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

APPELLANT:	FIRE SAND GLASS LTD.
RESPONDENTS:	DEVON HANSON
DATE OF HEARING:	JULY 9, 2021
PLACE OF HEARING:	VIDEOCONFERENCE
DATE OF DECISION:	SEPTEMBER 21, 2021

LRB FILE No. 011-21, Wage Assessment No. 1-004837, dated January 8, 2021

I. HEARING PROCESS:

1. Wage Assessment No. 1-004837 directed Fire Sand Glass Ltd. (hereinafter referred to collectively as "FSG " or "the Appellant") to pay $3,300 to Devon Hanson (hereinafter referred to as "Hanson" or "the Respondent") or appeal the assessment pursuant to section 2-75 of *The Saskatchewan Employment Act.* FSG appealed, and I was appointed to adjudicate the matter.

2. According to a Saskatchewan Corporate Registry Profile Report for FSG, the company's sole director and officer is Sandra Kirkup, who resides in Edmonton. Shareholder Dan Kirkup appeared as FSG's representative at the hearing. He is also the manager of the FSG workplace which formerly employed Hanson. At all material times during the wage assessment process and this appeal, Dan Kirkup ("Kirkup") spoke for FSG, which was essentially a self-represented litigant. Hanson was represented by counsel, James Zick. Kim King ("King") participated as the Director's Delegate. King plays a dual role in this process. First, she acted as investigator for the Employment Standards Division after Hanson filed his claim. Second, she participated in the hearing as the Director's delegate; responsible to file material she reviewed during the investigation together with the wage assessment under appeal. She participated in the hearing in her own right and not as counsel for Hanson. That said, the Director's and Hanson's positions naturally align since the assessment supports Hanson's claim.

3. After several conference calls necessary to discuss the hearing process and ensure all parties were ready to proceed using a virtual hearing platform, the July 9, 2021 hearing date was set. The following witnesses testified in support of FSG's appeal:

a. Tyler Williams
b. Steven Chester
c. Darcy Hekellar
d. Amy Wilton

The following witnesses testified in support of the Respondent:

a. Devon Hanson
b. Damien Volk
c. Ryan Buller

4. After presentation of all oral and documentary evidence, the Director's Delegate, FSG, and Hanson presented oral submissions. The parties were also granted leave to file supplementary submissions, which were provided by the King and Hanson on July 16 and by FSG on July 23. Finally, Hanson filed a rebuttal to FSG's written submissions on July 30.

5. Prior to the hearing, the parties disclosed and exchanged documents, to which there were no objections. The Director's Delegate filed all documents relevant to the wage assessment investigation and assessment under appeal.

II. BACKGROUND:

6. On March 23, 2007, Hanson was hired as a full-time labourer at FSG, earning $19.50/hr. Hanson's employment was terminated without notice on June 10, 2020.

7. Hanson filed a formal complaint arising from his dismissal on June 29, 2020, and the complaint was investigated by King who considered the application of Section 2-60 of *The Saskatchewan Employment Act*. Given the duration of Hanson's employment, Hanson would be entitled to 4 weeks' pay in lieu of notice, unless FSG had just cause for termination. If just cause existed, then FSG would not be required to provide Hanson with either notice or 4 weeks' pay in lieu.

8. Based on the evidence she gathered during her investigation, King concluded that FSG did not have just cause to terminate Hanson's employment as and when it did. Therefore, she calculated Hanson's unpaid wage assessment as $3,300.

9. In its appeal, FSG did not dispute calculation of the wage assessment. FSG simply submitted that the wage assessment should be quashed because Hanson's employment was terminated for just cause.

III. ISSUE

Was Hanson's employment with FSG terminated for just cause?

IV. EVIDENCE

10. As the Appellant (employer) in this case, FSG bears the burden to establish just cause for dismissal. To that end, Kirkup relied upon two letters he provided to King, dated September 22, 2020 and October 23, 2020. Additionally, Kirkup provided King with copies of three handwritten notes, an Employee Equipment Training Tracking Sheet, and documents relating to a workplace injury experienced by Hanson on June 20, 2017. FSG also filed FSG's *Crane and Hoist Operating Procedures Manual* and its *Forklift Operating Procedures Manual*.

11. FSG presented the four witnesses named above who testified about the two incidents which Kirkup submitted were grounds for Hanson's termination. The facts regarding these incidents are not in dispute.

12. On June 1, 2020, Hanson instructed Hekellar to stand on the forks of a forklift he was driving to steady the load as it was being transported and lifted. According to Hekellar, he "rode" about 10 feet on the forklift from the inside of the FSG building to the truck into which the load was to be placed. Hekellar was holding the load with his hands and body so that it would not have to be strapped to the machine, which would have been the correct procedure. Wilton testified that FSG's safety committee decided to refer the "forklift incident" to Kirkup, since "management was already aware".

13. On June 3, 2020, Williams and Chester both saw Hanson walk under a loaded crane, which contravened safety protocol (the "crane incident"). Chester described Hanson using descriptive language; that Hanson walked "bobbing like a boxer". Williams and Hanson did not describe Hanson's gait this way, but it is uncontroverted that Hanson walked under the loaded crane.

14. On June 10, 2020, Kirkup's handwritten note indicates he spoke with Hanson and obtained Hanson's confirmation that both safety infractions or incidents occurred as described. Hanson testified that little to no other conversation occurred, and he was simply advised by Kirkup that his employment was terminated, effective immediately. The handwritten note appears to corroborate Hanson's recollection.

15. For reasons he did not provide, Kirkup declined to testify during the hearing. As a result, he provided no *viva voce* testimony about the conversation he had with Hanson on the date he terminated Hanson's employment. Moreover, Kirkup provided no evidence about any warnings or progressive disciplinary steps he considered or took prior to ending Hanson's employment as abruptly as he did on June 10, 2020. Before FSG closed its case, I asked

Kirkup to reconsider his decision not to provide oral evidence, since his silence would lead almost inevitably to the Appellant being unable to meet its onus of proof. Kirkup was resolute. Consequently, I draw an adverse inference from Kirkup's decision not to testify and I am left with Hanson's uncontroverted evidence about their communication, or lack thereof.

16. Moving to the Respondent's side of the case, Hanson testified he began working for FSG as a glass fabricator on March 23, 2017. Hanson acknowledged that, when his employment began, he received training in first aid, forklift operation, and fall arrest, as well as "on the job" training on the crane and around the glass table. He was aware there were operations and procedures manuals available for him to read, but he was not directed to the manuals or told to read them at any particular time. (The reliability or authenticity of the Employee Equipment Training Tracking Sheet filed by FSG to demonstrate Hansen participated in 16 hours of training with Kirkup personally between March 13 and 21, 2017 is questionable since all dates predate the beginning of Hanson's employment as verified by his Record of Employment.)

17. Hanson was injured twice while working at FSG. On June 20, 2017, a large piece of glass fell on Hanson's foot which resulted in a serious fracture and him being taken to the hospital in an ambulance. This occurrence was investigated by the police and Occupational Health and Safety. On October 3, 2018, Hanson injured his thumb with a belt sander, and he received medical treatment. Both occurrences were considered accidental, and Hanson was not advised that any negligence or oversight on his part contributed to either injury.

18. As he did when speaking with Kirkup, and during King's investigation, Hanson freely admitted during his testimony that he walked under a loaded crane and drove a loaded forklift a short distance with Hekellar riding on the forks. Hanson also acknowledged both acts were ill-advised and contravened safety protocol at FSG. Hanson testified that Kirkup did not speak to him about either of the incidents after they happened. A few days passed while Hanson was away from work due to illness. When Hanson reported for work on June 10, he recalled having a 5-minute conversation with Kirkup about being fired, which ended when Hanson retrieved his personal belongings and left the premises.

19. Buller testified he was summarily terminated by Kirkup the day before Hanson, and that he saw others walk under a loaded crane as Hanson did. He acknowledged doing it himself once, and that he was admonished, but not terminated, as a result. Volk testified that he believed the personal protective equipment was inadequate for employees at FSG, especially gloves, but that he expected he would have been fired if he would have refused to work due to his safety concerns. While both witnesses acknowledged working with glass requires caution, they also described a workplace culture at FSG where infractions, shortcuts, or oversights happened periodically.

20. Speaking generally, Hanson testified that employees followed safety protocols at FSG on a somewhat haphazard basis – putting on safety glasses when they were warned OH&S inspectors were on their way and cutting corners with safety if it seemed sensible and efficient to do so. Buller, Volk and Hanson's evidence regarding safety infractions and the workplace culture at FSG was uncontroverted by Kirkup.

21. Finally, no evidence was presented by FSG that Hanson received any kind of warning that the forklift or crane incidents described above could or would result in termination of his employment. Hanson testified he did not receive a warning and had no opportunity to explain or correct his behavior.

V. ANALYSIS

22. As FSG concedes, it bears the onus to prove it had just cause to terminate Hanson's employment without notice. The Director of Employment Standards' submission describes how it views "just cause" , in the following excerpt:

> There is no definition of "just cause" under *The Saskatchewan Employment Act*. As such, our division looks to the common law for guidance. The Courts have stated that there are two types of conduct that can amount to just cause. The first type is conduct that is so egregious that an employer has no choice but to terminate the employment relationship immediately. Examples would be theft, assault, conflict of interest, and fraud.
>
> The second type of conduct is much more common. It occurs when an employee behaves in such a way that is inconsistent with his or her duties but does not amount to gross misconduct. Examples would be attendance, performance, or attitude issues. In order for the second type of conduct to be considered just cause, an employer is required to show that progressive discipline was undertaken.[1]

23. In addition to using a contextual approach as mandated by the Supreme Court of Canada in *McKinley v BC Tel*, 2001, SCC 38; Hanson's counsel submited that *Graf v. Saskatoon Soccer Centre Inc.*, 2004 SKQB 282, provides guidance for analyzing the evidence in this case:

> [28] It is also well established that where an employer relies on a series of inadequacies or inappropriate conduct short of dishonesty as grounds for summarily dismissing the employee, the employer must have previously informed the employee of his or her inappropriate conduct or inadequate performance and have warned the employee that she or he must correct the noted problems within a reasonable specified time or face dismissal. The essential elements of the requisite warning are set out in Wrongful Dismissal Practice Manual (Toronto: Butterworths, 1984), loose-leaf; Issue 77-May 2004 at CHP4: A: 2:1; Jasnoch v. Provincial Plating Ltd., 2000 SKQB 44, [2000] 5

[1] Closing Argument (written submissions), Director's Delegate.

W.W.R. 670, 190 Sask. R. 250 (Sask. Q.B.); and Lowery v. Calgary (City), 2002 ABCA 237, 312 A.R. 393 (Alta. C.A.). They essentially provide for the following:

> (a) the employer must provide reasonable objective standards of performance for the employee in a clear and understandable manner;
>
> (b) the employee must have failed to meet the employer's reasonable standard of performance;
>
> (c) the employer must give the employee a clear and unequivocal warning that she or he has failed to meet the requisite standard, including particulars of the specific deficiency relied on by the employer;
>
> (d) the warning must clearly indicate that the employee will be dismissed if he or she fails to meet the requisite standard within a reasonable time.

24. The Appellant also cited some cases which I have reviewed, but neither Kirkup's oral or written submission addressed the issue of whether Hanson was progressively disciplined or given a warning prior to termination. Instead, FSG focused entirely on the two incidents of unsafe conduct being sufficiently serious to warrant summary dismissal. While acknowledging jurisprudence from Nova Scotia adopting a contextual analysis for assessing whether misconduct warrants summary dismissal, FSG implied the context in this workplace is simply that handling glass is inherently dangerous and any deviation from the printed operations and procedures manuals kept on site is absolutely prohibited. FLG submits that the fact the incidents occurred constitutes evidence enough that the safely breaches were egregious and unforgiveable.

25. The totality of the evidence in this case does not support the Appellant's position. Instead, the evidence establishes, on the balance of probabilities, that Hanson's actions were not incompatible with his duties, willfully disobedient, or incompetent. Hanson's actions were ill-advised and reckless, but not deliberately intended to prejudice his employer. It is not enough to assert that Hanson disobeyed safety protocol. While Hanson's actions could, and perhaps should have, given rise to discipline, enhanced training, or – if repeated with regularity – dismissal, they were not the kind of incidents which warranted immediate termination of employment.

26. Therefore, I need only to return to the issue of whether Kirkup provided Hanson with sufficient feedback about his shortcomings or FSG's concerns regarding the two incidents. Was such feedback given? Was Hanson warned his job was in jeopardy? The evidence establishes no such warning was given, since the one and only conversation Kirkup had with Hanson about the incidents was to advise Hanson his employment was finished. Hanson was not given sufficient time to correct, or even address, FSG's concerns before his employment ended. This is not what the common law requires, or what the statutory regime dictates, and FSG is required to comply with the law.

27. That said, there is no question FSG was entitled to terminate Hanson's employment for any reason, including reasons Hanson might dispute because the law does not create perpetual employment relationships. However, when an employer unilaterally chooses to end an employment relationship, adequate notice must be given to the affected employee who then has an opportunity to get his or her affairs in order. FSG had two choices when Kirkup decided he no longer wanted Hanson as an employee: FSG could have provided adequate notice of its intention to terminate Hanson's employment to him. Alternatively, FLD should have provided Hanson with statutory pay in lieu of such notice in the appropriate amount as directed by *The Saskatchewan Employment Act*.

28. I conclude that the totality of the evidence in this case is insufficient to establish, on the balance of probabilities, that just cause for Hanson's dismissal exists.

VI. DECISION

29. The Appeal is dismissed and the Wage Assessment in the amount of $3,300.00 is upheld.

LESLIE BELLOC-PINDER, Q.C.
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 considers appropriate.

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.