



DECISION OF ADJUDICATOR

IN THE MATTER OF A HEARING PURSUANT TO PART IV of
THE SASKATCHEWAN EMPLOYMENT ACT, CHAPTER S-15, SS, 2013
IN RESPECT OF A MATTER ADVANCED PURSUANT TO SECTIONS 62.1 & 62.2 OF THE
LABOUR STANDARDS ACT, CHAPTER L-1, RSS, 1978 (AS AMENDED) (REPEALED)

LRB FILE # 183 - 15; Adjudicator file # 2015-06; Wage Assessment # 7367; Complaint # 4470; Employer
File # 41470

PARTIES TO THE ADJUDICATION HEARING:

- a) **COMPLAINANTS / APPELLANTS:** SAIR SUPPLY LTD. O/A SHOW CABINETS; BLAIR WEINHEIMER, BEING A DIRECTOR OF SAIR SUPPLY LTD. O/A SHOW CABINETS; SANDRA WEINHEIMER, BEING A DIRECTOR OF SAIR SUPPLY LTD. O/A SHOW CABINETS
[APPELLANT REPRESENTATIVE]
- b) **RESPONDENT:** GOVERNMENT OF SASKATCHEWAN, DIRECTOR, EMPLOYMENT STANDARDS, REPRESENTED BY Mike Luciak (former Employment Standards Officer and Investigating Officer on this file and now currently employed with Occupational health and Safety) and Doug Long (Employment Standards Officer) advised that they represented the Executive Director in the application and enforcement of the *Labour Standards Act* and the *Saskatchewan Employment Act*; they confirmed that he did not represent the employee or employer
- c) **RESPONDENT:** Dwayne Toth [EMPLOYEE], self-represented

ADJUDICATOR: MARIA LYNN FREELAND

PLACE OF HEARING: Saskatoon, SK

DATE OF HEARING: Friday October 23, 2015

DATE OF DECISION: December 20, 2015

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I. INTRODUCTION

This employment standards adjudication hearing was conducted on October 23, 2015 in the Sturdy Stone Centre Building in Saskatoon, SK pursuant to the provisions of the *Saskatchewan Employment Act*.

II. PRELIMINARY MATTERS AND PARTICIPANTS AT THE EMPLOYMENT HEARING:

- a) Mike Luciak (former Employment Standards Officer and Investigating Officer on this file and now currently employed with Occupational health and Safety) and Doug Long (Employment Standards Officer) advised that they represented the Executive Director in the application and enforcement of the *Labour Standards Act* and the *Saskatchewan Employment Act*; they confirmed that he did not represent the employee or the employer.
- b) Blair Weinheimer advised that he was Owner and a director for SAIR SUPPLY LTD. O/A SHOW CABINETS; and was the representative for the purpose of the hearing.
- c) The Employee Dwayne Toth was present on his own behalf.
- d) There were no additional preliminary matters or objections.

III. THE DISPUTE

Subsequent to the conclusion of his employment with Sair Supply Ltd, the Appellant/ Employer], Dwayne Toth [the Respondent/Employee] completed a Complaint to the Ministry of Labour Relations and Workplace Safety. [EXHIBIT - EE - # 6]. It was entitled "Formal Complaint Form". This document was received on 04-04-2014; by interview; signed by "Employment Standards Director's Representative" signature by and referred to Mike Luciak. The form indicated Mr. Toth worked for the employer from April 2, 2014 to August 18, 2014 in the job title of "Cabinet Maker" at the rate of \$24.00 per hour. The complaint form outlined the employee's claim for outlining employee's claim for:

- a) Regular wages April 1 – 15, 2015 in the amount of \$1582.39
- b) Mirror for \$75.00.
- c) Annual Vacation for period April 2, to August 15, 2015 in the amount of \$102.
- a) Claim for mileage for 247 km
- b) Pay in lieu of notice of termination

Pursuant to applicable legislation, the Director of Employment Standards determined that the employer owed the employee the amount of \$890.93 {Exhibit # EE – 3}. This represents wages in the amount of \$80.47 and termination pay in the amount of \$810.46.

It should be noted that the employee worked from April 2, 2014 to August 8, 2014. Thus, the *Labour Standards Act* applies with respect to the substantive provisions of the claim; the *Saskatchewan Employment Act* applies with respect to the procedural provisions of the claim and appeal process as the new legislation became effective April 24, 2015.

As a result of this wage assessment, the employer appealed the decision pursuant to section 2-75 of the *Saskatchewan Employment Act* [EXHIBIT – EE - #1]. I was appointed adjudicator pursuant to section 4-3(1) of the legislation. [Exhibit EE -# 4]

An adjudication hearing was conducted on October 23, 2015.

IV. THE ISSUES

The Issues to be determined is as follows:

- a) Did the employee quit or was he fired or laid off or “constructively dismissed”?
- b) Is the Employee/ Respondent entitled to money owing to him for pay in lieu of notice?
- c) Is the employee entitled for unpaid wages and/or unpaid annual vacation leave?
- d) Is the employee entitled for reimbursement for a mirror and/or mileage?

V. THE FACTS

a) EVIDENCE OF THE APPELLANT/EMPLOYER

The employee was employed in the position of "cabinet maker and installer" at the rate of \$24.00 per hour from April 2, 2014 to August 18, 2014.

The position of Mr. Weinheimer, [Owner and Director of the Appellants / Employer and representative of the both the Company and Directors at the hearing] was well summarized by 3 letters he wrote in response to this wage claim.

The first one is dated **March 4, 2015 and signed by Mr. Weinheimer** [2 pages; ER Exhibit # 8]. He states as follows:

"This letter is to contest the fact that Mr. Toth is saying that he was fired when in fact he quit.

On Friday, August 15, 2014, Dwayne along with several other employees decided that they would not show up for work on Monday, August 18, 2015. On that same Friday, he used company equipment for personal use which is against company policy. It was stated by an employee that he used the equipment until it broke (sandpaper became unattached) and left it as is.

Previously, I was working towards having two shifts which everyone was aware of. There would be a day shift for assembly of doors, drawers, etc. and a night shift for cutting and assembling boxes. Due to previous poor performance, I had assigned Dwayne to the night shift with a pay reduction to fit the job being done. This performance issue included taking abnormally long periods of time to complete tasks, errors that should not have with his level of stated experience, and insubordination of management on numerous occasions including the use of shop equipment for personal use and buying materials that were not needed but only because he forgot these at the shop (ie: tape measure from Canadian Tire). This equipment was supplied to him by the company.

On Monday, August 18, I gave Dwayne his new shift information. The discussion became quite heated and at that time, he said out loud verbally that he quit. He would not take the paper stating his changes. He did begin to leave the shop and I asked him if he was in fact quitting, and I needed his key back. He threw it on the desk in which I was sitting from approximately five feet away.

During the previous months, Dwayne had chosen not to attend work on several occasions without notice to me. I called to find out why. He has also called other employees telling them not to go to work either. These other employees were Cathy Mack, Julia Campbell, Jeff Olexyn and Mark Shumski. The only one that did not follow his discussion was Cathy Mack.

I feel the fact the Saskatchewan Labour Board is interviewing the people listed above for factual information is unjust and tainted. All of the above former employees would back Mr. Toth because of friendships held outside of the employment setting. In fact, on August 18, Mark Shumski, Dwayne Toth and Jeff Olexyn had made plans to meet at Jeff's place after they left the shop that morning. Cathy Mack remained at the shop.

The mentality of these former employees was all about going to the labour standards. During break times, on many different occasions, the above listed employees would discuss getting even with Jeff's former employer in which he filed a complaint. Between the group, it almost seemed like entertainment. "

The second letter from the employer is undated but stamped as "received" by employment standards on July 30, 2015 [DOCUMENT # ER-9.] It states as follows:

SHOW CABINETS

RE: DWAYNE TOTH

File no. 41470

To Whom it may concern,

In regards to the wage assessment of Dwayne Toth, we strongly feel that Mr. Toth is deceptive when he indicates that he was fired from his position. In fact, Mr. Toth was offered a shift change and chose to quit.

At this time, we find it unwarranted to pay any amount to Mr. Toth and would like to continue on with this through due process.

Sincerely,

Blair Weinheimer

Show Cabinets

PH: 306-270-3275

In a third letter [EXHIBIT # ER -5], the employer outlined his position as follows:

“Dwayne Toth

- 1. Dwayne withheld his times sheet for AUGUST 1 – 15, 2014. We received a copy of this time sheet from Mike Luciak when my wife met with Mike to discuss the discrepancies form the initial audit report. Dwayne phoned his hours in to us and stated that he worked 80 hours for that time period. His pay included 80 hours of work plus the Stat holiday. On the audit report, Dwayne is shown to have worked on August 4, 2014 which was a stat holiday. He did not work. The audit report used his actual time sheet and thought he had worked on the Stat Holiday because Dwayne had entered 8 hours in that column to remind me it was a Stat. This resulted in overpayment to Dwayne; 8 hours X \$36 = \$288.**
 - 2. This changes his vacation pay \$288 X 6% - \$17.28**
- Total overpayment = \$305.28**

There were also copies of correspondence file from Mr. Weinheimer to Mr. Luciak dated July 12, 2015 [EXHIBIT ER - #10] and a reply from Mr. Luciak dated July 13, 2015 [EXHIBIT ER - #11].

Mr. Weinheimer elaborated on the above mentioned objections to the alleged claim in his affirmed testimony.

A considerable amount of testimony concerned some employees’ dissatisfaction and complaints including some employees being deliberately uncooperative and “difficult” toward the employer. There was a lot of testimony with respect to employee tactics [such as all employees but one agreeing to show up one hour late Monday morning], and “game playing” on the part of some [but not all] employees. While this testimony was interesting and colorful it is not relevant to the issues to be determined at this Employment Adjudication Hearing and the proper application of the *Labour Standards Act* and the *Saskatchewan Employment Act*

other than to lend credibility to the conclusion there was friction at the workplace and that Mr. Toth was unhappy with his employer and his employment.

In an effort to provide timely services to his customers when work was available, the employer testified that he made the decision to change to 'double shifts' rather than one shift per day. The employer indicated that his reason for this was to provide fast service to customers in a competitive industry. When Mr. Toth was advised that he was being assigned to the evening shift with a wage reduction from \$24.00 per hour to \$18.00 per hour as he would be doing different duties, a heated exchange between the two parties followed. Mr. Weinheimer testified that he advised Mr. Toth that he could come to work Monday and continue to work as business orders permitted. The Employer testified that he advised the employee that he could come to work whenever work was available; Mr. Toth was on a "part-time casual basis" and called in when work was available. The employer further testified that Mr. Toth could come into work on Monday and continue to work as business orders permitted. Mr. Toth never returned to work. The employer's position is that the employee quit and was not fired.

The evidence of the Employer was that Mr. Toth withheld his recorded time sheet for the period of August 1 – 15, 2015. The Employer eventually received a copy of the time sheet from Mike Luciak, Employment Standards Officer when the parties met to discuss the audit report errors. The employee was paid for the period of August 1 – 15, 2014 subsequent to the submission of his time sheet,

b) EVIDENCE OF THE EMPLOYEE

The Employee, Dwayne Toth testified on his own behalf. He was affirmed prior to his testimony. He was also cross-examined at the conclusion of his submissions by Mr. Weinheimer.

Subsequent to termination of employment, Mr. Toth filed a complaint with the Labour Standards Branch (as it was then named) for an employment claim.

EXHIBIT EE - #1 Formal complaint form filed On line by Mr. Toth date 04-09-2014 received by interview, signed by Employment Standards Directors Representative and subsequently referred to Mike Luciak outlining employee's claim for:

- a) Regular wages April 1 – 15. 2015 in the amount of \$1582.39
- b) Mirror for \$75.00.
- c) Annual Vacation for period April 2, to August 15, 2015 in the amount of \$102.
- d) Claim for mileage for 247 km

This claim was assessed by way of "Wage Assessment letter" signed by Director's Delegate Supply Ltd. on July 6, 2005 directed to Sair with respect to 4 employees in the following amount in the following amount for Mr. Toth [EXHIBIT EE - # 3]:

File NO: 41470
Amount owing as of 02-Jul-15: \$890.83
Date: July 6, 2015

In his affirmed testimony, Mr. Toth testified that he was hired as a cabinet maker not an installer at the going rate of \$24.00 per hour. He indicated that the company did not have sufficient tools so he brought some of his personal tools from home. Mr. Toth also testified that at times there was a shortage of materials. Mr. Toth testified that he did not quit his employment but was fired. He acknowledged that he did not work one Stat that for which he recorded as worked and received payment. He also acknowledged that he withheld his time sheet from the employer for the period of August 1-15, 2014 but that it was provided to the Labour Standards Officer.

Mr. Toth indicated that he was not happy with being advised of a shift change and a reduction in pay and that there was a heated argument between the employer and employee. Mr. Toth testified that at one point he asked Mr. Weimheimer: "What are you trying to do – make me quit?" and that Mr. Weimheimer replied "Why – are you quitting?". Mr. Toth testified that he did not return to work after this discussion.

VI. ANALYSIS AND DECISION

After review and consideration of all the documented evidence and verbal testimony provided by all parties, as well as consideration of the Legislative provisions of both the *Labour Standards Act* and the *Saskatchewan Employment Act*, and applicable case law, I find that Mr. Toth quit his employment voluntarily; Mr. Toth was not fired nor laid off nor constructively dismissed and is therefore not entitled by law to be paid wages in lieu on Notice of Termination nor any amount for unpaid annual vacation leave with respect to his claim for payment regarding his claim for annual vacation regarding his claim for pay in lieu of notice. He was unhappy with his employment, his employer and his shift change.

With respect other money owing to the employee, I have reviewed Exhibit ER - #1: "audit sheet (Officer Worksheet) completed approximately May 6, 2015 as well as Exhibit ER - #3,[the same document as Exhibit ER #1 with some handwritten interlineations made by the employer outlining area of discrepancies]. I have also reviewed all additional exhibits filed by all parties.

With respect to the issue of unpaid wages, the Labour Standard Officer assessed the amount of **\$80.47** owing. It was acknowledged by both witnesses, however, that Mr., Toth was paid for the August 4, 2014 Statutory Holiday which he did not work. The employer calculates this as over payment to the employee in the amount of \$305.28 [Stat pay of \$288.80 plus annual vacation leave on this amount of \$17.28 for a total overpayment of \$305.28]. Accordingly, the employee Mr. Toth has actually been overpaid by his employer. I therefore find no money owing for unpaid wages.

There was no evidence presented with respect for a mirror or mileage. In the circumstances, I therefore allow the Appellant/Employer on this issue and dismiss the Respondent/Employer's claim. I would, however, further review this issue if the parties would like to forward me their position on the matter as well as supporting details and documentation. I would thereafter write an addendum to this decision. This additional information should be forwarded to Mr. Long at the Prince Albert Employment Standards Office to be sent to me. I would request that any material be sent by February 15, 2016.

The Appellant/Employer appeal is therefore allowed and the Respondent/Employee claim is dismissed.

VII. CONCLUSION

The Appellant/Employer appeal is therefore allowed and the Respondent/Employee claim is dismissed.

In accordance with section 62(2) (3) of *The Labour Standards Act*, no costs will be awarded.

Dated this 20th day of December, 2015.

ADJUDICATOR – Maria Lynn Freeland, BA, JD, Mediator, LL M (Candidate)

SECTIONS 4-8, 4-9 & 4-10 OF THE SASKATCHEWAN EMPLOYMENT ACT REGARDING THE PARTIES' RIGHT TO APPEAL

The parties have the right to appeal the decision of the adjudicator to the LABOUR RELATIONS BOARD pursuant to the *SASKATCHEWAN EMPLOYMENT ACT*.

SECTIONS 4-8, 4-9 & 4-10 OF THE SASKATCHEWAN EMPLOYMENT ACT REGARDING THE PARTIES' RIGHT TO APPEAL

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.

(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III 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 or hearing pursuant to Part II, the wage assessment or the notice of hearing;

(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;

(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 considers appropriate.

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 or the director of occupational health and safety, 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.

4-10 The director of employment standards and the director of occupational health and safety have 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 the decision of an adjudicator or the board.

APPENDICES

1.1 Exhibits Filed On Behalf of the Employer (ER -#1 to ER -# 9)

1.2 Exhibits filed on behalf of the employee (ER -#1 to ER – #6]

**1.3 SECTIONS 4-8, 4-9 & 4-10 OF THE SASKATCHEWAN EMPLOYMENT ACT
REGARDING THE PARTIES' RIGHT TO APPEAL [enclosed above in the body
of decision]**

1.4 Exhibits Filed On Behalf of the Employer (ER -#1 to ER -# 9)

ER - #1 Audit sheet (Officer Worksheet) indicating total amount payable of \$890.93, undated but approximated to be on or about May 6, 2015

ER - #2 "Payroll Deductions Online Calculator" for period August 1-15 indicating net amount of \$1582.39

ER - #3 Employee Time Sheet for Dwayne from August 1 to 15 [no year indicated] with two handwritten notations [presumable by employer] stating:

- a) "We never had this copy. Dwayne withheld it and phoned Blair and told his hours"; and
- b) "This copy was given to us by Mike Luciak".

ER -# 4 Duplication of Exhibit ER - #1 with handwritten notation of errors [made by employer]

ER - #5 Memorandum from Blair Weinheimer, dated July 12, 2015 noting 2 errors or discrepancies of time sheet for Dwayne Toth for period of August 1 – 15, 2014 resulting in overpayment of \$305.28

ER - #6 Letter dated August 18, 2014 entitled "Change in Duties" advising Dwayne Toth of his change of hours at SHOW Cabinets effective the 25th of August 2014 with a pay rate of \$18.00 per hour.

ER - #7 Corporate Registry Report from Information Services of Saskatchewan as of 5-Sept, 2014 for entity name: Sair Supply Ltd. # 1021242105 [same document as EE – # 1]

ER - #8 2 page letter from Blair Weinheimer dated March 4, 2015 outlining some of the activities that had been occurring at his business

ER - #9 One page letter from Blair Weinheimer undated outlining that Mr. Toth was not fired but quit his position when offered a shift change

ER- #10 Email correspondence from employer to Mike Luciak, Employment Standards Officer dated July 12, 2015

ER - #11 Reply to Email by Mr. Luciak to Employer dated July 13, 2015

1.2 Exhibits Filed On Behalf of the Employee

EE - #1 Corporate Registry Report from Information Services of Saskatchewan as of 5-Sept., 2014 for entity name: Sair Supply Ltd. # 1021242105 [duplication of exhibit ER - #7]

EE - #2 Formal complaint form filed On line by Mr. Toth date 04-09-2014 received by interview, signed by Employment Standards Directors Representative and subsequently referred to Mike Luciak.

EE - #3 Copy of Wage Assessment correspondence [Wage Assessment # 7367] with respect to Mr. Toth directed to Sair Supply *et. al.* signed by Director's Delegate dated July 6, 2015 indicating amount owing to Mr. Toth in the amount of \$890.93.

EE - # 4 Order of appointment of Maria Lynn Freeland as Adjudicator dated October 7, 2015, LRB file # 182 – 15, signed by Steven Schiefer, Vic-Chairperson, Labour Relations Board.