



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

COMPLAINANT: **TIMOTHY SPARVIER,**

 Represented by Dennis Benoit,
 Employment Standards Officer

RESPONDENTS: **COBB & COMPANY CABINETS INC.**
 and MIKE ZIMMERMAN, being a
 director of Cobb & Company Cabinets
 Inc.

DATE OF HEARING: **September 24, 2014**

PLACE OF HEARING: **3rd Floor Boardroom**
 1870 Albert Street
 Regina, Saskatchewan

I. INTRODUCTION

This is an appeal by the Respondents, Cobb & Company Cabinets Inc. (the Company or Cobb) and Mike Zimmerman (Mike), being a director of the Company, of a Wage Assessment issued by the Director of Employment Standards on May 20, 2014 directing the Respondents to pay the sum of \$1,440.00 to the Complainant, Timothy Sparvier (Tim).

On September 24, 2014, the following individuals were present at the hearing:

- Mike Zimmerman, Respondent and director of the Company;
- Shaylynn Otte, part owner of the Company;
- Chris Franks, employee of the Company and witness for the Respondents;
- Timothy Sparvier, Complainant and former employee of the Company;
- Denis Benoit, Employment Standards Officer; and
- Robin Brockett, Employment Standards Officer (observer).

II. PRELIMINARY MATTERS/OBJECTIONS

There were no preliminary matters or objections.

III. THE DISPUTE

On May 20, 2014 the Director of Employment Standards issued a Wage Assessment against the Respondents in the amount of \$1,440.00 for Tim. The Respondents choices were to pay this sum to the Complainant or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* ("the Act").

Mike appealed the Wage Assessment by way of a letter sent to Employment Standards. The grounds of appeal are set out in the letter. It states:

"We are appealing the case involving Cobb & Company Cabinets Inc. and Timothy Sparvier. The reason for this is he was fully aware of his 2 weeks notice when he came into our front office and quit in front of numerous staff members, stating that we can forget about the 2 weeks and that he was quitting at that moment."

The sum claimed in the Wage Assessment represents two weeks pay in lieu of notice. If Tim was terminated without notice then he is entitled to two weeks pay in lieu of notice. However, if Tim voluntarily resigned from his position on February 18, 2014, then he is not entitled to pay in lieu of notice.

IV. THE FACTS

At the beginning of the hearing, the parties agreed on the following basic facts:

- Cobb & Company Cabinets Inc. is a legally registered company in Saskatchewan and Mike Zimmerman is its sole director.
- The Company employed Tim from May 28, 2012 to February 18, 2014.
- At the time of his departure, Timothy was earning \$18.00 per hour.
- If Tim is entitled to 2 weeks notice, the Wage Assessment is calculated correctly.

The parties tendered evidence by way of testimony (affirmed or sworn) and documents. Mike Zimmerman and Chris Franks testified for the Respondents and Timothy Sparvier testified for the Complainant. The following exhibits were entered into evidence:

ER1 – Copy of letter of termination dated February 13, 2014 (1 page).

ER2 – Copy of Statement dated April 23, 2014 signed by Chris Franks (1 page).

Mike Zimmerman's testimony is summarized as follows:

- He owns the Company. They manufacture custom cabinets and millwork.
- Cobb usually employs 20-25 people depending on the number of projects on the go. Right now they are down to 16 employees.

- Tim worked from 7:00 a.m. to 5:30 p.m., Monday to Thursday.
- Tim had been having problems with other employees and was not happy. On February 18, 2014, a member of the office staff wanted to send Tim out to help an installer. Tim said that he was hired as a shop worker and refused to go. When Tim became upset, 2 supervisors reported it to Mike. They decided Tim should go immediately. Mike printed off a termination letter (ER1) and Don West, Tim's foreman, gave it to Tim at approximately 7:30 a.m.
- The termination letter states that Tim's employment was terminated effective immediately due to performance issues. It also states that it was his 2-week notice. The termination letter is based on a template from their server.
- Their intention was to give Tim working notice. They expected Tim to work 2 more weeks and then be done.
- After receiving the letter, Tim came into the office area and told Mike to "forget the 2 weeks." Chris Franks was nearby at the time. Tim said he was leaving right then and asked Mike if he wanted to follow him into the back to ensure he was not taking any of their tools. Mike kept his cool and allowed Tim to gather his tools and leave.
- Prior to February 18th, they were having issues with Tim. He was not performing properly. People in the back were reporting issues with him. For example, there are 2 big saws and if 1 saw was busy, Tim would sit at it for 20 minutes rather than using the available saw. Tim also believed somebody stole his drill bits. He was disgruntled with other employees and would refuse to work.
- They had not previously provided Tim with any verbal or written warnings. They had talked to him a few times to ask him what was up.
- The termination letter is dated February 13th likely because that was the last time someone had logged into the server. Mike did not notice that date was on there.
- The letter states the termination is "effective immediately" and Mike acknowledged that this is confusing.

Chris Franks' testimony is summarized as follows:

- He is a Project Manager with Cobb but when Tim was working, he was an installer moving into the Project Manager role. He was at the computer when Tim came into the office area on February 18th.
- He could hear what was going on but did not want to stick his nose into it. He was concentrating but heard Tim's statement to Mike. He is not sure of the exact words but the gist of it was that Tim said to forget the 2 weeks, walked out, and did not return.
- Don West told him shortly after that Tim refused the notice.
- He was astonished that somebody would refuse the 2 weeks notice. Tim had 2 weeks left to work and he did not take it.
- He provided a statement of his recollections 2 months after the fact (ER2).

Timothy Sparvier's testimony is summarized as follows:

- He worked from 7 a.m. to 5:30 p.m. from Monday to Thursday for \$18 per hour.
- He believes his termination letter (ER1) is dated February 13th because he had become upset at work on that date. On February 13th, Don West told him they required information from him. When he asked Mike about it, he was told he needed a Criminal Records check. Mike laughed about it and said it was a joke but it was not funny because Mike had previously joked that he was a rapist.
- On his last day of work, February 18th, he was wrapping up a countertop when Ed Masden (one of his bosses) asked him if he would go demo a kitchen. He refused because he was still sore from the previous conversation with Mike and he was hired as a shop person. Minutes later, Don West handed him a letter in a sealed envelope.
- He believes he was terminated because of his conversation with Mike on February 13th.
- After receiving the letter, he went into the office and said to Mike: "You know Mike, this is f'in bullshit." He was referring to the fact that he was being terminated due to "performance issues." Mike did not respond. He then asked Mike if he wanted to come and make sure he was not stealing anything.
- He believed he had been fired. He did not say anything about the 2 weeks. He remembers telling Gene that he had been let go. He did not even notice the 2 weeks part until he got home and his wife read it. He was too steamed over the performance issues raised in the letter.
- He was not disciplined while working for Cobb. He received no written warnings.
- When he went to work on February 18th, he had no intention of leaving or resigning.

V. ARGUMENT

The Respondents' argument is summarized as follows:

- Tim came into the office on February 18th and told Mike to forget the 2 weeks. He stormed out in a huff.
- Tim read the whole letter before he told Mike to forget the 2 weeks. The fact that he said it and now denies saying it shows that he lies.

The Complainant's argument is summarized as follows:

- Tim is entitled to 2 weeks pay in lieu of notice.
- Tim had no intention of quitting.
- The letter came as a complete surprise.
- The employer agrees that the letter is confusing and unclear.
- Caselaw suggests that notice must be clear and unequivocal which is not the case here (see *Kalaman v. Singer Valve Co. Ltd.*, 1997 CanLII 4035 (BCCA)).
- Tim saw the words "effective immediately" and thought he was fired. He was also upset from a previous conversation (February 13th) so he left.

- The notice is unclear and the employer made no effort to explain himself after the fact. He just let Tim leave.
- The onus is on the employer to prove a voluntary resignation.
- Even if Tim told Mike to forget the 2 weeks, caselaw says there needs to be a cooling off period. The employer could have said, "Are you sure that is what you want? You can work out your 2 weeks."
- There is some confusion over who wrote the termination letter and when. This goes to the employer's credibility.

VI. ANALYSIS AND DECISION

I found the testimony of all three witnesses to be credible. It is not uncommon for individuals to recollect the same conversations or events differently, especially given the passage of time and given the emotionally charged nature of the events of February 18, 2014.

Tim was not fired for cause. The termination letter (ER1) states the "[r]eason for termination is performance issues." However, the employer did not provide any convincing evidence of just cause. The evidence establishes that neither Mike nor another representative of the Company warned Tim that his job was in jeopardy. An employee is entitled to know the reasonable objective standards of performance, how he is failing to meet those standards, and that his job is in jeopardy should he continue to fail to meet those standards. The employer did not tell Tim (verbally or in writing) that a failure to improve his performance or change his behaviour would result in the loss of his job. There is no evidence to suggest that any progressive disciplinary measures were taken.

Unless Tim voluntarily quit his job, he is entitled to 2 weeks pay in lieu of notice under the Act.

The Complainant takes the position that he was dismissed without notice on February 18, 2014. He does not remember telling his employer to "keep the two weeks." The Respondents take the position that they intended to terminate Tim's employment but only after providing him with two weeks notice. They expected him to work through his notice period. According to the Respondents, Tim chose to quit on February 18, 2014; therefore, he is not entitled to pay in lieu of notice.

In general, the test for resignation is an objective test. It has regard to both the employee's spoken or written words of resignation and to surrounding circumstances, including any emotional stress affecting the employee. Often, however, there is also a subjective element to resignation in terms of the intention to resign. In order to find that a resignation has occurred, the resignation must be found to be voluntary – a resignation cannot be imposed. The intention to resign will not normally be presumed and in a case of ambiguity, a resignation will not generally be found.

I agree with the parties that the letter of termination is confusing. It states that Tim “is terminated effective immediately” but also that “[t]his is your 2 week notice.” The fact that it is dated February 13th rather than February 18th only adds to the confusion. Tim was blindsided by the letter and became emotional at the suggestion of his “performance issues.” When Tim confronted Mike, there was an opportunity for Mike, as the employer, to explain himself and to tell Tim they wanted him to work out his 2-week notice period. Mike said nothing. As the employer, Mike had an opportunity to clear up any misunderstanding regarding Tim’s termination either on February 18th or shortly thereafter.

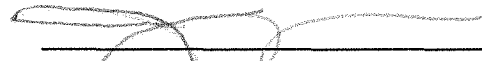
Based on the evidence, I find that Tim had no intention of quitting his job on February 18, 2014. There is no doubt the letter upset Tim. He believed he had been fired. I believe he likely told Mike to “forget the 2 weeks.” Regardless of whether or not Tim made a statement to this effect, I find that the employer had a duty to follow up with him after a reasonable cooling off period. Given the emotionally charged nature of the events of February 18, 2014, I find that the employer had a duty to contact Tim to advise him that he was entitled to two weeks notice and ask him whether or not it was his intention to quit.

Taking the totality of circumstances into account, I find that Tim was terminated without notice.

VIII. CONCLUSION

The appeal is dismissed. The Wage Assessment stands and the Respondents must pay the Complainant the sum of \$1,440.00.

DATED at the City of Regina, in the Province of Saskatchewan, this 17th day of November, 2014.



Jodi C. Vaughan
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.