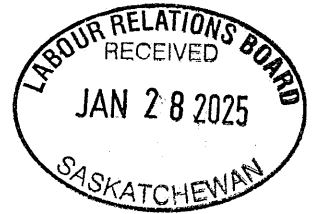


Decision of Adjudicator in the Matter of an Adjudication pursuant to
Sections 2-75 and 4-6 of *The Saskatchewan Employment Act*
LRB File No. 096-24
Wage Assessment No. 1-000807



COMPLAINANT: Jennifer Nemanishin
Represented by Kim King, Employment Standards Officer

RESPONDENT: Kelly Panteluk Construction Ltd.
Represented by Riley Panteluk, Director and
Kamara Willett, Kanuka Thuringer LLP

DATE OF HEARING: January 14, 2025

PLACE OF HEARING: Virtual Conference, initiated by the Adjudicator from his home in Regina, SK

PARTICIPANTS: Kim King ("Kim") and Jennifer Nemanishin ("Jennifer"), from Kim's office
Kamara Willet ("Kamara"), from her office
Riley Panteluk ("Riley"), from his office; and
Witness: Krystal Huculak, Safety Administrator for Kelly Panteluk Construction Ltd.

i. Introduction

I advised the participants of my expectations of the hearing, and what can be expected regarding the decision.

ii. Preliminary Matters

Kim advised that the amended wage assessment was reduced by \$300 as Kelly Panteluk Construction Ltd. ("KPCL") has refunded Jennifer's camp deposit.

iii. Opening Statements

Kim stated that there are three issues for me to deal with:

1. Modified Work Arrangement that KPCL used violates the Act Part 3, 9(1) of *The Saskatchewan Employment Act* ("SEA").
2. Jennifer's half hour lunch break should be paid as she was at the disposal of the employer; and;
3. Using a reduction in wage as discipline violates Section 2-16(1)(a) of the SEA.

Kamara responded by agreeing, the three issues put forward by Kim were the issues I need to rule on and went on to add that:

1. The wage reduction was appropriate as per KPCL policy;
2. Jennifer had no work responsibilities during her lunch break; and
3. KPCL's hours of work arrangement falls within Section 2-19 of the Act.

iv. Facts

1. Employer:

Kamara tabled a binder which contained all the documents she would rely on and the binder with several tabs and exhibits was marked ER1.

Kamara then called Krystal Huculak ("Krystal") and she was affirmed. In response to Kamara's questions, she provided the following evidence:

She is employed as Safety Administrator to KPCL during the construction season.

In June of 2023, she investigated an incident of employee conduct involving Jennifer (Exhibit 5, page 36 of ER1) and she drafted the report in Exhibit J.

She arrived at the site the morning after the incident and found that a fire had been set on a wooden camp table and car had been damaged. She was able to ascertain that Jennifer had been part of a party that started in the bar in Guernsey and continued at the camp after last call.

At a toolbox meeting of the partiers, Riley reviewed camp rules that were violated and advised the employees of their punishment.

Cross-Examination:

In response to questions asked by Kim, Krystal provided the following:

Employees involved in the incident were asked to sign payroll deduction forms to allow KPCL to deduct costs of damage from their pay. Damages were totalled and divided by the number of employees involved.

She advised Jennifer to sign the deduction and discipline forms, but Jennifer refused.

She is not sure if Jennifer was told to sign or be terminated.

She does not know who marked Jennifer's Record of Employment with "M", which means dismissed or suspended.

Note: Kim tabled a binder that contains all the documents the Ministry is relying on. The binder was marked EE1. It contains several tabs and sub tabs.

Tab 7E contains a Disciplinary Action Report that Krystal prepared. The Action Report generated the payroll deduction and discipline forms which when presented to Jennifer in the office, Jennifer refused to sign.

Jennifer left the office and went to her room. She (Krystal) followed Jennifer and saw that Jennifer had packed up all her belongings. Jennifer left camp shortly after.

She is aware that some employees signed the forms, some didn't, and one quit.

Redirect – none

Kamara called Riley Panteluk and he was affirmed.

Riley also swore all matters in his affidavit ER1 Exhibit "A" are true.

In response to Kamara's questions, he provided the following testimony:

KPCL's Modified Work Arrangement provides employees in remote sites with an opportunity to get their hours worked in a shorter time and have more time to spend at home. The Guernsey site worked 11 days at 11 hours each and then had 3 days off. KPCL did hire local as much as possible. Employees who lived in camp have free board and room.

EE1 TAB 7 Section E is the discipline report for Jennifer's part in the June 10 incident. It describes the wilful damage caused by the partying employees.

The employer replies on the rest of his affidavit for the rest of their evidence.

Cross-Examination:

In reply to Kim's questions, Riley provided the following:

Jennifer was hired as a Heavy-Duty Equipment Operator. First, she was trained on heavy equipment then she was assigned to drive a Rock Truck at Guernsey site. She resided in the company's camp.

She signed the company's Employment Agreement (EE1 TAB 7 B) and under Section 9B worked under the Modified Work Arrangement ("MWA") which paid overtime after 12 hours daily or 80 hours biweekly.

He is not sure if the MWA was reviewed with her when she signed it. He can say that an orientation manager is available to explain it to new employees. If a new employee will not sign the MWA, they won't be hired.

Jennifer never worked a 12-hour shift but could have if site or weather dictated the work schedule to be changed, see TAB 7B 10A.

Every site is different, and he is not aware if the work schedule was written and/or approved by all employees. Every employee has signed the Employment Agreement that states "daily hours up to a maximum of 12 with overtime after 12". Jennifer never worked more than 11 hours daily, it depends on the site and weather.

The benefit for Kim to waive overtime after 8 daily was to have more time off every two weeks.

The MWA only lasts the length of a season and then employees sign up to a new one. *The Saskatchewan Employment Act* is not violated because the arrangement is about eight months long, April to November, dependant on weather. If season goes beyond November KPCL notifies employees of the extension in writing.

Lunch break times are scheduled by notifying the employees during toolbox meetings. Employees are not allowed to have cellphones with them at work, so they are advised to wear a watch. Also, every piece of equipment is provided with a two-way radio for communication.

Employees are able to take their lunch break in their machine or they can leave their machine and take lunch in groups, or they can either drive their machine, or get a ride to the air-conditioned camp site lunch trailer.

Jennifer asked Riley, how she could go on lunch break if her truck was loaded and couldn't unload because other employees were on break. Riley replied that most of the time you could unload your truck without needing another employee, if you needed someone out of your way you could call for assistance on your radio.

Riley went on to state that KPCL did not require employees to be available on their lunch break.

Jennifer was disciplined (EE1 TAB 7E) for her participation in a party on the evening of June 10. Krystal's investigation report showed several violations of company camp policy including, having liquor on the premises, and damaging company property.

Employees involved were asked to sign forms that would allow deductions from their wages to pay for damages. Jennifer refused to sign and packed up and left camp. (TAB 7 D6)

KPCL policy allows for wage deduction for damage deposit and for other damages caused.

TAB 7C is the KPCL Discipline Policy. Part of discipline in the policy allows for a reduction in hourly wages. Part of Jennifer's discipline was a 10% wage reduction.

Jennifer's discipline included a rollback in wages, deduction for damages and was not paid for June 11th, when she worked.

Riley agreed there was an over deduction.

Redirect:

Riley reiterated that only when someone signs the Employment Agreement do they become an employee.

2. Employee:
Jennifer was called and affirmed and in response to questions from Kim provided the following:

She started with KPCL on May 1, 2023, and her last day was June 12, 2023.

She was employed as a Heavy Equipment Operator and was paid \$25/hr.

She worked at the Lanigan Potash Mine, she lived in the Company camp at Guernsey, Sask.

She signed the company Employment Agreement (TAB 7B) which contained the provision for working a maximum of 12 hours a day before overtime. The schedule was 11 days at 11 hours a day with 3 days off. She knows that in order to get the job she had to sign the agreement.

She knew it was called a Modified Work Arrangement, but she was never provided a schedule. In orientation she was told that everyone works the same hours, it's always 11 hours a day for 11 days and three days off. Even though the agreement states "to a maximum of 12 hours" she never worked a 12-hour shift.

She worked a modified arrangement in the past. It was four 9 hour days, and one 4 hour day. Overtime was after 9 hours in a day.

Regarding lunch break, when she first started, every morning a safety meeting was held. Employees were told where they would be working. Her job was a circle. She would get her truck filled, go empty it and repeat. Lunch was at 1:00 p.m. The rule was you stopped at 1:00. If your truck was loaded you had to stay in the truck. She was never told she could go to camp for lunch. No one went to the trailer for lunch. She was at the disposal of the employer during her lunch period.

Regarding her wage rollback, she was part of the group that partied at the Guernsey bar and continued to party back at camp, she did not cause any of the damage, and feels the company mishandled the investigation. She worked a full shift on the 11th and 12th of June.

Riley met with the employees involved on the morning of June 12. After the meeting she went to work and thought about the discipline. After work Krystal asked her to sign the wage deduction form, and she refused. She never caused any damage, so she didn't deserve to be deducted. Krystal and the site supervisor told her if she didn't sign, she would be let go.

Her response was to pack her belongings and leave camp.

From her final pay KPCL deducted damages and a 10% wage reduction.

She texted payroll regarding the deduction and was told by return text she had violated camp policy.

Cross Examination:

In response to questions from Kamara, Jennifer provided the following:

Her lunch break was to be one half hour and perhaps half the time she would be loaded and had to stay in the truck.

She was never told she could go to the trailer. Sometimes she got out of the truck but was still on site. She agreed she could take a nap in the truck, and that the company never asked her to respond during lunch break. She never asked to go to the trailer.

She agreed that she signed the Employment Agreement (EE1 TAB 7) and that the agreement bound her to the Accommodation and Discipline policies.

She agreed that the Guernsey site was a “dry” camp and that there are signs posted to that effect. She agrees that she violated the camp policy regarding alcohol.

Regarding the Employment Agreement TAB 7 9B she understood the hours of work and never raised with the company why she never worked 12 hours shifts, or what site and weather dependant meant.

Re-direct:

Jennifer indicated to Kim that lunch break was taken at the same time every day.

Regarding the “no alcohol” policy, it was well known, in fact Riley had told them that having a beer was fine, don’t go crazy.

There was booze in camp all the time. The policy was never enforced.

v. Final Argument

Employer:

Kamara provided a written brief to me later in the day of the hearing. The pertinent arguments regarding Jennifer’s Wage Assessment are as follows:

1. KPCL’s Employment Contract fulfilled the requirements of an MWA. The MWA is not required to be a separate document from the Employment Contract. There is nothing within *The Saskatchewan Employment Act*, it’s regulations or binding case law that prevents an Employment Agreement from also qualifying as a MWA under *The Saskatchewan Employment Act*.

The MWA set out in the Employment Agreement complies with every requirement in Section 9 of the Regulations.

MWAs are governed by section 2-19 of the SEA and section 9 of the Regulations. The Regulations list requirements for a valid MWA at s.9(3) which includes:

(3) An agreement must:

(a) be in writing

(b) be signed one week before the start date provided in the agreement by:

(i) the employer; and

- (ii) the employee or a majority of the group of employees subject to the agreement, as the case may be;
- (c) specify the number of weeks over which the hours will be averaged;
- (d) specify the daily hours of work after which an employee becomes entitled to overtime;
- (e) specify the work schedule that reflects the daily and weekly hours of work agreed to by the parties; and
- (f) provide for a start date and an expiry date for the agreement.

The brief goes on to match up each provision from Section 9 of the Regulations with corresponding provisions from KPCL's Employment Agreement. KPCL's conclusion is that their MWA meets the requirements of both Section 2-19 of *The Saskatchewan Employment Act* and Section 9 of the Regulations.

Moving to the issues of whether Jennifer's lunch break should have been paid, KPCL contends s.2-14 of *The Saskatchewan Employment Act* was met. There was no responsibility for the equipment and no limits on the use of their meal breaks.

Employees who work at a remote location, such as this case, often stay on site during their meal break, even though, in this case there was no obligation for the employees to remain on site.

Jennifer admitted that if she so chose, she could have had a nap during the break.

Addressing Jennifer's decrease in pay as a result of discipline, KPCL cites Section 6 of their Employment Agreement which Jennifer agreed with when she signed. Section 6 contains both the Accommodation and General Discipline Policy. KPCL's Discipline Policy gives it authority to, among other consequences, reduce hourly wages and terminate employment.

An investigation of an incident resulted in Jennifer being found guilty of breaking a number of company rules. Consequences were administered on Jennifer including a written warning, a pay reduction and withholding of her camp deposit. KPCL contends that their Discipline Policy does not violate Section 2-8(1) if *The Saskatchewan Employment Act* and therefore withholding wages as a discipline is legal. Further Section 2-36 of *The Saskatchewan Employment Act* is not applicable since the wages deducted were not "otherwise as payable" but rather the deductions were made from a rate of pay she would earn. Further the reduction applied only to the 22 hours Jennifer worked after the incident.

KPCL closes their argument concluding that:

- The MWA used complies with the provision of the SEA and the Regulations
- Reduction of Jennifer's pay for the discipline does not violate the SEA
- Jennifer was not at KPCL's disposal over her lunch break

Therefore, KPCL requests the Wage Assessment to be dismissed.

Employee:

Kim advised the Ministry will also provide a written brief later in the day, which I received as promised. The Ministries arguments are summarized:

Modified Work Arrangement

Regarding the MWA, Part 3-9(1) of the Regulations provides direction to employers regarding the elements necessary for a MWA to be valid. These elements 9(3) subsection (a) through (f) must be present; meaning they are non-negotiable.

Evidence presented during the hearing show there was no set schedule specifying daily and weekly hours which where agreed to by the employees. Further the employers MWA does not have a start and expiry date. The employers Employment Agreement also allows the schedule to be changed based on weather related events. For these reasons the Director ruled the MWA invalid and Jennifer is awarded overtime based on an 8 hour day. The audit conducted by the Ministry calculated overtime earned to be \$742.05.

Meal Break

Kim argues that Jennifer's evidence shows at least one-half of her lunch breaks were spent in her truck for safety reasons. The rest of her break she was unable to access the lunch trailer with washrooms, etc. It was not feasible for her to travel to and from the haul circuit to the lunch trailer. Therefore, it is evident Jennifer was at the disposal of the employer for all 30 minute lunch breaks as per section 2-16(1)(a) of the SEA. During her employment Jennifer had 33 meal breaks. $33 @ \$12.50 = \412.50 she is owed with holiday pay \$452.80.

Wage Rollback

KPCL deducted wages from Jennifer for two different reasons:

1. As her share of the costs of damages to the employer's property which occurred during an employee party at camp on Jun 10, 2023; and
2. As discipline for violating company rules

Section 2-36(1) of the SEA states:

Except as permitted or required pursuant to this Act, or any other Act or any Act of the Parliament of Canada, an employer shall not, directly or indirectly:

- (a) Make any deductions from the wage that would be or otherwise payable to the employee;
- (c) Require an employee to return to the employer the whole or any part of any wages paid.

The amount of \$68.61 was deducted for discipline reasons cited above and due to the violations of Section 2-36(1) (a) and (c) must be refunded to Jennifer. KPCL refunded to Jennifer the money deducted for her share of damages.

Kim closed her arguments with the conclusion that the Wage Assessment should be upheld and that KPCL be directed to pay Jennifer a total of \$1,263.46.

That concluded the hearing.

vii. Analysis/Decision

1. Modified Work Arrangement

Within the Employment Agreement, that all employees must sign in order to work for KPCL, Section 10 describes under heading A. the work schedule and hours of work. The employee is to understand that hours of work are weather and site dependent.

Throughout the hearing these terms “weather” and “site” were mentioned several times giving the impression that there must be some mystical or complicated meaning. It seems to me that once a site have been determined, as in the Guernsey camp, there is no more determination needed. It is the site and therefore the work schedule can be developed and posted in advance. In this case it was simple, two-week rotation, 11 hours a day for 11 days with overtime after 80 hours, and three days off. There was no need to state overtime after 12 hours in a day since for Jennifer’s tenure shifts were always 11 hours.

Any work activity that takes place outside will have to contend with weather situations from time to time. That is a given. However, a work schedule has to be flexible to weather, not the other way around. If the company decides some catch up is needed, overtime can be assigned over and above the hours stated in the schedule.

With the posting of a schedule employees can see clearly what their next two weeks have in store for them.

One last word about the maximum daily shift of 12 hours. This declaration in Section 9B of the Employment Agreement stipulates daily overtime only after working hours greater than 12 daily. My review of Jennifer’s pay sheets show she never worked more than 11 hours daily. Had she exceeded 11-day hours she would have been owed overtime, since the “unposted” work schedule was really 11 hours a shift. KCPL does not have the luxury of an hour free of paying overtime if employees were worked 12 hours instead of the scheduled 11.

Despite the lack of a posted in advance schedule, I have no doubt that Jennifer knew and understood the hours of work. Her pay stubs show no shifts over 11 hours, and overtime was paid after 80 hours in a two-week period.

I do not have any reason to rule the MWA invalid. Therefore, I must rule that this part of the Wage Assessment is unfounded.

2. Meal Break

Riley’s testimony was that if Jennifer’s truck was loaded at meal break time and she could not unload without help she had to stay with the truck and eat her prepared lunch there.

If her truck was either empty or she needed no help to unload at lunch break she could drive to the camp trailer which was no more than 800 meters away from the work site. In the alternative she could radio, and someone would come and take her to the camp trailer.

Jennifer’s evidence is that she was never made aware that she could either drive or be taken to the camp trailer. She spent every lunch break with her truck.

Evidence from both KPCL and Jennifer suggests that for about one half of her lunch breaks she could not leave her truck for safety reasons. Therefore, it is my decision that she was at the disposal of the employer for 17 lunch breaks out of 33. $\$12.50 \times 17 = \$212.50 \times 3/52 = \$224.76$ with holiday pay is owed by KPCL.

3. Wage Rollback

Section 2-36(1)(a) and (c) and 2-36(2) of the SEA clearly describes what deductions can and cannot be made.

The argument that KPCL put forward that the reduction was made on wages not yet earned is creative, but incorrect as section 2-36(1) states "from wages that WOULD be otherwise payable...".

Therefore, I order KPCL return the \$68.61 deducted from Jennifer's wages for disciplinary reasons.

Conclusion:

My decision is that the Wage Assessment is amended from \$1,263.46 to \$293.37.

Dated at Regina in the Province of Saskatchewan, this 20th day of January, 2025.



Ralph Ermel
Adjudicator