

LRB File No. 246-17
WAH 8896

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



Jeffrey Lewis

COMPLAINANT/EMPLOYEE

-AND-

C.R. Plumbing Ltd., Tyson Wade Rousseau and
Valerie Jean Rousseau

APPLICANT/EMPLOYER

DATE OF HEARING: February 1, 2018

PLACE OF HEARING: Moosic Jaw, SK

INTRODUCTION

This matter was heard before me on February 1, 2018 in Moose Jaw, Saskatchewan.

I am satisfied there has been compliance with subsections 2-74(6), 2-75(2) and 2-75(3) of *The Employment Standards Act* (the 'Act'). Therefore I have determined that I do have jurisdiction to hear this matter.

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

The Claimant/Employee, Jeffrey Lewis attended and gave evidence on his behalf.

The Applicant/Employer, C.R. Plumbing Ltd. was represented by Valerie Jean Rousseau, a Director of the Corporation.

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 \$3,274.62.

I. PRELIMINARY MATTERS

The Employment Standard Officer presented the Corporate Registry documentation pertaining to the Applicant which was entered as Employee Exhibit "1".

Mr. Armitage outlined his calculations that he used to arrive at the Wage Assessment and presented his Employment Standards Inspection Report which was entered as Employee Exhibit "2".

II. THE DISPUTE

The sole issue between the parties is whether or not the Applicant/Employer had just cause, within the meaning of The Act, to terminate the employment of Mr. Lewis.

III. FACTS

The parties agreed to the following facts:

1. The complainant was an employee of the Applicant from October 18, 2012 to February 11, 2013 and again from May 13, 2013 to January 9, 2017.
2. The complainant's rate of pay was \$21.50/hour and he worked a 36 hour work week.

IV. EVIDENCE OF THE EMPLOYER

Valerie Jean Rousseau was sworn and gave the following evidence:

C.R. Plumbing Ltd. is a plumbing business located in Coronach, SK.

During the time at issue there were 6 employees including herself and her two sons. At the time Mr. Lewis was employed, the business had 3 plumbers, her sons and Mr. Lewis.

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Mr. Lewis had commenced employment with C. R. Plumbing Ltd.in October 18, 2012 and remained employed until February 11, 2013. He returned to his employment May 13, 2013 up to an including January 9, 2017.

Mr. Lewis separated from his wife in November of 2012 which caused a number of problems at work.

On many occasions the conduct of the employee, Mr. Lewis, led to the employer, Mrs. Rousseau, to have conversations with Mr. Lewis regarding his attitude and other issues with his employment. This culminated in a letter entered as Employer Exhibit "2", dated February 9, 2016.

This letter was given to Mr. Lewis on February 10, 2016. The letter contained a number of job expectations and requirements for continued employment with C.R. Plumbing Ltd. The letter also stated that failure to comply with the terms and expectations outlined in the letter by Mr. Lewis would result in termination.

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The problems caused by Mr. Lewis that gave the employer concern continued after the letter of February 9, 2016 up to the date of Mr. Lewis' termination. A number of these problems and dates on which they occurred were outlined by Mrs. Rousseau and set forth in Employer Exhibit "3".

Mrs. Rousseau indicated that despite the letter of February 9, 2016, which outlined that Mr. Lewis would be terminated if the terms of the letter were not met; Mrs. Rousseau continued to point out the problems to Mr. Lewis and discuss them with him as they occurred. This action continued from February 9, 2016 up to the date of termination of January 9, 2017 which was the written date of termination from the employer to the employee.

Between February 9, 2016 and January 8, 2017 the employer had reverted back to dealing with employment problems with Mr. Lewis as she had done prior to February 9, 2016, despite the statements of what the consequences would be as outlined in the letter dated February 9, 2016.

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Mr. Lewis' employment continued on, and his relationship with the employer continued on, in the same manner as before February 9, 2016 up to and including January 8, 2017.

Mrs. Rousseau described the events leading up to the firing of Mr. Lewis on January 8, 2017 as follows:

January 7, 2017 was a Saturday. Mrs. Rousseau's two sons were loading the company vehicle intending to proceed to Regina to do work. Mr. Lewis happened to stop by at this time and was either requested or offered to be "on call" for the day since the other two company plumbers would be in Regina. This meant that Mr. Lewis would be available for any emergency plumbing calls that came in.

The parties agreed that Mr. Lewis would be "on call" for the day.

Sometime shortly after this, Mr. Lewis was asked to take some photographs by Yvonne, who was the common law wife of one of Mrs. Rousseau's sons, going to Regina for work on that Saturday.

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After Mr. Lewis took the photographs for Yvonne, he was invited to Yvonne's house, where beer was consumed by Mr. Lewis, before he left the house.

At appx 3:40pm of that day Mr. Lewis was contacted by the corporate employee Shelly, who took an emergency call from a customer in the Crane Valley area.

By this time Mr. Lewis had returned to Yvonne's house and further alcohol was consumed by Mr. Lewis.

It should be noted that all of the above information was received by Mrs. Rousseau from third parties. All of her evidence relating to January 7, 2017 was hearsay.

Shelly texted Mr. Lewis and asked if he would be able to do the call. Mr. Lewis texted back and said that he would be able to take the call after 6:30pm. Shelly advised the customer of this.

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Sometime after 6:30 the customer contacted Shelly indicating that Mr. Lewis had not yet arrived. Shelly set about locating Mr. Lewis but was unsuccessful.

A neighbor of the customer in Crane Valley, Mr. Coldwell, went out to search for Mr. Lewis, thinking that he had maybe become lost in trying to locate the customer's residence. Mr. Coldwell found Mr. Lewis in his vehicle on the side of the road. The lights were off and the vehicle had smoke from a cigarette inside. Mr. Lewis followed Mr. Coldwell to the residence of the customer and completed the job.

Mr. Lewis arrived at appx 9:00p.m. and left sometime after 11:00pm. Shelly was contacted at 11:30pm when Mr. Lewis indicated that the job had been completed and he was on his way back to Coronach.

Mrs. Rousseau was concerned about the conduct of Mr. Lewis on this occasion, indicating that he should have contacted the customer advising that he would be late. If there was no cell coverage (which

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there is not in a lot of that area of Crane Valley) he should have found a location with coverage and called the customer.

In addition, Mrs. Rousseau was concerned that the employee was drinking. She is adamant that employees do not drive corporate vehicles if they are under the influence of alcohol.

On the following day, January 8, 2017, Mrs. Rousseau was informed as to the events of the previous Saturday, and as a result, contacted Mr. Lewis via telephone and advised him that he was fired. Mr. Lewis was told to come in the next day to pick up his tools and personal items and drop off any corporate property including his key to the business.

Mr. Lewis attended the office on Monday, January 9, 2017 at which time he received a copy of his termination letter, Employee Exhibit "3", dated January 9, 2017.

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Under cross examination Mrs. Rousseau stated that subsequent to her giving Mr. Lewis the letter of February 9, 2016, there were a number of incidents that caused Mrs. Rousseau to speak to Mr. Lewis about his conduct. This type of disciplinary action was similar to what she had been doing with Mr. Lewis prior to the February 9, 2016 letter.

Mrs. Rousseau admitted that she did not have any personal knowledge as to whether or not Mr. Lewis had consumed any alcohol on January 7, 2017.

II. EVIDENCE OF THE EMPLOYEE

Mr. Jeffrey Lewis gave sworn evidence as follows:

That he had been an employee of C.R. Plumbing Ltd. from October 18, 2012 to February 11, 2013. He was then re-hired on May 13, 2013 and was terminated by telephone on January 8, 2017.

Mr. Lewis was employed as a Plumbers helper by the Employer.

That in November of 2012 his marital separation caused a number of issues at work and, as a result, he received a warning letter from his employer on February 9, 2016.

That subsequent to receiving this letter Mr. Lewis had further discipline problems with the employer; however, the employer had reverted to expressing their dissatisfaction with him by conversations. Just as was done prior to the February 9, 2016 letter.

Regarding the events of January 7, 2017, Mr. Lewis states that at the end of work on Friday, January 6, 2017 he had returned back from a job at Rockglen and learned that Mrs. Rousseau's two sons were working Saturday at a job in Regina. Mr. Lewis volunteered to be on call for them on Saturday, January 7, 2017. Mr. Lewis said that he did not receive payment for being on call unless he was actually

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called out for a job. If he was called out he would receive payment for the time spent on the call.

On January 7, 2017 he had received a call from Yvonne to attend at her residence to take some photos for her. Around 9:30am on January 7 he attended at Yvonne's residence, took the pictures and went into her residence and had a single beer.

Thereafter Mr. Lewis went for lunch, did a few other errands, then returned back to Yvonne's house at 3:30pm where he consumed one more beer.

During this time Shelly contacted him regarding the customer in Crane Valley. Mr. Lewis confirmed he would take the job and attend in Crane Valley at 6:30pm. He left Yvonne's residence where he returned to his own home to prepare for the Crane Valley call.

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At 6:30pm he attended at the office, took the tools and supplies he needed and proceeded to the customer's residence in the Crane Valley district.

Mr. Lewis indicates that he became lost on the back roads and at some point stopped to try and locate the customer's residence on his cell phone. To do so, he was stopped on the side of the road and was smoking a cigarette. He had turned off the lights of the vehicle. It was at this point that Mr. Coldwell came upon Mr. Lewis and guided him to the customer's yard.

Mr. Lewis repaired the customer's furnace and contacted Shelly that the job had been completed. He then proceeded back to Coronach. He arrived back in Coronach sometime after midnight.

On the next day, Sunday, January 8, 2017 at 10:48pm he received a call from Mrs. Rousseau. She was upset that he had gotten lost and had been drinking prior to going out on the job. As a result she fired him over the phone.

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On Monday, January 9, 2017 Mr. Lewis went to the shop to pick up his tools and personal items, return the corporate property. He was advised that he would be receiving a letter of termination in the mail, which he did receive. This is the letter dated January 9, 2017 entered as Employer Exhibit "3".

Mr. Lewis stated that he had 2 beer on Saturday, January 7, 2017. One was at 9:30am at Yvonne's house and one at 3:30pm at the same residence.

Mr. Lewis stated that he deliberately waited from 3:30pm to 6:30pm in order to have his body eliminate any alcohol from his blood stream so that he was not under the influence of alcohol prior to attending his work call in Crane Valley.

V. ANALYSIS/DECISION

Section 2-60(1) sets out the sum of money payable to the employee for failure to provide the employee with notice of termination.

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This sum must be paid except in the case of "just cause". Just cause is not defined in The Act; however, has been reviewed and discussed in many cases.

The Employer takes the position that the employee was dismissed with just cause within the meaning of The Act based on the events that took place on Saturday, January 7, 2017; and in the alternative, there was just cause to fire Mr. Lewis because of cumulative discipline from events between November 12, 2012 to February 7, 2017.

Dismissal for "just cause" can be cumulative or it can be a onetime event (serious isolated incident). The facts of this case do not support a onetime event. The onus of proof on the balance of probabilities is on the employer to show a onetime event that would support a dismissal for just cause.

I will deal firstly with the employers position that the isolated incident of January 7, 2017 was sufficient in meeting the just cause requirement in The Act.

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The employer takes the view that termination of Mr. Lewis's employment was justified because Mr. Lewis had been driving a corporate vehicle while under the influence of alcohol or impaired by alcohol and he should have contacted the customer as he was late.

In order to reach that conclusion, the employer is relying totally on hearsay evidence from other parties, both as to Mr. Lewis' possible consumption of alcohol and the manner in which Mr. Lewis dealt with getting lost or being late arriving at the customer's house.

Given that the employer is relying on hearsay evidence and having heard the employee's evidence, which I accept, as to his amount of consumption of alcohol on January 7, 2017, that is one beer at 9:30am and one beer at 3:30pm I find that the employee was not impaired or under the influence of alcohol at 6:30pm when he commenced getting ready to start work.

I am therefore not satisfied that the employer has met the threshold of the onus and find that the employee was not impaired by alcohol when he left for the job site at 6:30pm or anytime thereafter.

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I accept that Mr. Lewis got lost, and this was the reason he was late. This event in itself is not sufficient grounds to fire Mr. Lewis.

The employer also says that the cumulative of Mr. Lewis' conduct or progressive discipline relating to these events is adequate to meet the definition of just cause.

Cumulative events:

Again the employer alleges that this is just cause for dismissal of the employee, and must prove this allegation on the balance of a probabilities.

The activities of the parties in a cumulative time frame are as follows:

There was tracking and warnings of the employee's unacceptable conduct and discussions between the employer and employee up to February 9, 2016 warning letter. However, between February 9, 2016, and the date of the employees dismissal of January 9, 2017, there was little, if any, evidence of cumulative progressive discipline by the employer.

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The employee is entitled to know the standards of performance required by him, and whether or not he is meeting those standards, and what the consequence will be if the standards are not meet, including possible termination.

Unfortunately the Applicant/Employer then reverted back to willingly overlook incidents. She gave the employee further chances for almost an entire year, in the same manner that they had been doing prior to the letter of February 9, 2016.

As a result, I find the employee would not have known, taking the on call job and handling it in the manner in which he did, could result in termination of his employment as a consequence of his actions.

I find that the alleged misconduct of the employee by way of cumulative acts or progressive discipline does not meet the meaning of "just cause" within the legislation. The employer has not met the burden of proving the employee's misconduct is within the definition of "just cause" within The Act.

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VI. CONCLUSION

The appeal is dismissed and the wage assessment is stands in the amount of \$3,274.62.

Dated at Moose Jaw, in the Province of Saskatchewan, this 18th of February, 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.