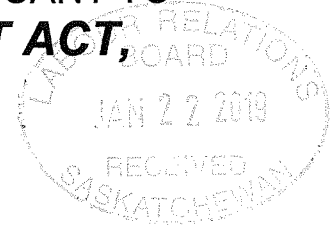


DECISION OF ADJUDICATOR
IN THE MATTER OF AN APPEAL
PURSUANT TO SECTION 2-75 WITH RESPECT TO A DECISION OF
AN EMPLOYMENT STANDARDS OFFICER PURSUANT TO
THE SASKATCHEWAN EMPLOYMENT ACT,
R. S. S. S-15.1 (as amended)



APPELLANT: 6132511 Canada Ltd. o/a Keeper's Restaurant

RESPONDENT: Shelly Stewart

and

Director of Labour Standards
Ministry of Labour Relations and Workplace Safety

DATE OF HEARING: November 26, 2018

PLACE OF HEARING: Saskatoon, Saskatchewan

I. INTRODUCTION

This is an appeal by 6132511 Canada Ltd. o/a Keeper's Restaurant (hereinafter referred to as Keeper's) with respect to a Wage Assessment issued by the Respondent, the Director, Employment Standards Branch, Ministry of Labour Relations and Workplace Safety, on July 5, 2018. The Wage Assessment required the Appellant to pay Shelly Stewart the sum of \$2,227.50 representing pay in lieu of notice. The Wage Assessment was prepared pursuant to s. 2-74 of *The Saskatchewan Employment Act*, R.S.S. S-15.1 (hereinafter referred to as *the Act*) (as amended).

This matter was heard before me on November 26, 2018. The Appellant was represented by Kathy Shaw, Manager, and Jae Hee Kim, President. Present for the Respondent at the Hearing was Randy Armitage, Department of Employment Standards. The employee Shelly Stewart was present, and she wished to be represented by Mr. Armitage.

The Appeal was perfected as the Wage Assessment was served on the Appellant on July 31, 2018 and the Notice of Appeal was received, along with the prescribed fee, on August 17, 2018.

II. PRELIMINARY MATTERS

All parties remained present throughout the hearing and there were no other preliminary issues.

III. ISSUES

The factual issue was whether the employee had resigned or was terminated without notice. In this case, the employer was relying on an assumption that the employee had resigned, which was not the case. There were side issues raised that were resolved during the hearing. One issue dealt with the obligation of an employer to ensure that an employee returning to work after an injury is properly reintegrated into the work place. The employer acknowledged that she had been unaware of her responsibilities to an employee who had been absent for an extended period due to an injury and the need to encourage that employee to return to work and provide her the opportunity to do so.

IV. EVIDENCE

Shelly Stewart testified. She commenced her employment with Keeper's Restaurant on October 20, 2014. She was a line cook. She worked full-time, usually 40 hours per week. The last day she worked was September 15, 2017. She had injured her hand a week earlier while shredding a turkey and had tendonitis. She did not leave her job until she had the diagnosis and it took her a bit of time to get in to see her doctor. Ms. Stewart

immediately put in a claim with the Workers Compensation Board (WCB), who told her that she should attend at the CBI Rehabilitation Centre in Saskatoon. She did so daily for 10 weeks and had to move to Saskatoon until her rehabilitation was concluded. Ms. Stewart was subsequently advised by WCB that she could return to work with 'modified duties' and she advised her employer of this on January 24, 2018. The employer advised that there were no 'modified duties' even though the WCB would assist with her pay. Ms. Stewart was able to return to work around mid-March, 2018 but there was no position for her; she was told that if she was permitted to return to work, Keeper's would have to let someone go. Ms. Stewart was not allowed to return to work, despite being able to and she was given her ROE. While there is a disagreement between Ms. Stewart and Ms. Shaw about the frequency of her communications with her employer between September 2017 and March 2018, I am satisfied that Ms. Stewart did regularly apprise her employer as to her progress, including when she was fit for modified duties and when she could return to work full-time.

The sole witness for the Appellant employer was Kathy Shaw.

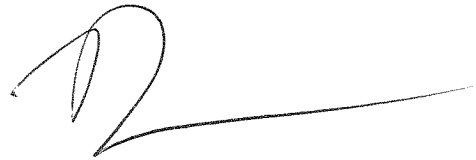
Ms. Shaw confirmed that Ms. Stewart had worked for Keeper's, that Ms. Stewart left somewhat abruptly on September 15, 2017 and that she never saw her again. Although Ms. Shaw heard about Ms. Stewart's injury claim, she was skeptical and as a result did not follow it up personally or as closely as she should have. Ms. Shaw was unaware of the doctor's notes (Exhibit EE3) and the two letters from the WCB (Exhibits ER1 & ER2). These may have been communicated to Ms. Kim or other managers at Keeper's Restaurant but not Ms. Shaw so she therefore assumed that Ms. Stewart had chosen to not return. Ms. Shaw had no recollection of Ms. Stewart ever indicating in writing or verbally that she was quitting. When there was phone contact from the WCB, Ms. Shaw said that modified duties were not possible for individuals working in the kitchen due to the weight of what needed to be lifted or held. There were some phone calls where the issue of Ms. Stewart returning to work was left hanging but Ms. Shaw never followed up as she believed that it was up to Ms. Stewart to ask for her job back. The Record of Employment (ROE) was sent out as she believed Ms. Stewart had quit. At the conclusion of her evidence, Ms. Shaw agreed that she assumed Ms. Stewart had quit her job and that she may not have been aware of some of the communications from Ms. Stewart. Ms. Shaw understood that it was possible that Ms. Stewart did not persist in making inquiries about

returning to work as she may have felt she was being shut out. While she did not fully agree with Ms. Stewart's evidence and felt that Ms. Stewart still should have done more to ask for her job back, Ms. Shaw also agreed that the hearing assisted her in understanding that there is a process to follow and it was unfortunate that was not done.

V. **CONCLUSION**

As the employer did not permit the employee to return to work when she was able, the employee was effectively terminated without notice and is therefore entitled to pay in lieu of notice. The appeal is dismissed, and the Wage Assessment is hereby upheld.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 21st day of January 2019.

A handwritten signature in black ink, consisting of a stylized 'L' followed by a long horizontal line extending to the right.

Leslie T.K. Sullivan, Q.C.
Adjudicator

Exhibit List

ER 1	Letter to Keeper's from WCB March 19, 2018
ER 2	Letter to employee from WCB March 19, 2018
EE 1	Letter to Keeper's from Ministry June 8, 2018
EE2	Letter to Ministry from WCB June 11, 2018
EE 3	Doctor's notes re employee

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.