

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

SASKATCHEWAN LABOUR RELATIONS BOARD FILE No. 271-15
WAGE ASSESSMENT No. 7571



COMPLAINANT: Katlin Balzer
Represented by Andrew Langgard
Labour Standards Officer

RESPONDENT: Thirteen Squared Properties Ltd. o/a Boston Pizza - Humboldt
Represented by Larry Aitken, Operations Manager and
Evan Nyhus, Franchise Manager

DATE OF HEARING: April 6, 2016
10:30 a.m.

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

1. INTRODUCTION

After introductions, I provided the parties with an explanation of my role and my expectations. I also outlined how the hearing would unfold.

Mr. Langgard advised that he would be assisted by fellow Officer Lorne Deeson as this was his first hearing.

Mr. Langgard also requested permission to provide a witness via video conferencing and that permission was granted.

II. PRELIMINARY OBJECTIONS

Mr. Aitken advised that the Employer accepted the figures and calculations provided by Mr. Langgard in a revised Wage Assessment (7571) on March 23, 2016. He also confirmed that the only outstanding issue for me to determine is whether pay in lieu of notice is owed.

Mr. Langgard advised that my report is to show that he and Mr. Deeson represent the Director of Labour Relations and Workplace Safety.

I advised Mr. Langgard that I have received no direction regarding that assertion, but I would seek further clarification.

III. THE DISPUTE

Whether Mr. Balzer was dismissed with just cause or does the Employer owe pay in lieu of notice?

IV. FACTS

i. EVIDENCE OF EMPLOYER

Mr. Aitken asked to have Mr. Nyhus called as a witness and he was sworn.

Mr. Nyhus then provided the following testimony:

- Mr. Balzer was hired into what is considered in the business, the most difficult job. The job was permanent evening to close shift.
- Mr. Balzer was a marginal employee throughout his employment, he was late reporting for his shift often, took extended breaks that were often from 1/2 to 3/4 of an hour longer than scheduled.
- Mr. Balzer was written up three times ER1, 2 and 3 and was given many verbal warnings. The written warnings are dated May 27, September 30 and December 1 of 2014. On December 1, Mr. Balzer was caught by Mr. Nyhus playing on the VLT's at the workplace. This is strictly forbidden and Mr. Balzer knew that.
- In 2015 on January 28, May 5, May 11, May 28, June 3, June 23, June 29 and July 3, Mr. Balzer was late reporting for work and was verbally warned.

Note: Mr. Nyhus tabled written statements from two supervisors confirming Mr. Balzer's behavior respecting being late and taking long breaks. ER 5 and ER 6.

- When Mr. Balzer was written up for playing VLT's on December 1, 2014, Mr. Nyhus told him this was the last straw and if another incident occurred he would be terminated.

- On June 25, 2015, two customers came into the Boston Pizza establishment and were seated in Mr. Balzer's area. After taking their order, Mr. Balzer went on break and didn't return until after the

customers had finished their food and drinks and had left. Server Melanie Jacob had provided the service during Mr. Balzer's break.

When Mr. Balzer returned from break, he went to the table, picked up the bill fold, and provides a 50% discount.

- Mr. Balzer knows discounts are not provided unless approved by a Manager, which he did not do. He spoke with Mr. Balzer on June 28 asking him if he took the money. Mr. Balzer's reply was that Manager Blair Cherpin did it.

- Mr. Nyhus then spoke to Cherpin and found out that Mr. Cherpin did not do it. Then Mr. Balzer says it must have been another Manager.

- Mr. Nyhus then checked the video of that evening and can see Mr. Balzer returning from break, going to the table, picking up the billfold. There is no one else in the view of the camera.

- Mr. Balzer then transferred the bill from Table 73 (where the customers were) to Table 90 (where typically Managers and Supervisors take their breaks) and discounted by 50%. When Mr. Nyhus spoke to Mr. Balzer about it again, Mr. Balzer asked what he should do, pay it back? Mr. Nyhus told him he stole from the company and terminated him verbally on July 6, 2015.

- Mr. Nyhus was reluctant to terminate because that shift is so tough to fill

Mr. Aitken was sworn and provided the following information:

- The POS system does record everything. The transfer from Table 73 to Table 90 is significant because for Table 90 to be used, there would have had to be someone at that table. The camera reveals that there was no one at that table.

Cross Examination

In response to questions from Mr. Langgard, Mr. Nyhus provided the following testimony:

- The Corporate Registry for the business in Humboldt is correct and was marked EE1.

- There is a written policy all employees are aware of regarding discounting. Mr. Balzer was aware because he signed off on the policy. There was some concern regarding Mr. Balzer's use of discounts but he was not warned prior to the June 25 incident.

- He was concerned about Mr. Balzer's late reporting. He tried to encourage promptness but did not want to lose him due to difficulty to fill that shift.

- He was not working on June 25, but the camera recorded Mr. Balzer picking up the billfold off the table. He can't be sure there was cash in it.

- He thinks Mr. Balzer took the money because the tip was small and he was not happy with the amount.

- Mr. Balzer did not request permission to discount from Manager Cherpin.

- Walk-outs or dine and dash occur maybe once every six months. Often people just forget and come back the next day to pay.

- The Employer's policy is to discount 100% all walk-outs. Employees are not responsible.
- It is not possible Mr. Balzer thought this was a walk-out. If it was the discount would have been 100% not 50%.
- He believes he investigated the situation thoroughly before taking the decision to terminate.
- He never interviewed Melanie Jacob because Mr. Balzer never suggested that. On hindsight he probably should have, however, Mr. Balzer was given three chances to tell the truth and he kept lying.

Re-direct

None

Mr. Aitken called Blair Cherpin and he was sworn.

Mr. Cherpin provided the following testimony:

- He is a Manager at the Humboldt Boston Pizza. He never wrote Mr. Balzer up because he was never really late but he kept track in his note book. Mr. Balzer was a good bartender but took long breaks.

Cross Examination

In response to Mr. Langgard's questions, Mr. Cherpin provided the following:

- When Mr. Balzer was late he'd say something like "Hey man you are late". Mr. Balzer would apologize and promise to get better.
- There was one employee who was charged for a walk-out but then Mr. Nyhus made it policy to 100% discount.
- Mr. Balzer never discussed with him the policy on walk-outs.
- On June 25, he was working but did not physically observe Mr. Balzer picking up the billfold. He saw it on camera later.

Re-direct

Mr. Cherpin confirmed that it was not a walk-out table on June 25.

ii. EVIDENCE OF EMPLOYEE

Mr. Langgard called Mr. Balzer and he was affirmed and provided the following testimony:

- He was employed at Boston Pizza in Humboldt as a Bartender and a Supervisor. He reported to Mr. Nyhus for numbers and to Managers for day to day. He got the job through an interview following contact at a Job Fair.

- As Supervisor he looked after Servers and waited on tables when servers were sent home due to slow periods.

Note: Mr. Langgard had Mr. Balzer identify his ROE and it was marked EE2.

- He started for Boston Pizza on November 20, 2013 and was terminated on July 4, 2015. During that period his employment was continuous, 5 or 6 days per week.

- He admits he was late and cites girlfriend and car problems as the reasons.

- Mr. Nyhus did speak to him on several occasions about making a stronger effort to report on time, but it was never a serious discipline effort.

- He feels other employees were more concerned about his attendance because they had to cover and also because they felt he was getting preferential treatment.

- Mr. Nyhus told him he didn't care if he was late.

- He may have made up time for being late once or twice.

- He was asked to come in early from time to time and he did.

Note: Mr. Langgard tendered The Ministries Worksheet showing the calculation for the Wage Assessment. It was marked EE3.

- He had the responsibility to discount his meals. 20% if not at work and 50% if working.

- He doesn't remember Mr. Nyhus taking away his discount card.

- He received many positive comments about his work from Mr. Nyhus, and he believed the Employer was satisfied with his work.

- On June 25, the two customers in question came in just before his break and were put at one of his tables.

- After his break he believes he went to the bar and Melanie Jacob tells him the bill for the table was closed off but they couldn't find it in the POS. He goes to Cherpin and he can't find it either. He gave the discount to Melanie because it never went through.

- He never lied to Mr. Nyhus about the three Managers. He told Mr. Nyhus that he thought it was a walk-out, but it turned out Melanie had the cash. He never took it.

- The table was his but now he wishes he had given it to Melanie.

- He thought the policy for walk-outs was 100% for the first and 50% for the second to prevent employees from making deals with customers. He has never paid for a walk-out but has for shortages. There was confusion amongst employees about the walk-out policy.

Note: Mr. Langgard tabled copies of facebook conversations between Mr. Balzer and Ms Jacob taking place on July 8, November 9 and November 10, I assume in 2015. Marked EE4.

- Ms Jacob at first thought she had used debit for payment of Table 73 on June 25 and later remembered she was paid in cash. Because they couldn't find POS record of the transaction, he and Ms Jacob assumed a walk-out and she was given 50% of the bill as the discount policy they thought was in effect. She offered to pay him the other half since she had kept the cash.

- He found out from Ms Jacob after he was terminated that the customers had paid cash.
- He was happy working there.

Cross Examination

Mr. Aitken received the following in response to his questions to Mr. Balzer:

- He knew playing VLT's at the workplace was against the rules.
- He knows the POS keeps track of all transactions.
- He knows Mr. Nyhus sent complimentary texts to all employees.
- He transferred Table 73 to Table 90 to be closer to his station and he used the 50% discount.

Re-direct

None

Mr. Langgard hooked up the video to call witness Melanie Jacob who is in Ontario and she was affirmed.

In response to questions from Mr. Langgard she provided the following testimony:

- She was employed as a Server at the Humboldt Boston Pizza from October 2014 to July 2015. She was working on June 25, 2015.
- She worked with Mr. Balzer some.
- On June 25, she remembers taking over for Mr. Balzer while he took a break. She remembers the two customers in question and that she thought they paid by debit and later remembered they paid in cash. There is no receipt when pay is by cash.
- She verified the message exchanged in EE4. Mr. Nyhus never talked to her about this incident.

Cross Examination

In response to questions from Mr. Aitken, Ms Jacob indicated she had no other facebook communication with Mr. Balzer and that Mr. Balzer had initiated the conversations in EE4. She reiterated that Table 73 had paid in cash.

Re-direct

None

iii. FINAL ARGUMENT

Mr. Aitken portrays Mr. Balzer as an employee who knew his job was hard to fill and as a result pushed the envelope regarding his behavior and performance.

His behavior produced three write ups and numerous verbal warnings. He was warned that he was at the end of the employer's patience and the next incident would produce his termination. The event of June 25 where he stole from the employer could not be tolerated so he was terminated with cause.

The Employer realizes the overtime portion of the Wage Assessment is owed along with the vacation pay but asks that the portion regarding pay in lieu be overturned.

Mr. Aitken apologized to Mr. Balzer for the failure to pay the overtime.

Mr. Langgard notes that the onus to prove just cause rests with the Employer and tabled three documents respecting that onus as well as the principles regarding termination for theft. He went on to argue that evidence shows employees believed they were responsible for 50% of walk-outs and that Mr. Balzer believed this was a walk-out situation.

It wasn't until later that Mr. Balzer found out Ms Jacob had received payment in cash.

Further Mr. Langgard asserts that the Employer failed to complete a thorough investigation before terminating Mr. Balzer. Ms Jacob, having worked during the time frame in question and who provided service to the customers needed to have the opportunity to provide her information. The Employer chose not to interview her.

Mr. Langgard feels an entirely different outcome may have happened had Ms Jacob been interviewed.

Mr. Langgard concluded that the Employer has not met it's onus to prove "Just Cause" and therefore pay in lieu of notice is owed.

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

V. ANALYSIS

The Employer is relying on the June 25, 2015 situation as the culminating incident, which fulfills their onus to demonstrate the termination was for "Just Cause".

Mr. Nyhus's testimony was that his investigation established for him the conclusion that Mr. Balzer stole money from the business.

For the record, the Employer is relying on many verbal warnings for reporting late and taking extended breaks, and three written warnings, two for being late and one for breaking a rule regarding VLT's.

It appears to me, that the Employer tolerated Mr. Balzer's tardiness and break violations because of the concern it would be difficult to fill that shift if Mr. Balzer was terminated.

Given this discipline history, it would be difficult for me to conclude "Just Cause" even if there was iron clad proof Mr. Balzer stole as the Employer contends.

As in F.H. vs McDougall, supra, the Supreme Court of Canada in part "that in all cases evidence must be sufficiently "clear, cogent, and convincing" to satisfy the balance of probabilities test." in cases involving alleged employee dishonesty".

The evidence before me is anything but clear, cogent and convincing.

Mr. Nyhus testified he viewed video of Mr. Balzer picking up the billfold from Table 73, but could not tell if there was cash in it.

Mr. Balzer testified that he did not pick up the billfold nor did he steal cash. He collaborated with Server Jacob and together they determined the customers did not pay. So they treated it as per the supposed walk-out policy and discounted the bill by 50%.

Ms Jacob, in her evidence through EE4 and video conferencing, indicated that she had concluded the service with the customers in question and initially thought they had paid by debit, but when POS did not show a record, she and Mr. Balzer concluded the customers walked out. Later she remembered they had paid in cash to her.

VI. DECISION

I. WAGES

Given the foregoing evidence, I am giving more credibility to the version presented by Mr. Balzer and Ms Jacob. Mr. Langgard's point that a more thorough investigation by Mr. Nyhus could have avoided this whole process is well taken.

My decision is that the Employer has not met the onus of proving just cause and therefore must pay in lieu of notice.

Wage Assessment No. 7571 total of \$2,409.57 is owed in full.

Dated at Regina, in the Province of Saskatchewan, this 12th of April, 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.