KARI METZ and KL LEASING INC., Appellants v JOHANNES VAN DEN BERG and DIRECTOR OF EMPLOYMENT STANDARDS, Respondents

LRB File No. 187-20; April 28, 2021
Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For Kari Metz and KL Leasing Inc:	Kari Metz and Curtis Metz
For Johannes van den Berg:	Self-represented
For Director of Employment Standards:	Steven Wang

Appeal from wage assessment adjudication dismissed – Application to admit fresh evidence dismissed – Appellants failed to establish that it met *Palmer* test for admission.

Appeal from wage assessment adjudication dismissed – Termination of employment without notice – Appellants failed to establish error of law in Adjudicator's decision.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: Johannes van den Berg ["Employee"] was terminated from his employment with KL Leasing Inc. ["Employer"] on October 25, 2019. He made a complaint to the Director of Employment Standards, who issued a Wage Assessment dated April 8, 2020 directing the Employer and Keri Lynn Metz, a Director of the Employer, to pay $2,115.40 in unpaid wages to the Employee.[1] The Employer and Metz [jointly "Appellants"] appealed that Wage Assessment. On November 30, 2020, an Adjudicator selected pursuant to section 4-3 of *The Saskatchewan Employment Act* ["Act"] dismissed their appeal.[2] They now appeal to the Board.

[1] There is a typographical error in the first paragraph of the Adjudicator's Decision, in which she indicates that the amount the Appellants were directed to pay in the Wage Assessment was $2,715.40. The Wage Assessment actually directed them to pay $2,115.40.

[2] *KL Leasing Inc. and Kari Lynn Metz, as Director of KL Leasing Inc. v Johan van den Berg and the Director of Employment Standards*, November 30, 2020, LRB File No. 072-20.

[2] The Adjudicator found that the issue to be determined was whether the Employer had just cause to terminate the Employee without notice. The Adjudicator held that the Appellants did not meet the onus of proving just cause.

Argument on behalf of Appellants:

[3] The Appellants argue first that they should be allowed to provide fresh evidence to the Board that was not provided to the Adjudicator, as further proof of their allegation that the Employer terminated the Employee because he stole money from them. They argue it should be admitted because it is relevant, credible and could have affected the result. With respect to whether it could have been provided to the Adjudicator, they argue that, as self-represented litigants, they were not aware that they should have provided better evidence of this event to the Adjudicator.

[4] With respect to the appeal, they argue that the error of law made by the Adjudicator is that she failed to recognize that theft of any amount is grounds for immediate dismissal.

[5] They also argue that the Adjudicator erred when she found that the Employer had not disciplined the Employee for past behaviour, citing the removal of privileges to which the Adjudicator referred. In their opinion, those actions should have been characterized by the Adjudicator as progressive discipline.

Argument on behalf of Employee:

[6] The Employee argues that the Adjudicator correctly found that there was no just cause for his termination. The termination letter stated:

> *You have been terminated for the following reasons:*
>
> - *Irreconcilable differences with management*
> - *False accusations towards management*
> - *Expiration of Johan Van den Berg's verbal Offer to Purchase for the company (KL Leasing/Accu-Blast & Painting) due to stated lack of funds.*

None of these reasons provides just cause.

Argument on behalf of Director of Employment Standards:

[7] The Director of Employment Standards ["Director"] argues that the fresh evidence tendered by the Appellants should not be accepted by the Board. The Director referred the Board to the following passage in *M.H. v A.B.*[3]:

> *[16] In order for fresh evidence to be admitted, it must satisfy the test for admission set out in R v Palmer, [1980] 1 SCR 759 [Palmer]. Fresh evidence will only be admitted if:*
>
> *(a) it could not, even with the exercise of due diligence, have been adduced at trial;*
> *(b) it is relevant in the sense that it bears upon a decisive, or potentially decisive, issue in the action;*
> *(c) it is credible, in the sense that it is reasonably capable of belief; and*
> *(d) it is of such a nature that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.*

[8] The Director argues that, while the evidence is credible, none of the other requirements has been met.

[9] With respect to the appeal, the Director points out that an appeal may only be taken on a question of law, and argues that the standard of review to be applied by the Board is correctness. In the Director's view, the Adjudicator's decision is correct. She took a contextual approach to this unusual employment relationship.

[10] The Adjudicator properly found that the manner in which past occurrences of misconduct were resolved amounted, at law, to condonation. The Board is without jurisdiction to consider the application of condonation by the Adjudicator. It would have been an error in law if past conduct was not considered, but the Adjudicator considered it.[4] The Adjudicator reviewed the resolution of past misconduct, and considered the minimum discipline to constitute condonation. The actions taken by the Employer did not amount to progressive discipline because the disciplinary actions taken were minimal and the Employee was never advised that his employment was in jeopardy. A breach of trust does not justify dismissal in all circumstances.[5] That the Adjudicator recognized this is not an error of law.

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[3] 2019 SKCA 135 (CanLII).
[4] *Chambers v. Omni Insurance Brokers*, 2002 CanLII 44952 (ON CA).
[5] *Vallières v. Royal Bank of Canada*, 2020 FC 957 (CanLII).

Relevant Statutory Provisions:

[11] The Board reviewed the following provisions of the Act in the consideration of this appeal:

Notice required
2-60(1) Except for just cause, no employer shall lay off or terminate the employment of an employee who has been in the employer's service for more than 13 consecutive weeks without giving that employee written notice for a period that is not less than the period set out in the following Table:

Table

Employee's Period of Employment	***Minimum Period of Written Notice***
more than 13 consecutive weeks but one year or less	*one week*
more than one year but three years or less	*two weeks*
more than three years but five years or less	*four weeks*
more than five years but 10 years or less	*six weeks*
more than 10 years	*eight weeks*

Payments in case of layoffs or terminations
2-61(1) If an employer lays off or terminates the employment of an employee, the employer shall pay to the employee, with respect to the period of the notice required pursuant to section 2-60:

(a) if the employer is not bound by a collective agreement that applies to the employee, the greater of:

(i) the sum earned by the employee during that period of notice; and

(ii) a sum equivalent to the employee's normal wages for that period.

Corporate directors liable for wages
2-68(1) Subject to subsection (2), notwithstanding any other provision of this Act or any other Act, the corporate directors of an employer are jointly and severally liable to an employee for all wages due and accruing due to the employee but not paid while they are corporate directors.

Wage assessments
2-74(1) In this Division, "adjudicator" means an adjudicator selected pursuant to subsection 4-3(3).
(2) If the director of employment standards has knowledge or has reasonable grounds to believe or suspects that an employer has failed or is likely to fail to pay wages as required pursuant to this Part, the director may issue a wage assessment against either or both of the following:

(a) the employer;

(b) subject to subsection (3), a corporate director.

(3) The director of employment standards may only issue a wage assessment against a corporate director if the director has knowledge or has reasonable grounds to believe or suspects that the corporate director is liable for wages in accordance with section 2-68.

Commencement of appeal to adjudicator
2-75(1) Any of the following may appeal a wage assessment:

(a) an employer or corporate director who disputes liability or the amount set out in the wage assessment;

(b) an employee who disputes the amount set out in the wage assessment.

Right to appeal adjudicator's decision to board
4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

Analysis and Decision:

Fresh evidence:

[12] The first issue for the Board to address is the request by the Appellants to tender fresh evidence. The evidence sought to be tendered was an affidavit of Doug Evanovich indicating that he paid the Employee $400 cash for sandblasting and painting the rims on his truck. As the Director noted, fresh evidence will only be admitted if all of the following criteria are met:

- it could not, with the exercise of due diligence, have been submitted to the Adjudicator;
- it is relevant in that it bears on a decisive, or potentially decisive, issue in the appeal;
- it is credible; and
- when taken with the other evidence considered by the Adjudicator, it could be expected to have affected the result.

[13] While the evidence appears to be credible, it does not meet any of the other tests. This affidavit could have been put before the Adjudicator. The evidence is not relevant, in that it does not bear on a decisive issue. The Adjudicator found:

> *Ultimately, the reason for firing Johan was that the Metz's could not come to terms with him on the sale of the business and they were done trying. It was not about the $400.*[6]

The evidence in the affidavit could not be expected to have affected the result. The facts set out in the affidavit were before the Adjudicator. The Adjudicator indicated that she believed those facts were what happened.[7]

[14] The application to tender fresh evidence is denied.

Appeal:

[15] The Director is correct that the standard of review applicable to this appeal is the appellate standard of correctness. The only ground of appeal, pursuant to section 4-8 of the Act, is whether the Adjudicator made an error on a question of law.

[16] The Appellants have not raised any errors of law in their appeal. The Adjudicator correctly interpreted the law that she applied to the facts as she found them. The issue to be determined

[6] At page 11.
[7] At page 10.

was whether the Employer had just cause to terminate the Employee without notice. If they did, he is not entitled to pay in lieu of notice. If they did not, he is entitled to pay in lieu of notice, and associated vacation pay. The onus was on the Appellants to prove just cause.

[17] The Adjudicator made the following finding:

> *The employer has the onus of proving just cause on a balance of probabilities. The employer must show the dismissal was warranted based on a serious isolated incident or on cumulative acts. Whether misconduct is serious enough to justify dismissal is a question of fact to be assessed individually in each case.*[8]

This is a correct description of the law that the Adjudicator was to apply to the facts as she found them.[9]

[18] The Adjudicator found:

> *The first question is whether the employer proved that Johan completed a cash job for Doug without his employer's knowledge or consent. If so, the question becomes whether the employer's discovery of this misconduct was so egregious that it justified immediate dismissal based on this isolated incident.*[10]

Again, this is a correct description of the law that the Adjudicator was to apply to the facts as she found them. After a detailed review of the evidence, including setting out her findings on credibility, the Adjudicator found that the Appellants failed to meet their onus of proving that the Employee was fired for cause based on a serious isolated incident.

[19] The Adjudicator then went on to find there was no just cause based on cumulative events, because the Employer failed to warn the Employee that he would lose his job if his behaviour continued:

> *To establish just cause based on cumulative events, the employer must establish that they took progressive disciplinary measures, including warnings as to the possible consequences of future misconduct. The employer must also show that they did not condone the behaviour, as is alleged in this case.*[11]
> . . .
> *The evidence establishes that the Metz's went along with Johan's behaviour, tallying up what they figured he owed them for his transgressions along the way.*[12]
> . . .
> *The Metz's were unhappy with Johan's behaviour but they accepted it. Although they took away some of Johan's privileges, they chose not to discipline him in any real manner or*

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[8] At page 6.
[9] *McKinley v. BC Tel*, 2001 SCC 38 (CanLII), [2001] 2 SCR 161.
[10] At page 7.
[11] At page 11.
[12] At page 12.

> *warn him that his job was on the line because this might jeopardize the sale of the business and a potential revenue stream for the future. At law, they condoned his behaviour.*[13]
> . . .
> *However, for their own reasons, the Metz's failed to employ progressive discipline and ended up condoning Johan's behaviour in the process. Accordingly, Johan was terminated without cause.*[14]

[20] The Adjudicator found as a fact, in the context of the unusual relationship between the Employer and the Employee, that the Employer condoned the Employee's behaviour. They may regret that choice now, but those were the facts before the Adjudicator.

[21] Given that the appeal to the Board is only on a question of law, the Board's jurisdiction to review the Adjudicator's findings of facts is very limited. Before the Board could set aside a finding of fact made by the Adjudicator, the Appellants would have to satisfy the Board that the Adjudicator made that finding of fact on the basis of no evidence or irrelevant evidence, in disregard of relevant evidence, on a mischaracterization of relevant evidence or on an unfounded or irrational inference of fact.[15] The Appellants have not met that high standard here. The Adjudicator carefully reviewed and considered the evidence before her. The Appellants have failed to establish an error of law in the Adjudicator's decision.

[22] The appeal is dismissed. The Appellants are ordered to pay to the Employee the amount found owing in the Wage Assessment, being $2,115.40.

DATED at Regina, Saskatchewan, this **28th** day of **April, 2021.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson

[13] At page 12.
[14] At page 13.
[15] *Missick v Regina's Pet Depot*, 2020 CanLII 90749 (SK LRB) at para 18.