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

COMPLAINANT:

Elaine Cousen;

Represented by Kelly Harris, Employment Standards Officer.

RESPONDENTS:

Precision Foundations Ltd., Box 1999; 903 – 6th Avenue South, Warman, SK S0K 4S0;
Marv Righi, being a Director of Precision Foundations Ltd., Box 1999; 903 – 6th Avenue South, Warman, SK S0K 4S0; and
Dean Geransky, being a Director of Precision Foundations Ltd., 303 Brookside Drive, Warman, SK S0K 0A1

Date of Hearing: December 16, 2016
Place of Hearing: 9th Floor Boardroom (9.3)
Sturdy Stone Building
122 Third Ave North
Saskatoon, Saskatchewan

Preliminary Matters:

The Director of Employment Standards issued Wage Assessment # 8322. It was signed by the 'Director's Delegate' Doug Long at Saskatoon, Saskatchewan, and dated October 11, 2016. It directed Precision Foundations Ltd. (the 'employer'); Marv Righi, being a Director of Precision Foundations Ltd.; and Dean Geransky, being a Director of Precision Foundations Ltd. to pay $4,230.77 in wages to Elaine Cousen (the 'employee').

The Ministry of Labour Relations and Workplace Safety (the 'Ministry') was represented at this hearing by Kelly Harris, Employment Standards Officer. The employer was represented by Marv Righi and Dean Geransky. No objections were made with respect to my jurisdiction to hear this matter.

Agreed Facts:

At the beginning of the hearing, Mr. Righi and Mr. Geransky for themselves and the employer, and Ms. Harris for the Ministry agreed that Elaine Cousen worked for Precision Foundations Ltd., which is an existing Saskatchewan Corporation. The parties also agreed that Mr. Righi and Mr. Geransky are (and were at all relevant times) directors of Precision Foundations Ltd. This is also borne out by the Saskatchewan Corporate Registry Profile Report filed as Tab 2 of Exhibit EE-1.

Issue

There are two issues in this matter. The first is whether or not the employer established just cause to terminate Elaine Cousen's employment. The second issue only arises in the event that just cause is not established. In this case, the employer disputes the date used for the purpose of calculating the proper minimum period of written notice pursuant to subsection 2-60 (1) of *The Saskatchewan Employment Act*.

Decision

Elaine Cousen, Marv Righi, and Dean Geransky each testified. There was very little difference in their testimony with respect to relevant facts. I believe each of the three witnesses was truthful. The differences in testimony can be accounted for by the difference in each party's perspective.

Ms. Cousen began working for the employer on May 6, 2013. She was a probationary employee for the first three months. Her initial salary was $21 per hour. After she passed her probationary period she received a raise to $23 per hour. In June 2015 she received another raise to $25 per hour. In addition to this, she received an annual bonus, which she believed was based on the company's performance and her own performance. Her last annual bonus was in December 2015.

Mr. Righi and Mr. Geransky were for the most part pleased with Ms. Cousen's work. Even at the hearing they spoke positively of Ms. Cousen's work ethic and indicated that each of them would still be willing to give Ms. Cousen's a positive work reference. Despite this, the employer alleges it had just cause to terminate Ms. Cousen's employment.

The employer terminated Ms. Cousen with a letter dated June 9, 2016. This letter was given to her in person at work. In the termination letter the employer alleges just cause, but indicates that it will pay Ms. Cousen two weeks pay in lieu of notice in exchange for her promise not to pursue the matter of her termination "with Labour Standards of Saskatchewan or any means". Ms. Cousen did not accept the two weeks pay which had been offered, and did not give up any entitlement she had to determine if the employer had just cause to terminate her employment.

In *Caudle v. Louisville Sales & Service Inc.*, 1999 SKQB 276 (CanLII) the court accepted the following definition of just cause from *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.*

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 may be established by evidence of a serious single incident, or may be established by evidence of a series of less serious 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 cautioned 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.).

The issue in this matter is whether or not this employer has put forth evidence which establishes just cause. If so, no notice is required. The employer alleged that just cause was in this case made up of three things: Ms. Cousen being late for work, Ms. Cousen using the company computer to do personal work and Ms. Cousen eating lunch at her desk after the lunch break. I will address each of these in turn. The employer is not alleging any single incident that results in just cause, but rather is putting forth the combined effect of the three alleged transgressions outlined above as constituting just cause.

Being Late for Work

Ms. Cousen freely admited to routinely being a few minutes late for work. She indicated that she and Dean would on occasion have a laugh about it, and that when they discussed it, she would indicate that she would try and do better. Ms. Cousen testified that she was usually 1-2 minutes late. Mr. Righi testified that Ms. Cousen would be "a couple of minutes" late "here and there", and that this later increased to Ms. Cousen being 10-12 minutes late.

At the same time both the employer witnesses and Ms. Cousen indicated that Ms. Cousen would also routinely stay beyond 4:30, which was the appointed time for her to end work. Ms. Cousen testified that she would not just stop everything precisely at 4:30, but rather would finish up whatever she had been working on. When the office was busy she would stay up to 30 minutes late, with the result being that she would often stay from ten to thirty minutes beyond her 4:30 quitting time. She did not ask to be paid, and was not paid for this time. The employer witnesses did not challenge this.

Ms. Cousen testified that at times she would pick up company mail while she was getting her own mail. This was outside of work hours. Mr. Righi testified that eventually he asked her to stop doing this. There was no evidence as to how often this occurred or how long it took. As a result, I am not going to consider any time spent dealing with company mail as time worked, although it certainly could be so considered if supported by appropriate evidence.

Mr. Geransky testified that when Ms. Cousen started work, the employer was not particularly concerned about exactly when Ms. Cousen would start work. The main concern was that she was to work a 40-hour week, with an unpaid lunch break. By agreement the workday was set at 8:30 to 4:30 with a 30 minute unpaid lunch break.

The evidence with respect to Ms. Cousen being late establishes that on a fairly regular basis, Ms. Cousen would be at least a minute or two late. Ms. Cousen admits that occasionally she would be in her estimation 5-6 minutes late. The employer estimates that when Ms. Cousen was later than a couple of minutes, she was something like 10-12 minutes late. It was clear to me that the employer witnesses believe this lateness occurred more often than Ms. Cousen estimates. Importantly the employer kept no records, and so did not provide any evidence as to the actual number of times, or specific days on which Ms. Cousen was late. Similarly no evidence was provided as to how many minutes Ms. Cousen was late on those days when she was late arriving. While I believe the witnesses testified to events as they recalled them, I suspect that Ms. Cousen probably underestimated how late she was while the employer witnesses probably overestimated how late she was. If I had to determine how late she was, given Ms. Cousen's overall demeanor while testifying, I would prefer her evidence.

I do not believe I have to determine exactly how late Ms. Cousen was however. All witnesses agree that although her lateness was mentioned from time to time, Ms. Cousen was never disciplined or warned that the employer would not tolerate lateness, no matter how minimal. The evidence seems to establish that Ms. Cousen did work 40 hours per week for the employer, although she often was a few minutes late. The evidence also establishes that the employer did not warn Ms. Cousen, did not discipline Ms. Cousen, and did not otherwise bring to Ms. Cousen's attention that it was in any way serious about her starting work punctually at 8:30.

Using the Company Computer to do Personal Work

The employer witnesses produced a binder of documents, which they indicate relate to Ms. Cousen's personal work. These document relate to personal interests of Ms. Cousen, and do not relate to her work for the employer. The company has a backup system, which automatically backs up copies of documents from each of the company computers. The employer witnesses have drawn the conclusion that since the documents existed on the company computer (on the backup system), they must have been created on work time. The inference here is that Ms. Cousen was creating fairly substantial personal documents while she was being paid to do work for the employer.

With respect to the employer witnesses, the evidence simply does not led exclusively to the conclusion they have arrived at. I fully accept that the fairly substantial documents that relate to Ms. Cousen's personal interests were found on the company computer system. I also fully accept that Ms. Cousen was responsible for the documents being on the company computer system. However, no evidence was adduced relating to when or where these documents were created. Further no evidence was adduced as to when Ms. Cousen accessed these documents at the workplace. It could be that the documents were created outside the workplace, at Ms. Cousen's home or elsewhere. It could be that she uploaded the documents in order to proofread them or make some minor edits. It could be that this minor work was done over the lunch break or while Ms. Cousen was on some other break. I don't know if this was the case or not, precisely

because no evidence was put forth, other than the presence of the documents on the employer's computer system. In the absence of any evidence, I am unable to conclude that Ms. Cousen created the documents on work time, or even that she worked on the documents on work time. The employer has simply not established that Ms. Cousen used company time to create or work on the personal documents which were found on the company computer system.

Eating Lunch at her Desk after the Lunch Break

Mr. Righi testified that at times Ms. Cousen was busy with personal matters during the lunch break. On some of these occasions, she would then eat her lunch after her lunch break, while she was working at her desk. Mr. Righi did not estimate how many times this occurred. I asked Mr. Righi if there was a company rule against an employee like Ms. Cousen, eating her lunch at her desk. He replied that there was no such rule, but that in his view it was unprofessional for someone working with the public to eat their lunch at their desk during business hours. He also said that eating lunch at a desk puts the computer at risk, as the keyboard could be damaged if something were spilled on it. In the absence of a rule against eating at one's desk, and in the absence of any evidence that Ms. Cousen was even informally asked not to eat at her desk, I am unable to conclude that she did anything at all wrong by eating her lunch at her desk.

The court in *Laszczewski* cautioned against employers relying on "a series of minor transgressions, cumulatively, in an effort to avoid the obligation of providing notice or pay in lieu thereof". I believe this case to be exactly the sort of situation the court had in mind when it made those comments.

The courts have established a two-step test for determining if just cause is established. The first step is to determine if the conduct put forward as establishing just cause has been proven on a balance of probabilities. The second step is to 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 evidence establishes that Ms. Cousen was often a few minutes late for work. The evidence also establishes that the employer did not express any concern about Ms. Cousen being late in any meaningful way. The evidence also establishes that Ms. Cousin caused a series of fairly substantial documents to be on the employer's computer system. The employer's witnesses did not alleges that this was in and of itself a violation of company rules or policy, but rather that this evidence led them to conclude that Ms. Cousen spend substantial amounts of work time working on the documents. As I previously indicated, the evidence does not establish the employer's conclusion. The employer therefore has not established that Ms. Cousen spend work time on personal projects. Finally the evidence establishes that on an unspecified number of occasions, Ms. Cousen ate her lunch at her desk during work hours. The evidence also established that this action was not in violation of any formal or informal workplace rules or even requests from the employer. Moving to the second step of the *McKinley* test, I conclude

that the conduct proven, which in this case is limited to being late, is not the type of conduct which is so inconsistent with the employee's obligations as to constitute just cause.

Having found that the employer did not have just cause to terminate Ms. Cousen's employment, I turn now to the second issue in this case. The employer and employee agree that Ms. Cousen began work on May 6, 2013. The employer and employee agree that Ms. Cousen was a probationary employee for the first three months. The employer takes the position that the appropriate date for determining the length of employment and determining the correct notice period is the end of the probationary period. The Ministry takes the position that the appropriate date is the first day of the probationary period.

The Saskatchewan Employment Act 2-1(f) defines "employee" as including:

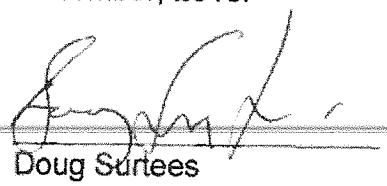
(i) a person receiving or entitled to wages;
(ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;
(iii) a person being trained by an employer for the employer's business;
(iv) a person on an employment leave from employment with an employer; and
(v) a deceased person who, at the relevant time, was a person described in any of subclauses (i) to (iv);

I have no doubt whatsoever in concluding that a probationary employee is an employee within the meaning of subsection 2-60 (1) of *The Saskatchewan Employment Act.* Since a probationary employee is an employee, that person's employment starts on their first day of work, whether or not there is a probationary period. As a result Ms. Cousen's employment with this employer lasted more than 3 years and less than 5 years. This means that subsection 2-60 (1) entitles her to 4 weeks notice. Subsection 2-60 (2) requires the employer to pay her "a sum equivalent to the employee's normal wages for that period". This is the amount calculated in Wage Assessment 8322.

Conclusion:

The respondent/employer's appeal is dismissed, and Wage Assessment # 8322 in the amount of $4,230.77 is hereby confirmed.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 21st 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.