

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



Christopher K. Burgess
 COMPLAINANT/EMPLOYEE

-AND-

The Thirsty Scholar (101247099 Saskatchewan Ltd.)
 APPELLANT/EMPLOYER

DATE OF HEARING: March 7, 2019

PLACE OF HEARING: Saskatoon, SK

LRB FILE: No. 252-18
 WAGE ASSESSMENT: No. 1-000155

INTRODUCTION

This matter was heard before me on March 7, 2019 in Saskatoon, 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.

Shelley Stretch, Employment Standards Officer represented the Department of Labour Standards.

Complainant/Employee, Christopher Burgess attended and gave evidence on his behalf.

The Appellant/Employer, Thirsty Scholar was represented by Chad Zipchian, and gave evidence on his behalf as a Director and on behalf of 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 \$1,606.29.

I. PRELIMINARY MATTERS

There were no preliminary matters raised by the parties.

II. AGREED FACTS

The parties agreed as follows:

1. Mr. Burgess was an employee of the Corporation from May 1, 2015 to May 10, 2018.
2. If the employee was not dismissed for just cause the amount owing pursuant to Section 2-60 of The Act would be \$1,606.29

III. DISPUTE

The sole issue to be decided in this matter is whether or not the employee was dismissed for just cause.

IV. EVIDENCE OF THE EMPLOYER

Chad Zipchian, Director of the Corporation was sworn and gave the following evidence:

The Thirsty Scholar was a pub on 8th Street in Saskatoon that was owned by his Corporation at the time of the firing of the employee.

Page 4 of 16

The employce was hired as a Manager and after 6 months he was promoted to Assistant General Manager.

Mr. Zipchian got involved in the accounting of the Corporation some 3 weeks before the employee, Mr. Burgess, was let go.

Mr. Zipchian had become aware of a downturn in revenue resulting from Skip The Dishes. As a result of his audit he became aware that the Skip The Dishes system was being turned off by the employee, Mr. Burgess, multiple times during Mr. Burgess' time with the Corporation. The reason for the turning off of the system was unknown by Mr. Zipchian.

After Mr. Zipchian concluded his investigation he was a of a view that Mr. Burgess was turning off the system in order to avoid extra work regarding orders or delivery of Skip The Dishes.

Turning off this system by the employee resulted in large financial losses to the Corporation.

Page 5 of 16

Under cross examination Mr. Zipchian stated that he was of a view that the policy regarding the computer and the Skip The Dishes system was that it was to be left on all of the time.

Mr. Zipchian indicated that there was no written policy regarding the Skip The Dishes system.

Mr. Zipchian did a further audit using Skip The Dishes information and discovered that the system had been shut off by Mr. Burgess on many occasions without explanation by Mr. Burgess to the corporation.

The corporation presented Mark Hauk as a witness and he gave sworn evidence as follows:

That he was the General Manager of The Thirsty Scholar and Mr. Burgess reported to him during the time that Mr. Burgess worked for the employer.

Page **6** of **16**

Over the period of time that Mr. Burgess worked with the corporation there were some discipline problems and Mr. Hauk would give verbal reprimands either by telephone, using text communication or speaking to him face to face.

There were no written discipline warnings given to Mr. Burgess by the corporation.

Mr. Hauk eventually fired Mr. Burgess for incompetence and dereliction of duty.

Mr. Hauk gave evidence regarding four occasions where he reprimanded Mr. Burgess that being:

1. April 18 – when Mr. Hauk went on vacation he gave a list of duties for Mr. Burgess to perform. When Mr. Hauk returned from vacation, these directions had not been followed and the work had not been completed. During this period of time the employee had a hernia problem that Mr. Hauk was aware of.

Page 7 of 16

2. June of 2017 – Mr. Burgess was to deal with concerts and/or bands playing at the pub and failed to satisfactorily perform these duties.
3. December 2017 – incentives to regular customers were to be put into a program by Mr. Burgess and he failed to complete this task.
4. April 2018 – the liquor inspector attended and advised Mr. Burgess that a liquor license had to be moved and Mr. Burgess did not move the same, although he did leave a notation for Mr. Hauk in the Manager Book.

Mr. Hauk had a conversation with Mr. Burgess regarding labor and to watch costs with respect to the same when the business was slow from time to time. Employees were to be sent home and Mr. Burgess was not doing this satisfactorily in the eyes of Mr. Hauk.

Mr. Hauk also had conversations with Mr. Burgess of two occasions regarding leaving the office safes open. The doors to these two safes were left open on two occasions. On both

Page 8 of 16

occasions the safes contained a large quantity of money.

These conversations were by way of text message and verbal discussions.

Mr. Hauk, in his discussions with the employee, was of a view that these were warnings and the consequences flowing therefrom would be implied to Mr. Burgess, as the employer was unsatisfied with Mr. Burgess' performance.

Mr. Burgess had not been specifically warned about the results of failing to perform better and no written warnings were given by Mr. Hauk or the Corporation to Mr. Burgess.

Mr. Hauk was of a view that when the lost revenue relating to the Skip The Dishes system was discovered that Mr. Burgess should be let go.

Under cross examination Mr. Hauk confirmed that he did not advise the employee of any consequences relating to his lack of performance, nor was the employee ever advised that his job

Page 9 of 16

was in jeopardy resulting from any of the contacts by Mr., Hauk relating to the performance of Mr. Burgess.

When Mr. Hauk decided to terminate the employee he was not aware of the amount of loss relating to the Skip The Dishes issue.

The amount of the loss was confirmed after the employee was let go when Mr. Zipchian did the audit from the Skip The Dishes information.

Mr. Hauk confirmed that there was no one time issue relating to the dismissal of the employee, but that it was cumulative and/or progressive discipline was the reason he was let go.

V. EVIDENCE OF THE EMPLOYEE

Mr. Burgess was sworn and gave the following evidence:

He was hired as a bartender in May of 2015 and was promoted to Manager in October 2015.

Page **10** of **16**

As Manager it was his job to oversee the employees, handle any complaints and order liquor for the bar.

Mr. Burgess reported to Mark Hauk.

Mr. Burgess did not receive any training with the exception of when he was promoted to Manager a senior staff member showed him how to deal with the VLT's.

There was no written policy by the Corporation relating to any aspect of his job and he did not ever receive any specific management instructions.

Relating to the Skip The Dishes issue, he was never told not turn the system off and did so from time to time when it was too busy and they could not complete the food orders and/or at the request of the kitchen, and/or when boxes or bags required to deliver the food were not available.

Page 11 of 16

There was no written policy relating to turning off or on the Skip The Dishes.

Mr. Burgess did not recall ever leaving the office safes open and was never warned about the consequences of leaving the safes open and at no time was he advised that his job would be in jeopardy.

Regarding the liquor inspector issue with the permit, Mr. Burgess did not move the permit because he did not know where the management wished to place the permit. Therefore left a note in the Managers Book for Mr. Hauk.

Relating to the directions of Mr. Hauk when he went on holidays, Mr. Burgess was of a view that he had completed the bulk of the duties and his failure to complete any of the duties was never discussed with him.

The issue of staff costs was discussed with Mr. Hauk, however after the discussion, he changed his method of letting staff go and thought that he was complying with the directions of the Corporation.

Page 12 of 16

In any discussions with Mr. Hauk he was never told of any consequences nor that his job would be in jeopardy if he did not improve his job performance.

He did not receive any written warnings and was never told that his job may be at risk.

Under cross examination Mr. Burgess stated that he felt that he had performed the duties of his job to the best of his ability and had never been advised by way of written or oral warning that he was not doing what was expected, nor was he ever advised that there was a possibility that he could get fired as a consequence.

V. ANALYSIS/DECISION

The employer argues that the employee was incompetent or disregarded his duties as instructed and his dealing with the Skip The Dishes system were such that it caused large losses to the employer. The employer feels that as a result of these shortcomings, the employee knew, or ought to have known, that he was not doing his job and his job would be at risk

Page **13** of **16**

accordingly. As such, the employer feels they had just cause in firing the employce.

The employee argues that there was no just cause in his dismissal, as any shortcomings of the employee were only discussed verbally and at no time was he ever given any warnings about his job being in jeopardy. Also, nothing in writing was every given to him, nor were there any written policies in place. As such progressive discipline is not made out.

The employer is not alleging that just cause was precipitated by a onetime incident but it was a result of progressive discipline.

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 on the circumstances of each case.

The onus of proof on the balance of probabilities is on the employer to show progressive discipline for just cause of dismissal.

Page 14 of 16

The employers evidence that Mr. Burgess was "talked to" by way of telephone, text and some face to face discussions does not meet the requirements of just cause within the meaning of The Act.

At no time did the employee receive any written warnings, at no time was the employee advised that his job was in jeopardy, nor was the employee advised, after being talked to by the employer, that he was not meeting the standards of required by the employer


As the consequences of the continued behavior of Mr. Burgess were not communicated to him, I find that he was dismissed without cause. He is entitled to 4 weeks in lieu of notice.

The parties agreed that this was the amount set out in the Wage Assessment of \$1,606.29.

VI. CONCLUSION

The appeal is dismissed and the Wage Assessment stands.

Dated at Moose Jaw, in the Province of Saskatchewan, this 27th of
March, 2019.



Clifford B. Wheatley
time Adjudicator

Page 16 of 16

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.