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

Marcie Craig

COMPLAINANT/EMPLOYEE

-AND-

M&M Equipment Ltd.

APPELLANT/EMPLOYER

DATE OF HEARING: February 17, 2022

PLACE OF HEARING: Regina, SK

LRB FILE: No. 148-21
WAGE ASSESSMENT: No. 1-006227

INTRODUCTION

This matter was heard before me on February 17, 2022, 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') with respect to service on the Corporation, M&M Equipment Ltd. and the Director, David Barber. Service on the Director, Robert David Barber was not in compliance with The Act. Therefore, I have determined that I only have jurisdiction to hear this matter with respect to M&M Equipment Ltd. and David Barber.

Lorne Deason, Employment Standards Officer represented the Department of Employment Standards.

Complainant/Employee, Marcie Craig, attended and gave sworn evidence on her behalf.

The Corporation and its Directors were represented by Alexander Buchan, Barrister and Solicitor.

The Appellant/Employer, Robert Barber, Director attended in person and gave sworn evidence on behalf of the company, M&M Equipment Ltd. and the Director, David Barber.

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 $5,686.00.

I. PRELIMINARY MATTERS

There were no Preliminary Matters.

II. AGREED FACTS

There were not facts agreed to between the parties.

III. DISPUTE

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

IV. EVIDENCE OF THE EMPLOYER

David Barber was sworn and gave the following evidence:

The Employer is alleging dismissal for cause by way of progressive dismissal rather then a one time incident with respect to the Employee.

Robert Barber is the President of the Corporation. The Corporation does heavy equipment repair and sale of parts for heavy equipment.

The Complainant/Employer was the receptionist at the corporate premises. Her responsibilities included answering the telephone, greeting people at the door, operating the computer system and keeping track of the Employee records and hours, as well as, invoicing and payment of receivables.

When M&M Equipment Ltd. took over the business some years earlier, part of the purchase agreement involved the corporation committing to give, at least 3 months of termination notice or payout, to any of the Employees should the business close or the Employee be laid off.

The building in which the company was operating had been sold and the company was moving to a new premises with a view of downsizing. As a result of this move the corporation let all but one of their Employees go.

On April 5, 2021 the corporation gave notice to the Employees including Marcie Craig. A copy of this notice was entered as "Employer Exhibit 2".

That Notice of Termination directed to Ms. Craig advised that she was terminated without cause and that her last day of employment would be Monday, July 5, 2021 (3 months from the date of service of the notice on Ms. Craig).

Mr. Barber says that after the Notice was served on Ms. Craig, she missed a considerable amount of work, was late, or left early on many days, and as well, took vacation days without approval.

The last several weeks of Ms. Craig's attendance at work was set forward at Tab "A" in "Employer Exhibit 1". Tab "A" sets out the days missed by Ms. Craig that were taken as vacation days, denoted by the letter "V", and other dates where Ms. Craig was late or left early. During the period set out on the spreadsheet there were 16 days of vacation taken and 12 days of working less than 8 hours by the Employee.

The company wanted Ms. Craig to stay on during the notice period as the customers and suppliers had to be notified of the move to the new location and other information relating to the changes being made.

Under Tab "B" of "Employee Exhibit "1", was the Record of Employment issued by the Employer to Ms. Craig. All parties

agree that the contents of the Record of Employment were correct.

The Corporation moved premises during the last week of May 2021. Mr. Barber indicated that he wanted Ms. Craig to attend at the new premises on May 31, 2021 to assist in the move, in particular, set up the computer system.

Ms. Craig did not attend work on May 31, 2021 and under Tab "C" of "Employer Exhibit 1" sets out the communications relating to the same.

Mr. Barber stated that he had started with the company in late 2018 and during his time with the company, Ms. Craig's conduct relating to absences, coming in late, taking vacation without approval, and leaving early had been ongoing since that time. Mr. Barber stated that Tab "B" of "Employer Exhibit 1", was demonstrative of the absences throughout Ms. Craig's time with the company since Mr. Barber started working in late 2018.

Ms. Craig's last day of work was May 28, 2021 (the Employee agreed with this date).

Mr. Barber said that he several ongoing verbal discussions with the Employee regarding the number of times she was late and/or leaving early, as well as taking vacation days without notice. He told her that her attendance and promptness was necessary for her job.

Mr. Barber said that the procedure for taking vacation for all Employees was for the Employee to ask him approximately 1 week or so before they wished to take the vacation time and Mr. Barber either consented or did not.

Under cross examination the Employer stated that he realized that the Notice of Termination of April 5, 2021, "Employer Exhibit 2", was for a greater period of time than was required by The Act under Section 2-60, as the Employee had been working with the company for more than 5 years but less than 10 years. Therefore. she was entitled to 6 weeks as a notice period.

Mr. Barber agreed that the Employee's rate of pay was $27.50/hour for an 8 hour work day. The balance of her annual vacation pay had been paid to the Employee.

Mr. Barber agreed that there was 24 days left in the notice period after May 28, 2021 which was the date he fired the Employee for refusing to come into work on May 31, 2021. This date is confirmed in the Record of Employment.

The Employer did not pay the Employee out for the balance of the 3 months' notice as set out in "Employer Exhibit 2" the letter of April 5, 2021. He only paid her from April 5, 2021 to May 28, 2021.

Under cross examination, Mr. Barber said that no written warnings were made or given to the Employee. There had not been any suspensions or other discipline subjected to the Employee by the Employer either for being late, leaving early or not coming in to work. Mr. Barber said that suspensions and

punishments were impracticable, as he required her attendance on a daily basis with respect to payment of payables, receivable's and employment records.

Mr. Barber was of a view that the Employees' behavior regarding unannounced vacation days and tardiness became more pronounced after Ms. Craig had received the termination letter of April 5, 2021.

Mr. Barber said that neither he nor the corporation communicated the Employee's termination to her on May 31, 2021, as he had assumed that the Notice of Termination would be communicated to the Employee by Payworks. Payworks was the company that M&M Equipment Ltd. used to make payments to the Employees. The Employee should have received a direct deposit in her account and then, by mail, should have received the pay slip and Notice of Termination. Also, very likely, an email would be sent to the Employee by Payworks, as well. Mr. Barber had no written confirmation or evidence regarding the

termination Notice having been sent to the Employee by Payworks.

The Employer did not have a discussion with the Employee regarding termination. The last contact the Employer had with the Employee was through a text message set out in Tab "C" of "Employer Exhibit "1", with the last text being June 17, 2021.

V. EVIDENCE OF THE EMPLOYEE

The Employee, Ms. Marie Craig, was sworn and gave the following evidence:

The Employee said that she had received the Notice of Termination Without Cause dated April 5, 2021. She had been expecting the same as all Employees were receiving one due the Corporation relocation and downsizing.

The Employee thought that she was a good Employee. She went to work at 8:15am, did not take coffee breaks or lunch breaks.

Ms. Craig said that at no time did anyone speak to her about being late, leaving early or missing work.

Ms. Craig started her employment with the previous company in 2015 and stayed on with M&M Equipment Ltd. when they took over in 2018.

Ms. Craig stated that she used up some of her vacation at the end of her notice, as she was concerned about the stability of the company, and their ability to pay out the Employee's unused vacation pay.

She never received any document relating to her work performance, was never told her job was in jeopardy, was never talked to about being late, leaving early, absentness or taking vacation days. She did not receive a Notice of Termination from Payworks.

On May 31, 2021 she had been intending to go into work at the new premises, however her 5 year old daughter was sick and

she had no one to care for her. Resultantly she could not go to work. This was the reason for her text of May 31, 2021 to Mr. Barber as set out in Tab "C" of "Employer Exhibit 1".

Regarding vacation time, the Employee had never been told of any problems with her taking vacation on short notice and the company practice was not to ask for or receive approval when taking vacation time.

Ms. Craig thought that as of May 30, 2021 she was laid off, and that notice provisions set out in the letter of April 5, 2021 would continue. She formed this conclusion as she was of a view that she had no where to go to work as the company was moving, she along with the majority of the other laid off Employees, had no where to work in the new premises.

VI. ANALYSIS/DECISION

The Employer alleges that just cause in dismissal of the Employee based on progressive discipline.

The Employer alleges that Ms. Craig was consistently late or absent and took vacation days without obtaining prior authorization from Mr. Barber.

The Employer states that he was not in a position to discipline by way of suspension or other means as the Employee was a key individual in the operating the business on a day-to-day basis.

During the later period of time after April 5, 2021, once Notice of Termination Without Cause was given to the Employees, suspension or other forms of discipline were not available as there was insufficient time left for the Employee to make the discipline to be of any value.

The Employer also states that the Employment Standards Officer should not have proceeded under Section 2-60 of The Act, as Notice of Termination had been given on April 5, 2021, and was effective as of July 5, 2021. Section 2-60 would not apply as termination notice had already been given. The Employee received 12 weeks notice of dismissal and had been paid 8 weeks from the date of the notice (April 5, 2021, to the date of termination May 28, 2021). This 12 week

notice was required pursuant to the terms of the contract between the Employer and the Employee when M&M Equipment Ltd. took over the business.

Thus the Employer takes the position that no monies are owed even if the dismissal was without cause, as Ms. Craig had been employed for more then 5 years with company and was entitled to 6 weeks notice. She had actually received 8 weeks notice under the April 5th termination without cause.

In response, the Employment Standards Officer says that Section 2-15 applies to an Employee's employment contract and in order to enforce it, the Employee they would be obligated to take the Employer to a Civil Court.

Therefore, the Employment Standards Officer proceeded under Section 2-60. Under that section, if the Employee was terminated without cause, she would have been entitled to 6 weeks. The Employment Standards Officer states that the Employee is entitled to

choose under which section she wishes to proceed and she chose to proceed under Section 2-60.

The Employee takes the position that she was terminated on April 5, 2021, with 3 months' notice as a term of her contract between her and her Employer, however on May 28, 2021, she was terminated by the Employer without cause, She chose to proceed under Section 2-60, as there was not just cause for the termination and there had been no progressive discipline at any time from the Employer.

The Employee stated that she had never received any warnings either verbally or in writing. Nor did she receive any directions from the Employer as to what changes were required by her to be in compliance with the Employer's wishes as to her conduct.

In particular, there is no evidence regarding the termination of the second notice by the employer on May 28, 2021.

The Employee says that she did not have any communication from any one that she had been terminated.

The Employee says that at no time did she receive any progressive discipline and consequently there was no chance for her to fix the problem and therefore the dismissal is without cause.

Regarding the taking of vacation days without notice. Throughout her employment with the Employer, she says the practice was that she would take vacation with little notice or by texting the employer on the day that she was be taking the vacation time. When she returned to the workplace, she would show a vacation day for the day she did not come into the workplace. She had never sought or obtained prior consent for vacation time.

The employer does not allege conduct for a single breach of policy or regulation to justify the just cause for the dismissal of the employee, rather the employer alleges progressive discipline.

Notice of Termination of employment must be specific, unequivocal and clearly communicated to the employee. SEE: *Kerfoot* v. *Weyerhaeuser Company Ltd.*, 213BCCA330.

The Employee's evidence is that she received no Notice of Termination whatsoever. The Employer's evidence is that she should have received Notice of Termination from the payroll company, Payworks, although he did not have any evidence supporting that such notice has actually been given to the Employee.

I accept the Employee's evidence that she did not receive a Notice of Termination.

With respect to just cause, the Employer says that from the time he was in charge of the Corporation, he was constantly verbally reprimanding the Employee for being late, leaving early and taking vacation days without approval. The Employee denied that she ever received any communication in this regard from her Employer and at no time did she receive any warnings or discipline regarding her conduct.

The burden falls on the Employer to establish on the balance of probabilities that just cause existed at the time the employment was terminated. SEE: *McKinley* v. *B.C. Tel*, (2001)2SCR 161 S.C.C.

In applying the McKinley decision coupled with Balzer V. Federated Co-Op, 2014 SKQB 32, I find that the Employer did not meet the onus of showing, on a balance of probabilities, that Ms. Craig was fired for cause based on cumulative events.

The evidence establishes that Ms. Craig was not warned that her job was in jeopardy should she continue to be late, leave early to take vacation days without notice. Nor was she warned of possible consequences as a result of future misconduct.

The alleged rules were never known to the Employee, nor were they enforced by the Employer. The Employee was never warned she would be terminated if she continued with her behavior and disciple was never discussed regarding the same.

An employee is entitled to know the reasonable objective standards of performance, how she is failing to meet those standards and that her job is in jeopardy should she continue to fail to meet those standards.

The Employer has not met the onus showing on a balance of probabilities that Ms. Craig was fired for cause based on cumulative events.

VI. CONCLUSION

The Appeal is dismissed. The Wage Assessment stands in the amount of $5,686.00 as against M&M Equipment Ltd. and David Barber, Director. The Appeal is allowed regarding Robert David Barber, Director, as service on him was not completed in compliance with The Act.

Dated at Moose Jaw, in the Province of Saskatchewan, this 28th, of February 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.