



LRB File 159-22

Wage Assessment 1-006919

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

APPELLANTS:

(Employer)

L.A.A.W. Towing Services Ltd. o/a Lakeland Towing
and
John Medynski (Director)
Represented by Trevor Klassen, Bendig Klassen Raas

RESPONDENT:

(Employee)

Harry Murphy

Irene Phan, Employment Standards Officer, acting for Government of Saskatchewan, Ministry of Labour Relations and Workplace Safety, Employment Standards Division

DATE OF HEARING: November 21, 2022 10:00 a.m.

PLACE OF HEARING: Boardroom 1.6
800 Central Avenue (McIntosh Mall)
Prince Albert, Sask.

I. INTRODUCTION

This is an appeal by the Employer, L.A.A.W. Towing Services Ltd. operating as Lakeland Towing, from a Wage Assessment in favour of the Employee, Harry Murphy, in the amount of \$16,337.08, dated August 16, 2022.

The parties presented an Agreed Statement of Facts which summarized the basics of the Employer/Employee relationship. Harry Murphy began working for the Employer on July 20, 2011 as a tow truck driver and his final day of employment was September 24, 2021. He was paid on commission at a rate of 35% of the work he performed, and his work schedule was Monday to Friday and every second weekend.

The Employer agrees Harry Murphy is owed public holiday pay of \$2,724.90, annual vacation pay of \$1,484.61, and annual vacation pay on the amount owed for public holiday pay of \$209.61: a total of \$4,419.12.

At issue is whether the Employee is owed eight weeks' pay in lieu of notice pursuant to s. 2(60) of *The Saskatchewan Employment Act*, which the parties agree would total \$11,917.96.

The Employer argues that the Employee quit, or, alternatively, abandoned or repudiated his contract of employment, and is not entitled to notice. The Employee maintains he was fired without just cause.

The Ministry provided information confirming the Employer's appeal and appeal deposit were received within the time requirements in s. 4-4(4) and s. 4-5(1)(b) of *The Saskatchewan Employment Act*.

II. EVIDENCE

The Employer called three witnesses:

John Medynski, the owner/operator of Lakeland Towing;

Susan Medynski, a dispatcher for Lakeland Towing, a shareholder in the company, and John's wife; and,

Jimmy Shiers, who worked for the company as a tow truck driver.

Harry Murphy testified on his own behalf.

John and Harry had a relationship going back many years. They first met when John was working at an auto wrecker in Prince Albert and Harry was driving a tow truck for another company. They worked together as drivers at Astro Towing from approximately 1993-1995. John left to start his own company – Lakeland Towing. Harry left Astro Towing and helped out at Lakeland off and on until 2011 when he came to work for the company full-time. John acknowledged that Harry was, overall, a good employee: a knowledgeable tow truck operator and a reliable driver.

John and Harry seemed to know each other quite well; John let Harry live rent-free for several months in a house John was renovating, just to "help him out". Harry noted they had been friends for a long time but acknowledged that John had quite a temper; for fifteen minutes he could be a "jerk", cussing you out for something, then quickly putting it behind him. Although both parties maintained a professional demeanor during the Hearing, Harry gave the impression he could 'give as good as he got' in the argument arena.

One incident tested the relationship. Two or three years ago Harry took out a company truck late one winter night to help a friend stuck on a lake. The truck went through the ice, totaling the expensive vehicle, and endangering Harry and other people in attendance. Harry testified that he had phoned Susan, John's wife, to ask if he could take the truck out, while John testified that no such permission was sought. In any event, the incident affected the relationship. John said he probably should have fired Harry then, but was very short-staffed. Harry maintained he never caused any problems for the company, even when he sank the tow truck.

As both the Employer and the Employee acknowledged, being short-staffed seems to be a perennial problem in the Prince Albert towing business. The work is challenging, requires skill, and demands odd working hours.

Over the years of his employment, Harry was quite vocal in complaining about aspects of the job he did not like. He repeatedly told John he did not want to work nights, so, eventually, they both sat down with the other drivers and worked out a schedule where Harry did not have to work nights. His regular hours of work were from 8:00 a.m. to 5:00 p.m., Monday to Friday, and every other weekend.

According to the testimony of John and Susan (who had also known Harry for over twenty years), Harry became selective about the type of work he would do; for the last couple of years of his employment, he almost exclusively worked for one client, United, hauling equipment on a flat-deck from point A to point B within Prince Albert. Susan also testified that Harry's attitude suffered, and he would occasionally "give her the finger" as he drove off from the lot.

Harry denied making the rude gesture at Susan. He denied refusing to do work, except when his employers wanted him to do something illegal. He claimed he often worked later than 5:00 p.m. when requested to during the week.

In at least his final year of employment, Harry also began to complain about working weekends. He testified he was unfairly asked to be on call on certain long week-ends, while other employees were not, and sounded bitter about it. He said he brought the issue up many times with John, and was always told they would talk about it "later".

The issue of working weekends led to the events of Friday, September 24, 2021.

Susan testified she was working as the dispatcher that day. The normal practice is for a tow truck driver to phone in to the dispatcher to say they were "clear", that is, had completed one job and were available to take another. She said on this particular day, she had a job waiting for Harry, but he had not yet "cleared" from his last one. Around 3:00 – 3:15 p.m. she heard the alarm as someone drove into the yard. She looked up and through the window saw Harry and his deck truck coming into the yard. She was surprised to see him, as she had not received his cleared call. She phoned and asked him what he was doing, and Harry replied that he was done for the day. She told him she had another call for him, but he said he was taking the weekend off. Susan advised him that it was not his weekend off. Harry said he was not working weekends, and she should talk to her husband, John. He got out of the deck truck and went to his own truck.

Susan immediately phoned John. She testified it was not part of her job to reprimand the drivers; if there was a problem, she would refer it to John.

John testified that earlier that day, while he was driving his truck, he received a phone call from Harry. It was around noon. He summarized the conversation as follows:

Harry: Working weekends stresses me out.

John: Me, too.

Harry: I won't work weekends.

John: You have to. We all have to
John: Maybe we can discuss this later.

Later that afternoon, around 3:00 p.m., John received a call from Susan who told him Harry had gone home, even though she had another job for him from his regular customer, United. John told her to get a different driver to take care of the customer. John phoned Harry. They basically repeated their earlier conversation, with Harry saying he did not want to work weekends and John saying all employees had to. John eventually said "whatever", and told Harry to leave the keys for Lakeland's truck and the fuel card in the truck.

At the time of the phone call, John said, he was busy driving his truck, the day shift not being over, and just "left" the issue for the time being.

The next day, a Saturday, Harry did not return to his scheduled weekend to work. He also did not show up on the following Monday. John gave evidence he called Harry on Monday to ask where he was and Harry said, "You fired me." "No," replied John, "I just told you to leave your keys and fuel card so another driver could use them." He went on to say Harry was expected at work that day.

At the Hearing, John concluded that Harry "obviously resigned because he didn't show up to work", either on the weekend, Monday or any subsequent day. He testified that after September 24 he felt Harry just needed some time to calm down or chill out, and expected him to return to work eventually. John vehemently denied that he intended to terminate Harry's employment with Lakeland. He never used the words "you're fired" or "don't come back to work".

Harry has a different recollection of the events of September 24, 2021. He stated he had been bringing up for months the issue of him not working weekends, but John kept putting him off. On September 24, he claims he had cleared his last call with Susan, and that it was 5:00 p.m., not 3:00 p.m., when he drove his truck into the yard. Susan saw him, called him, and told him he had another job. Harry told her he and John had talked earlier in the day and Harry was not working any more weekends. A minute later, John phoned Harry, who was still in Lakeland's towing yard. Harry asked John if John had told Susan that Harry was no longer working weekends. Harry reported that John then told him to clear out his personal items from the tow truck, leaving the keys and fuel card. Harry did so, then got into his personal vehicle and went home.

Harry testified that he had seen employees being fired by John before, and in his mind, being told to leave the keys (which would include the key to the compound) and the fuel card was John's way of firing someone. He stated, "It didn't feel like an assumption; it felt like I'd been fired." He acknowledged the words "you're fired" or "don't come back" were not uttered. He also declared he did not say "I quit", or "if I have to work weekends, I quit".

In his testimony at the Hearing, John said he told Harry to leave the truck keys because obviously someone else would have to use the vehicle if Harry was not there. He also stated there was a shortage of fuel cards, and they had to be left with the truck. Harry testified he was unaware of the fuel card shortage. John denied telling Harry to clear his personal items from the truck.

John acknowledged that the issue of not working weekends had come up with Harry prior to September 24. He said working weekends was the nature of the business – everyone worked some weekends, including himself. It was a common topic of conversation over the years with all drivers, not just Harry. John noted it was not feasible to hire part-time workers for the weekends; they frequently were not skilled at the job, and quickly left the position. No employees wanted to work weekends, but everyone had to. In summary, John said, there was “absolutely no way of someone not working weekends.” Drivers could trade weekends off, and arrange it among themselves, but it was still a requirement of the job.

To illustrate this point, the Employer called Jimmy Shiers, a tow truck driver. Jimmy worked for Lakeland, although he is currently off work for medical reasons. He testified that when he was hired, the terms of employment were twelve days on work (including a weekend), and then a weekend off. Drivers keep their trucks with them during the period they are working. When not busy during their shift they can return home or go elsewhere in the City to wait for the next call. Jimmy said that if you were not willing to work weekends, you did not have a job as a driver for Lakeland. Every driver worked alternate weekends.

Asked why he did not return to work on the Monday following his discussion with John, Harry testified he had been fired, so why would he go back to Lakeland? He also gave evidence that he did not recall John phoning him on that Monday or any other time to discuss the situation. He stated the first communication of any kind they had was by text message, as follows (Employee Exhibit #3):

Friday, October 15, 2021

Harry: R.o.e!

John: Yup I can get them to make up on Monday. I thought you would have been back by now

Harry: You fired me John so don't forget too check that box on roe

Tuesday, October 19, 2021

Harry: R.o.e. ready?

Wednesday, October 20, 2021

Harry: Employment needs to know about my severance check

Sunday, October 24, 2021

Harry: Heads up labour board in the morning. Don't bother responding to me at this point!

Sometime during this period Harry said John came by Harry's house to drop off the Record of Employment. Harry was outside working on his truck, and John asked him if he was coming back to work for him. Harry said no, he had been fired, and they would probably be arguing about the Record of Employment. John left the envelope on the tailgate of Harry's truck, and that was that. John did not recollect this conversation, or dropping off the envelope.

The Record of Employment (Employee Exhibit #4) listed Code “N” as the reason for issuing. “N” stands for leave of absence. When asked at the Hearing why this box was checked, John said he was not sure why; the record was submitted by the accounting firm used by the company, and, he wanted Harry to be eligible to receive Employment Insurance. He confirmed that Harry never explicitly asked for time off. John assumed that was what was happening. He

stated he felt Harry just needed a vacation, and John wanted to give him an opportunity to return to work when he felt able.

There was no further communication between the parties. Harry has not returned to work anywhere as a tow truck driver. He said in his testimony that he had surgery a few months prior to the Hearing, and was now only working part-time on weekends, driving for a moving company.

There was no written communication between the parties about the circumstances of the end of Harry's employment, and there were no witnesses to the verbal communications between them.

III. ANALYSIS

Did Harry Murphy quit his employment and/or repudiate his employment contract with Lakeland Towing, or, was he fired without cause by John Medynski?

The Appellants argue the Respondent Employee left his employment of his own volition (para. 5 of Notice of Appeal). They also argue that the Employee "abandoned and/or repudiated his contract of employment" by:

Para. 6.....

- a. His refusal to perform an essential part of his employment duties to work weekends when assigned to do so; in rotation with other similar employees;
- b. His continued refusal to return to work for an extended period without reasonable excuse or explanation;
- c. His refusal to accept the Appellants' offer to continue his employment, particularly after the Appellants allowed a reasonable cooling off period, after September 24, 2021, to permit clearer heads to prevail; and
- d. His clear intention to no longer abide by the contract of employment in force at any time in the future.

The Respondent and the Employment Standards Officer arguing on his behalf maintain that Harry was wrongfully dismissed by John on September 24, 2021 and he is therefore entitled to notice as per *The Saskatchewan Employment Act*.

The evidence was uncontroverted that after well over twenty years as a tow truck driver, the Employee no longer wanted to work weekends. The Employer acknowledged this had been an ongoing complaint of the Employee, which the Employer had avoided talking about for some time.

The evidence also showed that working weekends as a truck driver, at least at Lakeland Towing at the present time, is not optional. It appears there is a shortage of qualified staff, and the demands of the industry require that tow truck operators be available on weekends. The compromise is for employees to alternate weekends off.

As John put it, there was “absolutely no way of someone not working weekends.” He worked weekends, other employees, including Jimmy Shiers, worked weekends, and Harry had to work weekends.

Yes, earlier an arrangement was made between Harry, John and the other drivers so that Harry no longer had to work evenings. As pointed out by the Employment Standards Officer in her argument, the Employer made an accommodation in those circumstances, so it was not unreasonable for Harry to think that his refusal to work weekends would also be accommodated. However, the evidence provided by both parties at the Hearing illustrated that the topic of weekends had come up before, and Harry’s requests were not given into, so why would he expect it to be different on September 24? There was no similar meeting with his Employer and the other employees, as there was with the issue of working evenings.

By his actions and words on September 24, and his failure to return to work after that date, Harry was giving an ultimatum: either I don’t work weekends or I don’t work at all. His ultimatum ended in his termination of employment.

Evidence presented by the parties of the words of the September 24 conversation do not vary significantly, although the perception of the parties do. I note that the two conversations between John and Henry did not take place face to face, but over the phone, while John was working. Speaking in person can often give an entirely different meaning to a conversation. Body language can clarify or provide context for the words being spoken. That did not exist here. John took Harry’s comments that he would not work this, or any other, weekend as scheduled as saying he quit, at least temporarily. Harry assumed John’s comments that he should return the truck, keys and gas card meant he was being fired. Perhaps both parties heard what they expected or wanted to hear. Neither sought to clarify the situation.

I was somewhat surprised, given Harry’s testimony about John’s temper, that a volatile argument did not ensue, but Harry said no. Perhaps there was no argument because of the ambiguity of the conversation.

What happened after the Friday conversations? John said he felt Harry was stressed and needed a break, which was why he called Harry on Monday. Harry denied receiving a phone call. However, that John hoped or expected Harry to return is un-contradicted, as seen by the text messages, and Harry’s own testimony of the conversation when John dropped off the Record of Employment. It was not to John’s advantage for Harry to quit; he needed and wanted him to stay on as an employee.

Was Harry prepared to quit his career as a tow truck driver when he gave his Employer the ultimatum about not working weekends on September 24? Some evidence supports this. He did not want to work weekends although that was a given for any tow truck driver. He apparently never sought similar employment. He was away from any kind of work for a period in 2022 after surgery, and he currently only works part time as a general truck driver on weekends (which he said he didn’t want to work).

The Employment Standards Officer insinuated that on September 24 the Employer saw an opportunity to get rid of a troublesome employee. Given their long and not completely smooth history, and the Employer's need for employees, especially skilled ones like Harry, the evidence does not support this. Why would the Employer want Harry to return if he had plotted to make him quit?

The Employment Standards Officer argued that Harry did not resign, and referred to the case of *Johal v. Simmons da Silva LLP* (2016), ON SC (CanLII 7835), which quoted from *Gebreselassie v. VCR Active Media Ltd.* (2007), ON SC (CanLII 45710) paragraph 43:

A valid and enforceable resignation must be clear and unequivocal – to be clear and unequivocal, the resignation must objectively reflect an intention to resign, or conduct evidencing such an intention ... Whether words or actions equate to resignation must be viewed contextually – the totality of the surrounding circumstances are [*sic*] relevant to determine whether a reasonable person, viewing the matter objectively, would have understood the employee resigned ...

In *Gebreselassie* the issue was whether the employee had resigned or was dismissed without cause. In the paragraph preceding the one quoted, the Court noted (para. 42)

Where an employee severs the employment relationship by way of voluntary resignation rather than dismissal, the employee has no remedy by way of a wrongful dismissal action. In an action for wrongful dismissal, the plaintiff then bears the burden of establishing the threshold fact of dismissal as opposed to resignation. The employer has the onus to show a resignation, such as it may appear to exist, was voluntary in the legal sense: D. Harris, *Wrongful Dismissal*, ss. 3.1, para. 1.

After the quote above, the Court in *Gebreselassie* further noted at para. 44:

Whether a resignation is clear and unequivocal requires a fact-driven assessment of all relevant evidence.

It went on to find the Plaintiff was a “frustrated and disgruntled employee no longer prepared to work for the defendant,” and was not wrongfully dismissed.

In *Johal* the issue was whether the employee's emotional reaction to a change in circumstances in her job could be construed as a resignation, even though she later said she wanted to continue to work for the employer. The judge found no, it could not, and the employer was taking advantage of the circumstances to get rid of an excess employee.

In the present case, based on the events of September 24, 2021, the Employee's resignation was not “clear and unequivocal”. However, the Employee was given opportunity to recant his ‘resignation’. After not showing up for work for the weekend and the following Monday, the Employer testified he talked to the Employee on the phone to see if he would return to work. The Employee denied this phone call took place, but the text messages provided by the Employee in Employee Exhibit #3 show the Employer expected Harry to return. The Employee testified that when John dropped off the Record of Employment, at Harry's house, John told Harry he still hoped Harry would return to work.

Discussing the facts in the *Gebreselassie* case, the judge stated at paragraphs 49-50: I accept that a resignation during a spontaneous outburst in highly charged emotional circumstances can undermine its essential voluntariness.... As well, in some cases, an employee's conduct is sufficiently equivocal that it cannot be objectively construed as voluntary resignation.... However, in this case, the plaintiff, as already described, acted from Thursday night through to Monday afternoon entirely in accord with his unequivocal statement of intention of quitting his employment....

While an employee may resile from a resignation provided the employer has not relied upon it to its detriment... this factor is irrelevant on this record because the plaintiff maintains that he did not resign.

In the present case, the Employee claims he did not quit or resign. That was his state of mind on September 24 and the days following. He decided he was fired. However, the evidence shows that the Employer's state of mind was that Harry had quit, albeit temporarily.

Based on my "fact-driven assessment of all relevant evidence", I conclude that the Employer was entitled by at least October 15, 2022 to assume that the Employee had resigned.

In his argument that the Employee abandoned or repudiated his employment contract, Counsel for the Employer referred to the case of *Jim Pattison Industries Ltd. v. Page* (1984), Sask CA wherein an employee refused to accept a transfer to another branch of the employer's business. He was terminated for cause. The Court noted at para. 9 that "[t]he principles applicable to commercial contacts apply equally to contracts of employment." The Court of Appeal found it was an implied term of the employee's oral contract of employment that he would accept all reasonable transfers not involving a demotion or undue hardship. The Court concluded at paragraph 26:

If the employee refuses to perform the express or implied terms of obligations of the contract of employment, the employer is entitled to terminate the employee forthwith and without notice.

In the case before me, the Appellant argued that it was an explicit term of the Employee's oral contract that he work weekends. By refusing to do so, he was in violation of his contract. Given the Employee's experience in the industry and nature of the business, the requirement to work alternate weekends was reasonable, and one the Employee understood.

Counsel also referred to *Roden and Mottram v. The Toronto Humane Society* (2005), Ont. CA. The employees were dismissed when they refused to implement the employer's policies regarding stray animals. The Court found that the evidence supported the employer's arguments that the employees, by refusing to carry out the policies, had repudiated their employment contracts:

Para. 46 Repudiation...takes place when an employee refuses to perform an essential part of his or her job duties in the future. In such a situation, the employer is entitled to accept the repudiation and treat the employment relationship as terminated because the parties no longer agree on the fundamental terms of the contract.

Similarly, in the present case, he argued, the Employee repudiated his contract of employment by refusing to work weekends.

The Employer's counsel further maintained that the evidence that Harry was "fired" falls short of that required by law. Harry "assumed" he was being fired because of the comments he should leave his keys and fuel card in the truck. The Employer provided a valid explanation for those comments (they were needed for another employee to do the work). There was never a clear and unequivocal communication of dismissal. Much more is needed, Counsel argued. (see *Yeager v. R.J. Hastings Agencies Ltd.* (1984), BCSC, para. 40.) In the present case, the evidence was clear, however, that the Employee gave John clear and effective notice that he would not work weekends, in effect, that he was refusing to perform an obligation of his oral contract of employment.

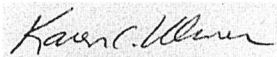
I conclude that the evidence in the Hearing supports the argument that the Employee quit or resigned his employment with the Employer. Alternatively, he refused to perform a fundamental requirement of his employment contract, and could be terminated without notice. The Employer therefore is not required to pay the Employee pay in lieu of notice.

IV. CONCLUSION

The Appeal is hereby allowed.

I order the Appellant to pay forthwith the agreed amount for owed public holiday pay, annual vacation pay, and annual vacation pay on the amount owed for public holiday pay, totaling \$4,419.12.

Dated at North Battleford, Saskatchewan:



Karen C. Ulmer
Adjudicator

Exhibits

Employee

- #1 Email from John Medynski to Irene Phan, October 27, 2021
- #2 Letter from John Medynski to Irene Phan, January 25, 2022
- #3 Texts between Employer and Employee
- #4 Record of Employment October 18, 2021

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the “Act”).

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at www.saskatchewan.ca.

Right to appeal adjudicator’s decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator’s decision or order with any directions that the board

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.