

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

APPELLANTS: KL LEASING INC. and KARI LYNN METZ, as
Director of KL LEASING INC.

RESPONDENTS: JOHAN VAN DEN BERG and the DIRECTOR
OF EMPLOYMENT STANDARDS

DATE OF HEARING: October 6, 2020

PLACE OF HEARING: 3rd Floor Boardroom
1870 Albert Street
Regina, Saskatchewan



LRB File No. 072-20, Wage Assessment No. 1-000390

I. INTRODUCTION

Wage Assessment No. 1-000390 directed KL Leasing Inc. (KL or the Company) and Kari Lynn Metz, director of the Company, to pay \$2,715.40 in unpaid wages to Johan Van den Berg or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act). Kari Lynn Metz and KL appealed the Wage Assessment.

On October 6, 2020, the following individuals attended the hearing:

- Kari Lynn Metz, owner and director of KL;
- Curtis Metz, independent contractor with KL;
- Johan Van den Berg, former KL employee and former owner of the sandblasting and painting company known as Accu-Blast; and
- Jas McConnell, Employment Standards Officer.

II. THE DISPUTE

On April 8, 2020, a Delegate on behalf of the Director of Employment Standards issued Wage Assessment 1-000390 against KL and its director, Kari Lynn Metz. The Wage Assessment represents unpaid wages for Johan Van den Berg. On April 23, 2020, Kari and KL filed a notice of appeal by way of a letter dated April 23, 2020, with attached letter dated April 1, 2020.

The notice of appeal claims Johan's pattern of fraud and theft, including taking on cash jobs without their knowledge and misuse of the Company credit card, broke their trust

and forced them to terminate him. The Appellants allege they had just cause to fire Johan and that he is therefore not entitled to pay in lieu of notice.

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.

IV. THE FACTS

The parties tendered evidence by way of sworn testimony and documents. Curtis Metz testified on behalf of the Appellants and Johan Van den Berg testified on behalf of the Respondents.

The following exhibits were tendered and entered into evidence:

Employer Exhibits (Appellants)

- ER1 – Contract between Johan Van den Berg & KL Leasing Inc. (2 pages);
- ER2 – Plumbing Invoice issued to KL Leasing, dated June 9, 2017 (1 page);
- ER3 – Email to Landon from Johan dated September 20, 2017 regarding changes to plumbing invoices (1 page);
- ER4 – Invoice dated September 18, 2017 from McDougall Auctioneers Ltd. to Johan Van Den Berg regarding truck (2 pages);
- ER5 – Transfer of Ownership document for Prairie Boy Spray Foam truck dated March 19, 2019 and email exchange between Jas McConnell and Johan on March 23 and 24, 2020 (3 pages); and
- ER6 – Notice of Termination dated October 25, 2019 (1 page).

Employee Exhibits (Respondents)

- EE1 – Documentation addressed to Curtis Metz regarding the results of the investigation including the Employment Standards Inspection Report (5 pages);
- EE2 – Email sent December 9, 2019 (dated December 12, 2019) from Curtis Metz to Jas McConnell regarding Johan's pattern of conduct (3 pages);
- EE3 – Information on permit for 2000 Freightliner Heavy including email from Amy at Henderson Insurance to Kari Metz regarding a May 2020 permit (2 pages);
- EE4 – Various receipts (7 pages); and
- EE5 – 2 photographs of Prairie Boys Spray Foam truck and 2 truck photographs showing the properties of the photographs including date taken (4 pages).

V. ARGUMENT

After presenting their evidence, the parties agreed to file written arguments by 4:00 p.m. on October 13th. The parties filed and exchanged written arguments by the deadline.

The Appellants' argument, as outlined by Kari Metz in her written argument, is summarized as follows:

- On October 6, 2020, we proved we had just cause to terminate Johan.
- Johan used the credit card for an overnight stay in Estevan and admitted that Bond plays hockey there and that they stayed there in the past.
- Regarding invoices identified as Exhibits C, D, E, F, and G (EE4), Johan admitted to shopping at these places. A job invoice number is written on each invoice in Johan's handwriting. The invoices were submitted in accordance with company policy so that our expenses get job costed. When we reviewed them, it was clear that Johan knowingly at the time submitted those invoices expensing them to a job #, where in fact they were for his own personal use.
- Regarding the invoice from Project Plumbing & Heating (ER2), Johan emailed Landon on September 20, 2017 asking him to change the wording and billing address to KL Leasing (ER3). This shows Johan premeditatedly had the documents falsified for his own gain.
- Johan admitted that on October 21, 2019, he had knowledge of the buyout offer that we sent him. He didn't recall any numbers, however, he did confirm that there was a personal component to the offer, ie. cash monies borrowed from KL Leasing and or credit card debt/cash jobs that Johan did. The numbers are irrelevant but the fact remains that he acknowledged the monies outstanding including such things as the \$6,700.00 cash job.
- When asked why he didn't put the Prairie Boy Spray Foam Truck in his own name (Exhibit I, EE4), he said he didn't know why.
- Johan agreed that he reads everything that comes to his phone unless it has already been read. The fact that we did not get into the company computer for approximately 2 or 3 weeks after October 24, 2019, leads to the conclusion that he did see the document that day when we sent it.
- When Johan was questioned about whether he knew he was fired or not, he was asked if he talked to anyone that afternoon after his conversation with Curtis regarding termination. He said no and that he left immediately. Curtis had a conversation with Bernardo, our painter, right after and asked him if Johan said anything, and Bernardo said that Johan said, "I'm done. Curtis wants to steal my business."
- According to the dictionary, "condone" means "to accept or allow behaviour without correction or response." The legal definition is, "To forgive, support, and or overlook moral or legal failures of another without protest."
 - *Johan's misuse of the credit card – we removed the credit card from his possession.
 - *Johan's misuse of the shop to work on projects for relatives and friends – resulted in us removing that privilege.

*Johan's misuse of the shop for his own personal projects – which were taken away unequivocally.

We displayed our protest to Johan's morally and ethically wrong behaviour by removing privileges from him. Nowhere in the legal definition of the word "condone" does it say the protest must be in writing, or that it must be escalated.

- Johan's actions fit directly into the category of "just cause" set out in section 43 of *The Labour Standards Act*. His actions constituted theft, insubordination and/or willful misconduct.
- Some of Johan's premeditated actions, such as the letter from Project Plumbing & Heating, display that our actions to dismiss Johan were founded. Our error was to not initiate this act sooner.
- Our reasons for not initiating this just cause act sooner were: We entered into this agreement with Johan and did our very best to follow the contract down to the letter, including giving Johan a raise after his 1-year probation (ie. release of his bankruptcy). We did not feel that he had earned a raise, however, our discussions at the beginning were that we would honour Johan's request for \$25.00/ upon release of his bankruptcy (1 year).
- Section 43 ("just cause") of the Act only requires that we had to prove theft and that we had a response to Johan's unacceptable actions so as not to fall into the condonement category. We have strongly proven both requirements of the Act.

The Respondents' argument, as outlined by Jas McConnell in his written argument, is summarized as follows:

- The employer stated the primary reason for termination was irreconcilable differences with management. The employer stated the irreconcilable differences were due to theft. They say Johan used company equipment, materials and time to complete cash jobs. They submitted documentation in support of this claim and believe it amounts to sufficient evidence to support termination for cause.
- The employer submitted receipts for pool supplies, Estevan motel and insurance costs, as proof of Johan's misuse of the company credit card. There is an unsigned contract that outlines limits to using the credit card but Johan says they had an agreement allowing him to use it. Johan explained he had some business in Estevan. He also explained Marlis' name on the hotel receipt. There is disagreement over whether Marlis was an employee or not. Also, the receipts are from 2017, which is over two years from the date of termination.
- The employer put forward the names of two individuals that it says paid cash to Johan for work: Doug Evonovich, an employee of the employer's partner company, and Cody from Prairie Boys Spray Foam. The employer says Johan did work for Doug for cash. Johan says there was an agreement where he could complete work for other employees but denies receiving cash from Doug. The

employer says Cody gave Johan \$5,000 cash and that Johan admitted to receiving \$3,000 cash but provided no documentation to support this claim. The employer states that Cody traded a truck for part of the payment and that he intended to keep the truck and only brought it to the shop when his employer questioned him about it. Johan provided pictures with date stamps to show the truck was in the shop earlier than what the employer stated. Johan explained he had put the truck in Marlis' name because he needed to move it from Cody's place to the shop to complete some work. Johan says he got a permit even if that is not what SGI records indicate.

- There are more questions than answers. Doug and Cody were not called as witnesses. These thefts are not clearly demonstrated and the intent is not proven.
- The employer stated there were other thefts but they were not able to submit documented evidence of these thefts. The employer stated that Johan completed work for Mike from Sask Beach worth \$6,700. We have not seen any document to support these allegations. The employer says he has a document where Johan agrees that he owes money and that he is going to pay it back but this document was not submitted. The employer agreed that this document does not confirm Johan doing jobs for cash or robbing the business of this money. It states that money is owed. This money could be for the personal help the employer talked about. The employer has not demonstrated that Johan completed any projects on the side for money that should have been for the company.
- The employer has not been able to demonstrate any progressive discipline. There are not written warnings, no suspensions, and no consequences for these supposed infractions. There is no clear documentation that the employee knew his job was in jeopardy. The employer did not clearly state to stop or he would lose his job. The infractions can be considered condoning the behaviour (Levitt, *The Law of Dismissal* 2nd edition).
- Some of the story is incongruent to the whole of the issue at hand. We have an employee who supposedly is stealing from the employer and who owes the employer money for these thefts yet the employer gives the employee a raise and pays out bonuses. There are names of people who can prove the employer's statement but no "I owe you" documents from Johan or other documents to support the allegations.
- The courts clarify the standard of proof of theft in employment law as "clear, cogent and convincing" as well as intent needing to be established: eText on *Wrongful Dismissal and Employment Law* (1st edition) CanLII 2015.
- The information the employer has submitted is not clear and intent is not proven. There are too many unanswered variables that throw each point off the "clear, cogent and convincing" scope.

- The application of progressive discipline is paramount for an employer to terminate with cause unless it is a fundamental infraction (Levitt, The Law of Dismissal 2nd edition).
- If an employer is going after cause due to “the straw that broke the camel’s back,” the employer still needs to prove the cumulative events. These are done by documentation, typically in progressive discipline. The employee also has the right to know their job is in jeopardy if they do not stop or change their behaviours.
- The employer failed to apply progressive discipline. The employer could not submit documents to demonstrate cumulative events. If the transgressions did occur, one could say that the employer condoned the behaviour. They were allowing the employee to keep being employed with no consequences.
- The Wage Assessment should be upheld.

VI. ANALYSIS AND DECISION

The issue to be determined in this case is whether the Appellants had just cause to terminate Johan without notice. If they did, Johan is not entitled to pay in lieu of notice and the Wage Assessment must be dismissed. If they did not, Johan is entitled to pay in lieu of notice, along with the associated vacation pay, and the Wage Assessment must be upheld.

Sections 2-60 and 2-61 of the Act outline notice and pay in lieu of notice requirements. There is no disagreement over the calculation of pay in lieu and annual vacation pay. The disagreement is over whether just cause existed. The employer has the onus of proving just cause on a balance of probabilities. The employer must show the dismissal was warranted based on a serious isolated incident or on cumulative acts. Whether misconduct is serious enough to justify dismissal is a question of fact to be assessed individually in each case.

The background facts of this matter require some explanation because the employment relationship is intermixed with the Metz’s purchase of a sandblasting and painting business (Accu-Blast) from Johan and with plans for a future sale of the business back to Johan. Curtis’ evidence establishes that after having some work done at Accu-Blast and talking to Johan about his financial difficulties, he and his wife, Kari, decided to help Johan by purchasing his business. They bought the business from Johan with the express intent to sell it back to him once he was cleared of his bankruptcy and had improved his financial situation. Kari never intended to own a sandblasting and painting company. The goal was always for Johan to buy it back. Curtis explained that any tolerances given to Johan were for the purpose of facilitating the sale of the business back to him.

The parties entered into an employer-employee relationship on or about April 5, 2017. The Metz’s submitted an unsigned copy of the Contract between Johan Van den Berg &

KL Leasing Inc (ER1) into evidence in support of the arrangement. Johan was hired to manage the Sandblasting & Painting Operation and was responsible for its day to day operations. Curtis is Kari's husband and was an independent contractor with the Company. His role was to recruit business for the Sandblasting & Painting operation. He had more direct contact with Johan as he was in and out of the shop all of the time. Kari managed the Company and she would consult with Curtis about issues and Curtis, in turn, would deal with Johan on her behalf.

In the Appellants' notice of appeal filed on April 23, 2020, they state that, "it was our discovery of the \$400.00 cash job done for Doug (contact info supplied to Jas), that Johan completed without our knowledge that once we found out, we concluded there was no longer any trust in this employee and we at that time made a choice to terminate him when confronted with these allegations, he did not deny them."

The first question is whether the employer proved that Johan completed a cash job for Doug without his employer's knowledge or consent. If so, the question becomes whether the employer's discovery of this misconduct was so egregious that it justified immediate dismissal based on this isolated incident.

Curtis' evidence surrounding the \$400 cash job and Johan's subsequent termination is as follows:

- Curtis saw Johan sandblasting and painting rims in the shop in October of 2019.
- Johan did not say anything about this job and Curtis did not see an invoice for the work.
- When Curtis noticed the rims had been picked up, he asked Johan about it and Johan told him he accepted cash from Doug (an employee of North 40, another company owned by Curtis) because he needed the money. The cash was not given to Kari. Curtis says that Johan told him to just add it to the money he owed him. Curtis and Kari then looked back and found other uninvoiced items where Johan had accepted cash for work.
- On October 21, 2019, Curtis and Johan had a conversation about him buying back the business. Curtis told Johan that the arrangement was not working and that he was done with it. He told Johan that he had to make arrangements to buy back the business or Curtis was folding it and selling everything. Curtis made Johan an offer and Johan counteroffered. Johan wanted them to 100% finance him. Curtis said he could not trust Johan to pay back \$150,000 in assets when they could not even trust him to properly bill \$400 worth of work he completed through the Company. Curtis told him he had to come up with a plan.
- On October 25, 2019, Curtis told Johan to show him his plan. Johan's plan involved the Metz's financing his purchase of the business. Johan said his girlfriend, Marlis, and her son would work for free. Curtis asked him what work they would have and Johan said it was none of his concern. Johan said he did not

have to tell Curtis anything. Curtis told him he could not trust him and said, "You are finished." Curtis asked him to clean out his truck and Johan left his keys.

- The Metz's emailed and texted the Notice of Termination (ER6) to Johan on October 25th. The letter stated his employment was terminated as of noon that day due to "irreconcilable differences with management," "false accusations towards management," and expiration of "Johan Van den Berg's verbal Offer to Purchase for the company (KL Leasing/AccuBlast & Painting) due to stated lack of funds." The letter stated that the locks had been changed and that he would have to contact Curtis to arrange access to the shop and yard. In addition to texting and emailing the termination letter, the Metz's also left Johan a voicemail asking if he had received it.
- Curtis has no doubt that Johan knew he was fired on Friday, October 25th.
- Johan never reported back to work after October 25th but broke into the shop through the back door on Sunday, October 27th with his stepson and cut the wires on the camera.
- The fact that Johan's work computer had not been accessed by them for 2-3 weeks following Johan's firing shows that Johan's statement, that he did not read the termination letter on his phone because it appeared as already read on his phone, is untrue.
- Curtis wishes they would have been more direct in the termination letter, listing theft instead of irreconcilable differences as the reason for termination.

Johan's evidence regarding the \$400 cash job and his subsequent termination is as follows:

- Johan says he received the termination letter on October 28th.
- Johan did not meet with anyone at KL regarding his termination and is not sure what "irreconcilable differences" meant.
- On October 25th, they met but it was about the buy out.
- Johan had discussions with Curtis about cash jobs but there were no side jobs.
- Johan did lots of jobs for people, including for Curtis' other employees. He did not do a cash job for Doug though. He did not accept cash for the rims. He did not do the work during work hours. They had a verbal agreement allowing them to use shop, equipment, and parts to do work for employees of North 40 or KL. Curtis allowed it.
- Johan never accepted cash for jobs.
- Johan can not confirm whether there is an email where he agreed to owing money for cash jobs because KL has his computer.
- Johan did lots of work for family, friends and co-workers on evenings and weekends. He mostly did not get paid for jobs on evenings and weekends. Friends and family would pay for their own supplies.
- Johan was never given a verbal or written warning that his job was in jeopardy.

- As far as Johan was concerned, it was his business and he was working to get it back.
- On Friday, October 21st, Curtis did not say, "You're finished." He said, "We are done here." Johan cleaned out his truck because he was going to work on it, not because he had been fired. Johan left in his own truck for a volleyball tournament.
- Johan did not know he had been fired on Friday. He went in to work on the following Sunday to work on a project. The locks had been changed. There was an employee living in the back who always used the back door so that is how Johan got in. His desk had been cleaned off. When asked on cross-examination what happened to the cameras, Johan said he did not want to answer that due to a criminal case against him. Johan also said he was not answering whether he removed items.
- The termination letter did not show up as "unread" on his phone so he did not read it. It had been opened on his work computer which is why it did not show up as unread on his phone. He received it on his phone but did not read it. His phone was linked to his work computer so if a message is read on one, it shows up as read on the other.
- He did receive an email on October 21st and he changed the numbers on the documents. He made a counteroffer. The numbers most likely included some personal money owed for approved expenditures but it had nothing to do with side or cash jobs. He had never agreed that he did that.

Obviously, Curtis and Johan have different accounts of the alleged \$400 cash job for Doug. Curtis says he saw Johan working on rims for Doug (an employee of Curtis') and when he realized the rims had been picked up without any record of payment, he asked Johan about it. He says that Johan admitted to accepting cash and to keeping it because he needed the money. Johan denies that Doug paid him cash for sandblasting the rims. There is very little that Curtis and Johan agree on. Johan did not even acknowledge that he knew Curtis had fired him on October 25, 2019. Johan says that he thought their business negotiations had come to an end but not his employment.

Based on the whole of the testimony of both witnesses, where there are discrepancies between their version of events, I prefer Curtis' evidence. Curtis testified in a straightforward and consistent manner and was clear with his reasons for refusing to provide certain information. He and Kari are involved in litigation against Johan so there were certain documents and figures that he chose not to produce and he was upfront about it.

Johan, on the other hand, was evasive with many of his answers. He said he was "not sure," "don't recall," or "could not remember" repeatedly throughout his testimony. Some of his evidence was inconsistent, including his evidence about cash or side jobs. He said getting cash for jobs "never happens" and yet he acknowledged that Curtis had talked to him about cash jobs. Johan said he "did not recall" saying he received cash

from Cody or getting cash for sandblasting grain bins. He could not "say yes or no" to the existence of an email from him where he agreed to owing money to KL for cash jobs because they had his computer. If he did not accept cash for jobs, it should have been easy to say he would never have sent such an email. Johan said he did work for Curtis' employees (and for family and friends) on the evenings and weekends and that this was allowed. I can understand why he would work for his family and friends on evenings and weekends for free, but why would he work for Curtis' North 40 employees without receiving compensation? It seems more likely than not that Johan would have received cash for such work.

Johan "did not recall" whether he charged personal expenses on the Company credit card for Paradise Leisurescapes, Mainline Insurance, Ellis Pools, Best Western in Estevan, Hub, and passport renewals for himself and Marlis. Copies of these receipts form part of the record as EE4. Also, Johan "does not recall" sending an email to Landon about changing the name and wording on an invoice for Marlis' pool heater (ER2 and ER3). Johan "did not recall" why he put the truck in Marlis' name rather than his own name. Johan was "not sure" what number he offered Curtis for the business but it "most likely" included personal money owed. The passage of time will affect an individual's memory, but the sheer number of things that Johan forgets is not credible, in my view.

I do not believe Johan when he says he thought his employment continued after October 25th. I do not believe his explanation about not receiving the letter of termination on his phone because it had already been opened on his work computer. The evidence leads me to believe that he knew he had been fired before he entered the shop on the Sunday. It does not make sense that he would find that the locks had been changed and then believe he had the right to enter through the back door. In any event, the issue is whether his employer had the right to terminate him for cause on October 25, 2019.

Theft, if proven, can warrant immediate dismissal. The Appellants could have called Doug as a witness to prove that he paid \$400 in cash to Johan but they did not do so. With that said, I prefer Curtis' testimony to Johan's and accept that Johan more likely than not earned cash on the side on more than one occasion, including this occasion. The problem for the Appellants, however, is that I do not believe that Johan was fired just because he did a \$400 job cash job for Doug without his employer's knowledge or consent. In the context of the facts of this case, the \$400 cash job was not a serious isolated event. This cash job was part of an on-going pattern of behaviour on Johan's part.

The evidence establishes that Johan was fired because the discovery of the \$400 cash job was the last straw in an ongoing pattern of deceitful behaviour. The employer's discovery of the payment led them to finally realize that Johan would never be in a position to buy back the business from KL. Johan wanted them to finance his purchase of the business and this was never going to work. I empathize with the Metz's. In most

employment relationships, theft of even a **small** amount would be grounds for immediate dismissal. Given the facts of **this case**, however, a \$400 cash job does not constitute misconduct serious enough to **warrant** dismissal when there had been an ongoing **pattern** of similar, if not worse, **conduct** that the employer had accepted. Ultimately, the reason for firing Johan was that the Metz's could not come to terms with him on the sale of the business and they were done trying. It was not about the \$400.

Because the employer failed to meet their **onus** of proving that Johan was fired for cause based on a serious isolated incident of **theft** or willful misconduct, the question then becomes whether the employer met **the onus** of proving that Johan was fired for cause based on cumulative events. To **establish** just cause based on cumulative events, the employer must establish that they took progressive disciplinary measures, including warnings as to the possible consequences of future misconduct. The employer must also show that they did not condone the behaviour, as is alleged in this case.

Even if I accept the totality of the employer's evidence and argument regarding Johan's misuse of the Company's credit card and resources, selling Company assets for cash, and of his general dishonesty in accepting cash for jobs on the side, the fact remains that they failed to warn Johan that he would lose his job if this behaviour continued. Curtis admitted that they began noticing dishonest behaviour shortly after purchasing Johan's equipment and entering into their agreement with him in April of 2017. The Agreement (ER1) specifically stated that the Company's credit card was to be used for KL Leasing Inc. for Sandblasting & Painting and that any purchases over \$300 must be approved by management. During the first year, they noticed Johan's personal expenses charged to the credit card so they addressed it with him. Eventually, they took the credit card away from him but they did not warn Johan that he would lose his job if this type of behaviour continued.

They discovered that Johan was not properly accounting for his time on an arrangement they had entered into with Johan's brother-in-law so they addressed it with him several times before pulling this particular privilege off the table. They did not warn him that he would lose his job if he continued to inaccurately record his time and misuse Company resources.

Because Johan needed money, he asked if he could bring in some of his own work, on his own time, and he would pay back the Company for any materials used. The Metz's agreed to this arrangement. It was not long before they discovered that Johan was purchasing items on the Company's expense account for this side work so they reversed their decision about allowing him to work on the side. The Metz's did not warn Johan that he would lose his job if he continued to do so.

The Metz's noticed that Johan purchased a truck for \$1,819.02 from McDougall Auctions (ER4) on September 18, 2017 with the Company credit card without pre-approval. Johan brought the truck to the shop, spent about \$4-5000 worth of work on it, and when they

asked him what happened to the truck, Johan said he sold it because he needed the money. This was when they realized that Johan had put the truck in his own name, not KL's name. They discussed this situation with him in October of 2017 and Johan told them to add it to the money he owed them. They did not warn him that he would lose his job if this type of behaviour continued.

In 2018 and 2019, the Metz's discovered that Johan had accepted cash for several jobs including steps at Sask Beach and \$5,000 for parts from Cody of Prairie Boy Spray Foam. When Curtis confronted Johan about the cash, Johan said, "Put it on my bill. I needed the money." Johan was not warned that his job was in jeopardy in either of these instances.

The examples listed above are just some of the examples of questionable, if not dishonest, behaviour on Johan's part. Johan has different explanations for most of these incidences but even if I prefer the employer's evidence in every instance, Curtis admitted that their end goal of having Johan own the business prevented them from doing what they should have done much earlier. Curtis said they accepted Johan's "theft" along the way, in part, because they planned to lease their space to Johan once he purchased the business. They had financial reasons to make it work. As Curtis stated, it was never their intention to own a sandblasting and painting company. Unfortunately, the employer's hope that Johan would straighten out his financial affairs, and put himself in a position to buy back the business, prevented them from employing progressive disciplinary measures and caused them to repeatedly accept Johan's unacceptable behaviour as an employee. The evidence establishes that the Metz's went along with Johan's behaviour, tallying up what they figured he owed them for his transgressions along the way.

The Metz's cite the legal definition for "condone" and argue that they can not be said to have condoned Johan's behaviour when they removed privileges from him as a direct result of his behaviour. They state, "Nowhere in the legal definition of the word condone does it say the protest must be in writing, or that it must be escalated." It is the common law that sets the standard for what constitutes progressive discipline and condonement. Courts recognize that work is one of the most fundamental aspects of a person's life. An employee has the right to know that his job is in jeopardy. Without evidence of verbal or written warnings, I find that Johan did not know that his job was in jeopardy. The Metz's were unhappy with Johan's behaviour but they accepted it. Although they took away some of Johan's privileges, they chose not to discipline him in any real manner or warn him that his job was on the line because this might jeopardize the sale of the business and a potential revenue stream for the future. At law, they condoned his behaviour.


I empathize with Kari and Curtis Metz. I believe they tried to help Johan. I believe they gave him many chances to straighten out his financial affairs so that he could buy back the business. I do not believe they were trying to steal his business. The evidence

suggests that Johan took advantage of the situation. He misused the Company credit, expense accounts, and resources. I also believe that he repeatedly accepted cash and/or goods for his work and agreed to pay his employer back only after being confronted. However, for their own reasons, the Metz's failed to employ progressive discipline and ended up condoning Johan's behaviour in the process. Accordingly, Johan was terminated without cause.

VII. CONCLUSION

The appeal is dismissed and the Wage Assessment is upheld.

DATED in Regina, Saskatchewan, this 30th 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.