

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

Wage Assessment No. 8946
LRB File No. 266-17



COMPLAINANT: Jesse Thompson
Represented by Doug Long
Employment Standards Officer

RESPONDENT: D & L Gourmet Meats Inc.
Represented by Tyler Weathered, Manager

DATE OF HEARING: May 17, 2018

PLACE OF HEARING: Board Room 1.6
800 Centre Avenue
Prince Albert, Sask.

1. INTRODUCTION

Mr. Long introduced Mr. Steven Morgan and requested Mr. Morgan's attendance as an observer as part of his Employment Officer Training. Mr. Weathered had no objection so I agreed to the request.

Mr. Long advised that he is representing the Director and that Mr. Thompson would be a witness for the Director. Further, Mr. Thompson could take part in the hearing independently if he wished.

I advised the parties of my role, time frame for filing my decision and my expectations regarding conduct during the hearing.

I asked Mr. Weathered if he was calling any witnesses and he replied that he was unaware that he could. He requested time to call an employee, Shawn McQuarrie, and I agreed.

II. PRELIMINARY OBJECTIONS

None

III. THE DISPUTE

D & L Gourmet Meats Inc. terminated Mr. Thompson for cause and without notice. The Ministry, in Wage Assessment #8946 contends that cause was not demonstrated and \$433.39 represents one weeks pay in lieu of notice as per Section 2-60(1). D & L Gourmet Meats Inc. has appealed that wage assessment.

IV. FACTS

i. EVIDENCE OF EMPLOYER

Tyler Weathered was sworn and provided the following evidence:

- Jesse was hired in November 2016 and worked at D & L Gourmet Meats Inc. for about 7 months.
- About 2 to 3 months in, Supervisor Dillan, reported to him that Jesse was smoking an E-Cigarette in the Blast Freezer Unit. He spoke to Jesse about this report from Dillan but Jesse denied the allegation.
- A couple of months later, Supervisor Shawn caught Jesse smoking in the bathroom, again he talked to Jesse and again Jesse denied smoking in the building.
- As a food production facility working with raw uncooked products, D & L Gourmet Meats Inc. must follow rigid Sask. Health standards and practices. If a Sask. Health Inspector had showed up at one of the times Jesse had been smoking in the facility, D & L Gourmet Meats Inc. would have been closed down immediately.
- On July 29, 2017 as Jesse was coming out of the bathroom, with a clear aroma of E-Cigarette smoke following him, he (Tyler) confronted Jesse. Jesse's response was belligerent and aggressive. Jesse said if they didn't like it they should fire him and he would go to the Labour Board. Jesse was informed that we could no longer tolerate his indifference to product safety and putting our customers in jeopardy and therefore he was terminated immediately.

Cross Examination

In response to Mr. Long's questions, Mr. Weathered provided the following:

- Jesse was never provided with a Safe Food Handling Course.
- Jesse was caught at least 3 times smoking in the facility.
- Supervisor Dillan saw him smoking in the facility.
- He had told Jesse, if he was caught smoking in the facility, he would be terminated. He believes the Supervisors Dillan and Shawn have told Jesse that as well.

- Outside of the verbal warnings, Jesse was not disciplined or written-up.
- While smoking in the facility was the reason for termination, Jesse could have been terminated for insubordination and belligerent behaviour.
- Supervisor Shawn has authority to terminate although he'd rather handle that chore himself. Vacancies are very hard to fill so employees are given chances to improve rather than terminate.
- E-Cigarette smoke is blatantly obvious even in a smoke-house environment. Jesse's refusal to follow the direction of no smoking in the facility was why he was fired.

Redirect

None

I asked Mr. Weathered what kind of formal training is provided for safe food handling. His reply that employees learn on the job, but early on are advised of the use of hair nets, aprons, hand washing and no smoking.

Mr. Shawn McQuarrie arrived to be a witness for D & L Gourmet Meats Inc. and he was sworn.

In response to Mr. Weathered's questions he provided the following:

- He is the back-shop supervisor responsible for all aspects of food processing.
- He caught Jesse smoking on numerous occasions during work time. He told Jesse on four or five occasions that if the "Boss" catches him, he'll lose his job.
- He reported these incidents to Tyler.
- Jesse had a general disregard for supervisors.

Cross Examination

In response to questions from Mr. Long, Mr. McQuarrie provided the following testimony:

- His position is supervisor to the back shop. He has never disciplined Jesse. He has fired maybe one employee in his role as supervisor.
- He never actually observed Jesse smoking but did see clouds of smoke coming out behind him as he came out of rooms.
- Jesse is the only employee who violates the no-smoking rule. Several other employees including himself smoke but confine it to breaks.

Re-direct

None

ii. EVIDENCE OF EMPLOYEE

Mr. Long tabled D & L Gourmet's Corporate registry and it was marked EE1. Mr. Long then called Jesse Thompson, he was sworn and provided the following testimony:

- He was hired to work at D & L Gourmet Meats Inc. on November 8, 2016. He was terminated on July 29, 2017. Tyler hired and fired him.
- He was a general labourer doing all sorts of tasks from breading meat, to packing steaks.
- He filed the claim with the Labour Board because he felt he was wrongly fired.
- He had hurt his back the third week of July and when he returned on July 29 he used the bathroom around 10:00 a.m. When he came out of the bathroom Tyler came up and fired him for wasting too much time in the bathroom. Nothing was said about smoking on the job.
- He feels his response was not belligerent nor aggressive. His tone might have changed but he didn't feel he was disrespectful. He told Tyler he was going to the Labour Board.
- Shawn talked to him twice but was never told he'd be fired.
- He did smoke outside during work time and was accused of smoking inside three times. He denied smoking inside.
- His third day of work he smoked in the building and Tyler told him there was no smoking in the building. That was the only time he smoked in the building.
- He believes he was fired for wasting time in the bathroom. He has had stomach problems since he was 12 years old.
- He was never disciplined during his employment.

Cross Examination

In response to Mr. Weathered's questions, Mr. Thompson provided the following:

- He was not told he was being fired for smoking in the facility. He was told he was wasting too much time using the bathroom.
- He feels he was not disrespectful toward Tyler during the termination discussion.

Final Argument

Mr. Weathered argues that the Company's difficulty with Jesse was always about his smoking in the facility and that Jesse knows that. Where this business of stomach problems and bathroom usage comes from he doesn't know.

An employee who continually and blatantly disregarded the standards of the workplace and disrespected fellow employees, could not continue in his job.

He, Shawn and Dillan all had many observations of his smoking violations and therefore, Mr. Thompson was fired for cause.

Mr. Long on behalf of the Director tabled a written argument. The Director argues that if the Employee is to be believed that he only smoke once, there is no cause at all for termination. If the Employer is to be believed that the employee vaped on numerous occasions, the Employer should have used progressive discipline to deal with the violations. Lastly, if health and safety concerns were as serious as the Employer asserts, Mr. Thompson should have been terminated upon the first violation.

Since the Employer did not terminate on the first violation, the vaping was condoned and therefore pay in lieu of notice is required.

Mr. Long also tabled two cases to support the Director's argument.

I thanked the parties for their presentations and with that the hearing was concluded.

V. ANALYSIS

According to Mr. Tyler Weathered, representing D & L Gourmet Meats Inc., the operation of the facility must develop and maintain stringent standards to ensure a "food safe" operation. Failing that, Sask. Health, could shut down their operation.

Secondly, Mr. Weathered emphasized that being a small, family operated business, low wages were offered to employees and an open-ended advertisement for employees was necessary to handle turn over. Since it was difficult to fill vacancies, they were reluctant to fire employees.

D & L Gourmet Meats Inc. has a responsibility to live up to Sask. Health Regulations, but according to Mr. Weathered, did not provide Mr. Thompson with the safe food handling course and neither were employees provided with written company policies.

Mr. Thompson testified that he only smoked in the facility once and when told not to, he never did again. This assertion comes in the face of Supervisor McQuarrie and Manager Weathered's testimony that Mr. Thompson's smoking in the facility was an ongoing occurrence.

On July 29, 2017, Tyler Weathered, convinced that Mr. Thompson was vaping in the bathroom, terminated him without notice.

The question of how this smoking incident was different from all the alleged others needs to be answered if "Just Cause" is to be up held.

VI. DECISION

In order for an employer to claim the termination of an employee was for "Just Cause", and thereby escape the notice requirement, it needs to be shown that the employee's conduct or behaviour was so serious, it made the employer-employee relationship irreparable.

Some examples of conduct or behaviour that could constitute just cause are theft, violence, willful misconduct and disobedience. These examples vary depending on the type of business, the employee's position, the employer's policies or practices and legal requirements.

According to Mr. Weathered, the employer's policy was that the consequence of smoking while on duty was termination. The only evidence, before me, of how this policy was communicated is that it was verbal and that there are "No Smoking" signs posted in the facility.

The evidence also shows that, from the Complainant, he smoked on the third day in, and from the Employer, many alleged instances throughout Mr. Thompson's tenure.

On the balance of probabilities, I am accepting the Employer's version, that, although not caught in the action, Mr. Thompson violated the "No Smoking" rule often.

Having concluded this to be the case, leads me to question the Employer's handling of the situation given their concern of being shut down by Sask. Health.

At the very least, Mr. Thompson, after the third day warning, should have been terminated when caught the second time. Had this happened, just cause could have been a very real claim.

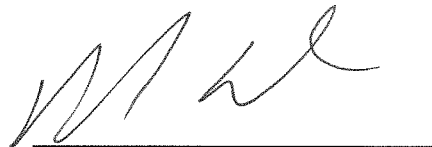
Since the termination took place after many smoking incidents, I agree with the Director that the Employer had condoned the behaviour and in doing so cannot have the claim of just cause up held. For just cause to be claimed the Employer should have followed the verbal warning with a written warning. That warning should have included a clear indication of the consequence if a further violation occurred. A subsequent violation could have been met with a suspension and that followed by the termination.

D & L Gourmet Meats Inc. cannot have it both ways. That is asserting that the Company policy is termination for violation of the no smoking order and then claiming it wasn't enforced because vacancies are difficult to fill.

When Mr. Thompson was allowed to continue his employment after the second infraction, D & L Gourmet Meats Inc. effectively lost any chance of arguing just cause and therefore must provide notice.

The Wage Assessment of \$433.39 is up held and the appeal denied.

Dated at Regina, in the Province of Saskatchewan, this 28th day of May, 2018.



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.