

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

APPELLANT: NICKEL PLUMBING & HEATING (1985) LTD.,
GARY NICKEL, WENDY NICKEL, and DEREK NICKEL

RESPONDENTS: CHRIS BARTKO and THE DIRECTOR OF EMPLOYMENT
STANDARDS DIVISION

DATES OF HEARING: MAY 30, 2019, and JUNE 11, 2019

PLACE OF HEARING: SASKATOON

DATE OF DECISION: JULY 22, 2019

LRB FILE No. 019-19, Wage Assessment No. 1-000159



I. HEARING PROCESS:

1. Wage Assessment No. 1-000159 directed Nickel Plumbing and Heating (1985) Ltd., Gary Nickel, Wendy Nickel and Derek Nickel (hereinafter referred to collectively as "Nickel Plumbing") to pay \$10,153.85 to Chris Bartko (hereinafter referred to as "Bartko") or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act*. Nickel Plumbing appealed the wage assessment.
2. Robert Frost-Hintz represented Nickel Plumbing, although he confirmed he was receiving instructions from Derek Nickel and that neither Gary Nickel nor Wendy Nickel intended to take part in the proceeding. Mr. Frost-Hinz acknowledged that Gary Nickel and Wendy Nickel understood they would be bound by my decision in this matter, whether or not they chose to attend and provide evidence.
3. On May 30, 2019, the following individuals attended the hearing:
 - Robert Frost-Hinz, counsel for Nickel Plumbing;
 - Derek Nickel, Director of Nickel Plumbing and witness;
 - Laurie Miller, Nickel Plumbing employee and witness;
 - Chris Bartko, former Nickel Plumbing employee and claimant (respondent);
 - Laura Ried, support for Chris Bartko;
 - Jordan Mulhall, former Nickel Plumbing employee and witness;
 - Kashus Bieber, former Nickel Plumbing employee and witness by telephone;

- Steven Moorgen, Employment Standards Officer;
- Shelly Stretch, Employment Standards Officer (observer).

4. On June 11, 2019, the following individuals attended the hearing:

- Robert Frost-Hinz, counsel for Nickel Plumbing;
- Derek Nickel, Director of Nickel Plumbing;
- Jeff Koop, employee of Nickel Plumbing and witness;
- Chris Bartko, former Nickel Plumbing employee and claimant (respondent);
- Steven Moorgen, Employment Standards Officer;
- Shelly Stretch, Employment Standards Officer (observer).

5. On June 11, 2019, the hearing was reconvened primarily to provide Bartko with an opportunity to testify. Nickel Plumbing's rebuttal witness also testified. Following conclusion of the oral evidence, the parties agreed to file written submissions. The appellant's submissions were circulated and filed on June 19, 2019 and the respondents' submissions were circulated and filed on June 27, 2019.

6. Prior to the hearing, two pre-hearing conference calls were convened. The parties disclosed and exchanged documents they intended to present as hearing exhibits and there were no preliminary objections.

II. BACKGROUND:

7. On September 17, 2012, Bartko was hired as a journeyman plumber by Nickel Plumbing. His employment was terminated verbally on May 2, 2018 and a letter dated May 3, 2018 which confirmed the termination was sent to Bartko sometime later.

8. Bartko filed a formal complaint with Employment Standards following his dismissal on May 16, 2018, and the complaint was investigated by the Director's Delegate, Steven Moorgen. Specifically, Mr. Moorgen considered the application of s.2-60 of *The Saskatchewan Employment Act*. Given the duration of Bartko's employment, Mr. Moorgen calculated Bartko would be entitled to six-weeks' pay in lieu of notice unless Nickel Plumbing had just cause for termination. If just cause existed, then Nickel Plumbing would not be required to provide Bartko with either notice or six-weeks' pay.

9. After conducting an investigation, Mr. Moorgen concluded that Nickel Plumbing did not have just cause to terminate Bartko's employment as and when it did. Therefore, he calculated Bartko's unpaid wage assessment as follows:

Hourly Wage: \$40.00 per hour x 40 hours per week = \$1,600.00

$\$1,600.00 \times 6 \text{ weeks (notice period)} = \$9,600.00$

$\$9,600.00 \times 3/52 \text{ (vacation formula)} = \553.85

$\$9,600.00 + \$553.85 = \$10,153.85$

10. In its appeal, Nickel Plumbing did not dispute calculation of the wage assessment as above. Nickel Plumbing simply took the position that the wage assessment should be quashed because Bartko's employment was terminated for just cause.

III. ISSUE:

Did Nickel Plumbing have just cause to terminate Bartko's employment?

IV. EVIDENCE:

11. As the appellant employer in this case, Nickel Plumbing bears the burden of establishing just cause for dismissal. Laurie Miller (hereinafter referred to as "Miller") is Nickel Plumbing's controller and was the first witness to testify. Miller began working for Nickel Plumbing a few weeks after Bartko was hired. Over time, she became aware that while Bartko was a competent plumber, he struggled with some administrative tasks including completion of work orders. In her role as controller, Miller initiated "action plans" with Bartko which she described as a "tool to open lines of communication with the men". From time to time, Miller met personally with Bartko to discuss his work performance. Commonly, Derek Nickel and office manager, Christa Dean, were also present for these discussions.

12. Miller described a process whereby both she and Bartko would complete standard form documents entitled "Action Plan to Improve Performance" and "Performance Review and Development". **Exhibit A-1** contains five such documents and Miller elaborated on their origins as follows:

TAB	DESCRIPTION	REVIEW DATE(S)	PREPARED BY:
1	Action Plan to Improve Performance	March 16, 2015 to June 15, 2015	Miller
2	Performance Review & Development form	Feb. 11, 2016	Miller (Bartko's self-evaluation not included & handwritten comments added by Christa Dean)

3	Action Plan to Improve Performance	Sept. 7, 2016 to Oct. 7, 2016	Miller
4	Performance Review & Development form	Apr. 27, 2017	Comments on page 4 provided by Christa Dean
5	Action Plan to Improve Performance	July 31, 2017	Miller

After reviewing Bartko's final action plan in July 2017, Miller said she wanted Bartko to "excel" at work and she encouraged Christa Dean (hereinafter "Dean") and Derek Nickel (hereinafter "Nickel") to keep Bartko "on the plan".

13. Miller's next involvement in assessing Bartko's work performance involved collaborating with Dean and Nickel in writing a letter entitled "Final Warning Before Dismissal" dated May 1, 2018 (**Exhibit A-1, Tab 6**). Miller attended the job site where Bartko was working on May 1 and watched while Bartko read the letter. She said Bartko didn't want to sign the letter and stated he wished to discuss its contents with Nickel. After Nickel undertook to discuss the letter "later" with Bartko, Miller witnessed Bartko sign an acknowledgment that he had reviewed the letter. She and Nickel then left the job site because they had other appointments. Miller was not part of any subsequent discussion between Bartko and Nickel and had no further interaction with Bartko.

14. When asked to describe Bartko's relationship with office manager, Dean, Miller acknowledged there was conflict. She described Dean as direct and blunt; a person who didn't treat Bartko any differently than anyone else and one who would "elevate her voice sometimes". Elaborating further, Miller described tension between Bartko and Dean as similar to "spousal conflict" and that yelling between Bartko and Dean would "go both ways". She sensed defensiveness from Bartko because he wasn't given enough time to complete jobs and frustration from office staff, including Dean, who were unaware of the status of certain jobs on a day-to-day basis.

15. Miller acknowledged that the action plans and performance reviews were designed to be corrective. She estimated five other "techs" and two or three other "office staff" were required to complete action plans in addition to Bartko. One tangible consequence attached to one of Bartko's action plans was that he would have one hour of pay deducted for every incomplete or missing work order. Other than that potential penalty, Miller acknowledged none of the documents referred to discipline, escalating consequences, or the prospect that Bartko's job might be in jeopardy. Finally, Miller acknowledged that Bartko received bonuses from time-to-time which she described as being "in the discretion of the owner".

16. Derek Nickel is the Nickel Plumbing director primarily responsible for day-to-day operations. He described his intent in providing staff bonuses as helping employees "feel better

about doing a good job". Generally speaking, Nickel felt Bartko was a capable plumber who preferred working on larger commercial jobs rather than smaller residential ones. Nickel did not recall having any conversation with Bartko about his suitability for a management role, but was advised by Project Manager, Jeff Koop (hereinafter referred to as "Koop"), that Bartko seemed frustrated he was subordinate to Koop and not the other way around. Nickel speculated that tension around this issue came to a head on a job site at a municipal swimming pool in April/May 2018. Nickel received a call from Koop advising him the work was "on hold" because Bartko "felt unsafe". Nickel later described the problem as a "workplace hazard" because Bartko was required to work in a confined space. Nickel acknowledged that compliance with Occupational Health and Safety Guidelines was essential, and that he authorized Koop to rent whatever equipment was necessary to solve the problem. Nickel's view was that a large winch with a hook and cable would be required, but he was aware Bartko eventually entered into the space without such equipment or a respirator/mask. According to Nickel, Koop was "stressed out" by the safety problem on the job site and Bartko's negative attitude.

17. During cross-examination, Nickel agreed that Bartko's apparent frustration was borne of concerns around the municipal pool site such as its physical layout, the confined space, the presence of underground roots, and some broken equipment. Nickel also acknowledged Bartko was entitled to refuse to work until the site was safe and that the "fix" was actually cutting a second egress (exit) in the wall. He also agreed that no further work could continue underground until a wall was built by someone other than Bartko.

18. Stemming from the concerns and frustrations at the municipal pool job site noted above, Nickel directed Dean to prepare the "Final Warning Before Dismissal" letter dated May 1, 2018. He had "input" into this letter, as did Miller. Paragraph 1 of the letter refers to Bartko's failure to adhere to guidance by his project manager, and Nickel acknowledged this point relates to the confined space/OH & S safety issue noted above. Paragraph 2 in the letter refers to physical outbursts and Nickel testified "the girls were upset because there was stuff being slammed around the shop." Nickel also acknowledged that Bartko "isn't the only one to get angry. A lot of guys throw stuff around the shop; part of the shop culture is that people are rough on tools." Nickel testified that paragraph 3 of the letter refers to Bartko's poor performance in completing work orders as noted in his action plans and performance reviews.

19. As did Miller, Nickel recalled attending at the municipal pool job site on May 1 and speaking with Bartko. He confirmed there was "not much discussion" and he agreed to meet Bartko later. After making family arrangements, Nickel met Bartko at the shop that same evening where he listened to Bartko "venting". Nickel formed the impression that, at the end of their conversation, Bartko committed to improving and "we were both in good spirits." Nickel described Bartko as calm and cool and they ended their conversation by shaking hands. Nickel did not mention he and Bartko spoke about Dean.

20. The next morning, Koop advised Nickel that Bartko wished to meet with him at the shop before departing for the job site at the municipal pool. Nickel agreed and moved Bartko into a more private space to discover “what his problem was”. Nickel testified that Bartko said he didn’t agree with the contents of the Final Warning Before Dismissal letter and that he felt abandoned by Nickel Plumbing. Nickel also reported that Bartko said if this letter constituted his “last chance” to save his job, it wouldn’t give him enough time to make things better. Bartko pointed out information in the letter he said wasn’t true, and Nickel recalled he appeared to be getting upset or angry. Bartko then said he wouldn’t go back to work unless Nickel “ripped up the letter”, which Nickel was unwilling to do. In that moment, Nickel testified he decided it wasn’t Bartko’s place to tell him how to run the business and give him an “earful”. As a result, Nickel said, “You know what, we are done.” After that, Nickel felt Bartko looked and sounded relieved. “He didn’t sit there and argue with me”, but was calm instead. Nickel made arrangements for Jordan Mulhall to drive Nickel home with his tools.

21. The next day, on May 3, 2018, Nickel instructed Dean and Miller to prepare a letter entitled “Termination of Employment”. (**Tab 7 of Exhibit A-1**).

22. Koop testified as a rebuttal witness to support admission of two pages of handwritten notes he prepared on June 11, 2018. (**Exhibit A-2**). Koop confirmed he prepared the notes at Nickel’s request after termination of Bartko’s employment. The notes describe certain interactions Koop had with Bartko at the municipal pool job site relating to the issues of cutting roots and the confined space safety concern. While the notes do not refer to opening a second exit or Bartko’s right to refuse to work in unsafe conditions, Koop acknowledged while testifying that adjustments had to be made to make the work site safe. Confined space entry personnel were brought to the site, a tripod was picked up, and a hole was cut.

23. Koop recalled that on April 28, 2018, Bartko appeared frustrated, “which I understand”. He was also somewhat critical of Bartko’s attitude when he seemed to be complaining unnecessarily about the routine task of cutting roots, that he took unreasonably long lunch breaks, and he slammed the washroom and shop doors. Koop said he talked to Nickel previously about Bartko’s attitude and said “Usually he was a go-getter and happiest guy at work. Sometimes his attitude would dip, but not too bad. This project was different. He had a more frustrated attitude.”

24. Bartko recalled his safety concerns at the municipal pool job site and that he was surprised Nickel Plumbing hadn’t identified the problem earlier. Once on site, Bartko said he advised Koop it was necessary to create a second exit in the confined space which required Koop to obtain a Change Order to the City of Saskatoon contract.

25. Bartko testified about his experiences as a Nickel Plumbing employee and acknowledged the existence of and his participation in the action plans and performance reviews noted above. He agreed with Miller's statement that the plans were intended to be as tools to improve work performance. Bartko admitted that filling out work orders in a timely fashion was his most significant short-coming at work. Bartko also provided additional detail around other concerns such as reducing "visiting" with customers and taking shorter breaks. Bartko explained that he sometimes condensed his lunch and coffee breaks into one period, and on other occasions, he travelled to obtain parts before or after a break to promote efficiency. In two reviews, Bartko noted a desire to obtain more specialized training and acknowledged Miller's involvement in reviewing his time sheets/work orders was helpful in keeping him on track.

26. Bartko testified he received four bonuses while employed at Nickel Plumbing as follows:

June 22, 2016	\$2,319.00
October 24, 2016	\$2,000.00
April 25, 2017	\$2,000.00
October 20, 2017	\$1,676.00

27. Bartko testified that approximately four days before his employment was terminated, he endeavoured to discuss a long-standing concern he had about Dean with Nickel. He said all of the plumbers talked about Dean's "misconduct", but no one "really wanted to complain". Bartko felt secure enough in his employment that he could bring concerns to Nickel's attention, and he did so. Additionally, Bartko told Nickel that Dean was communicating in an inappropriate manner with staff at the chiropractic clinic treating him for a workplace injury. To that end, Bartko filed a letter from Dr. Daniel Walker-Delisle describing certain interactions between Dean and Movement Chiropractic staff between February 13 and April 24, 2018. After mentioning his concerns to Nickel, Bartko said "nothing happened". He spoke briefly to Gary Nickel who advised that "Derek is handling it". Bartko was unsatisfied. He contacted Occupational Health and Safety and completed a harassment questionnaire. He intended to follow through with a harassment complaint against Dean, but his employment was terminated within a few days. After consulting with O H & S, Bartko decided not to proceed with his harassment complaint because he didn't intend to seek reinstatement. He acknowledged Nickel Plumbing employees on the "shop side" were aware of his communication with O H & S and shared his concerns about Dean's behavior. Bartko was not aware whether management or office staff knew he had filed a harassment complaint.

28. Bartko acknowledged feeling upset about being overlooked as a project manager and felt he was more qualified than Koop to assume that role. He said Nickel promised he would be promoted in the future, but had to overcome certain shortcomings he acknowledged. Bartko testified he was never told his employment was in jeopardy if his work performance did not improve in a certain way or within a certain period of time. He assumed, when Nickel and Miller

attended at the municipal pool job site on May 1, 2018, that he was “in trouble because I complained about Christa (Dean)”.

29. After being presented with the Final Warning letter, Bartko knew his job was in jeopardy but said he didn’t fully understand why. He wanted to ask questions, but Nickel said he was unavailable at that time and would speak with him later. He then met with Nickel at the shop during which time Nickel appeared to be in a good mood. Bartko said he asked Nickel why he was being disciplined instead of Dean and Nickel replied, “Don’t worry”. Bartko acknowledged he and Nickel shook hands at the end of their conversation and he went home.

30. After reflecting on the evening’s conversation, Bartko sought to speak with Nickel again in the morning to ask what more would be done. Bartko said he thought there would be a broader investigation into Dean’s behavior at work which, in Bartko’s view, was inappropriate, verbally abusive, and harassing. Bartko recalled asking Nickel why he was “still getting” the Final Warning letter when all he did was advise Nickel about Dean’s misbehavior. Nickel expressed concern that Bartko was recording the conversation on his cell phone (which he wasn’t), and then Nickel said, “I can’t believe you’re fighting me on this” (while pointing to the Final Warning letter). Then Nickel said, “That’s it. You’re done”. Bartko acknowledged he was confused and upset, but didn’t raise his voice with Nickel. Further, both during that conversation and the evening previous, Bartko said there was no discussion about his potential commitment to address the points set out in the Final Warning letter because these things were not happening.

31. During cross-examination, Bartko repeated that he was never advised his job was in jeopardy and felt he was “doing well” in all aspects of his work except with his “paper-work problem”. He also acknowledged he didn’t want to lose his job over anything so “frivolous”, but didn’t think it would happen. Bartko said Gary Nickel advised him to “keep up the good work; just get your work orders done”. The first time Bartko was aware his job was in jeopardy was upon receiving the May 1, 2018 Final Warning letter.

32. Jordan Mulhall was working at Nickel Plumbing on the day Bartko’s employment was terminated and he drove Bartko home at Nickel’s request. Mulhall testified that Bartko had a good and co-operative attitude at work.

33. Kashus Bieber testified that he witnessed Dean raise her voice to Bartko on a number of occasions starting in November 2017. Bieber said Bartko told him he spoke with Nickel about concerns regarding Dean. Bieber’s impression was that Bartko wanted to be treated better by Dean and not be yelled at by her. Bieber also testified that other employees and customers “really enjoyed” working with Bartko. Both Mulhall and Bieber are no longer employed at Nickel Plumbing, but they left of their own accord and were not terminated.

V. ANALYSIS:

34. As Nickel Plumbing concedes, it bears the onus to prove it had just cause to terminate Bartko's employment without notice. Steven Moorgen's November 14, 2018 letter describes how the Director of Employment Standards views "just cause":

Exhibit D-1, Tab 1, Page 2:

Just cause is not defined in *The Saskatchewan Employment Act*. However, the Courts have been clear as to what constitutes just cause. It is clear, that unless an extremely serious incident occurs, a single instance of misconduct does not warrant termination for cause. However, if an employer uses corrective and progressive discipline in bringing to an employee's attention perceived misconduct(s) and identifies the standards that the employee is to meet and then disciplines an employee on a graduated scale, making the employee aware of the ramifications for not improving, and further misconduct occurs, an employer may well have cause to terminate.

35. In addition to utilizing a contextual approach as mandated by the Supreme Court of Canada in *McKinley v. B C Tel*, 2001, SCC 38, *Graf v. Saskatoon Soccer Centre Inc.* SK QB 282, provides guidance for analyzing the evidence in this case:

[28] It is also well established that where an employer relies on a series of inadequacies or inappropriate conduct short of dishonesty as grounds for summarily dismissing the employee, the employer must have previously informed the employee of his or her inappropriate conduct or inadequate performance and have warned the employee that she or he must correct the noted problems within a reasonable specified time or face dismissal. The essential elements of the requisite warning are set out in *Wrongful Dismissal Practice Manual* (Toronto: Butterworths, 1984), loose-leaf; Issue 77-May 2004 at CHP4: A: 2:1; *Jasnoch v. Provincial Plating Ltd.*, 2000 SKQB 44, [2000] 5 W.W.R. 670, 190 Sask. R. 250 (Sask. Q.B.); and *Lowery v. Calgary (City)*, 2002 ABCA 237, 312 A.R. 393 (Alta. C.A.). They essentially provide for the following:

- (a) the employer must provide reasonable objective standards of performance for the employee in a clear and understandable manner;
- (b) the employee must have failed to meet the employer's reasonable standard of performance;
- (c) the employer must give the employee a clear and unequivocal warning that she or he has failed to meet the requisite standard, including particulars of the specific deficiency relied on by the employer;
- (d) the warning must clearly indicate that the employee will be dismissed if he or she fails to meet the requisite standard within a reasonable time.

36. Using the above four elements as a framework for considering the evidence, the first question is whether Nickel Plumbing provided reasonable objective standards of performance for

Bartko in a clear and understandable manner. Evidence from Nickel Plumbing and Bartko confirms that this was done. The action plans and performance reviews filed as exhibits constitute objective evidence that Bartko and his employer discussed his strengths and weaknesses, goals, and plans for training and development. Overall, Bartko's performance as a journeyperson plumber was acceptable. His shortcomings were identified as inconsistently completing work orders/time sheets, inconsistently reporting to office staff about job completion, off-site tasks and breaks.

37. Bartko's action plans and performance reviews are referred to in paragraph 3 in the final Warning Letter before Dismissal dated May 1, 2018 where the concern was articulated as follows:

Work Orders

- (a) You are currently on an action plan to improve performance for your work orders production.
 - i) This is the second time in two years that you have been put on this plan. It is imperative that you understand that this is a key part of your job requirements. (Tab 6, Exhibit A-1)

Bartko's action plans and performance reviews do not mention a concern about his failure to adhere to guidance by a project manager (May 1, 2018 letter, paragraph 1), or physical outbursts (May 1, 2018 letter, paragraph 2).

38. There is some evidence Bartko failed to meet Nickel Plumbing's reasonable standard of performance for completing his time sheets/work orders. His shortcoming in this regard was first identified in an action plan for the May to June 2015 review period, and he was advised he would have one hour deducted from his pay cheque per missing work order. He was also placed on a manual pay cheque system (rather than receiving direct deposit) for a period of three months.

39. Subsequently, Bartko met expectations regarding completion of his time sheets/work orders and was returned to a direct deposit pay cheque until his July 2017 review period. At that time, Bartko was required to meet, bi-weekly, with Miller to review his time sheets/work orders. He was reverted to receiving manual cheques for the second time, which continued from June 2017 until September or October, 2017.

40. There is no evidence Nickel Plumbing had a concern about Bartko slamming doors, mistreating equipment or refusing to work as directed by a project manager, except as stated in its Final Warning Before Dismissal letter dated May 1, 2018. Specifically, there is no mention of these concerns in any of the action plans and performance reviews noted above. Therefore, there is no evidence Bartko failed to meet Nickel Plumbing's reasonable expectations around treatment of equipment or following directions of project managers prior to that date.

41. The totality of the evidence establishes that Nickel Plumbing gave Bartko a clear and unequivocal message that he was required to meet expectations around completion of time sheets/work orders. Having said this, neither the documents nor Nickel and Miller's evidence establish that Bartko was warned his failure to meet expectations around completion of this paper-work might give rise to discipline and/or termination of his employment. Notably, Nickel and Bartko both testified that Bartko was never told his job was in jeopardy if his work performance in this regard was not improved. Counsel for the Appellant submitted, in argument, that Bartko "seems to have internalized as early as 2015 ... that deficiencies in preparing his work orders ... would influence his continued employment with Nickel Plumbing".¹ I do not agree. The evidence falls far short of elevating an implied concern which might be described as "internalization" to a warning as contemplated by *Graf v. Saskatoon Soccer Centre Inc.*

42. The only clear and unequivocal warning Bartko received that his work performance failed to meet Nickel Plumbing's standard was the May 1, 2018 letter. This letter included two additional concerns never before raised with Bartko. As the Director's Delegate notes in his submissions, Bartko's final (and only) warning was provided to him the day before his termination.

43. The May 1, 2018 letter also contains a statement that "any further outbursts, or failure to perform to the expectations of the owners of Nickel Plumbing and Heating (1985) Ltd. shall result in immediate dismissal without further warning". In less than 24 hours after receiving the letter, and speaking with Nickel, Bartko's employment was summarily terminated. Given the rapid pace of events, it cannot be said Bartko was provided a reasonable time to meet the requisite standard.

44. The circumstances surrounding Nickel firing Bartko during their conversation on May 2, 2018 warrant comment. Nickel recounted that Bartko was angry and disrespectful. Nickel Plumbing's letter dated May 3, 2018 includes the following points:

iii. You disrespected the owner, Derek Nickel, by raising your voice to him. The owner does not tolerate disrespectful behavior toward employees or owners. This is viewed by the company as insubordination and an outburst which is grounds for dismissal and a direct violation of the terms outlined in your Final Warning Before Dismissal. (Page 3, Tab 7, Exhibit A-1)

45. Bartko and Nickel provided conflicting accounts of that morning's conversation as well as their talk the previous evening, which Nickel described as Bartko "venting". Where Bartko and Nickel's accounts differ, I prefer Bartko's evidence. He testified in a clear and straight-forward manner. He was prepared to admit his shortcomings and provided a balanced and objective account of his performance as an employee with Nickel Plumbing. Bartko provided detail about his difficulty working with Dean and efforts to address the situation with Nickel. He presented,

¹ Written Argument of Appellant, Page 13.

not as a trouble-maker or malcontent but, instead, as a conscientious person who assumed an informal leadership role in his workplace. Nickel, on the other hand, was less credible as a witness. He appeared defensive and uncertain when asked to elaborate on Bartko's work performance. It is apparent Nickel relied on the judgment of others, including Miller and Dean, when it came to assessing Bartko's work performance.

46. Nickel did not acknowledge any problems with Dean's performance as Nickel Plumbing office manager, nor that she had any role to play in Bartko's perceived inadequate performance. Miller, on the other hand, acknowledged that Dean entered into conflict with Bartko and that she was "blunt" with other employees. Coupled with Bartko's direct evidence about how difficult it was for him to work with Dean (which culminated in his filing a formal harassment complaint), Miller's evidence about Dean's workplace behavior was credible. This stands in contrast to Nickel's silence on the issue. I also note Dean was not called as a witness in this proceeding, from which I draw an adverse inference. All of this is to say that where Nickel and Bartko's versions of events differ, I prefer Bartko's version. The evidence does not establish that Bartko was insubordinate, disrespectful or abusive while he was speaking with Nickel, either on May 1st or May 2nd. On the contrary, I accept Bartko's evidence that he was legitimately confused as to the purpose of the May 1st letter, and sought clarification. The next morning, Bartko again sought additional reassurance that his concerns about Dean would be addressed.

47. It is not necessary for me to find, as a fact, that Nickel dismissed Bartko, at least in part, as a reaction to Bartko's complaints against Dean. It is sufficient for me to find, and I do find, that Nickel terminated Bartko's employment impulsively.

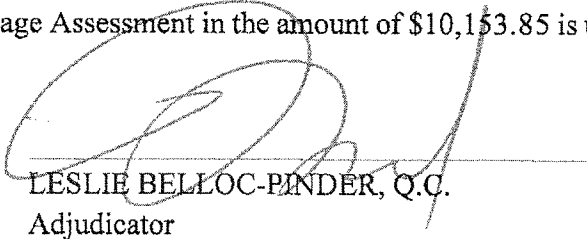
48. Bartko's action plans and performance reviews are not evidence of either misconduct or progressive discipline. As Miller described, the plans and reviews were used as tools to improve employee performance and communication between staff and management. While there is no doubt Bartko's workplace performance was not perfect, his periodic struggles with completing time sheets/work orders cannot be construed as just cause for his dismissal, absent considerably more and better communication from Nickel Plumbing about the perils of any continued inadequacy in this area.

49. Bartko submitted he was not given sufficient time to correct, or even address, Nickel Plumbing's concerns as set out in the May 1st letter before his employment was terminated. I agree. There is no question Nickel Plumbing was entitled to terminate Bartko's employment for any reason, including reasons Bartko might dispute. In making such a decision, however, Nickel Plumbing is required to provide statutory pay in lieu of notice in the appropriate amount as dictated by *The Saskatchewan Employment Act*.

50. I conclude that the totality of the evidence in this case is insufficient to establish, on a balance of probabilities, that just cause for Bartko's dismissal exists.

VI. DECISION:

51. The Appeal is dismissed and the Wage Assessment in the amount of \$10,153.85 is upheld.



LESLIE BELLOC-PINDER, Q.C.
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 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.