



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

**APPELLANTS:** **BOB NELSON CONSTRUCTION LTD. and  
ROBERT ROY NELSON, as director of Bob  
Nelson Construction Ltd.**

**RESPONDENTS:** **KENT HAGEL and DIRECTOR OF  
EMPLOYMENT STANDARDS, Employment  
Standards Division, Ministry of Labour  
Relations and Workplace Safety**

**Randy Armitage, Employment Standards Officer, Appearing for the Director of  
Employment Standards, Employment Standards Division, Ministry of Labour Relations  
and Workplace Safety**

**DATE OF HEARING:** **October 26, 2016**

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

**LRB File No. 184-16; Wage Assessment No. 81**

**I. INTRODUCTION**

This is an appeal of a Wage Assessment brought by Bob Nelson Construction Ltd. (the Company) and its director, Robert Roy Nelson (Bob). Wage Assessment No. 8146 directed the Company and its director to pay \$1,303.08 to Kent Hagel (Kent) or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act).

On October 26, 2016, the following individuals attended the hearing:

- Terri Nelson (Terri), co-owner and employee of the Company (witness for the Appellants);
- Kent Hagel, Complainant and former employee of the Company (witness for the Respondents); and
- Randy Armitage, Employment Standards Officer.

**II. PRELIMINARY MATTERS/OBJECTIONS**

Terri appeared on behalf of the Company and her husband, Bob. Kent appeared on his own behalf and Randy Armitage appeared for the Director of Employment Standards.

### III. THE DISPUTE

On July 22, 2016, the Director of Employment Standards issued Wage Assessment No. 8146 against the Company and its director. The Appellants appealed pursuant to section 2-75 of the Act.

In a Notice of Appeal dated August 2, 2016, Bob states:

“Mr. Hagel was not terminated by Bob Nelson Construction.

I had asked Mr. Hagel (via text) to stay on unemployment because he was already on it due to attending his Second Year Apprenticeship at Sask Poly Tech.

Quote from text – Monday April 25, 2016

“Morning Kent, work is pretty slow, you should stay on EI till things pick up”

Mr. Hagel did not respond to my text, nor did he contact me directly to discuss the 2016 construction season.

I had heard that he started working for Aztex Construction.”

The issue is whether or not Bob and his Company laid off Kent. If Kent was laid off, he is entitled to pay in lieu of notice. If he quit, he is not.

### IV. THE FACTS

At the beginning of the hearing, the parties agreed to the following basic set of facts:

- Bob Nelson Construction Ltd. is a registered business in Saskatchewan.
- Kent was employed at the Company as a labourer beginning May 8, 2013.
- A break in service occurred from March 1, 2015 to March 30, 2015.
- Kent earned \$22.00 per hour as a labourer for the Company.

The parties tendered evidence by way of sworn testimony and documents. Terri Nelson testified for the Appellants and Kent Hagel testified for the Respondents.

The following exhibits were entered into evidence:

#### **Employer Exhibits (Appellants)**

ER1 – Copy of Kent’s Apprenticeship documents for 2016 (5 pages);

ER2 – Copy of Kent’s Apprenticeship documents for 2015 (2 pages);

ER3 – Copy of Kent’s Heavy Trailer documents for 2016 (3 pages); and

ER4 – Copy of Kent’s medical expenses documents for 2016 (3 pages).

### **Employee Exhibits (Respondents)**

- EE1 – Copy of Kent’s Record of Employment (ROE) dated December 19, 2014 (1 page);
- EE2 – Copy of Kent’s ROE dated March 3, 2016 (1 page);
- EE3 – Copy of letter to Bob Nelson Construction from Saskatchewan Apprenticeship and Trade Certification Commission dated October 13, 2015 (1 page);
- EE4 – Copy of texts exchanged between Kent and Bob (1 page);
- EE5 – Copy of Employment Standards Inspection Report and Officer Worksheet (2 pages); and
- EE6 – Copy of emails exchanged regarding apprenticeship issue (1 page).

Terri’s testimony is summarized as follows:

- Bob and Terri started the Company in 1992. It is a construction company that deals mainly with concrete. They presently have 15 employees but typically have 20-22 employees, including them.
- Terri is in charge of payroll.
- Kent was not fired. They expected Kent to return to work April 25, 2016, as indicated on his ROE but the Company had a slow start to the year. Kent was going to school. They should have put “unknown” as his expected return date instead of a specific date.
- They had no intention of firing him. They paid for his tuition for carpentry the last two years, \$595 per year (ER1 and 2). They also paid for his G endorsement for hauling (ER3) and medical bills (ER4). Last year, they gave him an interest free loan and he was allowed to take as long as he wanted to repay it. They wouldn’t have done all this if they were planning on firing him.
- Bob thought Kent was a really good worker and wished he had more like him.
- The last day Kent actually worked for the Company was March 3, 2016. Because it is a slow time of year, they usually try to get employees to do their schooling at this time of year. Kent was working towards his journeyman in carpentry.
- It was a seven-week course and they expected him to come back when it was done. They are usually in full swing by then but this year was slow. Things didn’t pick up until June.
- They issued a ROE for Kent’s schooling. As part of the Apprenticeship Program, employees go on EI while attending the program. The employer pays the tuition and issues a ROE so the employee can receive benefits while attending school.
- This was his second apprenticeship leave and both leaves were approved by EI.
- Once the course was done, they expected Kent to return (April 25<sup>th</sup>).
- The morning Kent was supposed to start work, Bob texted him and asked if he could stay on EI a little longer since he was already on it and they were having a slow start to the year. They didn’t hear back from Kent but received a letter from the Labour Board.
- On Friday, May 13, Bob sent another text: “Sorry Kent things still looking pretty bad.” Terri thinks this was the only contact after April 25<sup>th</sup>.
- They received a letter from Employment Standards on May 4, 2016.

- Terri believes they laid Kent off so he could attend school but they did not fire him. She believes it is normal to lay employees off so that they can attend the Apprenticeship Program.

Kent's testimony is summarized as follows:

- He was a Labourer with Bob Nelson Construction and went on apprenticeship leave twice. His first leave was January 5 to February 22, 2015 and then again March 5 to April 22, 2016.
- He had his employer's approval for both leaves and Bob paid his tuition.
- During his first leave, the training ended February 22 and his employer listed March 1, 2015 as his expected return to work date on his ROE (EE1). Because work was slow, he did not actually return to work until March 30, 2015. His most recent ROE (EE2) shows his first day worked as March 30, 2015.
- The dates of his second course were March 7 to April 22, 2015.
- The Apprenticeship Commission requires the ROE and this is explained as in the letter from them about the course (EE3).
- According to his ROE, his expected recall date was April 25, 2016. He received a text from Bob at 5:33 that morning saying he should stay on EI because work was slow.
- He thought it would be few days or a week at the most.
- When he didn't hear anything after a couple of weeks, he texted Bob on May 12 asking if he could come back to work. Bob didn't text him back right away but replied on May 13<sup>th</sup> that things were bad (ER4).
- He did not return to work and Bob did not contact him again.
- When Bob told him to stay on EI, he was on an apprenticeship leave so it was not that easy. Those benefits automatically cut off when the course ends. He called EI after receiving Bob's text and asked to switch his benefits to regular EI. This didn't happen overnight. It took 3 weeks to get a payment.
- To this day, Bob has not contacted him to return to work.
- He started looking for a new job in May. He started looking even before he received Bob's text on May 13<sup>th</sup> because he didn't know when he might be able to return to work. He started a new job on June 13 and stopped receiving EI at that time. He stopped reporting to EI and therefore his benefits cut off automatically.
- The Officer Worksheet shows his average weekly wage based on the last 13 weeks of wages to be 28 hours per week x \$22.00 per hour = \$616.00 per week x 2 weeks = \$1,232.00 pay in lieu. The annual holiday pay on this amount was calculated as \$71.08.

## V. ARGUMENT

The Appellants' argument is summarized as follows:

- They did not fire Kent. He was a good employee. They paid for his apprenticeship tuition, heavy trailer endorsement, medical expenses and loaned him money because they thought he would continue working for their Company.
- They expected Kent to return to work once things picked up but Kent complained to Employment Standards and found another job rather than returning to work.

The Respondents' argument is summarized as follows:

- Kent was laid off when he started his apprenticeship leave but there was no break in service when he was laid off because this leave was approved by the employer.
- Layoff is defined in the Act as a temporary interruption by an employer of the services of an employee exceeding six consecutive work days.
- Kent was an employee until April 25 and after that six consecutive work days went by. He was entitled to notice or pay in lieu as result of the layoff.
- Based on his length of service, he is entitled to two weeks' pay in lieu of notice.
- There was a break in service after his first apprenticeship leave. The first course ended February 22, 2015 but he did not return to work until March 30, 2015. His service started over on March 30, 2015, but by the time he was laid off in 2016, he had passed his one year of service.
- A copy of an email from the Saskatchewan Apprenticeship and Trade Certification Commission, responding to a question about the contract of apprenticeship (EE6), says the Commission considers there to be no break in service in an apprentice's employment. The employment is deemed continuous.
- Kent had worked for over a year. He was supposed to return to work for the Company. He couldn't just stay on EI because the apprenticeship program was done. He had to apply for regular EI benefits and it was therefore determined he was laid off and entitled to pay in lieu of notice.

## **VI. ANALYSIS AND DECISION**

The employer takes no issue with the way in which the Wage Assessment was calculated. If Kent's employment was terminated, he is entitled to two weeks' pay in lieu of notice and annual holiday pay on that pay in lieu, or \$1,303.08, as set out in the Employment Standards Inspection Report and Officer Worksheet (EE5).

The employer does, however, take issue with Kent's employment having been terminated. They laid him off in order to allow him to qualify for EI benefits while attending the second session of his apprenticeship course. Under the apprenticeship program, the employer is required to issue a ROE for their employee. They thought Kent would return to work after the course but business was slow so they asked him to stay on EI until things picked up. Instead, Kent contacted Employment Standards and

then found another job. They do not believe Kent is entitled to notice or pay in lieu of notice because it was his choice to leave the Company.

For purposes of this appeal, the start date of Kent's employment was March 30, 2015, not May 8, 2013, due to a break in service that occurred after the completion of his first level in the apprenticeship program on February 20, 2015. Although his expected date of recall was March 1, 2015, he did not return to work until March 30, 2015. Section 2-60(2) of the Act says that "period of employment" means any period of employment that is not interrupted by more than 14 consecutive days. Neither Kent nor the Director of Employment Standards took issue with the fact that a break in service had occurred in March of 2015.

The evidence establishes that Kent was issued a ROE for purposes of attending the second level of his apprenticeship program on March 3, 2015 (EE2), with an expected date of recall of April 24, 2015. The apprenticeship course ran from March 7 to April 22, 2016. According to the Saskatchewan Apprenticeship and Trade Certification Commission, employees attending apprenticeship training are considered to be employed by their employers while attending training (EE6). Also, section 2-60(3) of the Act says that a leave granted by an employer is not considered an interruption in employment. The evidence shows the parties intended that Kent would return to work on April 25, 2016, following the completion of his apprenticeship program. Although Kent was temporarily receiving benefits from EI while attending his course, Bob and Terri still considered Kent to be an employee of the Company. Based on the facts and the law, Kent was an employee of the Company from March 30, 2015 to April 25, 2016.

Until the early morning of Monday, April 25, 2016, Kent thought he was returning to work that day as per his arrangement with his employer. At 5:33 a.m., however, he received a text from Bob stating: "Morning Kent. Work is pretty slow you should stay on EI til things pick up." Kent had no prior notice of this change of plans but was not immediately concerned as he thought this meant a delay of a few days or a week at the most. When he did not hear anything from Bob for over two weeks, he texted him on Thursday May 12 and asked: "Hey boss.. Is there enough work for me to come back for next week?" The next day, on Friday, May 18, Bob responded: "Sorry Kent things are looking pretty bad." This was the last time Kent heard from Bob.

Bob states in his Notice of Appeal that after advising his employee via text to stay on EI "until things pick up" that "Mr. Hagel did not respond to my text, nor did he contact me directly to discuss the 2016 construction season." The evidence shows, however, that Kent did in fact contact Bob again on May 12 to ask if he could come back to work to which Bob responded, "Sorry Kent things are looking pretty bad." Based on the communication (or lack thereof) between Bob and Kent, it appears Bob thought Kent should wait indefinitely for work to pick up. As the employer, it was Bob's responsibility to clarify Kent's hours/days of work with him. Bob failed to do this.

Section 2-1(l) of the Act defines "layoff" as a temporary interruption by an employer of the services of an employee for a period exceeding six consecutive work days. Accordingly, when Bob failed to recall Kent to work on April 25, 2016 and told him to stay on EI, he, in effect, laid Kent off. While Bob may have hoped to recall Kent at a later date, this intention does not change the fact that Kent had been laid off. Section 2-60(1) of the Act says that except for just cause an employer cannot lay off an employee who has been employed for over a year without providing the employee with two weeks' written notice. Bob did not provide written notice of layoff to Kent. Section 2-61 says that where an employee fails to provide notice of layoff, the employer must pay the employee a sum equivalent to the employee's normal wages for that period. Bob did not provide Kent pay in lieu of notice.

As indicated above, the Appellants did not take issue with the calculation of the Wage Assessment. According to the evidence, Bob laid off Kent when he failed to recall him to work on April 25, 2016. Kent is entitled to two weeks' pay in lieu of notice and annual holiday pay on that amount.

## VII. CONCLUSION

The appeal is dismissed. The Wage Assessment is upheld. The Appellants are ordered to pay \$1,303.08 to Kent Hagel.

DATED in Regina, Saskatchewan, this 18 day of November, 2016.



Jodi C. Vaughan  
Adjudicator

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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.