

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

APPELLANT: **DAVEY TREE EXPERT CO. OF CANADA,
LIMITED, operating as Davey Tree Services**

RESPONDENTS: **EVAN BASKERVILLE and the DIRECTOR
OF EMPLOYMENT STANDARDS**

DATE OF HEARING: **March 1, 2019**

PLACE OF HEARING: **Boardroom 9.3, Sturdy Stone Building
122 – 3rd Avenue North
Saskatoon, Saskatchewan**

LRB File No. 249-18, Wage Assessment No. 1-000208



I. INTRODUCTION

Wage Assessment No. 1-000208 directed Davey Tree Expert Co. of Canada, Limited, operating as Davey Tree Services (Davey Tree or the Company) to pay \$4,334.54 to Evan Baskerville or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act). Davey Tree appealed the Wage Assessment.

On March 1, 2019, the following individuals attended the hearing:

- Chris Johnson, the Saskatchewan Manager for Davey Tree;
- Mark Pinder, a Supervisor at Davey Tree;
- Devon LaRochelle, a Supervisor at Davey Tree;
- Evan Baskerville, former Dave Tree employee and Foreman (appeared by telephone); and
- Shelley Stretch, Employment Standards Officer.

II. THE DISPUTE

On November 9, 2018, a Delegate on behalf of the Director of Employment Standards issued Wage Assessment 1-000208 against Davey Tree. On November 26, 2018, Employment Standards received a letter dated November 22, 2018 from Brian Rosentreter, Vice President, Business Development Vegetation Management for Davey Tree, alleging job abandonment on the part of Evan Baskerville (the Notice of Appeal).

If Evan Baskerville quit his job when he abandoned the work site and returned to Regina

in mid-April of 2018, then he is not entitled to the pay instead of notice and associated vacation pay claimed in the Wage Assessment. On the other hand, if Evan Baskerville was terminated without notice when he was not scheduled to work after leaving the job site and returning to Regina, then he is entitled to the pay instead of notice and vacation pay claimed in the Wage Assessment.

III. PRELIMINARY MATTERS/OBJECTIONS

In advance of the hearing, I granted Evan Baskerville's request to appear at the hearing by telephone.

At the beginning of the hearing, I explained the process to the parties and there were no objections to proceeding with the hearing.

Before the parties began leading evidence, I made an order for exclusion of witnesses.

IV. THE FACTS

The parties agreed that Evan started working for Davey Tree on May 5, 2014 and that his last day of work was April 13, 2018. The parties also agreed the amount of the Wage Assessment is correct should I conclude that Evan did not quit or abandon his job.

The parties tendered evidence by way of sworn testimony and documents. Chris Johnson, Devon LaRochelle, and Mark Pinder testified on behalf of the Appellant. Evan Baskerville testified on behalf of the Respondents.

The following exhibits were entered into evidence:

Employer Exhibits (Appellant)

ER1 – Excerpt from Davey Tree Personnel Handbook entitled "Leaves of Absence" (1 page);

ER2 – Three Employee Violation Notices regarding Evan Baskerville (3 pages);

ER3 – Text exchange between Evan Baskerville and Elizabeth Potts, Payroll and Benefits Coordinator for Davey Tree (1 page);

ER4 – Itemized Long Distance Calls list (3 pages);

ER5 – Text exchanges between Evan Baskerville and Devon LaRochelle (11 pages); and

ER6 – Three written statements by Mark Pinder, Devon LaRochelle, and Chris Johnson dated November 22, 2018 regarding "Job Abandonment" (5 pages).

Employee Exhibits (Respondents)

EE1 – Employment Standards Formal Complaint Form (3 pages).

V. ARGUMENT

The parties chose to file written arguments. I received written submissions from both sides on March 8, 2019.

Davey Tree's argument is summarized as follows:

- Evan walked off the job. He made the conscious decision to walk off a job site.
- Evan was upset on Friday, April 13 due to a shortage on his weekly pay.
- Evan was responsible for accurately filling out and submitting his time sheets.
- Evan said he was trying to contact Chris all weekend but phone records show only one text message.
- Evan got a crew member to drive him home to Regina on Saturday, April 14. He did not notify his supervisor that he was leaving. He did not reach out to his supervisors until Friday, April 20, 2018.
- Chris is not responsible for begging an employee who has walked off the job to return to work. If he or another supervisor were to have followed Evan to beg him to return to work, his mind would not have been in a good place. Chris is responsible for the safety of his employees and can't afford to have people working next to high energized power lines when they are not 100%.
- Due to the circumstances and past poor job performance, Chris made the decision to not chase after Evan to find out why he walked off the job. Evan made the decision to walk off the job and was fully aware of the consequences.

Evan Baskerville and the Director of Employment Standards' argument is summarized as follows:

- On Friday, April 13, 2018, Evan contacted payroll about a shortage on his pay cheque. Janelle from payroll told him to contact Chris because it was Chris who would need to advise her about the specifics of the discrepancy. Evan forwarded the message to Chris who testified that he did not respond to Evan because he believed it had already been taken care of.
- Evan testified that he could not afford to continue working away from home because of the shortage on his pay cheque. He advised Devon in a text message that he was thinking of going home because he would not be able to eat for "how many days it takes to get those 2 sites done." On April 15th, Evan said he was ready to "head back home and call the Labour Board."
- Chris admitted that Mark and Devon told him about Evan missing work the entire weekend due to his frustration about being shorted on his cheque and that he was waiting to hear from Chris.
- Chris testified that Evan did not try to call him and that he did not try to contact Evan. His instructions to Mark were to wait a few days and not reach out to Evan. Chris told Mark that it was best if Evan quit and they moved forward without him. There were no measures to fix the problem.

- No attempts were made to contact Evan again until April 20th when Evan texted Devon to let him know he had still not been paid for the shortage. On Saturday, April 21st, Devon told Evan to call Chris.
- Davey Tree provided an excerpt from its Handbook addressing employee absence: "Employees who are absent for three days, without permission and without notice, will be considered to have voluntarily terminated their employment." Chris testified that he has no paper signed by Evan indicating he had read a copy of the manual and Evan testified that he never saw it.
- There were no text messages indicating that Evan report for work or he would be out of a job. All three witnesses from Davey Tree said they did not tell Evan he would be out of a job if he did not respond to them. Instead it appears they took him off the schedule. Given his length of service, he deserved better than being ignored.
- Without warning and without being scheduled to work, Evan was terminated from his position.
- Employment law principles establish that a valid resignation must have a subjective as well as an objective component. The subjective component requires an unequivocal manifestation of the employee's intention to quit and the objective component requires conduct on the employee's part that would lead a reasonable person to believe the employee had quit.
- Text messages show that Evan was still inquiring about work as late as Tuesday, April 24. This clearly demonstrates he did not quit his job, nor did he intend to quit his job.
- Evan's reason for leaving the jobsite was reasonable. He planned to return to work when his pay cheque shortage was figured out.
- Davey Tree admitted they intentionally stopped trying to contact Evan. They did not take reasonable steps to confirm that he did not intend to return to work. They did not warn him that if he failed to return to work, he would no longer have a job.
- Evan was unjustly terminated without notice or pay instead of notice. Section 2-60 and 2-61(1) of the Act apply. Evan is entitled to four weeks' written notice or pay instead of notice.

VI. ANALYSIS AND DECISION

The issue to be determined in this case is whether Evan quit his job in mid-April of 2018 when he left a jobsite before the work was finished, returned to Regina without permission, and then subsequently failed to report to work. If Evan quit, he is not entitled to pay instead of notice and associated vacation pay.

According to the uncontroverted evidence, Evan was the foreman on a tree/vegetation trimming crew and was working on multiple jobsites away from Regina during the relevant time frame. The crew was often on the road, staying in hotels paid by the

Company. While on the road, they received a non-taxable meal allowance of \$50 per day. The permit covering the various jobs making up this particular work package ran from April 4 to April 20, 2018. On Friday, April 13, Evan realized there was a problem with his weekly paycheck. He had been shorted 11.75 hours. He followed up with payroll and forwarded the exchange on to Chris. When he did not hear back from Chris, he became frustrated and decided he would not work until "things were figured out." Although it was suggested that Evan needed the money for meals and that this was the reason he left before finishing the job, during his testimony, Evan did not say this was the reason he left. Evan admitted he was mad about not getting answers. He did not report for work on Saturday and the Company truck's GPS showed that he had returned to Regina that evening. He had not asked permission to leave work before the projects were completed and/or to go home to Regina in the Company truck. Evan knew he could get into trouble for walking off the job, but he did it anyway because he was angry with Chris.

The evidence establishes this was not the first discrepancy with Evan's paycheck. Evan recalled other instances where he had been "shorted" but admitted these mistakes were rectified in each case after the fact. Chris explained that payday is every Friday. Employees submit their hours every Friday and are paid for those hours on the following Friday. The discrepancy in this case resulted from Evan submitting his hours for the week ending April 7 on Friday April 6, and then submitting for additional hours worked on Saturday April 7 by email on Sunday April 8. Despite having submitted the additional hours by email, Evan's April 13th paycheck did not include the hours he worked on Saturday, April 7.

Chris explained that Davey Tree could not cut cheques out of the Martensville office. In the case of a major mistake like where two of Evan's paychecks were mailed out at Christmas of 2017 instead of being direct deposited, Chris paid Evan out-of-pocket. Evan ended up signing over one of the cheques to Chris, but he was not reimbursed for all of it. Chris did not see the missed 11.75 hours as emergent. Chris thought Janelle had handled the situation and that Evan would receive payment for the missed hours on his following paycheck. Chris admitted he did not respond to Evan's text or follow up with him.

Devon tried unsuccessfully to reach Evan on April 14 and 15. The Company truck's GPS showed that Evan had gone back to Regina on the evening of April 14. After Evan failed to show up for work on the 14th and 15th, Chris told Mark not to reach out to Evan any further. By this point, Chris felt it was better if Evan quit and Davey Tree moved on without him. When five days went by with no word from Evan, Chris assumed he had walked off the job and formally issued his separation on April 23, 2018. Chris followed Davey Tree's policy that says employees who are absent for three days without permission and without notice are considered to have voluntarily terminated their employment.

There is no evidence to suggest Evan received and/or reviewed a copy of the Davey Tree Personnel Handbook (ER1). Chris was not employed at Davey Tree when Evan was hired and could not say whether Evan had ever received a copy of the policy, although he assumed Evan knew about it. Evan said he did not receive it and was not aware of Davey Tree's policy regarding unauthorized leaves of absence.

Based on the evidence, Davey Tree would have been well within its rights to discipline Evan for his words and actions on April 14 and 15. For example, on April 14th, Evan failed to show up for work and to respond to Devon's texts asking why he and his crew were not at work. The GPS on the Company truck showed that Evan and his crew were driving around Saskatoon. On April 15th, Evan replied to Devon's text in the morning saying, "you know why we didn't" show up for work the previous day but said they would report for work that day and that they were "leaving right away."

When they did not show up for work for the second day in a row, Devon again texted Evan. Evan asked if there was any word on their pay yet. When Devon said he understood Janelle had corrected it and that it would be on the next paycheck, Evan responded with expletive-filled texts including: "Still not waiting till next week for this sh*t. Sick of this, we have a panty a** f***ing manager who can't bother to respond to anyone's concern about their pay literally ignores them doesn't answer text or call nothing." Despite Evan's actions and words, Davey Tree chose not to discipline Evan, formally or informally. Moreover, Davey Tree failed to warn Evan that if he did not respond to texts and/or show up for work, he would be fired.

When Evan asked Devon on Friday, April 20th what was happening the following Monday or whether he was "off for another week?", Devon told him he was supposed to call Chris on Monday. "Monday" was April 23rd which is the day that Chris filled out Evan's separation. Chris had already directed Evan's supervisors to stop contacting him by this point. Evan tried to phone Chris but could not reach him.

Chris admitted under cross-examination that he never warned Evan that his job was in jeopardy if he failed to respond to his supervisor's texts or if he failed to report to work. Chris did not think he should have to chase his employees. He also admitted that Evan had not done this type of thing before. Evan had showed up to work late but had never left a jobsite without permission. Devon admitted it was unusual for Evan to leave a jobsite and that he did not tell Evan that he would lose his job if he did not report to work. Mark also admitted that he failed to warn Evan that he could lose his job.

It is safe to say that Evan reacted poorly to the hours missed on his April 13th paycheck. The evidence shows these types of mistakes were always rectified by Davey Tree. I do not believe that Evan ran out of money to pay for meals. The totality of the evidence suggests he lost his temper when Chris did not follow up with him. I believe Chris when he said that he thought Janelle had dealt with the payroll issue and that he did not see a reason to call or text Evan back. When Evan did not hear back from Chris, the evidence

suggests Evan lost his temper and wanted Chris to be as frustrated as he was. His response was to ignore his supervisor and have a crew member drive him back to Regina. This was not a wise or reasonable reaction under the circumstances.

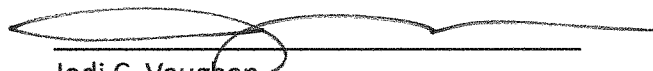
Evan's actions in abandoning the jobsite, taking an unauthorized trip in the Company vehicle back to Regina, ignoring texts from his supervisor, and then using highly inappropriate language with his supervisor about his boss, were wrong and worthy of discipline. Given that he was a four-year employee without a history of this type of behaviour, however, Davey Tree ought to have reached out to him after a reasonable cooling off period. At that point, Davey Tree could have disciplined him if they so chose, and warned him that if it happened again, he would lose his job. Treating Evan as if he had abandoned his job, without confirming it with him, was not reasonable or warranted under the circumstances.

Based on the evidence, I do not find that Evan quit or abandoned his job. I find that Davey Tree terminated Evan's employment without notice.

VII. CONCLUSION

The appeal is dismissed and the Wage Assessment is upheld. The Appellant is ordered to pay the sum of \$4,334.54 to Evan Baskerville.

DATED in Regina, Saskatchewan, this 17 day of April, 2019.


Jodi C. Vaughan
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

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.