



**DECISION OF ADJUDICATOR
IN THE MATTER OF AN APPEAL
PURSUANT TO SECTION 2-75 WITH RESPECT TO A DECISION OF
AN EMPLOYMENT STANDARDS OFFICER PURSUANT TO
THE SASKATCHEWAN EMPLOYMENT ACT,
*R. S. S. S-15.1 (as amended)***

APPLICANT: Durabuilt Windows & Doors Inc., Joe Sunner,
Director, Joginder Singh Sunner, Director, as
represented by Richard Paszkowski, HR Manager

RESPONDENT: Mark Kruining

and

Director of Employment Standards
Ministry of Labour Relations and Workplace Safety

DATE OF HEARING: July 17, 2017

PLACE OF HEARING: Saskatoon, Saskatchewan

I. INTRODUCTION

This is an appeal by Durabuilt Windows & Doors Inc. and its Directors (hereinafter referred to as Durabuilt) with respect to a Wage Assessment issued by the Respondent, the Director, Employment Standards Branch, Ministry of Labour Relations and Workplace Safety, on April 16, 2017. The Wage Assessment required the Applicant to pay Mark Kruining the sum of \$7260 representing pay in lieu of notice on his termination. The Wage Assessment was prepared pursuant to s. 2-74 of *The Saskatchewan Employment Act*, RSS S-15.1 (as amended).

This matter was heard before me on July 17, 2017. The Applicant was represented by Richard Paszkowski, Human Resources Manager for Durabuilt. Present for the Respondent at the Hearing was Shelley Stretch, Department of Employment Standards as well as the employee, Mark Kruining.

II. PRELIMINARY MATTERS

All parties remained present throughout the hearing and there were no other preliminary issues. Witnesses were permitted to provide evidence via teleconference.

III. THE ISSUE

The issue at this Appeal Hearing was whether the employee was terminated with just cause. This appeal is therefore with respect to the application of *The Saskatchewan Employment Act* RSS S-2-60.

The relevant portion of Section 2-60 (1) states:

(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... there follows a table requiring the notice provisions for different lengths of employment.

Durabuilt asserts that it had just cause to terminate Mr. Kruining. If they did not, then the Wage Assessment stands.

IV. EVIDENCE

The Applicant called two witnesses at the outset: Amar Singh and Gurpreet Cheema. Mr. Paszkowski was permitted to testify in rebuttal following the evidence of Mark Kruining. Mr. Kruining was the only witness on behalf of the Respondent.

i. EVIDENCE OF APPLICANT

Evidence of Amar Singh

Mr. Singh was the Service Manager for Durabuilt. Durabuilt manufactures doors and windows which are sold throughout western Canada. Installations are done by the builder. Mark Kruining had worked for Durabuilt for approximately seven years as a service technician. His job was to provide the service work after sales. He would deal with after sales work such as: broken glass, broken frames and adjustments. This job also required some travel. At the outset, Mr. Kruining was a solid, smart, hardworking employee; however, Mr. Kruining's attitude changed three or four months prior to his termination. In

this latter period, Mr. Kruining's willingness to cooperate and complete tasks on time deteriorated. Mr. Singh testified that Mr. Kruining began to talk negatively about Durabuilt to his fellow employees; he did not complete jobs assigned to him; he no longer got along with team members; he was unwilling to train people and listen to more experienced employees; and, at job sites, he would be frequently on his phone and not working, while others did the work.

Mr. Singh expanded on the above.

Every Tuesday, the employees would have a conference call with the office in Edmonton. In addition, every morning the standard 'Toolbox Talk' was held. Mr. Kruining declined to participate in these meetings; he would either have nothing to say or get up and leave.

During the team meeting every morning, when the plans for the work day were being discussed, including the best completion of the jobs for the day, Mr. Kruining would usually stand there for a few minutes, then walk away. He passively refused to participate in the discussion. This was disrespectful to the manager and the other employees. Mr. Singh provided numerous specific examples of these incidents.

Prior to the issues giving rise to his termination, Mr. Kruining was a good employee, finishing 75-95% of his work orders on time. In the months prior to his termination, this dropped to a 33% completion rate. It should be noted that this was 33% of the work that Mr. Kruining agreed to take on. Mr. Singh talked to Mr. Kruining about this almost every day. He told Mr. Kruining to 'pull his socks up' or there would be further actions in the form of a suspension or termination. When he found out Mr. Kruining was lacking in his performance, Mr. Singh tried to engage Mr. Kruining both one-on-one and in the presence of other employees. Sometimes Mr. Kruining would not respond or he would say "I don't know, what do you want me to do". This had a demoralizing effect on the other employees and some of them would refuse to take Mr. Kruining to job sites and work with him.

Mr. Singh hoped that when he conveyed to Mr. Kruining that he was an important part of the team, he might improve. Mr. Singh laid out, step by step, the requirements of Mr. Kruining's job and how he could successfully complete his work. Initially, management did its best to encourage Mr. Kruining; however, it evolved to the point that Mr. Singh instructed Mr. Kruining's manager, Bill, to tell Mr. Kruining to either finish the job, or go home.

During the third month of the problems, Mr. Singh had a private discussion with Mr. Kruining during which he said that Durabuilt was prepared to give Mr. Kruining the benefit of the doubt if there were personal issues going on and offered any kind of help that an employer could provide. There was no response and no improvement.

Additionally, a great concern to Durabuilt was regarding the negative effect on their business. Their biggest builder, DeNovo, was on the verge of firing Durabuilt due to the lack of timely completion by Mr. Kruining. Emerald Custom Homes in Regina told Durabuilt that they no longer wanted Mr. Kruining on their job sites due to his lack of completion and the conversations he was having with homeowners about the build.

Mr. Kruining had two recorded warnings. These are demonstrated in Exhibits ER1 and ER2. The Exhibits speak for themselves.

In cross-examination, Mr. Singh was asked for details of poor work performed by Mr. Kruining. He provided the example of Mr. Kruining's attendances at service calls regarding broken glass. Broken glass had to be replaced and Mr. Kruining would do the inspection measure. On many occasions, Mr. Kruining would get the measurement wrong. As a result, the wrong size glass would be ordered and, as a result, the job could not be completed.

The job required no lifting on the part of Mr. Kruining, who had some medical restrictions as per the Workers Compensation Board Order (EE4). Durabuilt responded with its offer of modified duties (EE5). After that, Mr. Kruining was instructed by the employer that if there was anything he could not lift, he should just say so and he would not have to lift it.

Mr. Singh testified that when he spoke to Mr. Kruining, often there would be no explanation for his failings. Mr. Singh would reiterate what Mr. Kruining's job was. Sometimes Mr. Kruining would respond that he wanted more pay, but mostly he conveyed an attitude of not caring.

Usually there were about nine to ten service calls per day. These would be divided between the three technicians. At the morning 'Tool Box Meeting', the assignments would be discussed and generally agreed upon. Efforts would be made to distribute them equally, but if five were in close proximity, they would be assigned together. Mr. Kruining

could indicate how many he would be able to take. The company average was an 85% completion rate per month; that is, on average technicians would complete 85% of their assigned jobs on time. For the last four months, Mr. Kruining' s completion rate was at 30%; that is, he finished only 30% of the jobs he agreed to take. He was told repeatedly that this number had to change.

Mr. Singh would try to talk to Mr. Kruining weekly. Some conversations were in the context of the weekly round table meeting, at least 25 conversations were over the phone and there were five private face-to-face conversations. Mr. Singh explicitly explained the standards and goals of Durabuilt. He also wrote these on the Board when he met with Mr. Kruining. Finally, he told Mr. Kruining several times that if there was no change, he would be fired. This was an ultimatum.

Mr. Singh conveyed as a sympathetic employer, who was willing to help if there were problems. Mr. Kruining did not reveal any problems and his poor work performance continued. Durabuilt had no choice. There were certainly verbal warnings, either on the telephone and or in the face-to-face conversations, indicated above. Mr. Singh testified that at least one of the warnings was in writing, but it could not be located in their file. Mr. Singh was an honest, forthright, compassionate witness and I have no reason to doubt his testimony that there was a written warning.

Exhibits ER1 and ER2 were reviewed with Mr. Singh. At the time, Mr. Kruining did not agree with the reports and said he was being treated unfairly. He put this in an email to Mr. Singh (Exhibit EE2.) Mr. Singh then personally looked into the allegations and determined that they were accurate. For example, regarding ER2, Mr. Singh spoke to the branch manager of the competitor who confirmed that it was indeed Mr. Kruining who had done this.

EE3 is Durabuilt' s Progressive Discipline Policy. Mr. Singh was cross-examined regarding whether the employer followed its own policy. There was the missing written warning already mentioned and the action plan, prepared according to Step III, that could not be located. The Policy is not rigid and nevertheless, the steps taken by Durabuilt in disciplining and subsequently terminating Mr. Kruining certainly were within the spirit of that policy. As previously mentioned, I find that Mr. Singh is credible in this regard.

Evidence of Gurpreet Cheema

The next witness called by Durabuilt was Gurpreet Cheema. Mr. Cheema had previously worked with the company in Saskatoon. His current position was as the Assistant Service Manager, second in command. He would be present for 70% of the Tuesday morning conference calls. He was made aware of the issues Durabuilt was experiencing with Mr. Kruining. Much of his evidence therefore was in the same vein as that of Mr. Singh, so I will not cover it in detail. He confirmed that during the conference meetings, Mr. Singh would carefully articulate the job requirements and double check with the employees present.

Evidence of the Respondent, Mark Kruining

Mark Kruining testified on his own behalf. He confirmed that he worked for Durabuilt from December 2009 until he was terminated on November 29, 2016. His workday was generally from 7:30 AM to 4:00 PM, with overtime as needed. During that time, he was promoted to the position of Senior Service Technician, but did not recall when that happened. His duties consisted primarily of inspections, measures and determining repairs. In August 2013 he was injured at work. He tore a tendon in his shoulder, requiring two surgeries. He was placed on Workers Compensation. He resumed working with Durabuilt in January 2016 and was given modified duties, none of which involved physical labor. These were considered 'light' duties such as inspections, measures and assisting other service technicians. Sometimes he had a helper, as needed.

On October 29, 2015, the Workers Compensation Board sent a letter (EE4) to Durabuilt detailing Mr. Kruining's work restrictions. Durabuilt responded to the Workers Compensation Board on December 22, 2015 with a modified work plan for Mr. Kruining (EE5). This modified work plan was approved by the Workers Compensation Board and the Board monitored his progress. As far as Mr. Kruining knew, these work restrictions were never lifted. Mr. Kruining testified that on occasion, he did refuse work which was beyond his restrictions. However, he said Mr. Singh and Bill would still ask him to go ahead and do it. Given the credibility and sincerity demonstrated by Mr. Singh, this is very difficult to believe.

Regarding ER1, Mr. Kruining recalls receiving this warning. He told Mr. Singh that the allegation was untrue, and Mr. Singh never responded to that.

Mr. Kruining denied the allegation of misconduct in ER2. This is a serious and unusual form of misconduct. I believe the evidence of Mr. Singh that he conducted his own independent investigation with the other company and was satisfied that the misconduct had occurred.

Regarding ER3, Mr. Kruining testified that he never saw it. I do not believe him.

Throughout his testimony, Mr. Kruining asserted that Durabuilt was fabricating complaints to get rid of him. Mr. Kruining accused the Employer's witnesses of lying under oath. These are very serious allegations and I do not give them any weight. In the end, Mr. Kruining's credibility was lacking. Where the evidence of Mr. Kruining differs from the evidence of Mr. Singh and Mr. Cheema, I find as fact the evidence of Mr. Singh and Mr. Cheema.

For most of his evidence, Mr. Kruining disagreed with just about everything that Mr. Singh had said under oath. The weekly conferences never happened. Mr. Singh never talked to him about his work performance, the Toolbox Talks never happened and each day the jobs were individually assigned. Mr. Kruining said he had no idea that he was underperforming and that no one ever told him that if his performance did not improve, he could be "let go". He did not think his job was in jeopardy. As indicated, I give his evidence no weight.

Evidence of Richard Paszkowski

Richard Paszkowski was permitted to give testimony in rebuttal. He did not want to get rid of Mr. Kruining and was unhappy that he had to be terminated. In the end, though, it was a business decision. The modified work agreement was never an issue; however, when a customer would specifically request that Mr. Kruining not perform its work, that was an issue. When other technicians would not work with Mr. Kruining due to his negative attitude and poor work performance, that was an issue. Durabuilt, a company with more than 500 employees, had other employees with modified work arrangements. The company tries to find ways to help all its employees. For example, at the workplace in Edmonton, during work hours, immigrant employees can take classes in English as a Second Language. While this is obviously a benefit to the employer, it demonstrates a willing to accommodate employees.

VI. DECISION


Durabuilt did everything an employer should do to encourage Mr. Kruining to perform up to standards. The reasons for warning Mr. Kruining and his subsequent termination are well set out in Mr. Singh's evidence. Durabuilt has a Progressive Discipline Policy, which was followed, in a general way. That Durabuilt has a Policy demonstrates its awareness that certain steps must be taken, including discussions with the employee and giving warnings, prior to terminating an employee.

Durabuilt had just cause to terminate Mark Kruining.

VI. CONCLUSION

Pursuant to s.4-6(1)(a)(ii) of *The Saskatchewan Employment Act* RSS, the appeal is allowed. The Wage Assessment and the decision of the Director are revoked.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 16th of January 2018.



Leslie T.K. Sullivan, Q.C.
Adjudicator

Exhibit List

Employer Exhibit	Item
ER 1	June 5/15 Discipline Write-up
ER 2	Nov. 11/15 Discipline Write-up
ER3	Email correspondence to employee from employer Nov. 18/15 and attached letter
ER4	Termination letter Nov. 29/16
Employee Exhibit	Item
EE1	Agreed Statement of Facts
EE2	Email String Kruining/Durabuilt Nov. 2015
EE3	Durabuilt Progressive Discipline Policy
EE4	Oct. 29/15 letter from WCB to Durabuilt
EE5	Modified Work Proposal Durabuilt to WCB

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.