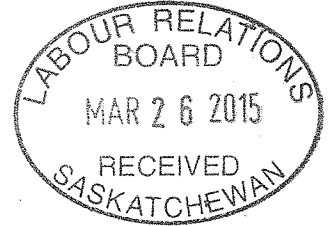


**DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION PURSUANT TO
SECTION 2-75 AND 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT**



COMPLAINANT: **DIANA GUSTUS**

**Dale Schmidt, Employment Standards
Officer**

RESPONDENTS: **101226259 SASKATCHEWAN LTD.,
operating as Greenwater Fisherman's
Cove, and DARLENE KORMOS,
director of 101226259 Saskatchewan Ltd.**

DATE OF HEARING: **February 27, 2015**

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

I. INTRODUCTION

This is an appeal by the Respondents, 101226259 Saskatchewan Ltd. (the Company), operating as Greenwater Fisherman's Cove (Greenwater) and Darlene Kormos (Darlene), being a director of the Company, of a Wage Assessment issued by the Director of Labour Standards Branch on April 9, 2014 directing the Respondents to pay the sum of \$2,900.67 to the Complainant, Diana Gustus (Diana).

On February 27, 2015 the following individuals were present at the hearing:

Darlene Kormos, director and owner of the Company;
Diana Gustus, former employee of Greenwater;
Ryan Gustus, Diana's husband; and
Dale Schmidt, Employment Standards Officer.

II. PRELIMINARY MATTERS/OBJECTIONS

Diana objects to this appeal. In her view, the employer did not appeal within the relevant time frame. She believes Darlene purposely evaded service of the Wage Assessment by refusing to pick up the registered letter. She does not think it is fair that

Darlene was subsequently personally served, effectively extending the appeal period and reviving the employer's right of appeal.

Diana's objection raises the question of whether I should be entertaining the merits of this appeal. The argument is that if the Wage Assessment was not appealed within the relevant appeal period, then the Wage Assessment stands and this appeal is not properly before me. I advised the parties I would take Diana's objection under advisement, hear the merits of the appeal (in case I ultimately decided to dismiss the objection), and address the objection as part of my written decision.

When was Darlene served?

The Wage Assessment in question was issued by the Director of Labour Standards Branch under *The Labour Standards Act* (the old Act) on April 9, 2014. On or about April 14th the Wage Assessment was sent by registered mail to Darlene Kormos at Box 2011 Yorkton, Saskatchewan. After processing, a notice card was left for Darlene on April 17th indicating there was an item for pick up at the post office. The item was unclaimed and returned to sender on May 8, 2014. Dale Schmidt personally served the Wage Assessment on the employer on May 29, 2014.

Under the old Act, service of a document by registered mail was deemed to have been received on the third day following the day of its mailing unless the person to whom it was mailed established that through no fault of her own, she did not receive the document (ss. 83.1(3)). The new Act, *The Saskatchewan Employment Act*, was proclaimed on April 29, 2014 and it says service of a document by registered mail is deemed to be received on the fifth business day following the day of its mailing. Like the old Act, it creates an exception to this rule: If the person to whom it was mailed can establish she did not receive it through no fault of her own or received it at a later date (ss. 9-9(4)).

Mr. Schmidt explained that after a failed attempt at serving the employer by registered mail, he personally served the Wage Assessment on May 29, 2014. At Employment Standards (formerly Labour Standards), the standard practice is to ensure that employers receive notice of any Wage Assessments issued against them, even if that means personally serving an employer.

Darlene explained that she lives at Greenwater Fisherman's Cove located at or near Porcupine Plane. This is a rural area and she sometimes does not collect her mail for days at a time. She lives two hours from Yorkton. She did not know there was a registered letter waiting for her at the Yorkton post office. She became aware that a Wage Assessment had been issued when Dale Schmidt personally served it on her employee at Greenwater on May 29, 2014.

Although the Acts provide different dates on which a party is deemed to have received a document sent by registered mail, both are consistent in saying that this applies "unless

the person to whom it was mailed establishes that, through no fault of that person, the person did not receive the document or notice.” Regardless of which Act we are operating under, I find the employer was not served until she was personally served on May 29, 2014. There is no evidence suggesting Darlene purposely evaded service by not picking up her mail in Yorkton. I accept that due to the distance to her post office box in Yorkton, it was reasonable for her not to have received notice of the registered letter before it was returned to sender. In other words, it was not her fault.

Based on the facts of this case, the Wage Assessment is not deemed to have been received either three days (old Act) or five business days (new Act) after the date of its mailing. Darlene was served on May 29, 2014, when Dale Schmidt personally served the Wage Assessment at Greenwater.

Did Darlene file her appeal on time?

Under the old Act, an employer had 21 days from the date of service of the Wage Assessment to commence an appeal (ss. 62(1)) and there was no specified timeframe within which the appeal deposit had to be filed. The new Act sets the time limit for appeals of Wage Assessments to 15 business days from the date of service (ss. 2-75(2)) and requires the appeal deposit to be paid before the expiry of the 15-day appeal period (ss. 2-75(5)).

Darlene prepared her notice of appeal on June 11, 2014 and Labour Relations and Workplace Safety received it on June 18, 2014. She provided her appeal deposit on June 23, 2014.

The Wage Assessment served on Darlene includes the following statement: “You are hereby directed to pay the total amount claimed within 21 days after the date of service of this Wage Assessment or commence an appeal pursuant to section 62 of The Labour Standards Act.” It would be unfair to the employer to hold her to the time limits established under the new Act when the Wage Assessment specifically references the 21-day appeal period under the old Act. As outlined above, the old Act did not require the appeal deposit to be provided before the expiry of the appeal period. I find the employer filed her appeal of the Wage Assessment within the applicable 21-day appeal period and also provided the appeal deposit within a reasonable time period.

Based on the circumstances of this case, I cannot allow Diana’s objection. While I understand her frustration, I find that this appeal is properly before me and I will consider the merits.

III. THE DISPUTE

On April 9, 2014 the Director of Labour Standards Branch issued a Wage Assessment against the Respondents in the amount of \$2,900.67 with respect to Diana Gustus. The

Wage Assessment directed the Respondents to pay this sum to the Complainant or commence an appeal pursuant to section 62 of *The Labour Standards Act*.

Darlene appealed the Wage Assessment by letter dated June 11, 2014 (the Notice of Appeal). It states that Diana was terminated for cause and outlines several incidents leading to Darlene's lost of trust in Diana (misuse of confidential information, overpaying herself for holidays and inflating her hours). Darlene also alleges that Diana's poor attitude created a hostile work environment.

The sum of \$2,900.67 claimed in the Wage Assessment represents 4 weeks' pay in lieu of notice, less \$181.65 owed by the employee to the employer for gas, meal and beverage charges.

IV. THE FACTS

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

- 101226259 Saskatchewan Ltd., operating as Greenwater Fisherman's Cove, is a legally registered company in Saskatchewan and Darlene is its sole director.
- Darlene took over as owner/operator of Greenwater on or about April 17, 2013.
- Diana was a Greenwater employee before Darlene took over the business and continued working until Darlene terminated her on July 15, 2013.

The Respondents and Complainant tendered evidence by way of testimony (sworn) and documents. Darlene testified for the Respondents and Diana testified for the Complainant. The following exhibits were entered into evidence on behalf of the parties:

EMPLOYER

ER1 – Various receipts for Diana's food, gas and alcohol (36 slips);

ER2 – Copy write-up regarding Diana dated July 9th entitled "Breach of Confidential Papers" (1 page);

ER3 – Copy of Diana's hours for pay periods covering June 2 – July 13, 2013 (1 page); and

ER4 – Copy of medical note from Diana's doctor dated 04/06/13 (1 page).

EMPLOYEE

EE1 – Copies of Diana's pay stubs for pay periods 15/06/2013, 29/06/2013 and 13/07/2013 (5 pages);

EE2 – Copy of summary of charges and payroll deductions prepared by Employment Standards (1 page); and

EE3 – Copy of letter to the Ministry of Labour Relations and Workplace Safety prepared by Diana (3 pages).

Darlene's testimony is summarized as follows:

- She took over the business on April 17, 2013. On her lawyer's advice she had everyone sign a 3-month probationary document. She does not have a copy of Diana's document because it went missing from her employee files. Diana was aware she was under a probationary period.
- During the probationary period, she discovered Diana was not paying for her food or gas bills. The office assistant, Robyn McCalley, found Diana's receipts in the garbage (ER1).
- It was Diana who was in charge of making sure that employees paid their charges for meals, gas, cigarettes and offsale. The receipts came to the office with an employee's name on them and then the amounts were subtracted from their paychecks.
- On July 9, 2013, she discovered Diana had given confidential client information that included credit card information to the kitchen staff to use as scrap paper. On July 10th, she spoke to Diana about this and explained how serious this was (ER2).
- She and Robyn found Diana's slips in the garbage after the confidential information conversation on July 10th. Diana's receipts were discovered when they dumped the burning bag of documents and went through it.
- She lost trust in Diana to handle confidential information and to honestly and accurately record her charges and as a result did not want her to work in the office anymore. Trust is huge and it was lost.
- Diana was also confrontational.
- She called Labour Standards for advice on how to terminate Diana. She was advised to keep it short and sweet.
- This occurred within the probationary 3-month period.
- On July 15th, she went into office earlier in the day and waited for witnesses to be there (her son-in-law and daughter sat outside the door) before terminating Diana.
- She told Diana the relationship was not working and that she was letting her go. She told Diana she had reason to let her go. Diana mentioned she had a lawyer. She asked Diana for her keys, Diana gathered her personal things and left.
- She did not provide Diana with anything in writing.
- The previous owner (Darren) was present on April 17th for the change over of ownership. Diana worked continuously – no break between working for Darren

and Darlene. On the 16th Diana worked for Darren and on the 17th she worked for Darlene.

- She did not have Diana sign the write-up regarding breach of confidentiality (ER2) because she did not know she needed to get it signed. The warning was verbal.
- Diana deducted some of her charges from her paychecks but not all of them.
- At 2 pay periods for month, there were 6 pay periods while Diana worked for Darlene (3 months).
- On October 28, 2013, she met with Dale Schmidt. They went through the till receipts and agreed that Diana owed Darlene \$181.65. They also agreed she would take this amount off of the holiday pay owed to Diana but this was not done.
- Diana was sent \$552.96 for unpaid holiday pay. Diana still owes \$181.65.
- She gave her file on Darlene to the RCMP in January of 2014 but no charges were laid.
- She believes Diana inflated her hours on her time cards. For example, she did not work for 10 hours in the office on July 1, 2013. This goes back to the trust. She did not bring this to Diana's attention because she discovered it after she fired Diana.

Diana's testimony is summarized as follows:

- She was employed at Greenwater from January 24, 2009 – 16 April 2013. She worked for Darren Teale until April 16, 2013 and then for Darlene from April 17th.
- She was the Office Manager and she was paid bi-weekly. Darren and then Darlene were her supervisors.
- When employees made purchases through the business, they could pay cash or by charge accounts in restaurant, within limits. She kept a spreadsheet in the office to keep track of the charge accounts. Two copies of the slips would be present when they did the daily cashouts. She would keep 1 copy and throw the other copy out. Deductions from paychecks were made at the end of each pay period.
- She was unable to make her final deductions because she was fired.
- She owes over \$100.
- She was not paid overtime. They agreed if she worked overtime one day then she could leave early on another day. She worked 80 hours per pay period.
- She never signed anything saying she was a probationary employee. Darlene told her she did not need to sign it because she trusted her.
- Trust was a very important thing to Darlene.
- She was not counselled or coached regarding performance issues. She did not receive any written reprimands for performance issues and was never asked to sign anything.

- Regarding the confidentiality conversation, Darlene was upset that day because the scrap paper found in the kitchen contained partial credit card information.
- She prepared EE3 after she got home from work on July 15th.
- When she arrived at work on July 15th, there was a new schedule that gave her extra days off. Until that time, she had been working fulltime.
- Robyn, the person who was hired when she was sick, needed help balancing the dailies and with the paychecks. After the fact, she realized she was training Robyn as her replacement.
- She challenged Darlene on her plan not to issue final paychecks and ROE's for 2 employees and when Darlene left the office she told Robyn not to listen to Darlene when she tells her to do things like that. When Darlene returned, she disagreed with her again about having to pay another employee for shifts she was scheduled for because Darlene told her not to come back to work (Maggie, the housekeeper). They got into a third argument over the payment of withholding taxes and whether or not she was late in paying them. Darlene left the office upset.
- Darlene came back to the office and told her she wanted her to leave. Darlene told her to get her belongings and get the "f" out. Before leaving, she gave Darlene her keys back, explained what each one was, got her belongings and told Darlene she would have to pay her severance. Darlene said she did not care what she had to pay but she wanted her "f'ing" gone.
- Darlene did not give a reason why she wanted her gone.
- Darlene was upset because she was following the rules and Darlene did not like that she brought up those rules/procedures in front of the new girl, Robyn.
- Darlene involved the RCMP, neglected to pick up her mail, and to respond to Dale.
- She was contacted by the RCMP and was asked questions over the phone. They did not tell her what became of it.
- The reason for the revised work schedule may have been the doctor's note (ER4) she submitted.

V. ARGUMENT

The Respondents' argument is summarized as follows:

- She needs to trust the office personnel.
- Although Diana admitted to owing money, it is still money that was taken from under her.
- She let Diana go prior to the end of the probationary period because she could no longer trust her.
- She had Diana sign a probationary letter on the advice of her lawyer.

The Complainant's argument is summarized as follows:

- An employee's service is deemed to be continuous upon the sale of a business.
- The onus is on the employer to prove just cause.
- There was no progressive discipline.
- There was no serious misconduct justifying immediate termination.
- The employer allowed its employees to make voluntary purchases and Diana agrees there is money owed (\$181.65).
- Diana agreed to repay this amount out of the outstanding holiday pay owed to her but the employer failed to deduct it from her holiday pay as agreed.
- The Wage Assessment should be upheld.

VI. ANALYSIS AND DECISION

Darlene alleges she terminated Diana for cause prior to the end of Diana's 3-month probationary period. Darlene says she had all employees sign probationary documents when she took over in April of 2013, including Diana. She was unable, however, to provide a copy of the document because it went missing from Diana's file. Diana says Darlene did not have her sign a probationary document in the first place. She says Darlene told her that she trusted her and did not need her to sign one.

The new Act makes no substantive changes to the old Act regarding notice requirements, pay in lieu of notice, or the continuous nature of an employee's service on sale or disposition of a business.

Both Acts deem an employee's employment at a business after its sale to be continuous (old Act s. 83, new Act s. 2-10). This is not something the parties can contract out of or negotiate. Regardless of whether or not Diana signed a probationary document, her service is deemed continuous. The evidence establishes that Diana started working for Greenwater in January of 2009. Darlene terminated Diana on April 16, 2013. Accordingly, as a 4-year employee Diana is entitled to 4 weeks' pay in lieu of notice unless Darlene establishes just cause for termination (ss. 43(c) of the old Act and ss. 2-60(1) of the new Act).

The employer has the onus of proving just cause on a balance of probabilities. The employer must show that dismissal was warranted based on a serious isolated incident or on cumulative acts. Whether misconduct is serious enough to justify dismissal is a question of fact to be assessed individually in each case.

Theft, if proven, would warrant immediate dismissal. Without evidence of serious misconduct warranting immediate dismissal (such as theft), an employer must establish that cumulative acts led to the dismissal and that progressive disciplinary measures were taken, including warnings as to the possible consequences of future misconduct.

Darlene believes she had just cause to terminate Diana. In her Notice of Appeal and testimony, Darlene said Diana was hard to work with due to her bad attitude. In addition to her negative impact on the work environment, Darlene's main issue with Diana was that she could no longer trust her. Darlene described several incidents explaining how she came to lose trust in Diana, including Diana giving paper containing confidential information to the kitchen staff for scrap paper, overpaying herself for vacation days taken, and claiming more hours than actually worked on one occasion. Her most important allegation, however, was that Diana stole from Greenwater by failing to deduct all of her food, beverage and gas charges from her wages.

Based on the evidence, I find the employer's allegation that Diana was stealing is unsubstantiated. Diana's explanation that it was her practice to throw the extra copy of receipts in the garbage and that she simply did not have the opportunity to deduct all outstanding charges before she was terminated without notice is equally as plausible as theft. At most, a warning to keep better track of employee charges might have been in order. Diana was not given the opportunity to address or remedy the situation.

Darlene admitted she allowed employees to charge food, beverages and gas. These were voluntary purchases allowed by the employer. Diana admitted to owing the sum of \$181.65 and asked that it be deducted from her vacation pay. The parties agreed to this number. For some reason, Darlene chose not to deduct the outstanding charges from Diana's final pay. Under the circumstances, I find no proof that Diana intended to defraud or steal from her employer.

Given that Darlene failed to prove Diana stole or committed some other serious act warranting immediate dismissal, Darlene must show that Diana's less serious infractions, when considered as a whole, support a dismissal for cause.

In order to uphold a termination for just cause on the basis of poor job performance or incompetence, the common law requires an employer to take certain progressive disciplinary measures. Before I can find just cause in this case, I must be satisfied that:

1. the employer established the level of job performance it required;
2. the standard was communicated to the employee;
3. the employer gave suitable instruction, supervision and time to enable the employee to meet the standard;
4. the employee was incapable of meeting the standard of the job; and
5. the employer warned the employee that failure to meet the standard would result in dismissal.

Whether Darlene established and communicated the level of job performance that she required of Diana is unclear from the evidence. However, the evidence establishes that trust was important to Darlene and that she communicated this fact to Diana. While

Darlene may have lost trust in Diana, I find no evidence that Diana was afforded the opportunity to improve her performance or change her behaviour in order to better meet Darlene's needs or standards.

Darlene spoke with Diana about not providing scrap paper containing confidential information to the kitchen staff on April 10th but Diana was fired only 3 days later. Similarly, when Darlene discovered copies of Diana's charge receipts in the garbage on or after July 10th, Diana was not provided with the opportunity to explain or correct the situation and yet theft was the main reason cited by Darlene for Diana's dismissal. Darlene referenced other incidents supporting just cause including signed documents going missing from employee's files, Diana overpaying herself for vacation days taken and actual hours worked and her poor attitude, none of which Diana was given the opportunity or time to address, change and/or remedy.

There is no evidence to suggest Darlene employed progressive disciplinary measures. An employee is entitled to know the reasonable objective standards of performance, how she is failing to meet the standards, and that her job is in jeopardy should she continue to fail to meet the standards. While the evidence establishes Darlene had issues with Diana's job performance and behaviour, it also establishes she failed to take the necessary steps that would allow her to summarily dismiss her. Darlene gave no verbal or written warnings to Diana that would let her know that her job was in jeopardy.

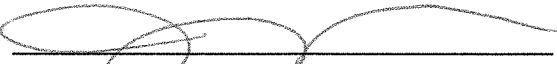
At the end of the day, Darlene did not like Diana's attitude and lost trust in her ability to adequately perform her job. Darlene chose not to give notice. She had already hired Diana's replacement and wanted Diana gone. Given the necessary progressive disciplinary measures were not taken, I find that Diana was terminated without just cause.

Based on the evidence presented during this appeal, the Respondents owe the Complainant the sum of \$2,900.67 representing 4 weeks' pay in lieu of notice, less the sum of \$181.65 owed to the employer by the employee for outstanding charges.

VIII. CONCLUSION

The appeal is denied and the Wage Assessment is upheld.

DATED at the City of Regina, in the Province of Saskatchewan, this 26th day of March, 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.