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


Quad-D Enterprises Ltd., and

Martin Wayne Derbowka, being a director of Quad–D Enterprises Ltd.

APPELLANTS

The Director of Employment Standards

RESPONDENT

Date of Hearing: March 12, 2019

Location of Hearing: Main Floor Boardroom; 72 Smith Street; Yorkton; Saskatchewan

Date of Decision: March 18, 2019

[1] Wage Assessment (file number 1-001827, hereinafter the 'Wage Assessment') was issued by the Director of Employment Standard's Delegate on January 14, 2019. It directed Martin Wayne Derbowka ('Mr. Derbowka'), being a director of Quad–D Enterprises Ltd. and Quad–D Enterprises Ltd. (hereinafter the 'appellants') to pay Jennifer Hull the sum of $2,669.91.

[2] Mr. Derbowka represented the appellants. The respondent Jennifer Hull ('Ms. Hull') represented herself. Dale Schmidt ('Mr. Schmidt') was the Director's delegate in this matter. He did not represent Ms. Hull.

**Issues**

[3] At the start of the hearing the parties agreed there were two issues in dispute. The first issue whether or not Ms. Hull voluntarily resigned from her employment. She says the employer terminated her employment, while the employer says she quit. The second issue is whether or not two deductions made from Ms. Hull's wages on October 8 and October 22, 2018 are permitted under *The Saskatchewan Employment Act* (the 'Act'). These deductions relate to shortages in Ms. Hull's cash 'float'.

**Facts and Decision**

[4] Very few relevant facts were in dispute. Mr. Derbowka agreed at the outset that *if* Ms. Hull did not quit her employment, and *if* the deductions related to the float were not permissible, then the amount of the Wage Assessment is correct. There was no dispute over Ms. Hull's employment, length of employment or wages.

[5] Ms. Hull worked at the City Limits, a bar in Yorkton. She had worked there for about 20 years. For most of that time she worked at City Limits part time, and also worked for the school board. About two years ago Mr. Derbowka became the sole owner of City Limits. Around the same time, Ms. Hull started working more or less full time at City Limits. She gave up her other employment for a time. Staff at City Limits had their hours cut back somewhat, and Ms. Hull felt she needed to earn more money. She went back to work for the school board, first as a relief janitor. Ms. Hull continued to work at City Limits, mostly as a server but also as a 'DJ' on Thursday nights. At the time her employment at City Limits ended, she earned $12.50 per hour.

[6] Mr. Derbowka was aware of Ms. Hull's employment with the school board. He said he was willing to 'accommodate' this at least until Ms. Hull knew if the school board job would work out. I use the word 'accommodate' because that is the word Mr. Derbowka used. This is not a matter of accommodation under any sort of human rights legislation.

[7] On most counts, Ms. Hull was clearly a very good employee. In fact, Mr. Derbowka described her as a 'fantastic' employee, in all respects but one. He said he liked her and she was "great with the customers and staff".

[8] On most counts, Mr. Derbowka was clearly a very good employer. Ms. Hull called him a 'wonderful boss'. Ms. Hull said she liked Mr. Derbowka and both said they got along very well.

[9] There was one point of friction however which eventually brought about the end of Ms. Hull's employment at the City Limits. Serving staff were permitted to switch shifts by making changes to a calendar Mr. Derbowka kept on the premises. Ms. Hull used this permitted procedure to enable her to work at her other job. Clearly she would not be able to work the same shift for both employers.

[10] Mr. Derbowka suggested Ms. Hull requested 31 shifts off during 2018. Although no evidence was led on the exact number of requests, Ms. Hull agreed that she had made a number of such requests. Both Mr. Derbowka and Ms. Hull testified that Mr. Derbowka never denied any such request.

[11] Mr. Derbowka also suggested that Ms. Hull called in to say she could not work her shift 13 times in the last ten months of employment. Again no evidence was presented on the exact number, but given what I saw as the open and honest testimony of both Mr. Derbowka and Ms. Hull, I accept that Mr. Derbowka believes the number to be accurate, and I accept that it is either correct or very close to correct.

[12] At some point, Mr. Derbowka became frustrated with Ms. Hull, particularly with her calling in to say she was unable to work an upcoming shift. Mr. Derbowka testified, "She finds another job to make more money, and now I'm supposed to accommodate her by giving her exclusive nights? She has to make a decision, rotating shifts at City limits or dayshifts at the school board." In an ideal world, at this point Mr. Derbowka and Ms. Hull would have had a candid conversation about the employer's expectations, made a record of that conversation, and perhaps even come to written arrangement which would indicate what exactly would be acceptable. That is not what happened. In answer to Mr. Schmidt's questions, Mr. Derbowka confirmed that Ms. Hull had never been disciplined for missing a shift or for anything else.

[13] Mr. Derbowka called a staff meeting. At that meeting he told all staff in attendance, that if a staff member failed to show up for a shift then he would consider that staff member to have resigned. Ms. Hull was at that meeting. In answer to Mr. Schmidt's questions, Mr. Derbowka said that he would apply this standard if a staff member had a medical emergency or a death in the family.

[14] Ms. Hull's last shift worked was Nov. 26, 2018. She was scheduled to work Nov. 28, 2018. A serious personal matter arose, and Ms. Hull realized she would not be able to work her shift. Prior to the shift start time, she texted Mr. Derbowka to explain this to him. Mr. Derbowka testified that he saw the text from her but didn't read it at the time.

[15] When Ms. Hull later spoke with Mr. Derbowka on the phone he told her she had been taken off the schedule, and would not be put back on. This applied both to serving and to being a DJ. He told her that since he considered that she quit, he would not be paying any money in

lieu of notice. In explaining this at the hearing, Mr. Derbowka testified (referring to the staff meeting) "In my mind I clearly stated that if you don't show up then you quit".

[16] It is clear that an employee can quit a job without expressly saying so. Some circumstances, such as abandoning the job, speak for themselves. That is not what happens in this case however.

[17] It is clear from the evidence of both Ms. Hull and Mr. Derbowka that Ms. Hull did not intend to quit her job. She experienced a situation which she concluded made it impossible for her to work one particular shift. She contacted Mr. Derbowka in advance of that shift to explain this. When Mr. Derbowka didn't reply, Ms. Hull later followed up with him. These are not the actions of someone intending to quit a job. These are the actions of someone who, at least at that time, wants to continue her employment. The employment ended not because she wanted it to but rather because he wanted it to.

[18] An employer can discipline an employee who fails to show up for a shift with no legitimate reason. However no employer can force an employee to quit when the employee does something the employer disapproves of. The employer may discipline the employee or may terminate the employment without cause, or if the matter is serious enough may terminate the employment with just cause. There was no evidence of just cause in this case, and in answer to my direct question, Mr. Derbowka stated he was not alleging the employer had just cause for dismissal.

[19] Therefore based on the evidence presented, I conclude that Ms. Hull did not quit her job, and that Mr. Derbowka terminated her employment without cause. Ms. Hull is therefore entitled to pay in lieu of notice in the amount contained in the Wage Assessment.

[20] This brings me to the second issue – were the deductions from Ms. Hull's wages on October 8 and October 22, 2018 related to shortages in Ms. Hull's cash 'float' permitted under the Act?

[21] Very little evidence was tendered regarding the system of float in place at City Limits. It is clear that the employer considers employees to be responsible for shortages (that is too little money in the float), and considers that overages (that is an additional amount in the float) to belong to the employer. The employer does try and find the error in order to make the float balance where possible. The employer also believes that where there is a larger overage, the most likely explanation is that a server forgot to ring in a purchase such as an off-sale purchase. It is also clear that where possible the employer used small overages to balance small shortages. I express no opinion on whether or not, under the system used by the employer, servers are responsible in law for float shortages. I would like to emphasize that there is no suggestion of any dishonesty by Ms. Hull or Mr. Derbowka. The imbalance in the floats appear to be simply mistakes which must commonly happen in such a setting. The only issue before me

is whether or not the two deductions for shortages are authorized by the Act. For the reasons I will explain below, my conclusion is that they are not.

[22] Employers are prohibited from making deductions from employee's wages, unless the deduction is permitted or required by federal or provincial legislation by ss. 2-36 (1) of the Act. Some deductions are specifically authorized be ss. 2-36 (2) of the Act. While none of the specifically authorized deductions specifies float shortages, it appears the employer believes the deduction was permitted because it was agreed to by the employee. At 2-36 (2)(f) the Act permits deductions for "voluntary employee purchases from the employer of any goods, services or merchandise". I am not aware of, nor was I referred to, any other legislation which could authorize these deductions, so I must conclude they are not lawful deductions unless they come within 2-16(2)(f).

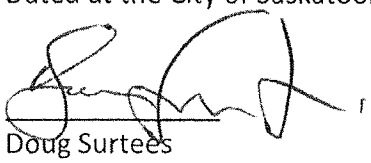
[23] Ms. Hull and Mr. Derbowka both testified that when a server was short on the float, the server was expected to make up the difference. Sometimes the server would pay the money upon cashing out. Other times, such as when the server may not have had sufficient funds on hand, the employer would deduct the shortage from the server's next cheque. When asked if she agreed to this system, Ms. Hull said simply said that was the way it was done at the bar, and it had been done that way since before she started. Ms. Hull did not object to this deduction, but neither did she consent to it. 'Voluntary' is an adjective which in this context refers to something done of one's free will. It is implicit that the doer has a choice. I conclude that for the deduction to be 'voluntary' within the meaning of the 2-36 (2)(f) employees must be aware that they have a choice. Since Ms. Hull was not aware of this I would hold that the deduction was not voluntary.

[24] If I am wrong, and Ms. Hull's lack of objection to the deduction makes it voluntary, I still hold that it does not come within 2-26 (2)(f) of the Act because nothing was purchased from the employer, and also because the cash shortage is not a 'good', a 'service' or 'merchandise'. The Act allows a deduction for a "voluntary employee purchases from the employer of any goods, services or merchandise". Therefore, even if the deduction was said to be voluntary, it is still not a permissible deduction. I make no comment on whether or not Ms. Hull is responsible for the shortage. My conclusion is simply that the Act does not permit the employer to deduct this amount from an employee's wages. Therefore I conclude that the portion of the Wage Assessment which relates to the deduction from Ms. Hull's October 8 and October 22, 2018 Pay should be confirmed.

**Conclusion**

[25] The appeal is dismissed, and the Wage Assessment in the amount $2,669.91 is confirmed.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 18th day of March, 2019.



Doug Surtees
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 or hearing pursuant to Part II, the wage assessment or the notice of hearing;
(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;
(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;
(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.

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**EXHIBIT LIST**

**Employee Exhibits**

EE-1 one page 'Employee's Earnings' sheet re: Jennifer Hull with highlights applied by Mr. Schmidt

EE-2 one page copy of Jennifer Hull pay stubs dated October 8, 2018 and October 22, 2018

**Employer Exhibits**

ER-1 one page 'Employee's Earnings' sheet re: Jennifer Hull with highlights applied by Mr. Derbowka