LRB File No. 003-18
- Corrigendum -

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

Appellant:

Carlton Trail Regional Park Authority

Respondents:

Lenora Magnusson, and Director of Employment Standards

Date of Hearing: May 29, 2018

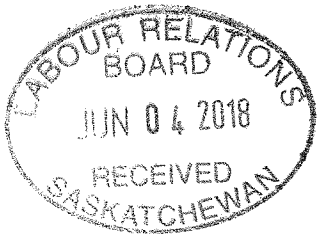
Place of Hearing: Mail Floor Boardroom; 72 Smith Street East; Yorkton; SK.

Amendment:

[1] My decision in this matter, issued June 4, 2018 incorrectly identified the Wage Assessment being appealed as #9046 at paragraphs 26 and 27. It should have been identified as Wage Assessment #8916. My decision is amended by substituting '8926' for '9046' in both paragraph 26 and 27.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 4th day of June, 2018.

Doug Surtees
Adjudicator



LRB FILE NO. 005

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PUSUANT TO SECTION 2-75 AND 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT

Appellant:

Carlton Trail Regional Park Authority

Respondents:

Lenora Magnusson, and Director of Employment Standards

Date of Hearing: May 29, 2018

Place of Hearing: Mail Floor Boardroom; 72 Smith Street East; Yorkton; SK.

Preliminary Matters:

[1] The Director of Labour Standards was represented by his delegate, Dale Schmidt. Carlton Trail Regional Park Authority was represented by board members Dale Kotzer and Barb Decker. Lenora Magnusson represented herself.

Issues:

[2] There are two issues in this matter. The first is whether Carlton Trail Regional Park Authority established just cause for terminating Lenora Magnusson's employment. The second issue is whether Carlton Trail Regional Park Authority established that they are not responsible for paying Lenora Magnusson wages for the hours she claims to have worked. I shall refer to Carlton Trail Regional Park Authority as the 'employer' and I shall refer to Lenora Magnusson as the 'employee'.

Facts and Decision:

[3] The employer and the employee have different interpretations about the overall quality of the employee's work, however, most of the relevant facts are not in dispute. I shall briefly summarize the facts as I find them, based on the evidence presented at the hearing.

[4] The employee began working for the employer April 15, 2016. Her employment was terminated by the employer on August 1, 2017.

[5] The employee was hired at a salary of $900.00 per month. Mr. Kotzer explained that the employee would have very little to do in the winter months, but would still receive the same monthly salary.

[6] The employee indicated that at the time before she was hired, this job was represented to her as a job which 'didn't have much to it' and that it was 'an easy job', which she could do in the evenings. She says that she was later warned by someone at the R.M. Office that the employer's books were 'a mess'. Mr. Kotzer confirmed this by saying 'to be fair to Lenore she inherited quite a mess'.

[7] The employee approached the Chair of the employer's board of directors and indicated that she could not do the work that was required for $900 per month. She says the Chair told her to keep track of her hours worked, and submit them to the board and they would consider paying her for the 'extra' hours. This is in fact what happened for all but the last two months of employment. The employer has not paid the employee for the 'extra' hours worked during June and July, which were the last two months of the employee's employment.

[8] I asked Mr. Kotzer how it was that an employee on a monthly salary could work 'extra' hours. He indicated that the employer's expectation was that in the summer months the employee would work 45 hours per month. In the winter months the employer's expectation was that the employee would work fewer than 45 hours per month, but would still be paid $900 per month. When the employee was paid for the 'extra' hours worked, she was paid by the employer at the rate of $20.00 per hour.

[9] I turn now to examine whether the employer had just cause to terminate the employee's employment. If so, no notice is required. If not, *The Saskatchewan Employment Act* (which I shall refer to as the '*Act*') at s. 2-60 requires a minimum period of written notice of at least two weeks in this case, because the period of employment was more than one year but did not exceed three years.

[10] An employer that alleges just cause for dismissing an employee carries the onus to prove it [See: *Warren v. Super Drug Markets Ltd.,* 1965 CanLII 380 (SK QB) at para.36].

[11] Ms. Decker explained the employer's frustration with the employee's work performance. In Ms. Decker's view the employee took many months too long to acquire and begin to use an accounting program called QuickBooks. Ms. Decker expressed frustration that the employee did not purchase the program until April, the month before the park opened. She was concerned that very little data was entered into the program through May, June and July. Ms. Decker was frustrated that regular financial reports were not being provided to the employer's board of directors. Both Ms. Decker and Mr. Kotzer explained that they were unsure what the employee had accomplished during the so-called 'extra' hours. There were other issues of a similar nature which both Ms. Decker and Mr. Kotzer found to be frustrating.

[12] The employee fully admits that she was slow to learn QuickBooks. She initially worked with two 'helpers' to help her learn the program, but had limited success. She indicated she had made some progress, and in fact did use the program to invoice camper rentals. This point was disputed by Ms. Decker, but I accept the employee's statement as true. The employee had begun to work with a third helper about 3 weeks before she was terminated. The employee believes she was making good progress with the program as she worked with this third helper. She thought she was learning to use the program more fully at the time her employment was terminated

[13] The employee detailed a number of successful initiatives she'd been involved in during her employment. These included advising the board of directors that damage to a building roof may have been insured, working with the employer's insurer to submit a claim for a new roof, working through a number of audits and so forth. And of course there was the 'cleaning up' of the employer's records as a result of the 'mess' she 'inherited' when she began. This included discovering previous overpayments made with respect to certain remittances. I accept that the employee believes she did a good job for the employer. Although she was admittedly slow in learning a new program, she took a number of steps to become familiar with it.

[14] I accept that the frustration felt by at least some of the employer's board of directors was real. Mr. Kotzer said that the employee said she could do the job when she was hired, and in his view, she could not. Ms. Decker spoke about a number of frustrations she felt, which I have referred to above.

[15] No dishonesty, or other actions which would provide just cause based on a single incident, was alleged by the employer. If just cause exists in this case, it would have to be because the employee was incompetent. The onus to prove incompetence rests on the employer who alleges it.

]16] In *Jasnoch v. Provincial Plating Ltd.*, 2000 SKQB 44, Justice Klebuc (as he then was) quoted the following test from *Bogden v. Purolator Courier Ltd.* 1996) CanLII 10572 (AB QB), (per Ritter J.) at page 91:

> Here, to a large extent, the employer bases its dismissal of the plaintiff on the plaintiff's incompetence. In order to establish that an employee's incompetence is grounds for dismissal, an employer must show more than mere dissatisfaction with the employees (sic) work and it is not enough to show that the employee was careless or indifferent. To establish cause on the basis of incompetence the employer must show:
>
> (1) The level of job performance that is required and that the level required was communicated to the employee.
>
> (2) That it gave suitable instruction to the employee to enable him to meet the standard.
>
> (3) That the employee was incapable of meeting the standard.
>
> (4) That there had been a warning to the employee that failure to meet the standard would result in his dismissal. (*Van Houwe v. Intercontinental Packers Ltd. (1987)* CanLII 4602 (SK QB), 59 Sask. R. 178 (Q.B.)).

[17] In this matter, the employer presented no evidence of what the level of job performance required was, and no evidence that the same had ever been communicated to the employee. The employer gave no evidence that suitable instruction, or any instruction for that matter, was given to the employee to allow her to meet the standard. In fact, there was no evidence of any formal communication with the employee regarding her work performance prior to her dismissal on August 1. Ms. Decker indicated that in her role as a board member she had, at several board meetings, asked the employee if she had purchased QuickBooks yet, but without more, this does not constitute an instruction, direction or warning to the employee. It is simply a single board member asking a question. There was no evidence that the employee was incapable of meeting required standard. It is quite possible that had the employee been given proper instruction on the program the employer wanted her to use, she would have become quite skilled with it. I do not mean to suggest that the first two 'helpers' arranged for by the board to assist the employee in learning QuickBooks were not effective teachers. I do not know if they were or not, as no evidence was presented by the employer on what type of assistance they were providing. Finally, there was no evidence of the employer doing any work performance review with this employee, and no evidence of any reprimand, discipline or warning being communicated to the employee prior to the August 1 termination.

[18] In short, there is simply no evidence of just cause. Since the employer has not established just cause, the employee is entitled to two weeks' pay in lieu of notice, based on the length of her employment.

[19] This brings me to the second issue. Subsection 2-75 (9) of the *Act* says:

> The copy of the wage assessment provided to the adjudicator in accordance with subsection (8) is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing...

Therefore, if the employer is to establish that it is not required to pay the employee for the so-called 'extra' hours worked during her last two months of employment, which are included in the Wage Assessment, it must establish some evidence that leads to this conclusion. In the absence of any evidence, the *Act* requires me to uphold the Wage Assessment (#8916).

[20] The employer's Notice of Appeal alleges two possible reasons which might have led to a conclusion that this employee should not be paid for the so-called 'extra' hours worked. The first is a claim she did not actually work the hours submitted. The second is a claim that she is bound by an employment contract which provided her with a monthly salary of $900. The employer advanced no other arguments which would justify non-payment of the wages.

[21] The employer's 'Notice of Appeal' says "It is our contention that these hours are false". At the hearing, the employer's representatives submitted that they were unsure of what work was accomplished during these hours. They did not however submit any evidence that the hours were not worked. In other words, they did not provide me with any 'evidence to the contrary', pursuant to subsection 2-75 (9), which would permit me to vary the Wage Assessment. The employee on the other hand provided significant evidence of the time she spent learning the new program, and completing other tasks. I find the employee to be an honest witness, and I conclude that she did work the hours as submitted.

[22] Although the employer indicated the employee was on a monthly salary of $900 per month, this was not actually the case. The employer voluntarily agreed to pay the employee an hourly wage of $20 for every hour worked in excess of 45 hours per month. This is a clear variation of the employment contract, agreed to by the employee and the employer. The employer has no right to unilaterally vary the contract to revert to the original terms.

[23] Even if the employer was permitted to revert to its original position of paying only a monthly salary, it would be estopped from doing so until reasonable notice had been given to the employee [See: *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130, [1956] 1 All ER 256]. It would be manifestly unjust for an employer to promise to pay an hourly wage of $20 for hours worked in excess of 45 per month, and then to simply change its mind, not tell the employee of the change and then refuse to pay her after she has worked additional hours in reliance on the employer's promise to pay the agreed wage.

[24] Therefore, I conclude that the employment contract was such that the employee was to be paid a minimum monthly salary of $900, and was also to be paid an hourly wage of $20 for every hour worked in excess of 45 hours per month. The employer agreed to this change as evidenced by the fact that it told the employee to track her hours and to submit these hours monthly to the board for payment. The employer was certainly entitled to put a maximum limit on the number of additional hours worked each month, but there was no evidence submitted that it did so.

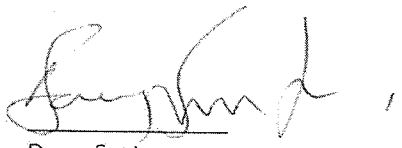
[25] The employee says she worked 194 hours in June (which is 149 hours in excess of 45) and 122 hours in July (which is 77 hours in excess of 45). The employer presented no evidence to the contrary. As a credible witness who appeared truthful to me, I accept the employee's statement that she indeed did work the hours submitted on her time cards (Exhibit EE-2).

[26] The employee is entitled to be paid for 149 hours worked in June. At her hourly wage of $20, this totals $2,980.00. She is entitled to be paid for 77 hours worked in July. At her hourly wage of $20, this totals $1,540.00. The sub-total of these figures is $4,520.00. Annual holiday pay on this amount (3/52) is $260.76, which totals $4,780.76 due to the employee as payment for the additional hours worked in June and July. In addition, as I previously concluded, because her employment was terminated without just cause the employee is entitled to a notice period of2 weeks, pursuant to ss. 2-60 (1) of the *Act*. In cases such as this one where written notice was not actually provided, 2-61 (1)(a)(ii) requires the employer to pay the employee 'a sum equivalent to the employee's normal wages for that period'. Subsection 2-61(2) explains that where the employee's hours vary from week to week (as in this case), her 'normal' wages are deemed to be the average wage earned over the previous 13 weeks, without considering overtime. Calculating the employee's hours worked during her last 13 weeks of employment based on the hours submitted on her time cards (Exhibit EE-2) indicates that on average she worked 33.3 hours per week. Therefore, she is entitled to be paid 66.6 hours, which would be her normal wages for two weeks calculated as required by the *Act*. At $20 per hour, wages for 66.6 hours total $1,332.00. Annual holiday pay (3/52) adds another $76.84 for a total of $1,408.84. Adding the amount due for hours worked in June and July ($4,780.76) and the amount due for two weeks' pay in lieu of notice ($1,408.84) totals $6,189.60. This is the amount due to the employee, and is the amount of Wage Assessment #9046.

Conclusion:

[27] The employer's appeal is dismissed. Wage Assessment #9046 in the amount of $6,189.60 is confirmed.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 4th day of June, 2018.



Doug Surtees
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 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 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, 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.