

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



Appellants:

North Park Enterprises Inc. o/a Maxie's Excavating; Vincent Dziadyk, being a director of North Park Enterprises Inc. o/a Maxie's Excavating; Brym Enterprises Ltd. o/a Maxie's Excavating; Myrna Braaten, being a director of Brym Enterprises Ltd. o/a Maxie's Excavating; Dingo Road & Rail Holdings Ltd. o/a Maxie's Excavating; Robert Harasymchuk, being a director of Dingo Road & Rail Holdings Ltd. o/a Maxie's Excavating; Januk Holdings Ltd. o/a Maxie's Excavating; Janice Harasymchuk, being a director of Januk Holdings Ltd. o/a Maxie's Excavating; GKB Holdings Ltd. o/a Maxie's Excavating; Gerald Braaten, being a director of GKB Holdings Ltd. o/a Maxie's Excavating

Respondent:

Director of Employment Standards

Date of Hearing: August 17, 2017

Place of Hearing: Boardroom 9.2
122 Third Avenue North
Sturdy Stone Building
Saskatoon, Saskatchewan

Introduction

1. The Director of Labour Standards (the 'Director') issued a Wage Assessment dated April 10, 2017 ordering North Park Enterprises Inc. operating as Maxie's Excavating; Vincent Dziadyk, being a director of North Park Enterprises Inc. operating as Maxie's Excavating; Brym Enterprises Ltd. operating as Maxie's Excavating; Myrna Braaten, being a director of Brym Enterprises Ltd. operating as Maxie's Excavating; Dingo Road & Rail Holdings Ltd. operating as Maxie's Excavating; Robert Harasymchuk, being a director of Dingo Road & Rail Holdings Ltd. operating as Maxie's Excavating; Januk Holdings Ltd. operating as Maxie's Excavating; Janice Harasymchuk, being a director of Januk Holdings Ltd. operating as Maxie's Excavating; GKB Holdings Ltd., operating as Maxie's Excavating; and Gerald Braaten, being a director of GKB Holdings Ltd. operating as Maxie's Excavating (the 'appellants') to pay \$6,478.97 to Sean Andrew Bridgette. The Appellants appeal this Wage Assessment.

2. Prior to the hearing, the Director confirmed that the appeal was made within the permitted time period. Employment Standards Officer Kelly Harris represented the Director at the hearing. Sean Bridgette was present at the hearing. The Appellants were represented by three of the named directors: Robert Harasymchuk, Janice Harasymchuk and Vince Dziadyk. All three gave evidence, as did Sean Bridgette.

3. The Director confirmed that the Wage Assessment was served on the appellants on May 1, 2017 and that the Director received the appellants' Notice of Appeal and required deposit on May 9, 2017. The appeal was therefore started within the 15 day time period provided by *The Saskatchewan Employment Act* (the 'Act').

4. The appellants' Notice of Appeal is a letter dated May 1, 2017, and signed by Janice Harasymchuk, who identifies herself as 'Chief Administrative Officer, Maxie's Excavating' and Rob Harasymchuk, who identifies himself as 'Director of Operations, Maxie's Excavating'. The Notice of Appeals states that the grounds are:

Maxie's Excavating has endeavored to give as much notice as possible to our employees regarding potential layoffs. All employees at Maxie's Excavating were given written notice on August 17, 2016 and October 13, 2016 that due to shortage of work, layoff notices may be forthcoming at any time after receipt of the letter(s).

Issues

5. There are two issues in this case:

- (i) Was the employee entitled to be paid a 'call out pay' for attending two meetings?
- (ii) Did the employee receive proper notice of lay-off under *The Saskatchewan Employment Act*?

Decision

6. There was no dispute with respect to the call out pay issue at the hearing. The parties agreed that Sean was called into work on December 1, and again on December 15, and that he

was not paid for these meetings. Sean says he does not remember if he ever submitted time sheets to be paid for these meetings. Janice said that Sean in fact did not submit time sheets for these two meetings, and candidly stated that he would have been paid three hours for each meeting had the time sheets been submitted. There is therefore no dispute on this issue, and I find that Sean should be paid for six hours at \$29.00 per hour for attending two meetings in December 2016. Six hours at \$29.00 per hour is \$174.00 in wages. In addition, 3/52 annual vacation pay would have to be paid on this amount. This amounts to \$10.04, so the total amount due related to the call out pay is \$184.04.

7. The rest of the Wage Assessment relates to the issue of whether or not Sean received proper lay-off notice.

8. The Act requires a period of notice whenever an employee is laid off or terminated:

Notice required

2-60(1) Except for just cause, no employer shall lay off or terminate the employment of an employee who has been in the employer's service for more than 13 consecutive weeks without giving that employee written notice for a period that is not less than the period set out in the following Table:

Table

Employee's Period of Employment	Minimum Period of Written Notice
more than 13 consecutive weeks but one year or less	one week
more than one year but three years or less	two weeks
more than three years but five years or less	four weeks
more than five years but 10 years or less	six weeks
more than 10 years	eight weeks

9. Most of the relevant facts in this case are not in dispute. Sean worked for the employer for more than eight years. Since he worked for the employer for more than five years but not more than 10 years, the Act (s. 2-60) says he is entitled to six weeks notice. If six weeks notice is not given, the employee is entitled to payment of wages in lieu of notice. At this employee's wage rate of \$29.00 per hour, six weeks of wages are \$5,951.57. When 3/52 annual holiday pay (\$343.36) is added this amount is increased to \$6,294.93.

10. This employer did provide a written document to employees on three occasions. These notices were filed as Tab 9 of Exhibit EE-1. Except for the date, each notice is identical. The document says:

Consider this written notice that, due to shortage of work,

Layoff notices may be forthcoming at any time after receipt of this letter (sic)

11. These documents were delivered along with employees' pay stubs, and were dated February 29, 2016; August 17, 2016; and October 13, 2016. Sean did receive copies of the February 29, 2016 and August 17, 2016 documents. Sean was on short-term disability when the October 13, 2016 document was issued, and so did not receive a copy. A copy was posted at the place of employment however. Sean testified he was aware the document had been posted, and he was aware of its contents, which were identical to previous documents he had received.

12. Sean testified that he had received such layoff notices about once a year since he started working for the employer. He testified that he did not believe that he would be laid off because he had not previously been laid off and because he had a 'higher position' in the company (he was a Safety Officer). The employer laid off most employees, including Sean annually for approximately two weeks around Christmas. A few employees would remain working if the employer had snow-clearing work to perform.

13. Robert Harasymchuk testified that the economic downturn meant several employees would have to be laid off between the summer of 2016 and January of 2017. At the same time, the employer's business was weather dependent. The exact day the employer would have no work for the employees to do would in large part depend upon the weather. I accept Robert's testimony in this regard.

14. Sean was laid off on December 15. Vince Dziadyk and Robert later decided that it was very important have a full time Safety Officer on the job. Just before noon on January 3, 2017, Vince called Sean's phone, to call him back to work. Sean did not answer and Vince left him a voice message asking Sean to call him back. Sean did not return the call.

15. It is unclear why Sean did not return Vince's call. Sean says he didn't call Vince back because he had previously received a telephone message from Robert, who Sean described as angry. As a result, Sean says he didn't want to talk to Vince. Whether Robert previously called Sean or not is not relevant to the issue of the sufficiency of notice. Sean's reasons for not calling Vince back are likewise not relevant.

16. In addition to the requirement to provide notice contained at 2-60 of the Act, there is a common law requirement for an employer to give employees notice of termination of employment (see: Peter Neumann and Jeffrey Sack, *Wrongful Dismissal and Employment Law*

2012 CanLiiDocs 1, section 6.1):

Under common law principles applicable to contracts of employment it is well established that employers have an implied contractual obligation to give indefinite-term employees notice of termination of the employment relationship unless there is "just cause" for immediate dismissal.

17. The common law test for what suffices as notice is summarized in *Wrongful Dismissal and Employment Law* section 6.2.1:

It is well established in Canadian jurisprudence that notice of termination of employment must be specific, unequivocal and clearly communicated to the employee. Whether a purported notice is specific and unequivocal is a question of fact to be determined on an objective basis in all the circumstances of each case

18. I have jurisdiction only with respect to the statutory notice provision contained in *The Saskatchewan Employment Act*. The *Act* requires that the notice be written, but is otherwise silent on what is required to constitute notice. I must determine if the content of the purported notice was sufficient. Given that the *Act* was passed in the context of a common law duty to provide notice, I conclude that notice pursuant to the legislation must also include the common law elements of notice. Therefore the appropriate test for me to apply is the common law test, as modified by the requirement that the notice be written introduced by the *Act*.

19. Sean received a written document together with his pay stub on February 29 and August 17. These written documents purport to give notice of a potential layoff. This taken together with the fact that Sean had received similar notices approximately once per year establish that Sean knew this employer's procedure was to attach layoff notices to pay stubs, and that layoff notices were provided to employees prior to seasonal slowdowns.

20. The *Act* requires that employees receive written notice. Sean was on short-term disability when the October 13, 2016 purported notice was delivered. Therefore Sean was not receiving pay stubs, and likewise did not receive a copy of the notice document. However a written copy of that notice was also posted at the place of employment. Sean stated he was aware the document had been posted at the place of employment. I conclude that the combination of the employer posting the written notice, and Sean's awareness of written notice being posted, and of the employer's usual procedure for issuing seasonal layoffs due to slowdowns is sufficient to satisfy the requirement that the notice be written. The legislation does not require that each potentially affected employee be given a separate copy of the written notice, although that is certainly the safe practise for employers to follow. In the circumstances I have outlined I find that the legislative requirement that the notice be written was satisfied by the posting of the written document combined with the employee's knowledge of that posting.

21. Having found that the purported notice in this case was written, I must now determine if the other elements of what constitutes notice are present.

22. The onus is on the employer to establish that the notice is specific, unequivocal and clearly communicated to the employee. On the facts of this case, there were two arguments that the notice was insufficient. One is Sean's stated belief that he would not be laid off. The other is that the notice contained no effective date of termination.

23. Wood J.A. in *Gibb v Novacorp International Consulting Inc.*, [1990] BCJ No. 1705 (BCCA) said:

I do not think that in order to be specific and unequivocal, the notice must necessarily use the words "you are hereby dismissed effective..." or some such equivalent. If the words used are such as would lead a reasonable person to the clear understanding that his employment is at an end as of some date certain in the future, it may well be that specific unequivocal notice has been clearly communicated. It must in every case depend on all of the circumstances in evidence.

24. Sean testified that he did not believe that he would be laid off because he had not previously been laid off and because of his position as a Safety Officer was a higher position with the employer. Sean's subjective belief that he would not be affected by the layoffs is not the test. The test is meant to be an objective, not subjective test. In my view a reasonable person who received a layoff notice worded as this one was, would conclude that he might be laid off. If not being laid off in the past were sufficient to negate a layoff notice, one would wonder how notice could ever be effectively provided to such an employee. If certain positions were exempt from being laid off, one would presume no notice would be given to individuals in those positions. I would suggest the fact one received notice would lead a reasonable person to conclude that they in fact were not except from being laid off because of their position. While Sean may have believed he would not actually be laid off, I conclude that on the facts as they occurred a reasonable person would conclude that they had received notice of a potential layoff.

25. The notice as given did not contain a specific date of layoff. Wood J.A. in *Gibb v Novacorp International Consulting Inc.*, [1990] BCJ No. 1705 (BCCA) said:

The fact that no effective date of termination is to be found in the letter is a circumstance that might support an inference that the requirement of specific notice has not been met, but again it depends on all of the circumstances. If no date were given, and much time passed, it might well lead a court to conclude that no proper notice was given.

26. It is clear that it is in an employer's interest to provide a specific date of termination. Employers who do not do so may find their purported notice to be ineffective. However it is also clear that there is no absolute rule that a specific date of termination must be given for notice to be effective.

27. The facts in this case indicate that this employee received written notice. He knew that the economic downturn meant layoffs would occur. He also knew that the work the business carried out was weather dependent, which meant the precise date of termination was not feasible to predict at the time notice was given. In these circumstances, I conclude that the notice given to the employee was specific and unequivocal.

Conclusion

28. Having found that effective notice was given, I reduce the Wage Assessment to the amount owing in respect to call out pay, which is \$184.04.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 28th day of August, 2017.



Doug Surtées
Adjudicator

The Parties are 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 viewed 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.
- (2) A person who is directly affected by a decision of an Adjudicator on an appeal pursuant to Part III 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 or hearing pursuant to Part II, the wage assessment or the notice of hearing;
 - (b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;
 - (c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;
 - (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 of the adjudicator's decision or order with any directions that the board considers appropriate.

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 or the director of occupational health and safety, 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 and the director of occupational health and safety have 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.



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

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

Between North Park Enterprises Inc. o/a Maxie's Excavating; Vincent Dziadyk, being a director of North Park Enterprises Inc. o/a Maxie's Excavating; Brym Enterprises Ltd. o/a Maxie's Excavating; Myrna Braaten, being a director of Brym Enterprises Ltd. o/a Maxie's Excavating; Dingo Road & Rail Holdings Ltd. o/a Maxie's Excavating; Robert Harasymchuk, being a director of Dingo Road & Rail Holdings Ltd. o/a Maxie's Excavating; Januk Holdings Ltd. o/a Maxie's Excavating; Janice Harasymchuk, being a director of Januk Holdings Ltd. o/a Maxie's Excavating; GKB Holdings Ltd. o/a Maxie's Excavating; Gerald Braaten, being a director of GKB Holdings Ltd. o/a Maxie's Excavating (Appellants);
and the Director of Employment Standards (Respondent)

Exhibit List

Appellants (Employer)

No exhibits

Respondent (Director of Employment Standards)

EE-1 14 Tab Exhibit Book dated August 17, 2017

A handwritten signature in black ink, appearing to be "Gerald Braaten".