IN THE MATTER OF AN ADJUDICATION
PUSUANT TO SECTION 2-75 AND 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT

Appellants:

J. J. Tomas Holdings Ltd., o/a Hooters Saskatoon and Jim Tomas, being a director of J. J. Tomas Holdings Ltd.,

AND

Respondent:

The Director of Employment Standards

Date of Adjudication:	August 28, 2024
Date of Decision:	September 6, 2024

1. On May 23, 2024, Wage Assessment # 1-000817 was issued on behalf of the Director of Employment Standards. The Wage Assessment was issued to J. J. Tomas Holdings Ltd., o/a Hooters Saskatoon and Jim Tomas, being a director of J. J. Tomas Holdings Ltd. [the 'appellants'].

2. Wage Assessment # 1-000817 directed the appellants to pay $4,147.00 to former employee Raleen Bowles [the 'employee'].

3. The appellants appealed Wage Assessment # 1-000817. Mr. Jim Tomas represented the appellants at the appeal hearing. Ms. Violet Harris-Tomlin was the Director's designate and represented the Director. She did not represent the employee, Ms. Raleen Bowles. Ms. Bowles was present throughout the hearing and represented herself. At the start of the hearing, the parties agreed that the appeal was properly constituted and within the permissible time limit. I reviewed the materials filed and agree that this is correct.

4. The appellant's accountant and the Director's delegate communicated with each other prior to the hearing, and as a result of information received, the Director's delegate modified the Director's position somewhat from that contained in the Wage Assessment. At the start of the hearing Ms. Harris-Tomlin indicated that the portion of the Wage Assessment which alleged a minimum wage top-up was owing has been abandoned. As a result of that, and a mathematical correction, the amount the director alleges is owing under the Wage Assessment was lowered to $3,088.18. This amount is made up of two components. If the amounts are found to be owing, *The Saskatchewan Employment Act* ['SEA'] requires that Annual Vacation Pay ['AVP'] be added to the total. For the sake of simplicity, I am simply referring to the amounts alleged owing inclusive of the AVP amount. The $3,088.18 alleged to be owing is made up of:

a. Public Holiday Pay ['PHP'] in the amount of $1,402.48; and

b. Pay in lieu of Notice, in the amount of $1,685.70

5. The parties agreed as stipulated facts that the named corporation is an existing Saskatchewan corporation, and that Mr. Tomas is and was at all relevant times a director of the corporation. The parties also agreed that the employee was employed by the corporation from April 17, 2022 to October 13, 2023, in a management position.

6. It was not disputed that the employee was at the time of her dismissal a 'general manager' of Hooters restaurant in Saskatoon and had been paid at a rate of $5,000 per month. She was expected to work 60 hours per week. Since she was a manager, she was not entitled to overtime pay. In March, 2023 Ms. Bowles went on sick leave – although she still worked occasionally at an hourly rate of $19.23. When she returned from sick leave her weekly hours were lowered from 60 to 40 hours per week and her remuneration was lowered to $3,500 per month.

7. Patricia Hoffart was the appellant's accountant. She was responsible for, among other things, calculating and issuing employee pay cheques. I use the term 'pay cheques', despite payment being made by electronic transfer. Ms. Bowles was paid two times per month: on the 15th and at the end of the month.

8. As a witness Ms. Hoffart impressed me as a person who answered questions directly, honestly and completely. She appeared to be very skilled and competent at her job. She testified that she had been doing the books for Mr. Tomas for over 20 years. Mr. Tomas provided her with basic parameters, but otherwise left the bookkeeping to her.

9. Ms. Hoffart took instructions from Mr. Tomas as to an employee's rate of pay, and whether the pay was to be counted as salary or bonus. In the case of Ms. Bowles and at least some other managers, these instructions were to pay a portion of the agreed remuneration as salary and the remainder of the agreed remuneration as a bonus. The result was that although the employee was paid two times a month, she received two 'salary' payments and two 'bonus' payments every month.

10. Different software programs were used to calculate and record the two types of payments, with the result that income tax (and perhaps other deductions, although that was not clear to me) would be deducted from the portion of the employee's remuneration called salary, but not from the portion called bonus. In Ms. Bowles' case this meant that she was paid a 'salary' of $1,500 gross on the 15th and at the end of each month, and was also paid a 'bonus' of $1,000 on the 15th and at the end of each month.

11. I make no comment on the propriety of this twice a month 'salary plus bonus' payment system, as that would clearly be outside of the jurisdiction given to me by the SEA. However, I do find that for the purpose of calculating Vacation Pay and Pay in lieu of Notice, I consider Ms. Bowles' salary to include both the portion identified as salary and the portion identified as bonus.

What Amount (if any) of Public Holiday Pay ['PHP'] is Owed?

12. The SEA defines public holidays at s. 2-30. Section 2-31 allows an employer under certain conditions to substitute another day off for a public holiday. Section 2-32 requires employees to be paid public holiday pay in accordance with a prescribed formula.

13. The system in place to pay wages at Hooters included that Mr. Tomas, or the kitchen manager Saad Pauls, would advise Ms. Hoffart of what days the employee was absent. If the employee had vacation time coming to her, Ms. Hoffart would use this to cover the time off. Ms. Hoffart says she used vacation time to cover a total of 45 days off taken by the employee. However, Ms. Hoffart was told the employee took more than 45 days off. For this additional time, Ms. Hoffart calculated the employee's daily rate of pay (using a six-day work week). Using the information provided to her, Ms. Hoffart calculated that given the amount of time the employee had taken off work, the employer had effectively overpaid the employee by $2,752.12.

14. I believe that Ms. Hoffart's calculations using the information she received are accurate. As I previously mentioned, she appeared to me to be very skilled and competent at her job. However, in a hearing such as this, the appellant must establish on a balance of probabilities that the information provided to Ms. Hoffart is accurate. This could be done through testimony establishing a reliable and accurate time keeping system was in place for tracking this employee's hours. No such testimony was provided.

15. Subsection 2-75(1) of the SEA says that the copy of the Wage Assessment filed in an appeal such as this "is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing...". I take this to mean that an adjudicator such as myself must uphold the Wage Assessment unless evidence submitted at the hearing establishes on a balance of probabilities that the amount in the Wage Assessment is incorrect. In this case, the amount in the Wage Assessment (as lowered by agreement) with respect to PHP is $1,402.48.

16. The onus is on the employer to keep proper records. The type and extent of these records is spelled out in section 2-28 of the SEA. The calculations done by Ms. Hoffart are the basis for the employer's challenge to the amount of PHP said to be owed in the Wage Assessment (as modified). Although a very large number of documents were filed as exhibits for identification purposes, there was no testamentary

evidence establishing a reliable and accurate time keeping system with respect to this employee. Ms. Hoffart made the calculations based on information provided by Mr. Tomas and Mr. Pauls as to the employee's absences. If there had been testimony that this employee's days off, and hours off were recorded by a reliable and accurate record keeping system, I could have evaluated the evidence to determine if the appellant had established on a balance of probabilities that the Wage Assessment amount was incorrect. In that case I would have had to consider whether the SEA would permit the alleged 'overpayments' to be set off against the PHP owing. As it is, the employer has not met the onus to establish that the modified Wage Assessment is in error, and I must uphold the PHP portion of the Wage Assessment, which is a total of $1,402.48.

What Amount (if any) of* Pay in lieu of Notice *is Owed?

17. The second issue in this matter is whether or not pay in lieu of notice is required. There is no dispute that the employee worked for Hooters from April 17, 2022 to October 13, 2023. This means that she was an employee who worked for the employer more than one year but not more than three years. The employer does not claim to have provided any notice. Therefore, if the employee's employment was not terminated for just cause, she is entitled to two weeks pay in lieu of notice (SEA section 2-60). However, if the appellant establishes that it had just cause for the termination, the employee is not entitled to any pay in lieu of notice.

18. The SEA does not define what constitutes 'just cause'. The exact meaning of just cause is determined from common law. One statement of the test for just cause is:

> *If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee*
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> *Regina v. Arthurs* (1967), 62 D.L.R. (2d) 342 (Ont. C.A.) at para. 11.

19. An employer may establish just cause by establishing that an employee has been progressively disciplined over a period of time. In order to establish this, the employer must establish that the employee was made aware of the employer's concerns. In this case there was no claim or evidence of progressive discipline. Since there is no evidence of progressive discipline, the employer here is effectively asserting that there was a single incident of behaviour which justified dismissal.

20. Courts have said that to determine if just cause is established, the decision maker must:

1. determine the nature and extent of the misconduct;
2. consider the surrounding circumstances; and
3. decide whether dismissal was warranted.

McKinley v. BC Tel, [2001] 2 SCR 16;
Dowling v. Ontario (Workplace Safety and Insurance Board), 246 D.L.R. (4th) 65 (Ont. C.A.); *Fernandes v. Peel Educational & Tutorial Services Limited (Mississauga Private School)*, 27 C.C.E.L. (2d) 185 (B.C.C.A.).

21. The appellant's Notice of Appeal dated May 24, 2024 alleges that the employee was terminated for theft. In addition to Mr. Tomas and Ms. Hoffart, the appellant called four employees to give evidence: Aaron Huber, Saad Pauls, Justice Thorne and Rutchel Rogador.

22. Most of the testimony of Aaron Huber, Saad Pauls, Justice Thorne and Rutchel Rogador was hearsay. This is not a criticism of the witnesses; they simply answered what they were asked. The fact is however, collectively these witnesses had very little relevant first-hand knowledge relating to the allegations of theft against the employee.

23. The appellant's assertion of theft is really two different assertions. The first assertion is that she wrongfully took float money which belonged to the employer and which she was intended to use as part of her job. There is no question that the employee required and used float money as part of her job. Sometimes this float money was provided to her by Rutchel Rogador and sometimes it was to be removed from a safe. The critical question is whether the employer has established that the employee wrongfully took some of this float money for her own use.

24. The second assertion is that the employee organized a golf tournament and fundraiser and that she absconded with money which had been collected for the golf tournament and fundraiser. Again, there is no dispute that she collected a large part of these funds. The critical question is whether the employer has established that the employee wrongfully took some of this golf tournament and fundraiser money for her own use.

25. The employee was required to use float money for two purposes. One float was connected to VLT machines. VLT machines do not pay out cash to the winners. When, during this employee's shift, a customer was entitled to a payout from a VLT, this employee was responsible for using the float to pay the customer the amount won. A second float was used to pay staff their tips in cash. The witnesses testified that many customers pay their bill and tip with either a credit card or a debit card. The tip therefore is deposited into the employer's account along with the funds to pay the bill. The manager on duty (sometimes this employee) would provide the amount of the tips which had been deposited by electronic fund transfer, from the float. There was a tip sharing protocol in place at Hooters. Providing cash (from the float) facilitated the tips being divided in cash, according to an established formula. The tip amounts were entered onto a spreadsheet by the employee in the presence of other staff. The spreadsheet applied a formula to calculate how much each working staff member was to receive. This was so that tips were shared with staff beyond the servers.

26. Mr. Tomas said the float amounts did not reconcile. The employee said they did. Although there was documentary evidence of the amounts Ms. Rogador paid to make the float whole again, there was simply no evidence put forward that the employee wrongfully took float money for her own use. Mr. Tomas, and at least most of the employees who testified, testified that they thought that the employee had wrongfully taken float money – but there was simply no evidence presented that this had occurred. The employee did not have exclusive access to the safe where the floats were stored. She was not seen wrongfully taking money by any employee who testified. None of the cameras in the business captured her wrongfully taking cash. As a result, when I apply the McKinley test (1. determine the nature and extent of the misconduct; 2. consider the surrounding circumstances; and 3. decide whether dismissal was warranted) I must conclude that the employer fails at the first step. There was simply no evidence presented which establishes misconduct on the part of this employer with respect to any float. I hasten to add that theft of float money where established by evidence would constitute just cause for termination.

27. This brings me to the allegation that the employee stole money intended to be used for a golf tournament and fundraiser. The employer made a police complaint about this alleged theft (which the police called fraud). This complaint however does not establish that any theft or fraud occurred. The written police report filed is simply evidence that a complaint was made by the appellant. No evidence was submitted of any investigation or any charge. As a result, the police report simply establishes that the appellant made a complaint to the police. The report is not evidence of the facts alleged in that complaint.

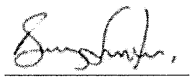
28. It is clear from the evidence of Mr. Tomas, the employee and other employees that the golf tournament and fundraiser was extremely poorly organized. Mr. Tomas represents the event as something completely within the control of the employee. It is clear that she took a leading role in this venture. However, it is also clear that Mr. Tomas' business was involved. Some registration fees were paid using a Hooters electronic payment terminal. Some cash was turned over to Hooters and used to pay for dinners (which were included in what the golfers paid for). Some fundraising, including purchasing the assistance of a Hooters staff member as a caddie, also used a Hooters electronic payment terminal. In the end it is clear that the golf course is owed money for the golfers' fees, and the charity which expected to receive a significant donation did not receive it. The employee testified that some of the registration cash Mr. Tomas claims is missing is in a file at the Hooters business premises, whereas Mr. Thomas says he is not aware that any funds being there. However, when I examine the evidence presented touching upon the nature and extent of the misconduct established, I am forced to conclude that the evidence presented simply does not establish that this employee stole or otherwise misused funds collected for either the golf course or the charity. It is clear that Mr. Tomas had control of some of those funds, as he says Hooters was paid at least for the dinners provided to the golfers. It is apparent that funds were not carefully accounted for, and it is very likely that someone wrongfully took some of those funds. For the sake of clarity, I would add that there is no suggestion that Mr. Tomas wrongfully took any of the funds. The evidence establishes that an undetermined amount of money was collected as a combination of registration feed and fundraising activities, that the golf course fees which were to be paid out of that money were not paid, that the meals at Hooters which were to be paid out of that money were paid, and that the charity which was to receive a sum of money did not receive the anticipated donation. Mr. Thomas says some of that money appears to be missing, and I accept that he is correct in that statement. The employee claims some of the money is at Hooters. I do not know if this is correct or not, but I am not convinced that the entirety of the missing money is at Hooters as she describes. However, there was simply no evidence put forward that establishes on a balance of probabilities that this employee wrongfully took the missing money. I don't know whether she did or did not; I only know that the evidence does not establish on a balance of probabilities that she did.

29. As a result, I must conclude that the employer has not established just cause for terminating the employee's employment. This means I must uphold the Wage Assessment award of two weeks salary, being a total of $1,685.70.

Decision

30. Wage Assessment # 1-000817 is hereby confirmed in the amount of $3,088.18.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 6th of September, 2024.



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:

(1)(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 on a question of law or a question of mixed law and fact; and

(c) to appeal any decision of the board on a question of law.

(2) If the director of employment standards or director of occupational health and safety intends to appeal to the board pursuant to this section, that director shall:

(a) file a notice of appeal with the board within 30 business days after the date of service of the decision of the adjudicator; and (b) serve the notice of appeal on all parties to the appeal.

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

(d) 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 or V, as the case may be;

(e) any exhibits filed before the adjudicator;

(f) the written decision of the adjudicator;

(g) the notice of appeal to the board;

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

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

(5) On an appeal, 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 considers appropriate.