

DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTION 2-75 and 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT

COMPLAINANT: Mary Taban
Represented by Randy Armitage
Labour Standards Officer



RESPONDENT: Hatquill Holdings Ltd.
o/a Capilano Court
Represented by Kevin Craigen

DATE OF HEARING: June 25, 2014 @ 9:30 a.m.

PLACE OF HEARING: Basement Boardroom #1
110 Ominica Street West
Moose Jaw, Saskatchewan

1. INTRODUCTION

- Since my last correspondence had indicated that the appeal had not been perfected, I confirmed with the parties that the appeal had been perfected.

- Mr. Armitage requested that Ms Taban's son, Emmanuel, be allowed to attend. Ms Taban is from Sudan and cannot read or write English and at times has trouble with the oral language. Her son would be able to translate if necessary. Mr. Craigen had no objection and I allowed the request on the condition that Emmanuel not speak unless requested to do so.

- Mr. Armitage confirmed with Mr. Craigen (marked EE1) a statement of facts regarding the Company, the Complainant's employment period and the amount of pay in lieu, if the wage assessment is allowed.

- I confirmed that those present were the only participants, reviewed my process and expectations and advised that under the Employment Act I am directed to provide my decision within sixty (60) days of the hearing.

II. PRELIMINARY OBJECTIONS

None

III. THE DISPUTE

The Respondent's position is that the Complainant was terminated for cause and therefore pay in lieu of notice is not required.

IV. FACTS

i. EVIDENCE OF EMPLOYER

Mr. Craigen was affirmed and then provided the following evidence:

- he is one of several Directors of Hatquill Holdings and Capilano Court is one of the Company's operations. Capilano Court is a personal care home for elderly persons. The home typically has 30 to 35 residents most of whom are level 1 and 2 with a few at level 3.
- Ms Taban was hired in 2010 (April 15) as a Night Shift Worker. She had been a fairly strong worker but it came to his attention that she was sleeping during her shifts.
- Ms Taban was verbally reprimanded on several occasions by the Manager, Betty-Anne Hanson. Ms. Taban was told that sleeping during her shift was totally unacceptable and that there were many duties to be performed not the least of which was to do a bed check every hour.
- a co-worker, Connie Bergeron, provided a written report which among other issues, cited observing Ms Taban, on July 26, 2013, sleeping on a couch for four (4) hours. Ms Bergeron finally woke her up at 4:00 a.m. This report is marked ER1.
- shortly before Ms Taban was terminated on October 17, 2013, a new employee was hired so as to be trained. He knew Ms Taban's employment would have to be ended because of her sleeping on the job.
- he became aware that Ms Taban was also working at the Spa and the Days Inn during the day and at Capilano Court at night. She was always tired.
- Ms Bergeron's report also cites a suspicion of Ms Taban sleeping during her shift on July 30, 2013. This time Manager Hanson advised Ms Taban that she would be terminated if she is caught sleeping on the job again.
- Ms Hanson provided a report (ER3) that details her coming to work at 5:40 a.m. on October 3, 2013 and catching Ms Taban and another employee sleeping although both denied they were.

Ms Hanson found several chairs pushed together with blankets and pillows. She reports that Ms Taban had used these as a bed.

- he did not receive Ms Hanson's report until October 16 as she had been away from October 4 to October 15. Upon receipt of the report he determined that Ms Taban had to go and she was fired for cause on October 17, 2013. The termination letter was marked ER4.

- he kept Ms Taban as long as he did because it is very difficult to hire night staff. Also, she had told him she was having problems sleeping at home because her bed broke. He took it upon himself to get her a bed based on her advice and gave her a loan to get it right away.

-he found out she was working at the Days Inn because she gave him the Days Inn phone number so he could contact her during the day. He actually phoned her there one day when he was shopping for her bed and she was there and took the call.

- he felt bad about having to terminate Ms Taban. She was a good employee except for the sleeping and she got along with all the staff. However, in a personal care home there is a huge responsibility to the residents and her irresponsibility produced a huge liability.

Note: At this point I advised Mr. Craigen that while I had no reason to disbelieve him, all his testimony was hearsay as his only involvement was the actual termination. As a result of my observation he provided four documents which I marked exhibits ER1 to ER4.

Mr. Armitage requested that these documents not be considered since he has no opportunity to cross-examine the authors except for ER4.

Mr. Craigen observed that he could get Ms Hanson and Ms Bergeron to the hearing in ten minutes.

I advised Mr. Craigen that he should have considered bringing witnesses as part of his preparation for the hearing.

- Mr. Craigen concluded his presentation by advising that in 21 years of operation only one other employee has been terminated for cause. It so happened to be for the same reason. His point being that this employer is fair and reasonable and only acts when necessary.

Cross-Examination

In response to questions from Mr. Armitage, Mr. Craigen provided the following evidence:

- it is true that he terminated Ms Taban on information provided to him. He had no personal experiences or observations of his own. He is satisfied the information was accurate from Ms Bergeron and Ms Hanson.

- his Manager has termination power but since he was in Moose Jaw he felt he should handle the situation.

- first became aware of the sleeping on the job when Ms Bergeron provided her report. That's when Ms Taban was first reprimanded.

- although sleeping on the job is very serious, Ms Taban was not terminated in July. Termination did not take place on October 4 since Ms Hanson's report did not get to him until October 16 as she was away.

- the termination letter (ER4) contains performance issues as well as sleeping on the job, but there is no documentation regarding those performance issues. The termination letter does not reference the October 3 sleeping incident and he does not know why.

Re-Examination

None

ii. EVIDENCE OF EMPLOYEE

Mr. Armitage called Mary Taban and she was sworn. In response to questions from Mr. Armitage she provided the following evidence:

- she was hired by Capilano Court to work the 11:00 p.m. to 7:00 a.m. shift. She worked five shifts and then would have two days off. Her work consisted of cleaning, doing laundry and removing garbage. She provided no personal care to residents as the other person on shift with her would provide that care.
- she never received any indication that her performance was a problem until July 30, 2013, actually not until she was terminated on October 17, 2013.
- on October 17, 2013, she worked until 7:00 a.m. and went home. She returned to the work place later to pick up her pay cheque, but Cynthia was on rounds so she waited. Finally she went and found Cynthia, who told her to wait in the laundry area. Finally Cynthia came and took her to Mr. Craigen's office. In Mr. Craigen's office Cynthia gave her her cheque and a letter. Cynthia told her the letter says she's been fired, that Kevin has fired her. She asks Cynthia why she has been fired and gets no answer. Mr. Craigen was not present.
- she then went out to her car and asked her son Emmanuel to read her the letter. She is very surprised since she had received no warnings before being fired.
- she went to the Multicultural Council for help and the woman there took her to see Mr. Armitage.
- she has never slept on the job. She swears on the bible that she has never slept on the job.
- she did not receive any notice or pay in lieu of notice.

Cross-Examination

In response to questions from Mr. Craigen, Ms Taban provided the following evidence:

- Betty-Anne Hanson never spoke to her about problems with her work.
- she made a mistake in saying her first indication there were performance problems was July, to Mr. Armitage when she meant October.
- she does not know why Ms Bergeron would say she was sleeping on the job.
- she was working at the Spa when she started with Capilano Court but she quit both the Spa and Days Inn April 25 and 30, 2010.

- she never slept on the job at Capilano Court.

Re-Examination

None

V. FINAL ARGUMENTS

Mr. Craigen finds it very disturbing to hear Ms Taban testify that she never slept on the job when three other employees observed her doing just that.

Further he finds it scary that Ms Taban refuses to take responsibility for her actions. He knows she was working other jobs and that she was tired all the time.

He is not saying she is a bad person but when working at a personal care home, the residents need to come first. Sleeping on the job is a serious offense.

Mr. Armitage provided a copy of the Inspection Report and it was marked EE2. He also tabled a copy of his final argument.

In summarizing his document he suggests that termination is the capital punishment of the employment world and the employer must prove that just cause existed.

Mr. Craigen did not observe any of the allegations himself; instead relied upon reports from others. He did no investigation, provided no witnesses or documentation given to Ms Taban. There is no evidence that Ms Taban was warned or even advised of short comings.

Therefore there is no evidence to support just cause and pay in lieu of notice is owed.

I thanked the parties for their respectful presentations and adjourned the hearing.

VI. ANALYSIS

The Respondent, Mr. Craigen, in his testimony, alleges that beginning with a written report from a co-worker (Connie Bergeron) Ms Taban was found sleeping on the job on July 25, 26, 30 and October 3, 2013.

He further alleges that Ms Taban was reprimanded on several occasions and finally threatened with termination if she was caught sleeping on the job again.

In a letter to Ms Taban dated October 17, 2013, Mr. Craigen terminated her employment with no notice or pay in lieu of notice.

The Complainant, Ms Taban, in her testimony, denied that she ever slept on the job. She also testified that she was never made aware of any problems with her work until the day she was terminated.

Mr. Craigen also testified that he, personally, did not observe Ms Taban commit any of the alleged performance issues cited in the termination letter. He acted on the reports from other employees.

VII. DECISION

Perhaps, being caught sleeping on the job while working the night shift in a personal care home is cause for immediate termination with no notice. Then again, maybe with investigation, the employee could provide a reasonable explanation, enough to be granted a second chance after being provided a reprimand.

Would a second incident of sleeping on the job warrant termination for cause with no notice? Perhaps.

In the present case I have evidence, much of which is hearsay, that begins late in July of 2013 and ends October 17, 2013.

Mr. Craigen even hired a new employee to be trained because he knew Ms Taban would be let go sooner or later.

Mr. Armitage's reference to "Condonation" in his written argument appears to fit this case. Capilano Court's delay in taking action in July had the effect of condoning Ms Taban's behaviour. With this lack of action the ability to assert "just cause" in October was lost.

In Mr. Craigen's defense, his argument that Night Shift Workers are difficult to come by is accepted. The reaction to Ms Taban's behaviour demonstrates the employer's concern regarding the staffing process. Rather than immediately terminating, the care home spent a couple of months trying to save Ms Taban's employment before determining that it couldn't be saved.

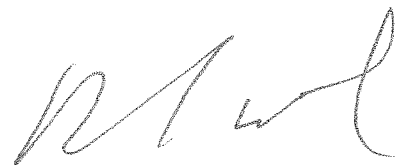
As Mr. Armitage argues the process was one of progressive discipline rather than termination for cause and I agree with his argument.

On the balance of probabilities Ms Taban was likely sleeping during her night shift, however, the process followed by the employer which concluded with the termination letter does not prove "just cause".

Therefore the appeal is denied and pay in lieu of notice is accessed.

As noted in EE1 the wage assessment of four weeks pay is owed. The amount as stated in EE2 of \$1,392.17 is owed to Ms Taban.

Dated at Regina, in the Province of Saskatchewan, this 7th of July, 2014



Ralph Ermel
Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at www.saskatchewan.ca.

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.
- (3) A person who intends to appeal pursuant to this section shall:
- (a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
 - (b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.
- (4) The record of an appeal is to consist of the following:
- (a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;
 - (c) the notice of appeal filed with the director of employment standards pursuant to Part II;
 - (d) any exhibits filed before the adjudicator;
 - (e) the written decision of the adjudicator;
 - (f) the notice of appeal to the board;
 - (g) any other material that the board may require to properly consider the appeal.
- (5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.
- (6) The board may:
- (a) affirm, amend or cancel the decision or order of the adjudicator; or
 - (b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

- 4-9(1)** With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.
- (2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.
- (3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards has the right:

- (a) to appear and make representations on:
 - (i) any appeal or hearing heard by an adjudicator; and
 - (ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and
- (b) to appeal any decision of an adjudicator or the board.