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

COMPLAINANT:	Jennifer Isaac Represented by Paul DeBruin Labour Standards Officer
RESPONDENT:	Battleford Super A Foods Ltd. Represented by Aaron Janzen and Charity Janzen
LRB File No. 249-15	
DATE OF HEARING:	January 13, 2016 1:00 p.m.
PLACE OF HEARING:	Kramer Building, North Battleford, Sask.

I. INTRODUCTION

This is an appeal by the Employer, Aaron and Charity Janzen operating as Battleford Super A Foods, from a Wage Assessment in the amount of $2,665.38 in favour of the Employee, Jennifer Isaac, dated July 24, 2015.

Jennifer claimed that she was wrongfully dismissed by the Employer and entitled to six weeks' pay in lieu of notice. In its appeal of the Wage Assessment, the Employer argued that Jennifer was dismissed for cause for not performing her job duties.

The Hearing was scheduled for December 16, 2015, but did not proceed at the request of the Employer, due to a family member's health crisis. The parties agreed to an adjournment and that the Employee would testify by telephone, as Ms. Isaac now lives and works in Regina, Saskatchewan.

The Wage Assessment is $2,665.38. The parties agree to the amount; the only issue is whether the Employee is entitled to it as pay in lieu of notice of termination of her job, pursuant to sections 2-60 and 2-61 of *The Saskatchewan Employment Act*.

II. EVIDENCE

Aaron and Charity Janzen are the owners and operators of the company Battleford Super A Foods Ltd., which operates a grocery store in the town of Battleford, Saskatchewan. The store includes a bakery where Jennifer Isaac was employed as a baker.

Aaron and Charity purchased the business in August 2013. Jennifer had been working in the store since July 2009 and continued as a baker after the Janzens took over. Jennifer's work

schedule was: Monday to Friday one week, then Monday-Tuesday, Thursday, Friday, Saturday the next week.

In late 2013 or early 2014, Aaron spoke to Jennifer about taking on some managerial responsibilities, including ordering baking supplies and price adjustments. She would continue to work the same schedule. In their testimony, Aaron and Charity emphasized that all managers in the store worked at least two Saturdays a month.

In the spring of 2014, Jennifer's wage was increased by $1/hour, from $13 to $14 to reflect her successful completion of these new duties. Aaron and Charity testified that Jennifer was a good employee; there were minor performance issues from time to time, including poor follow-through with assigned tasks and too much use of her personal cell phone at work, but these were addressed by discussions when they occurred and did not have an impact on her overall job performance. Charity described them as 'only human' behavior. No written warnings were given to Jennifer about her work performance.

Aaron testified that on August 1, 2014, he received a note from Jennifer stating she was going to school in September 2014 and as her school hours would be 4 p.m. to 10 p.m. Monday-Friday, she would only be able to work from 6 a.m. to 12 p.m. Monday to Friday. The note was not produced at the Hearing.

Aaron stated that around August 13, 2014, he spoke with Jennifer and told her he could schedule around her school hours. She could work 6 a.m. to 12 p.m. Monday to Friday, but she would have to work alternate Saturdays. Jennifer told Aaron she needed Saturdays off as a study day. Aaron says he replied that they could continue to give her the Wednesdays off, but all managers had to work some Saturdays, including Jennifer. He stated Jennifer said nothing in reply.

According to Aaron another conversation took place around September 2 wherein he told Jennifer she would be scheduled to work Saturdays.

Jennifer does not remember any conversations with Aaron about working Saturdays after she gave him the letter about her school schedule, but admits they could have taken place. I accept the Employer's testimony that they told Jennifer of their requirement that she work Saturdays on at least two occasions after they received her letter, otherwise, they would not have reacted as they did to following events.

On Friday September 5, Aaron posted the schedule for September in the staff room. He testified that on Saturday September 6 he received a text message from Jennifer which said, in capital letters: I TOLD YOU SATURDAYS WERE NOT GOING TO HAPPEN.

Neither Aaron's phone (water damage) nor Jennifer's (traded-in) were available at the Hearing to produce the text message. It was common practice for Jennifer and other employees to text Aaron if they were ill or had to change the schedule. The precise wording of the text sent on September 6 was not verified, but the parties did not dispute that it communicated Jennifer's position on working (or not working) Saturdays.

Aaron and Charity testified they were very upset upon receiving the text message. They felt the use of all capital letters (commonly referred to as 'shouting') was disrespectful. They thought about demoting Jennifer, but felt, after two conversations about working Saturdays and now this message, that the employment relationship had deteriorated to the point where they could not continue to work with her. They felt she was trying to define the terms of her employment and was becoming hostile, as shown by the 'caps lock' text message.

Jennifer testified that she did send a text message, but she does not believe it was in capital letters and she did not mean it to be angry or threatening. She remembers that she asked in the message why she was still scheduled to work Saturdays.

I accept Aaron and Charity's testimony that the message was in capital letters and the tone was such that they believed Jennifer was challenging them in a forceful manner. Otherwise, they would not have acted as follows; Aaron and Charity spoke to Jennifer while she was at work on Saturday September 6, asked for the return of the store key, and told her she was fired because she was refusing to work Saturdays.

During her testimony, Jennifer could not remember whether she talked to Aaron or Charity in August 2014 after her letter advising them of her school plans and her need to have Saturdays off to study. She also gave contradictory evidence about whether she spoke to Aaron before or after her text on September 5 or 6. Despite these inconsistencies, I accept that Jennifer believed, prior to September 5 that she would not have to work Saturdays once she was at school, or at least that the matter was still open for discussion. When she saw the schedule posted on the 5th, she wondered why she was marked to work for Saturdays when she had told them a month prior she could not. Her text to Aaron reflected that belief.

In other words, I find the Employer and the Employee failed to communicate clearly what Jennifer's hours would be come September; Jennifer believed she would not have to work Saturdays, and the Janzens believed Jennifer was unconditionally refusing to do so.

Jennifer testified that when Aaron spoke with her on September 6, she told him she wanted to talk to him about the issue, but he said to just go. Prior to that time, Jennifer stated, she was never told by Aaron or Charity that if she did not agree to work Saturdays, she would be fired. Faced with that alternative, she says she would have worked Saturdays, but Aaron did not give her a chance to tell him this during their final meeting.

Jennifer left the store and there was no further communication between the parties.

Aaron and Charity acknowledged that neither of them specifically said to Jennifer at any time 'if you don't work Saturdays, you will be fired'. The Employer also admits that Jennifer never failed to show up on a Saturday when she was scheduled to work.

III. ANALYSIS

An Employer has the right to dismiss an Employee without notice where the Employer has "just cause" to terminate the relationship.

The questions to be asked in determining "just cause" are: was there misconduct by the employee, and, was this misconduct so serious as to strike at the heart of the employment relationship? The sanction for the misconduct must be proportional. Dismissal is the most extreme action available to an employer and the onus is on the employer to show that the misconduct warrants that action.

> *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 and *Dowling v. Ontario (Workplace Safety and Insurance Board)* 2004 CanLII 43692 (ON CA), 246 D.L.R. (4th) 65 (Ont. C.A.)

In the case before me, the Employer argues Jennifer's refusal to work Saturdays, as stated by her in two or three conversations and a rude text message, was so serious as to warrant dismissal. I do not put too much weight on whether the text message was in capital letters, or if Aaron and Charity perceived the tone to be 'hostile'. As Jennifer mentioned in her testimony, one cannot verify emotion through texting. It is not an ideal method of communication.

I do not find that this was misconduct sufficient to justify a dismissal. At best, it was a failure between the parties to communicate on the issue of working Saturdays. At worst, it was an unresolved ongoing disagreement, which could have been solved many ways short of termination. There were other options open to the Employer, such as demotion, that would have been more proportional.

At no time did the Employer clearly spell out that if Jennifer did not agree to work Saturdays, she would be fired. In many different factual situations, the courts have held that an employer must warn an employee if her job is in jeopardy, and provide the employee an opportunity to correct her behavior. The warning must be clear and unequivocal.

> *Riehl v. Westfair Foods Ltd.*, 1995 CanLII 6086 (SK QB); *Gillam v. Waschuk Pipe Line Construction Ltd.*, 2011 SK QB 308 (CanLII)

Furthermore, Jennifer never failed to report to work on a scheduled Saturday – the only thing the Employer is relying on is her request not to work Saturdays.

Jennifer worked for the company for five years, and apart from minor performance issues which were addressed at the time, was a good employee. In these circumstances, Battleford Super A Foods was not justified in terminating her employment without further discussion which at least included a warning that her job was in danger IF she failed to work on a scheduled Saturday.

IV. CONCLUSION

I find that the Employer did not have just cause to dismiss the Employee and I dismiss the Employer's appeal from the Wage Assessment.

The Labour Standards Officer's Wage Assessment of six weeks' pay in lieu of notice ($2,665.38) is upheld. A copy is attached and forms part of this decision.

Dated at North Battleford, Saskatchewan, January 21, 2016.

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.