PRAIRIE OASIS TRAVEL PLAZA INC., Appellant v. MAHMOUD A. SAYED, Respondent Employee and DIRECTOR OF EMPLOYMENT STANDARDS, Respondent

LRB File No.: 192-14; December 1, 2014

Chairperson, Kenneth G. Love, Q.C., (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Appellant:	Mr. David K. Rusnak
For the Respondent Employee:	No one appearing
For the Director of Employment Standards:	Ms. Lee Anne Schiebein

Section 4-8 of *The Saskatchewan Employment Act* – Appeal to the Board from a decision of an adjudicator from a wage assessment made by the Director of Labour Standards.

Appellant alleges adjudicator failed to properly consider evidence regarding contract of employment having been amended to correct error in initial agreement – Board reviews decision and applicable law and finds no error by adjudicator.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** This is an appeal pursuant to Section 4-8 of *The Saskatchewan Employment Act* (the "*SEA*") from a decision of an Adjudicator regarding a wage assessment made by an Employment Standards Officer. The decision under appeal was made by the Adjudicator on July 31, 2014. For the reasons that follow, the decision of the Adjudicator is confirmed.

Facts:

[2] The Respondent Employee was employed by the Appellant. He commenced employment with the Appellant on June 13, 2012 and remained employed until October 12, 2013. Prior to the commencement of his employment, the Appellant sent an offer letter, which

included an employment contract, to the Respondent Employee in which his starting wage was specified to be $14.85 per hour. The Respondent Employee signed the employment contract dated November 21, 2011. The letter which enclosed the employment contract was dated June 13, 2012.

[3] The Appellant, through its owner, Terrence Fazakas, testified that the figure of $14.85 had been used in error and that wage rate applied for what the Employer considered to be a "skilled position". The Appellant testified that the correct wage rate for the position taken by the Respondent Employee should have been $11.00 per hour.

[4] The Appellant wrote a letter addressed to the Respondent Employee which was dated June 18, 2012. This letter indicated that the wage rate of $14.85 was in error and the proper wage rate should have been $11.00 per hour. The Adjudicator found that this letter had never been delivered to the Respondent Employee.

[5] The Adjudicator found that the Respondent Employee had been paid by the Appellant at the rate of $11.00 per hour and the Adjudicator accepted the Respondent Employee's testimony that he regularly complained about being paid less than $14.85 per hour.

[6] The Respondent Employee complained to the Director of Employment Standards regarding his wage rate. An investigation ensued and a labour standards officer concluded that the Respondent Employee had been underpaid. The Director of Employment Standards issued a wage assessment #6460, for the period September 29, 2012 to October 12, 2013, in the amount of $6,570.94.

[7] This wage assessment was appealed to the Adjudicator who, by his decision confirmed the wage assessment.

Relevant statutory provision:

> ***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:*
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> *(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;*
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> *(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;*
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> *(e) the written decision of the adjudicator;*
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> *(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) 4-8((4) of remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.*

The Adjudicator's Decision:

[8] The Adjudicator determined that an employment contract had been formed when the Respondent Employee accepted the offer of employment and executed the employment contract. He also found that the Respondent Employee had not taken advantage of a mistake by the Appellant and "snapped up" the offer as a result of the mistake.

[9] The Adjudicator determined that the employment contract could have been altered in the future by agreement. However, he found that "there was no evidence presented that the contract term, as to wage, had been altered".

[10] The Adjudicator also concluded that allegations of theft by the Respondent Employee, if proven, may provide justification for termination of the Respondent Employee, but

that would not affect the wage assessment because the wage assessment did not include any time in lieu of notice.

Appellant's arguments:

[11] The Appellant argued that the Adjudicator had erred in law when he determined that the employment contract had not been amended. The Appellant argued that the employment contract had been amended either by oral agreement or by virtue of the fact that the Respondent Employee failed to object to the amount which he was being paid.

[12] The Appellant argued that the Adjudicator had failed to properly consider relevant evidence, being the evidence of the principle of the Appellant, Terry Fazakas, and the conduct of the Respondent Employee in not complaining regarding his wage, resulted in a reviewable error in law.

Director's arguments:

[13] The Director of Employment Standards argued that the Adjudicator did not err in his determination that the contract of employment had not been altered. The Director supported the analysis of the Adjudicator with respect to unilateral mistake in the formation of the contract. The Director argued that additional consideration and mutual agreement was a required element for the employment contract to be amended.

[14] On the standard of review, the Director argued that whether the determination by the Adjudicator was reviewable on a correctness standard or on a reasonableness standard, that the decision was both correct and reasonable and should not be disturbed.

Analysis:

The Standard of Review:

[15] In *Barbara Wieler v. Saskatoon Convalescent Home,*[1] the Board considered the standard of review to be applied by the Board in respect of appeals from adjudicators appointed pursuant to *The Occupational Health and Safety Act, 1993*.

[1] LRB File No. 115-14

[16] This Board now[2] reviews decisions made by adjudicators pursuant to Section 4-8 of the *SEA*. In *Wieler*, the Board made the following determination regarding the standard of review:

> *[12] The first question for the Board to consider is what the applicable standard of review in this matter is. For the reasons which follow, we find the applicable standard of review of questions of law is correctness, for questions of mixed fact and law, reasonableness, and for questions of fact which may be considered errors of law, reasonableness.*

[17] In *Housen v. Nikolaisen,*[3] the Supreme Court of Canada described the different categories as follows:

> *Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.*

[18] The determinations by the Adjudicator with respect to contract law are subject to review on the standard of correctness. In respect of the application of the facts, as found, to that law would amount to a question of mixed fact and law which is reviewable on a standard of reasonableness. However, the Appellant suggests that the error made was in the factual determinations made by the Adjudicator with respect to the amendment of the contract. Findings of fact may be reviewable as questions of law where the findings are unreasonable in the sense that they ignore relevant evidence, take into account irrelevant evidence, mischaracterize relevant evidence, or make irrational inferences on the facts.[4]

[19] In his decision, the Adjudicator addressed four (4) issues. These were:

1. What was the Respondent Employees correct wage?
2. What hours should be included in the hours worked by the Respondent Employee?
3. Is the Respondent Employee entitled to overtime pay?

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[2] Previously under the repealed provisions, the Court of Queen's Bench reviewed decisions from adjudicators
[3] [2002] SCC 33, 2 S.C.R. 235, at para. 101 per Bastarache J.
[4] See *Whiterock Gas and Confectionary v. Saskatchewan (Director of Labour Standards)* [2014] SKQB 300 (CanLII) at para [34]

4. What is the impact of the alleged misconduct by the Employee on the wage assessment?

[20] The appeal by the Appellant focuses on point 1 above. The Appellant argued that the Adjudicator failed to properly consider relevant evidence, being the evidence of the principal of the Appellant, Terry Fazakas, and the conduct of the Respondent Employee in not complaining regarding his wage.

[21] In respect to the evidence concerning amendment of the contract the Adjudicator found that the contract had not been amended. At page 3 of his decision, he says:

> *This doesn't mean that the terms of the contract could not be altered at a future date. However, here there was no evidence presented that the contract term as to wage was ever altered. Mr. Fazakas did not write or deliver to Mr. Al Sayed, the letter filed as exhibit EE4. Mr. Fazakas indicated that he believed this letter was given to Mr. Al Sayed, but he did not see that happen. Mr. Al Sayed testified that he never saw the letter until after his employment had been terminated. There is therefore no evidence before me that Mr. Al Sayed's employment contract was ever renegotiated with respect to wage, or that Mr. Al Sayed's employment at $14.85 per hour was terminated, and replacement employment at $11.00 was ever offered and accepted.*

[22] This passage suggests that the Adjudicator considered the evidence from Mr. Fazakas and the Respondent Employee regarding any amendment of the employment contract. On consideration, the Adjudicator determined that the contract had not been amended. This was a reasonable conclusion for him to have made based upon the evidence he considered.

[23] The Appellant took no issue with the determination of points 2, 3 or 4 above. It is not therefore necessary for us to review the Adjudicator's determination of these points.

[24] For the above reasons, the decision of the Adjudicator is upheld and wage assessment #6460 confirmed. An order dismissing the Appeal will accompany these reasons.

DATED at Regina, Saskatchewan, this **1st** day of **December, 2014.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson