

DECISION OF ADJUDICATOR  
IN THE MATTER OF AN ADJUDICATION  
PURSUANT TO SECTION 2-75 and 4-6 OF  
**THE SASKATCHEWAN EMPLOYMENT ACT**  
LRB File No. 228-15

COMPLAINANT: David Hoffert  
Represented by Dale Schmidt  
Labour Standards Officer



RESPONDENT: Matt's Furniture Ltd  
Represented by Metro Kutsak, Director  
and David MacKay, Solicitor

DATE OF HEARING: November 4, 2015

PLACE OF HEARING: 3rd Floor Conference Room  
1870 Albert Street  
Regina, Saskatchewan

1. INTRODUCTION

After introductions and my opening remarks, Mr. Schmidt requested that Mr. Hoffert's spouse be allowed to observe the hearing. Mr. MacKay had no objection and I allowed the request with the caution that she remain a silent observer.

Mr. MacKay advised he had three witnesses and that he would have these excluded until called. Mr. Schmidt advised he was calling only the Complainant.

II. PRELIMINARY OBJECTIONS

None

### III. THE DISPUTE

It was established that the Ministry is seeking pay in lieu of notice for the termination of Mr. Hoffert while the Employer contends "just cause" had been established.

### IV. FACTS

#### i. EVIDENCE OF EMPLOYER

Mr. MacKay called Mr. Metro (Matt) Kutsak and he was sworn. In response to questions from Mr. MacKay, Mr. Kutsak provided the following evidence:

- he is president and a director of Matt's Furniture Ltd.
- Mr. Hoffert was an employee for about 10 years when the termination occurred.
- the basis of the termination was dissatisfaction with the work performed for many months.
- the work performance provided by Mr. Hoffert had been good until the fall of 2014. Things then changed, he appeared to become indifferent to his work, loading wrong things on the truck for delivery to other stores, and being disagreeable.
- beginning in March documentation began.

Note: Mr. MacKay tabled a document of 17 pages which was marked ER1.

- on March 21, 2015 Mr. Hoffert sent wrong carpets to the Fort Qu'Appelle store. This was documented and Mr. Hoffert was spoken to about it.
- on March 27 Mr. Hoffert sent 2 headboards instead of one. When Mr. Hoffert was spoken to about this and offered a written document about the incident he refused the offer. Mr. Hoffert told Mr. Kutsak on several occasions to "fire" him as he was not going to "quit".
- many times Mr. Hoffert admitted to "screwing up" but was not quitting.
- on April 7 Mr. Hoffert wrote up bills and forgot to indicate that no PST was charged because the sale was for an "Energy Star" unit. This could have caused problems with Sask Finance wondering why no PST was collected. (See ER1 page 6 and 7 (my marking) invoice #12334 and #12335.)
- ER1 page 4, Mr. Hoffert neglected to write the cheque number on the invoice and although not serious, is a violation of company expectations (invoice #12404).
- ER1 page 5 invoice #12383, Mr. Hoffert recorded the washer model number incorrectly. He recorded NTW4604YQ instead of NTW4604BQ. Not only does this affect inventory, and ordering it affects the price as different models have different prices.
- ER1 page 9 invoice #12260, Mr. Hoffert forgot to put the model number on the invoice and then put the wrong model number on the invoice. When advised of this Mr. Hoffert admitted he screwed up and he was asked to be as attentive as he was earlier in his employment. Mr.

Hoffert responded resentful and angry. Mr. Hoffert was not advised at this time that termination was a possibility if his mistakes continued.

- ER1 Page 14, Account History Report shows warehouse alarm system on/off report for the month of May 2015. Matt's Furniture had hired a new employee (Michael Williams) and Mr. Hoffert was asked to check on Mr. Williams arming and disarming of the warehouse security system. This report showed that Mr. Hoffert did not perform that function on a regular basis and for the period May 14 to May 20 the alarm system was unarmed. Had there been a break-in there would have been no alarm warning. When Mr. Hoffert was advised of this he got angry and says that it couldn't have happened. Upon reviewing the record he asked to be fired.

- On June 2, 2015 upon arriving at the Kamsack store at 8:55 a.m. he finds the "Open" sign flashing. When Mr. Hoffert was asked about it and was told he forgot to turn it off the day before and that he was sorry. At 11:00 a.m. that same day as he was leaving the store he notices the "Open" sign is now off. Again Mr. Hoffert, upon being advised, says fire me, I'm not quitting.

- ER1 Pages 12 and 13, Mr. Hoffert signed off on a delivery from Restwell Mattress for 4 mattresses when in fact 4 box springs were delivered. Luckily the Company agreed that Mr. Hoffert was wrong and the store did not lose money although the error cost time and effort to correct. Mr. Hoffert called him in Toronto all upset saying he screwed up. He was upset as well and told Mr. Hoffert that one more mistake and he will be fired.

- while in Kamsack on June 10 he discovered that Mr. Hoffert had neglected to put the sale of 4 appliances to Kamsack Housing into receivables. While this error would likely have been found by accounting, if not paid it would have taken some time. He was really upset and talked to Mr. Hoffert about this. He tells me again to fire him as he is not quitting.

- He spent a couple of days thinking about what to do about Mr. Hoffert and his mistakes. On June 13, he drove to Kamsack and at 4:00 p.m. he told Mr. Hoffert that he was fired. Mr. Hoffert paused and then asked "right now" and he replied "right now".

- luckily a fellow who use to work for us asked to come back shortly after Mr. Hoffert was fired. Our monthly sales at Kamsack used to be about \$75,000. In May the sales were \$37,867.32, June \$33,597.04. In July with the return of the former employee the sales jumped to \$63,072.00. Clearly Mr. Hoffert's performance, attitude and behaviour was costing us business as well as poor morale for other staff. September sales were \$54,000.00.

### **Cross Examination**

In response to questions from Mr. Schmidt, Mr. Kutsak provided the following evidence:

- he acts as Manager for all the stores including Kamsack. He visits the Kamsack store every week and his son Travis visits that store as well.

- the Kamsack store has 4 employees of which Christa has been there the longest, 11 1/2 years and then Mr. Hoffert next with over 10 years.

- his other employees have made few errors. Mr. Hoffert the only one with many.

- they never used progressive discipline nor did they put any of their concerns in writing. They talked often to Mr. Hoffert about his performance but he refused documentation while admitting he screwed up.

- when Mr. Hoffert asked to be fired, he was told to improve and he would agree that he would.

- Mr. Hoffert's name should have been on the alarm record for every close in the month of May.
- Mr. Hoffert's errors caused financial losses due to unnecessary trips, and time needed to correct inventory mistakes.
- June 10 was the last mistake and finally took decision to fire.
- Mr. Hoffert did a great job for over 9 years. He was a good caring employee until the fall of 2014.
- Mr. Hoffert had a health concern about five years ago when diagnosed with MS. He participated in a trial and quit because of the travel to Regina. Not aware of any other issues away from work.
- Mr. Hoffert was the cause of declining sales over the last several months.

### **Re-direct**

None

Mr. MacKay called Travis Kutsak and he was sworn.

In response to Mr. MacKay's questions he provided the following evidence:

- he is Metro Kutsak's son and an employee of Matt's Furniture Ltd.
- his responsibility is to manage the Company's warehouses, see that stock is up to par and that inventories are accurate. He also keeps employees on top of things.
- he has been around as long as Mr. Hoffert. He works out of the Fort Qu'Appelle store but travels to all the other stores. Mr. Hoffert would be one employee he monitored.
- Mr. Hoffert's performance was good. He was a trusted, dependable, valued employee until the last few months.
- for the several months prior to his termination Mr. Hoffert seemed to be making mistakes daily. He was talked to on many occasions by himself.
- on February 27, 2015 Mr. Hoffert was asked to ship a model 7500 washer to Fort Qu'Appelle and he shipped a model 7300. This error made the customer have to wait another week.
- on March 27 Mr. Hoffert shipped 2 headboard units instead of the 1 requested. Also he was requested to ship a recliner and he told me he didn't have one. Two days later when in Kamsack, I found it in the warehouse.
- he spoke to Mr. Hoffert every time he made a mistake and he would apologize and say it won't happen again. He was told that he has to pay more attention and he would agree.
- on April 24 he shipped a fridge that was not requested. Again Mr. Hoffert was spoken to and he gave the same responses.
- on May 15 Mr. Hoffert was requested to ship 3 recliners. Instead he shipped 2 with one piece of the third. Every time an error like this is made the cost of travel goes up to correct.

- May 29 Mr. Hoffert advised that he did not have certain items which were later found in his warehouse. Again he was spoken to him and again he tells me he does not know what happened. His lack of control of his warehouse causes problems for all 4 stores and their customers.
- he refused to follow Company guidelines for floor displays. His store always looked messy and time was spent changing it back changing it back.
- he had to speak to Mr. Hoffert many times about his floor display.
- over the last several months his performance got worse and worse and he didn't seem to know why things happened.
- he spoke with Mr. Hoffert by telephone after every incident and finally told him we will have to get rid of him. His reply was that we have to do what we have to do.
- on June 4 he accepted delivery for 4 mattresses when really 4 box springs had been delivered. This mistake almost looked to be on purpose. It could have been a costly mistake and never should have happened.

### **Cross Examination**

In response to questions from Mr. Schmidt, Travis Kutsak provided the following evidence:

- these were not small errors, every one affected the store and the customers.
- the April 24 fridge shipped in error was Mr. Hoffert's error not anyone else. It was he that put it on the shipping form.
- all the phone calls he made to Mr. Hoffert were cordial, no name calling but as the mistakes mounted he became progressively more frustrated and adopted a sterner tone.
- Christa had store responsibilities but she did not move the product around, Mr. Hoffert did that.
- the function for store transfers was all employees responsibility but Mr. Hoffert was responsible for the Kamsack warehouse.

### **Re-direct**

None

Mr. MacKay then called Jason Tosh as his last witness. Mr. Tosh was sworn and in response to Mr. MacKay's questions provided the following evidence:

- he has been an employee of Matt's Furniture Ltd for 2 1/2 years and works at the Melville store.
- he knows Mr. Hoffert and has had some involvement with him particularly for a week he worked at Kamsack while Christa was away.
- he found Mr. Hoffert to be excitable and pushy with his thoughts.
- he was in Kamsack in June of 2015 for a week and even though the store was slow Mr. Hoffert was stressed and seemed overwhelmed.

- Mr. Hoffert complained that Management was not happy with him and that they were going to get rid of him. Mr. Hoffert went on to say he wasn't going to quit and give up his severance. It seemed that Mr. Hoffert had it all figured out.

- he was not present when Mr. Hoffert was terminated.

### **Cross Examination**

In response to Mr. Schmidt's questions, Mr. Tosh provided the following testimony:

- the week he was in Kamsack, Mr. Hoffert miscounted mattresses for box springs. He is not sure it was an honest mistake. It certainly should never have happened.

- he has made mistakes and when that happened Metro would talk to him.

### **Re-direct**

None

## **ii. EVIDENCE OF EMPLOYEE**

Mr. Schmidt called his only witness, Mr. David Hoffert and he was sworn.

In response to questions from Mr. Schmidt, Mr. Hoffert provided the following evidence:

- he believes he started his employment with Matt's Furniture Ltd in April or May of 2005. The ROE provided upon his termination states his start date to be September 2006.

Note: At this point Mr. Hoffert produced two documents. The first appeared to be a pay stub dated December 14, 2005. Mr. Metro Kutsak verified it to be from Matt's Furniture Ltd. That document was marked EE1. The second document is a "Statement of Remuneration Paid" from CRA for the year 2005 from Matt's Furniture Ltd to David Hoffert. This document was marked EE2. Given his termination took place in June of 2015 his 10th anniversary would have been in April or May of 2015.

- his duties have ranged from sales to warehouse management. He has also cleaned out houses and cut lawns.

- over the last six months the Employer has never sat him down for a discussion nor has he been written up for mistakes.

- he doesn't remember shipping the fridge that Travis referred to as being not requested.

- he believes he fulfilled his obligations regarding training Michael on the security system. He is sorry for the lack of checking from May 14 to May 20. The door would have been locked, but the alarm was unarmed.

- he agrees that the mattress/box spring screw up was his fault. He was stressed out that day and instead of going off his own sheet he went off theirs. He had been interrupted twice during the delivery by a Kamsack Housing renter wanting a key and that got him mixed up.

- he enjoyed working at Matt's Furniture Ltd until the end.

- on March 23 during the unloading of a truck, a fridge was dropped and smashed. He told Travis and Matt and later Travis phoned him. During the call Travis was belligerent and rude not allowing him to talk. Every call since from Travis had the same tone.
- Travis told him that they didn't need two employees at the Kamsack store making him think he'd be let go.
- he agrees that Mr. Tosh's testimony reflected what happened.
- Travis told him that after 9 years he should not be making these mistakes.
- he told Matt about Travis's behaviour.
- Travis was upset that we would call on every little thing, but that was because we were afraid he'd give us hell if we didn't.
- when Matt fired me he told me the reasons were:
  - I was looking for another job
  - I was making too many mistakes
- he was not happy the last while because he was always getting berated by Travis.
- he did make mistakes but didn't do them on purpose. He would never do anything maliciously.
- he was never sick, worked weekends and days off. Came back after hours.
- Travis did mention during a phone call that he could be fired and when he asked Matt, Matt replied that he was an annoyance at times.
- the last day he was mowing lawns when Matt told me him was fired. He cleaned up the mower, put it away, talked to Matt for awhile and left. Mat has always be civil with him.

### **Cross Examination**

In response to Mr. MacKay's questions Mr. Hoffert provided the following evidence:

- he used to have a temper but feels he has mellowed out.
- he was happy with his employment until Travis started to yell at him.
- he wasn't going to quit like Nathan did. It seemed like they wanted him to quit so they wouldn't have to give notice.
- he only made the statement "I'm not going to quit so you'll have to fire me" once. That was to Travis. He did tell Christa and Jason that.
- near the end he did calculate what the severance should be.
- he was not looking for other employment. His wife was looking at work in Maple Creek and had she got that job he would have given proper notice to Matt's Furniture Ltd.
- he liked working for Matt but did make mistakes. He is not sure if his MS was a factor. He is not taking treatment.

- he was diagnosed with MS and did take part in a treatment trial. He had to stop the trial because the drug was affecting his kidneys. This was years ago.

### **Re-direct**

None

I asked Mr. Hoffert if he has seen his doctor recently regarding his MS and he said no. I asked if he had any conversations with his employer regarding MS and the mistakes that suddenly started last fall and he said no. He did say that he has had trouble remembering things and some days he has trouble with letters.

### **Final Arguments**

Mr. MacKay argues that the decision to terminate was financially driven. It followed a series of errors and warnings given.

Mr. Hoffert was given a final warning in June of 2015. That warning was correct your performance or be fired. The result was a hardening of the employee's position and an insolent reply "so fire me". So on June 10 the culminating incident regarding receivables took place and he was fired for cause.

Mr. Schmidt argues that the onus of proof is on the Employer to establish just cause on the balance of probabilities.

The Employer did not follow the principle of progressive discipline. The employee was given no consequences for his actions.

There were no financial losses but some inconvenience.

There were no warnings issued and no documentation generated.

Just cause has not been established.

Mr. MacKay closed his argument by suggesting the resurgence in sales supports the Employer's position of just cause.

I thanked the parties for their cooperative approach to presenting their cases and closed the hearing.

## **V. ANALYSIS**

There is no dispute that after nine or ten years of, in the words of Travis Kutsak, trusting, dependable, valued performance, on the part of David Hoffert, there was a dramatic change.

While there were many references to the change beginning in the fall of 2014, all examples provided by the Employer occurred in 2015.

Mr. Hoffert admitted to most of the allegations, claiming he could not remember some. Nevertheless the record shows a number of errors and omissions that several months earlier were routine tasks for him.



The concern for me, is the strategy followed by the Employer in dealing with this sudden change in performance. Their reaction to each incident was to blame Mr. Hoffert, criticize him, and warn him. There is no evidence before me that a consideration of other factors was taken. There are a myriad of external work place factors that can cause a change in performance. Those factors range from family issues, addiction issues, personal issues and health issues.

The Employer's evidence shows no consideration to possible outside factors even though they had knowledge of Mr. Hoffert's MS diagnosis. Mr. Hoffert's evidence is that never once was he sat down for a discussion about the causes of his mistakes. Instead he was telephoned and criticized and warned.

I admit that while I was aware that MS is a terrible disease, I had only a minute understanding until I took a few minutes to google it.

I want to be clear that I am not a medical practitioner and I am not suggesting that MS is the cause of Mr. Hoffert's performance change, however, had the Kutsak's taken the same time I did when Mr. Hoffert's difficulties began, they might have approached things differently.

For the record, Multiple Sclerosis attacks the protective covering of the brain and spinal cord causing inflammation. This causes the normal flow of nerve impulses to be interrupted or distorted. MS has a variety of symptoms and not everyone with MS experience all. MS also moves from periods of remission when symptoms improve to periods of non-remission when symptoms return. There are many symptoms but those which Mr. Hoffert may have been suffering from are loss of short term memory, depression, mood swings and involuntary emotional expression.

I will attach the information I printed off from the MS Society of Canada.

Mr. Hoffert's evidence did include that he was experiencing memory problems and trouble with letters.

Mr. Schmidt's arguments that progressive discipline principles were not followed and that Mr. Hoffert was not provided documentation nor consequences for his actions also have merit.

Although had the Employer gone the extra mile to do a thorough investigation of all factors including Mr. Hoffert's MS diagnosis and still concluded termination was warranted, just cause may have been upheld.

## **VI. AWARD**

### **Conclusion**

I am accepting Mr. Hoffert's testimony that he did not purposely or maliciously commit the errors or omissions he has agreed to as committed.

Given the long service of the employee one would think the Employer would have explored the possibility that Mr. Hoffert's MS may have been behind his performance change. If so, the mistakes would have become non-culpable.

Non-culpable behaviour requires a non-disciplinary response and if Mr. Hoffert was found to be unable to continue his employment, pay in lieu of notice would be the result or working out the period of notice.

My decision is that having the knowledge that Mr. Hoffert had been diagnosed and yet did not explore the ramifications of that diagnosis, the Employer cannot claim "Just Cause" and therefore the Wage Assessment is upheld.

**I. WAGES**

The Employer raised no objection to the calculation provided by The Ministry in the amount of \$5,813.66 a pay in lieu of ten weeks' notice. Therefore this amount is owed to the Complainant.

Dated at Regina, in the Province of Saskatchewan, this 12th of November, 2015



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Ralph Ermel  
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](http://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.