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

Andrew Fuller
COMPLAINANT/EMPLOYEE

-AND-

102002973 Saskatchewan Corp., o/a Fuller's
APPELLANT/EMPLOYER

DATE OF HEARING: October 29, 2018
January 14, 2019
January 23, 2019
February 15, 2019

PLACE OF HEARING: Moose Jaw, SK

LRB FILE: No. 183-18
WAGE ASSESSMENT: No. 1-000093

INTRODUCTION

This matter was heard before me on October 29, 2018, January 14 & 23, 2019 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. Daniel Corbett, Employment Standards Officer represented The Employment Standards Department.

The Complainant/Employee, Andrew Fuller attended and gave evidence on his behalf.

The Appellant/Employer, 102002973 Saskatchewan Corp., o/a Fuller's was represented by Jim Fuller and Denis Benoit.

Mr. Fuller gave evidence on his behalf and 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 $6,263.39.

I. PRELIMINARY MATTERS

There were no preliminary matters raised by the parties.

II. AGREED FACTS

Andrew Fuller was an employee of the Appellant and was employed from May 23, 2017 to March 7, 2018.

Parties agreed that the training rate of an employee was $15/hr.

The regular rate of pay for employees was $18.67/hr changed to $19.10/hr in November of 2017.

The employees worked 12 hours per day and a permit from Labour Standards Officer was obtained by the employer permitting the 12 hour

days. Overtime commenced after 12 hours or after the total monthly amount of hours was exceeded. (SEE employee exhibit "3")

III. DISPUTE

The issues to be determined is whether or not the amount, or any part of the amount, as set out in the Wage Assessment, is due and owing to the employee and was the employee dismissed for cause within the meaning of the Act.

IV. EVIDENCE OF THE EMPLOYER

Mr. Jim Fuller gave sworn evidence on his behalf as Director and that of the Corporation as follows:

> He has been operating a Freight Business since 1998, currently known as Fuller's. The company operates out of Alida, Saskatchewan and covers a daily, somewhat circular route, between Alida, Regina, Weyburn and Estevan, returning to Alida in the evening daily.
>
> This route is covered weekdays using Mr. Fuller's five ton truck.

The Employees were to work from 10am to 10pm, such information being communicated to the employees at the commencement of their work and on many days thereafter.

The Employee's day commenced at approximately 10am in Alida, Saskatchewan and the Employee make pick ups and deliveries to and from Regina as well as in the City of Regina. The Employee's try to leave the City of Regina by 5:00pm. An Employee makes approximately 18-20 stops (deliveries or pickups per day).

A Coop Gas Card is available to the employee for fueling purposes during their delivery day. This card is used when required by the employee.

There is a dispatcher at the corporate office who receives calls for pickups and deliveries and the same is then forwarded onto the driver of the truck by way of a text.

The employer did advise the employees that they could leave before 10am if they had personal matters to attend to or if they wished to do shopping or the like when they were in Regina. However, the employees would not be paid for this personal time.

Andrew Fuller was hired by Mr. Fuller at his house. At the time hiring Mr. Fuller advised that the work required 12 hours days from 10am to 10pm. Andrew was subsequently advised from time to time about the hours and saw the posted notice in November of 2017 regarding the hours.

Andrew had no requirements to make any deliveries between 8am and 10am.

Andrew never approached Mr. Fuller for overtime payment until Mr. Fuller received correspondence from the Labour Board.

Mr. Fuller states that May 22, 1017 no one was working and Andrew should not be paid for his claim on that date.

The employer went through fuel records with respect to Andrew and his hours and drew the conclusion that the hours claimed by Andrew as overtime are unsupportable, and, had been made up by Andrew.

As a further consequence of the employer noticing the employees starting early, he created employer exhibit "ER30" which set out the hours of work and it was posted around the middle of November 2017 at the office for the employees to review.

The employer knows that the employees, Carruthers and Fuller saw the notice as they approached the employer to have a meeting to discuss the notice.

Regarding Andrews termination, Mr. Fuller states that it was his policy to give employees 3 written warnings prior to termination and did so with Andrew.

Andrew was warned on January 5, 2018 – when he refused to hand in the drivers pick up sheets indicating that he wanted a bonus for doing that work.

Andrew was warned in emails, shown in "ER46".

Andrew received his second warning "ER47", regarding January 17, 2018. This written warning was given to Andrew on January 18, 2018 at the shop. This was given for the failure of Andrew to make a pickup in Regina. Andrew stated that as it was after 4pm he was not picking anything else up and started for home.

Andrew was given his third warning relating to insubordination as there was a further pick up in Regina that was refused by him, even though GPS records indicate that he drove by the pick up location. (ER48 & ER49).

The wage assessment for Andrew claims severance in lieu of notice.

The employer restated that none of the employees were required to come in before 10am and this was confirmed by his posted notice (ER30).

There were not any deliveries or pickups required before 10am and if the employees made any they were not required by the customers.

The employer was away from February to May of 2018 in the United States. Tanya was responsible to manage the day to day operations of the company for that period.

V. EMPLOYER CROSS EXAM

The employer was cross examined by Mr. Corbett on behalf of Andrew Fuller.

The employer was asked if there was a specific 4pm cut off time for pickups and/or deliveries in Regina. Mr. Fuller advised that, that was an approximate time unless the picks up or drop offs were close by.

The employer was of a view that the employees understood that they needed to leave Regina at approximately 5pm in order to avoid overtime which was not authorized.

The employer misunderstood the Labour Standards authorization in that he thought that overtime was only paid when the permitted hours per month were exceeded and did not apply to an employee working over 12 hours on any given day.

Andrew Fullers wage assessment includes a claim for 1 week severance in the amount of $575.62 plus $33.21 vacation for a total of $608.83 in lieu of notice to the employee.

The employer agreed that he has no record of what the employees did on a daily basis if they left before 10am.

The employer agreed that the employees returned after 10pm in the evening some days; however, were never paid for overtime as it was the employers understanding that they would be paid overtime once the

monthly hours were exceeded and this never occurred during the period of employment.

The employer was unaware what the employees did if they left early to go to Regina before 10am.

The employer took the position that he was to pay the employees for 12 hours per day and only pay overtime if they employee exceed the monthly hours set out in the Labour Standards Authorization (EE3).

VI. DEBBIE FULLER – WITNESS FOR EMPLOYER

Debbie Fuller was sworn and gave evidence that she was a dispatcher for Mr. Fuller's trucking company from June 2011 to June 2015 and as well she was a driver.

She is a sister of Mr. Fuller, the Appellant/Employer.

She advised that there was no requirement to make any deliveries in Alida, SK before 10am and certainly not at 8am.

That the 12hours a day that the drivers worked 10am to 10pm was adequate to do the job, and she never worked any overtime nor did she ever make a claim for overtime.

When she was working at the corporation no one worked any overtime and no one made a claim for overtime.

Ms. Fuller also advised that no one worked on a statuary holiday. Drivers could go to work early if they had personal things to do, however, all employees were aware that they could not make claim for their personal time.

Ms. Carruthers stayed with her for some 8-9 days after commencing work at the company thereafter staying at the trailer in the shop.

Ms. Carruthers would leave for work earlier then 10am, however, Ms. Fuller was unaware as to where Ms. Carruthers went or what she did.

Ms. Fuller advised that Tanya Hjelmeland was fired from the company in October or November of 2017 for stealing from the company.

Ms. Fuller learned of this conduct from Ms. Hjelmeland herself.

Ms. Fuller was aware that Mr. Jim Fuller had told Tanya and May Carruthers that it was unnecessary to leave the shop before 10am.

Under cross examination Ms. Fuller advised that she had never worked with Andrew Fuller or May Carruthers.

When May Carruthers stayed with her, May commenced work in Alida that Ms. Fuller was not expecting any rent or reimbursement from May.

That during her time with the corporation she only once saw Andrew in at work before 10am.

VII. KAREN MITCHELL – WITNESS FOR EMPLOYER

Karen Mitchell was sworn and gave evidence as follows:

Ms. Mitchell has been a friend of Jim Fuller for some 2 years.

Ms. Mitchell heard Jim talking about Andrew and his terms of employee at Jim's house when Andrew was hired.

She indicated that he was to be paid $225/day for 12 hours of work per day, the time being 10am to 10pm on the work days, and was to be trained by May Carruthers. Andrew could leave early if he wanted to but would not get paid.

Ms. Mitchell also had occasion to see the first and second warnings that were given by Jim to Andrew. She discussed both the warnings with Jim, who advised that Andrew had refused to sign the written documents. However, she never saw the termination notice.

She knows Tanya Hjelmelang and was aware that she was terminated from Fuller's for theft.

She was away in the United States with Jim from November 16, 2017 to April 17, 2018 and that Tanya was in charge of the companies operation during that time.

VIII. DARCY MCCRIMMON – WITNESS FOR EMPLOYER

Darcy McCrimmon was sworn as a witness and gave evidence as follows:

Mr. McCrimmon now works for Jim as a driver and has done so for a period of approximately 4 months. He normally works 12 hours per day, 10am to 10pm; however, on occasion works past 10pm in the evening.

Mr. McCrimmon has no problem doing the scheduled route within the 12-13 hour range daily and has never needed 15 hours to do the route.

IX. EVIDENCE OF THE EMPLOYEE

Tanya Hjelmelang was called by the Employee and gave sworn evidence as follows:

She was employed by Fuller's from August 2011 to December 2018 as a bookkeeper/dispatcher.

She commenced employment at 8am. During May Carruthers time with the company May would come into the office around 8am for coffee and would leave about 8:30am and return to the shop between 10:00-10:30pm.

Tanya never had any conversations with Jim about driver start times.

Tanya did the payroll and was told to put in 8 hours per day on the time sheets even through the employees were paid a daily rate, as apparently the computer program required 8 hours to be inserted and would not accept anything else.

As the payroll required hours and not per diem the company spreadsheets with respect to time and employee hours make no sense and do not reflect what was actually occurring.

The time sheets reflect an 8hr day whether the employee worked 8hours or 15hours.

Tanya confirmed that she wrote a letter to Employment Standards in response to a complaint to them by Curtis Porter, which indicated the start time as being 10am.

Tanya indicated that she wrote the letter under Jim's instructions even though the facts stated there in were a lie and she did not sign it but Jim did.

During Tanya's time with Fuller's she indicated that every driver left around 8:30am.

Under cross examination Tanya advised that no employee had made a claim for overtime.

Tanya had known May Carruthers and on the occasion a driver was needed she contacted Jim (who was the in the United States), for authority to hire May and Jim approved the hire.

At the time of hiring May Carruthers, no hours of work were explained by Tanya to May as she was of the view that the start time was 8am and that they were to work 12 hours per day as permitted by the Labour Standards Permit.

Under cross examination Tanya confirmed that she had never told Ms. Carruthers about the hours of working 10am-10pm and as May usually came in around 8:30am, Tanya assumed that was the arrangement that she had worked out with Jim.

Tanya confirmed that May Carruthers usually worked a 13-14 hour day, from 8:30am to 10:00pm.

Tanya was of a view that because the employees were paid by the day that the start time was irrelevant.

On November 22, 2017 there was a Notice to Drivers posted in the work place which had been authored by Jim.

Tanya confirmed that she had been terminated for creating a false document, theft from Jim and a relationship with another driver. This termination took place on December 5, 2017.

Tanya was not present for Andrew's hiring but did know that he was being paid the same as May Carruthers on a per diem basis.

In May of 2017 May trained Andrew and they started at approximately 8:30am each day and returned around 10:00pm.

X. EVIDENCE OF ANDREW FULLER

Andrew Fuller gave sworn evidence as follows:

Andrew started work at Fuller's on May 22, 2017 as a driver.

He was of a view that his start time was between 8:00-8:30am and would get to Regina between 11:30-12:00pm and leaving Regina about 5:00pm returning to Alida at approximately 10:30pm

Andrew confirmed that he was told by Jim at the commencement of his employment that the working hours were 10am-10pm; however when he trained with May they always left at around 8:30am and he was never told not to start at that time.

Most days when Andrew was leaving at 8:30am Jim would be on the premises and see him leave on his route at the time.

Jim never told Andrew not to work before 10am until November 22, 2017 when the letter was posted in the work place.

His agreed his wage was $225 per day.

Andrew never approached Jim about paying overtime and signed the Labour Standards Permit indicating that his workday was 12 hours per day. Andrew raised this with Jim, indicating that they work more than 12 hours per day; however Jim did not respond to him.

When the Notice was posted in the work place towards the end of November, Andrew asked for overtime and Jim responded that he did not pay overtime, (Employer Exhibit 30).

After Andrew was trained by May he was never told to commence work until 10am until "Employer Exhibit 30" was posted at the workplace.

After the notice was posted he commenced work at 10am.

When Andrew commenced work at 10am he was having difficulty completing his route within the 12hr period between 10am and 10pm.

Andrew received his first warning from Jim on January 7, 2018 for insubordination regarding the handing in of the driver pick up sheets in a timely fashion.

Andrew received his second warning from Jim on January 17, 2018 for insubordination for Andrews failure to make pick-ups in Regina after 4pm. Andrew refused to make the pick-ups as he was of the view that 4pm was the cut off time for pick-ups in Regina in order for him to be able to return to the employer's base by 10pm.

Andrew stated that he did not received nor was he ever aware of the second written warning that was written by Jim until after the commencement of these proceedings.

Andrew also stated that he was never spoken to by Jim regarding the failure to pick-up after the texting between he and Jim on day of the dispute (January 17).

Under cross examination Andrew was asked why he claimed 15hours per day when his average was 8:30am to 10:30pm, which was 14hours.

Andrew indicated that he guesstimated his hours as to start and end times until he started geo tracking late in his employment with Fuller's.

Andrew reiterated that he commenced work around 8:30am as this is what he had done during this training with May and Jim knew he was leaving at that time and said nothing to him until the posting of the notice on premises.

A number of re-fueling records were gone through on cross examination which indicated that Andrew was customarily away from

the premises for less than 14hours although he claimed 15hours on much of his claim with the Labour Standards Officer, which were incorporated into the Wage Assessment.

The times were confirmed in Tanya's evidence in that Andrew left around 8:30am not 7:00am which would be required in order for him to claim 15hours.

Andrew confirmed that he observed the notice to drivers posted on November 22nd or 23rd.

Andrew confirmed that May had told him that the hours were 8:30am to 10pm but that they only received pay for 12hours through the daily $225 rate of pay.

Andrew confirmed that from May 23, 2017 to November 16, 2017, he averaged 3hours per day overtime and yet, after observing the notice posted, his overtime claim would have been appx 10mins per day and he was still doing the job as required by the employer.

Andrew attributed the 3hours difference in the work time to the volume of work in that particular time of year.

Andrew confirmed that he was of a view that the 12hr work day was too short to get the job done, despite the fact that the other drivers, except May, were and are able to do the route within that 12hr time frame, as opposed to his 13hours (claim of 15hours).

XI. ANALYSIS/DECISION

OVERTIME:

The issue relating to overtime is unusual. The employer saw the employees leaving early every day (that is about 8:30am) yet took the position that he didn't think that they were working overtime but that they were taking personal time during the day, each and every day.

The employer also says that if it was overtime he did not authorize it.

This position by the employer flies in the face of the definition of "permit to work" as set out in Section 2-2 of The Act.

Clearly the employer either knew or ought to have known the employees were working and did not cause the employees to stop working. The employer just looked the other way.

It became very clear at the hearing that the employer's records were wrong, incomplete and unreliable.

The Wage Assessment was based in part on the erroneous information in the employer records.

Therefore the Wage Assessment is incorrect. Consequently the rebuttal of the presumption of correctness of the Wage Assessment under Section 2-75(9) has been met.

The evidence relating to the daily start times and end times is, not surprisingly, in conflict.

A review of all the evidence and documents clearly shows the employer payroll records were at best woefully inadequate and did not meet the requirements as set out in Section 2-38 of The Act. However, the employee's record keeping was equally as inadequate and both sets of record keeping are unreliable.

A review of the oral evidence of the parties and witnesses to determine what overtime, if any, was owing to employees is necessary.

In the evidence, not surprisingly, the employer minimized any amount owing to the employees and the employees overstated the amounts they felt were owing.

Even though Andrew Fuller's responses to cross examination questions were evasive and flippant, I conclude that Andrew worked

consistently from 8:30am to 10:00pm on the days he claimed overtime. This amounted to 13.5hours per day.

The employers permit from the Labour Standards Department permitted a 12hr work day so Andrew worked 1.5hours per day overtime on the days he claimed at least that amount in excess of a 12hr day.

The audit sheet sets out the number of days of overtime claimed during the period of time the Wage Assessment is concerned with which was 64 days.
(1.5hours/day (13.5-12hours) x 64days = 96hours of overtime worked by Andrew).

The rate of pay from the start date of date of employment to November 1 was $18.67/hr and after November 1 was $19.10/hr, creating overtime rates of $28.01/hr and $28.65/hr respectively.

The amount owing for overtime is:

84hours x $28.01 = $2,352.84

12hours x $28.65 = $343.80

After the employer posted the notice relating to hours on our about November 22, Andrew only worked 12hr days.

So no overtime is payable after that date as I find he only worked the scheduled 12hours/day or less after November 22.

WRONGFUL DISMISSAL

It is well established in Canadian Jurisprudence that Notice of Termination of Employment must be specific, unequivocal and clearly communicated to the employee. Whether a purported notice is specific and unequivocal is a question of fact to be determined on an objective basis in all the circumstances of each case.

Dismissal for "just cause" can be cumulative or it can be a onetime event.

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 dismissal for just cause.

The employer also claims cumulative, progressive discipline for just cause of dismissal of Andrew Fuller.

The employer's evidence indicates that Andrew was given three written warnings. The employee states that he only received two written warnings as well as some text messages regarding the third warning referred to by the employer.

Whether the employee received the two or three written warnings is of no consequence, as a review of the wordings of the warnings and texts do not satisfy the requirements for dismissal for cause, as the warnings do not meet the legal criteria for just cause dismissal as set out above.

Therefore I find that Andrew Fuller was not dismissed for cause as required by The Act and is entitled to one weeks severance pay in lieu of notice in the amount of $608.83.

XII. CONCLUSION

The appeal is granted in part and the Wage Assessment is amended to the amount of $3,461.02.47 calculated as follows"

Overtime owing until pay raise	$ 2,352.84
Overtime after raise	$ 343.80
3/52 vacation pay	$ 155.55
One week severance	$ 608.83
Total owing	$ 3,461.02

Dated at Moose Jaw, in the Province of Saskatchewan, this 21ST of February, 2019.

Clifford B. Wheatley
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 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.