Citation: Jolicoeur v Winnipeg Environmental Remediations Inc, 2025 MBCA 41
Date: 20250507
Docket: AI25-30-10192

IN THE COURT OF APPEAL OF MANITOBA

***B E T W E E N**:*

	)	***S. W. Cannon***
	)	*for the Applicant*
PATRICK JOLICOEUR	)	
	)	***T. D. Edkins***
	)	*for the Manitoba Labour*
(Employee) Respondent	)	*Board*
	)	
- and -	)	***No appearance***
	)	*for the Respondent*
WINNIPEG ENVIRONMENTAL REMEDIATIONS INC.	)	
	)	*Chambers motion heard and*
	)	*Decision pronounced:*
	)	***April 24, 2025***
(Employer) Applicant	)	
	)	*Written reasons:*
	)	***May 7, 2025***

CAMERON JA

[1] This is an application by the employer for leave to appeal a decision of the Manitoba Labour Board (the Board) allowing the appeal of the employee from the decision of the Director of Employment Standards (the director) and ordering that the employer pay $9,041.03, less statutory deductions, in vacation wages owing to the employee.

[2] The Board filed a written brief and provided oral submissions at the hearing pursuant to section 131 of *The Employment Standards Code*, CCSM c E110 [the *Code*].

[3] At the conclusion of the hearing of the motion, I denied the application for leave to appeal with brief reasons to follow. These are those reasons.

Background

[4] The employee had been employed by the employer from approximately December 2015 until the termination of his employment on July 26, 2022.

[5] In August 2022, the employee filed a claim with the Employment Standards Branch (the ESB) with respect to unpaid wages pursuant to section 92(1) of the *Code*.

[6] On May 17, 2023, the ESB dismissed the employee's claim and, on May 31, 2023, the employee filed correspondence with the ESB challenging the decision with regard to vacation wages only. The ESB referred the matter to the Board on July 6, 2023.

The Decision of the Board

[7] The hearing before the Board commenced on February 28, 2024. On that date, it was adjourned because the employer's instructing witness was in the hospital. The matter was further adjourned for an unrelated reason and was scheduled to resume on December 12, 2024. At that time, despite the Board granting a short adjournment to see if someone could appear on behalf of the employer virtually on that date, counsel for the employer advised that he had no instructing witness and no one would be present to testify on behalf of the employer.

[8] In its reasons, the Board succinctly explained the basis on which it determined that the employer owed vacation pay to the employee and the calculation it relied on. It stated:

> The [e]mployee submits the vacation pay was not properly calculated. He says there is $9,041.03 owing as vacation wages.
>
> The [e]mployee provided the payroll records that he testified he obtained while he still had access to the [e]mployer's system. The [e]mployer tendered payroll records that were inconsistent with those the [e]mployee was given while he had access. There were considerable differences in the records the [e]mployer provided. The Board asked the [e]mployer to have a witness attend the hearing who could speak to the differences between the records. Ultimately the [e]mployer did not produce any witnesses to explain the differences between the documents. *As such the Board has determined the employee was a credible witness and the records he provided are reliable*.
>
> The [e]mployee testified that the payroll records are done on Quickbooks. Emails are sent to employees by secure email and are password protected. He indicated it would be impossible for an employee to modify the payroll records. He testified the amount of vacation earned is clear on the paystubs submitted by the [e]mployer. He walked through the calculations for the 22-month period.
>
> The testimony and the documents provided demonstrate that at the *start of 2021 the [e]mployee had a vacation balance of $5,764.10* available to him.
>
> Between then and the end of employment he accrued additional vacation wages of $8,180.78 for a total vacation wage accrual of $13,944.88.
>
> In the period in question, he received vacation wage payments of $4,903.85.

> Therefore, the remaining balance owing to the [e]mployee is $9,041.03.
>
> [emphasis added]

Leave to Appeal

[9] The appeal of the Board's decision is governed by section 130(2) of the *Code*. An appeal may only be taken on a question of law or jurisdiction and requires leave by a judge of this Court.

[10] As explained by Pfuetzner JA in *Levin v Manitoba Public Insurance Corporation*, 2021 MBCA 16 at para 2 (in chambers):

> Such questions must not require the Court to assess or analyse conflicting factual issues. Even if the applicant identifies a question of law or jurisdiction, leave will only be granted if the question is one of sufficient importance to merit the attention of the Court. Finally, there must be an arguable case of substance; that is, one with a reasonable prospect of success.

[11] The court may also consider whether denial of leave would result in an injustice (see *Rolling River School Division v Rolling River Teachers' Association of the Manitoba Teachers' Society*, 2009 MBCA 38 at para 13).

[12] In general, leave will not be granted where an applicant raises a question of law regarding an issue that was never before the administrative tribunal (see *Gardentree Village Inc v Winnipeg (City) Assessor*, 2008 MBCA 117 at para 33 [*Gardentree*]).

Proposed Grounds of Appeal

[13] The employer identified three proposed grounds of appeal. I have slightly rephrased them as:

1) the Board erred in law in permitting the employee to refer the order outside of the seven-day period provided in section 110(1.1)(b) of the *Code*;

2) the Board erred in refusing to consider the evidence of the employer regarding the amount owed; and

3) the Board calculated the amount of vacation pay owing beyond that which is provided for in the *Code*.

Discussion and Decision

1. The Board Erred in Permitting the Employee to Refer the Order Outside of the Seven-Day Period Provided in Section 110(1.1)(b) of the Code

[14] The employer's argument is grounded in sections 110(1) and 110(1.1)(b) of the *Code*, which state:

Person named in order may request referral **110(1)** A person named in an order made under this Part in respect of a complaint relating to unpaid wages may request *the director to refer the matter to the Board*, and the director shall, subject to	**Demande de renvoi** **110(1)** La personne nommée dans un ordre donné sous le régime de la présente partie à l'égard d'une plainte ayant trait à un salaire impayé peut demander *au directeur de renvoyer l'affaire à la Commission*, auquel cas celui-

sections 109 and 111, refer the matter.	ci se plie à la demande, sous réserve des articles 109 et 111.
When request must be made **110(1.1)** A request under subsection (1) must be filed *with the director*, along with written reasons for the request, . . . (b) within seven days after the order is served on the person, in the case of any other order; or within any further time that the director may allow.	**Dépôt de la demande** **110(1.1)** La demande visée au paragraphe (1) est déposée *auprès du directeur*, tout en étant accompagnée de motifs écrits . . . soit dans les 7 jours suivant la date à laquelle elle reçoit signification de tout autre ordre, soit dans le délai supplémentaire que le directeur accorde.

[emphasis added]

[15] The employer submits that the director erred in law when it exercised its discretion to refer the matter to the Board and that the Board erred in law when it accepted the referral on the basis that the request was beyond the seven days provided for in section 110(1.1)(b).

[16] I agree with the argument of the Board that this does not raise a question of law. The director referred the matter to the Board based on a letter submitted by the employee, acknowledging that the seven days had passed but requesting that the matter be heard, thereby triggering the exercise of discretion by the director. This constitutes a question of fact or, at best, one of mixed fact and law.

[17] Regarding the argument that the Board erred in hearing the matter because the referral was requested after the seven-day period, I agree with the Board that nothing in sections 110(1) or 110(1.1)(b) provides the Board with the discretion to determine whether a request for a referral was within the time

frame or whether a referral ought to have been granted. The position advanced by the employer in this regard does not raise an arguable case of substance and has no reasonable prospect of success.

2. The Board Erred in Refusing to Consider the Evidence of the Employer Regarding the Amount Owed

[18] At the hearing of this matter, I was advised that, while the employer had filed affidavit evidence asserting the amount of vacation pay it claimed was owing, the Board refused to accept that evidence when the employer failed to call a witness to explain the discrepancy between its evidence and the evidence the employee stated had been earlier generated by the employer.

[19] The employer now argues that the failure to accept its evidence constituted a breach of procedural fairness and a question of law.

[20] The determination of what evidence the Board will consider is within its discretion. In my view, given the circumstances of this case and the refusal of the employer to justify the discrepancies in its own pay records, despite having been given ample notice and opportunity to do so by the Board, no issue of procedural fairness nor any other issue of law or jurisdiction is raised.

3. The Board Calculated the Amount of Vacation Pay Owing Beyond That Which Is Provided for in the Code

[21] The employer argues that the Board erred in its application of section 96(2)(b)(ii) of the *Code*, which states:

Maximum wages recoverable by order **96(2)** The wages that may be ordered to be paid under clause (1)(a) are limited to	**Salaire maximal recouvrable** **96(2)** Le salaire dont le versement peut être ordonné en vertu de l'alinéa (1)a) se limite :
(b) unpaid *vacation allowance that became due and payable within*, and any unpaid wages in respect of general holidays that occurred within, . . . (ii) if the employment was terminated before the complaint was filed, *the last 22 months of that employment*.	b) d'une part, *à l'indemnité de congé annuel impayée qui est devenue due et payable dans* . . . en cas de cessation d'emploi avant le dépôt de celle-ci, *dans les 22 derniers mois d'emploi et,* d'autre part, au salaire impayé à l'égard des jours fériés survenus au cours de la même période.

[emphasis added]

[22] The employer argues that the amount of $5,764.10 of unpaid vacation allowance owing at the start of 2021 was wrongly calculated by the Board. It submits that counting twenty-two months back from the time that the employee's employment terminated results in him only being owed vacation pay for the months of October, November and December of 2020, which the employer calculates to be $692.28.

[23] At the hearing of this matter, I asked counsel for the employer whether this argument was raised before the Board, as it is not apparent from the Board's reasons that the amount the employer now claims was owing up until the start of 2021 was at issue. Counsel for the employer candidly advised that the only argument that he can recall being made was that the employer

only owed unpaid vacation allowance for twenty-two months prior to the termination of employment in July 2022. He confirmed that the calculation that he advanced in this proceeding in asserting that the amount of vacation allowance owing was $692.28 was not before the Board.

[24] At the hearing before the Board, the employee testified that the figure of $5,764.10 that was asserted to be owing at the start of 2021 was based on pay stubs that he had been able to obtain before his access to the employer's records was discontinued. Due to the refusal of the employer to provide evidence to substantiate its calculations, there was no other evidence. The Board found the employee to be credible and accepted the amount he advanced. That is undeniably a question of fact that would end the matter.

[25] Nonetheless, although not raised by the parties, I would note in passing that the interpretation of the legislation advanced by the employer is not as evident as it is assumed. Rather, the determination of the issue would involve the consideration of whether the calculation of the amount owing pursuant to section 96(2)(b)(ii) is inclusive of amounts that were *due* at the commencement of the twenty-two months or whether the calculation only applies to amounts *accrued* during the twenty-two months with any unpaid amount up to that time to be forfeited. No argument was made in this regard and, given the facts of this case, it would not be appropriate to be raised for the first time on appeal (see *Gardentree* at para 33; *Dorge v Cummine*, 2004 MBCA 86).

[26] For the above reasons, I denied the application for leave to appeal. The Board did not seek costs and the employee did not attend the proceedings or file any materials. Therefore, I would not order costs.

Cameron JA