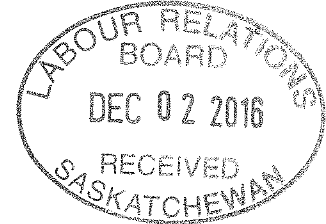
IN THE MATTER OF AN ADJUDICATION
PUSUANT TO SECTION 2-75 AND 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT



BETWEEN:

Chris Candillo;

Represented by Dale Schmidt, Employment Standards Officer.

AND

Rawtec Consulting Ltd., Box 1148, Yorkton, SK S3N 2X3

Represented by Patricia Rawlick and Kevin Rawlick

Date of Hearing: October 28, 2016
Place of Hearing: Main Floor Boardroom
72 Smith Street East
Yorkton, Saskatchewan

Preliminary Matters:

The Director of Employment Standards issued Wage Assessment # 8091. It was signed by the 'Director's Delegate' at Yorkton, Saskatchewan, dated June 14, 2016. It directed Rawtec Consulting Ltd., Box 1148, Yorkton, SK S3N 2X3 (the 'employer') to pay $4,393.48 in wages to Chris Candillo (the 'employee').

The Ministry of Labour Relations and Workplace Safety ('Ministry') was represented at this hearing by Dale Schmidt, Employment Standards Officer. Rawtec Consulting Ltd. was represented by Patricia Rawlick and Kevin Rawlick. No objections were made with respect to my jurisdiction to hear this matter.

Agreed Facts:

At the beginning of the hearing, Kevin Rawlick for the employer and Dale Schmidt for the Ministry agreed that Chris Candillo worked for the employer, which is an existing Saskatchewan Corporation, for about three and a half years. Rawtec Consulting Ltd.'s position is that they had just cause to terminate Mr. Candillo's employment. Kevin Rawlick however agreed that if Rawtec Consulting Ltd. did not have just cause to terminate Mr. Candillo's employment, the amount stated in the Wage Assessment as owing in wages is correct.

Issue

The sole issue in this matter is whether or not Rawtec Consulting Ltd. established just cause to terminate Chris Candillo's employment.

Decision

Just cause is a question of fact, and depends upon the context in which the incident or incidents occurred. The onus to establish just cause rests with the employer. In *Warren Ens v Gfs Prairies Inc,* 2012 SKQB 295 (CanLII) the court (at paragraph 18) explained it this way:

> *the employer has the burden of proof to establish, on an objective basis, just cause for the discharge, taking into account the nature of the conduct and all of the circumstances of the particular employment.*

Just cause need not be a single incident, but may consist of a series of incidents.

Laszczewski v. Aluminart Products Limited, 2007 CanLII 56493 (ON SC) (at paragraph 27) put it this way:

> *The seminal Ontario decision on cumulative just cause is McIntyre v. Hockin (1889), 16 O.A.R. 498 (C.A.). Caselaw over the past century has confirmed that an accumulated series of events, if accompanied by warnings from which it may*

be implied that an employee's job is in jeopardy, may entitle the employer to dismiss for cause.

The *Laszczewski* case continued by cautioning against using a series of minor events to piece together a case for just cause:

However, courts have repeatedly expressed caution against reliance upon a series of minor transgressions, cumulatively, in an effort to avoid the obligation of providing notice or pay in lieu thereof. (See: Clark v. Capp (1905), 9 O.L.R. 192 (Div.Ct.); Klamot v. Farm World Equipment Ltd. (1995), 1995 CanLII 5834 (SK QB), 8 C.C.E.L. (2d) 305 (Sask.Q.B.); aff'd at: (1996), 1996 CanLII 4989 (SK CA), 21 C.C.E.L. (2d) 29 (Sask.C.A.); and Ennis v. Textron Canada Ltd. (1987), 1987 CanLII 3528 (AB QB), 82 A.R. 260 (Q.B.).

In *Caudle v. Louisville Sales & Service Inc.*, 1999 SKQB 276 (CanLII) the court accepted the following definition of Saunders J. in *Leung v. Doppler Industries Inc.*:

Just cause is conduct on the part of the employee incompatible with his or her duties, conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance.

The courts have established a two-step test for determining if just cause is present. First the decision maker must determine if the conduct put forward as establishing just cause has been proven on a balance of probabilities. Second the decision maker must then determine if the conduct proven is the type of conduct which is so inconsistent with the employee's obligations to the employer as to constitute just cause. *Parkinson v. Kemh Holdings Ltd.*, [2013] S.J.No. 296 (Sask. Q.B.) citing *McKinley v. BC Tel*, [2001] 2 S.C.R. 161.

In this case the employer alleged the following three types of behavior to establish just cause:

1. that Chris Candillo consistently refused to follow the company's dress code;

2. that Chris Candillo consistently parked in metered parking, with the result that he had to leave work to plug the parking meters every two hours;

3. that Chris Candillo consistently worked less than 8 hours per day, as a result of both coming in late and including the lunch break in his time sheets.

As part of its argument, the employer submitted a binder, Exhibit ER-1. This binder contained copies of documents the employer referred to at the hearing, as well as some documents which were not referred to at the hearing. I indicated to Kevin and Patricia Rawlick (prior to accepting the binder as Exhibit ER-1) that I would not be able

to consider any documents, or incidents described in documents, where neither the document nor the incident had been mentioned at the hearing.
It would be improper to allow my decision to be influenced by documents Mr. Schmidt and Mr. Candillo neither had an opportunity to address, nor were aware of.

I will address Step One (has the conduct put forward as establishing just cause been proven on a balance of probabilities) and then Step Two (determine if the conduct proven is the type of conduct which is so inconsistent with the employee's obligations to the employer as to constitute just cause), with respect to each of the allegations against Mr. Candillo.

Allegation #1: that Chris Candillo consistently refused to follow the company's dress code

It is within management's prerogative to establish a dress code, such as was in place at Rawtec Consulting Ltd. This dress code was generally made known to all employees as it was contained in the company policy manual.

The employer indicated that Chris Candillo often wore jeans, t-shirts and ball caps in violation of the employer's dress code. Chris Candillo confirmed this in his testimony, but added that he generally worked inside the premises (as opposed to other staff, who would call on clients at the client's premises). He testified that he helped clients 'remotely' (that is from the Rawtec premises), and in fact spent 90-95% of his time at Rawtec's work premises.

Kevin Rawlick testified that he felt the dress code important as it made a statement to customers about professionalism. He also said that he saw Chris Candillo and the technicians who reported to him as a team, and he felt that Mr. Candillo was undermining the team feeling by not complying with the dress code. He felt that if Mr. Candillo didn't comply with the dress code, the technicians who reported to him would question why they had to comply with it. Mr. Rawlick clearly articulated his reasons for establishing the dress code. He did not however provide evidence that he, or anyone else on the employer's behalf, made it clear to Mr. Candillo that he had to comply with the dress code.

Mr. Candillo testified that he believed his manner of dress was acceptable to the employer, considering his position and duties. He indicated that his understanding of general conversations about the dress code was that the company dress code would not be applied in the same way to him. The employer did send out general emails reminding employees of the dress code, and did resend the policy book (which contained the dress code) to all employees. However, with one possible exception no clear communication was ever directed at Mr. Candillo to make it clear to him that he too must strictly abide by the dress code. This one possible exception is a letter dated October 16, 2015 from Kevin Rawlick to Chris Candillo. This letter begins "Please consider this letter as written, final warning of your work behavior." It goes on to say that issues including dress code and working hours had been discussed at a

September 10 'Employee Review'. The letter indicates that the employer has "not seen the required improvements. You continue to arrive late for work, do not work your required 8 hours/day, dress code is not observed...". Finally the letter says "unless there is immediate significant and long lasting change to the issues at hand your employment with RawTec Consulting Ltd. will be terminated."

This letter makes the nature of employer's concerns clear. There is however no evidence of the concerns mentioned in the letter being previously brought to Mr. Candillo's attention. There is also no evidence that this letter was ever transmitted to Mr. Candillo, as opposed to merely being placed on a file in the workplace. The employer did not testify as to whether, where, when or even if the letter was ever provided to Mr. Candillo. I note that the letter was addressed to what appears to be a residential address in Yorkton. Mr. Candillo testified that he had never seen the letter before the hearing. Mr. Schmidt, while not giving evidence, indicated that he had never seen a copy of it either, and I accept his word as fact. Therefore I am not able to conclude that the content or even the existence of the letter dated October 16, 2015 was ever brought to Mr. Candillo's knowledge. To the contrary, I accept Mr. Candillo's evidence that he was not aware of the letter prior to the hearing.

I also accept Mr. Candillo's testimony that although he was aware of the dress code, he did not think he had to abide by it. I conclude that Mr. Candillo held a reasonable belief, brought about by the employer's conduct that he need not strictly abide by the dress code. The employer's conduct in this case includes tolerating the dress code breaches without clear communication that the dress code applies to Mr. Candillo. Therefore I conclude that the allegation that Mr. Candillo consistently refused to follow the company's dress code has not been established on a balance of probabilities.

I would add that there was no evidence was adduced as to the extent or number of occasions that Mr. Candillo's dress departed from the dress code; only that he had failed to follow it. Mr. Candillo admitted to not following it, but did not elaborate. Therefore, even if it were to be established that Mr. Candillo violated the dress code every single day, it would be impossible for me to conclude on the evidence presented that such conduct was so inconsistent with the employee's obligations to the employer as to constitute just cause.

Allegation #2: that Chris Candillo consistently parked in metered parking, with the result that he had to leave work to plug the parking meters every two hours

The employer's concern with respect to employees parking in metered spots is that the employees would then take unauthorized breaks in order to plug their parking meters. Whether an employee parks in public metered parking is no concern of the employer. The employer does have the authority to tell employees they are not authorized to take additional breaks to attend to their parking meters (or for other purposes). On the other hand, an employee could use coffee breaks and the lunch break to plug the meter. On this issue I will simply say that no evidence was given as to how often Mr. Candillo took

such breaks, or how long such breaks were. However, given that Mr. Candillo testified he usually parked in a two-hour parking zone outside the office, presumably it would take only a few minutes every two hours minutes to plug the meter. In the absence of any further evidence all the employer has established, on a balance of probabilities, is that on an unknown number of occasions Mr. Candillo took an unknown (but presumably short) amount of time to put money in a public parking meter. Having concluded that this conduct is established under Step One, I conclude that the conduct proven (an unknown number of presumably short breaks) is not the type of conduct which is so inconsistent with the employee's obligations to the employer as to constitute just cause.

> Allegation 3: that Chris Candillo consistently worked less than 8 hours per day, as a result of both coming in late and including the lunch break in his time sheets.

Mr. Candillo was responsible for filling out his time sheets and submitting them to Patricia Rawlick. At least early in the employment Mr. Candillo regularly included the lunch break as time worked. This employer does not pay its employees for the lunch break. Mr. Candillo testified that he filled in these time sheets incorrectly until about the middle of his employment. Patricia Rawlick testified that she spoke to Mr. Candillo about the fact that the employer didn't pay for the lunch break. Ms. Rawlick rejected the timesheets on which the lunch break had been included. Mr. Candillo testified that after the timesheets had been rejected, he corrected them (by filling them out without counting the lunch break as time worked) and resubmitted them. He testified that he took a half hour lunch break, and after he was spoken to about the lunch break being unpaid, he began working a half hour longer.

It is clear that Mr. Rawlick and Ms. Rawlick believe Mr. Candillo's time sheets were inflated. They indicated they felt Mr. Candillo at times came in late, left early or took unauthorized breaks, and failed to adjust his time sheets accordingly. However, other than the lunch break matter I just discussed, no evidence was put forward at the hearing of specific dates or times when Mr. Candillo improperly claimed time as worked when it wasn't.

In summary, there was no evidence of times when Mr. Candillo was late arriving at work but recorded his time as if he arrived at the proper time. There was evidence of Mr. Candillo taking an unknown number of presumably short breaks to put money in a parking meter. There was no evidence of Mr. Candillo taking any other unauthorized breaks and recording the time as if it had been worked. There was evidence of Mr. Candillo recording his lunch break as time worked during the early portion of his employment with the employer. There was also evidence that these improperly completed timesheets were corrected, and thereafter Mr. Candillo testimony that he no longer claimed the lunch break as time worked was not contradicted.

Putting this into the two-step test from *McKinley v. BC Tel*, I conclude that the conduct which was proven on a balance of probabilities is that Mr. Candillo took an unknown number of presumably short breaks to put money in a parking meter, and recorded his

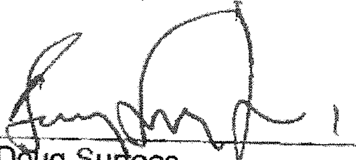
lunch break as time worked during the early portion of his employment with this employer. This error was later corrected.

In applying step two, I have no hesitation at all in concluding that the conduct proven is not the type of conduct which is so inconsistent with the employee's obligations to the employer as to constitute just cause. The employer did not establish just cause to terminate Mr. Candillo's employment. As a result Wage Assessment #8091 must be confirmed.

Conclusion:

The respondent/employer's appeal is dismissed, and Wage Assessment # 8091 in the amount of $4,393.48 is hereby confirmed.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 2nd day of December, 2016.



Doug Surtees
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.