

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



Kenneth Caelian

COMPLAINANT/EMPLOYEE

-AND-

Booster Juice (101249977 Saskatchewan Ltd.), and Directors
Scott Cunningham & Jodie King

APPELLANT/EMPLOYER

DATES OF HEARING: January 5, 2021

PLACE OF HEARING: Regina, SK

LRB FILE: No. 177-20
WAGE ASSESSMENT: No. 1-000460

INTRODUCTION

This matter was heard before me on January 5, 2021 at Regina, Saskatchewan.

I am satisfied there has been compliance with subsections 2-74(6), 2-75(2) and 2-75(3) of *The Employment Standards Act* (the 'Act'). Therefore, I have determined that I do have jurisdiction to hear this matter.

Andrew Landguard, Employment Standards Officers represented the Department of Employment Standards.

Complainant/Employee, Kenneth Caelian, attended and gave sworn evidence on her behalf.

The Appellant/Employer, Scott Cunningham, Director of Booster Juice attended and gave sworn evidence on behalf of the Corporation and the Directors.

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 \$518.78.

I. PRELIMINARY MATTERS

There were no preliminary matters.

II. AGREED FACTS

The parties agreed as follows:

1. That Kenneth Caelian was an employee of the corporation from April 2019 to May 28, 2020.
2. That the amount of the Wage Assessment of \$518.78 is the correct amount of severance that would be owing to the employee if the Corporation is liable for payment of the same.

III. DISPUTE

The issue to be decided in this matter is whether or not the employee voluntarily left her employment with the corporation or was dismissed

and is owed severance pay by the corporation in accordance with the act.

IV. EVIDENCE OF THE EMPLOYER

Scott Cunningham, Director of the corporation was sworn and gave the following evidence:

Booster Juice is a business operated by the corporation in the City of Regina. The corporation operates two Booster Juice locations and the employee was hired to work at the Rochdale North Regina location.

When the employer hired the employee, he was of a view that the employee would not be a long-term employee and would likely get another job before too long.

Every week the employee would give the employer her availability for coming week, in order that the employer could

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schedule shifts that were convenient for the employer as well as the employee.

Originally the employee was working 4 days per week and 6-8 hours per shift.

The employer was advised by the employee on May 21, 2020 that she would be changing her availability and was only available to the work 3 days a week for 4 hours per shift.

The employer tried to accommodate the employee with her new availability hours, however, was unable to fit her into the schedule for the corporation's and other employees' convenience.

The employer had the employee work her new shifts for one week. After that time, the employer concluded that they were unable to accommodate the new availability hours when scheduling the employee. The employer sent her a text on May 29, 2020 advising the employee that the corporation was not

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able to work around her new schedule. The employer did not receive a reply to this text from the employee.

On June 8, 2020, the employer texted the employee advising that she was terminated. The reason for the termination was the employer had not received any notice of the change in her availability and, her new availability hours and days did not work with the employer's scheduling.

The employer sent the above text after being advised by their supervisor, Lea, that she had spoken to the employee, Kenneth Caelian, when they bumped into each other at Superstore on the weekend.

During this conversation at the Superstore the employee supervisor, Lea, advised Kenneth Caelian that she needed to return her uniform and key to the employer's premises and, would not be paid her last cheque until she did so. (The items were returned shortly after by the employee).

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Lea also had been asked by Ms. Caelian as to the reason that she was being terminated. The above information was communicated by the supervisor Lea to the other director, Jody, (the wife of Scott Cunningham).

Mr. Cunningham said that because Ms. Caelian did not respond to the May 29, 2020 text, he assumed the employee had quit her position.

Under Cross Examination, Mr. Cunningham confirmed the corporate registry documents set out in LSO Exhibit 2 and that he had received the documentation set out in Exhibit LSO 1.

Mr. Cunningham also confirmed that the text messages in Exhibit LSO 3 were sent by the corporation and its employees.

Mr. Cunningham agreed that there was never any agreement or requirement as to hours or dates to be worked by the employee. The employee was to have a flexible schedule and it was based

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on her availability from week to week. It worked out well until she changed her availability in May 2020.

V. EVIDENCE OF THE EMPLOYEE

The employee, Kenneth Caelian was sworn and gave the following evidence.

She had obtained a new job and wished to update her availability at Booster Juice and sent the text on May 21, 2020 to Director, Jody King.

During the course of her employment the employee would give her availability to the employer and update the availability when she needed to make changes.

On May 21, 2020 she sent the text to Jody updating her new dates/times she was available to work. The next day she received a text saying, "Ok Kenneth".

As a result of receiving this text the employee assumed that her updated availability was ok with the employer.

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The following week she worked at Booster Juice for the hours set out in her new schedule being, Monday, Wednesday, Thursday from 9:30-2:30pm. "The new hours".

The employee says that at no time did the employer speak to her about problems with the new hours and that she did not receive the text of May 29, 2020 from her employer advising that they were not able to work around her new availability.

On May 29, 2020 the employee checked her schedule (this could be done through an app on her cell phone) and saw that she did not have any shifts scheduling for the coming week. (The second week for her new hours).

On June 5, 2020 she happened to see her Supervisor, Lea, at Superstore in Regina.

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Lea told the employee that Jody had told her (Lea) that Kenneth was to turn in her uniform and key for the premises.

Ms. Caelian returned her uniform and keys on June 9, 2020.

Ms. Caelian also attempted to log into the schedule app after the conversation with Lea. She discovered that she was now blocked and no longer had access to the work assignment schedule.

As a result of the conversation with Lea, (being told to turn in her uniform and key) not being scheduled to work, and being blocked from the schedule, Ms. Caelian assumed that she had been fired.

Ms. Caelian did not receive any calls or other communication from the employer after this contact with Lea on June 5th, 2020 at Superstore.

VI. ANALYSIS/DECISION

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The employer says that as the employee did not respond to the May 29, 2020 text message, (advising the employee that they could not accommodate her current availability) that the employee had quit.

The employer also argues that the employee is not entitled to severance pay as the employer is not required to accommodate an employee changing hours on short notice to the employer.

The employer also says that the employee should have made a greater effort to contact the employer to ascertain the status of her employment regarding the change in her availability.

The employee says that she thought that she was terminated as a result of her conversation with the supervisor, Lea, at Superstore where she was told to turn in her key and uniform. Not being assigned further shifts, and being blocked from the work schedule.

The employee takes the position that she was terminated without notice.

I do not see how the employee, Ms. Caelian, could have interpreted the facts, as she new them, in any other way than to conclude she had been terminated.

Resultantly, why would she contact the employer in that regard?

David Harris summarizes the distinction between dismissal and voluntary resignation in his text, "Wrongful Dismissal."

In paragraph 3.0 Dismissal, the author states that dismissal is a matter of substance, not form. It is effective when it leaves no reasonable doubt in the mind of the employee that his or her employment has already come to an end or will end on a set date. Among the relevant circumstances for this conclusion is the employee's state of mind.

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As a result, I find that the employee, Ms. Caelian, was terminated by Booster Juice and applying Section 2-60 of the act she is entitled to severance as set out therein.

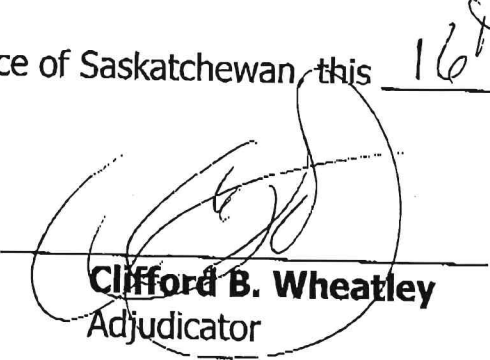
The parties have agreed that the amount is \$518.78.

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VI. CONCLUSION

The Appeal is dismissed, and the Wage Assessment stands in the amount of \$518.78.

Dated at Moose Jaw, in the Province of Saskatchewan, this 16th of January 2021.



Clifford B. Wheatley
Adjudicator

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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.