



101193093 SASKATCHEWAN LTD. and MR. JOHN (ZHONG) CHEN, Appellants v. GEORGE SELIMOS, Respondent Employee and DIRECTOR OF EMPLOYMENT STANDARDS, Respondent

LRB File No. 202-14; December 5, 2014

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

For the Appellants: Mr. John (Zhong) Chen by telephone
For the Respondent Employee: Self Represented
For the Director of Employment Standards: Ms. Lee Anne Schienbein

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

Section 2-75(9) of *The Saskatchewan Employment Act* – Board reviews actions of the Adjudicator – Determines that Adjudicator, in the absence of other information, entitled to rely upon wage assessment as proof of amount owing to employee.

Section 4-4 of *The Saskatchewan Employment Act* – Board reviews actions of the Adjudicator – Determines that Adjudicator, before proceeding in the absence of the Appellant, is required to ensure that proper notice of the hearing has been given and provide that information as a part of his decision.

Section 4-5 of *The Saskatchewan Employment Act* – Board reviews actions of the Adjudicator – Determines that Adjudicator entitled to determine procedures for the conduct of the adjudication.

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 respecting

an appeal from a wage assessment made by the Director of Employment Standards.¹ The decision under appeal was dated July 29, 2014.

Facts:

[2] Neither the Appellants, nor anyone else on behalf of the Appellants, appeared at the hearing scheduled by the Adjudicator on July 29, 2014. The complainant and the Labour Standards Officer who investigated the complaint were present. In the absence of the Appellants, the Adjudicator proceeded with the hearing and determined in accordance with Section 2-75(9) of *The Saskatchewan Employment Act*, that in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing. He accordingly upheld the wage assessment.

Relevant statutory provision:

[3] Relevant statutory provisions are as follows:

The Saskatchewan Employment Act

2-75(9) The copy of the wage assessment provided to the adjudicator in accordance with subsection (8) is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing, without proof of the signature or official position of the person appearing to have signed the wage assessment.

...

4-4(1) After selecting an adjudicator pursuant to section 4-3, the board shall:

(a) in consultation with the adjudicator and the parties, set a time, day and place for the hearing of the appeal or the hearing; and

(b) give written notice of the time, day and place for the appeal or the hearing to:

(i) in the case of an appeal or hearing pursuant to Part II:

(A) the director of employment standards;

(B) the employer;

(C) each employee listed in the wage assessment or hearing notice; and

(D) if a claim is made against any corporate directors, those corporate directors; and

¹ LRB File No. 187-14

- (ii) *in the case of an appeal or hearing pursuant to Part III:*
 - (A) *the director of occupational health and safety; and*
 - (B) *all persons who are directly affected by the decision being appealed.*
- (2) *An adjudicator may determine the procedures by which the appeal or hearing is to be conducted.*
- (3) *An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.*
- (4) *An adjudicator may determine any question of fact that is necessary to the adjudicator's jurisdiction.*
- (5) *A technical irregularity does not invalidate a proceeding before or by an adjudicator.*
- (6) *Notwithstanding that a person who is directly affected by an appeal or a hearing is neither present nor represented, if notice of the appeal or hearing has been given to the person pursuant to subsection (1), the adjudicator may proceed with the appeal or the hearing and make any decision as if that person were present.*
- (7) *The Arbitration Act, 1992 does not apply to adjudications conducted pursuant to this Part.*

Powers of adjudicator

4-5(1) *In conducting an appeal or a hearing pursuant to this Part, an adjudicator has the following powers:*

- (a) *to require any party to provide particulars before or during an appeal or a hearing;*
- (b) *to require any party to produce documents or things that may be relevant to a matter before the adjudicator and to do so before or during an appeal or a hearing;*
- (c) *to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:*
 - (i) *to summon and enforce the attendance of witnesses;*
 - (ii) *to compel witnesses to give evidence on oath or otherwise;*
 - (iii) *to compel witnesses to produce documents or things;*
- (d) *to administer oaths and affirmations;*
- (e) *to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the adjudicator considers appropriate, whether admissible in a court of law or not;*
- (f) *to conduct any appeal or hearing using a means of telecommunications that permits the parties and the adjudicator to communicate with each other simultaneously;*
- (g) *to adjourn or postpone the appeal or hearing.*
- (2) *With respect to an appeal pursuant to section 3-54 respecting a matter involving harassment or a discriminatory action, the adjudicator:*
 - (a) *shall make every effort that the adjudicator considers reasonable to meet with the parties affected by the decision of the occupational health officer that is being*

appealed with a view to encouraging a settlement of the matter that is the subject of the occupational health officer's decision; and

(b) with the agreement of the parties, may use mediation or other procedures to encourage a settlement of the matter mentioned in clause (a) at any time before or during a hearing pursuant to this section.

(a) to comply with section 2-42;

(b) subject to subsections (2) and (3), to pay any wages that the employee has lost as a result of the employer's failure to comply with section 2-42;

(c) to restore the employee to his or her former position;

(d) to post the order in the workplace;

(e) to do any other thing that the adjudicator considers reasonable and necessary in the circumstances.

...

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 decision or order with any directions that the board considers appropriate.*

Appellant's arguments:

[4] In his notice of appeal, the Appellants list the following as the grounds for appeal:

1. There is no reason listed for the Aug 18, 2014 decision.
2. Before filing appeal, I was told it is possible to hold the hearing over conference, but the adjudicator rejected it. While the adjudicator communicated everything by email, he rejected document I sent in email.
3. The hearing was void, as nothing has been done.

[5] The Appellant also attached materials which he argued showed that the relationship between the Respondent Employee was a partnership and not an employment situation.

Respondent Employee's arguments:

[6] The Respondent Employee argued that the Appellant was given the opportunity to appear at the hearing, or to have someone appear on his behalf, but failed to take advantage of that opportunity. He argued that the appeal should be dismissed.

Director's arguments:

[7] The Director raised three (3) points in their argument. Those were:

1. Whether the Adjudicator correctly determined that the wage assessment is proof that the amount stated in the wage assessment is due and owing, in the absence of evidence to the contrary;
2. Whether the Adjudicator reasonably determined that notice of the appeal had been given to the Appellants pursuant to subsection 4-4(1) of the *Act*;
3. Whether the Adjudicator reasonably determined the procedures by which the appeal was to be conducted.

[8] In respect of point 1 above, the Director argued that the Adjudicator was correct in his determination in accordance with subsection 2-75(9) of the *SEA*.

[9] In respect of point 2 above, the Director argued that based upon the findings in the decision, it could not be determined if the Adjudicator was satisfied that the requisite notice of hearing was provided to the Appellant. The Director further argued that the standard of review for this decision was reasonableness.

[10] In respect of point 3 above, the Director argued that the Adjudicator had the authority to determine the procedures by which the appeal would be heard and that deference should be given to the Adjudicator regarding the procedures by which adjudications are conducted.

Analysis:

The Standard of Review:

[11] In *Barbara Wieler v. Saskatoon Convalescent Home*,² 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*.

[12] This Board now³ 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.

[13] In *Housen v. Nikolaisen*,⁴ 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

² LRB File No. 115-14

³ Previously under the repealed provisions, the Court of Queen's Bench reviewed decisions from adjudicators

⁴ [2002] SCC 33, 2 S.C.R. 235, at para. 101 per Bastarache J.

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.

[14] We agree with the Director that, in the absence of evidence to the contrary, the wage assessment is proof that the amount stated in the wage assessment is due and owing. Absent any evidence, the Adjudicator is entitled to rely upon the wage assessment as proof that that amount is due and owing. Therefore, when an appellant fails to attend the hearing or, if he attends, but fails to provide evidence to the Adjudicator, the adjudicator may consider the assessment to be correct.

[15] Similarly, we agree with the Director that the Adjudicator may, in accordance with his authority granted by Sections 4-5 and 4-6 of the *SEA*, determine what procedures are appropriate with respect to the conduct of a hearing. This may include refusing to hear the matter by conference telephone call as was done in this case.

[16] No explanation was provided in the written reasons as to why the request for a telephone conference hearing was denied, but, we can understand that it would be difficult to conduct a hearing by telephone, where it is anticipated that documents and exhibits would be filed. Documents which were to be produced would have to be produced in advance and provided to both parties. They would then have to be introduced and identified by the party seeking to rely upon them. While this is possible, given the nature of the hearing before an adjudicator, and the lack of sophistication of the parties to the appeal, the conduct of such a hearing could be difficult.

[17] The question of whether the Adjudicator reasonably determined that notice of the appeal had been given to the Appellants pursuant to subsection 4-4(1) of the *Act* raises an issue of natural justice. That is, the fundamental right of a person to be heard. That right may, of course, be given up or abandoned, but the decision by the Adjudicator is, as noted by the Director, void of any reference to, what should be a condition precedent to the hearing proceeding in the absence of the Appellant, which is proof that notice of the hearing had been properly given. There is nothing in the decision dealing with that issue.

[18] Additionally, the Appellant argues that he was not permitted the opportunity to provide written arguments and document to the Adjudicator. He swears in his appeal document

that materials sent by email were rejected by the Adjudicator. It is not clear if these proposed documents were in affidavit form, or what form they were sent to the Adjudicator. Affidavit evidence by the Appellant (with a right of cross-examination of such evidence, if necessary), could be acceptable.

[19] Generally speaking, appeals to an adjudicator are not “legalistic” in nature. Nor, however, are they merely an informal process that has no consequences. I am not certain if the Appellant in this case has fully understood the process he is engaged in, nor the consequences of any outcome. It would be important for the Adjudicator to clearly advise as to the procedures for submission of evidence and documents to the hearing, in the event that a party is unable to attend the hearing in person.

[20] The Director has, in his submissions, argued that the proper disposition of this matter would be to remit the question back to the Adjudicator for a determination. I agree. An order remitting this wage assessment to the Adjudicator will accompany these Reasons.

DATED at Regina, Saskatchewan, this **5th** day of **December, 2014**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson