The Labour Relations Board
Saskatchewan

THE DIRECTOR OF EMPLOYMENT STANDARDS, Appellant v. BLACK GOLD BOILERS LTD., LOREN ANDERSON AND GLORIA PAWLUCK, and RAYMOND ROEN, Respondents

LRB File No. 049-16; December 2, 2016
Graeme G. Mitchell, Q.C., Vice-Chairperson (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1)

For the Appellant, the Director of Employment Standards:	Lee Anne Schienbein
For the Respondents Black Gold Boilers Ltd, Loren Anderson and Gloria Pawluck:	Loren Anderson
For the Respondent, Raymond Roen:	Self-Represented

Appeal by Director of Employment Standards from decision of Wage Assessment Adjudicator – Section 4-10 of *The Saskatchewan Employment Act* – Board reviews scope of appeal provision.

Appeal by Director of Employment Standards from decision of Wage Assessment Adjudicator – Board considers time-lines for filing appeals from a wage assessment or from a wage assessment adjudicator.

Appeal by Director of Employment Standards from decision of Wage Assessment Adjudicator – Board reviews Adjudicator's Decision on a Reasonableness Standard – Board concludes Adjudicator's Decision that no employer-employee relationship created was reasonable.

Appeal by Director of Employment Standards – Board dismisses appeal and upholds Wage Assessment Adjudicator's Order.

REASONS FOR DECISION

OVERVIEW

[1] Graeme G. Mitchell, Q.C., Vice-Chairperson: The Director of Employment Standards [the "Director"] appeals pursuant to subsection 4-10(b) of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 [the "*SEA*"] against a decision of an Adjudicator appointed under Part II of the *SEA*.

[2] A wage assessment had been issued against Black Gold Boilers Ltd., Mr. Loren Anderson and Ms. Gloria Pawluck [the "Respondents"] respecting the Respondent, Raymond Roen ["Roen"] in the amount of $ 2,485.58. Initially, the Respondents appealed against this wage assessment pursuant to subsection 2-75(1)(a) of the *SEA*.

[3] On October 7, 2015, this Board appointed Mr. Clifford Wheatley to adjudicate this appeal. Adjudicator Wheatley heard this appeal over three (3) days in November and December 2015.

[4] On January 1, 2016, Adjudicator Wheatley released his Decision. He allowed the Respondents' appeal from the wage assessment in part and reduced the amount owing to Roen from $2,485.58 to $1,000.00.

[5] Subsequently, on March 18, 2016, the Director filed an appeal with this Board. The Notice of Appeal states that the Director challenges Adjudicator Wheatley's determination that Roen did not qualify as "an employee while on the CN Rail Boiler job". The Notice describes the error of law committed by Adjudicator Wheatley this way:

> *Mr. Wheatley used the incorrect legal test to determine whether or not [Roen] was an employee while on the CN Rail boiler job. Instead of using the test of "control and direction" based on SEA section 2-1(g)(i), Mr. Wheatley used a test based on [Roen's] presence on the worksite possibly getting the employer into trouble – "negative consequences for the employer."*

[6] The Director's appeal was heard on May 30, 2016. Appeals brought under subsection 4-10(b) of the *SEA* are not limited to errors or questions of law. Rather the Legislature has authorized the Director "to appeal any decision of an adjudicator or the board".

[7] These reasons explain I have concluded that Adjudicator Wheatley's conclusion respecting Wage Assessment #7401 is reasonable. As a consequence, the Director's appeal is dismissed.

FACTUAL BACKGROUND

[8] On July 21, 2015, the Director issued Wage Assessment #7401 against the Respondents in the amount of $2,485.58 for unpaid wages and other benefits owing to Roen.

[9] On August 28, 2015, the Respondent, Loren Anderson on behalf of himself and the other Respondents filed a formal notice of appeal with the Ministry of Labour Relations and Workplace Safety. His letter setting out the basis of his appeal reads in part:

> *Raymond Roen contacted me in the spring looking for a job. Mr. Roen had taken the Boiler course but had failed the test. I told him I needed someone with their Boiler ticket. I had a two day job with the Boiler. I invited Mr. Roen to ride along to see what the work was like with NO EXPECTATION OF PAY.*
>
> *Mr. Roen was offered a job driving my truck loading crude oil from Shaunavon to Moose Jaw for Gibsons Energy. Mr. Roen had to go to Edmonton for Gibsons orientation and training with No Expectation of Pay.*
>
> *I then drove and rode with Mr. Roen for four loads will [sic] he trained and got orentated [sic] to load at Crescent Point in Shaunavon and unload at Gibsons Refinery in Moose Jaw.*
>
> *On Mr. Roens [sic] sixth load the truck broke down in Moose Jaw. The truck was in the shop for one week. In this time Mr. Roen went driving someone else without notifying me that he was not working for me anymore.*

[10] Adjudicator Wheatley in his Decision dated January 1, 2016 elaborates further on the factual background of this appeal as follows:

> *Black Gold Boilers Ltd. operates a high pressure boiler truck for which certification is required and, as well, operate [sic] a trucking service from the Shaunavon area to Moose Jaw hauling oil for Gibson Refinery.*
>
> *In January of 2015, Mr. Roen contacted Mr. Anderson via telephone.*
>
> *The conversation between Mr. Anderson and Mr. Roen revolved around Mr. Roen operating the Boiler truck for Mr. Anderson; however, Mr. Roen was not certified to operate the truck, but was in the process of studying and intended to write the exam for certification. Mr. Roen failed the exam.*
>
> *Mr. Roe intended to re-write the examination at a later date. The employer was in need of an employee to operate his oil transport truck; however, before Mr. Roen could operate the same it was required that he attend an orientation course in Edmonton, Alberta which he did.*
>
> *After attending the course, Mr. Roen made 5 trips with the oil truck from the Shaunavon area to Moose Jaw. On 2 of these 5 trips Mr. Anderson was present for training purposes and for the other 3 trips Mr. Roen did solo.*
>
> *The parties agreed that Mr. Roen made 5 trips from Shaunavon to Moose Jaw. Mr. Roen takes the position that he should be paid for all 5 rips. Mr. Anderson takes the position that Mr. Roen should only be paid for the 3 trips he made by himself and not for the 2 trips that Mr. Anderson accompanied him as Mr. Anderson was training Mr. Roen with respect to hauling oil.*

> *There was another load started from Shaunavon by the employee, Mr. Roen, who ran into problems with the truck in Gull Lake. Thereafter the truck require repairs which took approximately a week.*
>
> *During this downtime of the truck, Mr. Roen commenced working for another employer.*
>
> *Mr. Anderson's evidence was that Mr. Roen was to be paid by the completed load from Shaunavon to Moose Jaw at the rate of $200 per load.*
>
> *The employment stands summary entered as "Exhibit EE1" shows the employee claiming 6 trips at $225/trip. This was later modified by 5 trips by agreement between the parties.*
>
> *There…has also been a claim for wages pertaining to work done by the employee North of Regina on a job the employer was doing for CN Rail. This work was with the employer's boiler truck. As the employee had failed his certification as a boiler truck operator, the employer says that the employee was not able to work on this particular job; however, the employer took the employee with him in order to assist the employee in understanding the type of work that was done with the boiler truck and hopefully such observations would be of assistance to the employee in passing his certification exam. The employer says that the employee was not eligible to work on the job due to not being certified and therefore did not work. Mr. Roen was able to leave the CN work site at any time he chose.*

DECISION UNDER APPEAL

[11] After reviewing the factual background, Adjudicator Wheatley addressed the two (2) principal grounds of contention between the parties. First, respecting the "oil hauling" trips, what, if any, wages were owing to Roen for those trips. Second, respecting the "CN Rail Boiler Job", did Roen qualify as an employee for this purpose and, if so, what wages were owing to him for that work.

1. <u>Oil Hauling Trips</u>

[12] Adjudicator Wheatley stated that at the hearing, the parties achieved consensus on the number of trips Roen made between Shaunavon and Moose Jaw: five (5). On two (2) of those trips, the Respondent Anderson accompanied him. The remaining three (3) trips, Roen travelled on his own.

[13] The Respondent Anderson conceded that Roen should be compensated in the amount of $200 for each of the three (3) trips he completed alone. However, he disputed that

Roen should be paid for the remaining trips as these were intended as training excursions to assist Roen to acquire the necessary skills for future employment.

[14] Adjudicator Wheatley disagreed with the Respondent's position. He acknowledged that those two (2) trips were for training purposes. He invoked subsection 2-1(f)(iii) of the *SEA*. That provision reads as follows:

> ***2-1*** *In this Part and Part IV:*
> . . . . . .
> *(f)* ***"employee"*** *includes:*
> . . . . . .
> *(iii) a person being trained by an employer for the employer's business.*

[15] Applying this statutory definition to the factual circumstances before him, Adjudicator Wheatley determined that on those trips Roen qualified as an "employee" for purposes of the *SEA* and, therefore, was entitled to be compensated for those trips.

[16] However, he did agree with the Respondent Anderson that Roen should be paid only $200 for those trips. He concluded that there was no evidence before him to support the rate of $225 per trip as calculated in Wage Assessment #7401. As a result, Adjudicator Wheatley ordered that it be revised to reflect a rate of pay of $200 per trip for a total of $1,000.

2. CN Rail Boiler Job

[17] This aspect of Adjudicator Wheatley's Decision lies at the heart of this appeal.

[18] It was undisputed that at the time Roen participated in this job, he lacked the requisite certification as a boiler maker.

[19] The Respondent Anderson testified that he had invited Roen to join him on this job in order to "observe the work", something that might assist him in the future should he decide to challenge the boiler maker examination a second time.

[20] Adjudicator Wheatley acknowledged that another witness, Ms. Judi Taylor, a Labour Standards Officer, provided evidence on behalf of Roen. At the hearing, Ms. Taylor's written notes of a telephone conversation she had with the Respondent Anderson on April 14, 2015 were introduced into evidence. The pertinent portions of those notes read as follows:

> *[Anderson] treats all [employees] as contractors. He pays the exp'd, qualified ones $30/hour and new [employees] get $25/hour. Since Ray did not hv his boiler tickets (failed the test) he invited him to come along on a boiler run and is willing to pay him $20/hr for 50 hrs for that job.*

[21] Adjudicator Wheatley resolved the conflicting evidence before him as follows:

> *In such conversation Mr. Anderson says he was either misrepresented or misunderstood by Ms. Taylor. In cross examination Ms. Taylor admitted that she may have misunderstood the intention of Mr. Anderson.*
>
> *I find Mr. Anderson, the witness on behalf of the employer, to be a credible witness. With the lack of certification of the employee, I find that Mr. Roen was not an employee for the CN Rail Boiler job nor was he "training" as he was not certified and there could have been negative consequences for the employer, should he have permitted Mr. Roen to work or train on this particular job. Also Mr. Roen was able to leave the work site at any time he wished.*
>
> *All of the above points to Mr. Roen not being an employee within the meaning of the Saskatchewan Employment Act at the CN Rail work site and therefore is not entitled to wages for this claim.*

ISSUES

[22] The issue upon which the Director appealed against Adjudicator Wheatley's decision was whether the Respondents qualified as Roen's employer under the *SEA* for purposes of the CN Rail Boiler Job. The Director asserts that Adjudicator Wheatley applied the wrong legal test and when the correct test is applied the Respondents and Roen were in an employer-employee relationship. Accordingly, the Director asserts Roen is entitled to be paid the wages and holiday pay owing to him for the CN Rail Boiler job.

RELEVANT STATUTORY PROVISIONS

[23] The following statutory provisions are relevant to this appeal:

> ***2-1*** *In this Part and Part IV:*
>
> . . . . . .
>
> *(f)* ***"employee"*** *includes:*
>
> *(i) a person receiving or entitled to wages;*
> *(ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;*
> *(iii) a person being trained by an employer for the employer's business;*
> *(iv) a person on an employment leave from employment with an employer; and*

(v) a deceased person who, at the relevant time, was a person described in any of subclauses (i) to (iv);

but does not include a person engaged in a prescribed activity;

*(g) **"employer"** means any person who employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principla and every other person who, in the opinion of the director of employment standards, either"*

(i) has control or direction of one or more employees; or
(ii) is responsible, directly or indirectly, in whoe or in part, for the payment of wages to, or the receipt of wages by, one or more employees[.]
. . . . .

***2-75**(1) Any of the following may appeal a wage assessment:*

(a) an employer or corporate director who disputes liability or the amount set out in the wage assessement ;
(b) an employee who disputes the amount set out in the wage assessment.

(2) An appeal pursuant to this section must be commenced by filing a written notice of appeal with the director of employment standards within 15 business days after the date of service of a wage assessment.

. . . . .

(4) If the appellant is an employer or a corporate director, the employer or corporate director shall, as a condition of being eligible to appeal the wage assessment, deposit with the director of employment standards the amount set out in the wage assessment or any other prescribed amount.

(5) The amount mentioned in subsection (4) must be deposited before the expiry of the period during which an appeal may be commenced.

. . . . . .

***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.*

(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 decision of the adjudicator; and
(b) serve the notice of appeal on all person mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

. . . . .

***4-10** The director of employment standards and the director of occupational health and safety have the right:*

(b) to appeal any decision of an adjudicator or the board.

STANDARD OF REVIEW

[24] The *SEA* directs that appeals from wage assessment adjudicators under Part II come to this Board and not the Queen's Bench. In *Weiler v Saskatoon Convalescent Home*, LRB File No. 115-14, 2014 CanLII 76051 (SK LRB), the first such case decided by the Board following this legislative change, Chairperson Love considered the scope of the Board's review powers under section 4-8(1) and concluded that three (3) types of issues may arise under this provision. In *Matt's Furniture Ltd v Hoffert*, 2016 CanLII 31172 (SK LRB), for example, he summarized his conclusions in *Weiler* on the question of scope of review as follows:

> *The Board has outlined the standard of review for questions of law, questions of mixed law and facts, and factual questions which may be reviewable as errors of law in Wieler v. Saskatoon Convalescent Home. That decision established the following standards of review:*
>
> > ***1.*** *Errors of Law will be reviewed on the "correctness" standard.*
> >
> > ***2.*** *Errors of Mixed Law and Fact will be reviewed on the "reasonableness" standard.*
> >
> > ***3.*** *Errors of Fact which may be reviewable as questions of law will be reviewed on the "reasonableness" standard.*

[25] Unlike section 4-8(1) of the *SEA* which is limited to appeals "on a question of law", subsection 4-10(1)(b) authorizes the Director to seek appellate review from this Board on any basis. Very recent jurisprudence from the Supreme Court of Canada identifies "reasonableness" as the appropriate standard of review for the type of issue raised on this appeal.

[26] In *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ["*Edmonton East (Capilano)*"] the Supreme Court had to determine the appropriate standard of review for appeals under section 470 of Alberta's *Municipal Government Act* ["*MGA*"] that limited appeals to the Alberta Court of Queen's Bench on "a question of law or jurisdiction of sufficient importance to merit an appeal". Both Alberta's Court of Queen's Bench and Court of Appeal determined that the appropriate standard of review for such matters was correctness.

[27] The Supreme Court (5:4) disagreed. Writing for the majority, Karakatsanis J. stated at paragraphs 21 – 24:

> *[22] The [Dunsmuir v New Brunswick 2008 SCC 9, [2008] 1 S.C.R. 190] framework balances two important competing principles: legislative supremacy, which requires the courts to respect the choice of Parliament or a legislature to*

> *assign responsibility for a given decision to an administrative body; and the rule of law, which requires that the courts have the last word on whether an administrative body has acted within the scope of its lawful authority (para. 27-31).*
>
> *(1) Presumption of Reasonableness*
>
> *[22] Unless the jurisprudence has already settled the applicable standard of review (Dunsmuir, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (Mouvement laique Quebecois v Saguenay (City), 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.*
>
> *[23] The Dunsmuir framework provides a clear answer in this case. The substantive issue – whether the Board had the power to increase the assessment – turns on the interpretation of s. 467(1) of the MGA, the Board's home statute. The standard of review is presumed to be reasonableness.*
>
> *(2) Categories That Rebut the Presumption of Reasonableness*
>
> *[24] The four categories of issues identified in Dunsmuir which call for correctness are constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or vires", and issues "regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58-61). When the issue falls within a category, the presumption of reasonableness is rebutted, the standard of review is correctness and no further analysis is required (Canadian Artists' Representation v. National Gallery of Canada, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; McLean v. British Columbia (Securities Commission), 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22). [Emphasis added.]*

[28] Applying this analysis here, the presumption of reasonableness operates. The adjudicator was asked to interpret provisions of the *SEA* which for present purposes qualifies as the "home statute". None of the four (4) *Dunsmuir* categories that would rebut this presumption is relevant to this matter. Accordingly, this appeal must be adjudicated on a reasonableness standard.

ANALYSIS

[29] Prior to addressing the central issue on this appeal, two (2) issues respecting timeliness of appeal filings arose in the course of this proceeding. These issues will be addressed briefly here.

A. Timeliness Issues

1. The Director's Appeal

[30] At the outset of the hearing, the Respondent Anderson took exception to what he described as the late filing by the Director of his appeal. This objection was disposed of at that time; however it is useful to set out my reasoning for rejecting it.

[31] As noted above, the Director appealed pursuant to subsection 4-10(b) of the *SEA*. This section differs in two (2) significant ways, from the other appeal provision found in Part IV, *i.e.* subsection 4-8(1). The first difference is that subsection 4-10 is not limited to appeals on questions of law. It authorizes the Director to appeal "any decision of an adjudicator or the board".

[32] The second difference, and the one most pertinent to this discussion, is that section 4-10 does not impose a statutory time limit within which the Director must initiate an appeal. It is open-ended. By contrast, subsection 4-8(1) of the *SEA* requires an employer, employee or corporate director to file his or her appeal "within 15 business days after the date of the decision by the adjudicator".

[33] Here, Adjudicator Wheatley issued his decision on January 1, 2016. Yet, the Director did not file his formal appeal with the Board until March 18, 2016, approximately two-and-a-half (2 ½) months later. However, as subsection 4-10(b) of the *SEA* is the relevant provision and does not impose a statutory limitation period for appeals to the Board from an adjudicator[1], it is clear that the Director's appeal is not statute barred.

2. The Respondents' Initial Appeal of Wage Assessment #7401

[34] After the hearing of the appeal and as I was preparing these reasons, I noted that although Wage Assessment No. 7401 was issued on July 21, 2015, the Respondents did not file

[1] It should be noted that by virtue of section subsection 4-9(2) of the *SEA*, if the Director wishes to appeal a decision of the Board to the Court of Appeal, he, like other prospective appellants, must file a notice of appeal "within 15 business days after the date of service of the decision of the board". It is also unnecessary to determine if there may be common law limitations on the Director's ability to appeal despite the lack of a statutory limitation period.

a formal appeal with the Ministry of Labour Relations and Workplace Safety until August 28, 2015. Subsection 2-75(2) of the *SEA* requires that any appeal from a wage assessment must be initiated "by filing a written notice of appeal with the director of employment within 15 business days after the date of service of a wage assessment" (emphasis added). Without further information, it appeared that the Respondents' appeal fell outside this statutorily imposed deadline.

[35] The timeliness issue was not raised before Adjudicator Wheatley at the initial hearing or before me at the appeal.

[36] However, after the release of Adjudicator Anne Wallace, Q.C.'s Reasons for Decision in *Brady v. Jacobs Industrial Services Ltd. and Director Occupational health and Safety, Ministry of Labour Relations and Workplace Safety*, 2016 CanLII 49900 (SK LA) ["*Brady*"] on August 1, 2016, I had occasion to review the documentation filed in this appeal with greater care.

[37] In *Brady*, Adjudicator Wallace considered subsection 3-53 of the *SEA* which governed the filing of appeals under Part III, relating to occupational health and safety ["OH&S"] matters. She concluded that the appeal period of 15 business days from the date of an OH&S report was mandatory and could not be enlarged by either an adjudicator or the Board. Section 2-75 of the *SEA* – the complementary provision under Part II for wage assessment matters – is virtually identical to section 3-53.

[38] As a result, I wrote to all parties to this appeal on August 17, 2016 seeking clarification of the timelines related to the Respondents' appeal of the initial wage assessment section 2-75.

[39] On August 31, 2016, the Director submitted an affidavit sworn by Ms. Judi Taylor dated August 30, 2016 which clarified the relevant timelines. From this affidavit and other relevant documentation, the following chronology emerges:

July 21, 2015	Wage Assessment No. 7401 issued against the Respondents in the amount of $2,485.58 for wages owing to Roen. The Director forwarded this wage assessment to the Respondents by prepaid, registered mail to Box 291, Pennant, Saskatchewan.
August 7, 2015	The wage assessment was delivered to the Respondents by registered mail. Delivery confirmations of the wage assessment to the three (3) respondents were attached as exhibits to the affidavit.

August 21, 2015	The Respondent Anderson sent a handwritten letter to the Ministry of Labour Relations and Workplace Safety on behalf of the other respondents appealing against the wage assessment and enclosing the required deposit of $500.
August 28, 2015	The Ministry of Labour Relations and Workplace Safety confirmed receipt of the Respondents' formal appeal and deposit.

[40] The subsequent receipt of this information clarified that, indeed, the Respondents filed their formal appeal under section 2-75 on the final day of the requisite statutory appeal period of 15 business days from the date the original wage assessment was issued. As a consequence, it is not necessary for me to assess whether Adjudicator Wallace's conclusion respecting the effect of the statutory appeal periods found in section 3-53 and, by implication, section 2-75 of the *SEA* is correct.

[41] Accordingly, this appeal could proceed. However, before leaving this issue a final comment is in order. It would be advisable in future appeals under Parts II and III of the *SEA* for the Director to provide sufficient documentary evidence to adjudicators that would enable them to determine whether or not the appeal before them has been filed in compliance with the statutory appeal period.

B. The CN Rail Boiler Job

[42] The sole issue that the Director appealed is Adjudicator Wheatley's decision related to the portion of the wage assessment attributable to the CN Rail Boiler Job. Adjudicator Wheatley dismissed this portion entirely on the basis that Roen did not qualify as an "employee" of the Respondents when he accompanied the Respondent Anderson to that particular job site.

1. The Director's Submissions

[43] The Director began by noting that Adjudicator Wheatley had already determined that Roen was an employee of the Respondent for purposes of the five (5) oil hauling jobs. He took no exception to Adjudicator Wheatley's conclusion that Roen should be paid $200 per trip for a total award of $1,000.

[44] However, the Director submitted that Adjudicator Wheatley erred by identifying the wrong legal test for assessing whether Roen was an employee for purposes of the *SEA* while

attending the CN Rail Boiler job site. He elaborates on this argument at paragraphs 15 to 17 of his Brief of Law as follows:

> *15. It is significant that the Adjudicator found the Employee to be an employee of the Employer when operating the oil transport truck. The Employee and Employer were already in an employment relationship when they were at the CN Rail Site. The correct legal test to determine if the Employee was an employee at the CN Rail work site is whether or the Employee continued or ceased to be under the Employer's control or direction. The Adjudicator concluded that the employment relationship had ceased by applying an incorrect test based on the possibility of "negative consequences" for the Employer if the Employee had operated the boiler truck. In failing to apply the correct test, the Adjudicator did not consider if the Employee was under the control or direction of his Employer at the Employer's job site.*
>
> *16. An element of control and direction includes the employer training people for the employer's business per section 2-1(f)(iii). In this regard, the Adjudicator's Decision notes the following in the Facts section:*
>
> > *[t]he employer took the employee along with him on this job. The employer states that he took the employee with him in order to assist the employee in understanding the type of work that was done with the boiler truck and hopefully such observations would be of assistance to the employee in passing his certification exam.*
>
> *17. The Employer took its Employee to a work site where it knew the Employee could not perform certain work for what was ostensibly a training purpose. Again it is significant that an employment relationship already existed between the two, and that on the CN Rail work site the Employer allowed the Employee to observe boiler truck operations in preparation for a certification exam. Passing the certification exam would have allowed the Employee to operate the Employer's boiler truck. The facts appear to satisfy the section 2-1(f)(iii) of employee, and have constituted an element in the correct analysis and application of the control test.*

2. <u>The Respondent Anderson's Submissions</u>

[45] The Respondent Anderson did not file any written submission on this appeal. However, he participated in this hearing by way of telephone conference call and made oral representations on behalf of the three (3) Respondents.

[46] He stated that there was no employer-employee relationship between the Respondent and Roen when he attended at the CN Rail Job. The Respondent Anderson asserted that he was only doing Roen a favour by allowing him to ride-along. He thought it would assist Roen in understanding what transpired at such a job site.

[47] When I asked the Respondent Anderson when the CN Rail Truck Job took place, he stated that it was on or about January 25, 2015. He stated that he did not formally hire Roen for jobs until early February 2015.

[48] Respecting those jobs, he did not challenge Adjudicator Wheatley's findings or appeal from his Order.

3. Analysis and Disposition

[49] It is useful to reiterate that the standard of review to be applied to Adjudicator Wheatley's decision is a reasonableness standard. Respecting this standard, Karakatsanis J. in *Edmonton East (Capilano)*, *supra*, said this at paragraphs 36 to 38:

> *[36] A decision cannot be reasonable unless it "falls within a range of possible, acceptable outcomes" (Dunsmuir, at para. 47, per Bastarache and LeBel JJ.) Reasonableness is also concerned with the "existence of justification, transparency and intelligibility within the decision-making process"(ibid.). When a tribunal does not give reasons, it makes the task of determining the justification and intelligibility of the decision more challenging.*
>
> *[37] When procedural fairness requires a tribunal provide some form of reasons, a complete failure to do so will amount to an error of law (Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708, at paras. 20-22).*
>
> *[38] However, when a tribunal's failure to provide any reasons does not breach procedural fairness, the reviewing court may consider the reasons "which could be offered" in support of the decision (Dunsmuir, at para. 48, quoting D. Dyzenhaus, "The Politics of Defence [sic]:Judicial Review and Democracy", in M. Taggart, ed., The Province of Administrative Law (1997), 279, at p. 286).*

[50] I find his decision satisfies this standard for two (2) reasons. As a result, the Director's appeal must be dismissed.

[51] First, respecting the Director's submission that Adjudicator Wheatley found the Respondents and Roen already had an employer-employee relationship when Roen attended at the CN Rail Truck job, I conclude a fair reading of the Decision does not support his submission.

[52] It is true, as the Director sets out at paragraph 16 in his very helpful Brief of Law, that Adjudicator Wheatley does utilize the terms "employee" and "employer" loosely to identify Roen and the Respondents early in his Decision. It is also true that the Decision lacks clarity around the chronology of events relevant to this appeal. However, reading Adjudicator

Wheatley's Decision as a whole it is apparent that he did not find such a relationship existed at the time of the CN Rail Boiler job.

[53] At page 9 of his Decision (page 10 of the faxed version), Adjudicator Wheatley made the following important findings:

- The Respondent Anderson was a "credible witness".
- Roen was not certified as a boiler maker.
- The Respondent Anderson, as a favour, allowed Roen to join him at the CN Rail Truck job site "to observe the work as it may have assisted him in determining if he wanted to rewrite his certification to do boiler work".
- The Respondent Anderson was not training Roen to do boiler work.
- As Roen was not a certified boiler maker it was not possible for him to do any of the work, and had he done so, "there could have been negative consequences for the employer".
- Roen was able to leave the job site at any time.
- The testimony of Judi Taylor respecting the telephone conversation she had with the Respondent Anderson in which he stated that Roen was his employee while at the CN Rail Boiler job site was not accurate.

[54] The Director did not challenge any of these findings. Indeed, these findings are also consistent with the oral submissions made by the Respondent Anderson at the hearing of this appeal.

[55] Second, the Director submits that Adjudicator Wheatley applied the wrong legal test, namely the "negative consequences" test, to the facts before him. Again, reading his Decision as a whole I conclude Adjudicator Wheatley did not intend this term to connote a legal standard. Rather, he speaks of the factual possibility of "negative consequences" flowing to the Respondent were he to permit Roen to work at that site when he was not certified as a boiler maker.

[56] That said, the Director is correct that a 'negative consequences" test is unknown in employment law. However, even were the two (2) legal tests that the Director submits in his Brief of Law are relevant applied to Adjudicator Wheatley's findings his conclusion that neither is applicable is a reasonable one.

[57] I turn first to the Director's submission that Roen qualified as a "employee" under subsection 2-1(f)(iii) of the *SEA* because the Respondent Anderson was training him on the CN Rail Boiler job. Counsel for the Director, in her oral presentation, analogized Roen's situation at that job site to a student-at-law being trained by his or her principal.

[58] With respect, I do not accept this submission. It is undisputed that Roen was not certified as a boiler maker. He had failed the test once and there was no evidence presented at the hearing to indicate he intended on challenging it a second time. In light of this it was reasonable for Adjudicator Wheatley to conclude that the Respondent Anderson was not training Roen to work as a boiler maker in his employ. This plainly distinguishes Roen's situation from that of a student-at-law. To qualify as a student-at-law, an individual must have achieved a law degree from an accredited university and be hired to work under the supervision of a practicing lawyer.

[59] I turn next to the Director's submission that the Respondent Anderson qualified as an "employer" in these circumstances by virtue of the "control and direction" test identified in subsection 2-1(g)(i) of the *SEA*. The application of this test is well-known in the employment law context. In *McCormick v. Fasken Martineau DuMoulin*, 2014 SCC 39, [2014] 2 S.C.R. 108, for example, Abella J. described it this way at paragraph 25:

> *[25] Placing the emphasis on control and dependency in determining whether there is an employment relationship is consistent with approaches taken to the definition of employment in the context of protective legislation both in Canada and internationally: [Guy Davidov, "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection" (2002), 52 U.T.L.J. 357], at pp. 365-71. The Ontario Labour Relations Board, for example, uses a seven-factor test for determining if an employment relationship exists, based on indicia that relate mainly to control and economic dependency. Among other criteria, the Board asks whether the alleged employer exercises direction and control over the performance of work; imposes discipline; has the authority to dismiss employees; bears the burden of remuneration; and is perceived to be the employer (York Condominium Corp., [1977] OLRB Rep. 645; Adams, at p. 6-36.) That said, while significant underlying similarities may exist across different statutory schemes dealing with employment, it must always be assessed in the context of the particular scheme being scrutinized.*

[60] More recently, in *Mian v Prior*, LRB File No. 096-16, 2016 CanLII 79632 (SK LRB), Chairperson Love referred to the earlier decision of the Saskatchewan Court of Queen's Bench in *Director of Labour Standard v Acanac Inc*, 2013 SKQB 21. There R.S. Smith J., after

reviewing a large body of domestic and international jurisprudence on the question, enunciated the following test respecting the operation of the predecessor to subsection 2-1(g)(i) of the *SEA*:

> *[54] Having benefited from the above authorities, I am inclined to apply the fourfold test of control, ownership of tools, chance of profit and risk of loss. I consider and acknowledge that the intention of the parties is relevant but I also accept that "on the ground" conduct may be more determinative of the true relationship.*

[61] Applying the analysis set down in these cases to the factual circumstances of this appeal, I cannot say that Adjudicator Wheatley's conclusion on this question is unreasonable. It is undisputed that Roen lacked the requisite certification to perform the job the Respondent Anderson had been hired to do. As a consequence, he did not exercise any control over Roen's work at the job site as Roen had no employment duties to perform. His lack of control over Roen's activities is further illustrated by Adjudicator Wheatley's finding that Roen was at liberty to leave the job site at any time. These "on the ground" realities demonstrate that there was no employer-employee relationship existing at that time.

[62] This conclusion is confirmed by the Respondent Anderson's uncontradicted evidence that he did not hire Roen to work for him at the time the CN Rail Boiler job took place.

C. Conclusion

[63] For all of these reasons, the Decision of Adjudicator Wheatley in this matter satisfies the reasonableness standard and is affirmed. Accordingly, the Director's appeal is dismissed.

[64] I wish to thank counsel for the Director for her written Brief of Law and her oral submissions. They were very helpful.

DATED at Regina, Saskatchewan, this **2nd** day of **December, 2016**.

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
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