

IN THE MATTER OF AN ADJUDICATION
PURSUANT TO
THE SASKATCHEWAN EMPLOYMENT ACT



Appellants:

2449370 Alberta Ltd. o/a Dairy Queen, 248 Sixmile Common South, Lethbridge, Alberta;

Pravinkumar Patek, being a director of 2449370 Alberta Ltd. o/a Dairy Queen 248 Sixmile Common South, Lethbridge, Alberta;

Vishwas Patek, being a director of 2449370 Alberta Ltd. o/a Dairy Queen, 505-2525 Trout Lake Road, North Bay, Ontario.

AND

Respondent:

the Director of Employment Standards

Date of Adjudication: October 19, 2023
Date of Decision: November 6, 2023

Introduction:

[1] The Director of Employment Standards issued a Wage Assessment, dated June 29, 2023 (File No. 1-009571) against the Appellants, 2449370 Alberta Ltd. o/a Dairy Queen, 248 Sixmile Common South, Lethbridge, Alberta; Ms. Pravinkumar Patel, being a director of 2449370 Alberta Ltd. o/a Dairy Queen 248 Sixmile Common South, Lethbridge, Alberta; Mr. Vishwas Patlel, being a director of 2449370 Alberta Ltd. o/a Dairy Queen, 505-2525 Trout Lake Road, North Bay, Ontario (collectively the 'Appellants'). A copy of the Wage Assessment was filed at Tab 4 of EE-1.

[2] The Wage Assessment ordered the appellants to pay Nelia Rodrigo \$3,934.48.

[3] The Appellants appealed the Wage Assessment by way of an undated letter of appeal. This letter of appeal was received by the Ministry, along with the required \$500 deposit. The deposit cheque was dated July 7, 2023 and the Ministry issued a receipt (# ES 34820) dated July 11, 2023. It is apparent to me that this appeal was received within the time required by statute. In any event, the Ministry accepted that the appeal was within the statutory time limit, which is sufficient for me to progress with this appeal. The undated letter of appeal, a copy of the employer's cheque numbered 0019 and dated July 7, 2023, a copy of the receipt issued for the deposit dated July 11, 2023 and a letter from Employment Standards confirming the employer's appeal dated July 11, 2023 were all filed as Tab 8 of EE-1, and serve as evidence that the statutory limitation period was complied with.

[4] Mr. Vishawas Patel represented 2449370 Alberta Ltd. o/a Dairy Queen, 248 Sixmile Common South, Lethbridge, Alberta; Ms. Pravinkumar Patel, being a director of 2449370 Alberta Ltd. o/a Dairy Queen 248 Sixmile Common South, Lethbridge, Alberta; and himself as a director of 2449370 Alberta Ltd. o/a Dairy Queen, 505-2525 Trout Lake Road, North Bay, Ontario (collectively the 'appellants'). Ms. Kim King was the Director's Designate and represented the Director. Ms. Nelia Rodrigo, the former employee appeared as a witness.

Issue:

[5] The issue in this dispute is whether Ms. Rodrigo resigned during a meeting between her and Mr. Patel on March 27, 2023.

Facts and Analysis:

[6] The parties jointly submitted an agreed statement of facts. I marked it as exhibit EE-1 as Ms. King is the one who submitted it on behalf of the Director and the appellants.

[7] The Agreed Statement of Facts states that Ms. Nelia Rodrigo worked at the Dairy Queen in question for a 10 year period, from February 13, 2013 until March 27, 2023.

[8] The Information Services Corporation documents and Alberta Government documents filed at Tab 2 of EE-1 establish the existence of the corporation 2449370 Alberta Ltd. operating as Dairy

Queen and the fact that Ms. Pravinkumar Patel and Mr. Vishwas Patlel are and were the only two directors of the corporation at all relevant times. In addition, Mr. Patel confirmed this to be the case.

[9] The Agreed Statement of Facts also states that the dispute in this case is over whether Ms. Rodrigo quit or was fired during a meeting between herself and Mr. Patel on March 27, 2023.

[10] Labour Standards Officer Kim King determined that Ms. Rodrigo had been fired and as a result she was owed \$3,934.48. This amount is contained in the Agreed Statement of Fact, as well as in the Wage Assessment. At the hearing, Mr. Patel agreed that this amount is correct if I determine that Ms. Rodrigo was fired. Mr. Patel does not agree that she was fired and contends that she quit at the March 27 meeting.

[11] Both parties agreed that the sole matter for me to determine is whether Ms. Rodrigo quit or was fired at the March 27 meeting. If she quit, she is not entitled to any further pay and I should quash the Wage Assessment. If she was fired, she is entitled to pay in lieu of notice and the Wage Assessment should be upheld.

[12] Only Mr. Patel and Ms. Rodrigo were present at the March 27 meeting.

[13] The events which provided the context for the March 27 meeting are not in dispute. It is clear that Mr. Patel approved a vacation for Ms. Rodrigo. She was scheduled to return to work on March 27. Mr. Patel sent Ms. Rodrigo a text on March 3. Copies of all the texts I refer to are contained at Tab 5 of EE-1. The first text does not contain a date but Ms. Rodrigo and Mr. Patel both testified that it was sent and received on March 3. It read "Hello Nelia, how are you doing? Sorry to disturb you but I am wondering are you coming back here? If yes what date would you to start?"

[14] Ms. Rodrigo did not respond immediately, and Mr. Patel sent another text on March 7, saying "Hello Nelia, it has been 4 days since i text you, so i assume you are not coming back."

[15] Ms. Rodrigo replied the same day indicating that she was on an approved vacation from Feb. 13 and March 26 and that her "resume date" as she called it, was March 27. Mr. Patel replied "No problem just wanted to know if you coming back, you will be in schedule on 27 march"

[16] Ms. Rodrigo's undisputed evidence is that prior to March 27, 2023 she had never missed a shift or been disciplined in the 10 years she worked at the Dairy Queen.

[17] Ms. Rodrigo testified that when she arrived at work on March 27 she asked to speak with Mr. Patel. She was upset because Mr. Patel had reduced her regular shift by 1 hour per day on the work schedule. She testified that she believed Mr. Patel had previously promised her the same hours when she returned to work. She further testified that at the meeting Mr. Patel told her to give him two days to figure out a solution to the issue, and that she left believing that she

would hear from him regarding the number of hours she would be scheduled for within two days following the March 27 meeting.

[18] Ms. Rodrigo further testified that by the next day she had heard that Mr. Patel had crossed her off the work schedule. She sent a text to her supervisor, Carla Knihnitski asking if that was true. Ms. Knihnitski replied (Tab 5, Tab EE-1) 'He did that before you talked to him...". Ms. Rodrigo testified that upon learning this she sent Mr. Patel a text asking why he had taken away her shifts, but that Mr. Patel never responded. This caused her to assume that he had fired her.

[19] The March 27 to April 2 Dairy Queen work schedule (at Tab 6, EE-1) indicates that as of March 26, Ms. Rodrigo was scheduled to work Monday, March 27 to Friday, March 31 from 10-5 each day. This schedule was later amended by putting an 'X' through each of the shifts Ms. Rodrigo was scheduled to work Ms. Rodrigo was left off the work schedule for the following week of April 3-9. Copies of the three work schedules were filed under Tab 6 of EE-1.

[20] Mr. Patel testified that he did indeed approve Ms. Rodrigo's vacation, with March 26 being the last vacation day.

[21] Mr. Patel testified that "other workers" told him that Ms. Rodrigo was not going to return to work, and this is why he texted her on March 3. He testified that he originally did not include her on the March 27 to April 2 schedule. Upon hearing from Ms. Rodrigo on March 7 that she was planning to return on March 27, as he stated "I put her on reduced hours".

[22] Mr. Patel testified that Ms. Rodrigo came in late for her March 27 shift and that the meeting between them occurred sometime around 2:00 or 3:00 in the afternoon. By his own admission Mr. Patel was angry at that meeting and crossed Ms. Rodrigo off of the schedule immediately after the meeting. Mr. Patel claims that Ms. Rodrigo quit at the meeting and this is why she was crossed off the schedule.

[23] On April 3 Ms. Rodrigo texted Mr. Patel and said "...My name is not on the schedule list so I guess you fired me?..." Mr. Patel did not reply. When asked why he did not reply, Mr. Patel said "I don't reply to former employees unless they are asking for documents."

[24] Mr. Patel stated that he was actively trying to cut costs in his business. He also stated that he had lost some other staff and that he needed workers. He agreed that over a 10 year employment history with the Dairy Queen Ms. Rodrigo had never missed a shift or been disciplined. He stated that she was one of the only employees he had who could work at every position. In this context Ms. Rodrigo sent a text to Mr. Patel asking if she had been fired. If she had in fact resigned, one would expect that the employer would reply indicating that the employee had not been fired. Mr. Patel's stated reason for not replying to Ms. Rodrigo, that he simply does not reply to former employees unless they are requesting documents, is self-serving and I do not find it to be credible.

[25] Ms. Rodrigo admits to being late on March 27. She admits being upset over having her hours reduced. And she clearly stated that she discussed this with Mr. Patel on March 27, and her told her to give him a couple of days to come up with a solution. I accept Ms. Rodrigo's testimony as truthful and accurate.

[26] The onus is on the employer to establish that the employee quit. In this matter, the employer put forth no documentation, no texts, no emails or anything else to substantiate that this employee had resigned. This alone would have been sufficient to establish that the employee is entitled to pay in lieu of notice. However there was more in this case. I do not accept Mr. Patel's testimony that the employee resigned as truthful. I conclude that for reasons which are not apparent to me, Mr. Patel decided either during or immediately after Ms. Rodrigo's approved vacation, that he would remove her from the work schedule, and that he would not even show her the common courtesy of informing her that her employment had been terminated.

[27] I do find that Ms. Rodrigo was late for her shift on March 27. This single incident would be insufficient to establish just cause, and to the employer's credit they did not allege just cause.

[28] It is clear from the evidence including Ms. Rodrigo's testimony, the copies of the work schedule filed under Tab 6 of EE-1 and Mr. Patel's testimony that Mr. Patel removed Ms. Rodrigo from the employer's work schedule on March 27, and that she was left off all subsequent work schedules. *The Saskatchewan Employment Act* defines 'layoff' at section 2-1 (l) this way:

"layoff" means the temporary interruption by an employer of the services of an employee for a period exceeding six consecutive work days"

Decision:

[29] Wage Assessment No. 1-009571 is confirmed in the amount of \$3,934.48.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 6th day of November, 2023.



Doug Surtees
Adjudicator

The Parties are 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 viewed 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.

(2) A person who is directly affected by a decision of an Adjudicator on an appeal pursuant to Part III 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 or hearing pursuant to Part II, the wage assessment or the notice of hearing;

(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;

(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 of the adjudicator's decision or order with any directions that the board considers appropriate.

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 or the director of occupational health and safety, 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 and the director of occupational health and safety have 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.