

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

LRB File No: 001-17
Wage Assessment No: 8396



COMPLAINANT: Aaron Humble
Represented by Andrew Langgard
Employment Standards Officer

RESPONDENT: Littlemore Express
Represented by Charles Littlemore

DATE OF HEARING: January 24, 2017 at 1:00 p.m.

PLACE OF HEARING: 3rd Floor Board Room

1870 Albert Street
Regina, Saskatchewan

1. INTRODUCTION

I opened the hearing with introductions and described my role, time parameters for the decision and my expectations regarding conduct. Participants to the hearing were Mr. Littlemore, Mr. Humble and Mr. Langgard.

II. PRELIMINARY OBJECTIONS

Mr. Langgard tabled a document (attached) marked EE1 and asked that I include in my decision:

1. That he, the Employment Standards Officer, represents the Director of Employment Standards and only the Director
2. That the Complainant is a witness for the Director and can take a position independent of the Director
3. That the appeal by Littlemore Express has been perfected.

Mr. Langgard also tabled documents marked:

- EE2 Affidavit of Service
- EE3 copy of Littlemore Express Appeal cheque and government receipt
- EE4 Littlemore Express Appeal Document (4 pages).
- EE5 Humble ROE

III. THE DISPUTE

Littlemore Express is claiming that Mr. Humble was terminated for cause and the Ministry contends Mr. Humble is owed pay in lieu of notice as well as pay for three hours for reporting to work on his day of employment.

IV. FACTS

i. EVIDENCE OF EMPLOYER

Mr. Littlemore was sworn and provided the following evidence:

- he tabled an unsigned letter dated December 21, 2016 addressed to him from Mr. Humble. He considers the letter a threat (marked ER1).
- he believes Mr. Humble lied in his complaint given to the Ministry and for that some form of punishment should be meted out.
- he tabled a letter (marked ER2) from Cheshire Home of Regina Society, dated October 30, 2016. The letter details numerous concerns regarding the performance and behaviour of Mr. Humble during his employment which had ended on August 18, 2016.
- he tabled an undated letter from ATS Healthcare Solutions (marked ER3). This letter also details numerous concerns regarding the performance and behaviour of Mr. Humble during his employment.

Note: Mr. Langgard objected to the tabling of these two exhibits as he has no opportunity to cross-examine the authors.

-he then tabled a letter dated June 11, 2014 from Littlemore Express to Mr. Humble (marked ER4). The letter details a one-day suspension without pay for inappropriate and unacceptable behaviours. The letter also directs Mr. Humble to write a letter of apology.

- next, he tabled a letter from Littlemore Express to Mr. Humble, dated January 22, 2015. The letter warns Mr. Humble, again, about his use of profanity in front of customers and that further complaints will be dealt with "swiftly". (marked ER5)

- the last document he tabled dated November 16, 2016 (marked ER7) is an e-mail from Wascana Day Care to Littlemore Express. The e-mail details numerous concerns regarding Mr. Humble's

performance and behaviour during his deliveries to the Day Care including the safety of the children.

- in addition to his concerns regarding Mr. Humble's performance and treatment of customers, he believes Mr. Humble cost his company business and returned his good treatment with disloyal behaviour including using his vehicle for personal business. To pay out severance would be rewarding bad behaviour.

Cross-examination

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

- Mr. Humble received two wage increases during his employment. Both were a result of "whining", not a reflection of performance.
- after the June 11, 2016 suspension there were no more complaints from the YWCA, but he could not be sure Mr. Humble's performance improved.
- Cornwall School gave Mr. Humble a positive comment and Mr. Humble was advised of it. Most comments were negative. Mr. Humble has a tendency to tell his life story to clients and he was told to just do his job professionally. Mr. Humble said he would try.
- Mr. Humble never asked to be taken off a route.
- during Mr. Humble's employment he had a staff turnover of about 10. Mr. Humble probably stayed because he was desperate for work.
- Mr. Humble was not a loyal employee, as he had used company vehicles to deliver resumes and for other personal business.
- he never paid Mr. Humble the three hour call out on August 18th because he was unaware of the law.
- he made the decision to terminate Mr. Humble on August 17, 2016. The decision came after information was received that Mr. Humble was speeding in the wholesale Club parking lot that day. He never considered a lesser penalty because Mr. Humble would just continue to perform and behave badly.
- he never explained the reason for the termination because it was the straw that broke the camel's back. The Wholesale Club incident was reported to him by the Security employee who was advised by the cashier's supervisor who was told by the cashier who had seen Mr. Humble speeding.
- the termination was also based on a verbal complaint from Wascana Day Care. That complaint was requested by him in writing in November (ER7), but it was received verbally prior to Mr. Humble's termination.
- he did not give Mr. Humble an opportunity to explain the Wholesale Club incident, because Mr. Humble is a whiner and would have all sorts of excuses. Mr. Humble was given many opportunities but he was let down every time.

Re-direct

Mr. Littlemore reiterated that he gave Mr. Humble all sorts of lee way, constant advances, personal use of company vehicles and in return got slapped in the face

ii. EVIDENCE OF EMPLOYEE

Mr. Langgard called Mr. Humble and he was sworn. In response to questions from Mr. Langgard, Mr. Humble provided the following testimony:

- as an employee for Littlemore express, he reported to Mr. Littlemore and performed driving, swamping and labourer duties
- he came about the job after his former employer sold out. Mr. Littlemore interviewed and hired him.
- his ROE states his start date as February 3, 2014 but it actually was January 30, 2014. His last day was August 18, 2016.
- his employment was full time
- he remembers receiving the June 11, 2014 suspension (ER 4). He wrote a letter of apology and was not permitted to make deliveries there for 3 to 4 months. After resuming deliveries, he had no issues with them after that. He admits he had used foul language and deserved to be punished.
- the January 22, 2015 letter of reprimand was again for using foul language. Again he wrote a letter of apology and again there were no more issues.
- he did ask the YWCA for a copy of his apology letter, but they refused. He did not harass them.
- the letter from ATS (ER3) came after the fact and is all false.
- he admits he was not perfect, made mistakes and paid for them.
- if he was a bad employee, why did he receive two raises? He never used sick leave and always came to work on time.
- his customers always thanked him and he received cash tips and free lunches. He took his job seriously; he is a single Dad.
- during his employment 16 of his co-workers left because of poor wages, bad vehicle maintenance and shortage of hours.
- he considered himself a loyal employee and he turned down other jobs to stay because Mr. Littlemore allowed him flexibility.
- on August 18, 2016 he reported for work at 7:50 am after being on vacation. He was expecting Mr. Littlemore to provide a pay stub. Instead he was given a termination letter. He asked if this was a joke and Mr. Littlemore said it wasn't. He asked Mr. Littlemore what he had done wrong and was told to get off the property or the police would be called.
- he was not paid either a three hour call out or time in lieu of notice.
- on August 17, 2016 he had his girlfriend with him in the truck and went to the Wholesale Club to make a delivery. He noticed a friend of his ex-wife having a smoke outside. She is a cashier at the Club.
- he believes she made the complaint that he was speeding, which he wasn't. He has a minus 14 on his driver's license and there is no way he would jeopardize his goal to get back to zero.
- Mr. Littlemore never gave him a chance to tell his side of the speeding story.
- his letter to Mr. Littlemore dated December 21, 2015 (ER 1) is not a threat. He was simply advising Mr. Littlemore of the law.
- Mr. Littlemore is a father figure to him and helped him out on more than one occasion. He enjoyed working for Mr. Littlemore.

iii. Cross-examination

Mr. Littlemore suggested that Mr. Humble was not a loyal employee as he had used the company vehicle to look for other jobs and that it was Mr. Humble's responsibility to make sure the vehicles were in running shape.

Re-direct

None.

Final Argument

Mr. Littlemore agrees that Mr. Humble is owed three hours for reporting for work on August 18, 2016, but should be paid severance for bad behaviour.

Mr. Langgard tabled the Saskatchewan minimum wage regulations. He went on to advise that the Saskatchewan Employment Act requires pay in lieu of notice of two weeks for employees with more than one and less than three years of employment unless just cause has been established,

Mr. Langgard tabled a Supreme Court decision appealed from the British Columbia Court of Appeal *McKinley V. BC Tel.* June 28, 2001 and referred to paragraphs 53 & 54. Specifically, the statement "an effective balance must be struck between the severity of an employee's misconduct and the sanction imposed."

He went to argue that Mr. Littlemore relied on hearsay rather than doing a proper investigation for the culminating incident, which was allegedly speeding in a parking lot.

Mr. Langgard suggests that Mr. Humble's sworn testimony, that he was not speeding, is on the balance of probabilities more likely than Mr. Littlemore's third hand information. He further suggests that even if Mr. Humble had been speeding, that would not warrant termination for cause.

Mr. Littlemore allowed that where there is smoke, there is fire and he has been told by clients they left his business because of Mr. Humble.

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

V. Analysis

Mr. Littlemore is arguing that five documents (letter to him from Cheshire Homes dated October 30, 2016 and marked ER2, letter to Saskatchewan Labour Board from Ian O'Brian, Branch Manager ATS Healthcare Solutions undated and marked ER 3, letter to Mr. Humble from Mr. Littlemore, dated June 11, 2014 and marked ER 4, letter to Mr. Humble from Mr. Littlemore dated January 22, 2015 and marked ER 5, letter from Wascana Day Care dated November 16, 2016 and marked ER 7) provide the basis for justifying the August 18, 2016 termination and establish just cause.

It needs to be noted that Documents marked ER 2, ER 3 and ER 7 were constructed and provided to Mr. Littlemore after Mr. Humble's termination.

The letter of suspension dated June 11, 2014 covered a specific offense which Mr. Humble admitted to and followed the direction of providing a letter of apology to the complainant. The next incident which produced the January 22, 2015 warning was also admitted to by Mr. Humble and he wrote another letter of apology to that complainant. There is no further documentation until some 19 months later when Mr. Humble is terminated on August 18, 2016 for allegedly speeding with a company vehicle in the Wholesale Club's parking lot.

VI. Decision

I have no reason to disbelieve to contents of document ER2, ER3 and ER7 even though they were solicited after the fact by Mr. Littlemore in an effort to bolster his "just cause" arguments. Even if I reduce their authenticity since Mr. Langgard could not cross-examine the authors, the information paints a picture of performance and behavioural issues for Mr. Humble throughout his employment. The two disciplinary letters meted out by Mr. Littlemore are concrete examples of behaviour issues. However, Mr. Humble did deal with both as expected and given there is nothing more until August 18, 2016 either lessens their effect or negates them completely as building stones for a progressive discipline process leading to a culminating incident sufficient for a successful "just cause" claim.

That leaves the speeding incident primarily on its' own. Mr. Littlemore determined that this third hand complaint was the last straw and with no investigation terminated Mr. Humble for "just cause".

Perhaps Mr. Humble's approach to the needs of Littlemore Express was such that his employment could not work going forward and perhaps an end to that employment was necessary in Mr. Littlemore's assessment. However, "just cause" has not been established and therefore the appeal is dismissed and the Wage assessment in the amount of \$1011.24 (two weeks' pay-in-lieu of notice and three hours report for duty pay) is upheld.

Dated at Phoenix, in the State of Arizona, this 20th of February, 2017

Original signed by
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.