

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

Keli Samoleski
Represented by Ron Byers
Labour Standards Officer

COMPLAINANT

-AND-

Judy's Korner Tavern
Represented by Judy Erickson

RESPONDENT

DATE OF HEARING: June 23, 2014

PLACE OF HEARING: Conference Room 1
110 Ominica Street W
Moose Jaw, SK

1. INTRODUCTION

This matter was heard before me on June 23, 2014 in Moose Jaw, Saskatchewan. Mr. Ron Byers, Labour Standards Officer represented the Complainant, Keli Samoleski. Ms. Samoleski was present at the hearing.

Judy Erickson represented Judy's Korner Tavern.

Sworn testimony was heard on behalf of the Respondent, Judy's Korner Tavern from Judy Erickson.

Sworn testimony was heard on behalf of the Complainant by Keli Samoleski and Allan Samoleski.

In order for exclusion of witnesses except for the first to testify was made.

The Wage Assessment was prepared pursuant to the Labour Standards Act is for \$5,650.76.

II. PRELIMINARY OBJECTIONS

There were no preliminary objections from any of the parties.

III. THE DISPUTE

There were three issues raised in this matter:

1. Was Ms. Samoleski acting as a manager within the meaning of the Legislation and therefore exempt from overtime payments.
2. Was Ms. Samoleski dismissed or was there constructive dismissal by the employer such that pay in lieu of notice is due and owing to Ms. Samoleski.
3. Is the 10.5 hours shown as worked on May 4, 2013 a Sunday, due and owing to Ms. Samoleski.

IV. FACTS

The parties agreed that the last day of employment by Ms. Samoleski was June 13, 2013.

i. EVIDENCE OF EMPLOYER

Oral testimony was heard from Ms. Judy Erickson.

Ms. Erickson owns and operates a business known as Judy's Korner Tavern in Frontier, Saskatchewan.

The Complainant had been employed by Ms. Erickson for some years and in June of 2012 Ms. Erickson promoted Ms. Samoleski from an employee to a manager and increased her salary from \$12.00/hour during the week and \$16.00/hour on the weekends to \$16.00/hour for all hours worked.

At that time there were a total of three employees as well as Ms. Erickson working at the Tavern. After Ms. Erickson promoted Ms. Samoleski there was a manager plus 2 employees. In September of 2012 one of the two employees quit and was not replaced.

Ms. Erickson does not recall any meeting with Ms. Samoleski with respect to the raise in pay or appointment as a manager. She recalls unilaterally raising the rate of pay and paying Ms. Samoleski accordingly.

During the course of her employment Ms. Samoleski did bank deposits, shift scheduling for employees, ordered food, liquor and beer and acted as a bartender.

The employee who was on the closing shift would decide when to close.

Ms. Erickson took issue with the Labour Standards audit dealing with on May 4, 2013 for 10.5 hours as this was a Sunday and the business is not open on Sundays.

In June of 2013 Ms. Samoleski asked for two weeks leave and at that time Ms. Erickson advised Ms. Samoleski that when she returned to work the wages were going to be reduced to the \$12.00/hour during the week and \$16.00/hour on the weekend, as Ms. Erickson was returning to work as the manager and the bar was not doing well financially.

Ms. Erickson stated that she did not fire Ms. Samoleski and would have taken her back on the new terms for wages but not the old wage terms.

Ms. Samoleski in her capacity did some things different than the other employees. She did the deposits, shift scheduling for employees and ordered the food, liquor and beer.

Ms. Samoleski was not able to fire employees, she did not do evaluations of employees, or hire employees, she was independent in the same manner as other employees and did not decide on levels of remuneration for herself or the employees and did not participate in budgeting.

Under cross examination Ms. Erickson stated that Ms. Samoleski was her senior employee and that she promoted her to manager as she, Ms. Erickson, was requiring some medical assistance and was needed to help with her mother.

Ms. Erickson stated that Ms. Samoleski had no direction or control over the other employees.

Ms. Erickson paid Ms. Samoleski overtime if it was over 80 hours in a two week period on some occasions after promoting Ms. Samoleski to manager. Ms. Erickson did not know that managers were exempt from overtime until she sought advice after the complaint to the Labour Standards Department had been made by the employee.

In cross examination Ms. Erickson indicated that Ms. Samoleski had no direct supervision over other employees, was not able to discipline any employees, did not do evaluation of employees, did not participate in budgeting or the business plan and ran the business the way the owner wanted the business to be ran.

Ms. Samoleski made the deposits, scheduled the shifts for the employees and ordered the food, liquor and beer. However, Ms. Samolski had been doing this previously to her being promoted to manager and there were no changes in the scope of employment and her duties did not change from before and after she was promoted to manager.

ii. EVIDENCE OF EMPLOYEE

Ms. Samoleski gave evidence that she commenced employment with Judy's Korner Tavern in 2004 or 2005 and had worked some 8-9 years as an employee for Ms. Erickson. At the time of issue she was the senior employee at the business.

Ms. Samoleski was off work for approximately 1 year in 2011 and returned to work in June of 2012. Ms. Samoleski stated that there was not any discussion between her and Ms. Erickson relating to her being a manager and there was no change in her duties when she returned in June of 2012.

Ms. Erickson attended at the tavern on a daily basis except when illness or medical appointments prevented her attendance.

Ms. Samoleski stated that she had no control over employees, was not able to discipline employees and was not able to hire or promote employees.

On June 13, 2013 Ms. Samoleski was taking off a month for surgery with the consent of Ms. Erickson. During the shift on her last day Ms. Erickson advised her that her salary was going to be reduced to \$12.00/hour during the week and \$16.00/hour on the weekend as it had been before the increase.

In July Ms. Samoleski and her husband Allan were in the tavern as patrons and had a discussion with Ms. Erickson relating to her returning to work.

The parties attempted to re-negotiate the wage; however Ms. Erickson was not willing to increase the same. An argument ensued and Ms. Samoleski and her husband left the premises.

Ms. Samoleski`s position was that she was fired at the time as there was the change in salary and that she and her husband had been asked to leave the premises.

A credit application with Dunlop Ford Credit dated November 26, 2012 was filed as an exhibit by the Complainant wherein the Complainant describes herself as a part-time bartender not as a manager.

iii. EVIDENCE OF OTHERS

Sworn evidence was heard from Mr. Alan Samoleski, husband of the Employee. Mr. Samoleski gave evidence that he was a patron at the Tavern with his wife when there was a discussion between themselves and Ms. Erickson as to the salary of Ms. Samoleski. It was said that when Ms. Samoleski returned to work her wages would be dropped by \$4.00/hour.

There was some discussion related to negotiating the amount of the reduction; however an argument ensued and he and his wife were asked to leave the premises and did so.

Ms. Samoleski said that Ms. Samoleski was asked to leave with him and there was no discussion relating to Ms. Samoleski returning to discuss the matter with Ms. Erickson.

V. ANALYSIS/DECISION

The Labour Standards Act and the Saskatchewan Employment Act define an employee who performs services that are entirely of a managerial character in order to be exempt from the Legislation the same. Resultantly the case law in existence is applicable to both the statutes and the regulations thereunder.

From the evidence I find that Ms. Erickson was intending to promote Ms. Samoleski to be a manager in June of 2012.

However that does not end the matter. In order to put Ms. Samoleski in the exception set out in the Legislation the totality of the evidence must be reviewed in order to determine what Ms. Samoleski's actual position was.

The Legislation states that the provisions relating to overtime do not apply to an employee who performs services that are entirely of a managerial character.

Whether or not an employee was a manager has been discussed extensively by the Court of Queens Bench in the Westfair Foods Ltd. v. Saskatchewan (Director of Labour Standards) (1995) S.J. No 620. A Judgement of the Saskatchewan Court of Queens Bench by Justice Klebuc.

The issue here is whether Ms. Samoleski's positions falls within the exception contained within the Legislation.

The phrase "services that are entirely of a managerial character" contained in s.4(2) of the Act has been broadly considered. Mr. Justice Wright of this Court in Elcan Forage Inc. v. Weiler (1992), 102 Sask. R. 197 (Sask Q.B.) concluded the exception provisions contained in s.4 of the Act must be strictly construed to insure rights extended by the Act to employees are not casually eroded.

In Machtiger v. HOJ Industries Limited, (1992) 1 S.C.R. 986, the Supreme Court of Canada held that the Labour Standards Legislation should be interpreted to extend protection to as many employees as possible.

The word "entirely" was judicially considered by Wimmer J. in Michael Hill v. Ronert C. Begg, Keith O'Shea and Mr. Mechanic Sales & Service Ltd. (1982), Q.B. No.686/86. Justice Wimmer stated, "In my opinion the word "entirely" in this section is to be understood in the sense of continuously in contra-distinction to from time to time."

What constitutes "of a managerial character" for the purposes of s.4(2) of the Act will vary accordingly to the facts of each case. Hence, an all-encompassing definition for the phrase is impractical. However, a reference to those characteristics and functions indicative of, or at least associated with managerial positions, as indicia for determining whether an employee's services are of a managerial character are, in my view, appropriate. The indicium making up such criteria can readily be extracted from case authorities, dictionary definitions, reports of arbitration awards and legal writings on employment law. The fundamental ones in my opinion are:

1. The supervision and direction of other workers;
2. The discipline of subordinates, individually or as part of a management team;
3. Evaluating the performance of subordinates;
4. Hiring and promoting of subordinate staff;

5. Some independence and discretion in performing assigned duties;
6. Supervision of a collective agreement, where the work place is unionized;
7. Negotiating remuneration individually rather than collectively;
8. Level of remuneration, vis-à-vis, non-managerial staff;
9. Participation in carrying out the employer's budgets and performance requirements.

This list is not intended to be all inclusive; nor must each criterion be found to exist before an employee's position can take on a managerial character; nor is each criterion entitled to equal weight. To the contrary, in my opinion only the functions of supervision and right to discipline are of fundamental importance and are therefore of a greater significance.

Ms. Samoleski's lack of authority to regularly direct and discipline other employees did not place her services as a managerial outside of the meaning of the Legislation when viewed collectively in the context of this workplace.

Also I cannot reconcile the employer paying the employee overtime (when overtime was worked) if she was to be considered a manager.

Also, when reviewing the Westfair Foods Ltd. fundamental indicia of managerial character powers, only point number 5, which was some independence and discretion when performed assigned duties could be attributed to Ms. Samoleski; however her independence and discretion was no more than she had prior to being promoted nor was it any different from the other employees in the workplace.

The complainant also takes the position that she was fired during the argument that ensued at the Tavern on July 13, 2013. The employer evidence is that Ms. Samoleski was not fired and simply told to leave the premises with the expectation that further discussions relating to the recommencement of employment would be discussed at a later date.

The issue of whether or not Ms. Samoleski was fired or terminated on that date need not be decided in as much as the unilateral deduction in salary from \$16.00/hour to \$12.00/hour for the same work is sufficient for constructive dismissal of the employee and pay in lieu of notice is required to be paid by the employer.

The issue raised by the employer of the 10.5 hours overtime on May 4, 2013 attributed to the employee is not reconcilable and the Wage Assessment will be reduced accordingly with 2 hours regular time and 8.5 overtime:

$$\begin{array}{r} 2 \times \$16 = \$32 \\ 8.5 \times \$24 = \underline{\$204} \\ \$236 \end{array}$$

VI. CONCLUSION

The appeal is dismissed with respect issues 1 and 2 and the Wage Assessment is varied from the amount of \$5,650.76 to ~~\$5,114.76~~ ^{5,650.56} (the original assessment less \$236.00).

Dated at Moose Jaw, in the Province of Saskatchewan, this 30th of July, 2014.



Clifford B. Wheatley
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.