

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

LRB File #124-16 Wage Assessment #7991

COMPLAINANT: Marcus Geske
Represented by Jas McConnell
Employment Standards Officer



RESPONDENT: M & O Construction Ltd.
Represented by:
Wade Mollison, Director
Larry Obleman, Director
Sherry Mollison

DATE OF HEARING: August 30, 2016
9:30 a.m.

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

1. INTRODUCTION

All attendees were introduced and I outlined my expectations and processes for the hearing. I advised The Act provides 60 days for a written decision to be rendered.

Since this hearing is Mr. McConnell's first, Employment Officer Randy Armitage was permitted to attend as a mentor.

II. PRELIMINARY OBJECTIONS

Mr. McConnell requested that the parties agree to a "statement of facts". He provided a copy marked as EE5.

After some discussion the "agreed to" facts are as follows:

1. The Complainant worked for M & O Construction Ltd. from April 14, 2012 to December 23, 2014 and was paid \$19.50 per hour. He was a full time employee.
2. M & O Construction Ltd is a registered limited company with the province of Saskatchewan.

3. There are four registered directors for M & O Construction Ltd.: Glen Wayne Kitzul, Glen Obelman, Wade Mollison and Larry Obleman.
4. Riley Miller was the Complainant's foreman.

III. THE DISPUTE

The Ministry is claiming the Complainant was terminated and therefore is owed pay-in-lieu of notice.

The Respondent is claiming that the Complainant gave notice and quit and therefore is owed nothing beyond pay for work performed.

IV. FACTS

i. EVIDENCE OF EMPLOYER

All three employer representatives were sworn and together provided the following evidence:

Mr. Geske told Mr. Mollison in November of 2014 that he was on a "wait list" for employment with another employer. Mr. Mollison told Mr. Geske that was fine with the company but to keep in touch regarding when he would be leaving.

Mr. Mollison asked Mr. Geske several times in the next several weeks when he would be leaving but never got anything concrete.

Mr. Obleman testified that it was well known around M & O that Mr. Geske was waiting to be called to a pipe fitter job.

Mr. Mollison testified that M & O were tolerant of the situation because Mr. Geske was a good trained employee and turnover was quite high. They didn't want to lose him until he was really gone.

Mr. Mollison testified that all employees, including Mr. Geske, are routinely given lay-off notice for the Christmas period. In 2014 the lay-off date was December 23. Mr. Geske worked some days in January and February and went on a week vacation after the first week in February. Mr. Geske did not work after that and never contacted the M & O office. As far as Mr. Mollison is aware Mr. Geske never contacted Foreman Miller either after the vacation period.

Cross Examination

In response to questions from Mr. McConnell, the Company provided the following evidence:

Mr. Geske never gave the Company an end date. Mr. Geske was a good, reliable employee and the Company had no issues with his work. The Company assumed he had quit when there was no contact after his vacation.

Note: Mr. McConnell tabled an e-mail from Mr. Mollison to himself dated December 11, 2015. It was marked EE2.

Mr. McConnell tabled an e-mail from Riley Miller dated August 22, 2016. It was marked EE3. This e-mail states that Mr. Geske had contacted Mr. Miller after his return from vacation. The e-mail does not state dates as to when this happened.

Mr. Mollison understood Mr. Geske had a job to go to when he got to the top of the list. He also understood Mr. Geske was going to quit but didn't know when.

Mr. Mollison testified that Mr. Miller never told him that Mr. Geske was calling him, in fact Mr. Miller told him, he (Miller) had not spoke to Mr. Geske.

Mr. Mollison testified that Mr. Geske never told him that two weeks' notice would be given.

Mr. McConnell tabled Mr. Geske's ROE (Marked EE4) and asked Ms. Mollison when it had been completed as there is no date on the form. Ms. Mollison did not know.

Re-direct

None

ii. EVIDENCE OF EMPLOYEE

Mr. McConnell called Mr. Geske and he was sworn. Replying to Mr. McConnell's questions he provided the following evidence:

Mr. Geske talked about quitting M & O Construction Ltd. as he was waiting to be called to another job. He never gave M & O an actual date for quitting or resigning.

The reason he was waiting for the other job is because he wanted to pursue his career in plumbing. He is currently in his second year of plumbing apprenticeship.

He had qualified to be placed on the Union waiting list (UA179) and he would be called as soon as an employer needed a utility worker. He had told Mr. Mollison that when he was called he would give M & O two weeks' notice.

He has worked for various employers for 16 years and he has never walked out on a job. He has always given notice.

He told Mr. Mollison he would give two weeks because that was standard.

He has taken either the last week in January or the first week of February as vacation over the last few years. In 2015 it was early in February.

He believes he had a good relationship with M & O.

He called foreman Miller after he returned from vacation and told him he was ready to come back to work. Miller told him it was too cold, which it was for about two weeks.

His contact with the Company was always through his foreman whether for sick leave or other reasons.

He was surprised when he received the ROE but he can't remember when he received it.

He was on EI for three months before he was called from the "waiting list".

He applied for EI in February 2015 using the lay-off slip from December of 2014.

He has two children, whom he looked after while on lay-off. He looked for other work while on lay-off.

M & O Construction Ltd. never called him after his vacation, his only contact was Foreman Miller. He believed he was on lay-off for this period.

Cross Examination

Mr. Geske provided the following testimony in response to questions from M & O Construction Ltd. representatives:

He applied for EI sometime in January of 2015 and received benefits from February until he started the other job.

He called Foreman Miller for two months and was told each time after the cold period that there was no work. He finally gave up.

Re-direct

None

Final Argument

M & O Construction Ltd. representatives argued that Mr. Geske knew the process followed by the Company around Christmas and the early months of each year.

The Company is shut down for the last part of December and work is available in January, February and March as weather permits. Mr. Geske knew he could come back at any time after his vacation.

Mr. Geske is using Mr. Miller as an excuse when he could have called the office.

Mr. Geske's situation with the "wait list" was tolerated by M & O because they have a high staff turnover and didn't want to lose him until it was necessary.

It was unfortunate that Mr. Geske stopped communicating with the Company.

Mr. McConnell argued that pay-in-lieu of notice is payable even if an employee is on EI.

Further the process used by the Employer for lay-off is illegal and it is their responsibility to recall employees rather than employees recalling themselves.

Mr. Geske was vague on his end date because he simply didn't know when he would be called from the "wait list". There was no malice involved and the Employer had told him it was alright.

In order for an employer to determine an employee has quit, there must be a clear and unequivocal intention on the part of the employee. In this case there was an intent provided by the Complainant and then an assumption made by the Employer.

The Employer has an onus to make sure the intention was clear and unequivocal. In this case M & O did not, they laid Mr. Geske off on December 23, 2014 and never recalled him. Mr. Geske believed all along that he was on lay-off.

For this reason the appeal should be denied and the Wage Assessment up-held.

I thanked the parties for their able presentations and closed the hearing.

V. ANALYSIS

M & O Construction Ltd. provided sworn testimony that included:

1. Mr. Geske was provided notice of lay-off sometime prior to December 23, 2014. The effective date of lay-off was December 23, 2014.
2. Mr. Geske worked some hours in January and February of 2015 and took vacation for a week in February of 2015.
3. Neither Mr. Obleman, Mr. Mollison nor Ms. Mollison tried to contact Mr. Geske after his vacation in February of 2015.
4. Foreman Miller had no reason to lie to Mr. Geske in February or March of 2015 about lack of work.
5. Mr. Geske's work was appreciated and his being on a "wait list" for another job was tolerated because the Company's staff turnover was high and they didn't want to lose Mr. Geske until they had to.

Mr. Geske's sworn testimony included:

1. That he received notice of lay-off effective December 23, 2014.
2. That he had some work during January and early February of 2015 with M & O Construction Ltd.
3. That he took a week vacation early in February of 2015 probably the week of February 8.
4. That he applied for EI in January or February of 2015 and collected for about three months.
5. That he called Foreman Miller upon the end of his vacation and did so regularly for about two months and was told each time there was no work.
6. That he never called nor received a call from the M & O office.
7. That he told M & O he would give two weeks' notice when he was quitting.
8. That he received an ROE from M & O but can't remember when.

VI. DECISION

There is no dispute that it was well known Mr. Geske was going to leave his employment with M & O Construction Ltd.

There is also no dispute that no one knew when that would happen.

It was also well understood by all concerned that the reason Mr. Geske was leaving and the reason no one knew when was because he was on a "Union Hall wait list". Mr. Geske was poised to give his two weeks' notice to M & O as soon as he was called off the "wait list".

Mr. Mollison testified that M & O was fine with Mr. Geske's continued employment with them while on the "wait list".

The issue for me to determine is did Mr. Geske quit or was he terminated.

It is clear M & O Construction Ltd. laid Mr. Geske off. It is also clear M & O never contacted Mr. Geske after his vacation except by mailing the ROE to him.

I accept Mr. Geske's testimony that he made several contacts with M & O through his foreman.

Mr. McConnell's assertion that the employer has an onus to communicate with employees is accepted as well. An assumption of quitting does not allow avoidance of pay-in-lieu of notice.

Therefore the appeal is denied and the Wage Assessment, as per 2-60(1) of the Act, of \$1,650.00 is payable by M & O Construction Ltd. to Mr. Geske.

Dated at Regina, in the Province of Saskatchewan, this 6th of September, 2016.



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.

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.