



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

COMPLAINANT: **JOCELYN HENRY,**

**Represented by Dennis Benoit,
Employment Standards Officer**

RESPONDENTS: **CAPSTONE RESTAURANT &
LOUNGE LTD. and DANIEL
RAYMOND GENTES, being a director of
Capstone Restaurant & Lounge Ltd.**

DATE OF HEARING: **August 31, 2015**

PLACE OF HEARING: **6th Floor Boardroom
1870 Albert Street
Regina, Saskatchewan**

I. INTRODUCTION

This is an appeal by the Respondents, Capstone Restaurant & Lounge Ltd. (the Capstone) and Daniel Raymond Gentes, being a director of the Capstone, of a Wage Assessment issued by the Director of Employment Standards on May 12, 2015 directing the Respondents to pay the sum of \$235.18 to the Complainant, Jocelyn Henry (Jocelyn).

On August 31, 2015, the following individuals were present at the hearing in person or by telephone:

- James Gentes (Jamie) by telephone, Capstone General Manager and representative for Daniel Raymond Gentes and the Capstone;
- Jocelyn Henry by telephone, Complainant and former Capstone employee;
- Denis Benoit, Employment Standards Officer; and
- Andrew Langgard, Employment Standards Officer (observer).

II. PRELIMINARY MATTERS/OBJECTIONS

Prior to the hearing, the parties agreed to allow telephone evidence in order to avoid the time and expense involved for travel to Regina.

III. THE DISPUTE

On May 12, 2015 the Director of Employment Standards issued a Wage Assessment against the Respondents in the amount of \$235.18 representing public holiday pay and one week's pay in lieu of notice for Jocelyn. 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").

Jamie appealed the Wage Assessment by sending a Notice of Appeal dated May 20, 2015, with attachments (22 pages) to Employment Standards. He asked that the case be closed immediately on the following grounds:

1. The decision was made prior to requesting or receiving any evidence from my business to support our innocence. (Ref A1)
2. In order to support their unfair decision that was made previous to reviewing any evidence my business, my father and myself personally are being harassed by members of the labor board due to their zeal in supporting an unfair decision with no merit. (Ref A2)
3. The actual wage assessment claims the employee was not paid holiday pay or stat pay, both of which are clearly to be shown on the documents made available to members of the labor board, which makes the demanded pay even more exorbitant. (Ref A3, A5)
4. There are 8 witness statements that were provided to the labor board investigator, albeit after they made their decision without asking for them, that completely contradict the single nonfactual or evidence supported statement they received from the complainant Jocelyn Henry. (Ref A1, A4)

The issues are:

- 1) Is Jocelyn entitled to public holiday pay?
- 2) Is Jocelyn entitled to pay in lieu of notice?

IV. THE FACTS

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

- The Capstone is a registered business in Saskatchewan with Daniel Raymond Gentes as its director.
- Jamie represents his father, Daniel Raymond Gentes, and the Capstone.

- Jocelyn started working at the Capstone in October of 2012, prior to Jamie becoming General Manager.
- At the time of her departure, Jocelyn was earning \$12 per hour.
- Her last day of work was Wednesday, Nov 19, 2014.

The parties tendered evidence by way of affirmed testimony and documents. Jamie testified for the Respondents and Jocelyn testified for the Complainant. During the hearing, the following exhibits were entered into evidence:

Employer's Evidence

ER1 – Copy of Notice of Appeal with attachments (22 pages).

Employee's Evidence

EE1 – Copies of Jocelyn's pay stubs from 07/09/2014 to 29/11/2014 (6 pages);

EE2 – Copy of Jocelyn's pay stub for 06/29/2014 - 07/12/2014 (1 page);

EE3 – Copy of Jocelyn's ROE from Capstone (1 page);

EE4 – Copies of letters dated April 10, 2015 from Denis Benoit to James Gentes, the Capstone, and Daniel Raymond Gentes requesting documents (2 pages each);

EE5 – Copy of text messages between Jamie and Jocelyn (and Kevin) on November 19, 2014 (3 pages);

EE6 – Copy of text messages between Jocelyn and Melinda on November 19, 21, 28 and December 18, 2014 (5 pages);

EE7 – Copy of text messages between Jamie and Jocelyn on December 3 and 12, 2014 and between Melinda and Jocelyn on December 18, 2014 (3 pages);

EE8 – Copy of Formal Complaint Form dated January 12, 2015 (3 pages) and written statement (2 pages);

EE9 – Copy of Jocelyn's hours of work at Buddy's Pub from November 25 – 28, 2014 (1 page);

EE10 – Copy of Jocelyn's pay stub from Buddy's Pub for 11/01/2014 – 11/30/2014 (1 page); and

EE11 – Copy of calculation sheet prepared by Employment Standards covering pay instead of notice, public holiday pay and vacation pay (1 page).

Jamie's testimony is summarized as follows:

- He is the General Manager of the Capstone responsible for the day-to-day operations of the restaurant and lounge including financial, administration, and some of the hiring and firing duties.
- He had direct contact with Jocelyn when she was working. He dealt with all employees because it is not a big operation.
- She was a waitress on the lounge side and typically worked days.
- Before she quit, he gave her occasional hours in the kitchen because she wanted more hours.

- On November 19, 2014, Jocelyn texted the front manager, Melinda, to say she quit and to not bother putting her on the schedule. He would have provided copies of the text but Melinda's cell phone did not save her texts (after so many, they get typed over). He contacted the RCMP for help recovering the texts but because it is not a criminal proceeding, they will not access the cell's SIM card to retrieve the text.
- He had texted her earlier that night to tell her she was not needed in the kitchen the next day. He did not want to reward her with extra kitchen hours when he learned she had stayed an extra half hour the day before in order to get a customer's phone number. She texted him back and gave her two weeks' notice. He did not respond to this text.
- He knew she had quit because she told Melinda that she quit and she did not come back to work. It is a small town and he also heard she had another job. He did not do anything else.
- He does not owe Jocelyn any money. It is cut and dry. Employees quit all the time. She was upset, she swore, and said don't put me on the schedule. She had a tantrum, quit and it was over.
- Melinda was responsible for the waitress schedules and she usually prepared them one week in advance. They were typically taped on the fridge and written over extensively. Melinda would either put them in the cupboard at the end of the week or discard them if they were unrecognizable.
- Jocelyn was not on the kitchen schedule to begin with. He might ask her a day in advance, "Do you want to work tomorrow?"
- After November 19th, Jocelyn was not on the schedule because she didn't want to be.
- Jamie typed up the witness statements and had his employees sign them. There were 14 employees in total but he only had those employees who had direct contact with Jocelyn sign statements.
- Employment Standards made their decision prior to receiving any of his evidence or his side of the story.
- Public holiday pay is automatically calculated by QuickBooks Pro. Jocelyn was paid for what she qualified for. He does not know why the year-to-date as of September 9th was \$45.80 or why that number did not change after October or November even though there were public holidays in those months.
- He took over the bookkeeping in September of 2014. He gave everything he had to Employment Standards. He does not have any records for May to September although he acknowledges that she did work some hours during that time. He also acknowledges that the T-4 and pay stubs don't match up and that the records are inaccurate.
- He did not ask Melinda to testify. She no longer works for him. Employment Standards did not contact her either.

Jocelyn's testimony is summarized as follows:

- When she started at the Capstone on October 1st, 2011, she worked for Ryan and Melinda Gentes. In May of 2013, she started a maternity leave and came back to work in May of 2014.
- She had a second job at another restaurant in Kenosha (Club 19) where she worked during the week and mainly worked weekends at the Capstone. From May to October, she worked both places and when Club 19 closed for the season in September or October, she picked up as many hours as she could at the Capstone.
- The lounge schedule was kept on a calendar in the restaurant or behind the till computer on the lounge side. The only schedule that had names and days of week on it was the schedule for the kitchen staff. Melinda often took the schedule home in the evenings.
- From May to July, the schedule was done monthly or 2 to 3 weeks in advance but this was not working so well so Melinda started doing it 1 to 2 weeks in advance.
- Melinda had a spreadsheet where she recorded her hours. She'd sign her name at end of the 2-week pay period. It was kept underneath the till in lounge. She does not know what happened to the spreadsheets after each pay period. New ones would just show up.
- She did not pay attention to her public holiday pay but does not believe she was paid it. It wasn't until the investigation started that she learned she hadn't been paid properly.
- She worked on November 19th. She doesn't remember her exact hours but she usually worked 11 a.m. to 4:30 p.m. Her son was in daycare in Kenosha, WI and she picked him up at 5.
- At 4:30 she timed out. Kyle was sitting at the bar. She had been serving him food and drinks. He said he changed his number and she knew her husband, Kevin, would want it so she gave Kyle her phone and he put his number in it. She said thanks and left.
- That evening, she received a text from Jamie at 9:15 p.m. saying he was not paying her an extra ½ hour to get a guy's number. He told her not to come into the kitchen the next day. She was not on the schedule but it was a regular thing.
- She became upset about him thinking she was trying to get a customer's number. Her husband got mad, grabbed her phone and started texting Jamie that she was giving her 2 weeks' notice.
- She texted Melinda next and told her that she was giving her 2 weeks' notice.
- Her husband was mad because he knew she was having issues with Jamie. Kevin was mad that Jamie would blame her for trying to sleep with customers. Her husband was fully aware that she and Jamie had had an affair and that she had recently broken it off (several weeks earlier). The affair lasted about 3 months and it started affecting her at work. She felt she was being treated unfairly. Her hours were being randomly cut. This is why she gave her notice.

- She has provided copies of the texts back and forth between her and Jamie and her and Melinda and they are 100% accurate.
- Melinda was a supervisor of sorts. She was her day-to-day boss and she handled the scheduling. Melinda reported to Jamie.
- She didn't hear from anyone after giving her notice so on Friday, November 21st she texted Melinda asking if she worked on Sunday. She did not get a straight answer. Melinda said she had not done the schedule then she said it had been done since Thursday and hadn't changed.
- When she went into work on the Sunday, another girl was there in her place (Martha Floy). Her name was stroked off the schedule in pen and Martha was working. She went home thinking she was fired.
- Nobody told her not to come in on Sunday, November 23rd. She would have normally worked from 11:00 a.m. to 4:30 p.m. She did not work on November 20, 21 and 22 because those were her days off.
- She did not work any shifts after November 19, 2014.
- She started another job about a week later at the High House in Arcola, also called Buddy's Pub. She started there on November 25, 2014.
- On November 19th, she did not stay past her regular hours or charge overtime. She was not planning on quitting. She had worked there for 3 years.
- She was friends with Melinda and still is. She would not have swore at her or told her to take her off the schedule.
- Her first day of work at the High House was Nov 25th. She had no job the previous week.

V. ARGUMENT

The Respondents' argument is summarized as follows:

- Jocelyn is not entitled to pay in lieu of notice because she quit and asked to be taken off the schedule.
- Employees quit all the time.
- The Wage Assessment is also wrong because it includes vacation and public holiday pay both of which were paid where earned.
- Employment Standards made a decision before receiving any evidence from him and nothing changed after he did provide evidence.
- He was not going to mention his intimate relationship with Jocelyn but knowing that Jocelyn told Employment Standards about it makes the whole investigation make more sense now. The Employment Standards Officer knew about their relationship and assumed the worst.
- They use a reputable payroll program, QuickBooks Pro. If Jocelyn met the requirements for public holiday pay, she would have been paid it.

The Complainant's argument is summarized as follows:

- There are two issues: public holiday pay and pay in lieu of notice.

- Section 2-32 of the Act explains how public holiday pay is supposed to be calculated. The Capstone did not follow this section of the Act. There were at least two occasions where it was not paid but should have been (October and November).
- Because they did not have complete records (no documentation for May 2014), instead of 5% of wages earned during the previous four weeks, Employment Standards took 4% of Jocelyn's gross earnings.
- With respect to pay in lieu of notice, the employee's testimony was clear, forthright and given without hesitation. Jocelyn gave 2 weeks' notice in accordance with section 2-63 of the Act but was not allowed to work any of her notice period.
- In order to calculate pay in lieu of notice, the Act requires us to go back 13 weeks to come up with an average weekly wage. They could only go back 12 weeks due to the records they had.
- Only one week's pay in lieu is claimed because Jocelyn mitigated her losses and found alternate employment after being unemployed for one week. She started working at Buddy's on November 25, 2014 and ended up working 33 hours within the two-week notice period (see EE9). This amount was deducted accordingly.
- In support of the Complainant's position, the Employment Standards Officer filed a copy of the Supreme Court of Canada case of *Commission des Norms du Travail v. Asphalte Desjardins Inc.*, 2014 SCC 51. In this case, an employee gave notice to his employer. Instead of allowing the employee to work out his notice period, the employer terminated his contract of employment the next day. The Court held that an employer cannot terminate a contract of employment without giving notice of termination or paying an indemnity in lieu of notice.
- The employee is owed \$235.18. She was not allowed to work out her notice period and she was not paid public holiday pay. The Wage Assessment should stand.

VI. ANALYSIS AND DECISION

The Wage Assessment states that Jocelyn is owed \$235.18. According to the employment standards officer's calculation sheet (EE-11), this was calculated as follows:

Pay Instead of Notice

Since we only have records for the previous 12 weeks before termination, we calculated that during this period of time, Miss Henry earned \$2,718.50 divided by 12 weeks = \$226.54/week x 2 weeks = \$435.08 owing.

Miss Henry gave 2 weeks notice on November 19, 2014 effective December 2, 2014. During this time she worked at another location and earned \$363.00 during the notice period.

Amount owed - \$453 - \$363 = \$90.08

Public Holiday Pay

Since we do not have complete records, we are unable to determine the exact amount owing. Public holiday pay is based on 5% of the previous 4 weeks earnings prior to the statutory holiday. We have calculated public holiday pay owing at the rate of 4% of gross (\$4,607.33) = \$184.29 owing. According to the last pay stub a total of \$45.80 was paid to the employee.

Amount owed - \$184.29 - \$45.80 = \$138.49.

Vacation Pay

Earnings subject to vacation pay $\$4,306.50 \times 3/52 = \248.45

Last pay stub shows vacation pay paid \$255.03

Overpayment (\$6.57)

Total owed:	PIN	\$90.08
	PHP	<u>\$138.49</u>
		\$228.57
	VP	<u>\$13.19</u>
		\$241.75
Overpayment		\$6.57
		\$235.18

Although vacation pay was mentioned, it is not in issue since the documents suggest there was actually an overpayment, leading to the sum of \$6.57 being subtracted from the total amount owing to Jocelyn.

Issue 1 - Is Jocelyn entitled to public holiday pay?

Section 2-32 of the Act requires an employer to pay public holiday pay to its employees and sets out the formula for calculating it. The evidence in this case suggests section 2-32 of the Act was not followed. Jamie testified that they used QuickBooks Pro and that if Jocelyn had qualified for public holiday pay, the program would have calculated it, and they would have paid it. However, something went wrong. Jamie could not explain why Jocelyn's year-to-date public holiday pay did not increase after the months of October and November when she was working and there were clearly public holidays during these months. According to Jocelyn's hours of work, she ought to have earned more

than \$45.80 in public holiday pay.

Section 2-38 of the Act requires that an employer keep records of wages paid and hours worked. Jamie argued that we do not know whether public holiday pay is owed due to inaccurate and incomplete records. As the employer, it is his responsibility to keep accurate and complete records. He failed to do this so we have to calculate public holiday pay based on the records we have. This is what the employment standards officer did. I accept his calculations and find the Respondents owe Jocelyn \$138.49 in unpaid public holiday pay.

Issue 2 – Is Jocelyn entitled to pay in lieu of notice?

If Jocelyn was terminated without notice then she is entitled to pay in lieu of notice. However, if Jocelyn voluntarily resigned from her position effective November 19, 2014, then she is not entitled to pay in lieu of notice.

I found the testimony of both witnesses to be credible. Given the passage of time, it is not uncommon for individuals to recollect the same conversations or events differently. Also, Jamie and Jocelyn exchanged harsh, emotionally charged words by text on November 19th. Emotions were involved, feelings were hurt, and it is not uncommon in these circumstances for parties to have differing views on what happened and who was at fault.

Jocelyn was not fired for cause. Therefore, unless Jocelyn voluntarily quit her job, she is entitled to 2 weeks' pay in lieu of notice under the Act. Jocelyn takes the position that she was dismissed without notice when Melinda and/or Jamie took her off the schedule, not allowing her to work out her 2-week notice period. Jamie takes the position that Jocelyn quit on November 19th when she told Melinda to take her off the schedule. According to Jamie, Jocelyn quit on November 19, 2014 and 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 think it is fair to say that Jamie's text to Jocelyn on November 19th caused her emotional stress. Jamie accused her of working late so that she could obtain a customer's phone number and then said, "don't need you in the kitchen tomorrow after all." She responded by giving 2 weeks' notice. At this point, Jamie could have tried to diffuse the situation but he chose not to say anything.

After a reasonable cooling off period, Jamie ought to have contacted Jocelyn to determine whether she intended to quit on an immediate basis or work out her notice period. He did not do this.

Based on the evidence, I find that Jocelyn had no intention of quitting her job on November 19, 2014. She became upset after being accused of staying late at work in order to get a man's phone number. After trying to clarify the schedule with Melinda and showing up to work to find someone else working in the lounge, Jocelyn believed she had been fired. This was a reasonable conclusion.


Even if I accept Jamie's version of events (that Jocelyn's text to Melinda on November 19th included her swearing, quitting, and telling Melinda to take her off the schedule and that Jocelyn never came back to the Capstone after that), then Jamie, as her employer, ought to have followed up with Jocelyn after a reasonable cooling off period. Instead, he did nothing.

Taking the totality of circumstances into account, I find that Jocelyn was terminated without notice. She was not permitted to work out her notice period. Based on the evidence before me, I accept the employment standards officer's calculations and find that Jocelyn is entitled to pay in lieu of notice in the amount of \$90.80.

VIII. CONCLUSION

The appeal is dismissed. The Wage Assessment stands and the Respondents must pay the Complainant the sum of \$235.18.

DATED at the City of Regina, in the Province of Saskatchewan, this 15th day of October, 2015.


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.