

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



Binta Jallow Diallo

COMPLAINANT/EMPLOYEE

-AND-

Lancer Hotel Inc., Rocke Riggs and Priscilla Rioferio

APPELLANT/EMPLOYER

DATE OF HEARING: February 4, 2019

PLACE OF HEARING: Moose Jaw, SK

INTRODUCTION

This matter was heard before me on February 4, 2019 in Moose Jaw, Saskatchewan.

Robin Brockett, Employment Standards Officer represented the Department of Labour Standards.

Ryan Nagel, Barrister and Solicitor represented the employee/complainant, Binta Jallow Diallo.

Mr. Nagel appeared by telephone. Sworn testimony was heard from of the complainant/employee Binta Jallow Diallo.

Sworn testimony was heard from Cynthia Care, who appeared by telephone and who was called as a witness by the employee.

Sworn testimony was given on behalf of the employer, Lancer Hotel Inc. and the Directors Priscilla Rioferio and Rocke Riggs by Rocke Riggs.

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 \$12,762.61.

I. PRELIMINARY MATTERS

There were no preliminary matters raised by the parties.

II. THE DISPUTE

The issue between the parties is:

Was the amount set out in the Wage Assessment for wages, overtime pay, statutory pay and vacation pay due and owing to the employee or not.

III. FACTS

The parties agreed as follows:

1. Binta Jallow Diallo was an employee of Lancer Hotel Inc. from October 14, 2017 to February 27, 2018.
2. The employee terminated her employment with the employer on February 27, 2018 of her own volition.

3. The employer agrees that holiday pay for the monies earned during the period of employment was not paid to the employee by the employer.

IV. EVIDENCE OF THE EMPLOYER

Rocky Riggs gave sworn evidence at the hearing as follows:

He was the employer's representative when he hired the employee.

The terms of employment was that the employee was to receive a monthly salary of \$1836.00 less \$336.00 to be paid by the employee to the employer for room and board.

The employee commenced employment with the employer on October 14, 2017.

The employer was aware that the employee was in Canada from Spain and had a Visa from the Canadian Government authorizing her to be employed for the time frame covered by the employment.

The employer states that the employee was to work 5 days a week with Thursdays and Fridays off. The employee was to work on her work days from 7am to 9am, 11am to 2pm then again from 5pm to 7pm, for a work day of 7 hours per day.

The employer operates a hotel/restaurant and bar in the community of Lancer, SK and the employee had accommodation in the hotel building that was provided by the employer.

The employee was hired as a cook, however, was also required to do some waitressing, clean up as well as some food preparation in the hotel, restaurant and bar.

The employer disagrees with the times set out in the employment standards audit, Employee Exhibit "7", except for the month of February 2018 when the employer agreed that the employee worked a considerable amount of overtime. However, the employer was unaware as to how much overtime.

The employer stated that he did not have any records relating to the employee as, after the employee had left her employment, the records went missing, possibly during a break-in at the employers office in the Lancer Hotel.

The employer entered a calendar with the employee's work times entered on it, Employer Exhibit "1".

This calendar, however, in cross examination became problematic in that, the employers calendar shows the employee working on days that she was not working (the employee produced evidence that she was not in Lancer), and the overtime hours attributed to the employee, in particular, in February are incorrect.

The employer agreed that the calendar was problematic for the same reasons stated above.

The employer did not re-create any employee records, in particular paystubs, and was unable to verify that he had made payments to the employee with the terms of her employment.

Under cross examination by Mr. Nagel and Ms. Brockett the employer admitted that the employee may have worked some overtime that he did not record on his calendar relating to days were there were special functions and when the bar was busy.

The employer acknowledged that he did not give any paystubs to the employee and that he did not have any records of time sheets or time worked by the employee other than Exhibit "ER1".

The employer stated that the employee was only paid straight time for the overtime she was paid for on her last cheque, not time and one-half as require by the legislation.

V. EVIDENCE OF THE EMPLOYEE

The employee admits she received three payments from the employer in the amounts of \$1,000.00, \$800.00 and \$1,200.00.

The employee acknowledged that she received a further \$600.00 cheque, Employee Exhibit "3", which was deposited to her account.

The employee states that she cashed this cheque and gave this \$600.00 back to the employer.

On her last cheque that she received from the employer in the amount of \$1,200.00, Employee Exhibit "6", there was a \$200.00 overtime payment.

The employee never received any holiday pay.

The employee kept a calendar with her hours worked by her written on it. This calendar was what was used to prepare the audit sheet by Ms. Brockett.

The employee stated that she did not ask for further payments from the employer, as her main concern, was compiling the number of hours required for her to obtain a permanent residency with the Government of Canada. She was more concerned regarding the residency status than the overtime pay.

The employee had asked the employer for paystubs for the purposes of satisfying the Government of Canada regulations; however, she never received any pay documents from the employer.

Once the employee reached the required number of hours to satisfy to the Government of Canada and her Immigration Status, she left the employ of the employer.

Under cross examination the employee acknowledged that she received a T4 and Record of Employment from the employer but did not receive any holiday pay.

The employee admitted that she received the \$600.00 cheque but reiterated that, she returned the money by way of cash to the employer, after it was deposited to her account.

WITNESS CYNTHIA CARE:

The employee called Cynthia Care as a witness. Ms. Care was sworn in and gave the following evidence by telephone:

Ms. Care was also a part time employee of Lander Hotel Inc. during some of the time that Ms. Binta Diallo was employed.

Ms. Care confirmed that the employer kept the hours in a notebook at the hotel; however, Ms. Care's experience with the time keeping was that there was also a problem with the hours worked as well as the pay received. That is, she was always being under paid and that the deductions being deducted from the payroll were not accurate.

Ms. Care did not receive any paystubs from the employer during her time with them.

Sometimes she would be paid cash, other times she would be paid by cheque. Several times she would receive a cheque, endorse it and give it back, being told that she would be paid later.

Under cross examination Ms. Care stated that she had difficulties getting paid on many occasions.

Ms. Care confirmed that Ms. Binta Diallo only had one day a week off and not two.

Ms. Care stated that Ms. Binta Diallo's duties at the hotel were cleaning all areas, serving in all areas including the kitchen, bar and hotel as well as cooking on occasion. The type of work that Ms. Binta Diallo was doing was expected to be done by all employees at the hotel.

V. ANALYSIS/DECISION

The employer admitted that they had not produced the employment records required by The Act in Section 2-38.

The employer claimed that the records had been stolen; however, they did not re-create the records for the purposes of the hearing or the Labour Standards investigation.

The employer confirmed that holiday pay was not paid and that they did not give the employees paystubs as required by the legislation.

Regarding the hours worked by the employee, the employer's calendar with the employee's hours thereon was problematic in that the person who completed the calendar was not called to give evidence with regard to the calendar.

The employer confirmed that the overtime calculations on his calendar were incorrect.

The evidence of the employee confirmed that the employer's calendar was incorrect with respect to the overtime, the days the employee worked and many of the hours were not correct. The employee records and exhibits show that the calendar was incorrect regarding the days, the employee was working as well as the hours recorded thereon.

As a result, the employer's calendar records cannot be given much weight.

The employer also acknowledges that his calculations with respect to overtime worked are incorrect, that he did not pay any holiday pay, and his calculations regarding deductions and overtime payment, including payment for statutory holidays, were not in accordance with the requirements of the legislation.

The employer paid to the employee (as shown on the employee's records) 4 payments, 3 of which are credited to the employer on the audit sheet and a \$600.00 payment that was shown to have been deposited by the employee into her account.

The employee's evidence regarding time worked was much more forthcoming and believable. I accept her statements regarding hours worked.

The consequences for an employer to fail to keep records was discussed in the Carpet Warehouse Case (1978) unreported, a Sask. case, where it was

held, "An employer who has failed in the statutory duty to keep records is not in a position to dispute the records submitted by the employee". That position, as well as, the presumption of correctness of the Wage Assessment as set out in Section 2-75(9) of The Act, along with my finding that the employee's evidence was more creditable than the employer, I find that the Wage Assessment is correct with the exception of the \$600.00 payment.

The \$600.00 payment was received by the employee from the employer and deposited to her account. The assertion that she took the cash out and returned it to the employer is not supported by the evidence. I would credit this amount as being paid to the employee as wages.

VI. CONCLUSION

The appeal is granted in part and the Wage Assessment is amended to the amount of \$12,162.61, which is comprised of the Wage Assessment amount of \$12,762.61 less the \$600.00 payment referred to herein.

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.