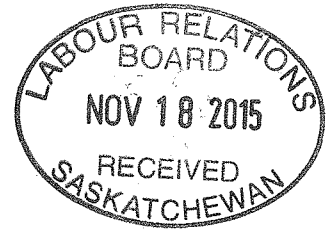


DECISION OF ADJUDICATOR

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



COMPLAINANT:

Lisa Lindsay:

Represented by Randy Armitage, Employment Standards Officer, Ministry of
Labour Relations and Workplace Safety

RESPONDENTS:

Ndal COMP-U-SERV Inc., 45 Hochelaga Street West, Moose Jaw, SK, S6H
2E9; Gale S. Toews, being a director of Ndal COMP-U-SERV Inc., 45
Hochelaga Street West, Moose Jaw, SK, S6H 2E9; and Donald Crook, being
a director of Ndal COMP-U-SERV Inc., 45 Hochelaga Street West, Moose
Jaw, SK, S6H 2E9

Date of Hearing: October 30, November 6, 2015

Place of Hearing: 110 Ominica St.W.,
Moose Jaw, Saskatchewan,
S6H 4P4

Introduction:

The complainant/employee ('employee') was represented by Randy Armitage, an Employment Standards Officer with the Ministry of Labour Relations and Workplace Safety. The respondent/employer ('employer') was represented by Gale Toews and Donald Crook. There were no objections as to my jurisdiction to hear the matter. The hearing began October 30. At that time no one appeared for the employer. The hearing was adjourned. Upon checking it became apparent that the employer had not been notified of a change in location of the hearing. The hearing reconvened on November 6, 2015.

Issue:

The issue in this case is whether a \$725.00 deduction from the employee's final pay cheque was authorized by *The Saskatchewan Employment Act*.

Facts:

At the beginning of the hearing the parties agreed that employer was an existing Saskatchewan corporation called Ndal COMP-U-SERV Inc., and that at the relevant times Gale Toews and Donald Crook were directors of the corporation. Exhibit EE-1 is a Corporate Registry Profile Report from Information Services Corporation confirming this to be so.

Gale Toews and Donald Crook both testified. Ms. Toews provided the vast majority of the employer's testimony. Mr. Crook provided a few comments, basically to support what Ms. Toews had said, and to add some detail to her comments. Mr. Crook was not present at what I consider to be the determining factual events, so I shall refer primarily to Ms. Toews' testimony for the employer.

Ms. Toews testified that Ms. Lindsay told her that she (Ms. Lindsay) had set up a humidifier incorrectly in her home. As a result a carpet in Ms. Lindsay's home became ruined with moisture. Ms. Toews says that she suggested to Ms. Lindsay that Ms. Lindsay claim on her home insurance. Ms. Lindsay did. She had a \$750.00 deductible on the insurance policy.

Ms. Toews says that Ms. Lindsay did not have the \$750.00 and so Ms. Toews provided her with a \$750 advance on her wages. She did this by writing a cheque on September 9, 2014. Ms. Toews and Mr. Crook are spouses. They were getting set to go on a holiday to Rome when this occurred, and so in order to expedite getting funds to Ms. Lindsay, she wrote the cheque on

her personal account. Ms. Toews explained this by saying that payroll was processed through Mr. Crook's office so it would be faster for Ms. Toews to give Ms. Lindsay a personal cheque. Ms. Toews said that she did not discuss repayment with Ms. Lindsay. A copy of the cheque was filed as Exhibit ER-1. Ms. Toews says that the payee of the cheque when she wrote it, was 'Lisa Lindsay'.

Ms. Toews and Mr. Crook left for their holiday on Sept. 22, 2014. Ms. Toews was back to work on October 14, 2014.

Shortly after Ms. Toews returned to work, Ms. Lindsay resigned. Her letter of resignation was dated October 31, 2014. That letter indicated that Ms. Lindsay planned to work until November 13, 2014. As events transpired, Ms. Lindsay left before that date.

At some point after Ms. Toews returned to work, she says her 'record keeper' told her she had a \$750.00 cheque to 'Carper World' and asked what it was about. Upon checking it out Ms. Toews said that this was Ms. Lindsay's advance, and that Ms. Lindsay had used 'white out' to cover up the original payee ('Lisa Lindsay') and write in 'Carpet World'. Ms. Toews said this occurred in 'early November'. Upon cross-examination Ms. Toews said that she had never seen the original cheque after she gave it to Ms. Lindsay. She had seen only a photocopy of the cleared cheque, a copy of which was filed as Exhibit ER-1. She said she believed white out had been used because the payee had been changed.

Ms. Lindsay's testimony told a different story. She says that she started working at Mr. Crook's business in September 2013, and later went to work for Ms. Toews. During the summer of 2014, Ms. Lindsay would work half the day at Mr. Crook's doing reception, some bookkeeping and typing, and work the other half of the day at Ms. Toews as her assistant. She was paid an advance in the middle of the month, and the rest of her monthly pay at the end of the month. These pay cheques were always drawn on the Ndal account. In August 2014 Ms. Lindsay received a \$500 bonus and a \$400 raise.

Ms. Lindsay testified that in August she and Ms. Toews were walking her car, and Ms. Toews told her that she and Mr. Crook would pay her insurance deductible. Ms. Lindsay said that originally she declined, but Ms. Toews said that she and Don 'wanted to do this for me'. She says that she cried, she and Ms. Toews hugged and they didn't speak about it again until September 9. On that date Ms. Toews brought the cheque for \$750.00 to Ms. Lindsay's workstation. She gave her the cheque otherwise completed, but with the

payee left blank. Ms. Toews said that she couldn't remember if Ms. Lindsay was getting the carpet at 'Carpet Gallery' or 'Carpet One'. Ms. Lindsay says she wrote in 'Carpet Gallery'

Ms. Lindsay says that her actual last day of work was November 6, 2014. She says the atmosphere at work changed after she gave notice. For example, she says she asked to leave early one day because her daughter needed to be picked up, and was told she would have to wash the office windows first. Ms. Lindsay says there was no discussion about the \$750.00 cheque when she resigned, and she was surprised when she saw \$725.00 had been deducted from her final pay cheque. Mr. Crook explained that the amount of the deduction (\$725.00) was simply an error, and that it was intended to be the full amount of the 'Carpet World' cheque (\$750.00).

It appeared to me from Ms. Toews' and Mr. Crook's testimony that there were hard feelings over Ms. Lindsay's decision to leave. Ms. Toews and Mr. Crook both mentioned more than once that Ms. Lindsay had transferred from Mr. Crook's business to Ms. Toews' business so that she could be trained in the financial industry. This training would include Ms. Lindsay writing her financial advisor exams. Ms. Lindsay had clearly changed her mind, and both Mr. Crook and Ms. Toews seemed annoyed by this. It also appeared to me that the work atmosphere worsened as soon as Ms. Lindsay gave notice that she was resigning. Ms. Toews also said that she felt the 'kindness and generosity' that she and her spouse had extended to Ms. Lindsay was being taken as a sign of weakness.

Decision:

The law in this case is quite simple. Employers may only deduct from wages, amounts *The Saskatchewan Employment Act* says are lawful deductions (see s. 2-36). If this payment of \$750.00 was a gift, nothing would be repayable. If it was an advance on salary, its non-inclusion on the employee's final cheque would not be a deduction from wages at all. It would simply be an accounting adjustment, as the employee would have been paid the wages. If it was something else, it would have to come within the list of authorized deductions in the legislation before an employer could make the deduction. Of course employees may owe employers funds for reasons other than those represented by the list of lawful deductions. An example would be an employer who loaned money to an employee. In such a case the employer may take other steps (including going to Small Claims Court) to recoup the funds.

Ms. Toews' testimony and Ms. Lindsay's testimony with regard to the nature of the \$750 cheque cannot stand together. In my view, Ms. Toews' testimony does not stand up to examination. Ms. Toews testified that she wrote the cheque as an advance on Ms. Lindsay's salary. Yet, the cheque was a personal cheque, drawn on a personal account. It simply does not make sense that an employer would write a personal cheque for a payroll advance. In order to balance such a transaction, the company would have to repay Ms. Toews the \$750.00, and then recover that amount from the employee. Ms. Toews appears to have not notified the 'record keeper' of this. In addition, Ms. Toews says the reason for this extraordinary way to make an advance was to expedite matters because she and Mr. Crook were going on holidays overseas. Yet, the cheque was written September 9, 2014 and Ms. Toews did not leave on holiday until September 22. This leaves 8 business days (and weekend time) to request a payroll cheque.

Ms. Toews claimed that the payee had been changed on the cheque. Like her, I have not seen the original cheque – only the photocopy filed as Exhibit ER-1. No alteration of any kind is apparent on that photocopy. The pre-printed payee line on which 'Carpet World' is written does not have any blanks, as one might expect had white out been used. It is true that the written words 'Carpet Gallery' do not seem to match the other writing on the cheque. This however is exactly consistent with Ms. Lindsay's testimony, that she filled in the store's name after Ms. Toews gave her the otherwise completed cheque.

There was no evidence presented to me of tampering with the cheque. There is also no apparent reason why Ms. Lindsay would tamper with the cheque. After all, if one accepts Ms. Toews' testimony as truthful, she gave Ms. Lindsay a cheque payable to Ms. Lindsay. All Ms. Lindsay had to do was cash the cheque or deposit it into her bank. She stood to gain nothing by tampering with the cheque. Indeed, had she tampered with it, and had such tampering been apparent, it is likely that the payee, Carpet World would have rejected the cheque. Therefore Ms. Lindsay could only harm herself by tampering with the cheque.

Ms. Toews also testified that she thought Ms. Lindsay had mistaken the 'kindness and generosity' she'd shown Ms. Lindsay with weakness. Providing an employee with a gift of \$750 certainly does show generosity. I doubt however that many would refer to an employer providing an employee with an advance of the employee's own salary of \$750.00 as an act of 'kindness and generosity'. It might be called considerate or accommodating, but it's hardly an act of 'kindness and generosity'.

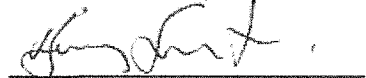
Based on the factors I have described above, as well as my own observations of the witness' demeanor, I accept Ms. Lindsay's testimony on every point where her testimony and that of Ms. Toews differ. This leads me to the following set of conclusions.

I conclude that Ms. Toews wrote a cheque in the amount of \$750.00 to Ms. Lindsay as a gift. This was a generous gesture. She gave the cheque to Ms. Lindsay at the workplace, implicitly asking Ms. Lindsay to fill in the carpet store of Ms. Lindsay's choice as payee. When Ms. Lindsay subsequently turned in a letter of resignation, Ms. Toews appears to have become annoyed at Ms. Lindsay. As a result, I conclude the employer attempted to 'recoup' the \$750.00 by characterizing it as an advance of salary.

Conclusion:

Wage Assessment # 7167 is confirmed in the amount of \$725.00.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 17th day of November, 2015.



Doug Surtees
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.