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

Bryce Schlamp

COMPLAINANT/EMPLOYEE

-AND-

Riverside Electric Ltd.

APPELLANT/EMPLOYER

DATES OF HEARING: June 7 and 8, 2022

PLACE OF HEARING: Swift Current, SK

LRB FILE: No. 047-22
WAGE ASSESSMENT: No. 1-000543

INTRODUCTION

The hearing commenced at 10 A.M. on June 7 2022, at Swift Current, 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.

Kelli Smith, Employment Standards Officer represented the Department of Employment Standards.

Complainant/Employee, Bryce Schlamp, attended and gave sworn evidence on his behalf.

The Appellant/Employer, Riverside Electric Ltd., and George Tsougrianis and Steven Cassidy, Directors of the Corporation attended in person. George Tsougrianis gave sworn evidence on behalf of the Corporation and the Directors.

The Corporation and Directors were represented by lawyers, Steve Seiferling and Walker Paterson.

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 $11,212.34.

I. AGREED FACTS

The parties agreed that the average amount the employee earned per week was $1301.46.

II. PRELIMINARY MATTERS

The Appellant objected to the role of the Director in the proceeding. The Appellant was of view that the Director, represented by Ms. Smith, had a limited role in the proceeding and could not actively take part in the proceeding nor act for the employee. That the role of the Director was one of an explanatory nature with reference to the record

before the hearing, as well as making representations relating to jurisdiction.

I advised that I would be applying section 4-10 of the Saskatchewan Employment Act which gives the Director of Employment Standards the right to appear and make representations on any appeal or hearing heard by an Adjudicator.

III. DISPUTE

The issue to be decided in this matter is whether the Employee voluntarily left his employment with the Employer or was the Employee dismissed without cause and therefore owed severance pay by the employer in accordance with The Act.

IV. EVIDENCE OF THE EMPLOYER

George Tsougrianis was sworn and gave the following evidence:

That he was the Director and Vice President of the Company.

The Company is an Electrical Contractor in Saskatchewan.

Mr. Schlamp was a part time employee of the Corporation, starting in 2011 as an Apprentice, during the time he was not attending school. Once Mr. Schlamp completed his Journeyman's Course, he became a full time employee. The first day of Mr. Schlamp's work was June 29, 2015, and he worked up to an including March 23, 2020.

On March 23, 2020, Mr. Tsougrianis received a text message from Mr. Schlamp, as set out in Employer Exhibit "3" (ER3) saying that Mr. Schlamp was going to "stay home with all this crazy stuff". Mr. Tsougrianis stated that Mr. Schlamp never came back to work after his text message was received by the Corporation.

Nothing was heard from Mr. Schlamp for some 2-3 weeks and Mr. Tsougrianis and the Corporation assumed that the employee had quit his employment. Sometime in April the Corporation made arrangements to retrieve their truck and tools which were in the possession of the employee as they had not been returned from March 23, 2020, onward.

At the time Mr. Schlamp left his employment, the Corporation had a number of ongoing jobs/projects that Mr. Schlamp could have been assigned to up to, and including June of 2020. In order to complete those ongoing jobs/projects other workers had been hired by the Corporation.

The Corporation was of a view that the employee had quit so they completed and forwarded the Record of Employment (ROE) on to Mr. Schlamp (Exhibit ER4).

The Federal Government had issued a number of directives to employers because of the Covid 19 Pandemic. They had directed employers to complete Records of Employment to show leave of absence as the reason for issuing the ROE to the employee. Mr. Tsougrianis was of a view that this was so the employee could apply for, and obtain, CERB Benefits.

The Employer said that at no time did the employee request a leave of absence from the employer, and the employer put leave

of absence of the ROE due to the direction from the Federal Government and in order to assist MR. Schlamp in obtaining CERB benefits.

After March 23, 2020, the Corporation had the following contact with Mr. Schlamp:

- April 13, 2020 (Employer Exhibit #5) – there was a text from Mr. Tsougrianis to the employee, Mr. Schlamp to make arrangements to have the Corporation property, truck and tools, returned to the Corporation.
- May 11, 2020 – Mr. Schlamp contacted Mr. Tsougrianis and requested he start working. The Corporation replied that he should come in and discuss the matter in person.
- May 29, 2020 – Mr. Schlamp texted the Corporation again, as well as June 8, 2020, inquiring about being able to work in both text messages. Mr. Schlamp also met with Mr. Cassidy personally on June 8th.

- There was no further communication between the parties after June 8, 2020, and Mr. Schlamp never returned to work with the employer.

The Corporation stated that they had not laid off Mr. Schlamp as there was plenty of work in the time frame of when he left and thereafter. His leaving necessitated the Corporation to hire new employees to complete the ongoing jobs/projects that Mr. Schlamp was previously assigned to.

The Corporation stated that they held the view, as a result of Mr. Schlamp writing the text message ER3, that he had quit his employment with the Corporation.

Under Cross examination Mr. Tsougrianis confirmed that the corporate documents in ESO – Exhibit #1, Tab 2a, were the Corporate documents of Riverside Electric Ltd.

He confirmed that ESO – Exhibit #1, Tab 6a, had been prepared by Riverside Electric and a copy had been sent out to all the

Corporate Employees, including Mr. Schlamp. Mr. Tsougrianis stated that Mr. Schlamp would have received this document before the Corporation received their text from Mr. Schlamp (ER #3).

The Employer stated that it took the text of Mr. Schlamp as a resignation as he did not ask for any of the documents set out in Tab 6a. Mr Schlamp did not ask for a return to work date, which the Corporation was of a view, that Mr. Schlamp would have required in order to apply for CERB benefits.

The Corporation issued the ROE showing a leave of absence and an unknown date for expected date of recall.

Mr. Tsougrianis stated that he never met with Mr. Schlamp in person, after receiving the text of March 23, 2020, and never clarified if Mr. Schlamp had quit his employment or not.

Mr. Tsougrianis had never discussed with Mr. Schlamp whether he was going to return to work or not.

Mr. Tsougrianis was of view that the employee had chose not to work and placed the leave of absence code in the ROE in order to assist Mr. Schlamp in obtaining CERB benefits.

Mr. Tsougrianis advised that the company, nor any of the Directors, had ever signed a document or had an agreement with Mr. Schlamp relating to his status as an apprentice employee training with them from 2011 to 2015.

V. EVIDENCE OF THE EMPLOYEE

The Employee, Mr. Schlamp, was sworn and gave the following evidence:

Mr. Schlamp started working for the company on February 1, 2011. He was doing his Apprentice Training wherein he would work for the Corporation for 10 months then return to school for 2 months each year up until he received his Journeymen Ticket wherein, he commenced work full time with the Corporation.

Mr. Schlamp received the document under Tab 6a from the Employer sometime before March 23, 2020 (when the employee sent the text message to the employer).

The Employee received the document from the employer and then decided to stay home as, he had previously had Mononucleosis and Pneumonia, and was concerned about the effect of Covid as it related to him.

On March 23, 2020, he contacted the employer by way of text. (EE3) He texted Janessa the Office Manager and Mr. Tsougrianis.

Subsequent to that date, the ROE was issued and given to him. The employee says that he gave no resignation and no discussion as to a time for him to return to work took place despite his inquiry's

On May 11, 2020, when he contacted the employer, Mr. Tsougrianis texted him to pop in. The employee did so and had

a meeting with Mr. Tsougrianis at the employer's office. The discussion dealt with him coming back to work and the employer advised that they did not have adequate work to bring him back to work and suggested he stay on CERB. *"Mr. Tsougrianis said that there never was a meeting on May 11 between him and the employee and Mr. Tsougrianis had never contacted the employee except by way text messages entered as exhibits."*

He met with with Mr. Cassidy on June 8, 2020, where his coming back to work was discussed, although the employer indicated that they again did not have sufficient work to bring him back at that time.

The employee requested to return to work on May 11, May 29 and June 8, 2020, (text and meeting on June 8). On each occasion the employer's response was that work was slow and that there was not enough work to bring him back to the job. The employer at no time told the employee that they had considered that he had quit or resigned from his employment.

At no time was the employee contacted by the employer to return to work nor was he told he was considered to be abandoning his position, by not being at work.

The employee started work with a new employer towards the end of July 2020.

The employee stated that he started his apprenticing in 2011. He would go to school for two months and work for the balance of the year. This went on for a period of four years when completed his schooling and became a Journeymen. He was not paid by the employer when he went to school.

On June 29, 2015, he commenced full time employment with the employer up to an including March 23, 2020 when he decided to stay home.

The employee agreed that the employer had adequate work for him to remain employed on March 23, 2020; however, he chose to stay home.

The employee did not provide any medical information to the employer or any of the documents set out in employers notice to the employees regarding covid (Tab #6a ESO Exhibit #1).

The employee never provided any medical information relating to this staying away from work to the employer.

The employee never worked from March 23, 2020, to late July of 2020 and during that period of time he collected CERB.

The employee never applied for a leave of absence from the employer and never talked to the employer relating to compliance with the Covid form sent from the employer to the employees including Mr. Schlamp. (LSO Exhibit 1,Tab 6A)

Mr. Schlamp was uncertain as to whether or not there was any agreement between him and the employer regarding his status while he was an apprentice. There was never a written document between them regarding the same.

VI. ANALYSIS/DECISION

The Employer takes the position that the Employee quit his job resultantly section 2-60 of the Employment Standards Act does not apply, and the Wage Assessment should be set aside.

The Employer arrives at this conclusion because:

1. When the employer received the text of March 23, 2020, from Mr. Schlamp, he read the text as Mr. Schlamp saying that he was quitting his employment with the Corporation.
2. The employer completed the Record of Employment stating that the reason for leaving was a leave of absence because of the Government advice that the company had received as a result of Covid 19 and that the employer wished to help out the employee in obtaining CERB benefits.

3. The Employer thought that it was incumbent upon the Employee to do more to confirm that he was still wanting to stay employed with the Employer.

Resultantly the Employer concludes that he does not owe severance pay as set out in The Act at Section 2-60.

The Employee states that he did not quit his position.

1. He says that he texted the employer indicating that he was going to stay home because he in the past had Mononucleosis and Pneumonia. He felt like he might be at higher risk should be contract Covid.
2. His intention was to stay home for a period of time in order to protect his health.
3. He texted and went to the employer's office on several occasions starting on May 11, 2020 with intent to return to work as usual.
4. In his texting, and at a meeting with Steven Cassidy, he was never told that they had considered him to have left his employment as of March 23, 2020. They indicated that there

was not adequate work to bring him back at the job at the times of the discussions.

The employee concluded from these events that he was fired and is entitled to severance pay under Section 2-60 of The Act.

The law relating to such events is addressed in *Beggs v. Wesport Foods Ltd., 2011 BCCA 76.* Where the British Columbia Court of Appeal reviewed the law relating to dismissal verses voluntary resignation and applied both as subjective and objective test to determine whether the Employee intended to resign and whether the Employees words and acts objectively viewed, support a finding that she resigned.

The Court looked to Wrongful Dismissal by David Harris and accepted the following:

1.0 Dismissal

Summary: Dismissal is a matter of substance, not form. It is effective when it leaves no reasonable double in the mind of the employee that

his or her employment has already come to an end or will end on a set date.

...

The crucial factor in assessing the effectiveness of a dismissal is the clarity with which it was communicated to the employee. Mr. Justice Macfarlane of British Columbia Court of Appeal stated that law is this regard as follows in *Kalaman v. Singer Value Co.* (1997), 31 C.C.E.L (2d) 1, 93 B.C.A. 93, 151 W.A.C. 93, 38 B.C.L.R (3d) 331, [1998] 2 W.W.R. 112, 97 C.L.L.C. 210-017, 1997 Carswell BC 1459, [1997] B.C.J. No. 1393:

> A notice must be specific and unequivocal such that a reasonable person will be led to the clear understanding that *his or her employment is at an end at some date certain in the future.* Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case. (p. 11[C.C.E.L.]; emphasis added)

...

3.0A Dismissal verses Voluntary Resignation

Summary: The test for voluntary resignation (as opposed to dismissal) is objective, focusing on the perceptions of a "reasonable employer" of the intentions of the employee based on what the employee actually says or does or, in some cases, on what he or she fails to say or do. Among the relevant circumstances are the employee's state of mind, any ambiguities in relation to the conduct which is alleged to constitute "resignation" and, to a certain degree, the employee's timely retraction, or attempt retraction, of his or her "resignation."

The employer drew his conclusion that the employee had quit from a text message received on March 23, 2020, that said, "Hey George I texted Janessa to let her know. After work today I will come and talk to you, but I am going to stay home with all of this crazy stuff since I have had Pneumonia before." The response was, "No problem." This was message was ambiguous at best.

The employer made arrangements to pick up the corporate tools and Truck from the employee many days later. With several meetings and text messages thereafter with the employee, the employer made no

comment with respect to why the employee was there, other than to say that there was not adequate work to have Mr. Schlamp return to work with the company. At no time did the employer discuss the fact that they had thought that Mr. Schlamp had quit his employment with them, and instead told him that there was inadequate work.

In July of 2020 Mr. Schlamp sought and obtained employment with another employer having concluded that he had been fired from Riverside Electric.

I do not see how the employee Mr. Schlamp, could have interpreted the text messages and facts as he knew them in any other way other than to conclude that he had been terminated. He saw no reason to contact the employer after reaching such conclusion after trying several times to get a return to work date.

I also find it strange the Employer said nothing to the Employee that they were of the view that Mr. Schlamp had quit, when in all his texts and at the meeting at the Employer's premises, he was asking to be scheduled back to work. How could they not know, by his conduct,

Mr. Schlamp was thinking he was still employed by them. That issue was not raised by them at any time.

A simple phone call or text could have confirmed the resignation one way or the other. The employer chose to do nothing.

Appying the above law, it is clear that the tests of Resignation by the Employee had not been met, therefore he was wrongfully dismissed.

As a result, I find the employee Mr. Schlamp was terminated by the employer Riverside Electric Ltd. without cause. Applying Section 2-60 of The Act, he is entitled to the benefits as set out therein.

VII. BIAS

The employer alleges bias in the decision and conduct of Ms. Smith, the Employment Standards Officer for:

a) Issuing the wage assessment after being presented with Mr. Seiferling's argument stating that a wage assessment should not be pursued.

It would seem that Ms. Smith, after her investigation into the employee's complaint, did not find Mr. Seiferling's argument compelling enough to not exercise her discretion in favor of the employee and issue the wage assessment.

I do not see nor find any bias in Ms. Smith's decision in this regard.

b) Mr. Seiferling, on behalf of the employer, also alleges that Ms. Smith, the Employment Standards Officer, exhibited bias against the employer and Directors by issuing the wage assessment against all three parties instead of just the Corporation.

Section 2-68 of The Act states that the Directors are jointly and severally liable to an employee if the employee was not paid when they were Directors.

Section 2-74 of the Act states that the Director may issue a Wage Assessment against the employer (in this case the Riverside Electric Ltd.), and the Directors. On several occasions

I have adjudicated wage assessment appeals whereby the time the appeal is heard, the Corporation no longer exists, or the Corporation does not have any assets remaining, or both.

Rather than bias on Ms. Smith's part, to join the Corporation and Directors in the wage assessment, it seems it is prudent to do so for the protection of the employee. It is also practical for enforcement, to enable the employee to be able to collect his wages should he be successful in the appeal.

Again, in these circumstances I find no bias against the Employment Standards Officer for her action in joining all three parties in the wage assessment.

VIII. TIME EMPLOYEE EMPLOYED WITH RIVERSIDE ELECTRIC LTD.

The employee stated that he started as an Apprentice with the employer in 2011. The apprenticing period was for four years, and the employee would attend school for two months and then work with the employer for ten months in rotation through the four years. The

employee completed his apprenticeship in 2015. He was not paid while attending school by the employer.

During this Apprenticing period of time, the employer was not obligated to have the employee return to work nor was the employee obligated to go back to work with the employer. After each two month period at school, both parties acted voluntarily to recommence the arrangement. This went on for the four years.

There was no employment contract between the parties during the apprenticing period.

I find there was not a continuing employment contract between the parties during the Apprenticing period It was renewed after each 10 month period of work.

The Employment Standards Officer presumed a four year contract of between the parties and added the four years as time employed to the wage assessment calculations bringing the wages payable under Section 2-60 of The Act to more than 10 years (8 weeks severance).

The employer says there was not written or verbal contract between the parties during the time of the apprenticeship. The employee does not recall if there was an oral or written contract or not. In any event there was no written contract between the parties entered or exhibited at the hearing. The evidence did not show a contract.

Mr. Schlamp started full time with the Corporation on June 19, 2015, to March 23, 2020 when the employee started staying home. The employment was automatically continued by the state of emergency declaration issued by the Saskatchewan Government on March 18, 2020, up to when the employee obtained new employment with another employer in late July of 2020. The employee was uncertain as to the exact date when he started working for the new employer.

As a result, I calculate the continuous employment with the Corporation was from June 19, 2015 to July, 2020 a period of which is in excess of 5 years.

According to Section 2-60 of The Act this period entitles Mr. Schlamp to 6 weeks of pay in lieu of notice.

IX. AMOUNT OF WAGE ASSESSMENT

The parties agreed (this was the only thing that the parties agreed upon at the hearing), that the average wage earned by the employee was $1,301.46 a week or $7,808.76 for a 6 week period. Plus, vacation pay of 3/52 which comes to $450.50 for a total of:

$7,808.76 + $450.50 = $8,259.26

The employer objected to the vacation pay being added on to any wages found owing. I find that vacation pay is eligible to be added on to the wages owing pursuant to the definition of wages in Section 2-1(v) of The Act.

X. CONCLUSION,

The Wage Assessment is amended to $8,259.26.

Dated at Moose Jaw, in the Province of Saskatchewan, this 21ST, of June 2022.

Clifford B. Wheatley
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 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.