IN THE MATTER OF AN ADJUDICATION

PUSUANT TO SECTION 2-75 AND 4-6 OF

THE SASKATCHEWAN EMPLOYMENT ACT

Appellants:

Centennial Installation & Service Corp.;

Michael Shaw, being a director of Centennial Installation & Service Corp.;

Steven Simpson, being a director of Centennial Installation & Service Corp.;

Arnie Shaw, being a director of Centennial Installation & Service Corp.;

Respondents:

Kyle Peters (Employee witness for the Director) and the Director of Employment Standards

Date of Hearing: October 11, 2019

Location of Hearing: Sturdy Stone Building; 122 Third Ave. N.; Saskatoon; Sask. (Room 10.1)

Date of Decision: October 25, 2019

[1] Andrew Langgard appeared as the Director's delegate. He represented the Director only, and not the employee, Kyle Peters. Mr. Langgard confirmed that the appeal was commenced within the time required by *The Saskatchewan Employment Act* (the 'Act') and that the appropriate deposit accompanied the appeal. Exhibit EE-1 is a date stamped letter of appeal from the employer, indicating the appeal was received Aug. 22, 2019. Exhibit EE-2 is a photocopy of a cheque from the employer to the Minister of Finance in the required amount of $500.00, and a receipt for that cheque, dated August 22, 2019.

[2] Michael Shaw ('Michael') appeared for all the appellants. He agreed that the corporate appellant is an existing Saskatchewan corporation, and that each of the named individual appellants are and were directors of the corporation at all relevant times. Exhibit EE-2 is a printout from Information Services Corporation relating to 'Centennial Installation & Service Corp. ('Centennial')', showing the same.

[3] This is an unusual case, in that the employee and the employer seem to agree on all the facts. Kyle Peters ('Kyle') was a plumber who worked for Centennial. Kyle started working for Centennial in the summer of 2007 as a driver, and worked his way up to become a journeyman plumber. He liked his job, and was good at it. Nevertheless, he decided to resign from his employment, and accepted a job with another employer that was based a little closer to his home.

[4] Michael disagrees that any amount is owing to Kyle, as Michael maintains that Kyle resigned as of the end of the workday on which the resignation was given. However, Michael agreed that if pay in lieu of notice is owed by the employer, then the amount indicated in the Wage Assessment, which is $1,735.02, is the correct amount.

[5] Kyle wrote a short letter of resignation, giving his employer two weeks notice. The letter is Exhibit EE-4. It was dated June 13, 2019. Kyle intended to work the two week notice period, and had arranged to start at his new job immediately after this notice period.

[6] At just before 8:00 AM on June 13, Kyle gave the resignation letter to his employer – specifically to his supervisor, Steven Simpson ('Steven'). Stephen was either in a meeting or about to begin a meeting as Kyle handed him the letter. Steven told Kyle they would talk about his resignation later. Kyle worked that day without hearing anything from Stephen. The next morning, at approximately 8:15 AM, Steven told Kyle he would like Kyle to stop by when he had a moment, so they could discuss Kyle's resignation. At approximately 10:00 AM on June 14, Kyle was picking up some parts for a job, and so he stopped to talk to Steven's about the resignation.

[7] At that discussion, Steven let Kyle know that they (Centennial) would not insist upon Kyle giving two weeks notice. This is where a misunderstanding occurred. Steven indicated to Kyle that it would be easier for the employer to replace Kyle if Kyle resigned right away. So, at Steven's suggestion, Kyle changed the letter of resignation. That letter originally said: "I would like to inform you of my intention to resign from employment at Centennial Installation &

Service Corp. effective two weeks from today (June 13, 2019)." Kyle put a line through the words "two weeks from today (June 13, 2019) and wrote in "end of day June 14, 2019", so that the letter now said "I would like to inform you of my intention to resign from employment at Centennial Installation & Service Corp. effective ~~two weeks from today (June 13, 2019)~~ end of day June 14, 2019".

[8] The only dispute in this matter related to what Kyle called "the unspoken assumption". Kyle believed that Steven was telling him that if he (Kyle) resigned effective the end of June 14, Centennial would pay out the two week notice period. Although Steven didn't attend the hearing or give evidence, Michael says, and I accept, that Steven meant that if Kyle resigned effective the end of June 14, Centennial would accept the resignation, but would not pay out the two week notice period. I note that it was Steven, not Kyle who suggested the change to the effective date of the resignation.

[9] Kyle mentioned to another worker, Aaron Kraus, that he would be done at the end of the day, as Centennial was going to pay out the notice period. This employee told Kyle he had better check with Steven, to ensure he was being paid out.

[10] Kyle did go back to Steven to clarify the agreement. Steven told Kyle that paying the notice period was 'a courtesy thing' that employers sometimes did. He said that Centennial was not required to pay out the notice period, and would not pay it out. Kyle said that if he wasn't being paid for the notice period, he would like to work the notice period. Steven told Kyle that he had already accepted Kyle's resignation so Kyle would not be allowed to work the notice period. This second conversation between Kyle and Steven occurred within an hour of the previous conversation where the date of resignation was changed.

[11] At this point, Kyle believed he was not entitled to be paid the notice period, and was not permitted to work the notice period. He was given time to clean out his van, remove his tools and so forth. Kyle wanted to, and did, leave his employer on good terms.

[12] In contract law, a mutual mistake occurs when the parties work at cross purposes. Where this mistake is essential to the agreement, the law may find the mistake nullifies the agreement. The law will sometimes apply an objective test, so that if a reasonable person would have believed the facts to be a certain way, the law will take that as the parties' agreement. See for example John McCamus, *The Law of Contracts (Second Edition)*, especially pages 528-529.

[13] In this case Kyle believed Steven to be saying "if you resign at the end of today, we will pay you for the rest of the notice period", and Steven believed Kyle to be saying "If you allow me to resign effective today, I will do so without being paid for the notice period".

[14] A classic case illustrating this principle is *Raffles v Wichelhaus* (1864), 159 ER 375. In that case one party had agreed to sell and the other party had agreed to buy a certain amount of cotton, to arrive from Bombay on a ship called *Peerless*. In this type of contract the particular

ship transporting the product is a critical term. Ironically, there were two ships named *Peerless* sailing from Bombay. One was set to sail in October, and the other in December. One of the parties had one ship in mind, while the other had the other in mind. It was as if the seller agreed to sell cotton being shipped by one ship while the buyer agree to buy cotton shipped on another ship. There was no meeting of the minds. In addition, because neither interpretation was objectively more reasonable than the other, the court held there was no contract.

[15] Clearly whether Kyle would be paid for the notice period is an essential term of the agreement to resign. It seems to me that since Kyle and Steven did not agree upon this essential term, they were under a mutual mistake and the agreement to change the resignation date was void. Neither Kyle's interpretation nor Steven's interpretation was objectively more reasonable than the other's. Therefore, the agreement to modify the resignation date is not valid, and Kyle should be paid the notice period.

[16] If I am wrong in applying mutual mistake in this way, I would be required to choose which interpretation is objectively more reasonable. In this event, I would conclude that a reasonable person observing the discussion between Kyle and Steven would make the same assumption that Kyle did, that is that the employer was offering to pay out the notice period in exchange for Kyle agreeing to resign at the end of the day. Kyle had found a new job starting after the two week notice period, and he had given written notice indicating that he was resigning and would work the notice period. Steven suggested the change in the effective date, and it would be reasonable for someone in Kyle's position to conclude that he would receive some benefit (such as being paid) for agreeing to the suggested change, which after all would otherwise deprive Kyle of two week's pay.

[17] Finally, if I am also wrong in this conclusion, I find that Kyle's agreement to change the effective date of his resignation was conditional upon being paid. Kyle's original letter of resignation (that is before the alteration) was not conditional. It clearly provided Centennial with two weeks notice. Kyle's position was effectively "I agree to change my resignation date to the end of today if you agree to pay me the notice period". Since this condition was not fulfilled, the change to the effective date was not valid. Therefore Kyle should have been permitted to work the notice period.

[18] Steven's opinion that he had already accepted Kyle's decision to resign effective June 14 would be correct only if Kyle freely agreed to the earlier resignation date. That is not what occurred here. It was Steven who suggested the earlier date, and Kyle and Steven simply never agreed to the essential term of whether or not Kyle would be paid for the notice period. Therefore as I stated, this makes the modification agreement void, or conditional and the result is the same in either event.

[19] My conclusion is consistent with case law which holds that "A resignation must be clear and unequivocal" [*Kieran v. Ingram Micro Inc.,* 2004 CanLii 4852 (Ont. C.A.) at paragraph 27]. Also: "Whether words or action equate to resignation must be determined contextually".

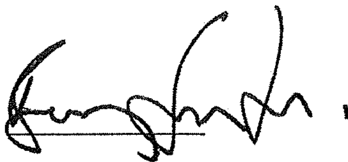
[*Kieran v. Ingram Micro Inc.*, 2004 CanLii 4852 (Ont. C.A.) at paragraph 30]. See also: *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76 (CanLii) especially paragraphs 36 and 37 holding that "A finding of resignation requires the application of both a subjective and objective test: whether the employee intended to resign and whether the employee's words and acts, objectively viewed support a finding that she resigned".

[20] As I stated, in this case Kyle did not intend to resign unless he was paid for the notice period. His actions were entirely consistent with this intention. If he was not paid for the notice period, he ought to have been permitted to work the notice period. Steven's refusal to allow him to (by insisting that the modification to the resignation letter was valid) is a dismissal.

Conclusion

[21] Wage Assessment 1-003148 is confirmed in the full amount of $1,735.02.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 25th day of October, 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.

(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III 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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THE SASKATCHEWAN EMPLOYMENT ACT

Between

Centennial Installation & Service Corp.; Michael Shaw, being a director of Centennial Installation & Service Corp.; Steven Simpson, being a director of Centennial Installation & Service Corp.; and Arnie Shaw, being a director of Centennial Installation & Service Corp. (Appellants); and Kyle Peters (Employee witness for the Director) and the Director of Employment Standards (Respondents)

Exhibit List

EE-1 Copy of a letter of appeal from Michael Shaw to the Director of Employment Standards

EE-2 Centennial Installation & Service Corp. Profile Report from ISC

EE-3 Copy of Centennial cheque # 032085 and Government of Saskatchewan receipt

EE-4 Letter from 'Martensville Plumbing & Heating'

The Appellants did not file any exhibits