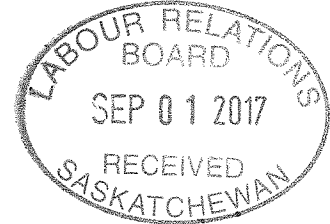


DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTION 2-75 and 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT

LRB No. 123-17
Wage Assessment #8637

COMPLAINANT: Douglas Klymchuk
Represented by Andrew Langgard
Employment Standards Officer



RESPONDENT: 101254226 Sask. Corporation
Represented by Harpinder Singh
Director

DATE OF HEARING: August 21, 2017 @ 10:00 a.m.

PLACE OF HEARING: 3rd Floor Board Room
1870 Albert Street
Regina, Saskatchewan

1. INTRODUCTION

Upon the arrival of the parties (Mr. Langgard, Mr. Klymchuk and Messers Harpinder and Jadjit Singh) I introduced myself. I advised that I expected respectful presentations with no interruptions. Further I advised my hearings were fairly informal and that I was required to provide a written decision within 60 days of this hearing.

II. PRELIMINARY OBJECTIONS

Mr. Langgard advised that he is representing the Director and not Mr. Klymchuk.

I advised that I was satisfied that the appeal had been perfected and that the hearing can proceed.

III. THE DISPUTE

Mr. Langgard advised that the Wage Assessment in the amount of \$1,393.59 is outstanding vacation pay.

IV. FACTS

i. EVIDENCE OF EMPLOYER

Mr. Singh was sworn and provided the following evidence and testimony:

- Mr. Klymchuk was hired on May 11, 2016, (Note: in his written appeal Mr. Singh in error used 2017 as the year of hire), as a Long Combination Vehicle Driver.

- During the first two weeks of training Mr. Klymchuk damaged a dock by hitting it with a truck. He blamed other people for the incident.

- He told Mr. Klymchuk early on the Company policies, like must give 20 days' notice when quitting and adequate notice in wanting a day off.

- Mr. Klymchuk quit with no notice at all.

- Mr. Klymchuk on his last day (September 19, 2016) was returning to Regina from Saskatoon when he was stopped by a Highway Traffic Officer and given a ticket for "incorrect dimension of truck rear axles". Mr. Klymchuk had, against direction to the contrary, taken the wrong trailer from the Saskatoon dock. Because of the wrong dimensions, Mr. Klymchuk had to drop the second trailer on the road and come back for it with an empty truck. At first Mr. Klymchuk refused to go get the second trailer but recanted when Mr. Singh said he'd pay extra for it. Mr. Klymchuk also missed his court date for the ticket.

- Upon return to the yard Mr. Klymchuk got into arguments with other tenants in the yard.

- After Mr. Klymchuk went home, on September 19, he refused to answer his phone and didn't return texts so Mr. Singh assumed he had quit and he hired another driver to take Mr. Klymchuk's night load.

- On September 20, 2016 Mr. Klymchuk shows up and says he wants to work rather than have 20 days pay deducted for no notice. He told Mr. Singh no because he had already replaced him. He never deducted the 20 days from Mr. Klymchuk's pay.

- Mr. Klymchuk advised that he never wanted to quit but he'd had a bad night and took the shift off.

- He believes Mr. Klymchuk, on his last day, stole batteries from the truck, tools, washer fluid, cut transmission lines and wrecked a dash by ripping stuck on LED lights off. He believes Mr. Klymchuk did this because he had (still has) a key to the truck.

- He also believes that Mr. Klymchuk (who had a key to Singh's truck) entered Mr. Singh's truck (also on September 20) and manipulated his phone to look like he, Mr. Singh, engaged in an exchange of text messages (see EE2). He believes Mr. Klymchuk changed the date on his phone to make it look like that date was in October rather than show it was done on September 20.

- Before Mr. Klymchuk quit he had asked for an advance because he was broke due to a number of family difficulties. He took this as a set up from Mr. Klymchuk to get extra money by quitting then coming back to work.

- Mr. Klymchuk exhibited hostile behaviour on many occasions. He got into arguments with other truckers and dispatchers. Also, he broke his own cell phone and blamed Jadjit for it.

Note: Mr. Singh tabled Mr. Klymchuk's weekly "Independent Cartage Agent's Invoices" along with his bi-weekly pay stubs for his entire employment period. These were collectively marked ER1.

- Mr. Singh pointed out that Mr. Klymchuk's signature appears at the bottom right of every one of the invoices and that Mr. Klymchuk never complained about any of the data appearing on the invoices including the vacation pay amount.

- Mr. Klymchuk's last day was September 19, 2016 and the vacation pay shown on the invoices was included in each pay cheque amount show on the pay stubs.

Cross-Examination

Mr. Langgard tabled a document from the Information Services Corporation and asked Mr. Singh if it represented the registration of his Company in Saskatchewan. Mr. Singh agreed that it did and I marked it EE1.

Mr. Singh provided the following evidence and testimony as he answered questions put to him by Mr. Langgard:

- Mr. Klymchuk's terms of employment were \$0.44/mi wait time \$23/hr paid bi-weekly. If two drivers \$0.52/mi LCB driver \$0.52/mi LCB Converter \$7.25 each and \$14.50 round trip.

- In his appeal, he used the language "temporary employee" because Mr. Klymchuk was not on the same route all the time.

- Mr. Klymchuk signed the Invoice for the week at the end of every week, most were signed in front of him. Mr. Klymchuk was aware of the process. Each employee had a mail box where he put the completed invoice copies, pay cheques and pay stubs for them to pick up.

- He thinks the difference in the totals for the invoices and the pay stubs (\$23,813.06 and \$24,155.49 = \$342.43) came as a result of him paying back Mr. Klymchuk for expenses incurred when Mr. Klymchuk ran out of gas at Saskatoon.

Note: After making some calculations Mr. Singh advised he paid Mr. Klymchuk \$194.62 for the Saskatoon incident. The reason for the difference of \$342.43 was never resolved.

Mr. Langgard pointed out that this difference causes some concern as to the authenticity of the Company's pay records pertaining to Mr. Klymchuk.

- Mr. Klymchuk had called Mr. Singh around 1:30-2:00 a.m. on July 6, 2016 to advise that he had ran out of gas close to Saskatoon and that he had called a tow truck. Mr. Klymchuk told him the fuel gauge had not worked properly and that he thought he had lots of gas. This is the only time in the history of that truck the fuel gauge did not work. Mr. Klymchuk should know from his training that fuel levels must be kept at a safe level. Any way his brother called another guy and that guy took fuel and ether to the truck and got it going again.

Note: Mr. Langgard tabled several pages of copies of text messages. Marked EE2.

- Mr. Singh believes Mr. Klymchuk broke into his truck on September 20, 2016 and using his own phone and Mr. Singh's, manufactured the texts in EE2 and dated them as being produced in October of 2016. Then he erased all record from Mr. Singh's phone.
- Mr. Klymchuk had several sets of keys and has returned all but 1 which is for the truck. He has never returned his LCD license either.
- He never observed Mr. Klymchuk stealing the batteries, cutting the transmission lines or wrecking the dash, but who else would be stupid enough to do that? Besides he was the only person with keys.
- Mr. Klymchuk did not need his(Singh's) phone from October 13 through October 14 because he manipulated the dates to show those dates when he was doing it on September 20, 2016.
- His company's pay stubs do not show vacation pay because it is shown on the invoices. He now understands the Employment Act requires it shown on pay stubs and they have been changed their procedures accordingly.
- There has been no response back from Police regarding the stolen batteries.

Re-Direct

None

ii. EVIDENCE OF EMPLOYEE

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

- In response to an ad on Kijiji for a driver, he was hired by Mr. Singh in May of 2016.
- Regarding ER1, he was never paid vacation pay as the pay stubs show.
- Before he was hired he met Mr. Singh and his brother at Tim Horton's and he was told how he would be paid.
- He had never seen the invoices tabled as part of ER1 before Mr. Langgard sent them to him in December of 2016. That is not his signature on them in fact he took them to the Regina Police Service to have them investigate Mr. Singh for fraud. Mr. Singh is simply trying to avoid paying vacation pay and is the first employer in 29 years to do that to him.
- The only documents he ever saw were his pay cheques and pay stubs and they were always left on the seat of his truck folded in an envelope that was too small for the documents. There was no mail box.
- He agreed that the inspection summary provided by Mr. Langgard (Marked EE3) is accurate. He also agreed that the pay stubs accurately reflected his pay without vacation pay included.

- Respecting EE2, his texts are in green and Mr. Singh's are in grey. He apologized for not knowing Saskatchewan's vacation pay is 3/52. He grew up in Alberta and thought all provinces were the same. He confirms it was on October 13, 2016 at 8:09 p.m. that he sent the text to Mr. Singh regarding vacation pay and he confirmed that all the texts are as they appear to be. He believes that it is not possible to manipulate data as Mr. Singh has stated. All phones record time and location when used and that can't be changed.

- He did not enter Mr. Singh's truck, use his phone or steal his stuff.

- It was on December 16, 2016 when he went to the Regina Police Services.

- Regarding the out of gas incident, he did run out of gas near a Tim Horton's in Saskatoon. Mr. Singh's brother pulled his truck to a service station, they got it going and he went to North Battleford. There was no money transactions except for the gas to fill the truck up and that went on the company credit card.

Cross-Examination

In response to questions from Mr. Singh, Mr. Klymchuk provided the following information:

- He had his complaint file opened on October 20, 2016 and he received copies of the invoices on November 28, 2016.

- He never tracked his own hours, if he happened to do something extra he wrote it on the trip sheet. He never questioned the records, he trusted Mr. Singh.

- Not every employer pays vacation on every cheque, some pay at the end of the year or at the end of employment. That is why he never questioned why vacation pay did not appear on the pay stubs.

- There is no requirement to give notice of quitting in Saskatchewan. He did offer to work his two weeks out but Mr. Singh told him no because he had already hired someone else.

- Derringer Transport hired him two days after he left Mr. Singh's company. He did not have to do a driving test but he received orientation.

- He did not have the new job when he offered to work out his two weeks with Mr. Singh's company.

Re-Direct

None

Final Argument

Employer

Mr. Singh argues that Mr. Klymchuk is lying about not knowing about the weekly invoices. Those invoices clearly show vacation pay was part of the calculations for each bi-weekly pay. The invoices show the details of each day's work.

Mr. Singh also argued that Mr. Klymchuk owed the Company for failing to give two weeks' notice of quitting (Section 2-63).

Also, the text messages do not match with the dates in Mr. Klymchuk's testimony.

Lastly, when Mr. Klymchuk got the ticket from the Police, he lied about the trailer to the Police.

Employee

Mr. Langgard argues that Section 2-27 clearly states the obligation for employers to pay vacation pay. Section 2-29 requires employers to pay out any vacation pay owed, even if not employed for a full year. It was Mr. Klymchuk's testimony that he never received vacation pay.

He further pointed out that Section 2-37 states that a statement of earnings must show the amount paid for vacation and if not shown, unless the contrary is established, it is deemed to not have been paid.

Mr. Langgard suggests that the language used by Mr. Singh in his appeal is similar to the language in the text messages and submits that Mr. Singh did send those texts on the balance of probability.

Mr. Klymchuk testified that he never saw the invoices before receiving them from the Ministry and never signed them. He is adamant that he never received vacation pay.

At this point Mr. Langgard tabled a Saskatchewan Labour Relation Board Decision regarding an appeal of an Adjudicator's Decision. Both the Adjudicator's and the Labour Relation Board's Decisions was that, in the absence of evidence to the contrary, the wage assessment is deemed to be accurate.

Mr. Langgard concluded with the assertion that Mr. Singh's story regarding the text messages, on the balance of probabilities, to be unlikely and therefore I should dismiss the appeal.

Mr. Langgard then provided me with a copy of Mr. Klymchuk's 2016 drivers license on my request. That copy contains Mr. Klymchuk's signature and it was marked EE5.

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

V. ANALYSIS

Despite the volume and the details provided by the parties, there are only four issues that are pertinent to the question of whether or not the Wage Assessment is valid. Those four items are the invoices, the pay stubs, the text messages and whether Mr. Klymchuk quit without notice.

Mr. Klymchuk's testimony is that not only had he never seen the invoices until after his employment, also he had never signed them. He claims that his signature was forged.

I am not a hand writing expert, however, when I compare the signature from the Driver's License to the signatures on the invoices, they are quite dissimilar. As an observation, I'm surprised there is a signature on the last invoice dated September 24, 2016. My surprise is that somehow during Mr. Klymchuk's leaving the company premises on September 20, 2017, Mr. Singh had Mr. Klymchuk sign the invoice.

Mr. Singh's testimony is that Mr. Klymchuk signed all the invoices, many of those signatures were obtained in front of him (Singh).

The pay stubs are self evident. They do show regular earnings, EI, CPP and income tax deductions. They do not show vacation pay. My assignment will be to determine if the Appellant has proven the contrary has been established.

Exhibit EE2 is a printed copy of several text message exchanges, allegedly, between Mr. Singh and Mr. Klymchuk.

Mr. Singh is prepared to own up to the first exchange. That exchange is as follows:

From Mr. Singh
Pick up pay check from Shop Tomm

From Mr. Klymchuk
OK What time?

From Mr. Singh
After 9

From Mr. Klymchuk
OK thx

There is no date showing but since the pay stub shows October 15, 2016 I am assuming the date to be there about.

Mr. Singh denies participating in the exchanges beginning October 13, 2016, 8:09 p.m. onward. He claims Mr. Klymchuk broke into his truck and used his (Singh) phone to produce the text messages attributed to him (Singh). He also claims it was done September 20, 2016.

As with hand writing, I am not a tech person, however, with my limited knowledge I am skeptical that it is possible to produce text messages in September and make it look like they were sent in October.

Regarding, whether Mr. Klymchuk quit with no notice, both Mr. Singh's and Mr. Klymchuk's testimony is that, on September 20, 2016, Mr. Klymchuk offered to work out his notice, but Mr. Singh refused the offer. Mr. Singh's appeal did not reference his allegation that Mr. Klymchuk quit with no notice and since his testimony agrees with Mr. Klymchuk's assertion he offered to work out the notice I'm only considering the vacation pay issue.

VI. DECISION

On the balance of probabilities, I am accepting the testimony of Mr. Klymchuk regarding the text messages found in Exhibit EE2. That is that the text messages (green for Klymchuk and grey for Singh) are as they appear and were sent by each of them during that period in October of 2016. Having accepted Mr. Klymchuk's testimony I, therefore, in the balance of probabilities, reject Mr. Singh's notion that Mr. Klymchuk manipulated his (Singh's) phone.

The text message from Mr. Singh "I think u did not get me first time buddy. no vacation pay for temporary employees. U got paid all stat holidays. That all my friend" says it all. Further the pay stubs provided by the Company do not reflect vacation pay throughout Mr. Klymchuk's employment.

I'm cannot to conclude that the invoices were manipulated by Mr. Singh, however, with Mr. Klymchuk signature on the last one brings a concern regarding them all. At any rate, I'm satisfied that on the balance of probabilities, that the text messages in EE2 are accurate and that as stated by himself, Mr. Singh did not pay Mr. Klymchuk vacation pay.

Given the absence of vacation pay on the pay stubs, Mr. Singh, as per Section 2-37 of the Act, must prove the contrary and it is my decision that has not happened.

Therefore, I am allowing the Wage Assessment of \$1,393.59 and rejecting the appeal.

Dated at Regina, in the Province of Saskatchewan, this 1st of September, 2017.

A handwritten signature in black ink, appearing to read 'R. Ermel', written in a cursive style.

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.