

DECISION OF ADJUDICATOR
IN THE MATTER OF A HEARING
PURSUANT TO SECTIONS 2-75 AND 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT

LRB File No. 027-20 Wage Assessment No. 1-000352

COMPLAINANT: Brad Kirstuik
Represented by Dale Schmidt
Employment Standards Officer



RESPONDENT: Lindenbach Trucking
Represented by Brent Lindenbach

DATE OF HEARING: 9:30 am August 10, 2020

PLACE OF HEARING: Main Floor Board Room
Yorkton Provincial Building
72 Smith Street E.
Yorkton SK

I. INTRODUCTION

Mr. Lindenbach was accompanied by his wife Kristi. Mr. Kirstuik was accompanied by Mr. Schmidt. I advised the parties as to my role to provide a written impartial decision with 60 days of the hearing. There were no questions and no opening remarks.

II. PRELIMINARY OBJECTIONS

None

III. THE DISPUTE

Mr. Kirstuik is claiming pay in lieu of notice. The parties agreed that should he be successful, the amount stated in the wage assessment of \$4230.00 is not in dispute.

IV. FACTS

i. EVIDENCE OF EMPLOYER

Both Brent and Kristi Lindenbach were sworn, and Mr. Lindenbach provided the following evidence:

- His appeal document sent with his deposit summarizes the events leading to the end of the employment relationship.
- He received a telephone call from Kirstuik during the morning of September 25, 2019. Kirstuik was driving Lindenbach's truck for a contractor named Potzus at a site near Foam Lake. That project was almost completed, and the next project was at Green Lake. Kirstuik was to go to that location upon the Foam Lake completion. September 25th was a Wednesday and Kirstuik was to have the weekend off. Kirstuik complained to Lindenbach that before he could go to Green Lake, he needed the time off to wash clothes, get groceries and so on. Lindenbach told Kirstuik that given the time of year, if he didn't go to Green Lake the season would be over.
- Kirstuik got very upset and told Lindenbach to f-off and that he was going to look for another job and hung up.
- Lindenbach tried several times to call Kirstuik back but Kirstuik would not answer.
- Lindenbach then sent him a text saying when he decides to quit acting like a child he should call Lindenbach back.
- When Kirstuik did not call back Lindenbach sent him a text, directing Kirstuik to return the truck to headquarters and clean it out.
- Lindenbach heard from one of his other employees and from one of Potzus's employees that Kirstuik was going to quit soon. Kirstuik has trouble getting along with other employees and was always complaining. Lindenbach had to move Kirstuik to other jobs, due to his inability to get along with other employees
- The summer of 2019 was Kirstuik's fourth season.
- All Kirstuik had to do was to call Lindenbach back and days off would have been in place and he could go to Green Lake on Monday
- Lindenbach was never contacted by Kirstuik after the September 25th phone call.
- Kirstuik had the truck back within two hours of Lindenbach's text. It was cleaned out as well, making Lindenbach think Kirstuik had it cleaned out prior to September 25th as he planned on quitting.
- Lindenbach never told Kirstuik he was fired. Kirstuik knew the season was close to being over.

Cross-Examination

In response to Mr. Schmidt's questions Lindenbach provided the following responses:

- The end of the 2019 season came as a result of Kirstuik's telephone call on the morning of September 25th. Had Kirstuik called him back, the text to return the truck would never have been sent

Redirect:

None

ii. EVIDENCE OF EMPLOYEE

Brad Kirstuik was sworn and provided the following evidence:

- He started working for the Lindenbach Trucking in June of 2016. 2019 was his fourth season.

- On the morning of September 25th, he had hauled two loads when he received a telephone call from the Potzus's foreman. The foreman asked him to go to Green Lake immediately. Kirstuik told the foreman that he was on day 9 of a 10-day rotation and that he had no clothes, nor groceries and that the truck needed repairs before he could go to Green Lake.
- The foreman then asked him to be in Green Lake for Tuesday morning, and he agreed, Kirstuik then phoned Lindenbach to tell him the change in plans and Lindenbach agreed. Kirstuik then told Lindenbach the truck needed repairs. Repairs that Kirstuik had been after Lindenbach to make since May. The frame needed welding, it was unsafe, and as the driver he had a legal obligation to not operate it until it was fixed. Lindenbach started screaming that he was combining so Kirstuik should finish the Foam Lake project and park the truck for the winter. Kirstuik responded that he might as well look for another f'n job and hung up.
- He refused to answer Lindenbach's calls because of Lindenbach's belligerent behavior. He hasn't spoken to Lindenbach since, until today.
- He never told Lindenbach that he quit. He stayed in the line up for more loads until he got the text from Lindenbach to return the truck to headquarters. That text came at 10:06 a.m. At that point Kirstuik felt he was no longer an employee and he complied with the request and took the truck to Lindenbach's farm.
- He drove to his home at Rokeby, cleaned his stuff out of the truck and drove truck to Lindenbach's place, where he was picked up.
- After being picked up he received a text from Lindenbach saying all expense bills had better be in the truck. That text arrived at 2:45 pm. The time between Lindenbach's first text at 10:06 a.m. and the second at 2:45 p.m. is more than the 2 hours that Lindenbach testified it took to get the truck home.
- He never got paid for the second last pay period or the last pay period until he went to the Ministry. Dale got him the money. He filed his complaint regarding pay in lieu at the same time.
- He would never quit without giving notice and at no point during September 25th did he say, "I quit". All I said was that I might as well start looking for another job.

Cross-examination

Lindenbach asked Kirstuik why he continued to drive the truck if it as unsafe? There was no answer.

Further Lindenbach told Kirstuik that the truck is certified for safety every six months winter and summer.

Re-direct

Kirstuik felt he was fired when Lindenbach texted to bring the truck home.

Final Argument

Employer

Mr. Lindenbach reiterated that had Kirstuik returned his calls on September 25th the employment would have continued. Further with Kirstuik quitting he cost Lindenbach Trucking about \$20,000 because the Green Lake project was not worked.

Employee

Kirstuik does not dispute he didn't answer Lindenbach's calls. He didn't because of Lindenbach's behaviour on the first call. Lindenbach had already agreed regarding the Green Lake arrangement and then changed his mind and ended the season.

I thanked the parties for their presentations and closed the hearing.

V. ANALYSIS

The renditions regarding the content of the morning telephone conversation may differ, however the context is the same. Whatever the content both parties became animated and frustrated and Mr. Kirstuik terminated the call. Prior to that termination he (Kirstuik) made the comment about looking for another job.

Both parties agree that several attempts to resume the conversation were made by Lindenbach vis telephone calls. Kirstuik admits he did not answer because of Lindenbach's earlier behaviour. Kirstuik further admits he has not initiated contact with Lindenbach since.

Lindenbach maintains that had Kirstuik answered his call the misunderstandings would have been resolved and Kirstuik would have continued his employment.

Lindenbach concluded that Kirstuik's refusal to communicate meant he had quit, and he then recalled the truck.

VI. DECISION

Mr. Kirstuik is adamant he did not quit and Mr. Lindenbach's position is he did not fire Kirstuik. It is quite evident, however, that the employment relationship ended on September 25, 2019.

It is my conclusion that Mr. Lindenbach had no alternative but to conclude that Mr. Kirstuik had quit, when no attempt had been made to communicate after hanging up on him that morning.

An employment relationship cannot continue when there is no communication. Therefore, with the threat of "looking for another job" and refusing to communicate with his employer, I conclude Mr. Kirstuik quit.

Therefore, the appeal is allowed and the deposit of \$500.00 is to be refunded.

Dated at Regina, in the Province of Saskatchewan, this 17th day of August , 2020.



Ralph Ermel
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.