Decision of Adjudicator in the Matter of an Adjudication
pursuant to Sections 2-75 and 4-6 of *The Saskatchewan Employment Act* (the "Act")
LRB File No. 099-21
W.A. No. 1-005-905

COMPLAINANT: Chian-Kai Kao
Represented by Andrew Langgard
Employment Standards Officer

RESPONDENT: Olympic Motors (SK) Corporation
o/a Auto Galley Subaru Regina Sask
Represented by Kevin Mellor, Nychuk & Company

DATE OF HEARING: December 2, 2021, at 9:30 a.m.

PLACE OF HEARING: Virtual from my home

i. Introduction

On the virtual conference the participants were:

a. Myself as Adjudicator;
b. Complainant Kao by telephone;
c. Employment Standards Officer, Andrew Langgard and a Ministry Observer, Dami Fadegi;
d. Kevin Mellor, lawyer for Auto Gallery;
e. Tom Glen, Owner of Auto Gallery; and
f. Josh Jors, Auto Gallery Operations Manager.

I welcomed the participants and briefly described my role and responsibilities, including my direction from the Act to provide a written decision within 60 days from the hearing date.

ii. Preliminary Matters

None

iii. The Dispute

The Parties agreed that the issue for me to determine is whether the Complainant quit or was terminated. If the decision is that he quit, then there is no notice in lieu of pay owed. If the Complainant was terminated, then pay in lieu of notice would be owed.

Both parties also agreed that Auto Gallery owes Mr. Kao accrued vacation pay earned during his employment period.

The Employer disputes the length of employment used by the Ministry to calculate pay in lieu of notice.

Mr. Mellor raised two other issues that the Employer will put forward as well. The first is whether Mr. Kao satisfied the legislation's criteria for the leave for family care and the second is what legislation covered the period of time for this case.

iv. Opening Statements

a. Employer

Mr. Mellor suggests that Mr. Kao (Kyle) resigned his position and further did not provide his employer with evidence that he was providing care and support for his family. Kyle is married and his wife could have provided the care. Kyle has no reason to miss work.

b. Employee

Mr. Langgard advised that this case is unique as it is the first one generated by the amendment to The Employment Act made on March 17, 2020, respecting Public Health Emergencies.

He believes that the facts will show that Mr. Kao was terminated and is owed two weeks' pay in lieu of notice.

Mr. Langgard concluded by suggesting that Mr. Kao was eligible for the leave and was not subject to recall.

v. Facts

a. Evidence of the Employer

Mr. Mellor called Josh Tors and he was affirmed.
In response to Mr. Mellor's questions, he provided the following evidence:

1. He has been employed by Auto Gallery since May of 2016. He is the Operations Manager and as such Kyle reports to him.
2. On March 23, 2020, Kyle approached him and requested a leave (TAB 1 ER binder). Kyle gave no reason for the leave.
3. The Employer attempted on multiple occasions to get Kyle to return to work. Kyle was important to Auto Gallery as he was one of two finance officers, and they arrange financing for customers. He delivered the letter (TAB 2) to Kyle. It represents a recall notice giving Kyle one month to return (letter dated May 29, 2020). Kyle did not return and did not respond during that month.
4. Even though Kyle had indicated (TAB 1) that he would come in for appointments he never did, and he could not work from home.
5. When Kyle did not return to work as directed in the recall notice, he used text messages to Kyle (TAB 3) May 29 and (TAB 4) June 5. In TAB 4 he tells Kyle that since he (Kyle) has not responded to any of the Employers communication that he will be considered as having resigned and forfeiting the recall. The letter is dated June 5 and Kyle has until June 6 to reply.
6. On June 6 he received an email from Kyle (TAB 5) telling him (Josh) that he (Kyle) will not be returning because of Covid.

NOTE: At this point Mr. Mellor asked Tab's introduced from the Employer binder be marked as exhibits. I marked Tab's 1 to 5 as ER 1 to ER5.

7. Next, he referred to Tab 6 (marked ER6) which contains a number of emails between Kyle and himself dated from June 16 to June 29 of 2020. On June 16 he emailed Kyle telling him the workplace is safe and that he should come back. June 18 Kyle responds telling him that the reason for his leave has not changed, it was and is to provide care and support for his immediate family members. On June 22 he emailed Kyle telling him that Covid restrictions have been relaxed despite the state of emergency still being in effect and that he (Kyle)needs to either provide details for his absence or return to work on Jun 23, 2020.
8. A discussion with the Ministry confirmed employee's responsibility includes providing clear reasons for a leave.
9. Email (Tab 6) dated June 23 from Kyle to him again refuses to provide explanation regarding for whom care is being provided.
10. On June 24 he emailed Kyle (Tab 6) again asking for an explanation as to why he (Kyle) needs the leave. Later that day Kyle responded but gave no reasons for his leave and did not return to work.
11. On June 29 he received an email from Kyle (Tab 6) refusing to return to work and provides no explanation as to why he was off.
12. Tab 7 (ER7) is a letter sent by Jason Braam, Director of Human Resources for Olympic Auto Group to Andrew Langgard. The letter represents the Employer's response to the wage assessment.
13. Tab 8 contains a letter from himself to Andrew (undated) stating that during the six-month period that Kyle was away there was no communication from him and that on September 15 Kyle resigned. Therefore, no money is owed to Kyle.
14. He never terminated Kyle, in fact he wanted Kyle back at work. He would rehire Kyle in fact he had asked Kyle to come back multiple times.
15. Tab 10 (ER10) contains three ROE's. The first one shows Kyle started work on April 23, 2019, and the last day was March 21, 2020. His employment was less than one year. Pay BOX I5C shows total insurance earnings to be $147,975.45. ROE #2 had vacation pay added he thinks making total insurable earnings $155,182.80. ROE #3 adds more vacation pay again he thinks, increasing earnings to $158, 827.47.
16. Kyle was one of two finance managers who dealt with financing needs of customers. A vital role in the company.
17. Kyle never told the Employer what he wanted the leave for, for example care and support under the legislation.

At this point Mr. Mellor asked for a break so the Employer could check to see if there was any vacation paying owing Kyle.

After the Break Mr. Jors reported that a cheque for vacation pay was mailed to 25 Hawkes Avenue in Regina on June 30, 2020, in the amount of $2,935.35. Therefore, according to the Employer vacation pay has been made in full.

b. Cross Examination

In response to questions from Mr. Langgard, Mr. Jors provided the following testimony:

1. He has no evidence that the cheque sent to Hawkes Avenue was either cashed or cancelled.
2. He agreed that the corporate registry profile report for Olympic Motors in the Ministry's binder is correct. It was marked EE1.
3. He knows Kyle from Kyle's whole employment period and knows Kyle has a family and that they have discussed personal lives. He knows Kyle is married and has school age children. He is aware Kyle requested leave because schools were closed; but Kyle never gave an explanation. When the leave was granted, it was only a voluntary leave requested. Kyle said he has concerns over Covid. He believes Kyle has a stay-at-home wife.
4. The Employer believed Kyle could be recalled at any time, the Ministry told them that employees have responsibility to communicate with the Employer. Kyle refused to give any reason to demonstrate he was providing care and support.
5. Kyle never gave any indication that he wanted to leave his employment, but he had to consider the September 15 email as a resignation.

   NOTE: At this point Mr. Langgard provided a document which represents an email from Josh Jors to Kyle Kao. The document is marked "Without Prejudice" and Mr. Mellor objected to it being admitted into evidence. He cited that documents so marked are not admissible as evidence. Mr. Langgard argued that under 4-4(1)(3) of the Act "an adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considered appropriate." I ruled that I would admit the email and make a decision as to whether to allow it as evidence or not when I draft the award. The document was marked EE2.

6. EE2 represented the culmination of Kyle's consistent refusal to tell the Employer what his leave was for and consistent refusal to return to work. It was therefore determined Kyle had abandoned his job.
7. It was not a termination he really wanted Kyle to come back. The reference to "misuse of generous government programs" indicated that the Employer has a responsibility to police these programs.
8. Regarding ER10 ROE #3 shows all accrued vacation pay has been paid. The notation "quit" in Box 16 was put in by payroll to be able to close the file. He did not think Kyle quit.
9. Kyle's position was filled by another Finance Officer, but he can't remember when and is not sure who it was.
10. It is the Employers position that Kyle resigned in a text message sent on September 15 and therefore his employment was over. ROE #3 also shows Kyle not returning form Covid lay-off along with "quit" as reason for issuing ROE. He believes payroll filled out these boxes.

c. Redirect

In response to questions from Mr. Mellor Mr. Jors provided:

1. The email to Kyle on June 25 (EE2) was designed to get Kyle to tell him why the leave needed to continue.

2. He believes a new Finance Officer was hired after Kyle resigned and the start date was January 1, 2021. The impact of being short staffed all that time was immense, both financially and customer service wise.

Mr. Mellor called Tom Glen and he was affirmed. In response to Mr. Mellor's questions, he provided the following testimony:

3. He has known Kyle since the start of Kyle's employment and he likes Kyle, but he is disappointed Kyle is not employed anymore.
4. Corporation policy always puts family first, if employees are not happy at home, then they are not good at work, in fact just recently his assistant had a daycare problem and he told her to go take care of it and not worry about her work.
5. The issue with Kyle was we didn't know why he wasn't at work, from April 13 to September 15. He texted Kyle seven times and that's not his job to deal with absent employees.
6. The texts asked Kyle where he was etc., and the troubling part here was no response from Kyle. Kyle never told us he had Covid or that childcare was the issue, or that he was afraid of catching Covid or whatever.
7. He would support any employee's absence if there was a good reason. To this day he would have Kyle back, if Kyle asked.
8. Kyle officially resigned on September 15.
9. Kyle did apologize for poor communication but never did give a reason for the leave.
10. He doesn't know who Kyle was caring for.
11. On April 13 Kyle requested a sick day.
12. Kyle was never terminated by the Company.
13. Tab9 (marked ER9) represents the texts sent between himself and Kyle between April 17 to September 15.

d. Cross Examination

In response to questions from Mr. Langgard, Mr. Glen provided the following:

1. He has known Kyle from the start of employment, and he liked what he knew of Kyle.
2. He was aware of Kyle's family and children.
3. He acknowledges the letter form Kyle to himself dated March 21, 2020 (marked EE3) and feels it is self-explanatory that Kyle needed to provide support for his family at home.
4. He started texting Kyle on April 13 and continued for six months as we needed more from Kyle regarding his leave.
5. The reference in Kyle's letter regarding return to work when the current measures and restrictions are removed was not good enough as things were changing all the time, we needed more from Kyle including constant communications.
6. He has never read the Act, but common sense says communication is necessary.
7. Kyle's request for leave came on March 21, 2020, he didn't speak to Kyle personally, it's not his scope to approve, that's Josh's area. The leave was voluntary, and we supported it.

8. Employee return to work from absence is not his area, he communicated with Kyle only to get particulars from him. Kyle could be still off, had he told us the reason. We did need to know if a replacement was necessary or not.
9. In ER11 ROE #3, he understands the "quit" term was used by payroll to close the file. That is not his department. He never has said Kyle quit as he texted Kyle after June 30, the date of the ROE.
10. While there were internal discussions about Kyle's absence, he did not know about Mr. Jors email to Kyle regarding job abandonment sent on June 25. All he knows is that Kyle resigned on September 15. He has no idea why Kyle quit.
11. The recall was issued to get a response from Kyle.
12. Kyle's reason for the leave stated in the March 21 letter was not enough for me as it didn't say who. Kyle never did any work remotely. Saying he'd return when current measures changed is unclear as measures changed frequently. We never heard from Kyle at any point.
13. The last sentence in Kyle's leave letter of March 21 was acceptable had he communicated regularly.

e. Redirect
None.

f. Evidence of the Employee
Mr. Langgard called Kyle Kao, who was connected by telephone. Mr. Mellor requested that Kyle be joined via video. Kyle objected and I ruled that the telephone connection was acceptable.

Mr. Kao's response to Mr. Langgard's questions are as follows and came after he was affirmed.

1. His employment period began on April 23, 2019, and ended on June 25, 2020. He was a Finance Officer for the Company.
2. He has one child, Tilly, who is 13 years old, she attended Douglas Park Elementary in grade 7.
3. The school was closed on March 17, 2020, when the health order was issued. He received the notice from the school online, and it was closed for the rest of the school year.
4. Since his daughter wasn't in class, he couldn't go to work so he drafted the letter dated March 21, 2020 (EE3) and delivered it to Tom Glen personally in Tom's office. He told Tom why he needed the leave. They had met shortly after 9:00 a.m. on March 23 after the sales meeting, The meeting lasted 10 to 15 minutes. At first it was just Tom and himself, Josh came in during the meeting. He explained the details of why he needed the leave, which was that he needed to stay home with his daughter to provide her with care and support. Tom approved my request and my access to the legislation. Tom told me to take care of my daughter and Josh was a witness. We discussed my return to work would be as soon as the government lifted the emergency order. Tom agreed and we shook hands, and he went home to his daughter.

5. During his leave he structured his daughter's day with school learning, physical activity, fed her etc. as he had her full time. His wife and he were separated at the time.
6. He had regular communication with his supervisor, Jessica Tetler throughout April and May. His last text to her was May 22.
7. The time frame for his return to work was when the state emergency was lifted.
8. He considered the recall notice from Josh May 29 (ER2) a bully tactic. It also confused him as his leave had been personally approved by Tom Glen. His daughter was still on remote learning, and he felt he had to defend his rights. It was never his intention to resign, he wanted to work there until retirement. He was ranked first in gross output in 2019.
9. The June 25 email from Josh (EE3) made him feel betrayed.
10. He knows that Auto Gallery hired a Finance Officer, who started on June 1. He felt relieved for the Company.
11. His daughter resumed her school attendance on September 8, 2020. He texted Tom on September 15 with his resignation because the culture at Auto Gallery was that vacation pay is not paid out until the employee quits. He felt this action was the only way to get paid.
12. He identified a document marked EE4, as a pay stub of his dated April 15, 2020. This was his final pay stub. It shows a total of $3,644.57 of accrued vacation pay owed. It has never been paid to him.
13. He has never received a cheque by mail or cashed one, nor received the vacation pay by direct deposit.
14. He emailed both payroll and Jason Braam in Human Resources asking for the pay out of his vacation pay and neither one responded.
15. He is not surprised Tom testified not meeting on March 23. Tom has showed he can change his perspective. He had sent an email to Jessica after that meeting telling her of his leave approval.

g. Cross Examination

In response to Mr. Mellor's questions Mr. Kao provided the following testimony:

1. He lived at 26 Hawkes Avenue, but also has a residence close to Douglas Park. Currently he and his spouse are in British Columbia. He moved to BC in July of 2020, his wife came in August. His parents are in BC and he went to visit and stayed. 26 Hawkes Avenue is his wife's parents house and they live there.
2. The house near Douglas Park is 2737 Francis Street and he has lived there since purchased in 2018.
3. He uses 26 Hawkes Avenue for his mail address, he stores things there as well. His wife lived with her parents, she never stayed with him full time, they were separated on and off.
4. He lived at Hawkes Avenue from 2014 to 2018 then moved to Francis Street.
5. His wife was neither available nor fit to take care of Tilly (daughters name), custody was not awarded by the courts, but he has the responsibility for her care.
6. His parents-in-law were not capable of looking after her daughter. He would have been at work if he had been able to.
7. He could not leave his daughter alone during the day to work 9-5.
8. His parents-in-law are in their late 60's.

9. Tilly is in BC with him and she is in school today.
10. He didn't need to put reasons for his leave in text messages as he provided all the details to Tom Glen during the meeting on March 23, 2020. He told Mr. Glen in that meeting it was his daughter that needed care and support.
11. He agrees he sent the September 15 text to Glen. He was already terminated in June, but he had not received his vacation pay so he resigned to get it.
12. He is not aware of any written policy at Auto Gallery regarding pay out of vacation pay.
13. He did request his vacation pay after receiving the June ROE, he made the request on October 1.
14. He didn't respond to the June 25 dismissal because it was not up for discussion.
15. He moved to B.C. because he was terminated and thought employment with the Company there might be possible. Tilly moved with him.
16. The health measures mentioned in his March 21 letter were still in place when he moved to BC There was no need to keep Auto Gallery up to date because there was no change.
17. The letter from Josh (ER6) dated June 22, suggested a return to work because "covid restrictions are now relaxing" was not heeded because the state of emergency was still in place and schools were still closed.

h. Redirect
None.

vi. Final Argument
Since the parties provided written arguments, I include those arguments as submitted:

a. Employer

I. INTRODUCTION

1. The Appellants, Olympic Motors (SK) I Corporation and Thomas Glen, appeal the wage assessment by the Respondent, Chian-Kai Kao, with respect to the amount claimed for noticesaid to be payable by the employer to the employee.

2. The Appellants do not appeal the wage assessment with respect to the vacation pay owing. They tried to pay it twice.

3. At the outset the Appellant submits this wage assessment is incorrect for three main reasons. Firstly, the employee resigned his employment and therefore no notice is payable to him. Secondly, the employee did not satisfy the *Saskatchewan Employment Act* (herein "Act") or its regulations including his obligation to demonstrate that he was required to provide care andsupport to anyone including his child and thirdly, before an employee is allowed to take a public health emergency leave section 2-59.1(5)(a) clearly states either the employer, medical doctor, government or the chief medical officer directed the employee to self isolate or that he is required to provide support and care to a child. None of the four designated individuals ever told or advised the Respondent to self-isolate. Car dealers are deemed essential services. There is no evidence provided to this Tribunal that had any of the four bodies directing Mr. Kao to self-isolate. Mr. Kao asked to self-isolate and his employer

voluntarily agreed but this does not put you under the legislation for legislated public health emergency leave. In order to fall under this legislated provision you must satisfy its provisions. There is no evidence before the Tribunal that the employer required the employee to self-isolate or that Mr. Kao was required to care for achild. There is evidence that the employer agreed the employee could take time off to be with his family if he was concerned with Covid. Those are two entirely different legal principles and fact scenarios. The evidence also disclosed that Mr. Kao had a wife who did not work and in laws. This Tribunal is allowed to draw an inference that the child could have been supported by the stay at home mom and in laws versus Mr. Kao especially when Mr. Kao refused to answer questions about the mother and in laws regarding the support of the child. Instead Mr. Kao was evasive, refusing to answer questions, mocking legal counsel.

4. Lastly, the employer wishes to point out to the Tribunal that when evaluating the evidence the employee's credibility needs to be questioned on key points of his evidence. Never mind the rudeness of Mr. Kao by not answering questions, being evasive, telling the Respondent's lawyer that he was humouring him and constantly asking if he has to answer that question and just his plain demeanour at the hearing is troubling. It is hard to imagine how the employer was to know that Mr. Kao did not live at his Hawkes address in Regina when that isthe address he gave to his employer. Is there any wonder why the vacation pay check was not received by Mr. Kao (twice) when he did not live at that address and we find out for the firsttime that his estranged wife and family live there. Does anyone think given the dynamics of an estranged family and an unsettled family home that the check was not given to Mr. Kao. Yet Mr.Kao tries to paint the picture that the employer held back the vacation check. To save time and expense the employer admitted the amount was owed.

5. It is incumbent on the employee to produce evidence that he had to care and support his child. He produced none and relied on his story that he was the only one but refused to answer questions when directly put to him why his wife could not care and support the child. That was self serving. The objective evidence clearly demonstrates that at no time did the employee ever suggest at any time that he had to care for his child and that no one else could. If income was so short for Mr. Kao why did he move to Vancouver when he was earning over $150,000/yr in Regina. That is because he was moving to Vancouver regardless.

6. The Appellants respectfully ask the Tribunal to dismiss the wage assessment in relation to the notice said to be owed to Mr. Kao as it is not supported by the facts or the law.

II. FACTS

7. That Mr. Kao commenced his employment with the Appellant, Olympic Motors (SK) I Corporation, on April 23, 2019. His place of employment was located in Regina, Saskatchewan.

8. That Mr. Kao voluntarily left his employment on March 21, 2020 and never came

back.

9. On March 23, 2020 Mr. Kao sent an email to Jason Braam regarding his leave of absencefrom his employer. Mr. Kao in this communication does not ever say he met with Tom Glen, he does not ever state that the employer, doctor, government or chief medical officer, asked him to self-isolate. He states he can not do his employment duties from home but is available on an appointment basis when deemed necessary. Kyle Kao clearly indicates in this email that it was his choice to leave his employment as his family is his number one priority (ER-1). At no time does he ever say he is caring for child.

10. That Mr. Kao was never given a letter or communication of any kind that he had to self isolate by the employer.

11. That Mr. Kao gave his place of residency at 26 Hawkes Avenue, Regina, Saskatchewan, to his employer even though he did not live there. The vacation pay checks were delivered to 26 Hawkes Avenue, Regina, Saskatchewan. That Mr. Kao did not live at 26 Hawkes Avenue but onFrancis Street in Regina, Saskatchewan. Mr. Kao's estranged wife and her parents allegedly lived at 26 Hawkes Avenue. Mr. Kao admitted his relationship with his wife and in-laws was complicated, but he never produced credible evidence that showed his wife could not care for the child.

12. Mr. Kao moved to Vancouver, British Columbia, in late July or August, 2020 and has notreturned to live in Regina. He admitted at the hearing that he lived in Vancouver.

13. That Mr. Kao was asked to come back to his employment by letter and text numerous times including the following dates:

    (a) April 20, 2020 (ER-9);
    (b) May 16, 2020 (ER-9);
    (c) May 29, 2020 (twice – letter and text) ER-2 and ER-3;
    (d) June 5, 2020 (twice – letter and text) ER-2 and ER-3;
    (e) June 7, 2020 (ER-9);
    (f) June 16, 2020 (ER-6);
    (g) June 22, 2020 (ER-6);
    (h) June 24, 2020 (ER-6);
    (i) September 15, 2020 (ER-9).

14. On April 21, 2020, Mr. Kao admits after leaving the employment on his voluntary leave that he has had very poor communication with the employer and apologizes (ER-8 and ER-9). He goes on to say he is not resigning. He knows to say I am not resigning in this email.

15. Mr. Kao receives text from Tom Glen on May 16, 2020 that customers are lining up out the door. Mr. Kao states that he is glad things are returning to normal.

16. On September 15, 2020 Mr. Glen texts Mr. Kao to determine how he is doing and Mr. Kao responds by formerly resigning his employment position on September 15, 2020:

> Morning TG.
>
> Thanks for asking. I hope all is well with you, your family, and your businesses.
>
> **Please accept this as my formal resignation from Auto Gallery.**
>
> I been fortune for the opportunity you have given me and sincerely thankful for your guidance and support during my tenure.
>
> I would appreciate it very much if the outstanding monies (vacation pay)can be direct deposited in a timely manner.
>
> Respectfully,
>
> Kyle
> (Bold and underline mine)

17. The employer issues 3 Records of Employment. The first on April 1, 2020 which documents the standard pay for Mr. Kao and indicates he took a leave of absence. The second on April 17, 2020 which documents the commissions Mr. Kao earned and indicates he took a leave of absence. The third and last record of employment on June 30, 2020 documents the vacation pay for Mr. Kao and indicates he was not returning from COVID layoff.

18. Mr. Kao never worked with the employer after March 21, 2020.

19. The employer never issued any covid isolation notice to Mr. Kao as required by statute.

20. Mr. Kao never once sent a text or letter during the period March 21, 2020 to September 15, 2020, explaining to his employer what care and support he was giving to any person never mind a child.

21. Mr. Kao never complains about his vacation pay from March to August, 2020. He raises his vacation pay in the September 15, 2020 text message when he resigns.

22. During Mr. Kao's cross examination he exhibited the following behaviour:

    (a) Rudeness;
    (b) Evasiveness;
    (c) Unwilling to answer questions;
    (d) Incivility;

(e) Refusal to provide documents that support his story.

III. ISSUES

23. Is Mr. Kao allowed notice under *The Employment Act* given the facts of his employment?

IV. LAW

24. The Appellants state that Mr. Kao did not satisfy section 2-59.1(5) to support that he was on a public health emergency leave. That section requires that the employee be asked to isolate by either his employer, doctor, government or the chief medical officer. It also provides that the employee is required to provide to care and support to the employee's child family member. No objective evidence was supplied to support that he was in care and support for his child. He simply wants the Tribunal to believe him and refused to provide answers to direct questions why his wife and in laws could not support the child.

25. There is no evidence that any of the four persons described above ever asked Mr. Kao toisolate. He voluntarily isolated. That is not isolation that the statute is demanding. Just becausean employee says he is taking a "public health emergency leave" does not mean he qualifies forit under the statute. He has to prove it. The employer cannot prove it for him unless it is askingfor the isolation. The employer did not ask for the isolation.

26. The statute requires that the employee be directed to isolate when it states as follows:

(5) An employee is entitled to a public health emergency leave for the period during which anorder of the chief medical health officer issued pursuant to subsection (2) is in force if:
(a) any of the following have directed employees to isolate themselves to prevent or reduce thespread of the disease that is the subject of the order:
(i) the employer of the employees;
(ii) a duly qualified medical practitioner;
(iii) the Government of Saskatchewan;
(iv) the chief medical health officer; or
(b) the employee is required to provide to care and support to the employee's child family member who is affected by a direction or order of the Government of Saskatchewan or an order of the chiefmedical health officer.

27. The statute also demands that the employee be required to care and support to a child family member. There was no objective evidence that Mr. Kao could produce that suggest he was required to provided care for his child. He never produced separation or divorce papers, he never produced any evidence from his allegedly estranged wife, he never disclosed any document or correspondence from his wife that she could not provide support for his child. The employer asked many times for proof and Mr. Kao refused to correspond and ended up apologizing. Mr. Kao was every evasive or refused to answer why the wife and in laws could not provide care and support.

28. The fact is there is an onus on the employee to prove that he was required to

care and support for the child. The evidence is that he has a wife and in-laws that could take care of the child while Mr. Kao was at work. He chose not to have them care for the child. When pressed about his family situation he refused to answer the questions. This Tribunal should draw a negative inference against Mr. Kao refusing to answer certain questions and mocking counsel fortrying to get at the truth. What is clear however is he never once in any correspondence disclosed that he had to care and support for anyone never mind a child. For the first time we hear that at trial. Why didn't he produce his wife to confirm his statement. Was he concerned she may contradict him. There is no way the employer could have ever known of this story priorto the verbal testimony at trial because Mr. Kao would not state why in the many emails and letters between him and the employer. Why not mention that you had to care for your child at least once in multiple emails and texts. Not once!

29. How can we hold employers responsible for an unknown notice period in these situations when the employee refuses to disclose the reasons for his voluntary removal from employment. The employee possesses all of the information. The employer has none of it. The March 23, 2020 email from Mr. Kao is very informative. Never once does he say he is caring for a child. That is important when asking for notice because you refuse to work with an employer who is begging you to come back to work as they need you as a valued employee.

30. Are we going to hold employers responsible for notice when the employee refuses to work. That is a very dangerous precedent. Surely this Tribunal will take into account that the employee voluntarily went on unpaid leave, never stated in any letter filed with the tribunal that he had to support his child (especially when his wife was available), stated for the first time that he is the only person who can care for his child (even though in laws and a wife live in Regina), moves to Vancouver in July or August of 2020, was asked multiple times to come back to work to fulfil his important role with the company and then resigns in writing but we are supposed to think he did not resign. Mr. Kao wants you to believe that he was wrongly dismissed and not given proper notice. How can this be? Now he also wants the Tribunal to find that he worked greater than a year because he sat at home for approximately 6-7 months. As a result he wants you to give him even greater notice. Mr. Kao wants 2 weeks notice instead of one.

31. The employer submits what did they do wrong exactly. They supported that he go on his voluntary leave because he asked, they begged Mr. Kao to come back to work, they paid his vacation pay twice and sent it to an address that he gave them (he did not live there), he resigned in writing and asked for his vacation pay.

32. To determine when an employee has resigned the case law is clear. See Nutrien Ltd. v United Steelworkers, Local 7689 (Dale Hansen), 2021 CanLII 54674 (SK LA). The case below highlights that for an employee to have resigned he or she must have done an objective act such as a written resignation that supports their subjective intention to quit. Dan Ish states the principles as follows when he

found the employee in his case had clearly resigned:

[60] The issue of whether an employee has effectively quit or resigned has been the subject of numerous arbitration decisions in Canada going back to the earliest days of reported arbitration decisions. In *Anchor Cap* 1949 the arbitrator outlined the elements of a voluntary quit thatcontinue to apply today. An effective resignation has both a subjective and an objective element
– "an employee must first have resolved to do so, and then done something to carry the resolution in effect' (Mitchnick and Etherington, at p. 485). This two-fold test has been described by Brown and Beatty at 7:7100 as follows:

In answering that question, from the earliest cases arbitrators have insisted that the act of quitting embraces both a subjective intention to leave one's employ and some objective conduct which manifests a continuing effort to carry that intention into effect. In the seminal case, one arbitrator summarized the rule in these terms:

The act of quitting a job has in it a subjective as well as an objective element. An employee whowishes to leave the employ of the Company must first resolve to do so and he must then do something to carry his resolution into effect. That something may consist of notice, as specifically provided for in the Collective Agreement or it may consist of conduct, such as taking another job, inconsistent with his remaining in the employ of the Company.

In many cases, the difference between the parties centres on whether an employee who expressly declared an intention to quit really meant what he or she said. It is not uncommon for people in a highly emotional state to declare an intention to resign which is not sincere. If, onthe facts of a case, the employee's statement was made on the spur of the moment, or out of anger or frustration, for example, it will typically be found to lack the subjective element that is necessary to establish a quit. "Resignations" made under duress and undue pressure, emotional turmoil and stress, or provocation, or by persons whose mental and medical condition deprived them of the capacity to make such decisions rationally, are treated the same way. On the other hand, if the arbitrator is of the opinion that the person simply opted to resign rather than face a less desirable alternative (such as a criminal prosecution and/or discharge) or made an ill- considered decision, acting unwisely and/or on a mistaken belief, the employee will, in the absence of any extenuating circumstances, likely be held to his or her declared intentions.

Whether an announcement of quitting will be found to be real depends, of course, on the facts ofeach case. Arbitrators take into account a wide range of factors, including the context in which the statement was made; the amount of time the employee had to reflect on his or her decision; whether the employee had the benefit of his or her union's advice; and what the employee did immediately thereafter. Putting a resignation in writing is usually taken to be objective evidence that the employee did intend to quit, but there can be circumstances, such as when the documentis prepared by the employer, when it is not.

[61] Arbitrator Brandt summarized the law surrounding resignation as follows:
The law in this area is quite clear. In order that an employee be found to have effectively resigned her employment it must be demonstrated not only that she had a "subjective intention" to resign but also that this intention be confirmed by some "objective conduct". The concern that underlies this doctrine is that resignations frequently are offered in the heat of the moment or at times of some personal stress and that they may not express the employee's real wishes. Consequently, arbitrators have looked at conduct over and above the expression of a desire to resign employment in order to satisfy themselves that the intention to resign is one of which is continuing and real ...

(*Re Meadow Park Nursing Home and Service Employees, Local 210* (1993), 36 LAC (4th) 283, at 285).

33. It is clear in this case that Mr. Kao objectively resigned. He texted his resignation to the owner Thomas Glen on September 15, 2020. I cannot think of a clearer form of resignation. This resignation came on the heals of a text from owner asking where he was and is he coming back. There is no duress here. The resignation was voluntary and done on Mr. Kao's own accord. He had not been in the dealership for 6-7 months when Saskatchewan had already re- opened.

34. The fact is this. Mr. Kao voluntarily removed himself from his employment. The company asked him to come back multiple times because he was a valued employee. He refused and apologized. He sold his house in Regina that he lived in and moved to Vancouver without anyone's knowledge. When asked to come back from the owner he resigned in September. The employee never worked, refused to return to work and now wants two weeks notice when he refuses to work. MR. Kao never intended to return to work but most importantly he never satisfied the requirements of the statute that he is relying upon.

V. CONCLUSION

35. The Appellants ask that the wage assessment be vacated regarding notice and be allowed regarding his vacation pay as they tried to pay the Respondent twice but were unable to as the check was sent to a house that he did not live at.

b. Employee

Introduction

- The central issue in this case is whether Kyle Kao quit his employment or was terminated. This is a unique case. This is the first adjudication hearing to address the Public Health Emergency Leave since it was enacted. As far as the Director is aware, there is no other case law interpreting this employment leave.

- The Government of Saskatchewan amended *The Saskatchewan Employment Act* ("the Act") in March 2020 to create a new employment leave to address the public health emergency resulting from the Covid-19 pandemic. The government recognized that with schools and daycare centers closing due to the pandemic, employees would need to stay home from work to care for their children. Section 2-59.1 was enacted to provide an unpaid, job-protected leave during a public health emergency for employees who must provide care and support to a child family member affected by a government order.

- The facts show that Kyle was eligible to access and remain on this leave during the period in question. The Chief Medical Health Officer's Public Health Order suspended in-person learning at all primary and secondary schools effective

March 20, 2020. Kyle's daughter was attending Douglas Park Elementary School at the time and was affected by this order. Since Kyle's daughter had to learn remotely, Kyle informed his employer on March 21 that he intended to access the leave to support his family.

Rationale For Leave and Notice of Recall

- The dispute arose as a result of the employer's May 29, 2020 email to Kyle recalling him from his employment leave. It appears the employer treated this as an optional leave which could be rescinded anytime at the employer's convenience. However, the circumstances which gave rise to the leave - that being the closure of his daughter's school to in-person learning- had not changed. Kyle's daughter was still affected by the public health order and he was still providing care and support to his family. Kyle reasonably opted to remain on the leave, as was his right. The employer's suggestion that Kyle could have made alternative arrangements for his spouse or his in-laws to provide care and support to his daughter is not relevant to his ability to access and remain on the leave.
- Every eligible employee has the right to access any of the employment leaves set out in the Act. Section 2-44 of the Act states that "no employer shall fail to grant an employee an employment leave when required to do so". The Director argues that the evidence shows that Auto Gallery was required to grant Kyle the public health emergency leave and to allow him to remain on the leave until his daughter was no longer affected by the school closure.
- It is also the Director's position that Auto Gallery had no authority to recall Kyle from the leave which he was lawfully entitled to. Auto Gallery could not recall Kyle from the public health emergency leave any more than they could recall him if he had taken a parental leave. According to information available on the Douglas Park Elementary School website, in-person classes did not resume until September 8, 2020. Only at that point would Kyle no longer be eligible for the leave.
- To support the recall notice, it appears the employer is relying on the fact that all staff at Auto Gallery were asked to participate in temporary leaves or other concessions when the pandemic began. The employer then assumed it could simply recall Kyle to work in accordance with the voluntary leave granted by the employer.
- However, any voluntary leaves offered by the employer and agreed to by the employee must still meet the minimum requirements of the Act. The fact is, Kyle

was eligible to access the Public Health Emergency Leave in addition to any temporary leaves offered by his employer. If there is any conflict between these two leaves - one provided voluntarily by the employer and one provided for in the Act -then the Act prevails.

- Section 2-6 of the Act states that "No provision of any agreement has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Part." In this case, the employer's attempts at recalling Kyle from a leave to which he is eligible deprives him of the right to access the protections afforded by the Public Health Emergency Leave.

- Auto Gallery's repeated attempts to recall Kyle back to work while on an eligible leave, and then treating his refusal to report to work as job abandonment, amounts to a dismissal. Could the communication between the parties have been better? Certainly. Kyle acknowledged as much in one of his texts to Tom Glen. Even so, at no time during all the email correspondence between Kyle and Auto Gallery did Kyle ever indicate any intention to resign.

- In several of the emails Auto Gallery sent to Kyle during the May to June 2020 period, Auto Gallery demanded that Kyle substantiate his reasons for remaining on the leave. Kyle had already met with Tom Glen on March 21, 2020 to explain in detail his reasons for accessing the leave. Since there had been no change in either Kyle or his daughter's personal circumstances, it is unclear to the Director why Kyle would need to provide additional reasons for continuing the leave.

- Regarding the disputed March 21, 2020 meeting, Kyle gave very specific evidence, including the date and time, nature of the discussion, the individuals present and the outcome of the meeting. This is in sharp contrast to Mr. Glen's vague assertion that he did not recall such a meeting. Given the detailed testimony Kyle provided regarding this meeting, the Director submits that it did in fact take place, and the employer was well aware of the exact nature of the care and support Kyle provided to his daughter during the leave. On this point, Kyle's evidence ought to be preferred over that of the employer.

- Moreover, there is no requirement in the Act for an employee to provide detailed information to their employer to access or remain on the public health emergency leave. While section 2-47 of the Act requires employees to submit medical or other written evidence to their employer to verify the circumstances of their employment leave, it is important to emphasize that this requirement does not apply to public health emergency leave. Section 2-59.1(10) specifically exempts employees from the requirements of section 2-47 to provide medical or

written evidence to their employer.

- According to the courts, legislation such as *The Saskatchewan Employment Act* is considered benefits conferring legislation that provides minimum standards of protection to employees. In the case of *Rizzo* & *Rizzo Shoes Ltd.* (Re), 1998 CanLIi 837 (SCC), [1998] 1 SCR 27, the Supreme Court of Canada held at paragraph 36 that employment standards legislation must be interpreted broadly and generously, and any ambiguities with the wording of the Act must be resolved in favor of the employee.

- Similarly, in the case of *Machtinger v. HOJ Industries Ltd.,* 1992 Canlll 102 (SCC), [1992] 1 SCR 986, a case that dealt with the interpretation of Ontario's Employment Standards Act, the Supreme Court noted that "an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not."

- The Director maintains that Kyle was eligible for the public health emergency leave and was not obligated to provide further reasons to continue the leave. The purpose of the leave is to ensure the employee's job is protected while they are providing care and support to a child family member. The above-noted case law supports the proposition that if there are any difficulties in interpreting the provisions of the Act, then the benefit of the doubt goes to the employee.

Email and Text Message

- The employer argues that the September 15, 2020 text message from Kyle to Mr. Glen is evidence of a resignation. In fact, the evidence reveals that Kyle's employment ended months earlier after Josh Jors sent Kyle the June 25, 2020 email taking his refusal to report to work as job abandonment.

- Although counsel for the employer objected to entering this email into evidence, the Director notes that section 4-4(3) of the Act states: "An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate." The mere fact that the email was sent without prejudice is an insufficient basis to exclude it from evidence. The email is relevant and necessary to determine how and when Kyle's employment ended, and accordingly, it has a direct bearing on the assessment for pay instead of notice. The Director respectfully asks that it be admitted into evidence.

- In the Director's view, the June 25, 2020 email is, in reality, a dismissal. There is no ambiguity with this communication - the employer treated Kyle's failure to

report to work as job abandonment, advised him of this determination, and wished him well in his future endeavours.

- The employer's own documents confirm the employment relationship ended in June 2020. Kyle's third Record of Employment (ROE) states the reason for issuing is "Quit". The ROE was issued on June 30, 2020, over two months before the September 15th text message. The Director notes that, pursuant to section 19 of the *Employment Insurance Regulations,* SOR/96-332, an employer is required to issue an ROE to an employee not later than five days after an interruption of earnings. Mr. Jors's email was sent on June 25, and five days later, the employer issued the ROE. The issuance of the ROE at this time further supports the Director's position that the June 25 email is a dismissal and the employment relationship had ended. A reasonable person who received Mr. Jors's email, and subsequently the ROE, would conclude that their employment had been terminated. By the time Kyle sent the September 15 text, there was no longer a job for him to resign from.

- Kyle provided a credible explanation for why he sent that text message: despite the employer issuing an ROE saying he quit, the employer had not paid out his accrued vacation pay. Section 2-33(3) of the Act requires an employer to pay out all wages to an employee within 14 days of their last day of employment. As of the date of this hearing, the employer still has not met this requirement, which is why it forms part of the wage assessment.

- To encourage Auto Gallery to issue the payment, Kyle sent a text with his resignation so that he may finally receive his vacation pay. Kyle testified that Auto Gallery's past practice is that employees are not paid their final wages unless they are terminated for cause or they resign. This supposed resignation text has no bearing on the claim for pay instead of notice - it was simply a means of attempting to get his vacation pay paid out. The evidence is clear that Kyle was terminated from his employment long before he sent the September 15 text.

Termination vs. Layoff

- The employer argues that section 44.3 of *The Employment Standards Regulations* exempts employers from the pay instead of notice provisions of the Act. It must be noted that the exemption only applies to layoffs, not terminations. The government created this exemption so that businesses would not be subject to substantial costs associated with mass layoffs as a result of the pandemic. This regulation, which has since been repealed, provided temporary relief from an employers' obligation to provide pay instead of notice in layoff situations.

- The Director submits that Kyle's employment was terminated by Josh Jors's June 25 email in which he said Auto Gallery had "no choice but to interpret your actions as role abandonment as a result of unsubstantiated, repeated absences. We wish you good health in your future endeavors." The wording of this email strongly suggests an end to the employment relationship, with no prospect of return. That is a termination, not a layoff. Accordingly, the exemption to pay instead of notice for layoffs does not apply in this situation.

Conclusion

- Since Kyle's employment was terminated, he is owed 2 weeks' pay instead of notice in accordance with section 2-61 of the Act, plus associated vacation pay on that amount, and lastly, his accrued vacation pay. The Director requests Mr. Adjudicator that you uphold the wage assessment and dismiss the appeal.

All of which is respectfully submitted.

vii. Decision

On March 17, 2020, an Act to amend *The Saskatchewan Employment Act* respecting Public Health Emergencies was assented to and was retroactive to March 6, 2020. Effective March 20, 2020, the Provinces Chief Medical Health Officer ordered in-school learning in all primary and secondary schools suspended. This meant Kyle's daughter, who attended Douglas Park Elementary, needed his care and support during the day. On March 21, 2020, Kyle Kao provided Mr. Tom Glen with a letter (Exhibit EE3). The letter as below was, according to Kyle, presented to Mr. Glen, in Mr. Glen's office, shortly after 9:00 a.m. on March 21, 2020:

March 21, 2020

Mr. Glen,

After days of thoughts and careful consideration, it is with great regret to inform you that I have decided to exercise my rights within the recent amendments to the Saskatchewan Employment Act.

I am formally requesting to take Public Health Emergency Leave.

At a time like this, during the COVID-19 pandemic, I strongly feel it's my duty and obligation to provide care and support for my family at home.

I am willing to assist, participate and complete tasks as per your request remotely, form home.

I understand you may have a different perspective regarding what is happening in our community, but it is with my greatest hope you can respect my decision.

I look forward to returning to work at Auto Gallery when the current measurements and restrictions are removed by the Government of Saskatchewan.

Respectfully,

Kyle Kao
639-590-3071

The meeting was joined in progress by Mr. Jors. Mr. Glen does not remember the meeting but does testify that he remembers the letter and that he approved the leave. Mr. Jors also testified he and Kyle had a discussion regarding the leave on that morning.

The relevant section of the March 17, 2020, amendment is the addition of a new leave (viii) to section 2-46(2)(a) Under the new leave (Public Health Emergency Leave) section 2-59.1(5)(b) and (10): An employee is entitled to a public health emergency leave for the period during which an order of the chief medical health officer issued pursuant to subsection (2) is in force if:
(b) the employee is required to provide to care and support to the employee's child family member who is affected by a direction or order of the Government of Saskatchewan or an order of the chief medical health officer.
(10) Sections 2-43 and 2-47 do not apply to an employee covered by this section."

The health order caused the school, attended to by Kyle's daughter to be closed beginning Monday March 21, 2020. A reasonable interpretation of the March 20, 2020, amendment would be that any employee required to provide care and support to a child family member is entitled to a without pay leave for the duration of the public health order. In Kyle's case the duration was from March 21, 2020, to September 8, 2020, when the schools opened.

During his testimony Mr. Glen described his corporate policy of "family first" and if an employee had family issues, they were given the time they needed away from work to deal with these issues. That corporate policy, for Kyle, seemed to end when persuasion to return to work began on May 29, 2020. Mr. Jors (ER2) sent a recall notice to Kyle and when Kyle did not respond, Mr. Jors, on June 5, 2020, sent another recall, threatening that no response would be taken as a resignation. Next on June 16, 2020, Mr. Jors sent Kyle an email (ER6) indicating that the workplace was safe for a return and if there is no response or a return to work the employer would take that as a refusal to accept recall. On June 22, 2020, Mr. Jors claims the leave Kyle has taken was "mutually agreed to" and expressed a deadline of June 23 for a return to work. On June 24 Mr. Jors again emailed Kyle telling him he's expected to return to work tomorrow (June 25).

Throughout the testimony from Mr. Glen and Mr. Jors the theme expressed again and again is that Kyle refused to provide them with the details associated with his situation. This theme was expressed in the May 29, June 16, June 22 and June 23 communications to Kyle.

On June 25, 2020, Mr. Jors sent an email to Kyle. That email (below) was marked Exhibit EE2.

From: Josh Jors <Josh@olympicmotors.com>
Sent: Thursday, June 25, 2020 3:40:07 PM
To: Kyle Kao

Subject: RE: Kyle Kao

Without Prejudice

Kyle,

The government has enacted job protected leaves of absence, each of which come with stipulations and criteria. We respect these protected leaves and the safety of our staff, customers and the community. We have simply, repeatedly requested that you provide is with the details surrounding your rationale for claiming what you have classified as a leave that you are entitled to.

We too have been in discussions with an officer who has made it clear that there is an onus on the employee to remain in open discussions with the employer and to provide necessary information.

Communications is key during these times and things are in constant flux. As an organization we also have a responsibility to ensure that we do our part in monitoring the use of government programs. Your repeated refusal to provide any substantive information, continued lack of cooperation and subsequent failure to attend to the office have together resulted in the unfortunate situation where there appears to be a misuse of generous government programs. As such, we have no choice but to interpret your actions as role abandonment as a result of unsubstantiated, repeated absences.

We wish you good health in your future endeavours.

Mr. Mellor objected to EE2 being accepted into evidence because it is marked "Without Prejudice".

I will now deal with the objection by reviewing the accepted meaning of this phrase. According to and article by Meagan Fougere and Dan Leduc of Norton Rose Fulbright Canada LLP the phrase is used when one wishes to communicate or respond to a settlement offer, indicate a willingness to negotiate or reconcile a position, or to make a counteroffer or proposal. Making these communications "Without Prejudice" keeps them within the protected realm of "settlement privileges" and therefore making them inadmissible. When one reads the last two sections of EE2:

"As such, we have no choice but to interpret your actions as role abandonment as a result of unsubstantiated, repeated absences.

We wish you good health in your future endeavours. "

I do not see that this message can be construed to be negotiable. Therefore, I allow it as an exhibit (EE2) for evidence.

Clearly EE2 terminated Kyle's employment as of June 25, 2020. To further cement the termination Olympic issued ROE #3 which indicates, although the reason listed was "Quit", the employment relationship has ended. Olympic also issued a cheque (never cashed) dated June 30, 2020, in the

amount of $2,935.35. That cheque was to be the pay out of Kyle's accumulated vacation pay. The parties agreed this amount is still owed to Kyle. A further indicator the Company meant to terminate, is the unrefuted testimony Kyle provided regarding the Company hiring a new Finance Officer for a June 1 start.

Since I have accepted that the June 25, 2020, email from Mr. Jors (EE2) terminated Kyle's employment, the relevance of the September 15, 2020, email from Kyle to Tom, resigning from Auto Gallery is moot. One cannot resign from a job one no longer has. While the reason put forward by Kyle is unusual, I have no reason to not accept his explanation.

Since the Employment Act under 2-59.1(5) entitles employees to a leave for the period during which an order of the Chief Medical Health Officer has been issued and since Kyle was required to provide care and support to his child for that period, his termination was without cause and pay in lieu of notice is owed. Further since the Act in Section 2-48(1) provides for leaves to count as service and Kyle's service spanned from May 2019 to June 2020, he is owed two weeks pay-in-lieu of notice.

As earlier stated, the parties agreed that Kyle's accrued vacation pay is still owed as well.

Therefore, it is my decision that Olympic Motors (SK) Corporation owes Chian-Kai Kao $12,032.36 for pay in lieu of notice and $3,644.67 for unpaid vacation accumulated (less statutory deductions).

Dated at Regina in the Province of Saskatchewan, this 4th day of January, 2022.

Ralph Ermel
Adjudicator