

2707-9888

**COMPLAINT OF UNJUST DISMISSAL**

IN THE MATTER OF:

Complaint of Alleged Unjust Dismissal under Division XIV -  
Part III of the *Canada Labour Code*

BETWEEN:

**GARY MALLARD,**

Employee,

- and -

**PRAIRIE FLOUR MILLS LTD.,**  
(Elie, Manitoba),

Employer.

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**A W A R D**

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Adjudicator:

Bryan P. Schwartz  
Pitblado LLP  
2500 - 360 Main Street  
Winnipeg, MB R3C 4H6

Employee:

Gary Mallard (Self Represented)  
P.O. Box 291  
Elie, MB R0H 0H0

Employer:

Prairie Flour Milles Ltd.  
11 Janzen Road  
P.O. Box 301  
Elie, MB R0H 0H0

Represented by: Clayton Manness,  
President/General Manager

Date of Hearing:

October 8, 2014

HRSDC File No.

YM2707-9888

**EDSC, TRAVAIL  
ESDC, LABOUR**

**NOV 19 2014**

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SFMC  
FMCS

Employer.

**AWARD**

**Introduction**

Gary Mallard ("Mr. Mallard") worked as a maintenance and repair worker at Prairie Flour Mills Ltd. ("the Employer") for fifteen months prior to being dismissed on December 18, 2013. In these proceedings, Mr. Mallard contends that the dismissal was unjust. I was appointed under Part III of the *Canada Labour Code* as the Adjudicator.

**The Hearing**

Although the parting of ways was a stressful event for both Mr. Mallard and the Employer's management team, the parties conducted themselves at the hearing in a very cooperative manner that greatly expedited the hearing.

Prior to the hearing both sides had prepared written accounts detailing their side of the events with documentation attached. Accounts including witness statements by Mr. Mallard, and a joint account of events by Clayton Manness ("Mr. Manness"), the President / General Manager, Dr. Kulwinder Kaur Sandhu ("Dr. Sandhu"), Assistant General Manager, and Ms. Sandi Penner

("Ms. Penner"), Office Manager. Mr. Mallard and the three members of the management team testified at the hearing, affirming that they would tell the truth. Each individual witness affirmed that to the extent that their written account concerned matters that the individual had directly witnessed, it stood as the individual's direct testimony. Mr. Mallard cross-examined the three members of the management team. The Employer was invited to cross-examine Mr. Mallard but elected not to do so.

The use of written statements to stand as direct testimony, with cross-examination at the hearing to follow, can be a highly efficient means of proceeding. With both parties agreeing to this procedure, the process worked well in giving both sides a fair chance to present evidence that was carefully considered and to test each other's evidence through cross-examination. Furthermore, in the absence of a transcript, the documents can provide a large part of a record of the evidence. In view of that documentation, the fact that I am able to conclude that the witnesses at the hearing did their best to present their evidence honestly and with precision, and that there was actually much common or uncontested grounds, I will now present my distilled findings rather than recount all the evidentiary details that led me to them.

### **The Facts**

I accept Mr. Manness' description of the general nature and circumstances of the Employer's business. He explained that the Employer is in a highly competitive business, and has to be highly efficient to survive. Nonetheless, it does its best to be fair to employees. The Employer pays above average wages. Mr. Manness is not quick to issue pink slips, and has only dismissed a small number of employees over the past several years. The workplace is not unionized, and the Employer is not always expert in the details of employment law, sometimes has to learn from experience, and occasionally inadvertently "crosses the line".

By all accounts Mr. Mallard was a very skilled employee. He was adept at problem solving when technical issues, particularly of a mechanical nature, arose. He had run his own business before coming to the Employer, and Mr. Manness was so impressed with Mr. Mallard that he hired him without the usual probationary period.

Prior to the incident that led to Mr. Mallard's dismissal (the "Incident"), there were some issues from Mr. Manness' perspective about Mr. Mallard's occasional displays of temper and use of profane language. Mr. Mallard's view was that from his previous workplace experiences, the use of rough language was normal. Mr. Manness' view was that in light of the nature of the

ownership, there was less tolerance for such language at this workplace. Mr. Manness had on several occasions warned Mr. Mallard – not in a threatening way, but in a "constructive" and "father-son" way about displays of temper and language. There had been no formal warnings or other disciplinary measures, but Mr. Manness thought he had indicated that if the issue of profane language was not resolved that eventually "some decisions would have to be made".

Mr. Mallard considered that prior to the Incident; he had shown a good ability to get along with fellow employees. In fact, he had been forbearing of bad behaviour by co-workers and thought management had not done enough to address these situations. Mr. Mallard testified, and I accept, that on one or more occasions he was either physically shoved by fellow employees or spoken to rudely, and responded with restraint. At the same time, I accept the Employer's testimony that it was not aware of all the incidents in which Mr. Mallard was at the receiving end of upsetting treatment. I further accept that in respect of one particular episode which did come the Employer's attention, management did not pursue the matter only because Mr. Mallard himself indicated that he had reconciled with the other employee and there was no need for the Employer to look into the matter further.

In the period leading up to the Incident, Mr. Mallard's personal situation was very stressful. His wife had almost died from heart problems and a reaction to anaesthetic while giving birth to his second child. Mr. Mallard himself had been informed that initial test results indicated he might have a very serious health condition. In light of the need to look after his children and his wife's health situation, Mr. Mallard had sought a flexible work schedule. The Employer had made that accommodation. The arrangement turned out to assist the Employer in ensuring that maintenance was effectively carried out at their 24-hour-a-day operation. Some issues eventually arose about Mr. Mallard's supplying details of the hours he actually worked, but this point had no significant bearing on his dismissal.

When Mr. Mallard came to work on December 16, 2013, a fellow employee, in the presence of other workers, told Mr. Mallard that insulting remarks had been made of Mr. Mallard by both Mr. Manness and Dr. Sandhu. Each of these two testified and I accept, that however their remarks were reported to Mr. Mallard by another employee they had not in fact made insulting remarks about Mr. Mallard. The inaccurate report about the remarks made by the other employee, however, caused Mr. Mallard to become highly upset.

Mr. Mallard made a series of calls and texts to Dr. Sandhu complaining about the remarks. Dr. Sandhu found the series of calls and texts, and the fact they were made in the evening, unusual and concerning. She suggested to Mr. Mallard that they meet in person the next day. At the meeting, Mr. Mallard exhibited anger in the way he expressed himself. He used the "F word". Dr. Sandhu said she could not understand what Mr. Mallard was concerned about. Mr. Mallard thought she was being evasive and was playing games. Dr. Sandhu considered Mr. Mallard's use of profanity in speaking with a manager to be a potentially dismissible offence. Dr. Sandhu called Ms. Penner into the meeting as she was concerned about Mr. Mallard's state of agitation. Near the end of the meeting, Mr. Mallard very firmly put down on Dr. Sandhu's desk a company cell phone he was returning to her for unrelated reasons.

My finding is that Dr. Sandhu was proceeding in a sincere manner and Mr. Mallard misinterpreted her conduct in light of his agitation. Mr. Mallard went back to work at the plant and later in the day apologized to Dr. Sandhu for the late evening phone calls and his language at the meeting.

On December 18, 2013, Mr. Mallard met with Mr. Manness. Mr. Manness dismissed Mr. Mallard. Mr. Manness did, however, offer a severance package – Mr. Mallard recalls eight weeks' pay, although Mr. Manness could not recall precisely and eventually provided five weeks' pay – in addition Mr. Manness offered to Mr. Mallard that he might be called in from time to time to deal with specific problems. I accept the testimony of Mr. Manness that he was trying to be generous to Mr. Mallard in light of Mr. Mallard's family situation, and that the offer of further work from time to time was aimed to "ease the transition".

As Mr. Mallard attempted to obtain documentation concerning his Record of Employment, the parties came to disagree about whether the dismissal was for cause or not. Mr. Manness testified that during post Incident discussions, he made it clear to Mr. Mallard that from his perspective the dismissal was for cause, and I accept his testimony.

Mr. Manness testified that the Incident itself was not sufficient to be grounds for dismissal, but that in light of some of Mr. Mallard's earlier displays of temper or profane language, it was the appropriate decision.

In view of the fact that Mr. Mallard had no employment contract, Mr. Manness could have dismissed him at any time without cause, provided he did not assert cause and paid appropriate severance. The issue here is whether just cause existed. The onus in this proceeding is on the

Employer to demonstrate that there was just cause for dismissal. I find that the Employer has not met that onus.

Mr. Mallard was indeed highly upset when he made the calls, and at the meeting with Dr. Sandhu he did use inappropriate language with her. But there were extenuating circumstances, including Mr. Mallard's very serious family and personal health stresses in his personal life, and the sudden report of highly insulting conduct by management that he received from a fellow employee at the beginning of the Incident in front of other workers. As noted above, Mr. Mallard presented evidence that established that he had dealt in a restrained manner with provocations by fellow employees on earlier occasions, including one or two in which he was physically pushed. He had tried to overcome the incidents and get along with the coworkers involved with them.

It is true that that Mr. Mallard had also in some previous incidents used profane language or displayed temper - albeit it was not shown that these previous incidents involved senior managers - and that Mr. Manness had expressed concern to Mr. Mallard about this behaviour. I cannot find, however, that the communications from Mr. Manness about the use of language or displays of temper put Mr. Mallard on reasonable notice that any further displays of agitation or raw language would result in dismissal rather than triggering some lesser measure of discipline, such as a warning, reprimand or even suspension. It has not been demonstrated that Mr. Mallard has shown sufficient unresponsiveness to Employer feedback in respect of language or displays of temper that the ultimate disciplinary step of dismissal was warranted. The principle of progressive discipline generally requires that an employer use an escalating series of disciplinary measures to express its expectations and to provide the employee a reasonable opportunity to show that the employee can bring his workplace conduct into conformity with those expectations. I also have taken into account that Mr. Mallard later apologized to Dr. Sandhu, and that Mr. Manness himself considered that it might be safe and productive for Mr. Mallard to at least occasionally work at the plant.

As noted, Mr. Mallard was only employed for fifteen months with the Employer prior to his dismissal. Five weeks' severance would have been appropriate if the dismissal had been without cause. I fully accept that Mr. Manness acted entirely in good faith, was acting pursuant to his own judgment about the best interests of the owners, and was sincerely trying to soften the blow for Mr. Mallard given that judgment. There was no attempt at all to humiliate Mr. Mallard in front of other employees or in the eyes of the community. Mr. Manness would not


agree in post-dismissal discussions to characterize the finding as "without cause" because, to Mr. Manness' credit, Mr. Maness sincerely did not believe that it was without cause. Mr. Manness had a laudable practice of only providing to government agencies characterizations of termination that he honestly believed were accurate.

Conclusion

I conclude that Mr. Mallard was unjustly dismissed. This finding might remove a cloud over Mr. Mallard's ability to find other employment.

Mr. Mallard sought as compensation for unjust dismissal the equivalent of fourteen months of wages and benefits and a further fourteen months wages and benefits as compensation for emotional distress and loss of reputation. He did not seek reinstatement. Mr. Manness stated that such an award would wipe out months of profits for the company. I am not sure that economic hardship to the Employer is a reason to reduce an order of compensation that would otherwise be appropriate. But I do not need to decide that point. Even leaving that issue aside, in all the circumstances, I find the payment of five weeks' severance is sufficient compensation and so will make no order for financial compensation.

DATED at the City of Winnipeg, in Manitoba, the 19<sup>th</sup> day of November, 2014.

  
BRYAN P. SCHWARTZ - Adjudicator