

DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTIONS 2-75 and 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT



COMPLAINANT: Jamie Harrick
Represented by Paul DeBruin
Employment Standards Officer

RESPONDENT: Bad Boys Welding Ltd.
Represented by Ryan Armstrong, lawyer
Robertson Moskal Sarsons

DATE OF HEARING: July 12, 2016

PLACE OF HEARING: Conference Room,
Offices of Robertson Moskal Sarsons
3801A-51 Avenue
Lloydminster, Alberta

I. INTRODUCTION

This is an appeal by the Employer, Bad Boys Welding Ltd., from a Wage Assessment in the amount of \$9,937.76 in favour of the Employee, Jamie Harrick, dated March 8, 2016.

Jamie claims that he was laid-off by the Employer and entitled to six weeks' pay in lieu of notice pursuant to section 2(61) of *The Employment Standards Act*, as well as money owed for unpaid regular wages, overtime and annual holiday pay.

In its Appeal of the Wage Assessment, the Employer laid out the following grounds:

1. The Employee was employed in seasonal construction primarily in the Oil and Gas Industry;
2. The Employer paid for the Employee's training in the welding trade;
3. Due to the recent and on-going slowdown in the Oil and Gas Industry the Employer was unable to provide the Employee with full time hours or hours as had previously been available;
4. The Employee was only to come in to work for the employer if work was available. The Employee had recently been coming into work, not working due to

- work being unavailable, and leaving without having worked but claiming three (3) hours pay;
5. The Employee effectively terminated employment with the Employer by quitting but requesting that the Employee's Record of Employment (ROE) reflect that the Employee was "laid off";
 6. The Employer believes the Employee requested the ROE to indicate "laid off" so that the Employee could obtain Government Benefits such as Unemployment Insurance Benefits;
 7. The Employer denies any wages owing to the Employee, including any wages for outstanding pay or for pay in lieu of notice of termination.

In summation, the Employer argues that the Employee asked to be laid off, although he was in fact quitting his employment, and so he should not be granted the right to notice as set out in *The Employment Standards Act*. The Employer also argues that the Employee recorded hours above those he actually worked and there are no monies owing for unpaid wages, overtime and holiday pay.

II. EVIDENCE

The Employer called two witnesses: Desi Latimer, the owner and General Manager of Bad Boys Welding Ltd., and Kent Chappell, the Manager of Operations of the company.

Jamie Harrick, who now lives in the south-east corner of the Province, testified by telephone.

Bad Boys Welding is owned and operated by Desi Latimer and his wife Rachel. The business was started in approximately 2001-2002 and incorporated in Saskatchewan in 2005. Bad Boys provides welding services and oil field maintenance to the oil and gas industry in the Lloydminster area. A team of employees, usually consisting of a company representative, supervisor, foreman, swampers and welders, is sent to a site to perform work for a customer. Swampers do pipe-fitting, attaching and set-up, while welders usually just weld. Employees keep track of their hours on time tickets. The time tickets plus the equipment used are the basis for preparing a bill for the customer. The time tickets are also the basis for paying Bad Boys' employees. Desi personally reviews the bills and the time tickets before the bills are sent out and before his employees are paid.

Kent Chappell has been the Manager of Operations at Bad Boys for about seven years. His duties include overseeing operations, seeking out and scheduling work, quality control, and ensuring proper policies and procedures are followed. He also deals with Human Resources matters including concerns and complaints, first aid, lost time, equipment damage and safety matters. He personally reviews all employees' daily time tickets before they go to the accounting department. He ensures all equipment and labour is recorded properly for billing to customers.

Jamie Harrick started work with the company in June 2008 when he was seventeen or eighteen years old. Bad Boys sponsored Jamie in his training to become a welder, paying for fuel, books and tuition during his apprenticeship. At the time his employment with Bad Boys ended, Jamie was a journeyman welder. He earned \$42/hour, but was only paid for the hours he actually worked on a job, which varied from day to day. He worked for Bad Boys for 6 ½ years.

By the fall of 2014, the world-wide decline in oil and gas prices began to impact the oil and gas industry around Lloydminster; the work available for businesses such as Bad Boys decreased.

The Employer produced Minutes from a Monthly Safety Meeting dated November 5, 2014 (Employer Exhibit #3). Attendance at the meeting was recorded on a sign-in sheet; Desi, Kent and Jamie were all present. The Minutes included the following hand-written notes:

- work is going to be slowing down
- lay offs will be coming
- Do not come in unless called or supervisor notifies you & foreman

Kent and Desi testified that these issues were discussed at the meeting. Jamie acknowledged he attended the meeting but does not recall the discussion.

Also found in the Meeting Minutes, under the heading "On-Call Schedule for discussion" is a note stating, "Jamie said to pay everyone something for sitting @ home."

Desi testified that he encourages a family-type work environment at the company with open discussion with his employees. He stated he had more than one conversation with Jamie wherein Jamie expressed concern about the slow-down in work. Jamie was getting fewer and fewer hours as the year progressed and mentioned to Desi that he might have to look for other work.

In fact, Bad Boys decreased the number of its employees from 11-15 in the summer of 2014 to only 4-5 by January 2015.

From time to time, Kent, Desi, or the accounting employee at Bad Boys noticed that a crew member's or welder's timesheet did not match the hours spent on the jobsite. In the last few months of 2014, Kent noted several times where Jamie recorded more hours than the crew that worked with him. Kent testified that usually a welder would have fewer hours on the job site than the other members of the crew, as their duties are limited to welding. When there was a discrepancy, Kent investigated the circumstances, talked to the job supervisor, corrected Jamie's hours and billed the customer accordingly. He said he usually told Jamie about the correction within a day or so.

Jamie testified that he would not know about the adjustments until his bi-weekly pay cheque. He also claimed that sometimes he had to stay on site more hours than the crew. He admitted that sometimes he recorded more hours than he actually worked, but only did so to get in his eight hours.

No specific circumstances were addressed by either party. From the testimony of all three witnesses, it sounded like exaggerating hours is not uncommon in oil-patch industries and so must be monitored closely.

Jamie's time sheet for the period December 7 to January 3 was produced as Employee Exhibit #2. The timesheet is simply a photocopied page with room for the date, a box for hours, which are written in by hand by the employee, a column for "Crew" and a column for "Ticket Numbers". The columns for Crew and Ticket Numbers have been left blank on these two pages; the only markings from Jamie are the 'total hours' recorded in the boxes.

Desi testified that when he reviewed the time sheets marked as Employee Exhibit #2, the actual hours Jamie worked were penciled in on the left-hand side of the page, and that was what Jamie was paid for. The hours would have been verified by Kent and/or the accounting clerk by comparing the crews' time sheets.

In late 2014, Desi and Kent testified that Jamie frequently came in to work even if not requested to do so, did nothing, then recorded the minimum three hour call-out on his time sheet. Desi testified the workers were welcome to come into the shop for coffee if they had nothing else to do but they would only be called when there was actually work. Bad Boys' normal practice was to call employees the night before, or text them the day of the job. Therefore, on Employee Exhibit #2, there are several instances where Jamie has recorded "3" hours but the office has entered "0" hours as the amount he is to be paid.

Jamie testified he had a twenty minute drive to the shop, and he had to be there in case there was work. Desi and Kent disagreed with this. Welders are the highest-paid employees on the crew at \$42/hour; Bad Boys is not going to pay one to sit around.

As seen from the Record of Employment, Jamie's hours varied greatly between pay periods, but his hours in the two months before his layoff usually averaged less than twenty hours per week.

In early January 2015, Jamie spoke with Desi and said he was going to look for other work to make ends meet. Desi said he understood but he wanted to keep Jamie at Bad Boys. Jamie went away for a week on holidays in Mexico with his girlfriend from January 13-19. He could not recall if he had pre-booked the holiday. He testified he was back and able to work as of January 20, and was away only for five business days.

Desi testified that after January 12, there was no work for welders and only a little for the rest of the crew. Jamie testified that in January, he was told he would be called in if there was any work. After January 12th, he was never called, so he texted Desi on January 27.

Desi produced a screen shot from his cell phone of the text conversation with Jamie on January 27, 2015 (Employer Exhibit #1):

Jamie: Hey what's going on

Desi: Not much. How was your trip

Jamie: It was really good man

Desi: Sweet

Jamie: Can you lay me off?

Desi: Sure

Desi: You didn't find another job?

Jamie: Not yet. Trying to find a camp job. Haven't really looked to much. Still on holiday mode lol

Desi stated that the next day he or an employee from his office phoned the 'labour board' and asked what his company had to do when laying off an employee. He testified he was told if the employee requested a lay-off, there was no need to 'pay them out'. No evidence was provided as to who was spoken to, or the exact details of the request for information.

On January 28, Desi had his office prepare a Record of Employment (Employer Exhibit #2), showing that Jamie's last day of work for which he was paid was January 12, 2015, with the final pay period ending January 17, 2015. Expected date of recall was "unknown", and the reason for issuing the ROE was "shortage of work/end of contract or season".

Jamie testified that he wanted to be laid off because he was not getting called in for work. He acknowledged he received Employment Insurance for approximately three weeks after leaving Bad Boys, then started a new job in the mining industry on March 1, 2015.

In calculating the Employee's claim for unpaid wages, the Employment Standards officer relied on the hours Jamie recorded on his time sheet in December and January (Employee Exhibit #3), but was not paid for:

Regular wages 19.5 hours x \$42 = \$819

Overtime 2 hours x \$63 = \$126

Annual holiday pay = \$819 + \$126 = \$945 x 3/52 = \$54.52

The Employer's witnesses testified that they deducted only the hours that Jamie exaggerated on his time sheets, including the days he came in unsolicited but claimed three hours of work.

Pursuant to section 2-61(2) of the *Act* pay in lieu of notice was calculated by the Employment Standards Officer by averaging the pay for the 13 weeks the employee worked preceding:

(a) the date on which the notice of layoff or termination was given; or

(b) if no notice of the layoff or termination was given:

(i) the date on which the employee was laid off or terminated;

The average weekly wage for Jamie's thirteen previous pay periods was \$1,335.60 (31.8 hours/week).

\$1,335.60 x 6 weeks' pay in lieu of notice = \$8,013.50

Annual Holiday pay (3/52) = \$462.32

The Employee's claim is summarized as follows:

Unpaid regular hours	\$ 819
Unpaid overtime	\$ 126
AHP on unpaid hours	\$ 54.52
6 weeks' pay in lieu of notice	\$8,013.50
AHP of pay in lieu of notice	\$ 462.32
TOTAL	\$9,475.44

I note that the first page of the Employment Standards Inspection Report (Employee Exhibit #3) contains an addition error; the \$462.32 AHP on the pay in lieu of notice has been added in twice. Therefore, the Employee's total claim should be as calculated above: **\$9,475.44** (not \$9,937.76)

III. ANALYSIS

The Saskatchewan Employment Act states:

2-60(1) Except for just cause, no employer shall lay off or terminate the employment of an employee who has been in the employer's service for more than 13 consecutive weeks without giving that employee written notice for a period that is not less than the period set out in the following Table:

Employee's Period of Employment	Minimum Period of Written Notice
.....	
more than five years but 10 years or less	six weeks

"Layoff" is defined as follows in the *Act*:

2 -1(1) "**layoff**" means the temporary interruption by an employer of the services of an employee for a period exceeding six consecutive work days;

The Employer argues that by asking Desi to lay him off, Jamie was actually quitting his job. It claims Jamie wanted his Record of Employment to state "layoff" so he could obtain Employment Insurance while looking for other work. This was not an employer-driven decision, but was instigated by Jamie. Given these circumstances, the Employer contends, Jamie should not receive the benefit of the notice provisions of *The Saskatchewan Employment Act*; the *Act* was not intended to confer a benefit on an employee who quits by asking to be laid off.

The Employment Standards Officer noted that Jamie never received written notice of a layoff, but according to the *Act's* definition of lay-off, had experienced a temporary interruption in work for 6 work days (January 20, 21, 22, 23, 26, 27). The Employee was therefore entitled to pay in lieu of notice of layoff.

The evidence clearly shows both Bad Boys and Jamie Harrick were aware of the possibility of a layoff:

- The Lloydminster area oil and gas industry was experiencing a slowdown because of declining world prices.
- Bad Boys decreased the number of its employees by approximately 10 between summer 2014 and January 2015.
- At the November 5, 2014 Safety Meeting, employees were told that layoffs were coming.
- As seen in Employee Exhibit #2 (Jamie's time sheets from December 7 to December 31) Jamie's hours were declining to an average of less than twenty hours per week.
- As testified to by Desi and Kent, Jamie was coming in when there was no work and recording three hours on his time sheet, in an attempt to increase his hours and paycheque.
- Desi testified that after January 12, 2015, there was simply no work for welders at Bad Boys.

Jamie's income was significantly reduced. He took a week's holidays, but on his return there was no end to the slowdown in sight, and he asked Desi to lay him off.

I find that Jamie did not quit or resign from his job by asking by text message for the layoff. Given the economic circumstances, his layoff seemed imminent in any event. I note that the statutory requirement of a 6 day interruption in work days had been fulfilled by the time of the text exchange between Desi and Jamie.

Perhaps Desi simply wanted to hang on to a good, long-term employee. Or, since Jamie was paid only for the hours worked on a job, perhaps Bad Boys' managers felt it would be more cost effective to give him the hours they could - minimal as they were becoming - rather than pay Jamie notice. This was obviously something considered by Desi, as he testified that he, or an office employee, rang up Employment Standards to ask about the situation.

Given these facts, I find that Jamie was laid off as contemplated by *The Saskatchewan Employment Act*, and is entitled to six weeks' pay in lieu of notice.

Concerning the amounts claimed by Jamie for unpaid regular wages, overtime and annual holiday pay for the period December 8 to December 31, I find the evidence did not substantiate his claim. The calculations were based on Jamie's hand-written time sheets, which did not match Bad Boys' records of the time worked on the jobs by the crews. As well, despite being told with the other employees at the Meeting on November 5, 2014 not to come into work unless called, Jamie would show up at the shop even when not called in, do nothing, and then record three hours on the time sheet. I accept that the Employer's records accurately reflect the hours worked by Jamie in December, and he has been paid for that work.

IV. CONCLUSION

The Employer's appeal is allowed in part, and that portion of the Wage Assessment for unpaid regular wages, overtime and annual holiday pay is overturned. This total was \$999.52.

The appeal as to the pay in lieu of notice is dismissed, and I hold the Employee was entitled to six weeks' pay in lieu of notice, plus annual holiday pay. After correcting the addition error in the Wage Assessment, the total now owing to the Employee by the Employer is **\$8,475.92**.

Dated at North Battleford, Saskatchewan, July 25, 2016.

Original signed by

Karen C. Ulmer

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.