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

APPELLANTS:	**BELMONT TIRE CORPORATION, operating as INTEGRA TIRE AUTO CENTRE, and GERALD HENDRY, as Director of BELMONT TIRE CORPORATION**
RESPONDENTS:	**NATHAN SMITH and the DIRECTOR OF EMPLOYMENT STANDARDS**
DATE OF HEARING:	**October 19, 2020**
PLACE OF HEARING:	**3rd Floor Boardroom 1870 Albert Street Regina, Saskatchewan**

LRB File No. 036-20, Wage Assessment No. 1-000370

I. INTRODUCTION

Wage Assessment No. 1-000370 directed Belmont Tire Corporation operating as Integra Tire Auto Centre (Integra Tire or the Company) and Gerald Hendry, director of Belmont Tire, to pay $1,776.94 to Nathan Smith or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act). Integra Tire and Gerald Hendry appealed the Wage Assessment.

On October 19, 2020, the following individuals attended the hearing:

- Gerald Hendry, owner and director of the Company;
- Nathan Smith, former mechanic for Integra Tire; and
- Jas McConnell, Employment Standards Officer.

II. THE DISPUTE

On February 7, 2020, a Delegate on behalf of the Director of Employment Standards issued Wage Assessment 1-000370 against the Company and its director, Gerald Hendry. The Wage Assessment represents unpaid wages for Nathan Smith. Gerald, on behalf of himself and the Company, filed a notice of appeal on February 20, 2020, by way of a letter dated February 18, 2020.

Gerald's notice of appeal claims that he followed the advice of the "Labour Standards

Department" and exercised due diligence before providing his employees with layoff and termination notices containing "all available data." The basis of his appeal is that Employment Standards provided him with incomplete information regarding layoff and termination of employees, both over the telephone and on their website, and that he should not have been expected to review caselaw in order to determine how to correctly provide notice to his employees. Gerald does not believe his employees are entitled to pay in lieu of notice because he gave them notice to the best of his ability and the business closure was ultimately beyond his control.

III. PRELIMINARY MATTERS/OBJECTIONS

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

The parties agreed that Nathan had been a mechanic earning $21.00 per hour. His first day of work was August 27, 2018 and his last day of work was November 22, 2019. His hours varied somewhat due to the seasonal nature of the work.

IV. THE FACTS

The parties tendered evidence by way of affirmed testimony and documents. Gerald Hendry testified on behalf of the Appellants and Nathan Smith testified on behalf of the Respondents.

The following exhibits were tendered and entered into evidence:

Employer Exhibits (Appellants)
ER1 – Notice letter to all employees from Gerald and Diane Hendry dated November 6, 2019 (1 page); and
ER2 – Termination letter to all employees from Gerald and Diane Hendry dated November 22, 2019 (1 page).

Employee Exhibits (Respondents)
EE1 – Letter dated December 6, 2019 from Jas McConnell to Integra Tire regarding complaint and inspection (1 page); and
EE2 – Employment Standards Inspection Report (1 page).

Gerald's testimony is summarized as follows:

- His issue is with the Department of Labour Standards and not Nathan.
- He had discussions with Jas, Employment Standards Officer, and Daniel Corbett, Manager of Investigations. The conversations were less than adequate. He also spoke with the Saskatchewan Ombudsman.

- He looked at the materials regarding layoffs and terminations on the Department's website and in the legislation. He found nothing in the materials that spoke of having to indicate a start and end date for the notice period.
- The first time he heard about the requirement for an end date was during his call with Jas.
- He initially called the call centre and provided notice to his employees as advised by the call centre.
- During his discussions with Jas and Daniel, he was advised that there are court rulings that employers needed to follow. This information should be made front and centre on the website. He was told that they can't put everything on their website. Why not reference the court rulings on the website where termination is discussed? During their telephone discussion, Daniel said maybe it should be on there.
- This was his fourth year producing the same letter to his employees (ER1). He followed the information received from the Department and had never had an issue before.
- The letter was a seasonal thing. He had no intention of closing the business at the time the letter was provided. People stop buying tires around Christmas every year.
- He didn't lay off anyone before. They always fought through. They warned the employees each season though, just in case lay-offs became necessary.
- He looked after his employees until the bitter end.
- He was negotiating with the bank regarding financing. The bank was refusing to enter into a loan agreement. If he had kept the business open past November 22, he would have been unable to make payroll.
- He issued the notice on November 22nd (ER2) and paid his employees wages, including vacation pay, up to then. He laid off all five employees.
- He closed the business at the end of the day on November 22, 2019.
- He did not speak with Employment Standards between November 6 and November 22nd.
- He called Daniel when he was filing his appeal. He explained that his personal accounts had been frozen at the same time the business closed. He asked if the appeal fee could be waived or relieved (on the Ombudsman's suggestion). It was a bad conversation. Daniel was condescending and refused to lower the appeal fee. He later found out that it could have been lowered to $100.00. He has dealt with government branches before but this was the worst.
- On cross-examination, he admitted to receiving Jas' letter dated December 6th (EE1). He agreed that he was not taking issue with the amounts claimed but that he disagreed with the advice given by the Department by phone and the website.
- He agreed that the amount of notice for the employees varied depending on the length of time they had worked but that the November 6th letter (ER1) gave a general range between two and eight weeks.

- He reiterated that he gave the letter to the employees just in case. It was a heads up or warning. He didn't expect that he would actually have to lay them off. He did not provide a specific date in January when lay-offs might occur because he had no idea. The lay-off dates were uncertain and hopefully would not happen at all.
- He did not know the purpose of a lay-off notice was to give employees time to transition to another job. He had never been through it before.
- He closed the business on November 22nd and nobody reported to work the following week.
- He did not provide any of his employees with pay instead of notice. There was no money left after paying wages to November 22nd.
- He doesn't believe he owes anybody any money based on the information he received from Employment Standards. The business closed and there was no money left anyway.
- He did not seek legal counsel on how to properly issue lay-off notices. He shouldn't need it. Employment Standards is supposed to be user-friendly. How could he afford to pay a lawyer when his business was closing.
- He understands that the Department was not legal counsel to him.
- Employment Standards produces the standards and has electronic information and a call centre. The information they provide should be accurate.

Nathan's testimony is summarized as follows:

- When he received the November 6th letter, he did not believe he was losing his job because he had received the same letter the year before. The previous year, the Manager, Ken, told him not to panic and that they had never laid anyone off before. He also said if there were layoffs, he would be one of the last people due to his seniority. He didn't worry about it.
- He was not given a date for layoff but was warned it might happen in January.
- He did not look for a job because he thought they were still busy in November. He might have looked for a job in January when things slowed down.
- He received a letter on November 22, 2019 and then never worked after that.
- Notice would have been nice. He bought a tool cabinet for work items on the Wednesday of his last week of work. He would not have bought it had he known. It made his financial situation very tight. Other available jobs had already been filled.
- He does not think his employer knew the Company was going to close. He doesn't think Gerald was hiding anything.

V. ARGUMENT

Before the hearing concluded, Gerald indicated his preference to provide an oral closing argument, while Jas asked for a few days to file a written argument on behalf of the

Director of Employment Standards. I allowed both requests but indicated that Gerald could also file a written argument by the deadline of 4 p.m. on October 22nd should he change his mind. In the end, only Jas filed a written argument which was, in turn, shared with Gerald.

Gerald's oral argument on behalf of himself and the Company is summarized as follows:

- On the Saturday following the business closure, he allowed the employees back into Integra Tire to get all of their personal items.
- They did as good as they could do under the circumstances.
- They would have done things differently had they known any different.

Jas' written argument on behalf of the Director of Employment Standards is summarized as follows:

- Section 2-60 of the Act speaks to the need for a notice period for any "lay-offs" or "termination."
- The employer began by issuing a warning letter of possible lay-offs and this turned into a business closure due to financial reasons.
- Mr. Smith lost his job with no notice.
- The company's closure does not remove the company's or director's liability.
- Integra is liable for wages owing under the Act and the director of the company, Gerald Hendry, is "severally liable" as per section 2-68 of the Act.
- Empathy for Mr. Hendry's situation does not absolve him of liability for wages owed.
- On November 6, 2019, Integra issued a group-wide warning of possible lay off. The letter had words such as, "lay off may become necessary" "in January" and "we would prefer not do to this" and it will be "reviewed at that time." The letter does not state the timeline or minimum period of when the lay-off will occur. Integra used a blanket statement of "...for the required minimum two week – maximum 8 week notice." There is no specific date and no clear indication that the lay-off was occurring.
- On November 22, 2019, Integra gave their employees a letter at the end of the day that the business was closing and November 22, 2019 was the last day of work. The employee's job had been terminated or had come to an end with no notice.
- Mr. Hendry believes his liability is absolved because the bank closed him down without warning. This is not the correct application of the law. The company and directors are liable for all wages owed. An owner may believe wages are only owed for hours worked but section 2-1(v) of the Act says wages owed include Pay Instead of Notice.
- The purpose of a notice period is for the employee to prepare themselves for a transition to a new job, different wages earned, budget, expenditures, etc.

Notice is for the employee to clearly indicate that they need to get ready for change. Integra's notice, not having a precise end date or a clear indication when the job will end or change, took the employee's statutory rights away. The warning letter issue was further compounded because the employer had done this for the previous four years and no employee had been laid off. The employee had no reason to believe that his job was ending or that it would be temporarily interrupted.

- In Harris' "Wrongful Dismissal" 2013 at page 3-30, he defines notice as, "Summary: notice of dismissal denotes an effective communication to an employee that his or her employment will end on a particular date."
- In the Saskatchewan Labour Relations Board ruling *The Director of Employment Standards v. Maxies Excavating* 2018, LRB File No. 194-17, the LRB overturned an adjudicator's decision where an end date was not given for a notice period or that it was not clear. At paragraph 63, the LRB quotes from *Wrongful Dismissal and Employment Law* section 6.2.1, "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 purpo[rted] notice is specific and unequivocal is a question of fact to be determined on an objective basis in all the circumstances of each case."
- The warning letter dated November 6, 2019, from Integra to Mr. Smith was not clear or specific on what actually was going to occur and when. It is not reasonable to consider that Mr. Smith knew his job was in jeopardy or that it was going to be temporarily interrupted. Mr. Smith did not have time to arrange his affairs.
- In Harris' "Wrongful Dismissal" page 3-32, Harris discusses the Supreme Court of British Columbia's *Barker* v. *Starline Cedar Mills* where the employer gave a notice to the employee that stated his job was terminated effective the end of January 1980. The judge did not find the notice to be proper because the employer failed to say January 31, 1980.
- Integra failed to give a proper lay-off notice with an appropriate timeline. Integra issued a warning letter of a possible lay-off. No liability can be absolved because the employer had a downturn and had to close their business. Pay instead of notice is owed. It is wages under the Act. The Wage Assessment should be upheld as-is.

VI. ANALYSIS AND DECISION

The issue to be determined in this case is whether Nathan is entitled to pay in lieu of notice and vacation pay. There is no disagreement over the calculation of pay in lieu of notice and associated vacation pay. Gerald's issue is with the way Employment Standards presented its information regarding termination and layoff via its website and call centre. He followed the advice given to him to the best of his ability and the sudden closure of his business was out of his control. He believes representatives of the Department gave him incomplete information and failed to take the gravity of his

financial situation into account in coming to its decision and in dealing with him after the fact.

Gerald provided a letter to all employees on November 6, 2019 (ER1). It states:

> This letter is being given as per Saskatchewan Labor Board Standards for the required minimum two week – 8 week notice that layoffs may become necessary for everyone in January. January is often a very slow start to the year, and we would prefer not to do this of course. The situation will be reviewed at that time.

The evidence establishes that this same letter was provided to employees for the previous three years. Nathan testified that he did not start looking for another job because despite receiving the same letter in previous years, he had never been laid off before. As Gerald said, they had always fought through.

Although I accept that Gerald tried to warn his employees of a potential interruption in their work schedule in January, the November 6, 2019 notice lacks specificity. It states that layoffs "may become necessary" and that the "situation will be reviewed" in January. This letter did not warn Nathan that he would lose his job on November 22, 2019.

Section 2-60 of the Act requires an employer to provide an employee with written notice of lay off or termination except for just cause. The minimum notice periods are set out in subsection (1). Section 2-61(1)(a)(ii) requires an employer to pay the employee "a sum equivalent to the employee's normal wages for that period." This is referred to as pay instead of notice. Section 2-1(v) defines "wages" as follows:

> **"wages"** means salary, commission and any other monetary compensation for work or services or for being at the disposal of an employer, and *includes* overtime, public holiday pay, vacation pay and *pay instead of notice*. (emphasis added)

I accept that Gerald had no intentions of closing his business when he issued the November 6, 2019 warning letter to his employees. He fought through seasonal downturns before and he expected to do so again. Regardless of the circumstances, the contents of the warning letter are too vague to constitute notice to his employees of lay off or termination in accordance with the Act. The letter states that "the situation will be reviewed at that time." "That time" was January, 2020, and yet Nathan lost his job at the end of work on November 22, 2019. There is nothing specific or unequivocal about this notice.

In issuing the November 6, 2019 letter to his employees, I believe that Gerald was trying to follow the advice given to him by Employment Standards and to provide written notice to his employees in compliance with the Act. Unfortunately for him however, the

notice was not executed properly. Notice has to be specific enough to allow an employee to realize they are losing their job, whether temporarily or permanently, on a particular date so that they can prepare accordingly. The fact that Gerald had to close his business is irrelevant in relation to section 2-60 of the Act. It specifically states that the only exception to written notice of lay off or termination is just cause.

I empathize with Gerald. He was trying to do the right thing. The evidence suggests he treated his employees well and did not intend to close his business. Although he is frustrated because he relied on the information provided to him by Employment Standards and still ended up with a Wage Assessment issued against him, the Department can not be held responsible for the content, or lack thereof, of notices drafted by employers. It was Gerald's responsibility to ensure he was following the law. I understand his frustration though. He was unaware of the caselaw/common law that establishes what constitutes proper notice. Perhaps there is more that can be done to alert employers to pertinent areas of the law aside from the Act, but this does not change the fact that under the circumstances, Nathan did not receive written notice of termination as required by the Act.

The Act requires employers to provide employees with written notice of termination or pay instead of notice. Nathan was not provided with notice of termination before he was terminated on November 22, 2019. He is entitled to pay instead of notice.

VII. CONCLUSION

The appeal is dismissed and the Wage Assessment is upheld.

DATED in Regina, Saskatchewan, this 13 day of November, 2020.

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.