave, he left work early once and was absent once to look after his child, both times with express permission - Absences were limited, condoned by Employer, and Employee was honest at all times regarding reason for requesting to be absent - Occasional or isolated absence not generally regarded as sufficiently serious misconduct to justify summary dismissal - Employee's absences did not constitute misconduct and not indicative of neglect of duty, disobedience, or conduct that was incompatible with his employment duties - Employee was never warned that absences could lead to discipline or termination - However, given small number of mechanics and time sensitive nature of its business, absenteeism may have prejudicial effects upon Employer's relationships with its clients and morale of other employees - Notwithstanding potential effect of employee's absences, Employer did not have absenteeism policies - Board determined termination of Employee was disproportionate response to his absences - Employer did not satisfy Board that Employee was terminated for just cause - Employee entitled to wages in lieu of notice - 136/12/ESC - February 27, 2013 - North Perimeter Service Centre.

Sec. 4.3-E9

DISCHARGE

Wilful misconduct - Employer appealed Order to pay Employee wages in lieu of notice asserting wages not owed because Employee engaged in conduct that constituted wilful misconduct or behaviour or disobedience – Employer testified, after meeting with Employee to discuss incident where he angrily swore at young co-worker, she sent him home and as Employee was leaving, he swore at Employer while customers were present and slammed front door as he left - Board accepted Employer's evidence that she was shaken by Employee's remarks and felt threatened – Whatever characterization one may make regarding Employee's initial and improper remarks to co-worker as stand-alone event, later actions and conduct of Employee involving Employer reflected deliberate, intentional and voluntary actions and fell within ambit of exception contemplated by Section 62(1)(h)(i) of *The Employment Standards Code* (as it then stood) - Board satisfied Employer met its onus, on balance of probabilities, that Employee acted in manner that constituted wilful misconduct, disobedience or insubordination - Appeal allowed – Substantive Order - 212/12/ESC – August 22, 2013 - C.C.'s Restaurant & Lounge.

Just Cause - On day in question, Employee, who was table games inspector, witnessed dealer pay out additional \$350 and then touched player's chips - As a result of incident, Employer terminated his employment for violating Employer's and gaming commission's policies and procedures - Employer disputed Order to pay Employee wages in lieu of notice asserting it had just cause to terminate his employment without notice because Employee did not perform his job responsibilities in accordance with policies and procedures – Board noted an employer's dissatisfaction or displeasure with an employee's performance is generally not enough to constitute just cause for dismissal without notice - Board found Employee caught sight of dealer's error, and proceeded to bring it to Employer's attention - Employer did not point to particular policies and procedures that it was relying on, nor did it elaborate on how policies or procedures were allegedly breached - Board could not conclude Employee's actions or performance amounted to "just cause" within meaning of section 62(1)(h) of *The Employment Standards Code* - Employee entitled to six weeks' wages in lieu of notice - Appeal dismissed - Substantive Order - 291/12/ESC - February 28, 2014 - South Beach Casino.

(Next Section: Sec. 4.6)

Sec. 4.6-E1

DUTY OF FAIR REPRESENTATION

Fundamental that Employees be represented at hearing - Ministerial approval declined to appoint counsel - Board reluctantly proceeded with hearing - 931-934/87/PWA - October 25, 1990 - Harvard Investments Limited, The Fort Garry Hotel.

(Next Section: Sec. 4.7)

DUTY TO BARGAIN IN GOOD FAITH

Employer rejected the 12-hour shift schedule at the bargaining table - During lock-out requested hours of work exemption for 12-hour shift - Held could not make unilateral changes during lock-out that it opposed during negotiations or "pre-impasse negotiating framework" - Request denied - 369/95/ESA - August 2, 1995 - Gateway Industries Ltd.

Union continues to represent the employees employed in the bargaining unit at the time the lock-out commenced, including those who had returned to work - Union was at party to the proceedings before the Board - 369/95/ESA - August 2, 1995 - Gateway Industries Ltd.

(Next Section: Sec. 5.0)

Sec. 5.0-E1

EMPLOYEE

Agricultural employee - Definition of "person employed in agriculture" examined - Subsection 2(1)(g)(ii) of **The Employment Standards Act** considered - 800/83/PWA - January 19, 1984 - Somerset Farm Equine Care Centre, Mike Smith.

Definition - The Board concludes that the Applicant, a Chef, was an "employee" within the contemplation of **The Payment of Wages** and **The Employment Standards Act** - 915/83/PWA - June 25, 1985 - Ramada Inn, King's Motel Winnipeg Ltd.

Board determines whether the Applicant is in fact a salaried employee of a life insurance company - 53/86/PWA - June 25, 1986 - Pioneer Life Assurance Company.

Definition - Whether a companion to an aged woman, who resided at a nursing home is an employee within Subsection 2(1)(g) of **The Employment Standards Act** - 1048/85/PWA - August 26, 1986 - Phillip Kives.

Definition - Applicant responsible "indirectly for the engagement or employment of, or payment of wages to persons employed ..." - Applicant denied access to remedies provided in **The Payment of Wages** - Subsections 1(c) and 1(d) of the **Act** considered - 414, 415, 416, 417/86/PWA - Nov. 17, 1986 - Progress Plastics Ltd.

Board determines that a Real Estate Company controlled the Applicant to such an extent that an employer/employee relationship existed - 646/86/PWA - November 28, 1986 - B. Leslie Real Estate and Development Co. Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Whether taxi drivers, who lease cars from Company, are employees under **The Employment Standards Act** - Applicable test discussed - 208/86/PWA - January 23, 1987 - Imperial Taxi Brandon (1983) Ltd.

Board reviews "control test" and "organization test" and determines claimant to be an employee - 197/87/PWA - May 28, 1987 - Executive Drywall Co., Brian McCaskill.

Status of Complainant determined - Section 1 of **The Payment of Wages** considered - 494/87/PWA - January 18, 1988 - Walter Sobie, Sobie Management Services.

Real estate agent involved in a dispute as to whether her status was a salaried employee or a commission salesperson - 119/88/PWA - September 13, 1988 - B. Leslie Real Estate and Development Co. Ltd.- **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Definition - Assistance provided as a result of friendship does not establish an employee/employer relationship - 857/88/PWA - December 14, 1988 - Baldy's Paun Shoppe, Solomon Monch.

Definition - Employee/employer and independent contractor distinction discussed - 686/88/PWA - December 21, 1988 - Today Homes (East) Ltd.

Definition - Construction manager determined to be an employee rather than a partner - 475/88/PWA - January 6, 1989 - Criteria Development Ltd., Cookie Break - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Sec. 5.0-E2

EMPLOYEE

Agricultural employees - Whether an employee of a farm raises and markets bison meat and associated products is employed in agriculture discussed - 1241/88/PWA - March 22, 1989 - Alan Wright Bison - Bison Meats and Products.

Employer and Employee are directors, officers, and equal shareholders in related real estate enterprise - Relationship not one of employer/employee - Section 6 of **The Payment of Wages Act** considered - 31/89/PWA - May 1, 1989 - Arborlea Homes Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Definition - Sales agent for real estate firm determined to be employee - Exclusion (h) of **The Employment Standards Act** considered - 25/89/PWA - August 3, 1989 - Executive Homes Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED IN PART; APPEAL DISMISSED.**

Definition - Subcontractors established independence from Employer – Not employees within the meaning of **The Employment Standards Act** - Board concerned over manner evidence presented at hearing - 451/88/ESA - September 21, 1989 - D. Phillips Acoustic Services Ltd.

Definition - Claimants establish employment relationship - Section 6 of **The Payment of Wages Act** considered - 305-310/89/PWA - November 30, 1989 - Imperial Janitorial Service, Comet Maintenance and Building Cleaning (1984) Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Board determines delivery driver doing additional independent work during business hours properly classified as an employee - 94/90/PWA - May 11, 1990 - F.J. Fibreclaim, Ron Ferguson – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Degree of control exercised over the owner/operators results in lack of independent decision making authority - Found to be dependent contractors as per definition of "employee" in **The Employment Standards Act** - 343/89/PWA - August 29, 1990 - Gelco Express Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

"Plant Manager", who had no control and direction of, nor was responsible directly or indirectly for the engagement or employment of, or payment of wages to an employee, was an employee as per section 1 of **The Payment of Wages Act** - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Individual not a director because no company shares transferred to him, no evidence existed to prove that he was elected as a director, and administratively he was treated as an employee rather than an owner, and he had little responsibility or authority - Claim for wages and vacation wages upheld - However, claim for wages in lieu of notice denied because Employee through poor attendance and negligence of duties effectively abandoned job - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Sec. 5.0-E3

EMPLOYEE

Individual who performed work at the Employer's plant on own accord not an employee - Claim for wages denied - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Although Employee hired as a result of an error or miscommunication, an employer/employee relationship existed between head office and the Employee - Head office responsible for the error and required to pay wages and vacation wages - 827/89/PWA, 58 & 154/90/PWA - September 14, 1990 - Koya Japan Inc., Chan-Wong's Food Inc., Wisner Enterprises Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Officer defined - Officer need not be a director or shareholder or have management responsibilities, and can have powers to sign negotiable instruments - Board held Employer was an officer within the meaning of *The Payment of Wages Act* - 430/90/PWA - December 12, 1990 - Gary Baty, Heritage Industries Ltd.

Board held that Employee was an employee on renovation project but an independent contractor thereafter, as he accepted church job on contract basis - 1198/90/PWA - June 7, 1991 - Douglas Lughas, Cambridge Builders, Cleaners & Managers Ltd - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Monthly sum received was an honourarium and not wages - Board held Employee was a volunteer and not an employee - Claim for wages denied - Section 1(e) of *The Employment Standards Act* considered - 180/91/PWA - August 21, 1991 - Khalsa Diwan Society (Manitoba) Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Definition of Agricultural Employee - Employees did not raise or rear livestock - Failed to meet the dictionary definition of agricultural employee - Fulfillment of federal Department of Agriculture regulation requiring presence of inspector and veterinarian does not render the operation "agricultural" within the meaning of the provincial legislation - 885-890/90/PWA - October 2, 1991 - Jack Levin and Louis Levin, East-West Packers (1969) Ltd.

Employee entitled to statutory holiday pay, vacation pay, and overtime wages even if Employer claims it does not pay those wages - Employee entitled to wages in lieu of notice because he was told by the Employer "to get out and not come back" - 300-301/91/PWA - October 10, 1991 - Ervin Funk, Fort Rouge Plumbing – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee was employed by Employer because he received a cheque which bore the name of the Employer, he was hired by the Employer who obtained the jobs, supplied the material and tools, and hired the crew, and because he did not receive any profits or assume any losses - 300-301/91/PWA - October 10, 1991 - Ervin Funk, Fort Rouge Plumbing – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Domestic Worker - Employee more than baby-sitter - Employed to do and did perform a full range of domestic work - 6/92/PWA - May 20, 1992 - Manjit Singh Bullar.

EMPLOYEE

Hairdresser did not set own hours or prices, did not pay rent, did not supply products used, did not pay expenses, did not perform different duties when paid by commission instead of hourly rate - Employer exercised significant degree of control - Held Employee not independent contractor - Entitled to wages owing - 1075/92/PWA - August 30, 1993 - Norman George Frost – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Burden of Proof - Employee worked two months without receiving wages - Employer argued she was aware he could not afford to hire her - Board found that person who "hired" Employee and who had discussions regarding wages owing was not a partner and had no authority to hire employees - Employee failed to prove on balance of probabilities that Employer/employee relationship existed - Claim for wages owing dismissed - 988/93/PWA - March 7, 1994 - James Murphy t/a Dockside 21 – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Duties of the Lodge "Manager-cook-maintenance-driver" encompassed control and direction of other employees - Found to be an employer under **The Employment Standards Act** - Claim for wages in lieu of notice and overtime wages dismissed - 743/93/PWA - March 25, 1994 - 79346 Manitoba Ltd., t/a Little Grand Rapids Lodge – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee worked full-time hours one month prior to lay-off - Employer claims not entitled to notice as hired on job-to-job basis - In absence of written contract of employment or evidence to substantiate Employer's claim, Board held Employee was employee under relevant legislation - In absence of no notice policy as per Section 39 of **The Employment Standards Act**, Employee entitled to wages in lieu of notice - 28/94/PWA & 29/94/ESA - August 3, 1994 - Tericorp Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

"Professional" - Real estate salespersons and branch managers are not professionals as per Section 1 of **The Employment Standards Act** - 485/94/ESA - February 7, 1995 - Canada Trust Realty – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Real estate salespersons do not have degree freedom of an independent contractor and are employees under **The Employment Standards Act** and **The Vacations With Pay Act** - 485/94/ESA - February 7, 1995 - Canada Trust Realty – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Entitlement to wages - Apartment caretaker/superintendent - Contract signed between the Employee and Employer was an employment contract - Employee found to be employee under **The Payment of Wages Act** as she personally performed duties outlined in contract - 544/95/PWA - February 8, 1996 - Anne & Theodore Kostynyk t/a Gateside Gardens – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Truck driver worked seven days for 10 hours per day delivering freight at the direction and benefit for the Employer - Employee/employer relationship exists - 636/95/PWA - Feb. 29, 1996 - Sharon Lemay, Heinz Isbach t/a Sterling Transportation Service – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

EMPLOYEE

Employer's father forcing him to hire his brother and the brother's refusal to submit to the Employer's authority did not nullify the employment status - Also brother's hiring other employees did not disqualify him from being considered an employee under ***The Payment of Wages Act*** - Claim for wages and vacation wages allowed - 210-212/96/PWA - November 7, 1996 - Sheldon Brounstein/Regent Auto & Truck Parts – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Entitlement - Position for factory agent altered during interview to be sales representative of Employer - Employee not paid for months - Held he performed functions for which he was entitled to be compensated under the law - 485/95/PWA - November 22, 1996 - Paul Sigurdson/Aerotech International Inc – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee installs security systems - Other than assigning jobs, Employer did not have effective control over the Installer - Test for determining whether individual was independent contractor discussed - Installer excluded from ***The Payment of Wages Act*** - 726/96/PWA - February 18, 1997 - While-Away Security Services t/a Accurate Alarm – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Definition - Travelling Salesman - Overtime - Entitlement - Sales & Marketing Representative performed functions not entirely sales related, received straight salary, travelled only as required - Held not "travelling salesman" as defined by Sec. 31(1)(b) of *The Employment Standards Act* - Entitled to overtime pay. - 377/97/PWA - January 13, 1998 - Hi-Qual Manufacturing Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Document submitted into evidence in which Employee states he was a subcontractor - Board finds Employer altered documents after Employee signed - Held employer/employee relationship existed - Work performed fell within *The Greater Winnipeg and Major Building Construction Wages Schedule* under the classification of Construction Labourer - Employer ordered to adjust rate of pay and pay wages owing - 476/97/PWA - May 22, 1998 - G & J Construction, Gursharn Singh.

Document submitted into evidence in which Employee states he was a subcontractor - Board finds Employer altered documents after Employee signed - Fraudulent documents can not be relied on - Held employer/ employee relationship existed - Work performed fell within the *Greater Winnipeg and Major Building Construction Wages Schedule* under the classification of Unskilled Labourer - Employer ordered to adjust rate of pay and pay wages owing - 488/97/PWA - May 22, 1998 - Best Country Property & Management Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Definition - Employer instrumental in interviewing, hiring and training of Employee - Employer also billed client for Employee's services - Held Employer exercised sufficient control and direction over Employee to establish employer-employee relationship - 76/99/PWA - June 23, 1999 - Michael Munroe t/a Munroe Equipment Services.

EMPLOYEE

Employee alleged she was employed as a human resource manager while Employer asserted only employment relationship existed with her spouse - Board found Employer's assertion that amount paid to the Employee was part of a scheme devised to split her spouse's income with his wife for income tax purposes - Further, her attendance at the workplace were personal visits, and not as an employee - No employer-employee relationship existed between the parties - Claim for wages owing dismissed - 750/01/ESC - September 12, 2002 - 2128829 Manitoba Ltd.

Employer disputed Order for wages owing claiming no employer-employee relationship existed and that he only agreed to Employee work as a favour so that he could get some business experience and training - Held employee-employer relationship existed as evident from Payroll Time Record signed by the Employer as based on discussions between the Employer and the Employee about continued employment - 730/02/ESC - May 6, 2003 - El Dorado Trading Centre - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Courier drivers owned vehicles and equipment and paid costs relating to vehicle - However, Employer dispatched calls and set rates charged to customers - Compensation by commission rather than by hourly wage did not mean individuals were independent contractors - Board held Applicants were Employees as defined in Employment Standards Code - 726 & 727/02/ESC - December 19, 2003 - Broadway Messenger and Courier Ltd. - **APPEAL TO COURT OF APPEAL DENIED.**

Bicycle courier performed duties under Employer's strict direction and control for its benefit and courier did not exercise any significant independent decision-making authority - Held courier was an "employee" under *The Employment Standards Code* - Claim for wages allowed - 602/04/ESC - May 19, 2005 - Frank Kenjak t/a Aries Courier Service - **LEAVE TO APPEAL TO THE COURT OF APPEAL DISCONTINUED.**

Bicycle courier not insurable for EI or CPP not determinative whether he was an employee under *The Employment Standards Code* - 602/04/ESC - May 19, 2005 - Frank Kenjak t/a Aries Courier Service - **LEAVE TO APPEAL TO THE COURT OF APPEAL DISCONTINUED.**

Agriculture - Employee was a person employed in agriculture as per Section 3(1)(a) of the *Minimum Wages and Working Conditions Regulation* - Part 2 of the *Code* does not apply to an agricultural employee - Claim for wages, overtime wages, general holiday wages, vacation wages and wages in lieu of notice dismissed - Substantive Order - 426/06/ESC - Nov. 9, 2006 - L J Livestock.

Work performed by Employee fell under *The Construction Industry Wages Act* - As Employee was employed in construction, he was not entitled to receive wages in lieu of notice - Substantive Order - 544/06/ESC - Nov. 17, 2006 - 2692784 Manitoba Limited t/a Wes Man Mechanical.

EMPLOYEE

Parental Leave - New Hire - Employee took parental leave without giving required four-weeks notice prior to end of maternity leave - Two weeks after her return to work, Employer terminated her employment without notice as it took position she was a new hire - Board noted Employer did not issued Record of Employment and never expressed to Employee she was re-hired as new employee - Board ruled her employment was continuous and Employer obliged to give two weeks notice - However given Employee failed to give written notice of parental leave she was entitled to only one week's wages in lieu of notice - Substantive Order - 732/06/ESC - March 15, 2007 - Kildare Investments t/s Kern Park Carwash.

Commission Wages - Employee closed a sale consisting of six advertisements - Employer had yet to receive payment for advertisements - Board ruled Employee entitled to receive commission wages and vacation wages on all collections received by the Employer for advertisements sold - Further, the agreement between the parties was that commission would be paid upon publication of advertisements - Substantive Order - 676/06/ESC - Preliminary Order March 2, 2007 & Final Order June 29, 2007 - GIJO Ltd t/a Canadian Homestead.

Taxi Driver - Informal and verbal working arrangement between Driver and Employer; manner in which "commissions" were paid, structured or implemented; and manner in which "tips" were dealt with not determinative whether relationship was employer/employee or independent contractor - However, Employer owned, provided, insured and maintained taxi which Employee drove; Employee had no responsibility for expenses, for setting fares (because taxi industry fares tightly regulated) or for engaging helpers - Employee performed duties under Employer's general direction and control for Employer's benefit and did not exercise significant independent decision-making authority - Relationship properly characterized as employer/employee - Appeal dismissed - Substantive Order - 248/09/ESC - December 11, 2009 - 5492735 Manitoba Ltd.

Chiropractor filed claim for wages owing submitting she was an employee as Employer became increasingly controlling - Board concluded Employer did exert some control over Chiropractor's activities with goal for her to increase volume of services but was not overly involved in prescribing methods result was to be achieved - Board determined Chiropractor was an independent contractor - Claim for wages dismissed - Substantive Order - 280/09/LRA - April 16, 2010 - Ashique Enterprises t/a Central Chiropractic Centre.

Decision of Courts - In support of its position that Chiropractor was independent contractor, Employer submitted appeal decision of Tax Court of Canada that established Employee was not an employee under *Employment Insurance Act* - Board noted judgment of Tax Court was not conclusive of issue before it because tests applicable under *Employment Insurance Act* may be different than tests applied by Board, and because judgment was on consent and matter was determined without full hearing and without specific factual determinations being made on issues - 280/09/LRA - April 16, 2010 - Ashique Enterprises t/a Central Chiropractic Centre.

EMPLOYEE LAY-OFFS

Board determines that employer had terminated applicant's employment under the guise of a lay-off - 443/86/PWA - October 9, 1986 - Wapun Security Services Inc.

Employee given written notice of lay-off effective same day - Verbal notice given two weeks earlier inappropriate given vagueness of effective date, lack of written confirmation, and threatening comments from the Employer - Entitled to wages in lieu of notice - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

No evidence that actual notice or constructive notice of lay-off given - Normal summer lay-off of two weeks does not equate to notice of termination - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Board held where Employees laid off with no date of recall, termination of employment occurred and notice was required - Exemptions under subsection 39(2) of the **Act** did not apply as production work not construction work, and collective agreement did not contain specific conditions for termination - Section 39 of **The Employment Standards Act** considered - 174/91/PWA - October 21, 1991 - Display Fixtures, Division of Westfair Foods Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED IN PART; APPEAL DISMISSED.**

Employee filed claim for wages in lieu of notice - Board dismissed claim finding that Employee not terminated but was placed on lay-off in accordance with the collective agreement - 14/93/PWA - August 23, 1993 - University of Manitoba.

Employee worked full-time hours one month prior to lay-off - Employer claims not entitled to notice as hired on job-to-job basis - In absence of written contract of employment or evidence to substantiate Employer's claim, Board held Employee was employee under relevant legislation - In absence of no notice policy as per Section 39 of **The Employment Standards Act**, Employee entitled to wages in lieu of notice - 28/94/PWA & 29/94/ESA - August 3, 1994 - Tericorp Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employer claimed Employee laid off or, in alternative terminated with cause, as per Section 39 of **The Employment Standards Act**, for giving unauthorized bonuses and use of company credit card to employees - Held Employee not laid off as Employer witness stated he was relieved of duties - Held did not exceed authority and conduct not type contemplated by **Act** - Claim for wages owing allowed - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee laid off indefinitely for sending "impertinent" letter to Employer - Employee claimed terminated without notice - Employer argued termination also justified, as per Section 39 of **The Employment Standards Act**, because Employee breached fiduciary duty by starting rival company - Board held Section 39 not applicable as Employee did nothing prior to termination and the alleged breach did not affect claim under **The Payment of Wages Act** - Ordered Employer to pay wages claimed - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

EMPLOYEE LAY-OFFS

Employer disputed Order for six weeks' wages in lieu of notice submitting Employee laid off and refused another position at lower pay rate at time of lay-off and two more times during next two months - Board not satisfied Employee offered alternate position or refused to accept such position as no documentation corroborating alleged offer submitted to Board - Board noted Record of Employment (ROE) identified reason for issuance to be shortage of work as opposed to quit or terminated - No additional or amended ROE was issued indicating Employee refused alternate position - Subsection 23(1) of *Employment Standards Regulation* provided that employment of employee who is laid off for one or more periods exceeding eight weeks within 16-week period deemed to have been terminated - Subsection 23(2) of *Regulation* provided that employee deemed to have been terminated entitled to wages in lieu of notice - Therefore, Board determined Employee was entitled to 6 weeks' wages in lieu of notice - Substantive Order - May 3, 2011 - 308/10/ESC - Brookside Auto Body Ltd.

EMPLOYER

Definition - The Board concludes that the Applicant, a Chef, was an "employee" within the contemplation of **The Payment of Wages Act** and **The Employment Standards Act** - 915/83/PWA - June 25, 1985 - Ramada Inn, King's Motel Winnipeg Ltd.

Board determines whether the Applicant is in fact a salaried employee of a life insurance company - 53/86/PWA - June 25, 1986 - Pioneer Life Assurance Company.

Claim for wages in lieu of notice - Applicants claim receiver/manager had become their employer - Subsection 8(3.1) of **The Payment of Wages Act** examined - 546, 547/86/PWA - November 13, 1986 - Clarkson Gordon Inc.

Definition - Applicant responsible "indirectly for the engagement or employment of, or payment of wages to persons employed ..." - Applicant denied access to remedies provided in **The Payment of Wages Act** - Subsections 1(c) and 1(d) of the **Act** considered - 414, 415, 416, 417/86/PWA - November 17, 1986 - Progress Plastics Ltd.

Board determines that a Real Estate Company controlled the Applicant to such an extent that an employer/employee relationship existed - 646/86/PWA - November 28, 1986 - B. Leslie Real Estate and Development Co. Ltd.

Board determines that an "attorney for service" is not a "director or officer" within Section 5 of **The Payment of Wages Act** - 686/87/PWA - October 16, 1987 - Arthur William Spriggs, Debtguard Corporation.

Board determines whether a sub-contractor who was responsible for paying a worker, was an employer within the contemplation of that term in **The Construction Industry Wages Act** - 910/87/PWA - May 16, 1988 - R. J. MacDonald Plumbing & Heating.

Definition - Claimants establish employment relationship - Section 6 of **The Payment of Wages Act** considered - 305-310/89/PWA - November 30, 1989 - Imperial Janitorial Service, Comet Maintenance and Building Cleaning (1984) Inc. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Although Employee hired as a result of an error or miscommunication, an employer/employee relationship existed between head office and the Employee - Head office responsible for the error and required to pay wages and vacation wages - 827/89/PWA, 58 & 154/90/PWA - September 14, 1990 - Koya Japan Inc., Chan-Wong's Food Inc., Wisher Enterprises Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Board held Employer not relieved of liability for wages owing even when actual notice came from Receiver who is an agent of the employer and considered to be employer as per Section 1 of **The Employment Standards Act** - As well, Employer terminated Employees by ceasing to employ and pay them - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Sec. 5.2-E2

EMPLOYER

Municipality found to be employing authority of security guards, who were hired to secure scene of fire, until fire investigation completed - After investigation completed, Estate found to be employing authority - 535/93/PWA - January 4, 1994 - Estate of Matt Pasternac.

Duties of the Lodge "Manager-cook-maintenance-driver" encompassed control and direction of other employees - Found to be an employer under ***The Employment Standards Act*** - Claim for wages in lieu of notice and overtime wages dismissed - 743/93/PWA - March 25, 1994 - 79346 Manitoba Ltd., t/a Little Grand Rapids Lodge – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Definition - Employer instrumental in interviewing, hiring and training of Employee - Employer also billed client for Employee's services - Held Employer exercised sufficient control and direction over Employee to establish employer-employee relationship - 76/99/PWA - June 23, 1999 - Michael Munroe t/a Munroe Equipment Services.

Employer disputed Order to pay Employee \$8259.27 being wages owing - Held employer/employee relationship did not exist between parties - Also found alleged Employee was not an employee as defined in *The Employment Standards Code* - Claim for wages dismissed - 350/08/ESC - June 17, 2009 - 64940 Manitoba Ltd. t/a The Patio Café.

Employer disputed Order to pay Employee \$1,726.23 in wages owing - Held employer/employee relationship did not exist between parties - Claim for wages dismissed - 351/08/ESC - June 17, 2009 - 64940 Manitoba Ltd. t/a The Patio Café.

Employer disputed Order to pay Employee \$444.42 in wages owing - Held employer/employee relationship did not exist between parties - Claim for wages dismissed - 351/08/ESC - June 17, 2009 - 64940 Manitoba Ltd. t/a The Patio Café.

Employee submitted he was not employee of temporary staffing agency but of Client and therefore Client ought to have given him notice – Also submitted that “temporary period” in sub-clause 62(1)(e) of *The Employment Standards Code* limited to period of less than 30 days because that tied in with 30-day exception in 62(1)(a) – Held exceptions found in sub-clauses of Section 62(1) stood independently – “Thirty days” referred to in sub-clause (a) cannot be read as a limitation on words “temporary period” in sub-clause (e) - Board concluded temporary staffing agency was employer - Fact that Employee worked at Client's in excess of 30 days did not change that employment was of temporary nature – Appeal dismissed - 64/10/ESC - August 10, 2010 - Houston Recruiting Services - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

(Next Section: Sec. 5.4)

ESTOPPEL

Employees knowingly entered into an arrangement which was contrary to ***The Employment Standards Act*** - Claim for overtime wages limited to a two month period - 542/88/PWA - January 6, 1989 - Minic's Welding Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Sec. 5.5-E1

EVIDENCE

Employees, though absent from hearing, entitled to claim for wages on the basis of material filed and arguments heard - 581/85/PWA - December 11, 1985 - Skinner's Wet 'n Wild and 65683 Manitoba Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; MATTER ADJOURNED.**

Failure of individuals to appear to give evidence as to their alleged entitlement results in the Board dealing with their claims based on material filed and evidence and argument presented - 54/87/PWA - July 6, 1986 - Serpreco Systems Ltd.

Board finds termination unjust due to lack of evidence to substantiate Employees drinking - Entitled to notice or wages in lieu thereof - 1261/88/PWA - March 9, 1989 - Camp Wasaga Inc.

Definition - Subcontractors established independence from Employer – Not employees within the meaning of *The Employment Standards Act* - Board concerned over manner evidence presented at hearing - 451/88/ESA - September 21, 1989 - D. Phillips Acoustic Services Ltd.

Board advised subsequent to hearing that evidence used to calculate wages differed from payroll records - 489/89/PWA - September 21, 1989 - Sid's Complete Car Care Centre Ltd.

Onus of Proof - NSF cheques and uncashed paycheques constitute prima facie evidence of the validity of wage claim - Claims allowed even though individuals did not attend hearing - 522-526/90/PWA - February 28, 1991 - 2219701 Manitoba Ltd., Fort Garry Restaurant & Catering Services, H. Boulet, A.W. Holt, R.P. Huot, G. McPhee.

Board accepts the documentation of Employment Standards as best evidence when Employer fails to subpoena payroll records from receiver - Claims allowed as presented in the Order - 1102/90/PWA - April 5, 1991 - Matheos Holdings Ltd., Matheos Restaurant & Coffee Shop, Steve and John Matthews – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee's claim for wages owing allowed as Employer produced no evidence to the contrary - Board noted that the actions of the Employer's Counsel displayed extreme disrespect towards the Board - 1279-1281/90/PWA - April 15, 1991 - Myriad Innovative Designs Inc., Mind Computer Products, Bradley Fry, Neil Stern.

Board admits sworn affidavit as evidence from Employee who was out-of-the-country and could not attend hearing - 1198/90/PWA - June 7, 1991 - Douglas Lughas, Cambridge Builders, Cleaners & Managers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Onus - Employee refuses to provide specific evidence on allegation that Employer made sexual advances - Due to lack of evidence Board unable to find Employer guilty of violent or improper conduct - Held Employee did not give proper notice - Forfeiture claim allowed - 220/92/PWA & 221/92/ESA - June 12, 1992 - Peter Knoedler.

Admissibility - Board rules videotape not admissible as no witness called with direct knowledge of circumstances it was taken and person filmed on the tape not easily identified - Unauthorized absence and dishonesty - 531/92/PWA - Dec. 2, 1992 - Oshawa Holdings Ltd. t/a The Codville Co. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

EVIDENCE

No evidence presented from Employer representatives who had personal involvement in case - Memo from shift supervisor, who was still an employee, inadmissible evidence as no explanation why he did not testify - Operations Manager recount of conversation between supervisor and Employee inadmissible hearsay evidence - Board accepts evidence of Employee - Held Employee did not quit without notice - Forfeiture claim denied - 864/92/ESA - February 9, 1993 - Inner-Tec Security Services – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Board gives little weight to letters submitted from witnesses who did not give viva voce evidence - 761/92/PWA - August 4, 1993 - Spartan Building Services Ltd.

Burden of Proof - Employee worked two months without receiving wages - Employer argued she was aware he could not afford to hire her - Board found that person who "hired" Employee and who had discussions regarding wages owing was not a partner and had no authority to hire employees - Employee failed to prove on balance of probabilities that Employer/employee relationship existed - Claim for wages owing dismissed - 988/93/PWA - March 7, 1994 - James Murphy t/a Dockside 21 – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

No weight placed on "contract" which was altered after the Employee signed it - Claim for underpayment of wages allowed - 88/94/PWA - August 29, 1994 - Best Country Property & Management Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Calculation of wages owing - Board assumes Employer's calculation for sick time correct since Employee refused to present any evidence on the issue - Held Employee was overpaid - Claim for wages dismissed - 356/94/PWA - October 21, 1994 - Keystone Agricultural Producers Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Admissibility - Audiotape - Employer objects to admissibility of audiotapes - Board attached no weight to one tape and did not consider other tape because verbal evidence of Employee uncontradicted as President of company did not testify - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee discharged with two weeks notice for causing damage - Next day, Supervisor informed him the owner wanted him off the property - Given lack of testimony by Supervisor, Board concluded the Employer was originally prepared to terminate with notice, but Supervisor later terminated him without notice merely because of opinion expressed by office manager - Claim for wages in lieu of notice allowed - 771/94/PWA - April 13, 1995 - Gateway Packers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Probationary Employee discharged for repeated tardiness - Employee's version of culminating incident not credible - Claim for wages in lieu of notice dismissed - 215/95/PWA - September 28, 1995 - Inner Tec Security Consultants Ltd. t/a Inner Tec Security Services – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

EVIDENCE

Credibility - Employee claimed Employer refused to accept her notice and told her to quit or be fired without notice - She then said nothing and walked away - Employer testified she was being gracious and told Employee if she had full-time job waiting, to take it right away - Board preferred evidence of Employer finding if conversation occurred as described by Employee, walking away without further discussion was inappropriate - Held parties had understanding Employee could leave without notice - Claim for wages in lieu of notice denied - 476/95/PWA - November 6, 1995 - Waymart Inc.

Employer is bound by the evidence of its representative sent to the hearing - Board can only consider evidence submitted to it at the hearing - 836/95/PWA - April 15, 1996 - Majestic Towing Services Ltd. t/a Economy Towing. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer presents different sets of figures at hearing than those used at the time of termination to calculate bonus - In the absence of any written or verbal agreement to the contrary, the Board accepted the set of figures provided at the time of the termination - 235/95/PWA - September 11, 1996 - Maxwell Maryk, Warehouse One - The Jean Store – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employer seeks to introduce affidavits sworn by a key witness - Evidence allowed subject to weight given witness was out of jurisdiction on day of hearing - 210-212/96/PWA - November 7, 1996 - Sheldon Brounstein/Regent Auto & Truck Parts (1993) – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Hours worked - Employee's personal calendar on which he recorded appointments does not constitute a sufficient record of hours worked - 485/95/PWA - November 22, 1996 - Paul Sigurdson/Aerotech International Inc – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Admissibility - Hearsay - Employee not paid for months told by Employer to get bank loan - Employer objected to a letter from the bank alleging his involvement with the Employee's loan - Letter not admissible as it was hearsay - 485/95/PWA - November 22, 1996 - Paul Sigurdson/Aerotech International Inc – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Witness - Negative inference drawn from Employer's failure to call secretary who overheard argument between the Employee and Employer - Lends support for Employee's version of events - 448/96/PWA - December 10, 1996 - Electra Signs. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Admissibility - Audio tape - At the conclusion of the proceedings, Employee indicated for the first time she had a tape recording of a telephone conversation between herself and the Employer - Employer objected to audio tape being admitted into evidence as he was unaware of its contents and had never consented to being recorded - After questioning Employee, Board held that the tape recording was not relevant to the determination of the issue before it and declined to hear it - 764/96/PWA - March 17, 1997 - Harry Ross Area Rug Store Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Sec. 5.5-E4

EVIDENCE

Rate of commission - Parties disagree as to start date of new rate - Employee's evidence accepted as it was more specific than Employer's - 758/96/PWA - May 15, 1997 - Prairie West Industrial Ltd.

Board accepts Employee's record of hours in absence of Employer records - 759/95/PWA - May 30, 1997 - Mr. Canada's Touring Network Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED**

Overtime - Calculation - Sales & Marketing Representative entitled to overtime - His evidence of six months of overtime worked simplistic and devoid of details of daily activities, appointments or breaks taken - Board adopts "best we can" approach - Ordered wages owing equivalent to amount claimed for last three months of employment - 377/97/PWA - January 13, 1998 - Hi-Qual Manufacturing Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Document submitted into evidence in which Employee states he was a subcontractor - Board finds Employer altered documents after Employee signed - Held employer/employee relationship existed - Work performed fell within the **Greater Winnipeg and Major Building Construction Wages Schedule** under the classification of Construction Labourer - Employer ordered to adjust rate of pay and pay wages owing - 476/97/PWA - May 22, 1998 - G & J Construction, Gursharn Singh.

Document submitted into evidence in which Employee states he was a subcontractor - Board finds Employer altered documents after Employee signed - Fraudulent documents can not be relied on - Held employer/ employee relationship existed - Work performed fell within the *Greater Winnipeg and Major Building Construction Wages Schedule* under the classification of Unskilled Labourer - Employer ordered to adjust rate of pay and pay wages owing - 488/97/PWA - May 22, 1998 - Best Country Property & Management Ltd. – LEAVE TO APPEAL TO COURT OF APPEAL DENIED

Witness - Cross-examination - Board satisfied friction occurred between Employee and manager - Manager did not appear at hearing - Employee's actions do not warrant termination without notice due to absence of manager's direct testimony and cross-examination - Claim for wages in lieu of notice allowed - 496/98/PWA - November 2, 1998 - Steinbach Dodge Chrysler Ltd.

Unauthorized Deductions - Overtime - Witness - Credibility - Employee filed claim for overtime for time after shift she was required to cash out and clean up and filed claim for unauthorized deductions to cover daily shortages - Board noted Employee signed, without duress, authorization sheet accepting responsibility for shortages - Employee was not at work on all the days she was claiming overtime - Employee's allegations lacked sufficient credibility - Claim dismissed - 175/99/PWA - June 1, 1999 - 3269001 Manitoba Ltd. t/a Burntwood Motor Hotel.

Employer obliged to maintain appropriate records as per Section 6 of *The Employment Standards Act* - Board could not rely on Employer's evidence of vacation days taken as attendance records contained discrepancies and errors - Evidence of Employee accepted - 34/99/PWA - June 28, 1999 - Burand Holdings Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

EVIDENCE

Witness - Onus - Guaranteed Wage - Employer disputes Order to pay wages owing as it claim Employee paid on percentage of profits - Witnesses can only comment on matters on which they have personal knowledge - Employer's witness did not attend all the meetings in which employment arrangements were finalized - Not sufficient for witness to state that a certain event could not have occurred because it was not the usual course of business - Board concluded Employee had been working under a guarantee - Employee entitled to compensation as determined by Employment Standards - 557/99/PWA - January 5, 2000 - Frontier Toyota - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Affidavit - Statements not prepared in affidavit form do not warrant consideration as credible evidence - 750/01/ESC - September 12, 2002 - 2128829 Manitoba Ltd..

Employee requested proceedings be taped - While it was Board's policy to not tape proceedings, it would consider request if Employee retained services of a court reporter and made transcript available to Board and all parties - 421/02/ESC & 586/02/LRA - April 22, 2003 - (C.A.H.R.D.) Centre for Aboriginal Human Resource Development.

Overtime - Employee submitted pay stub recording overtime pay and a deduction to negate the pay - Employer contended pay stub was created with software Employee had at home - Evidence was clear and convincing that the Employer's computer records did not indicate deduction from overtime wages was made - 473/05/ESC - December 2, 2005 - Native Reflections Inc. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Recalling witness - Counsel opposed request to recall a witness who had testified in October 2002 - Board held alternate position taken by counsel was not articulated until after it had opened its case in April 2003- Witness to be recalled as her evidence was relevant - 414/02/PWA - April 20, 2006 - Rodney Allan Shier, being a Director of Bissett Gold Mining Company - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Theft - At time of termination, Employer issue wages in lieu of notice and a Record of Employment reflecting "things not working out" - Employer reissued Record of Employment and for first time noted Employee was dismissed for theft of muffins based on allegations of one witness - Board troubled that Employer allowed Employee to work after it became aware of alleged theft - Evidence to substantiate theft fell short of being clear, compelling and cogent - In absence of sufficient explanation for change of mind, Employer should be held to original position - Order for wages in lieu of notice confirmed - 204/07/ESC - Jan. 28, 2008 - Tonya Collins, trading as Lite Stop Foods.

Vacation Pay - Entitlement - Employer disputed claim he owed vacation wages to Employee as he paid Employee in cash which Employee signed for - Employee asserted signature acknowledging receipt of the cash was not his - Board held that signature was identical not only to Employee's signature on resignation letter but also to his signatures on other documents he signed during his employment - Claim for wages dismissed - Substantive Order - 19/08/ESC - May 7, 2008 - 4819633 Manitoba LTd. t/a Dylan O'Connor's Irish Pub and Restaurant.

EVIDENCE

Admissibility - Videotaped Evidence - Employee requested Board accept DVDs into evidence - DVDs would be accepted if Employee provide two copies of all DVDs and if a witness was available to testify from first hand knowledge to the authenticity of all the DVDs - Substantive Order - 13/08/ESC - May 23, 2008 - Wally Welechenko t/a Wally's Island.

Onus of Proof - Employer disputed Order to pay wages in lieu of notice as Employee was guilty of wilful misconduct, disobedience and insubordination - Board inferred from Employee's failure to testify that he could not cast doubt on cogency or validity of Employer's evidence - Held Employer met burden to establish on balance of probabilities that Employee's conduct fell within statutory exceptions in Section 62(h) and (p) of *The Employment Standards Code* - Substantive Order - 106/08/ESC - July 8, 2008 - Dominion Window & Door.

Onus - When employer relies on exceptions in Section 62 of *The Employment Standards Code* employer bears legal onus to bring itself within exception - One incident of wilful misconduct or insubordination would be sufficient to oust requirement to give notice under Section 61 of the *Code* - 215/08/ESC - August 15, 2008 - Marketplace in North Kildonan.

Overtime - Documentation submitted by Employee in support of claim for overtime contained inconsistencies and errors which raised questions regarding reliability - Employer's calculations and payroll records more accurate recording - Board satisfied on balance of probabilities no overtime wages were owing - Claim for overtime dismissed - Substantive Order - 108/08/ESC - November 25, 2008 - Bright Futures Day Care.

Witness - Credibility - Documentation submitted by Employee contained errors and included hours for meal breaks and time spent doing maintenance at home which Employer provided to him at no cost - Explanations offered regarding hours claimed were not reasonable - Employer's payroll records accepted as more accurate recording of hours worked by Employee - Employee's appeal for wages owing dismissed - Substantive Order - 136/09/ESC - August 14, 2009 - Omni Facility Services Canada.

Subpoena - Witness - Compellability - As per Section 121 of *The Employment Standards Code*, Employment Standards Officer not compellable as witness in proceeding - Given ruling on non-compellability Employer did not call evidence in support of appeal - In absence of evidence and as onus on Employer, appeal dismissed - Substantive Order - 35/09/ESC - December 9, 2009 - Kildonan Ventures Ltd. t/a Kildonan Auto & Truck Parts - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Witness Compellability - Subpoena - Employer served subpoena upon Workers Compensation Board employee to give evidence at Labour Board hearing - Section 62 of *The Workers Compensation Act* states employee not compellable witness in civil action or other proceedings - Board proceedings fell within phrase "or other proceeding" - Subpoena quashed - Substantive Order - 51/09/ESC - December 21, 2009 - Innvest Hotels GP XV.

EVIDENCE

Witness - Vastly differing evidence re date of hire and manner employment concluded - Employee more credible as he provided details of circumstance of hiring, employment duties, manner he was paid, events leading to termination and his evidence was corroborated by his landlord - Employer provided short of fulsome answers - Board accepted Employee's testimony as more truthful - 246/09/ESC - March 18, 2010 - Wong's Dynasty Ltd. t/a Wong's Asian Bistro.

Overtime - Record Keeping - Employment Standards Division ordered Employer pay Employee \$16,026.43 for wages owing - Employer disputed payment - Employee's estimate of hours worked as provided in monthly calendar entries not accurate or reliable record of hours worked as he produced record after employment concluded and he testified to difficulty recollecting actual hours of work at time record produced - Board held evidence did not establish parties agreed salary inclusive of payment for up to 55 hours per week - Board accepted evidence adduced by Employer that Employee was expected to work six days per week, worked an average of fifty-five hours per week and, resulting from hours of restaurant increasing, he worked additional twenty hours over and above his average weekly hours during month in question - As reflected on Statement of Adjustment Employee entitled to receive \$8,999.75 as overtime wages - Substantive Order – 198/09/ESC – April 13, 2010 – Shogun Japanese Restaurant – **LEAVE TO APPEAL TO COURT OF APPEAL ABANDONED.**

Decision of Courts - In support of its position that Chiropractor was independent contractor, Employer submitted appeal decision of Tax Court of Canada that established Employee was not an employee under *Employment Insurance Act* - Board noted judgment of Tax Court was not conclusive of issue before it because tests applicable under *Employment Insurance Act* may be different than tests applied by Board, and because judgment was on consent and matter was determined without full hearing and without specific factual determinations being made on issues – 280/09/LRA – April 16, 2010 – Ashique Enterprises t/a Central Chiropractic Centre.

Relevance - Employer appeals General Agent's claim for wages submitting he was independent contractor – Employee alleged Supreme Director responded to question by Field Agents if they were self-employed to which he responded they were employees - Board noted English was not Supreme Director's first language and he may have said opposite to what he intended - Regardless, he had no authority to bind insurance arm of Company by unilaterally changing terms of the agents' agreements and his comment irrelevant to outcome of case before Board – In addition, Board considered Employee filed income tax on basis that he was independent contractor but manner in which an individual filed income tax not determinative of status for purposes of employment standards legislation - 397/08/ESC - June 23, 2010 - Knights of Columbus.

Deductions – Standard of proof - Board did not accept Employer's allegation that Employee stole tools - Accusation of theft required proof beyond general claim made by Employer - Claim for wages allowed - 30/10/ESC - September 1, 2010 - North Star Construction.

EVIDENCE

Record Keeping – Overtime – Entitlement – Employer disputed Employee's overtime claim submitting parties had verbal employment contract where Employee paid salary for working up to 55 hours per week – Held no requirement, statutory or otherwise, employment agreement providing for salary inclusive of overtime must be in writing – However, evidence fell short of demonstrating parties had agreement salary was payment for up to 55 hours per week - Board determined salary included payment for standard 40 hours per week and he was entitled to overtime for hours worked in excess of standard - No evidence Employer made application under section 13 of *The Employment Standards Code* for permit to increase standard hours - Board found Employee's records of estimated hours worked not accurate or reliable - Records were produced after his employment concluded and he testified he had difficulty recollecting actual hours worked - Sizeable amount of disputed overtime related to Employee's claim he was required to remain on premises and work when restaurant was closed between lunch and dinner - Board accepted Employee on break while restaurant closed - Pursuant to section 17(2) of the Code, overtime did not include time employer provided as a break - Employee entitled to \$8,999.75 in overtime wages - 198/09/ESC - January 27, 2011 - 5220459 Manitoba Inc. t/a Shogun Japanese Restaurant.

Credibility - Overtime - Authorization - Employment Standards Division dismissed Employee's overtime claim ruling no evidence Employer authorized or condoned overtime - Employee appealed arguing Employer was aware of hours he was working; that his duties could not be completed by one person in normal work week; that, after his termination, his position had been split indicating amount of responsibility involved - Board found job was not split, rather one individual continued doing core functions Employee had performed and when second individual hired, it reflected new and separate position - Claim for hours worked must be assessed against fact that claim was only advanced to Employer after termination of employment - Employee's failure to raise overtime issue at any time with Employer was not reasonable nor did it engender confidence in reliability and accuracy of hours claimed - Documentation submitted in support of overtime claim contained errors and discrepancies and included hours during which Employee was not performing duties on behalf of Employer and many of hours claimed were for tasks done at home - Board accepted evidence of executive director that she never authorized, expressly or by reasonable implication, overtime hours - Employee had not met onus to establish, on balance of probabilities, that hours claimed as overtime were either accurate or reflected time actually worked - Appeal dismissed - Substantive Order-200/11/ESC - January 18, 2012 - Life Science Association of Manitoba.

EVIDENCE

Post termination - Employer testified that subsequent to termination of employment, Employee solicited Employer's clients and was in breach of Employment Agreement - Board noted whether or not Employee breached covenants in Agreement after his dismissal was not before Board - Substantive Order - 401/11/ESC - June 20, 2012 - Money in Motion (Manitoba).

Admissibility - Original hearing date adjourned at request of Employer - When hearing reconvened, Employer requested opportunity to file supporting and additional evidence by way of Affidavit or Statutory Declaration, after hearing - Board denied request as such evidence only admissible in extraordinary circumstances which did not exist and particularly when original hearing date adjourned based on Employer's request - Substantive Order - 83/12/ESC - August 10, 2012 - Toomey Construction.

Quit Alleged - Witness Credibility - Employer appealed portion of Order to pay \$676 wages in lieu of notice arguing Employee quit his employment and was not entitled to wages in lieu of notice - After assessing credibility of witnesses, Board accepted evidence of Employer that Employee announced "I quit" and immediately packed up his personal tools in his vehicle and left Employer's premises - Employer met onus, on balance of probabilities, that Employee quit his employment - Employee not entitled to wages in lieu of notice - Appeal allowed - Substantive Order - 124/12/ESC - September 6, 2012 - McEwen Bros.

Overtime - Calculation - Record Keeping - Employer appealed Order to pay wages submitting spreadsheet prepared by Employment Standards Division based on Employee's time records which were not correct because he claimed more hours than he actually worked - Employer noted instances on timesheet where Employee indicated he was at project site, yet he had not signed sign-in sheet required for attendance at job site and noted instances when Employee stated he was at particular job site, but he could not be located on site by Employer representative - Board determined Employee's explanations somewhat contrived, but were not entirely implausible and Employer's evidence not sufficient to discredit accuracy of Employee's evidence of hours worked during period of his employment - Substantive Order - 151/12/ESC - April 10, 2013 - KDR Design Builders (Commercial).

Board denied Employee's request to file additional evidence noting that, even though hearing had been adjourned for more than a month, issue had not been raised until second day of hearing, nor had proposed statutory declaration been made available to Employer - Substantive Order - 131/11/ESC - July 9, 2013 - D.S.I. Technical Systems.

EVIDENCE

Relevance - Reporting to Work - Employee appealed Dismissal Order that determined after hour phone calls did not fall under section 51 of *The Employment Standards Code* and his claim for wages for reporting to work was dismissed - Board not satisfied evidence established Appellant worked authorized overtime for which he was entitled to further compensation - Evidence of time worked was little more than listing of telephone calls and insufficient documentation or explanation was provided to satisfy Board, on balance of probabilities, Appellant was entitled to any further wages - He did not have records to identify purpose or meaningful details of specific calls - Appeal dismissed - Substantive Order - 80/13/ESC - December 9, 2013 - Duffy's Taxi (1996) Ltd.

Employer disputed Order to pay wages asserting Employee's claim, which was primarily for overtime wages, was complete fabrication - Employer introduced open/close signal history report which showed dates and times when company's alarm system was activated and de-activated, and identified name of employee who had activated or de-activated alarm - Board noted report was not record of a "time clock" showing arrival and departure times of each employee - However, it was of some use in establishing when particular employee may have been on business premises -Substantive Order - 206/13/ESC - January 29, 2014 - City Collections and Bailiff Service.

EXCLUSIONS

"Professional" - Real estate salespersons and branch managers are not professionals as per Section 1 of *The Employment Standards Act* - 485/94/ESA - February 7, 1995 - Canada Trust Realty – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Management - Overtime - Assistant Banquet Manager had supervisory authority and stepped into role of Banquet Manager in his absence but she held junior role and did not perform management functions primarily - Employee entitled to overtime wages - First decision to address managerial exemption under Section 2(4)(b) of *The Employment Standards Code* - 41/08/ESC - December 15, 2008 - Legacy Hotels Corporation trading as Fairmont Winnipeg.

Management - Res Judicata - Assistant Banquet Manager filed overtime claim - Employer submitted previous Board decision which held individuals in position at similar managerial level found not to be employees under *The Labour Relations Act* - Written Reasons not issued for previous Order so Board could not determine rationale for previous decision - 41/08/ESC - December 15, 2008 - Legacy Hotels Corporation trading as Fairmont Winnipeg.

Management functions primarily – Overtime – General Manager (GM) of branch location paid monthly salary and at time of hire was told job may entail up to sixty hours per week – He filed claim for overtime – Held GM ultimately responsible to Marketing President at main office, but GM was day-to-day managerial presence at branch - GM possessed independent authority to operate and manage branch within parameters of monthly budget - As to his own hours of work, he scheduled himself to work every day but was not told to do so by President – Ruled GM performed management functions primarily within meaning of Section 2(4)(a) of *The Employment Standards Code* - Claim for overtime dismissed - Substantive Order - 341/09/ESC - November 15, 2010 - U-Haul Co. (Canada).

Management functions primarily – Overtime – General Manager (GM) of branch location paid monthly salary and at time of hire was told job may entail up to sixty hours per week – She filed claim for overtime – Held GM ultimately responsible to Marketing President at main office, but GM was day-to-day managerial presence at branch - GM possessed independent authority to operate and manage branch within parameters of monthly budget - Ruled GM performed management functions primarily within meaning of Section 2(4)(a) of *The Employment Standards Code* - Claim for overtime dismissed - Substantive Order - 342/09/ESC - November 15, 2010 - U-Haul Co. (Canada).

Overtime - Management - Employee did not perform management functions primarily – Therefore, he was not exempted from standard hours of work and overtime provisions of *The Employment Standards Code* on basis of Section 2(4) of the *Code* – Board ruled he was entitled to receive wages, overtime wages, general holiday wages and wages in lieu of notice - Substantive Order - 137/10/ESC - December 17, 2010 - Brousseau Bros. Ltd. t/a Super Lube - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

EXCLUSIONS

Management - Overtime - Employer claimed Employee, as manager, exempt from standard hours of work and overtime - Held while Employer testified Employee hired, fired and set sales targets, there was little evidence he carried out those functions - Board found Employee, despite job titles, was primarily technician who ordered parts, dealt with customers, and sent in reports of hours worked by staff - Employer had not met onus to establish Employee was performing management functions primarily - 137/10/ESC - May 26, 2011 - Brousseau Bros. Ltd., t/a Super Lube - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Overtime - Rate of Pay - Employment Standards Division ordered Employer to pay wages in lieu of notice but determined no overtime wages were owed - Employee, hired as manager of one of Employer's locations, appealed Order regarding overtime - Employer submitted Employee would be working 50-hour week, and paid 40 hours at \$15 per hour, and 10 hours at time and a half - Employer referred to "rounding off" resulting sum to \$1,500 every two weeks - Board found Employer's explanation implausible and arithmetically flawed - Payroll Register noted Employee paid \$1,500 bi-weekly at hourly rate of \$18.75 - Board rejected Employer's contention that Employee's remuneration included at least 10 hours of overtime per week - In addition, Employer submitted Employee was performing management functions primarily, and exemption in section 2(4)(a) of *The Employment Standards Code* with respect to overtime applied - Board noted mere supervision of other employees not determinative of managerial status - Absence of evidence that Employee met with senior managerial personnel about issues such as hiring and firing practices, human resource policies, long term business planning, budgeting or marketing - Employee was not manager of all business conducted from his work location as another individual was designated as manager of tire and brake store which operated from same location - Board accepted when business conducted from several locations, person may perform management functions primarily only at one location, but may still fall within exception in section 2(4)(a) of the *Code* - Board satisfied Employer had not established Employee performed management functions primarily - Employee entitled to receive \$1,500 wages in lieu of notice and \$8,325 overtime wages - Substantive Order - 210/11/ESC - July 11, 2012 - Brousseau Bros. Ltd. t/a Super Lube.

EXCLUSIONS

Overtime - Management - Employee, who was General Manager (G.M.), appealed Dismissal Order that determined his claim for overtime wages be dismissed as per section 2(4) of *The Employment Standards Code* as he performed management functions primarily - Board found G.M. responsible for labour relations activities including supervising, hiring, scheduling, promoting, disciplining and terminating employees - While he consulted with members of Board of Directors in performance of his duties, G.M. was responsible for overall management of enterprise - Board satisfied G.M. came within definition of "employer" set out in the *Code* as he had control or direction of, or directly or indirectly was responsible for employment of employees - Held G.M. not entitled to amounts sought in his complaint under the *Code*- Appeal dismissed - Substantive Order - 80/13/ESC - December 9, 2013 - Duffy's Taxi (1996) Ltd.

(Next Section: Sec. 8.0)

Sec. 6.5-E1

FRAUD

Document submitted into evidence in which Employee states he was a subcontractor - Board finds Employer altered documents after Employee signed - Held employer/employee relationship existed - Work performed fell within **the Greater Winnipeg and Major Building Construction Wages Schedule** under the classification of Construction Labourer - Employer ordered to adjust rate of pay and pay wages owing - 476/97/PWA - May 22, 1998 - G & J Construction, Gursharn Singh.

Document submitted into evidence in which Employee states he was a subcontractor - Board finds Employer altered documents after Employee signed - Fraudulent documents can not be relied on - Held employer/ employee relationship existed - Work performed fell within the *Greater Winnipeg and Major Building Construction Wages Schedule* under the classification of Unskilled Labourer - Employer ordered to adjust rate of pay and pay wages owing - 488/97/PWA - May 22, 1998 - Best Country Property & Management Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

(Next Section: Sec. 7.0)

GROUP TERMINATION

Board has jurisdiction under Section 8(3) of **The Payment of Wages Act** to order payment of termination wages even though no charge made under Section 39 of **The Employment Standards Act** - Sections 39 and 40 of **The Employment Standards Act** discussed - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Subsection 40(5) of **The Employment Standards Act** not permissive - Board could not order less than statutory minimum of 10 weeks notice - However, as per Board practice, actual notice given deducted in determining pay in lieu of notice - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Pay in lieu of notice is "wages" and not damages - Concept of mitigation of losses not relevant to proceedings under **The Employment Standards Act** - No duty on employee to mitigate - Amount of notice and pay in lieu of notice statutory minimum and cannot be reduced by wages earned from another employer during notice period - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

No evidence that actual notice or constructive notice of lay-off given - Normal summer lay-off of two weeks does not equate to notice of termination - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Board held Employer not relieved of liability for wages owing even when actual notice came from Receiver who is an agent of the employer and considered to be employer as per Section 1 of **The Employment Standards Act** - As well, Employer terminated Employees by ceasing to employ and pay them - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Exemption from notice or payment of wages in lieu of notice under subsection 40(2)(d) of **The Employment Standards Act** not applicable because Employer aware of possible receivership action two months prior to action being taken and because in bankruptcy, employment terminated by dismissal rather than by frustration - As per section 8 of **The Payment of Wages Act**, receiver must comply with order for payment of wages - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Board has jurisdiction under Section 8(3) of **The Payment of Wages Act** to order payment of termination wages even though no charge made under Section 39 of **The Employment Standards Act** - Sections 39 and 40 of **The Employment Standards Act** considered - 885-890/90/PWA - October 2, 1991 - Jack Levin and Louis Levin, East-West Packers (1969) Ltd.

Informing Employees of plant closure same as terminating their employment - Directors liable for termination wages as their resignations were made 15 minutes after Employees informed of termination - Resignations have no effect on liability for wages and vacation wages owing at time terminated - 885-890/90/PWA - October 2, 1991 - Jack Levin and Louis Levin, East-West Packers (1969) Ltd.

GROUP TERMINATION

Employees do not have duty to mitigate damages in group termination cases - Wages earned from work done for Receiver not deducted from termination wages owing - 885-890/PWA - October 2, 1991 - Jack Levin and Louis Levin, East-West Packers (1969) Ltd.

Board determines that seven individuals were not employees pursuant to **The Employment Standards Act** and **The Payment of Wages Act** - Number of employees to be considered as part of group terminated reduced to 49 - Group must total 50 for Section 40, Group Termination provisions, of **The Employment Standards Act** to be applicable - Substantive Order, Reasons not issued - 468/89/PWA - November 18, 1992 - James F. Kay being a Director of Red Carpet Distribution Inc.

Liability - Effectiveness of Resignation - Director tendered resignation 45 minutes after head office notified local manager to shut down operations but hours before last workers' shift ended - Legislation in effect at the time did not refer to "intent to terminate" but only of an employer who "terminates" - Resignation letter received in company's registered office hours before first employees were terminated, which the Board found was the end of the work shift since the employees were working and were paid for that work - Director not liable to pay \$3.3 million for termination wages owing - 414/02/PWA - April 20, 2006 - Rodney Allan Shier, being a Director of Bissett Gold Mining Company - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

(Next Section: Sec. 9.2)

HEALTH AND SAFETY

Forfeiture - Employee quit after dispute with co-worker - Two weeks prior, he had given Employer's mother notice he was quitting due to continual harassment from customer - Claim for forfeiture allowed because he neglected to communicate directly with Employer or give an exact date of departure - Penalty reasonably and fairly reduced due to Employee's understandable fear for own safety and lack of prejudice to Employer as he was easily replaced - 136/84/ESA - April 22, 1994 - Angelo Giovanni Zamparutti t/a Fish Doctor.

(Next Section: Sec. 8.2)

HOURS OF WORK

Employer rejected the 12-hour shift schedule at the bargaining table - During lock-out requested hours of work exemption for 12-hour shift - Held could not make unilateral changes during lock-out that it opposed during negotiations or "pre-impasse negotiating framework" - Request denied - 369/95/ESA - August 2, 1995 - Gateway Industries Ltd.

Union continues to represent the employees employed in the bargaining unit at the time the lock-out commenced, including those who had returned to work - Union was at party to the proceedings before the Board - 369/95/ESA - August 2, 1995 - Gateway Industries Ltd.

Overtime - Saturday work - Salaried Employee claimed overtime for 5 hours worked every third Saturday - Held salary inclusive of all hours worked - Saturday hours not overtime but fell within standard hours of work - Claim dismissed - 122/00/ESC - June 23, 2000 - McTavish Insurance Agency Inc.

(Next Section: Sec. 9.2)

INDEPENDENT CONTRACTOR

Whether taxi drivers, who lease cars from Company, are employees under **The Employment Standards Act** - Applicable test discussed - 208/86/PWA - January 23, 1987 - Imperial Taxi Brandon (1983) Ltd.

Board reviews "control test" and "organization test" and determines claimant to be an employee - 197/87/PWA - May 28, 1987 - Executive Drywall Co., Brian McCaskill.

Status of Complainant determined - Section 1 of **The Payment of Wages** considered - 494/87/PWA - January 18, 1988 - Walter Sobie, Sobie Management Services.

Definition - Employee/employer and independent contractor distinction discussed - 686/88/PWA - December 21, 1988 - Today Homes (East) Ltd.

Definition - Sales agent for real estate firm determined to be employee - Exclusion (h) of **The Employment Standards Act** considered - 25/89/PWA - August 3, 1989 - Executive Homes Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED IN PART; APPEAL DISMISSED.**

Definition - Subcontractors established independence from Employer - Not employees within the meaning of **The Employment Standards Act** - Board concerned over manner evidence presented at hearing - 451/88/ESA - September 21, 1989 - D. Phillips Acoustic Services Ltd.

Board determines delivery driver doing additional independent work during business hours properly classified as an employee - 94/90/PWA - May 11, 1990 - F.J. Fibreclaim, Ron Ferguson - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Board held that Employee was an employee on renovation project but an independent contractor thereafter, as he accepted church job on contract basis - 1198/90/PWA - June 7, 1991 - Douglas Lughas, Cambridge Builders, Cleaners & Managers Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Hairdresser did not set own hours or prices, did not pay rent, did not supply products used, did not pay expenses, did not perform different duties when paid by commission instead of hourly rate - Employer exercised significant degree of control - Held Employee not independent contractor - Entitled to wages owing - 1075/92/PWA - August 30, 1993 - Norman George Frost - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Real estate salespersons do not have degree freedom of an independent contractor and are employees under **The Employment Standards Act** and **The Vacations With Pay Act** - 485/94/ESA - February 7, 1995 - Canada Trust Realty - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Truck driver worked seven days for 10 hours per day delivering freight at the direction and benefit for the Employer - Employee/employer relationship exists - 636/95/PWA - Feb. 29, 1996 - Sharon Lemay, Heinz Isbach t/a Sterling Transportation Service - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

INDEPENDENT CONTRACTOR

Employee installs security systems - Other than assigning jobs, Employer did not have effective control over the Installer - Test for determining whether individual was independent contractor discussed - Installer excluded from ***The Payment of Wages Act*** - 726/96/PWA - February 18, 1997 - While-Away Security Services t/a Accurate Alarm – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Courier drivers owned vehicles and equipment and paid costs relating to vehicle - However, Employer dispatched calls and set rates charged to customers - Compensation by commission rather than by hourly wage did not mean individuals were independent contractors - Board held Applicants were Employees as defined in Employment Standards Code - 726 & 727/02/ESC - December 19, 2003 - Broadway Messenger and Courier Ltd. - **APPEAL TO COURT OF APPEAL DENIED.**

Bicycle courier performed duties under Employer's strict direction and control for its benefit and courier did not exercise any significant independent decision-making authority - Held courier was an “employee” under *The Employment Standards Code* - Claim for wages allowed – 650/04/ESC – May 19, 2005 – Frank Kenjak t/a Aries Courier Service.

Courier driver spending majority of time servicing two accounts was not an independent contractor - Employer set rates to be charged all his customers, and paid driver when customers paid their accounts - Employer gave driver radio, manifest, waybills, signage and covered his duties when necessary - Driver worked essentially for the benefit of the Employer - Held driver was an employee - 602/04/ESC - January 23, 2006 - Broadway Messenger & Courier Ltd.

Employee engaged to paint apartment suites and perform some maintenance work - Employer supplied paint and tools and controlled access to apartment, but Employee determined manner and sequence of performance of tasks - Engagement was short term and no evidence Employee was to work exclusively for Employer - Held Employer/Employee relationship did not exist - Employee not entitled to receive any wages, overtime wages, vacation wages or general holiday wages - Substantive Order - 22/09/ESC - July 9, 2009 - A B Kung Ltd.

Taxi Driver - Informal and verbal working arrangement between Driver and Employer; manner in which “commissions” were paid, structured or implemented; and manner in which “tips” were dealt with not determinative whether relationship was employer/employee or independent contractor - However, Employer owned, provided, insured and maintained taxi which Employee drove; Employee had no responsibility for expenses, for setting fares (because taxi industry fares tightly regulated) or for engaging helpers - Employee performed duties under Employer’s general direction and control for Employer’s benefit and did not exercise significant independent decision-making authority - Relationship properly characterized as employer/employee - Appeal dismissed - Substantive Order - 248/09/ESC - December 11, 2009 - 5492735 Manitoba Ltd.

INDEPENDENT CONTRACTOR

Chiropractor filed claim for wages owing submitting she was an employee as Employer became increasingly controlling - Board concluded Employer did exert some control over Chiropractor's activities with goal for her to increase volume of services but was not overly involved in prescribing methods result was to be achieved – Board determined Chiropractor was an independent contractor – Claim for wages dismissed - Substantive Order – 280/09/LRA – April 16, 2010 – Ashique Enterprises t/a Central Chiropractic Centre.

Decision of Courts - In support of its position that Chiropractor was independent contractor, Employer submitted appeal decision of Tax Court of Canada that established Employee was not an employee under *Employment Insurance Act* - Board noted judgment of Tax Court was not conclusive of issue before it because tests applicable under *Employment Insurance Act* may be different than tests applied by Board, and because judgment was on consent and matter was determined without full hearing and without specific factual determinations being made on issues – 280/09/LRA – April 16, 2010 – Ashique Enterprises t/a Central Chiropractic Centre.

Relevance - Employer appeals General Agent's claim for wages submitting he was independent contractor – Employee alleged Supreme Director responded to question by Field Agents if they were self-employed to which he responded they were employees - Board noted English was not Supreme Director's first language and he may have said opposite to what he intended - Regardless, he had no authority to bind insurance arm of Company by unilaterally changing terms of the agents' agreements and his comment irrelevant to outcome of case before Board – In addition, Board considered Employee filed income tax on basis that he was independent contractor but manner in which an individual filed income tax not determinative of status for purposes of employment standards legislation - 397/08/ESC - June 23, 2010 - Knights of Columbus.

Employer appealed General Agent's claim for wages submitting he was independent contractor – Requirement to work exclusively for Employer and receipt of benefits suggested employer/employee relationship – However, employment agreement clearly provided employee/employer relationship specifically not contemplated - Other factors led Board to conclude General Agent was independent contractor: he operated profitable business on his own account in which he had control over hours worked and manner in which work was done; his business expenses were within his control and indicative of significant financial risk; he personally leased office space, provided office furniture and equipment, an automobile, and certain office supplies; he hired an office assistant and recruited and managed Field Agents to maximize profit for his agency - Although he was restricted as to product sold, how it was advertised, to whom it was sold and rates of insurance products, such limits indicative of control by insurance regulators and compliance with provincial rules in tightly regulated field - Board satisfied, on balance, control factor favoured conclusion General Agent was not an employee - 397/08/ESC - June 23, 2010 - Knights of Columbus.

INDEPENDENT CONTRACTOR

Sales Agent filed tax returns as independent contractor and claimed business expenses; controlled expenses, operated and developed business as he saw fit; hired employees; and owned customer list which he sold for profit without approval of Employer - Any control by Employer was for monitoring overall success of agency rather than how tasks carried out – Sales Agent in business where his actions and decisions determined chance of profit and risk of loss - Board determined he was independent contractor - Claim for wages dismissed - Substantive Order - 247/09/ESC – Sept. 30, 2010 - Polar Window of Canada.

Bicycle courier – Employee used and maintained own bicycle which supported independent contractor status – However, chance of profit or loss beyond Employee's control as rates set by Employer, number of calls received depended on dispatcher offering him calls, and he was not allowed to work for other companies - Bonus offer for attracting new accounts more consistent with services being provided by employee to promote the employer's business - Board gave little weight to fact Employee filed Workers Compensation Board claim as "owner operator" or that he was responsible for statutory deductions and could write off expenses - Income tax return or WCB claim standards different from those applied under employment standards legislation, therefore not determinative of Employee's status under *The Employment Standards Code* - Held Employee not performing services as person in business on own account - Relationship properly characterized as an employer-employee relationship - 97/10/ESC - January 5, 2011 - 3526861 Manitoba Ltd. t/a Rene's Courier.

Employer disputed Order of Employment Standards Division that he owed wages to alleged Employee - Employer submitted Employee was contract driver - Held Employer provided general direction and control over performance of Employee's duties as evidenced by Employer providing necessary equipment and information to perform duties required - Board considered Employee went for four years without having deductions made or T4 issued, but that was not determinative of issue - On balance of probabilities, conduct of parties was more consistent with employer/employee relationship - Claim for wages allowed - 198/10/ESC - April 6, 2011 - 5256951 Manitoba Ltd. t/a The Boat Finders.

Board determined Employee was not performing services as a person in business on his own account - Relationship between Employer and Employee properly characterized as employer-employee relationship - Therefore, Employee entitled to receive \$4,823.36 in vacation wages and general holiday wages as reflected on the Statement of Adjustment prepared by the Employment Standards Division - Substantive Order - 144/11/ESC - Sept. 30, 2011 - United Messenger Co-op. - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

INDEPENDENT CONTRACTOR

Courier Driver - Employer appealed Order to pay vacation and general holiday wages submitting Employee was owner/operator and therefore *The Employment Standards Code* did not apply - Board determined Employer decided that drivers must use its dispatch system and determined amount charged to drivers for rental of equipment; obligated drivers to wear, and pay for, uniforms; to affix company decal and signage to their vehicles; to use its weigh bills; set hours of work when it expected Employee to be available to make deliveries and he could not do deliveries for a rival business during those hours; set rates charged to customers; and, established commission rate paid - Beyond investment in personal vehicle, Employee had no significant role for investment and management - Board determined Employee was not performing services as a person in business on his own account and relationship between Employer and Employee was properly characterized as employer-employee relationship - Employer's appeal dismissed - 144/11/ESC - April 16, 2012 - United Messenger Co-Op Ltd.

(Next Section: Sec. 10.0)

JURISDICTION

Director of Employment Standards Division issues an order without examining the books of the employer - Board determines that order was valid - Section 8 of **The Payment of Wages** considered - 800/83/PWA - January 19, 1984 - Somerset Farm Equine Care Centre, Mike Smith.

Board determines Director of Employment Standards is not authorized to investigate a complaint of unpaid wages where the complaint has been determined untimely - Subsections 8(1) and 8(3) of **The Payment of Wages** considered - 1120/85/PWA - April 22, 1986 - Joe's Auto Clinic, Tahhan Bros. Ltd.

Board determines Director of Employment Standards has jurisdiction to file a caveat on behalf of an employee merely on the strength of the complaint filed by the employee - Subsections 7(4), 7(5), 8(5) and 8(6) of **The Payment of Wages** considered - 31/86/PWA - September 22, 1986 - Abalon Construction Ltd.

Director of Employment Standards files a caveat prior to the expiry of the employer's right to have an order of the Director referred to the Board - No denial of natural justice - 31/86/PWA - September 22, 1986 - Abalon Construction Ltd.

Board determines that it has jurisdiction to make an order concerning a claim for unpaid wages against an Indian Band - 187, 777, 779, 780, 781/87/PWA - June 21, 1988 - Wasagamack Constructors, R.A.L. Enterprises Ltd. – **APPEAL TO COURT OF QUEEN'S BENCH DENIED.**

The Board conducts a hearing de novo upon reference from the Director of Employment Standards Division - 1100/87/PWA - September 12, 1988 - Independent Heating and Air Conditioning Limited.

Board has right to deal with unauthorized deductions - 1113/89/PWA - February 7, 1990 - Flanders Design and Development Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL WITHDRAWN.**

Functions performed by the employees were primarily within provincial boundaries - Business within jurisdiction of the Manitoba Labour Board - 343/89/PWA - August 29, 1990 - Gelco Express Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Making an order against the receiver is not a prerequisite to the enforceability of an order against the directors or officers - Claim upheld - Subsection 8(4) of **The Payment of Wages Act** considered - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Officer of the Employment Standards Division authorized to issue an order on behalf of the Director of Employment Standards Division - Section 22 of **The Payment of Wages Act** considered - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

JURISDICTION

Board does not have jurisdiction to enforce payment of Employee's debt through an offset of wages and vacation wages owing - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Board held it did not have jurisdiction to deal with the claim that the Employee quit without notice as a forfeiture claim was not filed with the Board - Board also held it did not have jurisdiction to deal with the allegations of criminal misconduct - 1112/90/PWA - December 27, 1990 - Nupulse Dairy Equipment Ltd.

Board not limited to enforce minimum standards set out in the legislation - Has jurisdiction to enforce wages payable under employment contract, equal to or greater than the minimum set in the legislation - 549-561/90/PWA - June 24, 1991 - Metal & Alloys Co., R. Francis et al. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL DISMISSED.**

Board has jurisdiction under Section 8(3) of *The Payment of Wages Act* to order payment of termination wages even though no charge made under Section 39 of *The Employment Standards Act* - Sections 39 and 40 of *The Employment Standards Act* discussed - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Board has jurisdiction under Section 8(3) of *The Payment of Wages Act* to order payment of termination wages even though no charge made under Section 39 of *The Employment Standards Act* - Sections 39 and 40 of *The Employment Standards Act* considered - 885-890/90/PWA - October 2, 1991 - Jack Levin and Louis Levin, East-West Packers (1969) Ltd.

A leave to appeal does not act as a stay of proceedings - Board has jurisdiction to hear matter, but does not have jurisdiction to offset debts against wages - 300-301/91/PWA - October 10, 1991 - Ervin Funk, Fort Rouge Plumbing – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employees covered by collective agreements not precluded from remedial provision of *The Employment Standards Act* - Matter properly before Board - 174/91/PWA - October 21, 1991 - Display Fixtures, Division of Westfair Foods Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED IN PART; APPEAL DISMISSED.**

Employer disputed authority of Director to grant Order for wages and Board's jurisdiction to hear matter as Employee filed claim in Courts eight days previous to granting of Order - Board has jurisdiction to hear matter as Employee filed Notice of Discontinuance for claim in Courts - Section 11 of *The Payment of Wages Act* discussed - 655/92/PWA - March 10, 1993 - Chariot Courier and Messenger Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Unauthorized deductions - Held Employee was overpaid on final pay cheque - Board has no jurisdiction to offset debts against earned wages - 356/94/PWA - October 21, 1994 - Keystone Agricultural Producers Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

JURISDICTION

Time Limits - As per subsection 8(2.1) of *The Payment of Wages Act*, the recovery of wages limited to wages payable in the six month period preceding the date of termination - Board held the decision of the Employment Standards Division was in error and should be reversed as no funds were due during the six months preceding the termination - 124/95/PWA - December 21, 1995 - Gerard Lucyshyn t/a Skyline Management Accounts Receivable Specialists.

Constitutional Challenge - Board held that constitutional challenge regarding section 5(1) of **Manitoba Regulation 194/91** should be handled by the courts - 849/94/PWA - January 18, 1996 - Linda Tyndall t/a 2890675 Manitoba – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Security deposit not an issue within the Board's jurisdiction - 544/95/PWA - February 8, 1996 - Anne & Theodore Kostynyk t/a Gateside Gardens – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Constitutional - Transportation - Held economic relationship between provincially registered tour operator and federally regulated busing company does not amount to the integration necessary to bring tour operator under federal jurisdiction - Provincial labour board has jurisdiction in the matter - 759/95/PWA - May 30, 1997 - Mr. Canada's Touring Network – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Board does not have jurisdiction to deal with issue of constructive dismissal – 742/99/ESC – April 26, 2000 – B. Lambert Ltd.

Board must always satisfy itself that any matter was properly before it - Therefore, it has jurisdiction to determine whether referral was made in accordance with statutory provisions of subsection 8(12.2) of *The Payment of Wages Act* – 58/00/PWA – February 16, 2001 – Protect-A-Home - **APPEAL TO THE COURT OF APPEAL GRANTED; BOARD ORDER DECLARED A NULLITY; LEAVE TO APPEAL DENIED RE SECOND BOARD ORDER.**

Employer argued Board did not have jurisdiction to consider portion of a claim that covers period beyond date the complaint was filed - Held practical implications allow an order to capture period beyond date complaint filed - *The Payment of Wages Act* specifically limits the time a complaint can go back, but does not restrict the time forward - 58/00/PWA - November 20, 2002 - Protect-A-Home Services Inc. - **APPEAL TO THE COURT OF APPEAL GRANTED; BOARD ORDER DECLARED A NULLITY; LEAVE TO APPEAL DENIED RE SECOND BOARD ORDER.**

Bicycle courier not insurable for EI or CPP not determinative whether he was an employee under *The Employment Standards Code* – 650/04/ESC – May 19, 2005 – Frank Kenjak t/a Aries Courier Service.

Employee acknowledged she owed Employer an amount in excess of her total wage claim - Board does not have jurisdiction to award Employer an amount greater than the amount owing to Employee for wages, overtime wages, general holiday wages and vacation wages - Substantive Order - 347/06/ESC - July 31, 2006 - Inajit Ventures.

JURISDICTION

Employer appealed Notice of Administrative Penalty – Director of Employment Standards Division submitted Employer failed to file timely appeal and bank account was garnished to satisfy penalty – Held Board had no jurisdiction to extend time to file an appeal – Substantive Order - 98/11/ESC - October 13, 2011 - Sterling O & G International Corporation.

Reduction - Notice of Administrative Penalty for \$7,500 issued to Employer for 15 separate incidents for alleged failure to pay general holiday pay – Employer requested Board’s Chairperson reduce deposit required - Employer noted no individual orders had been issued ordering payment of general holiday pay – Held subsection 138.2(6) of *The Employment Standards Code* limited Board’s jurisdiction on merits of administrative penalty appeal in that Board must confirm or revoke penalty - Board did not have jurisdiction to vary penalty or to set it aside and make new order - Fact that individual employee had not filed complaint or that Employment Standards Division had not issued specific order for unpaid wages did not affect right of Director to issue Notice of Administrative Penalty – Application dismissed – Substantive Order - 237/11/ESC - November 24, 2011 - 3422640 Manitoba Ltd. t/a Greencut Environmental Services.

(Next Section: Sec. 10.2)

JUST CAUSE

Employee's employment terminated without notice or wages in lieu of notice for failure to report to work his shift for a total of 5 days - 39/86/PWA - October 23, 1986 - Flin Flon Mining Contractors Ltd.

Employee unjustly terminated for attending a local bar after requesting time-off to attend a hospital for medical treatment - 1037/85/PWA - October 28, 1986 - Chicken Delight, Roblin Chicken Ltd.

Employee absent due to vehicle repair problems terminated without just cause - 870/86/PWA - January 7, 1987, 72303 Manitoba Ltd., Rossini Ristorante Italiano.

Board determines that the cashing of a personal post dated cheque by the employee was not just cause for termination - 824/86/PWA - January 9, 1987 - The Other Place Hotel Ltd., Trail West Motor Inn.

Employer fails to establish that the termination of his employee was for just cause - 607/87/PWA - July 31, 1987 - R. D. Stenning Enterprises Ltd., Stenning Skoda.

Employee implicated in misappropriation of Company's funds terminated without just cause and entitled to wages in lieu of notice - 411/87/PWA - October 9, 1987 - CHC Holdings Ltd., Vacu-Maid Sales.

Employee absent from the office due to death in the family, terminated without just cause - 1013/88/PWA - March 8, 1989 - National Testing Laboratories Limited.

Board finds termination unjust due to lack of evidence to substantiate Employees drinking - Entitled to notice or wages in lieu thereof - 1261/88/PWA - March 9, 1989 - Camp Wasaga Inc.

Continued employment of Employee on 60 day probation subject to certain conditions, breach of which would result in immediate termination - Refusal to meet those conditions along with previous work history sufficient cause to discharge employee without further notice or wages in lieu thereof - Reasons not issued - 1144/90/PWA - February 1, 1991 - INCO Ltd.

Board held that whether or not the Employee was on duty, "knocking out" a manager amounted to just cause for dismissal - Claim for wages in lieu of notice dismissed - 1159/90/PWA - March 21, 1991 - Kayway Industries Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer claimed Employee laid off or, in alternative terminated with cause, as per Section 39 of *The Employment Standards Act*, for giving unauthorized bonuses and use of company credit card to employees - Held Employee not laid off as Employer witness stated he was relieved of duties - Held did not exceed authority and conduct not type contemplated by *Act* - Claim for wages owing allowed - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

JUST CAUSE

Forfeiture - Employee resigned without notice claiming Employer asked him to participate in insurance fraud - Employer filed forfeiture claim for quitting without notice and breaching fiduciary duty for being involved with competing company - Board held Employee's reasons did not justify quitting without proper notice - Forfeiture claim allowed - No need to deal with alleged breach of fiduciary duty as that would not affect claim under *The Payment of Wages Act* - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee laid off indefinitely for sending "impertinent" letter to Employer -Employee claimed terminated without notice - Employer argued termination also justified, as per Section 39 of *The Employment Standards Act*, because Employee breached fiduciary duty by starting rival company - Board held Section 39 not applicable as Employee did nothing prior to termination and the alleged breach did not affect claim under *The Payment of Wages Act* - Ordered Employer to pay wages claimed - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Just cause - Employee was insubordinate for refusing numerous times to complete inventory - Board found request was reasonable and would not create undue hardship and Employee had been warned failure to comply could result in termination - Employer had just cause to terminate employment - Ruled Employee not entitled to wages in lieu of notice - 106/99/PWA - September 9, 1999 - College Universitaire de Saint Boniface - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Evidence presented, including Employee's own exhibit, show he knew consequences of his continued tardiness and failure to call in as instructed - Held Employer had "just cause" to terminate his employment without being required to provide pay period's notice or wages in lieu of notice - Claim for wages in lieu of notice dismissed - 211/03/ESC - September 3, 2003 - Convergys Customer Management Inc. - **APPEAL TO THE COURT OF APPEAL GRANTED.**

Exceptions - "wilful misconduct" - Mechanic terminated without notice for uttering abusive comments about Employer - Outburst constituted "just cause" but remark made on spur of the moment and did not reach level of intention or malice inherent in the word "wilful" to allow Employer to rely on exception to avoid minimum notice requirements of the *Code* - 86/06/ESC - May 11, 2006 - Leonard W. Carlson, trading as Len's Auto Service.

JUST CAUSE

Just cause vs. wilful misconduct - Employer argued no notice required for Bicycle Courier terminated for cause for losing Client's bank deposit on street - Conduct amounting to "cause" or "just cause" for dismissal at common law or under collective bargaining not necessarily same as conduct justifying termination without notice under *The Employment Standards Code* - Section 62(1)(h) sets out exception to notice if employee acted in manner not condoned by employer and that constituted wilful misconduct, disobedience or wilful neglect of duty - "Wilful" interpreted as being "deliberate", "malicious" or "intentional" - Loss of bank deposit an accident, and Employee made concerted effort to find it - Also, evidence did not support finding that he acted "wilfully" in a verbal exchange with client - Board concluded exception to providing notice did not apply - Employee entitled to wages in lieu of notice - 97/10/ESC - January 5, 2011 - 3526861 Manitoba Ltd. t/a Rene's Courier.

Legislative Change - Employer relied on exceptions in subsection 62(1)(h) of *The Employment Standards Code* - Board noted subsection was amended effective January 1, 2012 to provide that notice not required when employment is terminated "for just cause" - However, as Employee's employment was terminated on November 3, 2011, case to be decided under provisions of the **Code** which were in effect prior to January 1, 2012 - Substantive Order - 195/12/ESC - January 21, 2013 - Scissors, Paper & Stone Hair Studio.

Just Cause - First case in which Board interprets just cause standard of *The Employment Standards Code* which came into force on January 1, 2012 - Standard of just cause founded upon principle of repudiation of contract which occurs where one party deprives other of substantial benefit of contract - When employee's conduct is incompatible with fundamental term of employment agreement, employer may terminate employment without notice or wages in lieu - Board employs contextual approach to just cause standard which requires consideration of: 1) the nature and extent of the employee's misconduct, if any; 2) the surrounding circumstances, including the circumstances of the employee and those of the employer; and, 3) whether termination is a proportional response to the misconduct having regard to all of the relevant circumstances - Once it has been established that employee was dismissed without notice, onus shifts to employer who seeks to take advantage of the exceptions - 136/12/ESC - February 27, 2013 - North Perimeter Service Centre.

JUST CAUSE

Just Cause - Employer appealed Order to pay Employee wages in lieu of notice claiming it had just cause to terminate Employee's employment because his absenteeism detrimentally affected its operations and jeopardized its relationships with customers and other staff - Employer relied upon section 62(1)(h) of *The Employment Standards Code* - Board employed contextual approach to just cause standard - Board considered nature and extent of employee's misconduct; surrounding circumstances; and, whether termination was proportional response to misconduct - Board found, following Employee's return to work from parental leave, he left work early once and was absent once to look after his child, both times with express permission - Absences were limited, condoned by Employer, and Employee was honest at all times regarding reason for requesting to be absent - Occasional or isolated absence not generally regarded as sufficiently serious misconduct to justify summary dismissal - Employee's absences did not constitute misconduct and not indicative of neglect of duty, disobedience, or conduct that was incompatible with his employment duties - Employee was never warned that absences could lead to discipline or termination - However, given small number of mechanics and time sensitive nature of its business, absenteeism may have prejudicial effects upon Employer's relationships with its clients and morale of other employees - Notwithstanding potential effect of employee's absences, Employer did not have absenteeism policies - Board determined termination of Employee was disproportionate response to his absences - Employer did not satisfy Board that Employee was terminated for just cause - Employee entitled to wages in lieu of notice - 136/12/ESC - February 27, 2013 - North Perimeter Service Centre.

Just Cause - On day in question, Employee, who was table games inspector, witnessed dealer pay out additional \$350 and then touched player's chips - As a result of incident, Employer terminated his employment for violating Employer's and gaming commission's policies and procedures - Employer disputed Order to pay Employee wages in lieu of notice asserting it had just cause to terminate his employment without notice because Employee did not perform his job responsibilities in accordance with policies and procedures - Board noted an employer's dissatisfaction or displeasure with an employee's performance is generally not enough to constitute just cause for dismissal without notice - Board found Employee caught sight of dealer's error, and proceeded to bring it to Employer's attention - Employer did not point to particular policies and procedures that it was relying on, nor did it elaborate on how policies or procedures were allegedly breached - Board could not conclude Employee's actions or performance amounted to "just cause" within meaning of section 62(1)(h) of *The Employment Standards Code* - Employee entitled to six weeks' wages in lieu of notice - Appeal dismissed - Substantive Order - 291/12/ESC - February 28, 2014 - South Beach Casino.

LOCK-OUT

Employer rejected the 12-hour shift schedule at the bargaining table - During lock-out requested hours of work exemption for 12-hour shift - Held could not make unilateral changes during lock-out that it opposed during negotiations or "pre-impasse negotiating framework" - Request denied - 369/95/ESA - August 2, 1995 - Gateway Industries Ltd.

Union continues to represent the employees employed in the bargaining unit at the time the lock-out commenced, including those who had returned to work - Union was at party to the proceedings before the Board - 369/95/ESA - August 2, 1995 - Gateway Industries Ltd.

(Next Section: Sec. 14.0)

NATURAL JUSTICE

Director of Employment Standards files a caveat prior to the expiry of the Employer's right to have an order of the Director referred to the Board - No denial of natural justice - 31/86/PWA - September 22, 1986 - Abalon Construction Ltd.

Board does not have the discretion to relieve Officer from liability even though that person had no more interest in, or control over the affairs of the company than any other employee - 430/90/PWA - December 12, 1990 - Gary Baty, Heritage Industries Ltd.

(Next Section: Sec. 14.2)

NOTICE

Employer attempts to establish a no notice policy for termination of employment - Compliance with Subsections 35(3) and 35(4) of **The Employment Standards Act** discussed - 555/85/PWA - October 10, 1985 - Izabell's Place Ltd.

An Employee was not required to work notice period as result of agreement with Employer - 203/86/ESA - May 28, 1986 - Karen Wells Enterprises, Molly Maid.

Board determines that employer had terminated applicant's employment under the guise of a lay-off - 443/86/PWA - October 9, 1986 - Wapun Security Services Inc.

Failure of employer to give proper notice - **The Employment Standards Act**, Subsection 35(1) considered - 496/86/PWA - October 23, 1986 - Cineplex Odeon Corporation, Garrick Movie Theatre.

Employee's employment terminated without notice or wages in lieu of notice for failure to report to work his shift for a total of 5 days - 39/86/PWA - October 23, 1986 - Flin Flon Mining Contractors Ltd.

Board determines that the cashing of a personal post dated cheque by the employee was not just cause for termination - 824/86/PWA - January 9, 1987 - The Other Place Hotel Ltd., Trail West Motor Inn.

Effect of employer's policy on notice of termination requirements – **The Employment Standards Act**, Subsection 35(3) considered - 491/86/PWA - January 30, 1987 - Inner-Tec Security Consultants Ltd.

Employee hired on a term basis not entitled to notice when discharged at end of term - Subsection 36(8) of **The Employment Standards Act** applied - 757/86/PWA - January 30, 1987 - Residence St. Claude Ltee.

Board determines employee terminated his employment voluntarily - 788/86/PWA - February 18, 1987 - Frank H. Wiley Limited.

Employee terminated for leaving his shift early - Employee alleges that it was unsafe to remain and work alone - Employee's claim for wages in lieu of notice limited to one week - 108, 109/87/PWA/ESA - April 24, 1987 - Canadian Anglo Machine & Iron Works Inc.

Established practice of Employer regarding notice of termination to be followed - 292/87/ESA - June 22, 1987 - Transcona Dodge-Chrysler (1980) Ltd.

Employer fails to establish that the termination of his employee was for just cause - 607/87/PWA - July 31, 1987 - R. D. Stenning Enterprises Ltd., Stenning Skoda.

Employee quits without notice when her employer becomes intrusive into her personal life - Employers claim for wages in lieu of notice denied - Subsection 35(14) of **The Employment Standards Act** applied - 781, 782/86/ESA/PWA – Sept. 1, 1987 - Thomas Norman Miller, T. N. Miller & Partners.

Employee terminates his employment without notice after first week of employment - Claim for forfeiture denied - Subsections 35(1) and 35(2) of **The Labour Relations Act** applied - 1133/86/ESA - September 1, 1987 - Kildonan Car and Truck Parts.

NOTICE

Claim for wages in lieu of notice denied - Employer's wife not a person with authority to hire, fire, etc. - 864/87/PWA - December 14, 1987 - Symbol Signs.

Employee dismissed without notice entitled to receive wages in lieu of notice - Subsection 35(1)(a) and 35(4) of **The Employment Standards Act** applied - 741, 742, 743/87/PWA - December 15, 1987 - Robertson Family Trust, Delta Management Services.

Employees refuse to do heavy lifting, recognizing the possibility of permanent injury to themselves - Employer not justified in claiming wages in lieu of notice - 977 and 978/87/ESA - January 28, 1988 - Kildonan Auto Parts.

Employees leave bush camp without notice due to poor weather conditions entitled to wages and transportation costs - 1068, 1069/87/PWA - April 7, 1988 - Yellow Thunder Holdings Ltd.

Collective agreement providing for conditions regarding termination governs - Subsection 35(2)(b) of **The Employment Standards Act** applied - 29/88/PWA - April 15, 1988 - United Canadian Shares Limited, Dominion Tanners Sales.

Employee submits letter of resignation before leaving for holidays - Employee's claim for wages in lieu of notice allowed - 1162/87/PWA - April 20, 1988 - Terrance Travel on Academy Ltd., Cross World Travel.

Employee terminated his employment without notice by abandoning his position - 322/88/ESA - May 27, 1988 - Builders Furniture Ltd.

Employee's award of wages in lieu of notice reduced due to her conduct in meeting with Manager - Subsection 39(4)(a) of **The Employment Standards Act** applied - 476/88/PWA - September 1, 1988 - Baaco Pizza, Southwood Foods Inc.

Failure to give notice - Employer and Employee failed to act responsibly - Employer not entitled to forfeiture of wages; Employee not entitled to wages in lieu of notice - 567/88/ESA - September 6, 1988 - Creative Interiors.

Employer's claim for forfeiture denied - 649/88/ESA - September 16, 1988 - Neeco Labels.

Employee discharged without notice due to improper conduct not entitled to wages in lieu of notice - Subsection 39(4) of **The Payment of Wages Act** applied - 653/88/PWA - September 27, 1988 - MacCosham Storage & Distribution Centres (Winnipeg) Ltd.

Employer fails to give proper notice - 599/88/PWA - October 14, 1988 - Stevens and Sons Limited.

Employee contributed to misunderstanding concerning notice period, required to forfeit a portion of her earned wages - 947/88/ESA - January 11, 1989 - Broosters Restaurant.

Employee's conduct not insubordinate or dishonest - Entitled to wages in lieu of notice - Subsection 39(14)(d) of **The Employment Standards Act** considered - 1240/88/PWA - April 11, 1989 - The Royal Winnipeg Ballet - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

NOTICE

Failure of Employer to place Employee in alternative position – Termination without proper notice - Entitled to wages in lieu thereof - 245/89/PWA - April 14, 1989 - Metropol Security Ltd./Securite Metropol Ltee. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer fails to file proper claim to Minister - Claim for forfeiture denied - Subsections 39(11) and (14) of *The Employment Standards Act* considered - 124/89/PWA - May 30, 1989 - Rae-Mar Investments Ltd., Schimmel's Dutch Bakery – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee precipitated altercation with supervisor - Claim for termination wages in lieu of notice denied - 91/89/PWA - June 1, 1989 - Altra Steel (1985) Ltd.

Despite Employee consuming alcohol on Employer's premises, entitled to wages in lieu of notice due to Employer's unnecessary delay in terminating Employee - Subsections 39(10), (13), and (14) of *The Employment Standards Act* considered - 17/87/PWA - August 17, 1989 - Griffin Canada Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL ALLOWED.**

Employee not complying with notice requirements in *The Employment Standards Act* - 521/89/ESA - September 1, 1989 - The Great Toy Machine Co. Ltd.

Claim for forfeiture by Employer - Employee fails to work out notice period - 577/89/ESA - September 29, 1989 - Unisex Scizzors.

Employer's claim for forfeiture denied for failure to comply with legislation - Subsections 39(11) and (14)(b) of *The Employment Standards Act* considered - 419/89/PWA, 420/89/ESA - October 11, 1989 - The Great Toy Machine Co. Ltd.

"No notice" policy - Whether posting of copy of relevant legislation constitutes a "no notice" policy - Subsection 39(3) and (4), *The Employment Standards Act* considered - 961 and 962/89/PWA - December 28, 1989 - Sasagiu Rapids Lodge Ltd.

Agreement between Employer and Employee that no notice required for day-to-day employee is binding on both parties - 1062/89/ESA - March 21, 1990 - Remco Tires Distributors Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Board determines Employee fired without notice - Employee refusal to work notice period when subsequently offered by Employer characterized as unreasonable - Right of board to alter award - One week wages in lieu of notice awarded - Subsection 39(2) of *The Employment Standards Act* considered - 1126/89/ESA, 1127/89/PWA - April 5, 1990 - Electra Sign Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer's comments to Employee and failure to pay overtime as required by law sufficient cause to quit without notice - Forfeiture claim denied - 937/89/ESA - April 10, 1990 - New Way Restaurant Suppliers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Board finds Employment Standards Division should rectify its omission of wages in lieu of notice - 820/89/PWA - April 18, 1990 - Naleway Foods Ltd.

NOTICE

Board determines delivery driver doing additional independent work during business hours properly classified as an employee - 94/90/PWA - May 11, 1990 - F.J. Fibreclaim, Ron Ferguson – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

After Employer becomes enraged, Employee leaves a note stating she quit - Claim for forfeiture not allowed due to Employer's behaviour and because he refused to allow the Employee to work out her notice period - 435/90/ESA- August 20, 1990- Astra Dental Lab.

Individual not a director because no company shares transferred to him, no evidence existed to prove that he was elected as a director, and administratively he was treated as an employee rather than an owner, and he had little responsibility or authority - Claim for wages and vacation wages upheld - However, claim for wages in lieu of notice denied because Employee through poor attendance and negligence of duties effectively abandoned job - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R.Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee given written notice of lay-off effective same day - Verbal notice given two weeks earlier inappropriate given vagueness of effective date, lack of written confirmation, and threatening comments from the Employer - Entitled to wages in lieu of notice - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee given numerous warnings regarding his insubordinate behaviour - Not entitled to wages in lieu of notice - 589/90/PWA - November 14, 1990 - Carlton Club – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Disagreement over the ownership of the funds from empty bottles not reason enough to terminate without proper notice or wages in lieu of notice - 879/90/PWA - December 13/1990 - Wasagaming Properties Ltd., Mooswa Motel & Bungalows – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Although legislation clearly prohibits the use of vacation time to fulfill notice period, Employer's silence to Employee's request amounts to consent - Forfeiture claim denied - Subsection 7(4) of **The Vacation With Pay Act** considered - 682/90/ESA, 683/90/PWA - January 30, 1991 - Dial Data Services Inc.

Continued employment of Employee on 60 day probation subject to certain conditions, breach of which would result in immediate termination – Refusal to meet those conditions along with previous work history sufficient cause to discharge employee without further notice or wages in lieu thereof - Reasons not issued - 1144/90/PWA - February 1, 1991 - INCO Ltd.

Employer acted unreasonably when it ordered Employee who had broken his glasses to report for work - Employee did not abandon his job by refusing to work and entitled to wages in lieu of notice - Subsection 39(10) of **The Employment Standards Act** considered - 844/90/PWA - February 14, 1991 - Continental Caterers – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

NOTICE

Board held that whether or not the Employee was on duty, "knocking out" a manager amounted to just cause for dismissal - Claim for wages in lieu of notice dismissed - 1159/90/PWA - March 21, 1991 - Kayway Industries Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Probationary Employee not subject to no notice policy due to absence of signed acceptance confirming that he read the contents of policy manual - Employee did not effectively quit his employment when he acknowledged that he was looking at other job prospects - Claim for wages in lieu of notice upheld - 897/90/PWA - April 15, 1991 - Northland Healthcare Products Ltd.

Subsection 40(5) of **The Employment Standards Act** not permissive - Board could not order less than statutory minimum of 10 weeks notice - However, as per Board practice, actual notice given deducted in determining pay in lieu of notice - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Pay in lieu of notice is "wages" and not damages - Concept of mitigation of losses not relevant to proceedings under **The Employment Standards Act** - No duty on employee to mitigate - Amount of notice and pay in lieu of notice statutory minimum and cannot be reduced by wages earned from another employer during notice period - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

No evidence that actual notice or constructive notice of lay-off given - Normal summer lay-off of two weeks does not equate to notice of termination - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy.

Exemption from notice or payment of wages in lieu of notice under subsection 40(2)(d) of **The Employment Standards Act** not applicable because Employer aware of possible receivership action two months prior to action being taken and because in bankruptcy, employment terminated by dismissal rather than by frustration - As per section 8 of **The Payment of Wages Act**, receiver must comply with order for payment of wages - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Employees do not have duty to mitigate damages in group termination cases - Wages earned from work done for Receiver not deducted from termination wages owing - 885-890/90/PWA - October 2, 1991 - Jack Levin and Louis Levin, East-West Packers (1969) Ltd.

Board held where Employees laid off with no date of recall, termination of employment occurred and notice was required - Exemptions under subsection 39(2) of **The Act** did not apply as production work not construction work, and collective agreement did not contain specific conditions for termination - Section 39 of **The Employment Standards Act** considered - 174/91/PWA - October 21, 1991 - Display Fixtures, Division of Westfair Foods Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED IN PART; APPEAL DISMISSED.**

In the absence of a policy forbidding employees from performing personal work during work hours or in the absence of previous discipline for tardiness, Employer fails to prove Employee guilty of gross insubordination or dishonesty - No justification for terminating without notice - 751/91/PWA - Jan. 20, 1992 - John A. Flanders Co. Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

NOTICE

Employee terminated without notice after charged with theft, an act he claimed was motivated by his consumption of alcohol - Employee not entitled to wages in lieu of notice because he was warned further problems with alcohol would not be tolerated - 899/91/PWA - Feb. 24, 1992 - Inner-Tec Security Consultants Ltd., trading as Inner-Tec Security Services – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee refusing to return keys to Employer discharged for insubordination properly denied wages in lieu of notice as per section 39 of **The Employment Standards Act** - Employee's claim for overtime denied as hours claimed not authorized, not part of his assigned duties, and were done on own initiative - 818/91/PWA - February 24, 1992 - Dr. Amrit Varma, trading as The Terraces of Tuxedo – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Onus - Employee refuses to provide specific evidence on allegation that Employer made sexual advances - Due to lack of evidence Board unable to find Employer guilty of violent or improper conduct - Held Employee did not give proper notice - Forfeiture claim allowed - 220/92/PWA & 221/92/ESA - June 12, 1992 - Peter Knoedler.

Employee off work due to non-work related injury told to leave as he did not know date of return - Conduct not insubordinate or dishonest as per Section 39(14)(d)(ii) of **The Employment Standards Act** - Entitled to wages in lieu of notice - 229/92/PWA - August 26, 1992 - J.S. Stewart t/a Culligan Water Conditioning.

Baker/manager claimed he was given only one week's notice due to a change in ownership - Employer claimed that Employee was quitting at end of week - Board found Employee not likely to quit as he had no job - Also held that ownership did not change, management did - Claim for wages in lieu of one week's notice allowed - 503/92/PWA - September 16, 1992 - Emjaydee Management Ltd.

Orderly discharged for threatening to "mess up lives" of management because they moved him to day shift - Board held threats were insubordination as per Section 39 of **The Employment Standards Act** - Discharge justified - Not entitled to wages in lieu of notice - Claim for vacation wages dismissed as supporting documentation showed none owing - 247/92/PWA - September 22, 1992 - Park Manor Personal Care Home Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Unauthorized absence and dishonesty - Board accepts Employee's evidence that he assumed the Employer would call him - Held absence not unauthorized - Due to inadmissibility of videotaped evidence, held assertion of dishonesty without evidence to support it - Claim for wages in lieu of notice allowed - 531/92/PWA - December 2/1992 - Oshawa Holdings Ltd. t/a The Codville Co. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

No evidence presented from Employer representatives who had personal involvement in case - Memo from shift supervisor, who was still an employee, inadmissible evidence as no explanation why he did not testify - Operations Manager recount of conversation between supervisor and Employee inadmissible hearsay evidence - Board accepts evidence of Employee - Held Employee did not quit without notice - Forfeiture claim denied - 864/92/ESA - February 9, 1993 - Inner-Tec Security Services – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

NOTICE

Although Subsection 7(4) of **The Vacation With Pay Act** prohibited use of vacation time to fulfill notice period, manager had agreed to request - As manager had authority to make decision, his agreement amounts to consent - 1036/92/ESA - March 8, 1993 - Berna Dean Flowers – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employer argued with Employee that she could not use vacation time to fulfill notice period after manager had consented to her request - Original agreement binding on Employer whose conduct was sufficient to warrant employee leaving without agreement as to notice period being honoured - 1036/92/ESA - March 8, 1993 - Berna Dean Flowers – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Because Employee was ill and had permission to leave work early, and in absence of specific terms of probationary period regarding notice, claim for wages in lieu of notice upheld - 889/92/PWA - May 5 1993 - DFS Ventures Inc. t/a Duty Free Shop-Emerson – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Misunderstanding regarding the repayment of sick days not cause for termination without notice as per Section 39(10)(d) of **The Employment Standards Act** - 969/92/PWA - June 18, 1993 - Gateway Soap & Chemical Co. Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Even if Employee quits without notice, Employer cannot deduct earned wages from pay cheque to offset debt it unilaterally believed to be owing - Employer should have filed claim of forfeiture - 761/92/PWA - Aug. 4, 1993 - Spartan Building Services Ltd.

Office cleaner overpaid due to administrative error - Husband who assisted Employee and acted as spokesperson, informs Employer reimbursement impossible and he would no longer assist wife - Two days later, Employee informed she had worked her last day as she had quit without notice - Board accepts Employee's claim she was fired and held she was entitled to wages, vacation wages and wages in lieu of notice - 761/92/PWA - August 4, 1993 - Spartan Building Services Ltd.

Shift supervisor terminated for not following cash control and security policy - Termination could not be upheld as Employee unaware of policy which had been issued after her termination and no evidence she was responsible for loss or theft of deposit - Employee entitled to wages in lieu of notice - 202/93/PWA - November 1, 1993 - Mandolfo Investments (Canada), Pizza Hut.

Employee fired without notice and wages withheld when night deposit short by \$2,500 - Claim for wages in lieu of notice denied because of "no notice" agreement between the parties - 999/93/PWA - March 9, 1994 - Bewza Hotels.

Forfeiture - Employee quit after dispute with co-worker - Two weeks prior, he had given Employer's mother notice he was quitting due to continual harassment from customer - Claim for forfeiture allowed because he neglected to communicate directly with Employer or give an exact date of departure - Penalty reasonably and fairly reduced due to Employee's understandable fear for own safety and lack of prejudice to Employer as he was easily replaced - 136/84/ESA - April 22, 1994 - Angelo Giovanni Zamparutti t/a Fish Doctor.

NOTICE

Employee worked full-time hours one month prior to lay-off - Employer claims not entitled to notice as hired on job-to-job basis - In absence of written contract of employment or evidence to substantiate Employer's claim, Board held Employee was employee under relevant legislation - In absence of no notice policy as per Section 39 of **The Employment Standards Act**, Employee entitled to wages in lieu of notice - 28/94/PWA & 29/94/ESA - August 3, 1994 - Tericorp Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee inquiring whether his employment was "finished" not deemed to be notice - Employer order to pay one week's wages in lieu of notice - 1020/93/PWA - August 17, 1994 - Crystalline Ventures Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Forfeiture - Employee takes his tools and does not report for work after argument regarding \$2 per hour reduction in wage rate - Returns to work but without his tools as ordered - After Employer shouted to go get tools, Employee leaves work and did not return - Held Employee quit and not entitled to wages in lieu of notice - Forfeiture claim allowed as Employee's departure inconvenience to Employer who paid other employees overtime and took one week to find replacement - 758 & 759/93/PWA & 760/93/ESA - Sept. 7/94 - Joseph Seesai being a Director of Autocraft Rebuilders.

Hair stylist decided she would not have enough time to completely service client and arranged for another stylist to serve her - Employer believed she had the time and fired her for violating policy to not refuse client unless busy - Paid one week's pay in lieu of notice although paid every two weeks - Held decision not to serve client reasonable and within scope of Employer's policy - Ordered Employer to pay balance of notice period - 461/94/PWA - October 19, 1994 - Argon Enterprises LTD – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee discharged for not reporting for work despite request for day-off being denied - Board held she misunderstood Employer and believed she had permission - Claim for wages in lieu of notice allowed - 553/94/PWA - November 9, 1994 - J. & M. Investments Ltd. & Normand Park Car Wash – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer claimed Employee laid off or, in alternative terminated with cause, as per Section 39 of **The Employment Standards Act**, for giving unauthorized bonuses and use of company credit card to employees - Held Employee not laid off as Employer witness stated he was relieved of duties - Held did not exceed authority and conduct not type contemplated by **Act** - Claim for wages owing allowed - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Forfeiture - Employee quits without notice as work environment unpleasant - Employer filed forfeiture claim and for wage advances and wage overpayment - Held Employee did not owe amounts claimed and jurisdiction limited to offset debts as set out in **Kodiak Parking Services v. Kowalson** - Not fair or reasonable to penalize for full two weeks wages due to work environment - Order to forfeit wages and vacation wages owing - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

NOTICE

Forfeiture - Employee resigned without notice claiming Employer asked him to participate in insurance fraud - Employer filed forfeiture claim for quitting without notice and breaching fiduciary duty for being involved with competing company - Board held Employee's reasons did not justify quitting without proper notice - Forfeiture claim allowed - No need to deal with alleged breach of fiduciary duty as that would not affect claim under **The Payment of Wages Act** - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Forfeiture - Employee terminated for theft - Ten days after Employer asked him to return to work, Employee quits without notice due to humiliating treatment by Employer - Filed claim for wages in lieu of notice - Employer filed forfeiture claim - Held first termination without cause as theft allegations not substantiated and second termination without cause as Employee constructively dismissed - Entitled to wages in lieu of notice for either termination - Forfeiture claim dismissed - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Forfeiture - Board held Employer unreasonably refused Employee with systemic lupus 5 month leave of absence - Cannot characterize as quit - Forfeiture claim denied - 694/94/ESA - Jan. 23, 1995 - Kim's General Store – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Probationary period - Waiver of rights - Employee on "extended probation" argued he could quit without notice because Policy and Procedure manual stated no notice required during "probationary period" - Board held Employee not a new employee on probation and also required by Section 39(6) of The Employment Standards Act to give one pay periods notice - However, Employer waived rights to notice by not insisting Employee work out notice period and not informing him wages would be withheld - Ordered to pay wages owing - 27/95/ESA - April 12, 1995 - Loss Prevention Group g.p. Inc.

A no notice or short notice policy established under Section 39(2) of **The Employment Standards Act** applies equally to the employer and employee - 27/95/ESA - April 12, 1995 - Loss Prevention Group g.p. Inc.

Employee discharged with two weeks notice for causing damage - Next day, Supervisor informed him the owner wanted him off the property - Given lack of testimony by Supervisor, Board concluded the Employer was originally prepared to terminate with notice, but Supervisor later terminated him without notice merely because of opinion expressed by office manager - Claim for wages in lieu of notice allowed - 771/94/PWA - April 13, 1995 - Gateway Packers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Overtime - Claim for hours worked prior to start time dismissed as hours were within the sole control of Employee and were not authorized by the Employer - However claim for the hours worked after quitting time to finish work and correct errors allowed because Employer knowingly allowed and required Employee to work beyond eight hours per day - 256/95/PWA - September 27, 1995 - Prime Properties Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Sec. 14.2-E10

NOTICE

Forfeiture - Employee justified in terminating her employment without notice given the supervisor threw objects at her and verbally abused her - Employer's claim for forfeiture dismissed - Board held Employee could not also claim for wages in lieu of notice - 256/95/PWA - September 27, 1995 - Prime Properties Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Probationary Employee discharged for repeated tardiness - Employee's version of culminating incident not credible - Claim for wages in lieu of notice dismissed - 215/95/PWA - September 28, 1995 - Inner Tec Security Consultants Ltd. t/a Inner Tec Security Services – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Forfeiture - Employee refused to remain at end of shift to fill customer's order - Leaving work after being told by Employer to either fill order or get out does not characterize quit without notice especially when he reported for work next day - Forfeiture claim dismissed - 159/95/ESA - October 2, 1995 - Zatser Investments Limited – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Credibility - Employee claimed Employer refused to accept her notice and told her to quit or be fired without notice - She then said nothing and walked away - Employer testified she was being gracious and told Employee if she had full-time job waiting, to take it right away - Board preferred evidence of Employer finding if conversation occurred as described by Employee, walking away without further discussion was inappropriate - Held parties had understanding Employee could leave without notice - Claim for wages in lieu of notice denied - 476/95/PWA - November 6, 1995 - Waymart Inc.

Employee refused to write statement outlining goals, expectations and complaints - Held Employer simply attempting to identify solutions to his problems - Employee voluntarily leaves his employment and not entitled to wages in lieu of notice - Claim dismissed - 494/95/PWA - December 21, 1995 - Karen Rodko, 2896657 Manitoba Ltd., J.F.T. Typewriter & Office Equipment.

Employee claimed he was laid off without proper notice period - Evidence established no notice policy posted near time clock for a number of years - Employee must bear responsibility for not reading the notice or checking out rumours he had heard that such a policy existed - Claim for wages in lieu of notice dismissed - 292/95/PWA - December 21, 1995 - Dustrial Plastic and Steel Ltd.

Employee claimed surprised by termination - Employer believed sufficient notice given by informing Employee no room on payroll for him - Employee believed method of pay under review, not tenure of employment - Board agreed with Employee, because Employer alluded to a further meeting for Employee to present a plan of action - Held notice of termination not clearly given - Employee entitled to wages in lieu of notice - 37/96/PWA - May 9, 1996 - Park Avenue Tile Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Only two of the six claims for wages in lieu of notice allowed as those employees were not advised of the "no notice" policy - 210-212/96/PWA - November 7, 1996 - Sheldon Brounstein/Regent Auto & Truck Parts (1993) – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Sec. 14.2-E11

NOTICE

Quit alleged - Employee claims his notice was not accepted before he left the office, while Employer submits Employee quit then later tried to give notice - Employer's failure to call key witness and Vice-president's history of abusive behaviour support Employee's version of events - Employee entitled to wages in lieu of notice - 448/96/PWA - December 10, 1996 - Electra Signs. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer viewed Employee's refusal to pay for damages to vehicle as refusal to drive - Board disagreed and held termination unjust - Employee entitled to wages in lieu of notice - 477/96/PWA - January 28, 1997 - Kildonan Ventures/Kildonan Auto & Truck Parts –**LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee filed claim for wages in lieu of notice seven months after her employment was terminated - Claim dismissed as it fell outside the six-month time limit prescribed in Section 8(1) of *The Payment of Wages Act* - 764/96/LRA - March 17, 1997 - Harry Ross Area Rug Store Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee sent facsimile of medical certificate advising he should quit work due to job related stress - Certificate was not questioned by the Employer and Employee led to believe he could leave without penalty - Forfeiture claim dismissed - 758/96/PWA - May 15, 1997 - Prairie West Industrial Ltd.

Resignation - Held Employee unable to take a scheduled trip due to illness did not quit - Claim for wages in lieu of notice allowed - 759/95/PWA - May 30, 1997 - Mr. Canada's Touring Network – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Abandonment - Employee should have reported for shifts as scheduled while his new part-time schedule was being negotiated especially given Employer's orders to report for work - Held Employee abandoned position by not reporting for scheduled hours - Claim for wages in lieu of notice dismissed - 711/96/PWA - September 26, 1997 - AT & T Canada Inc.

Sufficient cause - Employer replaces Brandon crew with Winnipeg crew simply to reduce food and lodging expenses - Terminating employment for the sole reason of economics not sufficient cause to terminate without notice - Claim for wages owing in lieu of notice allowed - 685 & 686/97/PWA - Jan. 30, 1998 - Westman Tree Services Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Forfeiture - Employee provided intention to work out notice period, but changes to terms and conditions of employment warrant not working out full notice period - Employee entitled to receive accrued wages, but not wages in lieu of notice - Declaration, full Reasons not issued - 46/98/PWA & 47/98/ESA - April 14, 1998 - Telespectrum Worldwide Inc.

Transfer - Employee refuses to accept transfer to other store location - Employer's motives for transfer was to bring profitability and efficiency to its operations - Transfer not deemed to be a termination of employment - Held Employee severed employment relationship - Claim for wages in lieu of notice dismissed - 559/98/PWA - October 30, 1998 - Salvation Army National Recycling Operations.

Sec. 14.2-E12

NOTICE

Commissions - Sales Representative aware of Employer's policy that commissions for last month of employment not payable for the month in which employment severed - Claim for wages in lieu of notice dismissed - 428-430/98/PWA - November 2, 1998 - Polar Bear Rubber - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED, BUT DISCONTINUED.**

At time notice was given, Employer not aware Employee was actively pursuing a competing business venture - Cause not shown why Employee should not be allowed to work out notice period - Claim for wages in lieu of notice allowed - 428-430/98/PWA - November 2, 1998 - Polar Bear Rubber - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED, BUT DISCONTINUED.**

Witness - Cross-examination - Board satisfied friction occurred between Employee and manager - Manager did not appear at hearing - Employee's actions do not warrant termination without notice due to absence of manager's direct testimony and cross-examination - Claim for wages in lieu of notice allowed - 496/98/PWA - November 2, 1998 - Steinbach Dodge Chrysler Ltd.

Procedural Requirements - Delay - Board satisfied friction occurred between Employee and manager - However, Employee's actions do not warrant termination without notice due to length of time between culminating incidents and termination - Claim for wages in lieu of notice allowed - 496/98/PWA - November 2, 1998 - Steinbach Dodge Chrysler Ltd.

Just cause - Employee was insubordinate for refusing numerous times to complete inventory - Board found request was reasonable and would not create undue hardship and Employee had been warned failure to comply could result in termination - Employer had just cause to terminate employment - Ruled Employee not entitled to wages in lieu of notice - 106/99/PWA - September 9, 1999 - College Universitaire de Saint Boniface - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Change in Shift - Employee told night before that time of shift was changing - He failed to report for shift as he could not arrange for childcare - Employer terminates without notice - Board held short notice of shift change was unreasonable, but Employee had not requested additional time to make other arrangements - As both parties partially at fault in failing to act reasonably, fair and reasonable determination would be that Employee receive one week wages in lieu of notice - 380/99/PWA - December 2, 1999 - Garden Grove Distribution (1998).

Entitlement - Employee frequently late and not showing up for work when required not entitled to pay in lieu of notice - However Employer partially at fault in failing to establish clear and unequivocal working rules - Claim for wages, vacation and overtime allowed, but claim for insufficient notice disallowed - 708/99/ESC - May 19, 2000 - Bill Protopapas t/a/ Bill's Sticky Fingers.

NOTICE

Deemed quit - Employee stated he had "quit" on his claim for wages in lieu of notice - Board accepted that this statement was made in error in view of his poor command of the English language - However, Employee frequently late and not showing up for work when required not entitled to pay in lieu of notice - 708/99/ESC - May 19, 2000 - Bill Protopapas t/a/ Bill's Sticky Fingers.

Employee filed claim for three days wages in lieu of notice - Payroll evidence showed she was paid in full - She also claimed termination contrary to Section 133(1)(b) of *The Employment Standards Code* as it resulted from job complaints she made - Held Employee terminated at end of probationary period for unsuitability - Employee complained about "labour issues" but did not advise Employer about complaint filed with Labour Board - She did raise filing a complaint post-termination, but that was not relevant time period for purposes of section 133(1)(b) - Complaint under Code not established and unfair labour practice application dismissed - 421/02/ESC & 586/02/LRA - April 22, 2003 - (C.A.H.R.D.) Centre for Aboriginal Human Resource Development.

Forfeiture - Employer's action of removing Employee's time card caused Board to question whether Employer was prepared to let him work out notice period - Unlikely Employee would quit without notice as he was aware he would lose money and his prospective employer was willing to wait two weeks for him to start new job - Employer's claim for insufficient notice dismissed - Employee's claim for wages and wages in lieu of notice allowed - 749/02/ESC - June 18, 2003 - Kildonan Ventures t/a Kildonan Auto & Truck Parts - **LEAVE TO APPEAL TO THE COURT OF APPEAL WITHDRAWN.**

Forfeiture - Employee attempted to negotiate a shorter notice period - Employer told him in frustration to "leave now" - Claim for wages allowed, but claim for wages in lieu of notice and claim for insufficient notice not allowed - 751/02/ESC - June 18, 2003 - Kildonan Ventures t/a Kildonan Auto & Truck Parts - **LEAVE TO APPEAL TO THE COURT OF APPEAL WITHDRAWN.**

Evidence presented, including Employee's own exhibit, show he knew consequences of his continued tardiness and failure to call in as instructed - Held Employer had "just cause" to terminate his employment without being required to provide pay period's notice or wages in lieu of notice - Claim for wages in lieu of notice dismissed - 211/03/ESC - September 3, 2003 - Convergys Customer Management Inc. - **APPEAL TO THE COURT OF APPEAL GRANTED.**

Employee files claim for wages in lieu of notice - Four warning notices for lateness, two of which Employee signed and Notice of Warning policy satisfy Board that Employee terminated pursuant to section 62(h) and (p) of *The Employment Standards Code* - Claim for wages owing dismissed - 534/03/ESC - January 16, 2004 - Bobcat of Central Manitoba - **LEAVE TO APPEAL TO THE COURT OF APPEAL DENIED.**

Sec. 14.2-E14

NOTICE

Exceptions - Dishonesty - Non-payment of alcohol consumed by Employee's boyfriend was dishonest act - Employer justified in terminating her employment pursuant to section 62(p) of *The Employment Standards Code*, which allows for termination without requirement for notice - Claim dismissed as letter from Employment Standards Division stated that Employee advised that she did not wish to pursue her claim for wages in lieu of notice and facts did not support alleged discrepancies in record of hours - 159/04/ESC - June 28, 2004 - 3677746 Manitoba Ltd.

Unequal Notice Periods - Store Manager submitted one month's notice but Employer decided to terminate her employment immediately - Clause in employment agreement, which established notice period for both parties but conferred upon Employer right to accept Employee's resignation immediately without further remuneration contrary to the *Code* - Store Manager entitled to wages in lieu of notice - 735/03/ESC - February 11, 2005 - Nygard International Partnership Associates - **APPEAL TO COURT OF APPEAL DENIED, LEAVE TO APPEAL TO SUPREME COURT OF CANADA DENIED.**

Employment agreement required employees to give 30 days notice while Employer had right to accept termination immediately without further remuneration - Held unequal notice periods for Employer and employees was contrary with Section 62(b) of *Employment Standards Code* - Provision allowing "termination immediately without further remuneration" was null and void - Employee entitled to wages in lieu of notice - 732/03/ESC - April 12, 2005 - Nygard International Partnership Associates - **LEAVE TO APPEAL TO COURT OF APPEAL WITHDRAWN.**

Exceptions - Employer argued Employee wilfully neglected his duties - Held Employer did not demonstrate employee acted voluntarily or intentionally - Employee was placed in a position which may not have been suited to his experience and education - He tried to work to best of his abilities but his efforts were undermined by inappropriate behaviour of others - Claim for wages in lieu of notice allowed - 732/03/ESC - April 12, 2005 - Nygard International Partnership Associates - **LEAVE TO APPEAL TO COURT OF APPEAL WITHDRAWN.**

Abandonment - Employee refused to work when company president did not apologize for berating her - Refusal to work amounted to Employee abandoning her position and Employer not liable to pay wages in lieu of notice - 473/05/ESC - December 2, 2005 - Native Reflections Inc. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Exceptions - "wilful misconduct" - Mechanic terminated without notice for uttering abusive comments about Employer - Outburst constituted "just cause" but remark made on spur of the moment and did not reach level of intention or malice inherent in the word "wilful" to allow Employer to rely on exception to avoid minimum notice requirements of the *Code* - 86/06/ESC - May 11, 2006 - Leonard W. Carlson, trading as Len's Auto Service.

Work performed by Employee fell under *The Construction Industry Wages Act* - As Employee was employed in construction, he was not entitled to receive wages in lieu of notice - Substantive Order - 544/06/ESC - Nov. 17, 2006 - 2692784 Manitoba Limited t/a Wes Man Mechanical.

NOTICE

Wilful Misconduct - Employer terminated Employee without notice for refusing to accept offer of employment from prospective purchaser of Employer's business causing business deal to fail - Board held Employee not under legal obligation to take employment with new employer - Failure to reach an agreement did not constitute a breach of either Section 62(h) or (j) of *The Employment Standards Code* - Employee entitled to wages in lieu of notice - Substantive Order - 502/06/ESC - Dec. 8, 2006 - Daniel Carter McGonigal being a Director of 4225732 Manitoba Ltd.

Parental Leave - New Hire - Employee took parental leave without giving required four-weeks notice prior to end of maternity leave - Two weeks after her return to work, Employer terminated her employment without notice as it took position she was a new hire - Board noted Employer did not issued Record of Employment and never expressed to Employee she was re-hired as new employee - Board ruled her employment was continuous and Employer obliged to give two weeks notice - However given Employee failed to give written notice of parental leave she was entitled to only one week's wages in lieu of notice - Substantive Order - 732/06/ESC - March 15, 2007 - Kildare Investments t/s Kern Park Carwash.

Exception under Section 62 of *The Employment Standards Code* - Employer asserted it was entitled to terminate Employee without notice as he had not fulfilled all of his responsibilities, and had been inattentive to important details, and had otherwise failed to fulfill some rules and procedures relating to transactions - Held circumstances at the material time were not so extreme as to justify an immediate dismissal without notice - Claim for wages in lieu of notice allowed - Substantive Order - 714/06/ESC - April 13, 2007 - Mandix Corporation t/a McDougall Auto Superstore.

Theft - At time of termination, Employer issue wages in lieu of notice and a Record of Employment reflecting "things not working out" - Employer reissued Record of Employment and for first time noted Employee was dismissed for theft of muffins based on allegations of one witness - Board troubled that Employer allowed Employee to work after it became aware of alleged theft - Evidence to substantiate theft fell short of being clear, compelling and cogent - In absence of sufficient explanation for change of mind, Employer should be held to original position - Order for wages in lieu of notice confirmed - 204/07/ESC - Jan. 28, 2008 - Tonya Collins, trading as Lite Stop Foods.

Wilful Misconduct - During notice period and after verbal exchange between Employer and Employee, Employer advised Employee that her conduct substantiated dismissal for cause and she would not be paid for balance of notice period - Board was satisfied that Employee's actions did not constitute wilful insubordination or neglect of duty - Employer and Employee were equal participants in verbal exchange - Board ordered Employer to pay \$1,125 wages owed in lieu of notice and dismissed Employee's request to award costs pursuant to Section 125(5) of *The Employment Standards Code* - Substantive Order - 07/08/ESC - April 30, 2008 - Dr. Gary Levine Dental Corp.

Resignation - Employee asserted he was coerced into signing resignation letter - Board does not accept assertion given that Employee never filed a complaint that he was not paid for any hours worked during last two weeks of employment - Claim for wages dismissed - Substantive Order - 19/08/ESC - May 7, 2008 - 4819633 Manitoba Ltd. t/a Dylan O'Connor's Irish Pub and Restaurant

Sec. 14.2-E16

NOTICE

Intention to Quit - After Employee gave two weeks notice she offered to work part time - Employer did not terminate Employee by not accepting her proposal to continue working for Employer on part-time basis - Employee formed requisite subjective intention to quit and then objectively carried that intention into effect when she arranged for, accepted and commenced employment with new employer - Claim for wages in lieu of notice dismissed - Substantive Order - 105/08/ESC - June 19, 2008 - Girton Management.

Onus of Proof - Employer disputed Order to pay wages in lieu of notice as Employee was guilty of wilful misconduct, disobedience and insubordination - Board inferred from Employee's failure to testify that he could not cast doubt on cogency or validity of Employer's evidence - Held Employer met burden to establish on balance of probabilities that Employee's conduct fell within statutory exceptions in Section 62(h) and (p) of *The Employment Standards Code* - Substantive Order - 106/08/ESC - July 8, 2008 - Dominion Window & Door.

Resignation - Company President and Employee on medical leave argue over her return to work - Employee claimed President said if she did not come back immediately he had to "let her go" - On balance of probabilities, Board did not accept Employee's version of events but found she was offended that he would hire someone else - She expressed intention to resign and removed her personal effects from workplace satisfying subjective and objective elements necessary to establish a resignation - Application for wages in lieu of notice denied - 55/08/ESC - July 8/08 - JMJ Fashions.

Wilful misconduct - While threatening remark Employee made to manager did not constitute "violence in the workplace" within meaning of Section 62(1)(h) of *The Employment Standards Code* when assessed in context of other events it constituted wilful misconduct - Employer met its burden to prove Employee engaged in conduct that was prohibited by Section 62(1)(h) of the Code and it was entitled to dismiss Employee without notice - 215/08/ESC - August 15, 2008 - Marketplace in North Kildonan.

Statutory Exceptions - Sales Manager deliberately chose not to provide statistical information in the form requested despite Employer giving him numerous verbal and two written warnings - Conduct fell within statutory exceptions in section 62(h) and (p) of *The Employment Standards Code* - Employee not entitled to wages in lieu of notice - Substantive Order - 434/07/ESC - March 11, 2009 - Maxim Transportation Services - **LEAVE TO APPEAL TO COURT OF APPEAL ABANDONED.**

Sell of Business - Employee worked for previous owner for 8 years and for new owner for four shifts after which she was not given additional shifts - Where employee is immediately re-employed, purchaser of business is responsible for providing notice if employee is ultimately terminated - Section 5 of *The Employment Standards Code* provides Employee's employment was continuous and uninterrupted and by section 61(2) of the Code she was entitled to six weeks' wages in lieu of notice - 306/08/ESC - March 17, 2009 - 5614547 Manitoba Ltd. t/a Viking Hotel.

Sec. 14.2-E17

NOTICE

Employee discharged without notice for submitting false claims for tuition reimbursement - Employee claimed she was not active participant - Based on credible evidence, Employer established Employee was dishonest in her employment - Held Employer entitled to terminate Employee without notice pursuant to Section 62(1)(h)(iii) of *The Employment Standards Code* - Appeal dismissed- 001/09/ESC - April 29, 2009 - Convergys New Brunswick, Inc. t/a Convergys CMG Canada Limited Partnership.

Employee discharged without notice for submitting false claims for tuition reimbursement - Employee asserted Employer decision to terminate her as her services were no longer needed due to impending closure of Employer's offices - Board accepted that Employer's investigation was undertaken in good faith and was completed expeditiously - 001/09/ESC - April 29, 2009 - Convergys New Brunswick, Inc. t/a Convergys CMG Canada Limited Partnership.

Period of Employment - Less than two months after Employee resigned he was rehired but was dismissed six months later - Section 24(5) of *Employment Standards Regulation 6/2007* provides that if an employee rehired within two months after termination with that employer, period between periods of employment included in total period of employment for purpose of any subsequent termination - Employer submitted period of employment should only be deemed continuous where an employer terminates an employee in the first instance and then rehires them - *The Employment Standards Code* specifically contemplates that employment may be terminated by either an employer or an employee - Employee entitled to six weeks' wages - 386/09/ESC - April 30, 2009 - Paramount Storage.

Wilful misconduct - Automotive technician terminated for servicing customer's vehicle on off-duty hours - Held Employee innocently assisted individual with work he honestly and in good faith believed Employer was not promoting or performing - Order confirmed for further four weeks wages in lieu of notice - 25/09/ESC - May 12, 2009 - Frontier Management Inc., t/a Frontier Subaru.

Resignation - Employer disputed payment of wages in lieu of notice claiming Employee quit - Employee continued to perform work for Employer and was paid for that work after date when Employer asserted Employee quit - Employee entitled to four weeks wages in lieu of notice - Appeal dismissed - 47/09/ESC - June 1, 2009 - 2127423 Manitoba Ltd. t/a London Limos.

Exemption - Held Employee did not quit but was terminated by Employer without notice - Employer did not assert exemption from providing notice by subsection 62(1) of *The Employment Standards Code* - Employee entitled to one week wages in lieu of notice - Substantive Order - 159/09/ESC - September 2, 2009 - Duo Enterprises.

Calculation of wages in lieu - Prior to work related injury, Employee worked 40 hour week - At time employment terminated, Employee worked modified duties on restricted hours or 12 hour week - Board considers definition of "regular hours of work" in Section 77 of *The Employment Standards Code* - Wages in lieu of notice calculated on basis of 12 hour week or actual hours worked - Substantive Order - 51/09/ESC - December 21, 2009 - Invest Hotels GP XV.

Sec. 14.2-E18

NOTICE

Deemed Quit - Held Employee did not quit but was terminated - Employer's evidence did not establish, on balance of probabilities, Employee had subjective intention to quit and her objective conduct at time of and shortly after alleged quit did not support conclusion she quit - Held employment terminated without notice and Employee entitled to one week's wages in lieu thereof - Appeal dismissed - Substantive Order - 187/09/ESC - January 28, 2010 - 40706 Manitoba Ltd.

Employee allowed terminated co-worker access to office and to remove files despite Employer's directive that co-worker not allowed on premises - Employee terminated for dishonesty as per employment agreement - Held Employee not entitled to receive wages in lieu of notice - Substantive Order - 11/10/ESC - July 26, 2010 - Krevco Lifestyles.

Cash Advances - Employer acknowledged Employee entitled to wages in lieu of notice but asserted amount owing covered by wage advances - Employee argued advances repaid under arrangement where Employer would underreport her hours worked - Held no corroborative documentation submitted regarding alleged manner of repayment including any records kept by Employee tracking hours deducted from payroll which would have reflected decreasing outstanding balance - By Section 19(2), Rule 7 of *The Employment Standards Regulation*, Employer entitled to deduct cash advances from wages owing - Substantive Order - 77/10/ESC - July 28, 2010 - 3726615 Manitoba Inc. t/a L & L Catering.

Employee submitted he was not employee of temporary staffing agency but of Client and therefore Client ought to have given him notice - Also submitted that "temporary period" in sub-clause 62(1)(e) of *The Employment Standards Code* limited to period of less than 30 days because that tied in with 30-day exception in 62(1)(a) - Held exceptions found in sub-clauses of Section 62(1) stood independently - "Thirty days" referred to in sub-clause (a) cannot be read as a limitation on words "temporary period" in sub-clause (e) - Board concluded temporary staffing agency was employer - Fact that Employee worked at Client's in excess of 30 days did not change that employment was of temporary nature - Appeal dismissed - 64/10/ESC - August 10, 2010 - Houston Recruiting Services - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Calculation - Record Keeping - Employer maintained Employee not entitled to overtime as he inflated hours recorded on daily worksheets and challenged whether Employee could have worked that many extra hours but was unable to provide any evidence beyond his suspicions - Board not able to conclude time recordings inflated based on speculation alone, particularly when Employer had accepted and relied upon those recordings without any prior challenge - Claim for wages allowed as calculated - 30/10/ESC - September 1, 2010 - North Star Construction.

Employer argued Employee had not provided appropriate notice - Board accepted Employee left phone message at Employer's apartment - Employer could not say message not left but rather only that he did not receive it - Held notice was provided - 30/10/ESC - September 1, 2010 - North Star Construction.

Sec. 14.2-E19

NOTICE

Employee terminated after second violation of company I.D. policy for selling tobacco to mystery shopper under age of 30 without asking for identification – Board observed shopper at hearing and could not find objectively reasonable basis for Employee's view shopper appeared over 30 – Basing age assessment on subjectivity of employee would make policy unenforceable as every employee could rely on opinion regardless of reasonableness - Held Employee acted voluntarily, intentionally and knowingly – Her actions were not unthinking, careless, neglectful or inadvertent - Employer met onus to establish Employee's actions constituted disobedience and wilful neglect of duty within Section 62(1)(h) of *The Employment Standards Code* – Claim for wages in lieu of notice dismissed – Substantive Order- 157/10/ESC – Nov. 15, 2010 - 7-Eleven Canada.

Just cause vs. wilful misconduct - Employer argued no notice required for Bicycle Courier terminated for cause for losing Client's bank deposit on street - Conduct amounting to "cause" or "just cause" for dismissal at common law or under collective bargaining not necessarily same as conduct justifying termination without notice under *The Employment Standards Code* - Section 62(1)(h) sets out exception to notice if employee acted in manner not condoned by employer and that constituted wilful misconduct, disobedience or wilful neglect of duty - "Wilful" interpreted as being "deliberate", "malicious" or "intentional" - Loss of bank deposit an accident, and Employee made concerted effort to find it – Also, evidence did not support finding that he acted "wilfully" in a verbal exchange with client - Board concluded exception to providing notice did not apply - Employee entitled to wages in lieu of notice - 97/10/ESC - January 5, 2011 - 3526861 Manitoba Ltd. t/a Rene's Courier.

Discharge versus quit - Employer appealed Order for wages owing alleging Employee failed to report for work despite receiving phone call from manager advising of next three shifts and letter delivered by company's driver stating if he did not report by certain date, Employer would assume he quit - Employee denied receiving phone call or letter - Board found evidence did not establish Employee had any subjective intention to quit or that his objective conduct at time supported conclusion that he quit - Employer did not provide documentation evidencing delivery of letter nor was driver called as witness - Employee did not refuse to report for work or quit; employment terminated without notice or wages in lieu of notice - Appeal dismissed - Substantive Order - 262/10/ESC - April 28, 2011 - Kildonan Ventures Ltd. t/a Kildonan Auto & Truck Parts.

Employer disputed Order for six weeks' wages in lieu of notice submitting Employee laid off and refused another position at lower pay rate at time of lay-off and two more times during next two months - Board not satisfied Employee offered alternate position or refused to accept such position as no documentation corroborating alleged offer submitted to Board - Board noted Record of Employment (ROE) identified reason for issuance to be shortage of work as opposed to quit or terminated - No additional or amended ROE was issued indicating Employee refused alternate position - Subsection 23(1) of *Employment Standards Regulation* provided that employment of employee who is laid off for one or more periods exceeding eight weeks within 16-week period deemed to have been terminated - Subsection 23(2) of *Regulation* provided that employee deemed to have been terminated entitled to wages in lieu of notice - Therefore, Board determined Employee was entitled to 6 weeks' wages in lieu of notice - Substantive Order - May 3, 2011 - 308/10/ESC - Brookside Auto Body Ltd.

NOTICE

Resignation - Employer submitted Employee left phone message with instructions to lay him off and deduct money he owed off his severance pay - Employee countered that after he yelled at an employee he spoke with operations manager who told him to take time off - Next contact he had with Employer was voicemail in which Employer stated he was not sure there was a point in planning on having Employee return - Employee testified he had been fired in that message - Employer issued final cheque that indicated \$900 deducted for money it alleged Employee took without authorization and \$1200 deducted for advance paid to Employee at beginning of stress leave which was to be paid back when he returned to work - Board found that from Employer's voicemail any reasonable person would conclude Employer fired Employee and Employee had no intention to resign as he was suffering from health issues - Held Employer terminated Employee's employment without notice - Employee entitled to six weeks' notice - As to \$900, Employee gave detailed evidence as to how he received funds from shop managers as payment for services rendered - Employer did not report matter as theft and Employer could have called managers as witnesses to dispute Employee's evidence - Board found Employer provided \$1,200 to Employee without expectation of repayment - Amounts should not be subject to deductions from the sum owing to Employee - Employer's appeal dismissed and Employee's claim upheld - 137/10/ESC - May 26, 2011 - Brousseau Bros. Ltd., t/a Super Lube.

Threats and ultimatums - Employer demanded Employee rectify deficiency in his work on his own time and without compensation - If he refused then his employment was terminated - Employee refused to work for no wages and removed himself from workplace given Employer's instruction - Held issuing ultimatum to employee that he perform work for no wages, failing which he would suffer termination of employment was contrary to subsection 4(1) of *The Employment Standards Code* - Employee reasonably concluded his employment was terminated and did not voluntarily terminate his employment - He was entitled to two weeks' wages in lieu of notice - Substantive Order - 111/11/ESC - June 15, 2011 - Detail Woodwork Ltd.

Quit alleged - Employer tabled offer to Employee to relocate - Employee asked for 24 hours to consider offer - Next morning he e-mailed owner, declined offer and asked owner to call him - Few minutes later, owner replied "This is unfortunate since the offer presented was fair and in line with your skill set. I will commence separation documents immediately since it appears this is the direction you wish to take" - Employee told co-worker he was no longer employed and handed in his keys and uniform - Director of Employment Standards Division order Employer to pay wages in lieu of notice - Employer disputed payment asserting Employee quit - Held e-mail response from owner reasonably viewed to be notice employment terminated - Employee did not intend to quit - Appeal denied - Employee entitled to eight weeks pay in lieu of notice - Substantive Order - 303/11/ESC - February 7, 2012 - Portage Chrysler Dodge Jeep.

Sec. 14.2-E21

NOTICE

Wilful misconduct - Working for Competitor - Employer filed appeal of Order to pay wages in lieu of notice arguing Employee broke fiduciary responsibilities by working as editor for competitive publication - Board noted act or omission wilfully done if done voluntarily and intentionally - Employee not fulfilling production quota not wilful misconduct within the meaning of section 62(1)(h)(i) of *The Employment Standards Code* - Specific written rule against untrustworthiness, conflict of interest or unfair competition not required because accepted practice in publication industry was writer for one employer can write freelance for another publisher provided work did not interfere or compete with employment obligations to primary employer - Being editor materially different from writing articles - Given Employee's years of experience, he was aware he should not engage in competitive activities and accepting editorship of competitor wilful in nature - Employee not entitled to wages in lieu of notice - Employer's appeal allowed - Substantive Order - 314/11/ESC - March 6, 2012 - Mercury Publications Limited.

Calculation - Board advised wages in lieu of notice calculation based on average hours worked per week and not on 40-hour work week as Employee contended - Substantive Order - 313/11/ESC - March 26, 2012 - Quality Design Inc.

Wilful misconduct - Employer claimed section 62(1)(h)(i) of *The Employment Standards Code* exempted it from requirement to provide six weeks' notice as Employee acted in manner not condoned by Employer when he left work without permission, did not report absence and did not provide doctor's note for an absence - Held Employer condoned failure to provide doctor's note due to Employee's misunderstanding note needed for one day's absence - Board noted general manager who gave dismissal notice not aware Employee sought and received permission from immediate supervisor to leave work early and he had called supervisor to report absence and gave reasons for it - Ruled Employee's actions could not be characterize as "wilful misconduct" and entitled to wages in lieu of notice - Appeal dismissed - Substantive Order - 313/11/ESC - March 26, 2012 - Quality Design Inc.

Quit Alleged - Employer appealed Order to pay wages in lieu of notice to Employee, who was a cook, alleging Employee quit without notice - Employee testified Chef fired her at meeting with Employer to discuss tension that developed between Employee and Chef - Bookkeeper, who attended meeting, testified Chef tried to convince Employee they could work things out and Employee asked why they did not just fire her - Further, Employer offered her position working with different chef at Employer's other restaurant, but Employee just walked out of meeting - She did not return to work and did not return Employer's phone call inquiring if she wanted to accept alternate position - Board preferring evidence of Bookkeeper to Employee's, found Chef did not tell her she was fired - Board satisfied Employee formed requisite subjective intention to quit and then objectively carried that intention into effect when she walked out of meeting then failed to return to work or to respond to Employer's offer of alternate position - Held Employee quit her employment and not entitled to wages in lieu of notice - Substantive Order - 203/11/ESC - April 13, 2012 - S.V. trading as The Star Grill.

NOTICE

Wilful misconduct - Employer appealed Order to pay wages in lieu of notice asserting Employee, employed as Corporate Account Officer, committed gross misconduct by being dishonest and breached his employment agreement by assisting business competitor - Therefore, his employment was terminated for cause and pursuant to section 62(1)(h) of *The Employment Standards Code* wages in lieu of notice were not owed - Employer assumed Employee had given business competitor access to confidential information based on screenshot of Employee's e-mail account - Board satisfied that Employer was upset with Employee and said words to effect of "...Keys; Phone; Out" - Employer did not give specific reason to Employee for dismissal, did not show screenshot to Employee, did not do any independent investigation and did not ask Employee for explanation and relied upon circumstantial evidence - However, Employee provided explanation, under oath, and explanation did not reveal Employee engaged in wilful misconduct, wilful neglect of duty or dishonesty, as those terms have been defined in Board's jurisprudence for purposes of Section 62(1)(h) of the *Code* - Abrupt manner in which dismissal was carried out led Board to conclude dismissal reflected Employer's disappointment in Employee's response to share offering and did not reflect any conduct which could objectively be characterized as wilful misconduct or wilful neglect of duty within meaning of Section 62(1)(h) of the *Code* - Appeal dismissed - Employer ordered to pay wages in lieu of notice - Substantive Order - 401/11/ESC - June 20, 2012 - Money in Motion (Manitoba).

Exception - Wilful misconduct - Employer appealed Order to pay \$7,593.60 wages in lieu of notice to Employee - Board determined Employee consciously and deliberately engaged in acts or omissions which he knew, or ought reasonably to have known, were wrongful or forbidden including: refusing to stop to discuss an issue with manager; initiating physical contact with manager; issuing invitation to engage in physical confrontation with manager off of Employer's property and/or verbally intimidating manager; and engaging in workplace harassment by telling manager he should retire - Employee acted in manner not condoned by Employer as per section 62(1)(h)(i) of *The Employment Standards Code* - Appeal allowed - Substantive Order - 107/12/ESC - July 31, 2012 - Federated Co-Operatives.

Quit Alleged - Witness Credibility - Employer appealed portion of Order to pay \$676 wages in lieu of notice arguing Employee quit his employment and was not entitled to wages in lieu of notice - After assessing credibility of witnesses, Board accepted evidence of Employer that Employee announced "I quit" and immediately packed up his personal tools in his vehicle and left Employer's premises - Employer met onus, on balance of probabilities, that Employee quit his employment - Employee not entitled to wages in lieu of notice - Appeal allowed - Substantive Order - 124/12/ESC - September 6, 2012 - McEwen Bros.

NOTICE

Employee appealed Dismissal Order claiming he was entitled to receive one weeks pay pursuant to section 77 of *The Employment Standards Code* - Employer advised Employee of termination for sleeping in Handi-Transit van, for perpetually running late, and for complaints which had been received about him - Employer provided notice orally in dispatch office and had deliberately left office door open so other employees could overhear conversation - Based on Employer's evidence, including testimony of employee who overheard conversation and office calendar bore notation that March 18th would be Employee's last day, Board concluded Employee given notice on March 1st - Claim for one week of pay in lieu of notice dismissed - Substantive Order - 143/12/ESC - October 22, 2012 - A.B. Transit t/a Complete Car.

Resignation - Employer ordered to pay Employee \$7,252.48 for wages owing - Employee appealed Order on basis that he was also entitled to wages in lieu of notice - Employee, who was finance manager, submitted that conversation with sales manager regarding his concerns that he was being replaced became heated and sales manager said to Employee if he did not like it, "there's the door" - Employee testified that, believing he was fired, he took home his personal items and later returned Employer's key in drop box - Board satisfied Employee could not reasonably have believed that sales manager, whom Employee had hired, had fired him, or that he would have had authority to do so - Evidence did not show Employer hired new sales manager to replace Employee - Employee demonstrated an intention to quit when he left work taking his personal items with him - Having had time to reflect on and reconsider his position, he confirmed his intention to quit by putting key in drop box - Employee did not attempt to speak to owner - Board satisfied that Employee had requisite subjective intention to quit and his conduct objectively demonstrated that he quit - Employee terminated his own employment and was not entitled to wages in lieu of notice - Substantive Order - 120/11/ESC - November 13, 2012 - Car World Inc. t/a Car World Superstore.

Exemption - Wilful misconduct - Employer appealed Order to pay two weeks wages in lieu of notice asserting she was entitled to terminate Employee's employment without notice when Employee, in spite of a previous warning, left work early without making any attempt to contact Employer, then failed to provide medical note following day - As stated in prior Board decision, for employer to discharge onus of proving an employee has acted with requisite degree of wilfulness as set out in subsection 62(1)(h) of *The Employment Standards Code*, it must satisfy Board that employee consciously and deliberately engaged in acts or omissions which he or she knew, or ought reasonably to have known, were wrongful or forbidden - Employer has not met its onus to establish, Employee's conduct constituted wilful misconduct - Employer not exempt from notice requirements under section 61 of the *Code* - However, Employer did establish Employee was employed for less than one year and was only entitled to receive one week's wages in lieu of notice - Substantive Order - 195/12/ESC - January 21, 2013 - Scissors, Paper & Stone Hair Studio.

NOTICE

Just Cause - First case in which Board interprets just cause standard of *The Employment Standards Code* which came into force on January 1, 2012 - Standard of just cause founded upon principle of repudiation of contract which occurs where one party deprives other of substantial benefit of contract - When employee's conduct is incompatible with fundamental term of employment agreement, employer may terminate employment without notice or wages in lieu - Board employs contextual approach to just cause standard which requires consideration of: 1) the nature and extent of the employee's misconduct, if any; 2) the surrounding circumstances, including the circumstances of the employee and those of the employer; and, 3) whether termination is a proportional response to the misconduct having regard to all of the relevant circumstances - Once it has been established that employee was dismissed without notice, onus shifts to employer who seeks to take advantage of the exceptions - 136/12/ESC - February 27, 2013 - North Perimeter Service Centre.

Just Cause - Employer appealed Order to pay Employee wages in lieu of notice claiming it had just cause to terminate Employee's employment because his absenteeism detrimentally affected its operations and jeopardized its relationships with customers and other staff - Employer relied upon section 62(1)(h) of *The Employment Standards Code* - Board employed contextual approach to just cause standard - Board considered nature and extent of employee's misconduct; surrounding circumstances; and, whether termination was proportional response to misconduct - Board found, following Employee's return to work from parental leave, he left work early once and was absent once to look after his child, both times with express permission - Absences were limited, condoned by Employer, and Employee was honest at all times regarding reason for requesting to be absent - Occasional or isolated absence not generally regarded as sufficiently serious misconduct to justify summary dismissal - Employee's absences did not constitute misconduct and not indicative of neglect of duty, disobedience, or conduct that was incompatible with his employment duties - Employee was never warned that absences could lead to discipline or termination - However, given small number of mechanics and time sensitive nature of its business, absenteeism may have prejudicial effects upon Employer's relationships with its clients and morale of other employees - Notwithstanding potential effect of employee's absences, Employer did not have absenteeism policies - Board determined termination of Employee was disproportionate response to his absences - Employer did not satisfy Board that Employee was terminated for just cause - Employee entitled to wages in lieu of notice - 136/12/ESC - February 27, 2013 - North Perimeter Service Centre.

NOTICE

Proper Notice - Employer disputed Order to pay wages in lieu of notice - After June 4th performance meeting, Employee was presented with document that stated if she was unable to demonstrate ability to meet sales goals, her employment would be terminated effective June 28th - Employer submitted her employment was terminated on June 4th and subsequent days to June 28th were notice period and memo given constituted proper two weeks' notice - Board determined that "notice" provided was not clear, specific and unequivocal notice of termination, but was "conditional" notice of termination because of possibility employment would not be terminated if performance improved in intervening period - Appeal dismissed - Substantive Order - 58/13/ESC - July 10, 2013 - Sunova Credit Union Limited.

Wilful misconduct - Employer appealed Order to pay Employee wages in lieu of notice asserting wages not owed because Employee engaged in conduct that constituted wilful misconduct or behaviour or disobedience – Employer testified, after meeting with Employee to discuss incident where he angrily swore at young co-worker, she sent him home and as Employee was leaving, he swore at Employer while customers were present and slammed front door as he left - Board accepted Employer's evidence that she was shaken by Employee's remarks and felt threatened – Whatever characterization one may make regarding Employee's initial and improper remarks to co-worker as stand-alone event, later actions and conduct of Employee involving Employer reflected deliberate, intentional and voluntary actions and fell within ambit of exception contemplated by Section 62(1)(h)(i) of *The Employment Standards Code* (as it then stood) - Board satisfied Employer met its onus, on balance of probabilities, that Employee acted in manner that constituted wilful misconduct, disobedience or insubordination - Appeal allowed – Substantive Order - 212/12/ESC - August 22, 2013 - C.C.'s Restaurant & Lounge.

Sale of Business - Period of Notice - Employer disputed Order to pay wages in lieu of notice submitting its business was distinct from and not continuation of business in which Employee formerly employed and claimed when Employee was released, she had been employed for less than one year - Board satisfied there was sale or transfer of business within meaning of Section 5 of *The Employment Standards Code* such that Employee's employment deemed to have been continuous and uninterrupted - Having purchased remaining inventory from their predecessor, new owners reopened and continued to operate store as going concern, with very little or no interruption, selling essentially same products, under same name, at same location, and with same workforce - Board not convinced evidence established Employee agreed to start from scratch - Even if she did agree, term to that effect would be inconsistent with provisions of the *Code* which preserve employee's continuity of employment, and would amount to attempt to "contract out" of those provisions - Under section 3(3) of the *Code*, any agreement which purports to do so does not prevail over the *Code* - Appeal dismissed - Substantive Order - 53/12/ESC - October 11, 2013 - Dapasons Ltd.

NOTICE

Unacceptable Behaviour - Employer disputed Order to pay wages in lieu of notice submitting reason for Employee's dismissal included unacceptable behaviour which fell within exceptions to notice requirements in Section 62(1)(h) of *The Employment Standards Code* - Employee was not reprimanded or cautioned that her behaviour or conduct was unacceptable - Employer argued Employee flagrantly disregarded its rules, policies and procedures, but did not identify what rules, policies or procedures, or breach, it was relying on, or how that fit within exceptions in section 62(1) of the *Code* - Appeal dismissed - Substantive Order - 53/12/ESC - October 11, 2013 - Dapasons Ltd.

Just Cause - On day in question, Employee, who was table games inspector, witnessed dealer pay out additional \$350 and then touched player's chips - As a result of incident, Employer terminated his employment for violating Employer's and gaming commission's policies and procedures - Employer disputed Order to pay Employee wages in lieu of notice asserting it had just cause to terminate his employment without notice because Employee did not perform his job responsibilities in accordance with policies and procedures - Board noted an employer's dissatisfaction or displeasure with an employee's performance is generally not enough to constitute just cause for dismissal without notice - Board found Employee caught sight of dealer's error, and proceeded to bring it to Employer's attention - Employer did not point to particular policies and procedures that it was relying on, nor did it elaborate on how policies or procedures were allegedly breached - Board could not conclude Employee's actions or performance amounted to "just cause" within meaning of section 62(1)(h) of *The Employment Standards Code* - Employee entitled to six weeks' wages in lieu of notice - Appeal dismissed - Substantive Order - 291/12/ESC - February 28, 2014 - South Beach Casino.

OFFICER/DIRECTOR

Inactive director of a corporation held liable for employee's outstanding wages - Section 5 of **The Payment of Wages** considered - 1021/86/PWA - May 15, 1987 - Roderick I. A. Smith, Jacobson Elevator Builders Ltd.

Board determines that an "attorney for service" is not a "director or officer" within Section 5 of **The Payment of Wages** - 686/87/PWA - October 16, 1987 - Arthur William Spriggs, Debtguard Corporation.

Individual not a director because no company shares transferred to him, no evidence existed to prove that he was elected as a director, and administratively he was treated as an employee rather than an owner, and he had little responsibility or authority - Claim for wages and vacation wages upheld - However, claim for wages in lieu of notice denied because Employee through poor attendance and negligence of duties effectively abandoned job - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Making an order against the receiver is not a prerequisite to the enforceability of an order against the directors or officers - Claim upheld - Subsection 8(4) of **The Payment of Wages Act** considered - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Individual cannot accept directorship on the condition that he be excluded from liability - However, Board finds he was not a director at the relevant time as appointment was until the fiscal year end which had passed before the time period in which the claims were made - Not liable for claims - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Definition of resignation - The resignation of the directors was effective from the time the corporation received the written resignation even though a **Notice of Change of Directors** was not filed within the time limits of the legislation - Therefore, the directors were not liable for wages owing - Sections 18, 103(2), 108(1) and 246 of **The Corporations Act** considered - 931-934/87/PWA - October 25, 1990 - Harvard Investments Limited, The Fort Garry Hotel.

Officer defined - Officer need not be a director or shareholder or have management responsibilities, and can have powers to sign negotiable instruments - Board held Employer was an officer within the meaning of **The Payment of Wages Act** - 430/90/PWA - December 12, 1990 - Gary Baty, Heritage Industries Ltd.

Board does not have discretion to relieve Officer from liability even though that person had no more interest in, or control over the affairs of the company than any other employee - 430/90/PWA - December 12, 1990 - Gary Baty, Heritage Industries Ltd.

OFFICER/DIRECTOR

Board did not have discretion to relieve Directors of liability once established that wages were owing and they were directors at relevant time - Section 5 and subsections 8(7), 15(1), and 15(2) of *The Payment of Wages Act* considered - 522-526/90/PWA - February 28, 1991 - 2219701 Manitoba Ltd., Fort Garry Restaurant & Catering Services, H. Boulet, A.W. Holt, R.P. Huot, and G. McPhee.

Definition of Wages in Section 1 of *The Payment of Wages Act* expansive - Board held severance pay considered as wages and finds directors are liable for payment - In accordance with section 5(a) of *The Payment of Wages Act*, liability limited to 6 months rather than for total years of service as originally agreed by parties - 549-561/90/PWA - June 24, 1991 - Metal & Alloys Company Ltd., R. Francis et al. - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL DISMISSED.**

Informing Employees of plant closure same as terminating their employment - Directors liable for termination wages as their resignations were made 15 minutes after Employees informed of termination - Resignations have no effect on liability for wages and vacation wages owing at time terminated - 885-890/90/PWA - October 2, 1991 - Jack Levin and Louis Levin, East-West Packers (1969) Ltd.

Officer appeals Order for payment of wages and vacation wages owing after business placed in receivership arguing he resigned prior to closure of store - Held not liable for unpaid severance wages, but liable for unpaid vacation wages up to and including date of resignation - Section 5 of *The Payment of Wages Act* considered -827/91/PWA - April 20, 1993, Parviz Javahery, General Drugs Ltd. - **MOTION FOR ORDER DISMISSING LEAVE TO APPEAL GRANTED.**

Employer, as director of the company, responsible for paying wages owing to employees even if they were hired due to interference of family and against his wishes - However, employees' claims against his brother dismissed as Board held an employee/employer relationship did not exist - 210-212/96/PWA - November 7, 1996 - Sheldon Brounstein/Regent Auto & Truck Parts (1993) - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Liability - Effectiveness of Resignation - Director tendered resignation 45 minutes after head office notified local manager to shut down operations but hours before last workers' shift ended - Legislation in effect at the time did not refer to "intent to terminate" but only of an employer who "terminates" - Resignation letter received in company's registered office hours before first employees were terminated, which the Board found was the end of the work shift since the employees were working and were paid for that work - Director not liable to pay \$3.3 million for termination wages owing - 414/02/PWA - April 20, 2006 - Rodney Allan Shier, being a Director of Bissett Gold Mining Company - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

(Next Section: Sec. 16.0)

PAYROLL RECORDS

Employer required to keep accurate payroll records - Onus on employer to refute any evidence arising from his own records - Subsection 5(1) of **The Employment Standards Act** considered - 54/87/PWA - July 6, 1986 - Serpreco Systems Ltd.

Board accepts the documentation of Employment Standards as best evidence when Employer fails to subpoena payroll records from receiver - Claims allowed as presented in the Order - 1102/90/PWA - April 5, 1991 - Matheos Holdings Ltd., Matheos Restaurant & Coffee Shop, Steve and John Matthews – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Frequency of pay - Pay Statements - Inadequate, sporadic cash payments and Employer's failure to provide pay statements to the Employee violated sections 86 and 135 of the *Code* - Employer's position that wages promised to the Employee were contingent upon it receiving a government grant was inadequate response to claim for wages owing - Employee entitled to unpaid wages less amount for failure to provide sufficient notice - 565/05/ESC - April 11, 2006 - Solar Solutions Renewable Energy and Conservation Devices Inc.

(Next Section: Sec. 16.4)

PRACTICE AND PROCEDURE

Director of Employment Standards Division issues an order without examining the books of the employer - Board determines that order was valid - Section 8 of **The Payment of Wages** considered - 800/83/PWA - January 19, 1984 - Somerset Farm Equine Care Centre, Mike Smith.

Employees, though absent from hearing, entitled to claim for wages on the basis of material filed and arguments heard - 581/85/PWA - December 11, 1985 - Skinner's Wet 'n Wild and 65683 Manitoba Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; MATTER ADJOURNED.**

Employees fail to complain within 30 days of receiving wages at a lower rate as outlined in **The Construction Industry Wages Act** - Claim for wages allowed - Subsections 14(1), 14(2) and 14(4) on **The Construction Industry Wages Act** considered - 581/85/PWA - December 11, 1985 - Skinners Wet 'n Wild and 65683 Manitoba Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; MATTER ADJOURNED.**

Director of Employment Standards may on his accord or on receipt of a complaint proceed to determine whether an employer has failed to pay wages according to **The Construction Industry Wages Act** - Subsection 8(3) of **The Payment of Wages** discussed - 581/85/PWA - December 11, 1985 - Skinners Wet 'n Wild and 65683 Manitoba Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; MATTER ADJOURNED.**

Whether the Board has authority to rely on information submitted to the Director of the Employment Standards Division discussed - Subsections 9(2), 9(3) and 9(4) of **The Payment of Wages** considered - 581/85/PWA - December 11, 1985 - Skinners Wet 'n Wild and 65683 Manitoba Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; MATTER ADJOURNED.**

Failure of individuals to appear to give evidence as to their alleged entitlement results in the Board dealing with their claims based on material filed and evidence and argument presented - 54/87/PWA - July 6, 1986 - Serpreco Systems Ltd.

Board determines the status of the Director of Employment Standards participating in Board hearing - 54/87/PWA - July 6, 1986 - Serpreco Systems Ltd.

Notice of Hearing - Applicant fails to inform Board of change of address and misses hearing notice - Board dismisses applicants claim - 197/86/PWA - July 22, 1986 - Tilltek Incorporated.

Board applies an amendment to **The Payment of Wages** extending the time allowed for filing of applications, retrospectively - 17/87/PWA - May 26, 1987 - Griffin Canada Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL ALLOWED.**

The Board conducts a hearing de novo upon reference from the Director of Employment Standards Division - 1100/87/PWA - September 12, 1988 - Independent Heating and Air Conditioning Limited.

PRACTICE AND PROCEDURE

Style of cause - Board declines request that the names of employees who did not lodge the complaint be stricken from the style of cause - 1357/88/PWA - April 17, 1989 - Jet Roofing Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED IN PART; APPEAL DISMISSED.**

Officer of the Employment Standards Division authorized to issue an order on behalf of the Director of Employment Standards Division - Section 22 of **The Payment of Wages Act** considered - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Fundamental that Employees be represented at hearing - Ministerial approval declined to appoint counsel - Board reluctantly proceeded with hearing - 931-934/87/PWA - October 25, 1990 - Harvard Investments Limited, The Fort Garry Hotel.

Board does not have discretion to relieve Officer from liability even though that person had no more interest in, or control over the affairs of the company than any other employee - 430/90/PWA - December 12, 1990 - Gary Baty, Heritage Industries Ltd.

Board held it did not have jurisdiction to deal with the claim that the Employee quit without notice as a forfeiture claim was not filed with the Board - Board also held it did not have jurisdiction to deal with the allegations of criminal misconduct - 1112/90/PWA - December 27, 1990 - Nupulse Dairy Equipment Ltd.

Claim filed in a timely fashion, but was dismissed, as the overtime claimed fell outside the 6 months, plus 5 day time period as per sections 8(1) and 3(1) of **The Payment of Wages Act** as interpreted by the Manitoba Court of Appeal in **Shyam v. India Gardens Ltd.** - Reasons not issued - 609/90/PWA - January 31, 1991 - Mayday Personnel Inc.

Onus of Proof - NSF cheques and uncashed paycheques constitute prima facie evidence of the validity of wage claim - Claims allowed even though individuals did not attend hearing - 522-526/90/PWA - February 28, 1991 - 2219701 Manitoba Ltd., Fort Garry Restaurant & Catering Services, H. Boulet, A.W. Holt, R.P. Huot, G. McPhee.

Board admits sworn affidavit as evidence from Employee who was out-of-the-country and could not attend hearing - 1198/90/PWA - June 7, 1991 - Douglas Lughas, Cambridge Builders, Cleaners & Managers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Stay granted by Ontario courts on all proceedings against the corporation which ceased operations - Proceedings against it adjourned sine die - 549-561/90/PWA - June 24, 1991 - Metal & Alloys Co. Ltd, R. Francis et al. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL DISMISSED.**

Subsection 40(5) of **The Employment Standards Act** not permissive - Board could not order less than statutory minimum of 10 weeks notice - However, as per Board practice, actual notice given deducted in determining pay in lieu of notice - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

PRACTICE AND PROCEDURE

Deposit upon referral to Board - Amount of deposit reduced as reasonable grounds existed for referral, and undue hardship would be imposed as two separate orders issued to each Director who would then be required to deposit an amount for each of the 48 employees - Section 8(12.2) and 8(12.3) considered - Case Nos. 202-204, 206, 208-210/92/PWA-R - April 28, 1992 - Wilton Ford Truck Sales (1982) Limited, W.C. Wilton, P. Wilton, C. Frizzley, T.J. Wilton, C. Hanwell.

Employer disputed authority of Director to grant Order for wages and Board's jurisdiction to hear matter as Employee filed claim in Courts eight days previous to granting of Order - Board has jurisdiction to hear matter as Employee filed Notice of Discontinuance for claim in Courts - Section 11 of *The Payment of Wages Act* **discussed** - 655/92/PWA - March 10, 1993 - Chariot Courier and Messenger Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Director failed to appear at hearing - Contacted Board office shortly after Board rendered decision in favour of Employee - Board unable to hear Director's case as *The Payment of Wages Act* contains no provision for review and reconsideration - 917-919/93/PWA - June 15, 1994 - Buchanan Printers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Forfeiture - Inappropriate for Employer to file forfeiture claim for reimbursement of monies owed by friend of Employee to whom she extended credit - Forfeiture claim dismissed - 694/94/ESA - January 23, 1995 - Kim's General Store – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer failed to appear at hearing in compliance with Notice of Hearing, receipt of which was confirmed by certified card - Held Employee entitled to receive vacation wages and pay in lieu of notice - Substantive Order - Reasons not issued - 786/94/PWA - April 25, 1995 - Pan Canadian Computer Group Inc - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee, who had received notice of hearing, fails to appear - Application for underpayment of wages dismissed - 849/94/PWA - January 18, 1996 - Linda Tyndall t/a 2890675 Manitoba – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Board held that Order issued by Employment Standard valid even though employer name cited on Order different from name cited by Employee on complaint form - Responsibility to identify an employer in the style and cause lay with the Employment Standards Division after it conducts an investigation as to who is the true employer - 849/94/PWA - January 18, 1996 - Linda Tyndall t/a 2890675 Manitoba – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Appearance at Hearing - Employer failed to appear at hearing in compliance with Notice of Hearing, receipt of which was confirmed by certified card - Held Employee entitled to receive wages and vacation wages - Subsequently, Employer indicated he had not received notice of hearing - Board determined case be reheard - At second hearing, Employee failed to establish he repaid acknowledged debt - Original Order revoked and Employer ordered to pay wages and vacation wages owing less amount of debt - Substantive Order - Reasons not issued - 78/96/PWA - November 14, 1996 - Kildonan Ventures Ltd. t/a Kildonan Auto & Truck Parts.

PRACTICE AND PROCEDURE

Adjournment - Employer's third request for adjournment denied because of number of times adjournment requested and Employee's objection to take more time to attend to proceedings - 758/96/PWA - May 15, 1997 - Prairie West Industrial Ltd.

Legislative Requirements - Employer failed to file deposit with request for referral to Board as per subsection 8(12.2) of *The Payment of Wages Act* - Employment Standards Officer extended the time for filing the deposit on his own motion - Held subsection 8(12.2) is mandatory and should be strictly construed - Deposit must be filed when making the request - Appeal not properly before Board – 58/00/PWA – February 16, 2001 – Protect-A-Home - **APPEAL TO THE COURT OF APPEAL GRANTED; BOARD ORDER DECLARED A NULLITY; LEAVE TO APPEAL DENIED RE SECOND BOARD ORDER.**

Employer argued Board did not have jurisdiction to consider portion of a claim that covers period beyond date the complaint was filed - Held practical implications allow an order to capture period beyond date complaint filed - *The Payment of Wages Act* specifically limits the time a complaint can go back, but does not restrict the time forward - 58/00/PWA - November 20, 2002 - Protect-A-Home Services Inc. - **APPEAL TO THE COURT OF APPEAL GRANTED; BOARD ORDER DECLARED A NULLITY; LEAVE TO APPEAL DENIED RE SECOND BOARD ORDER.**

Hearing - In camera - Employer did not assert that intimate personal or financial matters may potentially be disclosed but took issue with representatives of the Employment Standards Division being present - Board determined hearing ought to be public - 409/06/ESC - March 20, 2007 - Manitoba Business Magazine (1996).

Admissibility - Videotaped Evidence - Employee requested Board accept DVDs into evidence - DVDs would be accepted if Employee provide two copies of all DVDs and if a witness was available to testify from first hand knowledge to the authenticity of all the DVDs - Substantive Order - 13/08/ESC - May 23, 2008 - Wally Welechenko t/a Wally's Island.

Overtime - Employee claimed overtime wages for 14 month period - Board ruled claim for overtime wages limited to six month period immediately preceding termination of employment - Substantive Order - 108/08/ESC - November 25, 2008 - Bright Futures Day Care.

Management - Res Judicata - Assistant Banquet Manager filed overtime claim - Employer submitted previous Board decision which held individuals in position at similar managerial level found not to be employees under *The Labour Relations Act* - Written Reasons not issued for previous Order so Board could not determine rationale for previous decision - 41/08/ESC - December 15, 2008 - Legacy Hotels Corporation trading as Fairmont Winnipeg.

Administrative Fee - Employer took issue with payment of administrative fee - As per subsection 125(3) of *The Employment Standards Code*, when Board orders payment of wages, it "shall require" payment of administrative costs- 386/09/ESC - April 30, 2009 - Paramount Storage.

PRACTICE AND PROCEDURE

Subpoena - Witness - Compellability - As per Section 121 of *The Employment Standards Code*, Employment Standards Officer not compellable as witness in proceeding - Given ruling on non-compellability Employer did not call evidence in support of appeal - In absence of evidence and as onus on Employer, appeal dismissed - Substantive Order - 35/09/ESC - December 9, 2009 - Kildonan Ventures Ltd. t/a Kildonan Auto & Truck Parts - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer appealed Order issued by Employment Standards Division that \$297 in wages was owed to Employee - Prior to hearing but eight months after Order issued and Employer's appeal filed, Employee filed correspondence with Board disputing calculations in Order and sought additional monies - Board denied Employee's request as appeal not filed within time period specified in Section 110(1.1) of *Employment Standards Code* - Substantive Order - 35/09/ESC - December 9, 2009 - Kildonan Ventures Ltd. t/a Kildonan Auto & Truck Parts - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Witness Compellability - Subpoena - Employer served subpoena upon Workers Compensation Board employee to give evidence at Labour Board hearing - Section 62 of *The Workers Compensation Act* states employee not compellable witness in civil action or other proceedings - Board proceedings fell within phrase "or other proceeding" - Subpoena quashed - Substantive Order - 51/09/ESC - December 21, 2009 - Innvest Hotels GP XV.

Orders - Delay - Employer submitted Employment Standards Division acted improperly and beyond jurisdiction when it issued Order two years after verbally advising Employee's claim dismissed - Preparation of draft Dismissal Order irrelevant given it was unsigned and not served upon parties in accordance with section 136 *The Employment Standards Code* - Verbal declaration regarding status of file or disposition of complaint did not equate to issuance of lawful and properly served Order - Delays or administrative failings do not disentitle Employee to wages or wages in lieu of notice - 246/09/ESC - March 18, 2010 - Wong's Dynasty Ltd. t/a Wong's Asian Bistro.

Employee of temporary staffing agency submitted 62(1)(e) of *The Employment Standards Code* may lead to abuse and allow agency to act as "interloper" between real employer and employee - Board obliged to assess each case on facts - Circumstances of hypothetical nature not before Board could not be fulcrum upon which individual appeal decided - 64/10/ESC - August 10, 2010 - Houston Recruiting Services Ltd - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Board denied Employer's request to adjourn proceedings noting hearing had already been adjourned to accommodate Employer's prior request and parties mutually agreed to resultant date months earlier - Substantive Order - 78/10/ESC - November 10, 2010 - AAR-Auto List of Canada (1999) Inc.

PRACTICE AND PROCEDURE

Reduction of Deposit - Given Employer's admission of liability for holiday pay and vacation pay, Chairperson determined appeal did not raise any important or unique principle of law regarding general holiday pay to reduce deposit owing – However, given Employer disputed amount owing for wages in lieu of notice, Chairperson reduced portion of deposit related to notice from \$11,627.39 to \$5000 – Section 111(2) of *The Employment Standards Code* considered - Substantive Order - 207/10/ESC-R - November 10, 2010 - Autotown Sales.

Service – Employer appealed Notice of Administrative Penalty arguing he did not receive Order - Employment standards officer went to Employer's home to effect personal service – Home did not have two doors nor mailbox - Officer wedged Order between door and frame in compliance with director of Employment Standard Division's directive that service could be accomplished by placing document in mailbox or between doors – Held officer did not follow directive because Order was neither left in mailbox nor between doors - Board was not satisfied Employer validly served with Order – Board's jurisdiction on merits of appeal of penalty limited by Section 138.2(6) of *The Employment Standards Code* to confirm or revoke penalty - Notice of Administrative Penalty revoked and Appeal allowed – Substantive Order - 98/11/ESC - October 13, 2011 - Sterling O & G International Corporation.

Employer's Statutory Obligations - Record Keeping - Subpoena - Board satisfied Employee worked hours as determined by Employment Standards - Employer did not produce records to refute Employee's evidence to support his contention he worked those hours or that some hours consisted of snow removal using heavy equipment - Board denied Employer's request to issue subpoena to access Employee's cellular phone records which it claimed contained details of hours Employee worked - Employer failed to comply with its responsibilities to keep and maintain employment records at principal place of business in accordance with section 135 of *The Employment Standards Code* - Substantive Order - 175/11/ESC - May 25, 2012 - Sterling O & G International.

Notice of Appeal - Employment Standards Division ordered Employer to pay wages in lieu of notice but determined no overtime wages were owed - Employee appealed Order regarding overtime - At commencement of Board hearing, Employer made application for leave to appeal Order in favour of wages in lieu of notice - Board denied application because Employer failed to file written Notice of Appeal specifying grounds for appeal and because allowing Employer to appeal could cause substantial prejudice to Employee, who had come to hearing not knowing he would be required to deal with issue of entitlement to wages in lieu of notice - Substantive Order - 210/11/ESC - July 11, 2012 - Brousseau Bros. Ltd. t/a Super Lube.

PRACTICE AND PROCEDURE

Legislative Change - Employer relied on exceptions in subsection 62(1)(h) of *The Employment Standards Code* - Board noted subsection was amended effective January 1, 2012 to provide that notice not required when employment is terminated "for just cause" - However, as Employee's employment was terminated on November 3, 2011, case to be decided under provisions of the *Code* which were in effect prior to January 1, 2012 - Substantive Order - 195/12/ESC - January 21, 2013 - Scissors, Paper & Stone Hair Studio.

(Next Section: Sec. 18.2)

RECEIVER/MANAGER

Claim for wages in lieu of notice - Applicants claim receiver/manager had become their employer - Subsection 8(3.1) of **The Payment of Wages Act** examined - 546, 547/86/PWA - November 13, 1986 - Clarkson Gordon Inc.

Making an order against the receiver is not a prerequisite to the enforceability of an order against the directors or officers - Claim upheld - Subsection 8(4) of **The Payment of Wages Act** considered - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Board held Employer not relieved of liability for wages owing even when actual notice came from Receiver who is an agent of the employer and considered to be employer as per Section 1 of **The Employment Standards Act** - As well, Employer terminated Employees by ceasing to employ and pay them - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy.

Exemption from notice or payment of wages in lieu of notice under subsection 40(2)(d) of **The Employment Standards Act** not applicable because Employer aware of possible receivership action two months prior to action being taken and because in bankruptcy, employment terminated by dismissal rather than by frustration - As per section 8 of **The Payment of Wages Act**, receiver must comply with order for payment of wages - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Employees do not have duty to mitigate damages in group termination cases - Wages earned from work done for Receiver not deducted from termination wages owing - 885-890/90/PWA - October 2, 1991 - Jack Levin and Louis Levin, East-West Packers (1969) Ltd.

(Next Section: Sec. 18.4)

Sec. 18.4-E1

REMEDY

Order for wages owing limited to three months because Employee knowingly worked six months at lower wage and waited until termination to make claim for underpayment - 1009/93/PWA - August 17, 1994 - Safeway Electric Co. Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Unauthorized deductions - Held Employee was overpaid on final pay cheque - Board has no jurisdiction to offset debts against earned wages - 356/94/PWA - October 21, 1994 - Keystone Agricultural Producers Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Held employee/employer relationship existed - Employee not paid for months must take some responsibility - As rate of pay ambiguous, Board concludes parties agreed to minimum wage - In absence a record of hours worked, the Board concluded he worked on a full-time basis until a couple of weeks before he resigned at which time his hours tapered off - No allowance for overtime worked or outside training program- 485/95/PWA - November 22, 1996 - Paul Sigurdson/Aerotech International Inc – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Overtime - Calculation - Sales & Marketing Representative entitled to overtime - His evidence of six months of overtime worked simplistic and devoid of details of daily activities, appointments or breaks taken - Board adopts “best we can” approach - Ordered wages owing equivalent to amount claimed for last three months of employment - 377/97/PWA - January 13, 1998 - Hi-Qual Manufacturing Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee’s claim for a rent reduction and claim for equal wages, pursuant to Section 82 of *The Employment Standards Code*, dismissed - Substantive Order - Reasons not issued - 640/6/ESC - May 30, 2006 - Appleton Holdings t/a Edison Rental Agency.

Employee acknowledged she owed Employer an amount in excess of her total wage claim - Board does not have jurisdiction to award Employer an amount greater than the amount owing to Employee for wages, overtime wages, general holiday wages and vacation wages - Substantive Order - 347/06/ESC - July 31, 2006 - Inajit Ventures.

Original hearing adjourned and rescheduled - Employee failed to appear at second hearing in compliance with Board’s letter, receipt of which was confirmed by way of delivery confirmation through courier service - Employee’s conduct unreasonable given Employee’s failure to comply with terms of adjournment granted by Board and failure to appear at hearing without having requested an adjournment - Board awards costs to Employer for \$100 pursuant to Section 125(5) of *The Employment Standards Code* - Substantive Order - 13/08/ESC - May 23, 2008 - Wally Welechenko t/a Wally’s Island.

Jurisdiction – Employee requested severance package, paid employment counseling services, vacation pay for final year of service, and compensation for wrongful dismissal and hardship – Board only deals with claim for wages, general holiday wages, vacation wages, and wages in lieu of notice - Board does not have statutory jurisdiction to entertain other claims - Substantive Order - 247/09/ESC - September 30, 2010 - Polar Window of Canada.

REMEDY

Service – Employer appealed Notice of Administrative Penalty arguing he did not receive Order - Employment standards officer went to Employer's home to effect personal service – Home did not have two doors nor mailbox - Officer wedged Order between door and frame in compliance with director of Employment Standard Division's directive that service could be accomplished by placing document in mailbox or between doors – Held officer did not follow directive because Order was neither left in mailbox nor between doors - Board was not satisfied Employer validly served with Order – Board's jurisdiction on merits of appeal of penalty limited by Section 138.2(6) of *The Employment Standards Code* to confirm or revoke penalty - Notice of Administrative Penalty revoked and Appeal allowed – Substantive Order - 98/11/ESC - October 13, 2011 - Sterling O & G International Corporation.

Costs - Board found Employer made baseless accusations against Employee and his family during hearing and he failed to provide employment records in support of positions advanced in his appeal - Board determined Employer's conduct was unreasonable and having matter referred to Board was frivolous and vexatious - Board awarded \$400 in costs to Employee pursuant to section 125(5) of *The Employment Standards Code* - Substantive Order - 175/11/ESC - May 25, 2012 - Sterling O & G International.

Costs - In addition to wages in lieu of notice, Board awarded costs, under section 125(5)(a) of *The Employment Standards Code*, to Employee in amount representing one day's wages at his current wage rate with his present employer - Costs awarded on basis that Employer's adjournment request, made one hour prior to start of scheduled hearing, on basis of nebulous "unforeseen circumstances" constituted unreasonable conduct by Employer - 136/12/ESC - February 27, 2013 - North Perimeter Service Centre.

Costs - Employee's representative requested Board award costs against Employer pursuant to section 125(5) of *The Employment Standards Code*, asserting general manager's conduct before Board was unreasonable - Board noted general manager did assert Employer's position aggressively and was insulting and sarcastic towards Employee; however, Employee's responses were similar in tone and content - Further, Employer's positions were not frivolous or vexatious as Board determined Employee's claim was inflated - Board determined not appropriate case to award costs in favour of either party - Substantive Order - 206/13/ESC - January 29, 2014 - City Collections and Bailiff Service.

REVIEW

Director failed to appear at hearing - Contacted Board office shortly after Board rendered decision in favour of Employee - Board unable to hear Director's case as ***The Payment of Wages Act*** contains no provision for review and reconsideration - 917-919/93/PWA - June 15, 1994 - Buchanan Printers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

(Next Section: Sec. 19.3)

STATUS

Board determines the status of the Director of Employment Standards participating in Board hearing - 54/87/PWA - July 6, 1986 - Serpreco Systems Ltd.

Based on factors Board established to determine the classification of workers under ***The Construction Industry Wages Act***, Board finds that some of the classifications determined by Employment Standards Division were in error - 212/88/PWA - April 30, 1991 - Con-Pro Industries Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Nature of the work performed fell within the classification of journeyman rather than labourer - **The Greater Winnipeg and Major Construction Wages Schedule, M.R. 347/88, Schedule B** of ***The Construction Industry Wages Act*** considered - 1198/90/PWA - June 7, 1991 - Douglas Loghas, Cambridge Builders, Cleaners & Managers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

On-site maintenance and repair duties fell within the scope of ***The Construction Industry Wages Act*** - Employee entitled to wage of journeyman electrician - 1009/93/PWA - August 17, 1994 - Safeway Electric Co. Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer rejected the 12-hour shift schedule at the bargaining table - During lock-out requested hours of work exemption for 12-hour shift - Held could not make unilateral changes during lock-out that it opposed during negotiations or "pre-impasse negotiating framework" - Request denied - 369/95/ESA - August 2, 1995 - Gateway Industries Ltd.

Union continues to represent the employees employed in the bargaining unit at the time the lock-out commenced, including those who had returned to work - Union was at party to the proceedings before the Board - 369/95/ESA - August 2, 1995 - Gateway Industries Ltd.

(Next Section: Sec. 19.7)

Sec. 19.7-E1

SUB-CONTRACTING

Definition - Claimants establish employment relationship - Section 6 of **The Payment of Wages** considered - 305-310/89/PWA - November 30, 1989 - Imperial Janitorial Service, Comet Maintenance and Building Cleaning (1984) Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

SUCCESSORSHIP

Sale of Business - Period of Notice - Employer disputed Order to pay wages in lieu of notice submitting its business was distinct from and not continuation of business in which Employee formerly employed and claimed when Employee was released, she had been employed for less than one year - Board satisfied there was sale or transfer of business within meaning of Section 5 of *The Employment Standards Code* such that Employee's employment deemed to have been continuous and uninterrupted - Having purchased remaining inventory from their predecessor, new owners reopened and continued to operate store as going concern, with very little or no interruption, selling essentially same products, under same name, at same location, and with same workforce - Board not convinced evidence established Employee agreed to start from scratch - Even if she did agree, term to that effect would be inconsistent with provisions of the *Code* which preserve employee's continuity of employment, and would amount to attempt to "contract out" of those provisions - Under section 3(3) of the *Code*, any agreement which purports to do so does not prevail over the *Code* - Appeal dismissed - Substantive Order - 53/12/ESC - October 11, 2013 - Dapasons Ltd.

(Next Section: Sec. 20.1)

TIMELINESS

Board determines Director of Employment Standards is not authorized to investigate a complaint of unpaid wages where the complaint has been determined untimely - Subsections 8(1) and 8(3) of **The Payment of Wages** considered - 1120/85/PWA - April 22, 1986 - Joe's Auto Clinic, Tahhan Bros. Ltd.

Employer maintains employee's claim for wages was time-barred by statute - Officer of Employment Standards Division acts on "his own accord" - 536, 537/86/PWA - October 31, 1986 - Craven Hill Data Corporation, Elizabeth Anne and Terrence Harry Neplyk.

Board applies an amendment to **The Payment of Wages** extending the time allowed for filing of applications, retrospectively - 17/87/PWA - May 26, 1987 - Griffin Canada - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL ALLOWED.**

Claim filed in a timely fashion, but was dismissed, as the overtime claimed fell outside the 6 months, plus 5 day time period as per sections 8(1) and 3(1) of **The Payment of Wages Act** as interpreted by the Manitoba Court of Appeal in **Shyam v. India Gardens Ltd.** - Reasons not issued - 609/90/PWA - January 31, 1991 - Mayday Personnel Inc.

Claim for wages filed 8 months after relevant pay period dismissed as untimely - 758 & 759/93/PWA & 760/93/ESA - Sept. 7, 1994 - Joseph Seesahai being a Director of Autocraft Rebuilders Inc.

Employee filed claim for wages in lieu of notice seven months after her employment was terminated - Claim dismissed as it fell outside the six-month time limit prescribed in Section 8(1) of **The Payment of Wages Act** - 764/96/LRA - March 17, 1997 - Harry Ross Area Rug Store Inc. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Complaint untimely as monies allegedly owed were earned prior to the six-month period provided for filing of a complaint under *The Employment Standards Code* - Complaint dismissed - 742/99/ESC - April 26, 2000 - B. Lambert Ltd.

Employer appealed Order issued by Employment Standards Division that \$297 in wages was owed to Employee - Prior to hearing but eight months after Order issued and Employer's appeal filed, Employee filed correspondence with Board disputing calculations in Order and sought additional monies - Board denied Employee's request as appeal not filed within time period specified in Section 110(1.1) of *Employment Standards Code* - Substantive Order - 35/09/ESC - December 9, 2009 - Kildonan Ventures Ltd. t/a Kildonan Auto & Truck Parts - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

(Next Section: Sec. 21.0)

UNFAIR LABOUR PRACTICE

Employer's comments to Employee and failure to pay overtime as required by law sufficient cause to quit without notice - Forfeiture claim denied - 937/89/ESA - April 10, 1990 - New Way Restaurant Suppliers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employer acted unfairly by withholding vacation pay and denying commissions on sales resulting in bad debts, when it, not the Employee, chose to extend credit to customers who it had determined were not to have credit - Employer cannot unilaterally determine the liability of the employee, the quantum of damages and then fail to pay that sum to an employee - 437/91/PWA - January 9, 1992 - Damore Enterprises Ltd., trading as Dave's Quick Print – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

VACATION ENTITLEMENT

Worker's time on Workers' Compensation treated as time worked/or the purpose of determining vacation entitlement - Subsections 5(3), 5(4), 6(1), 6(2), 6(3) and 11(2)(b) of **The Vacation With Pay Act** considered - 387/87/PWA - February 16, 1988 - E. H. Price Ltd.

Employer and Employee are directors, officers, and equal shareholders in related real estate enterprise - Relationship not one of employer/employee - Section 6 of **The Payment of Wages Act** considered - 31/89/PWA - May 1, 1989 - Arborlea Homes Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Period of time for calculation of entitlement to vacation wages as assessed by the Employment Standards Division in keeping with intent of **The Vacation With Pay Act** - 343/89/PWA - August 29, 1990 - Gelco Express Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Although legislation clearly prohibits the use of vacation time to fulfill notice period, Employer's silence to Employee's request amounts to consent - Forfeiture claim denied - Subsection 7(4) of **The Vacation With Pay Act** considered - 682/90/ESA, 683/90/PWA - January 30, 1991 - Dial Data Services Inc.

Vacation pay - Board rules that Employee had taken days off sporadically which fully compensated him for any vacation entitlements claimed to be owing - Claim for vacation wages dismissed - 898/92/PWA - December 14, 1992 - Kensington Homes Ltd.

Although Subsection 7(4) of **The Vacation With Pay Act** prohibited use of vacation time to fulfill notice period, manager had agreed to request - As manager had authority to make decision, his agreement amounts to consent - 1036/92/ESA - March 8, 1993 - Berna Dean Flowers – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Banked Time - Parties had arrangement that regular work day was six hours and any time over would be banked and taken as time off - Board accepts Employee's evidence that any time taken was time in lieu of overtime earned and he had not received vacation or vacation pay for twenty-two month period -Claim for vacation wages owing allowed - 34/99/PWA - June 28, 1999 - Burand Holdings Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Vacation wages - Employer argued that since an accounting had been ordered pursuant to a Default Judgment, it was not required to pay vacation wages - Held Employee was an employee at the time for which vacation wages were owing and had not been paid - The accounting was a separate matter - Claim for vacation wages granted - 58/00/PWA - November 20, 2002 - Protect-A-Home Services Inc. - **APPEAL TO THE COURT OF APPEAL GRANTED; BOARD ORDER DECLARED A NULLITY; LEAVE TO APPEAL DENIED RE SECOND BOARD ORDER.**

VACATION ENTITLEMENT

Board ruled that an employee's vacation entitlement should cover the period of 22 months preceding the date on which the application was filed - Substantive Order - Reasons not issued - 676/98/VWPA - February 18, 2004 - Westfair Foods Ltd.

Bonus Pay - Employee acknowledged he received bonus payments for satisfactory performance - Pursuant to Section 40 of The Employment Standards Code, such payments do not affect employee's entitlement to vacation allowance as set out in The Employment Standards Code - Employee entitled to receive \$276.62 for a vacation allowance based upon 4% of his gross regular earnings - Substantive Order - Reasons not issued - 437/06/ESC - April 20, 2007 - Les Entreprises Bo-Pa Limitee t/a as Acadian Cleaning Services.

Calculation - Employee alleged that he was not paid all vacation pay owing to him - Having regard to his length of service, Employee entitled to vacation allowance calculated at 4 percent of wages earned in last 22 months of employment as per subsection 96(2) of *The Employment Standards Code* - Employee entitled to \$2,139.86 vacation allowance and had been paid \$2,177.60 in vacation wages - Accordingly, he was paid all of vacation allowance owing - Appeal dismissed - Substantive Order - 333/10/ESC and 334/10/ESC - April 28, 2011 - D & M Cartage & Crossdocking.

Commission Draws - Employee appealed Order submitting that vacation pay to be paid in addition to and separate from his normal draw and commissions and Employer not entitled to deduct draws which he had received in excess of commissions earned from his vacation balance - Board, being statutory tribunal, can only deal with claim for wages, including vacation wages, in accordance with specific provisions of *The Employment Standards Code* and *Employment Standards Regulation* - Board satisfied, on balance of probabilities, that Employee paid all wages owing to him under the *Code*, including all vacation wages in respect of the last 22 months of his employment - Board did not agree with Employee's contention that Employer not entitled to deduct draws received in excess of commissions earned from vacation pay - Board satisfied that monthly draws which were paid to Employee fell within scope of deductions permitted under Rule 7(a) of Subsection 19(2) of the *Regulation* - Appeal dismissed - Substantive Order - 225/12/ESC - July 17, 2013 - Maxim Transportation Services Inc. t/a Maxim Truck & Trailer.

(Next Section: Sec. 23.0)

WAGES

Board allows employee's claim for minimum 3 hour call in time where the employer and employee fail to establish an agreement to work for a period of less than 3 hours - Section 7 of **The Employment Standards Act** applied - 479/84/PWA - November 24, 1984 - City of Brandon, Sportsplex Pool.

Overtime wages - An employee, under an employment contract which outlined salary and bonus but failed to indicate the number of hours to be worked, denied for overtime wages - 915/83/PWA - June 25, 1985 - Ramada Inn, King's Motel Winnipeg Ltd.

Municipal employee, who operated heavy equipment from time to time, claimed that he was entitled to be paid according to **The Construction Industry Wages Act** - Applicability of the **Act** to a Municipality discussed - 195/84/PWA - July 16, 1985 - Rural Municipality of East St. Paul.

Employee involved in the installation of plumbing and heating fixtures in residential and commercial buildings entitled to wages according to **The Construction Industry Wages Act** - 492/85/PWA - November 29, 1985 - Four Seasons Electrical Mechanical Contractors Ltd.

Employee waited until termination to file a complaint requesting payment of wages according to **The Construction Industry Wages Act** - Claim for wages limited to 30 days - 492/85/PWA - November 29, 1985 - Four Seasons Electrical Mechanical Contractors Ltd.

Employees, though absent from hearing, entitled to claim for wages on the basis of material filed and arguments heard - 581/85/PWA - December 11, 1985 - Skinner's Wet 'n Wild and 65683 Manitoba Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; MATTER ADJOURNED.**

Employees fail to complain within 30 days of receiving wages at a lower rate as outlined in **The Construction Industry Wages Act** - Claim for wages allowed - Subsections 14(1), 14(2) and 14(4) on **The Construction Industry Wages Act** considered - 581/85/PWA - December 11, 1985 - Skinners Wet 'n Wild and 65683 Manitoba Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; MATTER ADJOURNED.**

Director of Employment Standards may on his accord or on receipt of a complaint proceed to determine whether an employer has failed to pay wages according to **The Construction Industry Wages Act** - Subsection 8(3) of **The Payment of Wages** discussed - 581/85/PWA - December 11, 1985 - Skinners Wet 'n Wild and 65683 Manitoba Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; MATTER ADJOURNED.**

Unauthorized deductions - Application for employment stated that all employees were responsible for any cash loss or mishandling of products - Deductions made from employee's paycheque for shortages disallowed by the Board - 174/86/PWA - April 25, 1986 - Braemar Bakery Ltd.

Employer required to keep accurate payroll records - Onus on employer to refute any evidence arising from his own records - Subsection 5(1) of **The Employment Standards Act** considered - 54/87/PWA - July 6, 1986 - Serpreco Systems Ltd.

WAGES

Employer maintains employee's claim for wages was time-barred by statute - Officer of Employment Standards Division acts on "his own accord" - 536, 537/86/PWA - October 31, 1986 - Craven Hill Data Corporation, Elizabeth Anne and Terrence Harry Neplyk.

Machine drywall taper's wages governed by **The Construction Industry Wages Act** - 492/86/PWA - November 7, 1986 - Executive Drywall Co., Brian D. McCaskill.

Unauthorized deductions - Board determines that there was no agreement between the employer and employee which would allow deductions for spillage of drinks - 761/86/PWA - January 9, 1987 - Tederr Holdings Ltd.

Overtime - Employee's claim for overtime wages unpaid limited to sixty-five (65) days prior to the date complaints were filed - 810/86/PWA - January 20, 1987 - Barkwell Paper Company Ltd.

Employer claims employees voluntarily entered into an agreement to work for less than the minimum wage required under **The Construction Industry Wages Act** - 581, 582/86/PWA - January 26, 1987 - Frank Andrews, Andrews Contracting.

Effect of employer's policy on notice of termination requirements – **The Employment Standards Act**, Subsection 35(3) considered - 491/86/PWA - January 30, 1987 - Inner-Tec Security Consultants Ltd.

Employee terminated without just cause entitled to wages in lieu of notice - 491/86/PWA - January 30, 1987 - Inner-Tec Security Consultants Ltd.

An employee, through accepting a lower rate, is not barred from advancing a claim for payment of wages as stipulated by legislation - Subsection 14(2) of **The Construction Industry Wages Act** applied - 1032/86/PWA - May 11, 1987 - Sunset Plumbing & Heating Ltd.

Inactive director of a corporation held liable for employee's outstanding wages - Section 5 of **The Payment of Wages** considered - 1021/86/PWA - May 15, 1987 - Roderick I. A. Smith, Jacobson Elevator Builders Ltd.

Established practice of Employer regarding notice of termination to be followed - 292/87/ESA - June 22, 1987 - Transcona Dodge-Chrysler (1980).

Part-time teachers file a claim for wages for attending non-instructional teaching days outside of their normal working schedule - 402, 403/86/PWA - June 24, 1987 - River East School Division #9.

Overtime - Employer failed to seek an exemption to the overtime provisions under **The Employment Standards Act** required to pay overtime - 921/86/PWA - July 29, 1987 - Intercultural Development Education Association Inc.

Board asserts that it is the employer's responsibility to keep a record of hours worked - Section 5 of **The Employment Standards Act** noted - 921/86/PWA - July 29, 1987 - Intercultural Development Education Association Inc.

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WAGES

Employee terminates his employment without notice after first week of employment - Claim for forfeiture denied - Subsections 35(1) and 35(2) of **The Labour Relations Act** applied - 1133/86/ESA - September 1, 1987 - Kildonan Car and Truck Parts.

Board classifies employees involved in the installation of transmission line towers as general labourers under the Rural Building Construction Wages Schedule - 675/86/PWA - October 22, 1987 - M. W. Orbanski Ltd.

Unpaid training - Claim for wages allowed in the absence of any statutory provisions allowing for an unpaid training period - 891/87/PWA - December 17, 1987 - Idil Issa Enterprises Ltd., Mac's Store.

Terms of employment - A monthly rate of pay "for any and all hours worked" was not acceptable - 858/87/PWA - January 27, 1988 - David J. Johnston, Johnston Ventures Ltd.

Worker's time on Workers' Compensation treated as time worked/or the purpose of determining vacation entitlement - Subsections 5(3), 5(4), 6(1), 6(2), 6(3) and 11(2)(b) of **The Vacation With Pay Act** considered 387/87/PWA - February 16, 1988 - E. H. Price Ltd.

Whether dues deducted by an employer came within the definition of wages under **The Payment of Wages Act** - 400/87/PWA - March 14, 1988 - Norman Gunn, Gunn Installations – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL DISMISSED.**

Employees leave bush camp without notice due to poor weather conditions entitled to wages and transportation costs - 1068, 1069/87/PWA - April 7, 1988 - Yellow Thunder Holdings Ltd.

Employee submits letter of resignation before leaving for holidays - Employee's claim for wages in lieu of notice allowed - 1162/87/PWA - April 20, 1988 - Terrance Travel on Academy Ltd., Cross World Travel.

Failure to give notice - Employer and Employee failed to act responsibly - Employer not entitled to forfeiture of wages; Employee not entitled to wages in lieu of notice - 567/88/ESA - September 6, 1988 - Creative Interiors.

Real estate agent involved in a dispute as to whether her status was as a salaried employee or a commission salesperson - 119/88/PWA - September 13, 1988 - B. Leslie Real Estate and Development Co. Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Standard hours of work - Board requires parties to apply for an exemption order where shift schedule violated maximum daily or weekly hour provisions - Sections 32 and 33 of **The Employment Standards Act** discussed - 99/88/PWA - September 27, 1988 - The City of Brandon.

Calculation of overtime wages where wages set on a bi-weekly and annual basis reviewed - 99/88/PWA - September 27, 1988 - The City of Brandon.

WAGES

Employees knowingly entered into an arrangement which was contrary to **The Employment Standards Act** - Claim for overtime wages limited to a two month period - 542/88/PWA - January 6, 1989 - Minic's Welding Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee contributed to misunderstanding concerning notice period, required to forfeit a portion of her earned wages - 947/88/ESA - January 11, 1989 - Broosters Restaurant.

Board reclassifies Employees in order to better suit provisions under the Legislation - **Manitoba regulation 285/87 (The Construction Industry Wages Act)** considered - 1357/88/PWA - April 17, 1989 - Jet Roofing Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED IN PART; APPEAL DISMISSED.**

Employer and Employee are directors, officers, and equal shareholders in related real estate enterprise - Relationship not one of employer/employee - Section 6 of **The Payment of Wages** considered - 31/89/PWA - May 1, 1989 - Arborlea Homes Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer fails to file proper claim to Minister - Claim for forfeiture denied - Subsections 39(11) and (14) of **The Employment Standards Act** considered - 124/89/PWA - May 30, 1989 - Rae-mar Investments Ltd., Schimmel's Dutch Bakery – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee precipitated altercation with supervisor - Claim for termination wages in lieu of notice denied - 91/89/PWA - June 1, 1989 - Altra Steel (1985) Ltd.

Employers and employees entering wage arrangement contrary to **The Employment Standards Act** - Subsequent filing of complaint of employees in respect of wages - 169/89/PWA - August 15, 1989 - Larson Welding Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Despite Employee consuming alcohol on Employer's premises, entitled to wages in lieu of notice due to Employer's unnecessary delay in terminating Employee - Subsections 39(10), (13), and (14) of **The Employment Standards Act** considered - 17/87/PWA - August 17, 1989 - Griffin Canada Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL ALLOWED.**

Board advised subsequent to hearing that evidence used to calculate wages differed from payroll records - 489/89/PWA - September 21, 1989 - Sid's Complete Car Care Centre Ltd.

Employer's claim for forfeiture denied for failure to comply with legislation - Subsections 39(11) and (14)(b) of **The Employment Standards Act** considered - 419/89/PWA; 420/89/ESA - October 11, 1989 - The Great Toy Machine Co. Ltd.

Payment on salary basis rather than on hourly basis - 1026/87/PWA – October 25, 1989 - Qualico Developments (Winnipeg) Ltd.

"Metal bonus" not deemed to be "wages" for purposes of **The Payment of Wages Act** - 965/89/PWA - December 28, 1989 - Northern Bulk Hauling Ltd.

WAGES

Security Guards on rotating shifts entitled to overtime pay – Collective agreement takes precedence over government regulation - 1248/88/PWA - January 9, 1990 - Province of Manitoba, Manitoba Government Services.

Unauthorized deductions - Board determines no agreement existed allowing Employer to deduct cost of previously paid travel expenses from wages - 1113/89/PWA - February 7, 1990 - Flanders Design & Development Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL WITHDRAWN.**

Employer's comments to Employee and failure to pay overtime as required by law sufficient cause to quit without notice - Forfeiture claim denied - 937/89/ESA - April 10, 1990 - New Way Restaurant Suppliers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Board finds Employment Standards Division should rectify its omission of wages in lieu of notice - 820/89/PWA - April 18, 1990 - Naleway Foods Ltd.

Overtime - Employee not entitled to overtime as he was given compensatory time off, but entitled to full two weeks promised - Employee to be compensated for one week's wages and vacation pay - 820/89/PWA - April 18, 1990 - Naleway Foods Ltd.

After Employer becomes enraged, Employee leaves a note stating she quit - Claim for forfeiture not allowed due to Employer's behaviour and because he refused to allow the Employee to work out her notice period - 435/90/ESA- August 20, 1990- Astra Dental Lab.

Individual not a director because no company shares transferred to him, no evidence existed to prove that he was elected as a director, and administratively he was treated as an employee rather than an owner, and he had little responsibility or authority - Claim for wages and vacation wages upheld - However, claim for wages in lieu of notice denied because Employee through poor attendance and negligence of duties effectively abandoned job - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Individual who performed work at the Employer's plant on own accord not an employee - Claim for wages denied - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Board does not have jurisdiction to enforce payment of Employee's debt through an offset of wages and vacation wages owing - 395-404 & 418/89/PWA - September 6, 1990 - Capital Data Inc., S.B. Winning, J.D. Wuckert, K.R. Ferguson, R. Hitesman – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Although Employee hired as a result of an error or miscommunication, an employer/employee relationship existed between head office and the Employee - Head office responsible for the error and required to pay wages and vacation wages - 827/89/PWA, 58 & 154/90/PWA - September 14, 1990 - Koya Japan Inc., Chan-Wong's Food Inc., Wisher Enterprises Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

WAGES

Overtime - Employee not authorized to start shift early and failed to have management sign time card to authorize payment for missed lunch as per procedure - Not entitled to overtime pay - 589/90/PWA - November 14, 1990 - Carlton Club – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Disagreement over the ownership of the funds from empty bottles not reason enough to terminate without proper notice or wages in lieu of notice - 879/90/PWA - December 13/1990 - Wasagaming Properties Ltd., Mooswa Motel & Bungalows – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Statutory holiday pay - Employee's termination effective after general holiday - Employer's silence to Employee's request to take vacation amounts to consent so she was not absent without leave on the work day following holiday - Subsections 35(3) and 35(11)(c) of **The Employment Standards Act** do not apply - Employee entitled to wages for general holiday - 682/90/ESA & 683/90/PWA - January 30, 1991 - Dial Data Services Inc.

Overtime - Claim filed in a timely fashion, but was dismissed, as the overtime claimed fell outside the 6 months, plus 5 day time period as per sections 8(1) and 3(1) of **The Payment of Wages Act** as interpreted by the Manitoba Court of Appeal in **Shyam v. India Gardens Ltd.** - Reasons not issued - 609/90/PWA - January 31, 1991 - Mayday Personnel.

Employer acted unreasonably when it ordered Employee who had broken his glasses to report for work - Employee did not abandon his job by refusing to work and entitled to wages in lieu of notice - Subsection 39(10) of **The Employment Standards Act** considered - 844/90/PWA - February 14, 1991 - Continental Caterers – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Board held that whether or not the Employee was on duty, "knocking out" a manager amounted to just cause for dismissal - Claim for wages in lieu of notice dismissed - 1159/90/PWA - March 21, 1991 - Kayway Industries Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Board accepts the documentation of Employment Standards as best evidence when Employer fails to subpoena payroll records from receiver - Claims allowed as presented in the Order - 1102/90/PWA - April 5, 1991 - Matheos Holdings Ltd., Matheos Restaurant & Coffee Shop, Steve and John Matthews – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee's claim for wages owing allowed as Employer produced no evidence to the contrary - Board noted that the actions of the Employer's Counsel displayed extreme disrespect towards the Board - 1279-1281/90/PWA - April 15, 1991 - Myriad Innovative Designs Inc., Mind Computer Products, Bradley Fry, Neil Stern.

WAGES

Contrary to subsection 35(1) of **The Employment Standards Act**, the Employees signed a petition to accept statutory holiday pay for 4 hours less than their regular shift - In normal circumstances, parties cannot contract out of provisions of legislation - However, Board dismissed claim for additional 4 hours pay for 5 general holidays, because Employee fraudulently circulated petition - Section 32 and subsection 35(1) of **The Employment Standards Act** considered - 1220/90/PWA - April 29, 1991 - Domtar Inc., Domtar Construction Materials.

Employer cannot pay employees a flat rate or blended rate instead of rates specified under **The Construction Industry Wages Act** - Recovery period restricted to three months as Employees must accept responsibility for non-compliance with minimum wages - **The Construction Industry Wages Act** and **The Fair Wage Act** discussed - 212/88/PWA - April 30, 1991 - Con-Pro Industries Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Nature of the work performed fell within the classification of journeyman rather than labourer - **The Greater Winnipeg and Major Construction Wages Schedule, M.R. 347/88, Schedule B** of **The Construction Industry Wages Act** considered - 1198/90/PWA - June 7, 1991 - Douglas Loghas, Cambridge Builders, Cleaners & Managers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Definition of Wages in Section 1 of **The Payment of Wages Act** expansive - Board held severance pay considered as wages and finds directors are liable for payment - In accordance with section 5(a) of **The Payment of Wages Act**, liability limited to 6 months rather than for total years of service as originally agreed by parties - 549-561/90/PWA - June 24, 1991 - Metal & Alloys Company Ltd., R. Francis et al. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL DISMISSED.**

Severance pay agreement binding on Employer and not subject to bank approval as condition not indicated in confirmation letter - However, Employee would have to wait for payment with all other unsecured creditors - 549-561/90/ PWA - June 24, 1991 - Metal & Alloys Co. Ltd, R. Francis et al. – **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED; APPEAL DISMISSED.**

Pay in lieu of notice is "wages" and not damages - Concept of mitigation of losses not relevant to proceedings under **The Employment Standards Act** - No duty on employee to mitigate - Amount of notice and pay in lieu of notice statutory minimum and cannot be reduced by wages earned from another employer during notice period - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Board held Employer not relieved of liability for wages owing even when actual notice came from Receiver who is an agent of the employer and considered to be employer as per Section 1 of **The Employment Standards Act** - As well, Employer terminated Employees by ceasing to employ and pay them - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy.

WAGES

Exemption from notice or payment of wages in lieu of notice under subsection 40(2)(d) of **The Employment Standards Act** not applicable because Employer aware of possible receivership action two months prior to action being taken and because in bankruptcy, employment terminated by dismissal rather than by frustration - As per section 8 of **The Payment of Wages Act**, receiver must comply with order for payment of wages - 207/90/PWA - August 16, 1991 - Michael Ian Hoffer, Conversions by Vantasy Ltd.

Monthly sum received was an honourarium and not wages - Board held Employee was a volunteer and not an employee - Claim for wages denied - Section 1(e) of **The Employment Standards Act** considered - 180/91/PWA - August 21, 1991 - Khalsa Diwan Society (Manitoba) Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Informing Employees of plant closure same as terminating their employment - Directors liable for termination wages as their resignations were made 15 minutes after Employees informed of termination - Resignations have no effect on liability for wages and vacation wages owing at time terminated - 885-890/90/PWA - October 2, 1991 - Jack Levin and Louis Levin, East-West Packers (1969) Ltd.

Employees do not have duty to mitigate damages in group termination cases - Wages earned from work done for Receiver not deducted from termination wages owing - 885-890/90/PWA - October 2, 1991 - Jack Levin and Louis Levin, East-West Packers (1969) Ltd.

Employee entitled to statutory holiday pay, vacation pay, and overtime wages even if Employer claims it does not pay those wages - Employee entitled to wages in lieu of notice because he was told by the Employer "to get out and not come back" - 300-301/91/PWA - October 10, 1991 - Ervin Funk, Fort Rouge Plumbing – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employer acted unfairly by withholding vacation pay and denying commissions on sales resulting in bad debts, when it, not the Employee, chose to extend credit to customers who it had determined were not to have credit - Employer cannot unilaterally determine the liability of the employee, the quantum of damages and then fail to pay that sum to an employee - 437/91/PWA - January 9, 1992 - Damore Enterprises Ltd., trading as Dave's Quick Print – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

In the absence of a policy forbidding employees from performing personal work during work hours or in the absence of previous discipline for tardiness, Employer fails to prove Employee guilty of gross insubordination or dishonesty - No justification for terminating without notice - 751/91/PWA - Jan. 20, 1992 - John A. Flanders Co. Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee terminated without notice after charged with theft, an act he claimed was motivated by his consumption of alcohol - Employee not entitled to wages in lieu of notice because he was warned further problems with alcohol would not be tolerated - 899/91/PWA - Feb. 24, 1992 - Inner-Tec Security Consultants Ltd., trading as Inner-Tec Security Services – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

WAGES

Employee refusing to return keys to Employer discharged for insubordination properly denied wages in lieu of notice as per section 39 of **The Employment Standards Act** - Employee's claim for overtime denied as hours claimed not authorized, not part of his assigned duties, and were done on own initiative - 818/91/PWA - February 24, 1992 - Dr. Amrit Varma, trading as The Terraces of Tuxedo – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Domestic Worker - Charges for room and board in employment agreement exceed maximum allowed pursuant to **Manitoba Regulation 99/87R, Domestic Workers Regulation** - Employer not entitled to pay minimum wage as he was already bound by an agreement to pay more - Employee entitled to one hour overtime per day as she was on duty all day in terms of child care responsibilities - 6/92/PWA - May 20, 1992 - Manjit Singh Bhullar.

Unauthorized Deductions - Employee did not give express authorization - Deductions for wage advance and money owed for purchases from spouse's business not proper - 220/92/PWA & 221/92/ESA - June 12, 1992 - Peter Knoedler.

Employee off work due to non-work related injury told to leave as he did not know date of return - Conduct not insubordinate or dishonest as per Section 39(14)(d)(ii) of **The Employment Standards Act** - Entitled to wages in lieu of notice - 229/92/PWA - August 26, 1992 - J.S. Stewart t/a Culligan Water Conditioning.

Baker/manager claimed he was given only one week's notice due to a change in ownership - Employer claimed that Employee was quitting at end of week - Board found Employee not likely to quit as he had no job - Also held that ownership did not change, management did - Claim for wages in lieu of one week's notice allowed - 503/92/PWA - September 16, 1992 - Emjaydee Management Ltd.

Orderly discharged for threatening to "mess up lives" of management because they moved him to day shift - Board held threats were insubordination as per Section 39 of **The Employment Standards Act** - Discharge justified - Not entitled to wages in lieu of notice - Claim for vacation wages dismissed as supporting documentation showed none owing - 247/92/PWA - September 22, 1992 - Park Manor Personal Care Home Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Unauthorized Deductions - Employer deducts \$991.50 from termination wages due to Employee's mishandling of job resulting in \$2500 loss - Even though Employee responsible for loss, Employer not entitled to deduct amount from wages without expressed authorization of Employee - 529/92/PWA - October 20, 1992 - Michalski Printing Service Ltd.

Commission sales - Contract which could be cancelled within 60 days written notice properly regarded as having a duration of less than one year - Employee to be paid at lower rate of 1½ times monthly revenue - 538/92/PWA - Nov. 4, 1992 - Canadian Waste Disposal & Management Ltd.

Vacation pay - Board rules that Employee had taken days off sporadically which fully compensated him for any vacation entitlements claimed to be owing - Claim for vacation wages dismissed - 898/92/PWA - December 14, 1992 - Kensington Homes Ltd.

WAGES

Officer appeals Order for payment of wages and vacation wages owing after business placed in receivership arguing he resigned prior to closure of store - Held not liable for unpaid severance wages, but liable for unpaid vacation wages up to and including date of resignation - Section 5 of **The Payment of Wages Act** considered -827/91/PWA - April 20, 1993, Parviz Javahery, General Drugs Ltd. – **MOTION FOR ORDER DISMISSING LEAVE TO APPEAL GRANTED.**

Unauthorized deductions of vacation pay for repayment of dental fees - Held Employee entitled to dental benefits - Employer ordered to repay vacation wages deducted without authorization of Employee - 969/92/PWA - June 18, 1993 - Gateway Soap & Chemical Co. Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Even if Employee quits without notice, Employer cannot deduct earned wages from pay cheque to offset debt it unilaterally believed to be owing - Employer should have filed claim of forfeiture - 761/92/PWA - August 4, 1993 - Spartan Building Services Ltd.

Office cleaner overpaid due to administrative error - Husband who assisted Employee and acted as spokesperson, informs Employer reimbursement impossible and he would no longer assist wife - Two days later, Employee informed she had worked her last day as she had quit without notice - Board accepts Employee's claim she was fired and held she was entitled to wages, vacation wages and wages in lieu of notice - 761/92/PWA - August 4, 1993 - Spartan Building Services Ltd.

Rate of pay - Employee, by conduct, acquiesced to commission structure for six months - Could not, by way of claim for wages, attempt to change method of pay - Claim for underpayment dismissed - 1076/92/PWA - December 13, 1993 - Polaris Leasing Ltd.

Rate of pay - Security guards at scene of fire investigation - No evidence to establish that wage rate was \$15 per hour as shown on complaint form - In absence of evidence to the contrary, held minimum wage rate applied - 535/93/PWA - January 4, 1994 - Estate of Matt Pasternac.

Work performed on 32,000 square foot building which was one of six or seven in a 165,000 square foot expansion project properly assessed at the wage rate for major building construction projects as per **Greater Winnipeg and Major Building Construction Wage Schedule** - 69/93/PWA - February 4, 1994 - 285525 Alberta Ltd. t/a Alberta Custom Steel Buildings – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Unauthorized deductions - Property Manager fired for theft of rent money - Employer not allowed to withhold wages for restitution without authorization of Employee - Claim for wages owing allowed - 910/93/PWA - February 7, 1994 - Kirkwall Properties Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Burden of Proof - Employee worked two months without receiving wages - Employer argued she was aware he could not afford to hire her - Board found that person who "hired" Employee and who had discussions regarding wages owing was not a partner and had no authority to hire employees - Employee failed to prove on balance of probabilities that Employer/employee relationship existed - Claim for wages owing dismissed - 988/93/PWA - March 7, 1994 - James Murphy t/a Dockside 21 – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

WAGES

Employee fired without notice and wages withheld when night deposit short by \$2,500 - Held Employer could not recoup its losses by using a blanket authorization to deduct wages to cover shortages because amount of money missing could not be characterized as a "shortage" - Also held the release for further money owing signed by Employee improperly obtained as Employee forced to sign if wanted money which was lawfully his - Claim for underpayment of wages and vacation wages allowed - 999/93/PWA - March 9, 1994 - Bewza Hotels Ltd.

Forfeiture - Employee quit after dispute with co-worker - Two weeks prior, he had given Employer's mother notice he was quitting due to continual harassment from customer - Claim for forfeiture allowed because he neglected to communicate directly with Employer or give an exact date of departure - Penalty reasonably and fairly reduced due to Employee's understandable fear for own safety and lack of prejudice to Employer as he was easily replaced - 136/84/ESA - April 22, 1994 - Angelo Giovanni Zamparutti t/a Fish Doctor.

Employee worked full-time hours one month prior to lay-off - Employer claims not entitled to notice as hired on job-to-job basis - In absence of written contract of employment or evidence to substantiate Employer's claim, Board held Employee was employee under relevant legislation - In absence of no notice policy as per Section 39 of *The Employment Standards Act*, Employee entitled to wages in lieu of notice - 28/94/PWA & 29/94/ESA - August 3, 1994 - Tericorp Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

On-site maintenance and repair duties fell within the scope of *The Construction Industry Wages Act* - Employee entitled to wage of journeyman electrician - 1009/93/PWA - August 17, 1994 - Safeway Electric Co. Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer claims Employee agreed to be paid \$10 per room painted - Held contract altered after Employee signed agreeing to \$7 per hour - Also unlikely he would have agreed to \$10 per room - Claim for underpayment of wages allowed - 88/94/PWA - August 29/1994 - Best Country Property & Management - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Rate of pay - Employee informed by letter that rate of pay reduced from \$10 to \$8 per hour for not meeting quality and productivity standards - Refused to sign letter and filed claim for wages at \$10 per hour - Held, after receipt of letter, rate of pay \$8 per hour - 758 & 759/93/PWA & 760/93/ESA - Sept. 7/94 - Joseph Seesahai being a Director of Autocraft Rebuilders.

Forfeiture - Employee takes his tools and does not report for work after argument regarding \$2 per hour reduction in wage rate - Returns to work but without his tools as ordered - After Employer shouted to go get tools, Employee leaves work and did not return - Held Employee quit and not entitled to wages in lieu of notice - Forfeiture claim allowed as Employee's departure inconvenience to Employer who paid other employees overtime and took one week to find replacement - 758 & 759/93/PWA & 760/93/ESA - Sept. 7/94 - Joseph Seesahai being a Director of Autocraft Rebuilders Inc.

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WAGES

Claim for wages filed 8 months after relevant pay period dismissed as untimely - 758 & 759/93/PWA & 760/93/ESA - Sept. 7/94 - Joseph Seesahai being a Director of Autocraft Rebuilders Inc.

Calculation of wages owing - Board assumes Employer's calculation for sick time correct since Employee refused to present any evidence on the issue - Held Employee was overpaid - Claim for wages dismissed - 356/94/PWA - October 21, 1994 - Keystone Agricultural Producers Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Unauthorized deductions - Held Employee was overpaid on final pay cheque - Board has no jurisdiction to offset debts against earned wages - 356/94/PWA - October 21, 1994 - Keystone Agricultural Producers Inc. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee discharged for not reporting for work despite request for day-off being denied - Board held she misunderstood Employer and believed she had permission - Claim for wages in lieu of notice allowed - 553/94/PWA - November 9, 1994 - J. & M. Investments Ltd. & Normand Park Car Wash – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Forfeiture - Employee quits without notice as work environment unpleasant - Employer filed forfeiture claim and for wage advances and wage overpayment - Held Employee did not owe amounts claimed and jurisdiction limited to offset debts as set out in **Kodiak Parking Services v. Kowalson** - Not fair or reasonable to penalize for full two weeks wages due to work environment - Order to forfeit wages and vacation wages owing - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Forfeiture - Employee resigned without notice claiming Employer asked him to participate in insurance fraud - Employer filed forfeiture claim for quitting without notice and breaching fiduciary duty for being involved with competing company - Board held Employee's reasons did not justify quitting without proper notice - Forfeiture claim allowed - No need to deal with alleged breach of fiduciary duty as that would not affect claim under **The Payment of Wages Act** - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Forfeiture - Employee terminated for theft - Ten days after Employer asked him to return to work, Employee quits without notice due to humiliating treatment by Employer - Filed claim for wages in lieu of notice - Employer filed forfeiture claim - Held first termination without cause as theft allegations not substantiated and second termination without cause as Employee constructively dismissed - Entitled to wages in lieu of notice for either termination - Forfeiture claim dismissed - 76/94/PWA & 77-79/94/ESA - December 14, 1994 - Aerotech International Incorporated – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Forfeiture - Board held Employer unreasonably refused Employee with systemic lupus 5 month leave of absence - Cannot characterize as quit - Forfeiture claim denied - 694/94/ESA - Jan. 23, 1995 - Kim's General Store – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

WAGES

Forfeiture - Inappropriate for Employer to file forfeiture claim for reimbursement of monies owed by friend of Employee to whom she extended credit - Forfeiture claim dismissed - 694/94/ESA - January 23, 1995 - Kim's General Store – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employee discharged with two weeks notice for causing damage - Next day, Supervisor informed him the owner wanted him off the property - Given lack of testimony by Supervisor, Board concluded the Employer was originally prepared to terminate with notice, but Supervisor later terminated him without notice merely because of opinion expressed by office manager - Claim for wages in lieu of notice allowed - 771/94/PWA - April 13, 1995 - Gateway Packers Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Overtime - Claim for hours worked prior to start time dismissed as hours were within the sole control of Employee and were not authorized by the Employer - However claim for the hours worked after quitting time to finish work and correct errors allowed because Employer knowingly allowed and required Employee to work beyond eight hours per day - 256/95/PWA - September 27, 1995 - Prime Properties Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Forfeiture - Employee justified in terminating her employment without notice given the supervisor threw objects at her and verbally abused her - Employer's claim for forfeiture dismissed - Board held Employee could not also claim for wages in lieu of notice - 256/95/PWA - September 27, 1995 -Prime Properties Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Employee refused to write statement outlining goals, expectations and complaints - Held Employer simply attempting to identify solutions to his problems - Employee voluntarily leaves his employment and not entitled to wages in lieu of notice - Claim dismissed - 494/95/PWA - December 21, 1995 - Karen Rodko, 2896657 Manitoba Ltd., J.F.T. Typewriter & Office Equipment.

Time Limits - As per subsection 8(2.1) of *The Payment of Wages Act*, the recovery of wages limited to wages payable in the six month period preceding the date of termination - Board held the decision of the Employment Standards Division was in error and should be reversed as no funds were due during the six months preceding the termination - 124/95/PWA - December 21, 1995 - Gerard Lucyshyn t/a Skyline Management Accounts Receivable Specialists.

Unauthorized deductions - Employer not entitled to deduct \$50 for collector's licence from paycheque because Employee did not authorize the deduction as per Board's longstanding practice, and because the deduction was unfair as licence was not transferable and could only be used while employed with the Employer - 125/95/PWA - Dec. 21, 1995 - Gerard Lucyshyn t/a Skyline Management Accounts Receivable Specialists – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

WAGES

Overtime - Employee filed claim for two hours overtime worked on Tuesdays arguing her hours were from 8:00 a.m. to 7:00 p.m. - Employer argued salary was based on monthly rate and no employee was required to work overtime - Held Employee entitled to overtime for two hours worked each Tuesday as the hours were not included in her monthly rate - 125/95/PWA - December 21, 1995 - Gerard Lucyshyn t/a Skyline Management Accounts Receivable Specialists – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Commission - Guarantee wage - Held that salesman paid on commission had received a gross wages in excess due him based on the minimum wage - However, Board found he was not paid for a two week period - Order of Employment Standards reduced from \$779 to \$416 - Section 3(1) of *The Payment of Wages Act* considered - 340/95/PWA - January 4, 1996 - Eastern Chrysler Plymouth Inc.

Salary advances - Advances repaid should not be treated as earnings - 340/95/PWA - January 4, 1996 - Eastern Chrysler Plymouth Inc.

Rate of pay - Employee employed in excess of one year should be classified as general construction labourer, not unskilled labour - Board held Employee underpaid and should be paid at the rate set out in **Greater Winnipeg and Major Building Construction Wage Schedule of Manitoba Regulation 194/91** - Section 5(1) of **Regulation 194/91** need not be considered - 849/94/PWA - January 18, 1996 - Linda Tyndall t/a 2890675 Manitoba – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Entitlement to wages - Apartment caretaker/superintendent - Contract signed between the Employee and Employer was an employment contract - Employee found to be employee under *The Payment of Wages Act* as she personally performed duties outlined in contract - 544/95/PWA - February 8, 1996 - Anne & Theodore Kostynyk t/a Gateside Gardens – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Unauthorized deductions - Damage to employer's property - Employee damages Employer's truck in accident - Employer not entitled to make unauthorized deduction from Employee's wages to cover insurance deductible - Claim for wages owing allowed - 636/95/PWA - February 29, 1996 - Sharon Lemay, Heinz Isbach t/a Sterling Transportation Service – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Unauthorized Deductions - Employer deducted \$500 from Employee's wages for damage to vehicle - Employee forced to sign authorization weeks after alleged incident, and under threat of not receiving wages or having employment terminated - Held authorization not voluntarily given and Employee entitled to wages owing and reimbursement of deduction- 836/95/PWA - April 15, 1996 - Majestic Towing Services Ltd. t/a Economy Towing. –**LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Vacation Pay - Definition - Bonus earnings are a reward or recompense for services performed and fall within the definition of salary or wages under **The Vacation With Pay Act** - 235/95/PWA - September 11, 1996 - Maxwell Maryk, Warehouse One - The Jean Store – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

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WAGES

Employer's father forcing him to hire his brother and the brother's refusal to submit to the Employer's authority did not nullify the employment status - Also brother's hiring other employees did not disqualify him from being considered an employee under *The Payment of Wages Act* - Claim for wages and vacation wages allowed - 210-212/96/PWA - November 7, 1996 - Sheldon Brounstein/Regent Auto & Truck Parts – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer, as director of the company, responsible for paying wages owing to employees even if they were hired due to interference of family and against his wishes - However, employees' claims against his brother dismissed as Board held an employee/employer relationship did not exist - 210-212/96/PWA - November 7, 1996 - Sheldon Brounstein/Regent Auto & Truck Parts (1993) – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Overtime - Employee accepts pay under the table - Lack of honesty and credibility leads Board to deny claim for overtime wages owing - 210-212/96/PWA - November 7, 1996 - Sheldon Brounstein/Regent Auto & Truck Parts (1993) – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Revenue Canada garnished Employee's wages - Claim for wages owing reduced by amount Employer paid to Revenue Canada after Employee's termination - 210-212/96/PWA - November 7, 1996 - Sheldon Brounstein/Regent Auto & Truck Parts – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Entitlement - Position for factory agent altered during interview to be sales representative of Employer - Employee not paid for months - Held he performed functions for which he was entitled to be compensated under the law - 485/95/PWA - November 22, 1996 - Paul Sigurdson/Aerotech International Inc – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Hours worked - Employee's personal calendar on which he recorded appointments does not constitute a sufficient record of hours worked - 485/95/PWA - November 22, 1996 - Paul Sigurdson/Aerotech International Inc – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Employer viewed Employee's refusal to pay for damages to vehicle as refusal to drive - Board disagreed and held termination unjust - Employee entitled to wages in lieu of notice - 477/96/PWA - January 28, 1997 - Kildonan Ventures/Kildonan Auto & Truck Parts – **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Meal breaks - Health Care Aide to be paid for meal breaks since she was unable to leave the patients - 568/96/PWA - February 20, 1997 - Stewartville Professional Centre - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Overtime - Employee worked twelve-hour shifts - Employer unaware that hours in excess of eight hours per day were to be paid at overtime rates - Claim for overtime wages allowed - 568/96/PWA - February 20, 1997 - Stewartville Professional Centre - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

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WAGES

Rate of commission - Parties disagree as to start date of new rate - Employee's evidence accepted as it was more specific than Employer's - 758/96/PWA - May 15, 1997 - Prairie West Industrial Ltd.

Overtime - Tour director paid by per diem rate - No consistent hourly rate established - Held wages paid met the minimum wage standards for the amount of hours worked - Claim for overtime dismissed - 759/95/PWA - May 30, 1997 - Mr. Canada's Touring Network – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Definition - Travelling Salesman - Overtime - Entitlement - Sales & Marketing Representative performed functions not entirely sales related, received straight salary, travelled only as required - Held not “travelling salesman” as defined by Sec. 31(1)(b) of *The Employment Standards Act* - Entitled to overtime pay - 377/97/PWA - January 13, 1998 - Hi-Qual Manufacturing Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Overtime - Calculation - Sales & Marketing Representative entitled to overtime - His evidence of six months of overtime worked simplistic and devoid of details of daily activities, appointments or breaks taken - Board adopts “best we can” approach - Ordered wages owing equivalent to amount claimed for last three months of employment - 377/97/PWA - January 13, 1998 - Hi-Qual Manufacturing Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Overtime - Entitlement - Daily and weekly hours exceed the daily and weekly hours allowed by Exemption Order issued by Labour Board - Employer ordered to pay overtime wages in excess of those provided in Exemption Order - 685 & 686/97/PWA - January 30, 1998 - Westman Tree Service Ltd. – **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Commissions - Sales Representative aware of Employer's policy that commissions for last month of employment not payable for the month in which employment severed - Claim for wages in lieu of notice dismissed - 428-430/98/PWA - November 2, 1998 - Polar Bear Rubber - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED, BUT DISCONTINUED.**

At time notice was given, Employer not aware Employee was actively pursuing a competing business venture - Cause not shown why Employee should not be allowed to work out notice period - Claim for wages in lieu of notice allowed - 428-430/98/PWA - November 2, 1998 - Polar Bear Rubber - **LEAVE TO APPEAL TO COURT OF APPEAL GRANTED, BUT DISCONTINUED.**

Unauthorized Deductions - Overtime - Witness - Credibility - Employee filed claim for overtime for time after shift she was required to cash out and clean up and filed claim for unauthorized deductions to cover daily shortages - Board noted Employee signed, without duress, authorization sheet accepting responsibility for shortages - Employee was not at work on all the days she was claiming overtime - Employee's allegations lacked sufficient credibility - Claim dismissed - 175/99/PWA - June 1, 1999 - 3269001 Manitoba Ltd. t/a Burntwood Motor Hotel.

WAGES

Banked Time - Parties had arrangement that regular work day was six hours and any time over would be banked and taken as time off - Board accepts Employee's evidence that any time taken was time in lieu of overtime earned and he had not received vacation or vacation pay for twenty-two month period - Claim for vacation wages owing allowed - 34/99/PWA - June 28, 1999 - Burand Holdings Ltd. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Overtime - Employee not entitled to overtime because there was no arrangement to pay same; because he was paid on the basis of an annual salary; because he included in his record of time worked lunchtimes and other times taken off; and because he had taken an extra week of vacation - 106/99/PWA - September 9, 1999 - College Universitaire de Saint Boniface - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Witness - Onus - Guaranteed Wage - Employer disputes Order to pay wages owing as it claim Employee paid on percentage of profits - Witnesses can only comment on matters on which they have personal knowledge - Employer's witness did not attend all the meetings in which employment arrangements were finalized - Not sufficient for witness to state that a certain event could not have occurred because it was not the usual course of business - Board concluded Employee had been working under a guarantee - Employee entitled to compensation as determined by Employment Standards - 557/99/PWA - January 5, 2000 - Frontier Toyota - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Repayment of Advance - Employer indicated Board did not address its legal right to recover wages advanced to Employee - Board concluded that there was no formal or statutory obligation for the employee to repay a bonus/advance in this particular circumstance - Order had accurately reflected Board's intent - Letter Decision - Reasons not issued - 664/99/PWA - May 19, 2000 - Bauschke & Associates.

Overtime - Saturday work - Salaried Employee claimed overtime for 5 hours worked every third Saturday - Held salary inclusive of all hours worked - Saturday hours not overtime but fell within standard hours of work - Claim dismissed - 122/00/ESC - June 23, 2000 - McTavish Insurance Agency Inc.

Unauthorized Deductions - Commission salesperson and Employer had an agreement that he would share any profit or loss for specific product line - Held wages owed to be reduced by loss for 2 x 6 lumber - Board not satisfied Employee agreed to assume liability for 2 x 3 lumber - Letter Decision - Reasons not issued - 81 & 82/01/ESC - February 15, 2001 - Linda Mitchell; Sawyer Wood Products.

Commission wages - Verbal employment agreement - Employee claims his rate of pay was \$2,000 while Employer testified they had agreed on \$1,000 for non-selling casual work and \$1,000 draw similar to what other sales people received - Reasonable to conclude Employee would be paid in same way as other sales people - Claim for wages dismissed - 852/01/ESC - January 21, 2002 - 4131240 Manitoba Ltd.

WAGES

Vacation wages - Employer argued that since an accounting had been ordered pursuant to a Default Judgment, it was not required to pay vacation wages - Held Employee was an employee at the time for which vacation wages were owing and had not been paid - The accounting was a separate matter - Claim for vacation wages granted - 58/00/PWA - November 20, 2002 - Protect-A-Home Services - **APPEAL TO THE COURT OF APPEAL GRANTED; BOARD ORDER DECLARED A NULLITY; LEAVE TO APPEAL DENIED RE SECOND BOARD ORDER.**

Rate of Pay - Although Employee stated rate of pay was \$15.00 per hour, complaint form, which was signed by him, had rate of \$14.00 per hour. In assessing rate of pay, Board was satisfied that information on complaint form, signed by Employee, was the rate to be used in this matter - 730/02/ESC - May 6, 2003 - El Dorado Trading Centre - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Evidence presented, including Employee's own exhibit, show he knew consequences of his continued tardiness and failure to call in as instructed - Held Employer had "just cause" to terminate his employment without being required to provide pay period's notice or wages in lieu of notice - Claim for wages in lieu of notice dismissed - 211/03/ESC - September 3, 2003 - Convergys Customer Management Inc. - **APPEAL TO THE COURT OF APPEAL GRANTED.**

Commissions - Project did not conclude within the three-month protected period subsequent to Employees terminating their employment - Board held one Employee not entitled to commissions as he did not have any specific agreement with Employer for commissions to be paid on the project beyond the three-month period - Given agreement between him and Employer, second Employee was entitled to commission based upon the project's completion percentage - Substantive Order - Reasons not issued - 60 & 61/04/ESC - Nov. 16, 2004 - R.A. Kane Sales & Service.

Overtime - Eligibility - Front Line Supervisor - Employer argued Store Manager/Regional Merchandising Supervisor was not entitled to overtime pay as she held a salaried management position - Held *The Employment Standards Code* does not expressly distinguish between hourly paid employees and those compensated by salary. - Further, Store Manager did not determine ultimate corporate response for employment issues and significant part of her position involved selling - Therefore she was an employee as defined in the *Code* - Claim for overtime wages allowed - 735/03/ESC - February 11, 2005 - Nygard International Partnership Associates - **LEAVE TO COURT OF APPEAL DENIED, LEAVE TO APPEAL TO SUPREME COURT OF CANADA DENIED.**

Deductions - Training and Orientation period - Employer not entitled to deduct two weeks' pay to cover cost of training and orientation period from wages owing as training was not completed during time frame set out in employment contract and was not transferable to other employers - Moreover, allowing deduction for training period contrary to most basic and fundamental principle set out in the *Code* that an employer is obligated to pay an employee wages earned - 735/03/ESC - February 11, 2005 - Nygard International Partnership Associates - **LEAVE TO COURT OF APPEAL DENIED, LEAVE TO APPEAL TO SUPREME COURT OF CANADA DENIED.**

Deductions - Equipment Loan - Employer ordered to pay Employee \$9,309.71 for wages owing but entitled to deduct balance of purchase price of laptop computer that Employee failed to return upon termination of employment - 735/03/ESC - February 11, 2005 - Nygard International Partnership Associates **LEAVE TO COURT OF APPEAL DENIED, LEAVE TO APPEAL TO SUPREME COURT OF CANADA DENIED.**

Sec. 23.0-E19

WAGES

Employer's liability to pay \$9,309.71 wages owing cannot be offset by amount Employee received for a productivity bonus as bonus related to Employee's compliance with corporate policies and procedures and not for payment of overtime wages or wages in lieu of notice - 735/03/ESC - February 11, 2005 - Nygard International Partnership Associates - **LEAVE TO COURT OF APPEAL DENIED, LEAVE TO APPEAL TO SUPREME COURT OF CANADA DENIED.**

Training Costs - Employment agreement provided that an employee who resigned within first 24 months of employment would reimburse Employer half the cost of orientation and training program - Employee resigned after being employed 10 months - \$790.35 deducted from his final cheque - Training included performing actual work of position - Board not prepared to allow deduction because Employee was productive during training period and was entitled to wages for his labour; deduction was an attempt to penalize Employee for leaving his position within first 24 months; and "individuals in training" not exempt from Minimum Wage Regulation - 731/03/ESC - May 2, 2005 - Nygard International Partnership Associates - **LEAVE TO APPEAL TO COURT OF APPEAL WITHDRAWN.**

Overtime - Employee submitted pay stub recording overtime pay and a deduction to negate the pay - Employer contended pay stub was created with software Employee had at home - Evidence was clear and convincing that the Employer's computer records did not indicate deduction from overtime wages was made - 473/05/ESC - December 2, 2005 - Native Reflections Inc. - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Frequency of pay - Pay Statements - Inadequate, sporadic cash payments and Employer's failure to provide pay statements to the Employee violated sections 86 and 135 of the *Code* - Employer's position that wages promised to the Employee were contingent upon it receiving a government grant was inadequate response to claim for wages owing - Employee entitled to unpaid wages less amount for failure to provide sufficient notice - 565/05/ESC - April 11, 2006 - Solar Solutions Renewable Energy and Conservation Devices Inc.

Calculation - Employer argued it did not owe Employee any wages as he wrongfully claimed for time not worked - Held Employer cannot seek an order authorizing Board to deduct or offset from wages owing amounts which Employee has not consented to and which represent Employer's unilateral determination of liability - However Board uses Employer's calculations of hours worked to determine wages owing as those numbers more accurately reflected hours actually worked by Employee - Substantive Order - 488/05/ESC - May 18, 2006 - Saint John's Aqua Kings Swim Club Inc. trading as Winnipeg Wave Swim Club.

Unauthorized Deductions - Damage to Property - Employer cannot seek an order authorizing it to deduct and/or offset from wages otherwise due to the Employee, amounts which have not been specifically consented to by the Employee and which therefore represent the Employer's unilateral determination of liability - Substantive Order - 110/06/ESC - July 11, 2006 - Alias Autobody Limited.

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WAGES

Employee agreed that he failed to contribute \$300 to tip pool - Claim for wages reduced by amounts for tips owing, additional wages paid and for claim for insufficient notice - Substantive Order - Reasons not issued - 404/06/ESC - July 19, 2006 - Perry Paul Scaletta trading as Cafe La Scala.

Employee cashing cheque representing "final payment" did not prevent him from seeking all amounts owed to him pursuant to the legislation - Substantive Order - Reasons not issued - 738/06/ESC - Feb. 23/07 - 3422640 Manitoba Ltd. t/a Hofer Enterprise.

Commission - Work performed - Employer claimed advertising sales representative not entitled to commission on "house ads" of long-standing clients as little work was required - Sales Representative held negotiations and meetings to secure the ads and was never advised she would not receive compensation for "house ads" - Employer not allowed to set off or deduct from wages perceived losses due to the employee's allegedly neglectful or substandard work - Employee was entitled to commission - 409/06/ESC - March 20, 2007 - Manitoba Business Magazine (1996).

Commission Wages - Employee closed a sale consisting of six advertisements - Employer had yet to receive payment for advertisements - Board ruled Employee entitled to receive commission wages and vacation wages on all collections received by the Employer for advertisements sold - Further, the agreement between the parties was that commission would be paid upon publication of advertisements - Substantive Order - 676/06/ESC - Preliminary Order March 2, 2007 & Final Order June 29, 2007 - GIJO Ltd t/a Canadian Homestead.

Unauthorized deductions - Employee filed claim for an unauthorized deduction relating to an invoice for labour and parts for work done on a vehicle that he purchased from Employer - While he had not signed order authorizing work to be done, he clearly asked that a few things be done to the vehicle, the labour and parts as invoiced were supplied and he benefited from the work performed - Claim for reimbursement for an unauthorized deduction dismissed - Substantive Order - 714/06/ESC - April 13, 2007 - Mandix Corporation t/a McDougall Auto Superstore.

Bonus Pay - Employee acknowledged he received bonus payments for satisfactory performance - Pursuant to Section 40 of The Employment Standards Code, such payments do not affect employee's entitlement to vacation allowance as set out in The Employment Standards Code - Employee entitled to receive \$276.62 for a vacation allowance based upon 4% of his gross regular earnings - Substantive Order - Reasons not issued - 437/06/ESC - April 20, 2007 - Les Entreprises Bo-Pa Limitee t/a as Acadian Cleaning Services.

Vacation Pay - Entitlement - Employer disputed claim he owed vacation wages to Employee as he paid Employee in cash which Employee signed for - Employee asserted signature acknowledging receipt of the cash was not his - Board held that signature was identical not only to Employee's signature on resignation letter but also to his signatures on other documents he signed during his employment - Claim for wages dismissed - Substantive Order - 19/08/ESC - May 7, 2008 - 4819633 Manitoba LTd. t/a Dylan O'Connor's Irish Pub and Restaurant

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WAGES

Commission - Rate of Pay - Employer disagreed with Salesperson's claim that he was to be paid a 1% commission on in-store sales - Terms and conditions of employment relationship were not in writing - Board determined that agreement that Employee was to receive a fixed guaranteed salary was consistent with Employer's claim that there was no agreement to pay 1% commission on in-store sales - Claim for 1% of total in-store sales commission and vacation wages dismissed - Substantive Order - 40/08/ESC - June 6, 2008 - Lor-No Holdings t/a Nolan's Home Furnishings.

Intention to Quit - After Employee gave two weeks notice she offered to work part time - Employer did not terminate Employee by not accepting her proposal to continue working for Employer on part-time basis - Employee formed requisite subjective intention to quit and then objectively carried that intention into effect when she arranged for, accepted and commenced employment with new employer - Claim for wages in lieu of notice dismissed - Substantive Order - 105/08/ESC - June 19, 2008 - Girton Management.

Overtime - Employee claimed overtime wages for 14 month period - Board ruled claim for overtime wages limited to six month period immediately preceding termination of employment - Substantive Order - 108/08/ESC - November 25, 2008 - Bright Futures Day Care.

Overtime - Documentation submitted by Employee in support of claim for overtime contained inconsistencies and errors which raised questions regarding reliability - Employer's calculations and payroll records more accurate recording - Board satisfied on balance of probabilities no overtime wages were owing - Claim for overtime dismissed - Substantive Order - 108/08/ESC - November 25, 2008 - Bright Futures Day Care.

Management - Overtime - Assistant Banquet Manager had supervisory authority and stepped into role of Banquet Manager in his absence but she held junior role and did not perform management functions primarily - Employee entitled to overtime wages - First decision to address managerial exemption under Section 2(4)(b) of *The Employment Standards Code* - 41/08/ESC - December 15, 2008 - Legacy Hotels Corporation trading as Fairmont Winnipeg.

Sell of Business - Employee worked for previous owner for 8 years and for new owner for four shifts after which she was not given additional shifts - Where employee is immediately re-employed, purchaser of business is responsible for providing notice if employee is ultimately terminated - Section 5 of *The Employment Standards Code* provides Employee's employment was continuous and uninterrupted and by section 61(2) of the *Code* she was entitled to six weeks' wages in lieu of notice - 306/08/ESC - March 17, 2009 - 5614547 Manitoba Ltd. t/a Viking Hotel.

Vacation Pay - Vacation allowance payable under Sections 39(2) and 44(2) of *The Employment Standards Code* to be based on percentage of wages earned in applicable time period - Commissions payable fell within definition of wages in Section 1(1) the *Code* - Therefore, vacation allowance to be paid on commissions which form part of an employee's regular compensation - Substantive Order - 137/09/ESC - September 21, 2009 - Matrix Environmental Solutions.

Sec. 23.0-E22

WAGES

Commission - Whether remuneration structure characterized as “bonus” or “commission” was of no particular consequence - Board satisfied Employee compensated based on commission structure - Substantive Order - 137/09/ESC - September 21, 2009 - Matrix Environmental Solutions.

Commission - Employer contended Employee not entitled to commission for last month of employment as monthly threshold sales figure not met- Board satisfied after discounting invoices Employer asserted not claimable, sales generated by Employee still exceeded monthly threshold - Adjusted sales coincided with commission calculations in Employment Standards Division's Statement of Adjustments - Appeal dismissed - Substantive Order - 137/09/ESC - September 21, 2009 - Matrix Environmental Solutions.

Unauthorized Deductions - Employee terminated for theft of company property with criminal charges pending - Employer claimed wages owing be returned as partial restitution - Employer may seek recovery or restitution in other forums, but as per Section 19 of *The Employment Standards Regulation*, Board had no authority to authorize any deduction, off-set or restitution order from the wages earned - Board also applied general law that employer cannot unilaterally determine liability of employee, or quantum of damages and then seek to deduct such amount from wages owing - Substantive Order - 221/09/ESC - October 23, 2009 - Goodway Express.

Unauthorized Deductions - Employer retained \$500 from Employee's last pay cheque for deductible for vehicle accident - Employee claimed wrongful deduction - Employer submitted Employee signed document giving Employer blanket authorization to withhold wages for cost of vehicle damage - Held agreement signed at time of hire contrary to or inconsistent with provisions of *The Employment Standards Code* and was unenforceable - While Employer may be able to seek recovery or restitution in other forums, Board has no authority under the *Code* to authorize restitution from wages - Employee did not voluntarily consent to deduction - Employer required Employee pay deductible contrary to Section 19(2)(5) of the *Code* - Appeal dismissed - Substantive Order - 200/09/ESC - October 29, 2009 - Kildonan Ventures Ltd. t/a Kildonan Auto & Truck Sales - **LEAVE TO APPEAL TO COURT OF APPEAL DENIED.**

Overtime - Record Keeping - Employment Standards Division ordered Employer pay Employee \$16,026.43 for wages owing - Employer disputed payment - Employee's estimate of hours worked as provided in monthly calendar entries not accurate or reliable record of hours worked as he produced record after employment concluded and he testified to difficulty recollecting actual hours of work at time record produced - Board held evidence did not establish parties agreed salary inclusive of payment for up to 55 hours per week - Board accepted evidence adduced by Employer that Employee was expected to work six days per week, worked an average of fifty-five hours per week and, resulting from hours of restaurant increasing, he worked additional twenty hours over and above his average weekly hours during month in question - As reflected on Statement of Adjustment Employee entitled to receive \$8,999.75 as overtime wages - Substantive Order - 198/09/ESC - April 13, 2010 - Shogun Japanese Restaurant - **LEAVE TO APPEAL TO COURT OF APPEAL ABANDONED.**

WAGES

Overtime – Vacation Pay/Holiday Pay - Employer disputed Order of Employment Standards Division (ESD) to pay Employee \$486.33 in wages owing – Employer did not satisfied Board, on the balance of probabilities, that Employee did not work 12.75 hours of overtime and accepted ESD's recording of hours for Employee – Further, consistent with *Employment Standards Code*, Board did not accept Employer's submission that vacation pay and general holiday pay was included in the regular hourly rate paid to Employee – Employer ordered to pay wages as ordered by ESD – Substantive Order - 33/10/ESC – April 28, 2010 – 3422640 Manitoba Ltd. t/a Greencut Environmental Services.

Overtime - Entitlement - Employer disputed Order of Employment Standards Division (ESD) to pay Employee \$230.36 in wages owing – Board found among other items that during pay period in question Employee not entitled to overtime as she did not work more than 50 hours in any individual week - Board accepted Employer's evidence Employee only to receive \$15 per hour for that work – Board orders Employer to pay Employee \$189.38 – Substantive Order – 35/10/ESC – April 28, 2010 – 3422640 Manitoba Ltd. t/a Greencut Environmental Services.

Vacation Pay/Holiday Pay – Rate of Pay - Employer disputed Order of Employment Standards Division (ESD) to pay Employee \$230.36 in wages owing – Consistent with *Employment Standards Code*, Board did not accept Employer's submission that vacation pay and general holiday pay was included in the regular hourly rates paid to the Employee - Board orders Employer to pay Employee \$189.38 – Substantive Order - 35/10/ESC – April 28, 2010 – 3422640 Manitoba Ltd. t/a Greencut Environmental Services.

Pay Advance - Employer disputed Order of Employment Standards Division (ESD) to pay Employee \$230.36 in wages owing –Among other items, Employer credited with \$40 advance given to Employee – Board orders Employer to pay Employee \$189.38 – Substantive Order - - 35/10/ESC – April 28, 2010 – 3422640 Manitoba Ltd. t/a Greencut Environmental Services.

Overtime – Entitlement – Seven months after commencing employment, Employer advised Employee that extra unauthorized hours were appreciated but were not required – Overtime claim allowed for period prior to notification but disallowed after Employee received written directive from management not to work extra hours – Claim for overtime wages adjusted to reflect standard 7.5 hours per day or hours actually worked whichever hours were less - Substantive Order - 11/10/ESC - July 26, 2010 - Krevco Lifestyles.

Bonus – Calculation – Employee filed claim for incentive bonus to be calculated as pro-rated share of yearly team/store bonus of 1% of gross sales distributed to employees in accordance with allocation formula as determined by management – Employer decided not to pay bonus to any employee for the fiscal year in question because division not profitable – Held plain and ordinary meaning of “gross sales” could not be equated to “net income”, “net profit” or “profitability” as terms distinct concepts in commercial and accounting sense - However, other conditions affected entitlement – Allowing Employee's claim for bonus, would call for Board to make speculative judgments regarding meaning of term “yearly team/store bonus” and would require Board to abrogate to itself express discretion reserved to senior management and determine the allocation formula and the criteria relating to it – Claim for bonus dismissed - Substantive Order - 11/10/ESC - July 26, 2010 - Krevco Lifestyles.

Sec. 23.0-E24

WAGES

Record Keeping – Holiday Pay - Employer disputed owing Employee for general holidays asserting general holiday pay included in global hours – From review of payroll records, Board not satisfied Employer discharged its onus that Employee received general holiday pay to which she was entitled - Board confirmed Employment Standards Division's Order for wages owed for general holiday pay and wages in lieu of notice – Substantive Order - 77/10/ESC - July 28, 2010 - 3726615 Manitoba Inc. t/a L & L Catering.

Deductions – Standard of proof - Board did not accept Employer's allegation that Employee stole tools - Accusation of theft required proof beyond general claim made by Employer - Claim for wages allowed - 30/10/ESC - September 1, 2010 - North Star Construction.

Calculation – Record Keeping - Employer maintained Employee not entitled to overtime as he inflated hours recorded on daily worksheets and challenged whether Employee could have worked that many extra hours but was unable to provide any evidence beyond his suspicions – Board not able to conclude time recordings inflated based on speculation alone, particularly when Employer had accepted and relied upon those recordings without any prior challenge – Claim for wages allowed as calculated - 30/10/ESC - September 1, 2010 - North Star Construction.

Overtime – Entitlement - Employer maintained Employee agreed to accept time off in lieu of overtime - Employee denied any such agreement and no evidence presented he was given time off in lieu – Claim for wages allowed as calculated - 30/10/ESC - September 1, 2010 - North Star Construction.

Overtime – Entitlement – Employee agreed to hours of work and bi-weekly salary at time of hire – In 4½ years he was employed, he never filed claim for overtime wages – Board satisfied on basis of hours worked and total salary paid that Employee fully compensated - Accordingly, he was not entitled to receive any wages from Employer and his claim was dismissed - Substantive Order - 136/10/ESC - September 30, 2010 - Brousseau Bros. Ltd. t/a Super Lube.

Management functions primarily – Overtime – General Manager (GM) of branch location paid monthly salary and at time of hire was told job may entail up to sixty hours per week – He filed claim for overtime – Held GM ultimately responsible to Marketing President at main office, but GM was day-to-day managerial presence at branch - GM possessed independent authority to operate and manage branch within parameters of monthly budget - As to his own hours of work, he scheduled himself to work every day but was not told to do so by President – Ruled GM performed management functions primarily within meaning of Section 2(4)(a) of The Employment Standards Code - Claim for overtime dismissed - Substantive Order - 341/09/ESC - November 15, 2010 - U-Haul Co. (Canada).

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Management functions primarily – Overtime – General Manager (GM) of branch location paid monthly salary and at time of hire was told job may entail up to sixty hours per week – She filed claim for overtime – Held GM ultimately responsible to Marketing President at main office, but GM was day-to-day managerial presence at branch - GM possessed independent authority to operate and manage branch within parameters of monthly budget - Ruled GM performed management functions primarily within meaning of Section 2(4)(a) of *The Employment Standards Code* - Claim for overtime dismissed - Substantive Order - 342/09/ESC - November 15, 2010 - U-Haul Co. (Canada).

Overtime - Management - Employee did not perform management functions primarily – Therefore, he was not exempted from standard hours of work and overtime provisions of *The Employment Standards Code* on basis of Section 2(4) of the *Code* – Board ruled he was entitled to receive wages, overtime wages, general holiday wages and wages in lieu of notice - Substantive Order - 137/10/ESC - December 17, 2010 - Brousseau Bros. Ltd. t/a Super Lube - **LEAVE TO APPEAL TO COURT OF APPEAL DISCONTINUED.**

Record Keeping – Overtime – Entitlement – Employer disputed Employee's overtime claim submitting parties had verbal employment contract where Employee paid salary for working up to 55 hours per week – Held no requirement, statutory or otherwise, employment agreement providing for salary inclusive of overtime must be in writing – However, evidence fell short of demonstrating parties had agreement salary was payment for up to 55 hours per week - Board determined salary included payment for standard 40 hours per week and he was entitled to overtime for hours worked in excess of standard - No evidence Employer made application under section 13 of *The Employment Standards Code* for permit to increase standard hours - Board found Employee's records of estimated hours worked not accurate or reliable - Records were produced after his employment concluded and he testified he had difficulty recollecting actual hours worked - Sizeable amount of disputed overtime related to Employee's claim he was required to remain on premises and work when restaurant was closed between lunch and dinner - Board accepted Employee on break while restaurant closed - Pursuant to section 17(2) of the *Code*, overtime did not include time employer provided as a break - Employee entitled to \$8,999.75 in overtime wages - 198/09/ESC - January 27, 2011 - 5220459 Manitoba Inc. t/a Shogun Japanese Restaurant.

Reporting For Work – Less than three hours - Director of Employment Standards Division dismissed the Employees' complaints against Employer - Employees disputed Dismissal Order and matter referred to Board - Board agreed Employees reporting to work for a scheduled period of less than three hours and were paid all wages owing in accordance with the provisions of Section 51(2) of the *Code* – Appeals dismissed - Substantive Order - 189/10/ESC, 190/10/ESC, 191/10/ESC – March 17, 2011 - Great-West Life Assurance Company.

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Management - Overtime - Employer claimed Employee, as manager, exempt from standard hours of work and overtime - Held while Employer testified Employee hired, fired and set sales targets, there was little evidence he carried out those functions - Board found Employee, despite job titles, was primarily technician who ordered parts, dealt with customers, and sent in reports of hours worked by staff - Employer had not met onus to establish Employee was performing management functions primarily - 137/10/ESC - May 26, 2011 - Brousseau Bros. Ltd., t/a Super Lube.

Overtime - Calculation - Board satisfied bonus was "incentive pay" based on Employee performing well and generating sales and was not payable at Employer's discretion as per subsection 18(3)(c) of *Employment Standards Regulation* - Held wages for overtime purposes should include bonus which was performance related - 137/10/ESC - May 26, 2011 - Brousseau Bros. Ltd., t/a Super Lube..

Call-in pay - Shifts less than three hours - Employer's on-call policy provided that information technology professionals were compensated minimum of one hour for calls received - Relying upon subsection 51(1) of *The Employment Standards Code*, Employees believed they should be compensated for minimum of three hours - Held Legislature allowed scheduled periods of less than three hours - Employer's policy of paying employees who receive calls during the on-call period for minimum of one hour or actual time worked if call exceeded one hour constituted a "scheduled period of less than three hours" consistent with subsection 51(2) of the *Code* - Employer paid all wages owing - Employees' appeals dismissed - Subsections 51(1) and 51(2) of the *Code* considered - 189/10/ESC, 190/10/ESC and 191/10/ESC - November 14, 2011 - The Great-West Life Assurance Company.

General holiday pay - Entitlement - Employer submitted that it paid Employee for hours worked on a general holiday at rate of time and one half and payment of additional five per cent holiday pay was not warranted - Held Subsection 25(1) of *The Employment Standards Code* provided that an employee who worked general holiday entitled to be paid for hours worked at overtime wage rate and holiday pay for that day - Board satisfied Employee entitled to receive overtime wages and general holiday wages - Substantive Order - 171/11/ESC - December 29, 2011 - Wok House.

Overtime - At time of hire, Employee provided hand-written statement to Employer she was willing to accept straight time payment instead of overtime - Employee testified she was advised by Employer that document had to be signed to commence employment - Board found Employer could not rely on hand-written statement - Subsection 3(3) of *The Employment Standards Code* prevailed over any agreement that provided an employee less wages than provided under the *Code* - Subsection 4(1) provided agreement to work for less than minimum wage, or under any term or condition contrary to the *Code* or less beneficial to employee than required by the *Code* not defence in proceeding or prosecution under the *Code* - Therefore, hand-written statement afforded no defence to Employer - Employee entitled to overtime wages - Substantive Order - 171/11/ESC - December 29, 2011 - Wok House.

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Credibility - Overtime - Authorization - Employment Standards Division dismissed Employee's overtime claim ruling no evidence Employer authorized or condoned overtime - Employee appealed arguing Employer was aware of hours he was working; that his duties could not be completed by one person in normal work week; that, after his termination, his position had been split indicating amount of responsibility involved - Board found job was not split, rather one individual continued doing core functions Employee had performed and when second individual hired, it reflected new and separate position - Claim for hours worked must be assessed against fact that claim was only advanced to Employer after termination of employment - Employee's failure to raise overtime issue at any time with Employer was not reasonable nor did it engender confidence in reliability and accuracy of hours claimed - Documentation submitted in support of overtime claim contained errors and discrepancies and included hours during which Employee was not performing duties on behalf of Employer and many of hours claimed were for tasks done at home - Board accepted evidence of executive director that she never authorized, expressly or by reasonable implication, overtime hours - Employee had not met onus to establish, on balance of probabilities, that hours claimed as overtime were either accurate or reflected time actually worked - Appeal dismissed - Substantive Order - 200/11/ESC - January 18, 2012 - Life Science Association of Manitoba.

General Holiday Pay - Entitlement - Employer claimed Employee not entitled to general holiday wages for October 11, 2010 as her last day of work was October 9, 2010 - Board satisfied Employee attended work on October 12, 2010 and was entitled to general holiday wages for October 11, 2010 pursuant to section 22(1) of *Employment Standards Code* - Substantive Order - 203/11/ESC - April 13, 2012 - S.V. trading as The Star Grill.

Reporting for Work - Employer appealed Order to pay two-days wages to Employee - Employer contended Employee not scheduled to work, but, as per her request, attended meetings on days in question to discuss tension which developed between herself and her supervisor - Held Employee reported to meetings as scheduled by Employer and was entitled to be paid for scheduled period as per section 51(2) of *Employment Standards Code* - Substantive Order - 203/11/ESC - April 13, 2012 - S.V. trading as The Star Grill.

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Overtime - Managerial Exemption - Employer appealed Order to pay \$14,287.81 in wages, overtime wages and general holiday wages submitting Employee fell either within definition of "employer" under *The Employment Standards Code*, or within managerial exemption in section 2(4) of the *Code* and was not entitled to overtime - Board did not accept argument that Employee fell within definition of "employer" as accepting that argument would result in inconsistency and lead to absurd consequences that employee who met management criteria would be an employer and not entitled to protection of the *Code* yet at same time be entitled to some protection under section 2(4)(a), the management exclusion clause - Board satisfied Employee had responsibility and high degree of independent decision-making authority to operate and manage Employer's business in local area - Employee had authority to perform key management functions, including hiring, scheduling vacations, assigning and authorizing extra time, and taking steps and authorizing expenditures - Employee had ability to affect income of customer service representatives through sales to customers on their routes and reorganization of delivery routes - Employee argued he tried to perform managerial position but did very few of functions expected of him which indicated he understood his position to be managerial - He did not submit overtime hours for himself even though he did so for other employees, or seek approval or payment from Employer for any such hours which further supported conclusion he was of view that he was in managerial position and not entitled to overtime wages - Board satisfied Employee did not fall within definition of "employer" under the *Code*, but determined Employee performed management functions primarily and fell within managerial exemption in section 2(4)(a) and was exempted from overtime under the *Code*, but not from other protections of the *Code* - Given Employer did not challenge Order for amounts for regular wages and general holiday wages and Employee did not appeal Order, Board accepted those amounts as reflected in Order - Substantive Order - 306/10/ESC - May 22, 2012 - Canadian Linen and Uniform Service Incorporated

Employer's Statutory Obligations - Record Keeping - Subpoena - Board satisfied Employee worked hours as determined by Employment Standards - Employer did not produce records to refute Employee's evidence to support his contention he worked those hours or that some hours consisted of snow removal using heavy equipment - Board denied Employer's request to issue subpoena to access Employee's cellular phone records which it claimed contained details of hours Employee worked - Employer failed to comply with its responsibilities to keep and maintain employment records at principal place of business in accordance with section 135 of *The Employment Standards Code* - Substantive Order - 175/11/ESC - May 25, 2012 - Sterling O & G International.

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Unauthorized Deductions - Employer claimed Employee had several accidents while operating its equipment and sought to recover cost pertaining to damage sustained - Employee's mother issued cheque to Employer - Board satisfied Employer's demand of money from Employee and his parents arising from allegedly faulty work or damage caused by Employee was contrary to section 19(2)(5) of Employment Standards Regulation, Man. R. 6/2007 - Substantive Order - 175/11/ESC - May 25, 2012 - Sterling O & G International.

Overtime - Rate of Pay - Employment Standards Division ordered Employer to pay wages in lieu of notice but determined no overtime wages were owed - Employee, hired as manager of one of Employer's locations, appealed Order regarding overtime - Employer submitted Employee would be working 50-hour week, and paid 40 hours at \$15 per hour, and 10 hours at time and a half - Employer referred to "rounding off" resulting sum to \$1,500 every two weeks - Board found Employer's explanation implausible and arithmetically flawed - Payroll Register noted Employee paid \$1,500 bi-weekly at hourly rate of \$18.75 - Board rejected Employer's contention that Employee's remuneration included at least 10 hours of overtime per week - In addition, Employer submitted Employee was performing management functions primarily, and exemption in section 2(4)(a) of *The Employment Standards Code* with respect to overtime applied - Board noted mere supervision of other employees not determinative of managerial status - Absence of evidence that Employee met with senior managerial personnel about issues such as hiring and firing practices, human resource policies, long term business planning, budgeting or marketing - Employee was not manager of all business conducted from his work location as another individual was designated as manager of tire and brake store which operated from same location - Board accepted when business conducted from several locations, person may perform management functions primarily only at one location, but may still fall within exception in section 2(4)(a) of the *Code* - Board satisfied Employer had not established Employee performed management functions primarily - Employee entitled to receive \$1,500 wages in lieu of notice and \$8,325 overtime wages - Substantive Order - 210/11/ESC - July 11, 2012 - Brousseau Bros. Ltd. t/a Super Lube.

Commissions - Calculation - Employer and Employee appeal Order to pay \$95.68 in wages owing - Employer asserted no commissions were owed - Employee asserted \$324 in commissions and bonuses were owing - Board determined Employee entitled to receive \$324 for commissions and bonuses plus \$12.95 in vacation wages - Board took into account commissions Employee earned during two pay periods immediately preceding two pay periods at issue; admitted volume of business; and that amounts for commissions were posted on bulletin board at workplace by Manager/Supervisor at or near end of each pay period - Board accepted purpose of postings were to advise employees of commission earnings - Employer's Appeal dismissed and Employee's Appeal allowed - Substantive Order - 89/12/ESC - August 2, 2012 - 4354311 Manitoba Limited.

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Overtime - Rate of Pay - Employer appealed Order to pay Employee \$4,506 for wages owing - Board satisfied Employee was hired as Construction Worker within the meaning of Part 3 of Industrial, Commercial, and Institutional (ICI) Schedule to *The Construction Industry Wages Act (CIWA)* - Parties had agreed to hourly rate of \$15 - Employee, based on experience and hours worked for Employer not entitled to a top rate of \$20.89 for a General Construction Labourer under Part II of the ICI Schedule as no evidence Employee completed necessary hours as Trainee 1 and Trainee 2 in the General Construction Labourer classification - As work performed fell within ICI Sector, Employee entitled to overtime after 10 hours per day or 40 hours per week - Employment agreement parties signed that Employee to be paid for hours worked at his regular rate and overtime hours to be banked at regular hours unenforceable, as provisions contrary to Sections 14(1) and 14(2) of the CIWA - Employee entitled to \$1,348.65 in wages - Appeal allowed in part - Substantive Order - 83/12/ESC - August 10, 2012 - Toomey Construction.

Unauthorized deductions - Employer not entitled to deduct \$40 from wages owing for damages Employee allegedly caused to skid steer as deduction of that nature prohibited by section 19(2)(5) of *Employment Standards Regulation* - Substantive Order- 83/12/ESC - August 10, 2012 - Toomey Construction.

Overtime - Rate of Pay - Employee appealed Dismissal Order alleging that overtime wages were not paid upon termination of employment - Board concluded Employer varied and adjusted Employee's rate of pay for regular hours downward, when overtime was worked, so that rate of pay for all hours worked averaged \$15 per hour - Manner of payment did not comply with section 17(1) of *The Employment Standards Code* - Any confusion or ambiguity with respect to manner Employee to be paid was responsibility of Employer, given lack of documentation evidencing agreement - Employee entitled to receive additional wage payments with respect to overtime hours which he worked, but for which he was not paid, at the rate of 150% of his regular wage rate - Appeal allowed - Substantive Order - 143/12/ESC - October 22, 2012 - A.B. Transit t/a Complete Car.

Breaks - Employee appealed Dismissal Order alleging that breaks were not provided as required by subsections 50(1) and 50(2) of *The Employment Standards Code* - Based on testimony of Employer and another driver, Board satisfied that drivers, including Employee, were given flexibility when to take breaks and were encouraged to take breaks and were not expected or required to adhere to times outlined on daily run sheets - Claim for wages for breaks not taken dismissed - Substantive Order - 143/12/ESC - October 22, 2012 - A.B. Transit t/a Complete Car.

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Entitlement - Travel Time - Employee, who was Handi-Transit driver, appealed Dismissal Order alleging he was not paid for time spent traveling from garage to first pickup and for travel time spent returning to garage at end of each shift - Run sheets introduced as evidence provided only sketchy information as to travel time to various locations and did not establish Employee spent travel time returning to garage - Moreover, Employer made scheduling allowances for Employee's activities as a taxi driver, including periodically sending a driver with taxi driver's license, in Employee's taxi, to Employee's last drop off destination in order that Employee's taxi would be immediately available to him - Board unable to conclude Employee entitled to additional wage payments in relation to travel time - Claim for wages for travel time dismissed - Substantive Order - 143/12/ESC - October 22, 2012 - A.B. Transit t/a Complete Car.

Overtime - Exclusion - Employer ordered to pay Employee \$7,252.48 for wages owing - Employer appealed Order arguing Employee was not entitled to overtime as he was finance manager, was in control of his own hours, and made twice Manitoba Industrial Wage - Board satisfied Employee, by his own account, had ability to and did organize his schedule, and had substantial control over his hours of work - Further, Employee's annual regular wage was more than two times Manitoba Industrial Average Wage - As both requirements under section 2(4)(b) of *The Employment Standards Code* were met, standard hours of work and overtime provisions of *Code* did not apply to Employee - Substantive Order - 120/11/ESC - November 13, 2012 - Car World Inc. t/a Car World Superstore.

Entitlement - Employer ordered to pay Employee \$7,252.48 for wages owing - Employee appealed Order on basis he was also entitled to wages for monthly base salary of \$5,000 - Appeal based on written contract for sales manager position which Employee no longer occupied - Contract stated Employee, as sales manager, would be paid monthly base salary of \$5000 and \$75 per all vehicles sold - When Employee became finance manager, no other written contract was entered into at that time - Board noted spreadsheets detailing commissions that Employee received as finance manager were varied and in excess of fixed commissions of \$75 per vehicle contemplated under written contract - Also, pay stubs show Employee had not been paid monthly base salary for last 2½ years of his employment - Employee failed to establish he was entitled to receive monthly base salary during applicable period of time under section 96(2)(a)(ii) of *The Employment Standards Code*, being last six months of his employment - Board satisfied Employee was paid all wages to which he was entitled - Substantive Order- 120/11/ESC - November 13, 2012 - Car World Inc. t/a Car World Superstore.

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Overtime - Calculation - Record Keeping - Employer appealed Order to pay wages submitting spreadsheet prepared by Employment Standards Division based on Employee's time records which were not correct because he claimed more hours than he actually worked - Employer noted instances on timesheet where Employee indicated he was at project site, yet he had not signed sign-in sheet required for attendance at job site and noted instances when Employee stated he was at particular job site, but he could not be located on site by Employer representative - Board determined Employee's explanations somewhat contrived, but were not entirely implausible and Employer's evidence not sufficient to discredit accuracy of Employee's evidence of hours worked during period of his employment - Substantive Order - 151/12/ESC - April 10, 2013 - KDR Design Builders (Commercial).

Overtime - Calculation - Standard Work Week Over 40 Hours - Salaried Supervisor - Employer appealed Order to pay overtime submitting Employee signed agreement to work standard work week of 40 to 48 hours and only time worked above 48 hours in a week was overtime - Employer pointed out overtime calculations in Order based on standard 40-hour work week - Board concluded phrase "standard work week of 40 to 48 hours" reasonably construed as meaning standard work week consists of any number of hours between 40 to 48 hours and only hours worked in excess of 48 hours in a week result in overtime - Held that amount determined by Employment Standards Division to be owing be reduced as Employee only entitled to overtime on hours worked in excess of 48 hours - Substantive Order - 150/12/ESC - April 10, 2013 - KDR Design Builders

Overtime - Calculation - Standard Work Week Over 40 Hours - Salaried Supervisor - Employer appealed Order to pay overtime submitting Employee signed agreement to work standard work week of 40 to 48 hours and only time worked above 48 hours in a week was overtime - Employer pointed out overtime calculations in Order based on standard 40-hour work week - Board concluded phrase "standard work week of 40 to 48 hours" reasonably construed as meaning standard work week consists of any number of hours between 40 to 48 hours and only hours worked in excess of 48 hours in a week result in overtime - Held amount determined by Employment Standards Division to be owing be revised as Employee was only entitled to overtime on hours worked in excess of 48 hours, but was entitled to receive proportionate weekly value of annual salary during weeks he worked less than 40 hours - Substantive Order - 151/12/ESC - April 10, 2013 - KDR Design Builders (Commercial).

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Overtime - Calculations - Employee disputed Dismissal Order on basis there were errors in calculation of overtime hours - Board not satisfied timecards sufficiently or reliably establish hours worked or overtime as timecards list only total hours worked each day without providing any details and were not provided to Employer during Employee's employment - Therefore, Board not convinced Employer expressly or impliedly knew of or authorized hours - GPS records do not provide accurate picture of hours worked and work performed, but may signal when Employee started and finished work - Board satisfied daily job sheets provided sufficiently detailed and reasonably accurate and reliable record of hours worked and were expressly, or at least impliedly, authorized by Employer - No evidence to back up Employer's contention that hours should be reduced to reflect one hour lunch break - Board did not accept Employee was compensated for overtime by accumulating and taking advantage of banked time as there was no written agreement with respect to banked hours or time off in lieu of wages for overtime as required under Section 18 of *The Employment Standards Code* - Board satisfied all overtime wages owed for six months prior to Employee's termination, as contemplated under Section 96(2)(a)(ii) of the *Code*, had been paid - Appeal dismissed - Substantive Order - 131/11/ESC - July 9, 2013 - D.S.I. Technical Systems.

Commission Draws - Employee appealed Order submitting that vacation pay to be paid in addition to and separate from his normal draw and commissions and Employer not entitled to deduct draws which he had received in excess of commissions earned from his vacation balance - Board, being statutory tribunal, can only deal with claim for wages, including vacation wages, in accordance with specific provisions of *The Employment Standards Code* and *Employment Standards Regulation* - Board satisfied, on balance of probabilities, that Employee paid all wages owing to him under the *Code*, including all vacation wages in respect of the last 22 months of his employment - Board did not agree with Employee's contention that Employer not entitled to deduct draws received in excess of commissions earned from vacation pay - Board satisfied that monthly draws which were paid to Employee fell within scope of deductions permitted under Rule 7(a) of Subsection 19(2) of the *Regulation* - Appeal dismissed - Substantive Order - 225/12/ESC - July 17, 2013 - Maxim Transportation Services Inc. t/a Maxim Truck & Trailer.

Overtime - Managerial Exclusion - Employer appealed Order to pay Employee overtime wages arguing he was General Manager and his salary took into account overtime - Board satisfied Employer failed to establish Employee performed management functions primarily - Board not satisfied Employee had effective or independent authority to hire or dismiss anyone - Employee was responsible for preparing work schedules, but with limitations and subject to review by Regional Manager - Employee did not have authority to schedule or authorize overtime, although he could give employees time off in lieu - Employee had some control

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over marketing, purchasing and collections - Little or no evidence was introduced to establish whether Employee performed functions considered indicative of managerial role such as promotion or demotion of employees, authorizing absences or leaves of absence, completing performance appraisals, engaging in policy making, or establishing budgets - Board not convinced there was agreement salary was inclusive of overtime worked - In any event, Board consistently held such agreement inconsistent with, and no defence to, a claim under *The Employment Standards Code* - Board found Employer had not met onus of establishing, on balance of probabilities, Employee performed management functions primarily within meaning of section 2(4)(a) of the *Code* - Employee entitled to claim overtime - Substantive Order - 140/12/ESC - October 4, 2013 - 1405383 Alberta Ltd. t/a Aarons Furniture.

Overtime - Calculation - Record Keeping - Employer and Employee appealed Order to pay Employee overtime wages - Employer argued Employee was General Manager and his salary took into account overtime - At very least, Order should be reduced to take into account meal breaks which Employee would have been expected to take - With respect to Employer's assertion it did not keep track of Employee's hours because his salary took into account overtime, Employer had obligation to keep track of hours worked as per section 135 of *The Employment Standards Code* - Board found Employer had not met onus of establishing, on balance of probabilities, Employee performed management functions primarily within meaning of section 2(4)(a) of the *Code* - Employee entitled to claim overtime - Employee appealed Order for overtime wages arguing he was entitled to additional overtime wages based on his documented hours of work for six-month period in question - Board not convinced Employee's daytimer accurately or reliably established hours he worked as pages only show start and end times without providing details or any record of time taken for meal breaks - Daytimer not provided to Employer during course of Employee's employment - Board not satisfied that Employer knew of or authorized those hours - Board satisfied, on balance of probabilities, that Employee was expected to and would have taken one hour break during work day - Statement of Adjustment adjusted to take into account unpaid meal break of one hour on every day Employee worked, except those where he worked less than six hours, and to include time in respect of three-day conference Employee attended - Substantive Order - 140/12/ESC - October 4, 2013 - 1405383 Alberta Ltd. t/a Aarons Furniture.

Vacation Pay - Bonus - Employer disputed Order to pay Employee vacation wages on premium earnings - Relying on section 40 of *The Employment Standards Code*, Employer characterized premium earnings (incentives) as bonus and asserted vacation pay not payable on bonus - Board held incentive payments were a "commission" as payments were based on gross value of sales made or number of vehicles sold - Wage plan could not be characterized as "bonus" which is payable at Employer's discretion on *ex gratia* basis - Section 40 not a "limiting" provision, but rather is "confirmatory" in nature, its purpose to ensure employer cannot reduce or offset entitlement to vacation or vacation pay by reason of any bonus or other pecuniary benefit provided - Fact Employee signed Pay Plan which contained

Sec. 23.0-E35

provision that vacation pay was based on base salary and not “incentives” cannot be relied upon - As per sections 3(3) and 4(1) of the *Code*, agreement to work for less than applicable minimum wage, or under any term or condition that is contrary to the *Code* or less beneficial to employee than what is required by the *Code* not a defence in proceeding or prosecution under this *Code* - Appeal dismissed - Substantive Order - 41/13/ESC - October 11, 2013 - Parkside Ford Lincoln Ltd.

Unauthorized Deductions - Employer disputed Order to repay for improper deductions made to recover cost of damages, and speeding and parking tickets issued to vehicles Employee provided to individuals for test drive - Part of amount was paid by deducting vacation pay and Employee paid remaining amount via debit card - Board satisfied Employee was authorized to release vehicles to potential customers and he was not personally responsible for damage done to vehicles nor were tickets issued to him personally - Rule 1 of section 19(2) of the *Employment Standards Regulation* not applicable as deduction cannot be characterized as Employer having provided “direct benefit” to Employee, but rather was Employer imposing liability on him - Employee paying via debit constituted deduction from wages - Employee did not voluntarily consent to deduction which would be of direct benefit to himself and further, Employer, in effect, required Employee to pay amount to cover damages contrary to rule 19(2)5 - Rule 19(2)8 did not apply because no offence committed by Employee -To extent Employee agreed to deduction or payment, sections 3(3) and 4(1) of *The Employment Standards Code* applied which provided the *Code* prevails over agreement that would provide employee wages that are less than provided under the *Code* - Appeal dismissed - Substantive Order - 41/13/ESC - October 11, 2013 - Parkside Ford Lincoln Ltd.

Relevance - Reporting to Work - Employee appealed Dismissal Order that determined after hour phone calls did not fall under section 51 of *The Employment Standards Code* and his claim for wages for reporting to work was dismissed - Board not satisfied evidence established Appellant worked authorized overtime for which he was entitled to further compensation - Evidence of time worked was little more than listing of telephone calls and insufficient documentation or explanation was provided to satisfy Board, on balance of probabilities, Appellant was entitled to any further wages - He did not have records to identify purpose or meaningful details of specific calls - Appeal dismissed - Substantive Order - 80/13/ESC - December 9, 2013 - Duffy’s Taxi (1996) Ltd.

Overtime - Management - Employee, who was General Manager (G.M.), appealed Dismissal Order that determined his claim for overtime wages be dismissed as per section 2(4) of *The Employment Standards Code* as he performed management functions primarily - Board found G.M. responsible for labour relations activities including supervising, hiring, scheduling, promoting, disciplining and terminating employees - While he consulted with members of Board of Directors in performance of his duties, G.M. was responsible for overall management of enterprise - Board satisfied G.M. came within definition of “employer” set out in the *Code* as he had control or direction of, or directly or indirectly was responsible for employment of employees - Held G.M. not entitled to amounts sought in his complaint under the *Code* - Appeal dismissed - Substantive Order - 80/13/ESC - December 9, 2013 - Duffy’s Taxi (1996) Ltd.

Sec. 23.0-E36

Overtime - Entitlement - Calculation - Employer disputed Order to pay wages asserting Employee's claim, which was primarily for overtime wages, was complete fabrication - Board concluded, as Employee alleged, that he made agreement with co-owner that he would perform collections work during regular hours and perform extra IT work outside regular working hours - However, Board concluded Employee's claim was inflated and not supported by any conclusive documentation - Employee did prepare spreadsheet after he filed his claim, but acknowledged it was "guesstimate" - Board made adjustments to reduce hours claimed on certain specific days where alarm system open/close signal history report did not support his claim - Board rejected Employee's claim that he was denied lunch break because evidence as to what co-owner specifically said with respect to Employee's lunch break was not established with sufficient specificity - Also, Board also noted arithmetic error in Employment Standard calculations with respect to number of overtime hours worked during one of the weeks - Substantive Order - 206/13/ESC - January 29, 2014 - City Collections and Bailiff Service.

Calculation - Employer disputed Order to pay Employee overtime and vacation wages as calculated on Statement of Adjustment - Board agreed with Employer's submission that overtime hours were calculated using 47.57 for total weeks worked, but it should be 48 weeks - There was nothing to indicate where 47.57 came from - Board satisfied, on balance of probabilities, that agreement between Employer and Employee was that Employee would be entitled to annual vacation of three weeks, and would be increased to four weeks - Statement of Adjustment based on 8% of wages up to March 18, 2011 pay period, and 10% of his wages thereafter - Board agreed with Employer that vacation allowance should be calculated at 6% of wages earned to April 2, 2011, and 8% thereafter - Board satisfied no deduction to be made for 11.5 days which Employer listed, because list compiled after Employee had left his employment and Employer did not file documentation to substantiate or support its assertion that Employee was absent on those days - Appeal allowed in part - Substantive Order - 288/12/ESC - March 3, 2014 - AAR-Auto List of Canada (1999) Inc. t/a Auto List Of Canada.

WORKING CONDITIONS

Forfeiture - Employee provided intention to work out notice period, but changes to terms and conditions of employment warrant not working out full notice period - Employee entitled to receive accrued wages, but not wages in lieu of notice - Declaration, full Reasons not issued - 47/98/ESA - April 14, 1998 - Telespectrum Worldwide Inc