

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



Barbi-Rose Weisgerber
COMPLAINANT/EMPLOYEE

-AND-

Rural Municipality of Maple Creek #111
APPELLANT/EMPLOYER

DATE OF HEARING: November 27, 2018

PLACE OF HEARING: Moose Jaw, SK

LRB FILE: No. 144-18

WAGE ASSESSMENT: No. 8422

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INTRODUCTION

This matter was heard before me on November 27, 2018 in Moose Jaw, Saskatchewan.

Mr. Randy Armitage, Employment Standards Officer represented the Employment Standards Department.

The Claimant/Employee, Barbi-Rose Weisgerber attended and gave sworn evidence on her behalf. Ms. Weisgerber was represented by Mr. Ken Cornea, Barrister and Solicitor.

The Appellant/Employer, Rural Municipality of Maple Creek #111 was represented by, Christine Hoffman, who gave sworn evidence on behalf of the employer and was represented by, Mr. Kevin Hoy, Barrister and Solicitor.

The Wage Assessment was prepared pursuant to the Saskatchewan Employment Act s.s.2014 c.s-15.1, herein after referred to as "The Act" is for \$6,901.44.

This matter was directed for hearing by the Saskatchewan Labour Board.

The Board directed that two issues be heard:

1. How much the employee is entitled to be paid for unused vacation entitlement;
2. Was the employer's appeal filed in time to be in accordance with the legislation.

I. PRELIMINARY MATTERS

Mr. Armitage outlined his calculations that he used to arrive at the wage assessment and presented his employment standards inspection report along with a summary of his investigation. These documents are marked "ESO Exhibit 1, 2 and 3".

Mr. Armitage calculated the wage assessment on the basis that all the outstanding vacation pay was paid to Ms. Weisgerber on December 31, 2014 except for 1 week which was carried over into 2015.

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Mr. Armitage then calculated the balance of the vacation pay on the basis of 6/52 of wages paid to her from the period of January 1, 2015 to September 30, 2015.

Mr. Armitage did not calculate vacation time when Ms. Weisgerber was on medical leave.

Mr. Armitage went through the appeal documentation confirming that the wage assessment was served on the employer on June 6, 2017. The employer's appeal was received by the employment standards office in Regina on June 23, 2017. The required \$500.00 cheque was also enclosed with the appeal.

As the appeal was filed within 13 business days it is in compliance with the employment standards act.

The employer agreed with the above dates and the employee, while not agreeing to such facts, offered no contradictory evidence to the labour standards officers statements and documents.

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After reviewing the documents I am satisfied that the appeal was filed within the time required by the act and that I have jurisdiction to hear this appeal.

II. THE DISPUTE

As the appeal jurisdiction and appeal time frame has been determined the sole issue between the parties is whether or not the wage assessment calculated by Mr. Armitage is correct.

The employer takes the position that the wage assessment is incorrect and should be a lower amount.

The employee takes the position that the wage assessment is incorrect and should be higher.

III. EVIDENCE OF THE EMPLOYER

The employer's position, as stated by the Mr. Hoy, was that the employee had been paid out her vacation owing to the end of 2014 with the exception of the 1 week carry over.

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The employer's issue with the assessment was that there was an additional week of vacation pay that should not have been accrued as owing by the labour standards officer.

Christine Hoffman was sworn and gave evidence that she was the administrator of the Rural Municipality of Maple Creek #111 and had been working with them firstly as an administrative assistant, in 2015 taking on the role of administrator in January 2017.

Ms. Hoffman pointed to the RM resolution of December 23, 2014. This authorized payment of all holiday and sick pay to Ms. Weisgerber with the exception of 1 week vacation which she was permitted to carry over to 2015, (SEE Employer Exhibit 1, tab 5).

Ms. Hoffman then referred to Employer Exhibit 1, Tab 6. This was a payout cheque dated December 23, 2014 to Ms. Weisgerber indicating that this was the total payout owing to Ms. Weisgerber, with the exception of the 1 week holidays that was carried over, up to and including December 31, 2014.

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Ms. Weisgerger was employed from January 1, 2015 up to and including September 17, 2015, at which date she was deemed unable to work by her doctor for medical reasons. Thereafter, Ms. Weisgerger was placed on SARM benefits effective October 1, 2015.

Ms. Weisgerger had used one week of holidays in January and February of 2015 and therefore the only vacation owing to her was 6/52 of the wages paid to her from January 1, 2015 to September 30, 2015. Ms. Weisgerger was entitled to 6 weeks of vacation per annum.

6/52 of her total salary during that period came to \$6,901.44, which is the amount of the wage assessment.

Ms. Weisgerger was terminated from her employment for cause on July 15, 2016 as set out in Employer Exhibit 1, Tab 7.

The employer takes the position that, as there was no written agreement between the employer and the employee, that she should only be entitled

to the statutory payment of 4 weeks of holidays on termination rather than the 6 weeks per annum used in the calculation by the labour standards office.

IV. EVIDENCE OF EMPLOYEE

Ms. Weisgerber gave sworn evidence as follows:

That she had been employed as the administrator at the RM from September 1, 2014 until she was terminated on July 15, 2016. In 2015 her annual salary was \$79,750.00.

That at the end of 2014 the RM paid her for all holiday and sick leave owed to her with the exception of one week vacation carry over into 2015.

Ms. Weisgerber went on short term disability on September 18, 2015 (September 17, 2015 was her last day worked) and her disability payments commenced on October 1, 2015.

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She indicated that it was her position that the RM was giving her 2 weeks a year sick leave that was not able to be carried over to the next year, which she used during this waiting period of September 18-October 1, which would still have her still entitled to the 1 week carry over holiday pay from 2014.

Ms. Weisgerber said that she received 6 weeks holidays per annum from the RM. She did not have a written contract of employment with the RM.

V. ANALYSIS/DECISION

The employer argues that Ms. Weisgerber was only entitled to 4 weeks vacation per annum as this is the statutory amount set out in Section 2-24(1)(b).

The employer also says that the employer did not offer sick days and therefore the payments by the RM from September 17, 2015-October 1, 2015 (is the bridging between Ms. Weisgerber's last day of work and when

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her short term disability payments commenced), were not sick leave but were vacation pay.

This vacation pay would comprise of the 1 week carry over from 2014 in addition to 1 week of vacation pay earned in 2015. Thereby reducing the wage assessment by 1 week's wages.

The employers position with respect to the 2 weeks per annum sick leave and 4 weeks vacation as opposed to 6 weeks vacation were predicated on the basis that there was no written agreement between the employee and the employer RM.

It is important to note that there was not any employer evidence to support this position factually.

The employer also takes the position that wages do not include disability payments and should not be calculated in the wage assessment as suggest by the employee.

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The employee took the position that the labour standards officer was correct in using 6 weeks vacation and 2 weeks sick leave as benefits that the employee received from the employer.

This position was set out in the evidence of the employee and no evidence to the contrary was submitted by the employer. I accept that the evidence shows that Ms. Weisgerber received a benefit "more favorable" from the employer than that set out in the Act pursuant to section 2-7.

This benefit was that she received 6 weeks vacation per year, and two weeks non carryoverable sick leave per year.

The employee argued that her vacation pay should go back to September 2013. So up to and including September 30, 2015, with plus the one week carry over from 2014, she would be entitled to vacation pay in the amount of \$19,593.71.

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This argument was based on the position that the employee was always behind in receiving vacation pay and was therefore entitled to receive it on termination.

This position is contrary to the evidence of the employer and employee.

Ms. Weisgerber stated in her evidence in chief, and again in cross examination, that in December of 2014 she had received all her vacation pay up to that time, with the exception of 1 week that was carried over to 2015. This position is confirmed by the resolution of the RM on December 23, 2014. This is also the evidence of the employer.

I find, based on the evidence, that Ms. Weisgerber's vacation and sick leave was paid up to and including December 31, 2014 with the exception of 1 week vacation carry over. The calculation of vacation pay should reflect this accordingly.

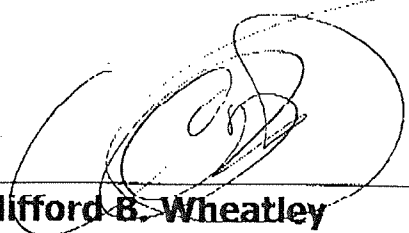
The employee also takes the position that the monies received by her while on medical disability should be included and used to form the base for the calculation of the 6/52 of vacation pay.

In reading of section 2-89 and the definition of wages in the legislation I do not include disability payments as wages and resultantly holiday pay calculated on these payments is not recoverable under the legislation.

VI. CONCLUSION

The appeal is dismissed and the wage assessment stands in the amount of \$6,901.44.

Dated at Moose Jaw, in the Province of Saskatchewan, this 1ST of December, 2018.



Clifford B. Wheatley
Adjudicator

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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 <http://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.