



SADAT MOHAMED MIAN, Applicant v. TIM PRIOR, Respondent and EXECUTIVE DIRECTOR, EMPLOYMENT STANDARDS, Respondent

LRB File No. 096-16; November 3, 2016

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

For the Applicant:	Self Represented
For the Respondent:	Self Represented
For the Respondent Executive Director Employment Standards:	Ms. Lee Anne Schienbein

Appeal from a decision of an Adjudicator – Employment Standards – Section 2-1(f) of *The Saskatchewan Employment Act* - Employer appeals from a determination of an adjudicator wherein the Adjudicator found that an employer-employee relationship existed contrary to the independent contractor status claimed by the employer.

Independent Contractor vs. Employee – Board considers law and facts related to Adjudicator’s determination – Board determines that Adjudicator followed the correct legal test and applied that legal test to the facts in a reasonable fashion.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Chairperson: This is an appeal against a decision of an Adjudicator appointed pursuant to Section 4-3 of *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the “SEA”). Sadat Mohamed Mian (the “Appellant”), appeals against the decision of an Adjudicator dated April 10, 2016, which decision upheld the determination of the Executive Director, Employment Standards that Tim Prior (the “Respondent”) was owed the sum of \$15,572.28 for wages and holiday pay due to him as an employee of Lyonheart Logistics Inc. (“Lyonheart”).

[2] The Respondent was an employee of Lyonheart. A wage assessment was made by the Executive Director, Employment Standards in respect of wages due to the Respondent by Lyonheart. The Appellant was named in the wage assessment as a Director of Lyonheart. Corporate Directors are jointly and severally liable for all wages due and accruing due to an employee pursuant to section 2-68 of the *SEA*.

[3] The Appellant argued both before the Adjudicator and before the Board that Prior was an independent contractor, not an employee. The Adjudicator found that the Respondent was an employee.

Facts:

[4] In his decision, the Adjudicator set out his findings of fact as follows:

(4) Lyonheart is an Ontario body corporate with registered office situate at Brampton, Ontario. It carries on the business of, inter alia, transporting crude oil from lease properties to batteries. Mian is the sole shareholder, director and officer of Lyonheart.

(5) Husky Energy Inc. ("Husky") contracted with Heavy Crude Hauling L.P. ("Heavy Crude") to transport crude oil from various leased fields to various batteries. Heavy Crude subcontracted some of that work to Lyonheart.

(6) Lyonheart hired Prior on February 2, 2014. It appears he commenced work on February 6, 2014. Prior testified his duties were to "haul oil" from various Husky leases to various batteries in Saskatchewan - all North of North Battleford, Saskatchewan. He said he basically "drove in circles" all day long.

(7) Prior testified that at the time of being hired, Mian told him he would be paid twenty five dollars (\$25.00) per hour. He said there was no discussion of overtime. Prior made no reference in his testimony in chief to any other terms of his engagement.

(8) Under cross-examination, Prior testified that:

- a) when he first spoke with Mian, he advised that he wanted to earn as much as he could and therefore wanted "a lot" of hours;*
- b) Mian would e-mail him his "load list," but would not direct him as to the order in which to attend to same-that decision was left for Prior;*
- c) he would tell Mian which days he wanted to work, although he said this was "not all the time";*

- d) *acknowledging he needed to ensure the daily job got done, he rarely started at the regular, daily, start time of 7:00 p.m.- he started when he wanted to;*
- e) *except for a HS monitor, he had and, therefore, supplied his own personal protective equipment;*
- f) *Mian asked him to supply his own tools, but he did not - Mian gave him his tools to use;*
- g) *if there was a spill on site, he was to call Mian; and*
- h) *he was never restricted from working for anyone else at the same time as working for Lyonheart - however, saying he did not have time, he did not work for anyone else.*

(9) *Mian's version of his preliminary discussions with Prior is different. He testified:*

- a) *Prior said he wanted to work "a lot of hours" and make "lot of money" in order to get rid of his financial problems and buy a truck;*
- b) *Prior "presented" as a young man "desperately struggling" to "put his life back on track";*
- c) *they "worked out a solution for his problem" and decided on a rate of twenty-seven dollars (\$27.00) per hour flat rate, with no deductions, as a contractor;*
- d) *the rate for drivers was twenty-five dollars (\$25.00) per hour and overtime after eight (8) hours;*
- e) *it is a common practice for businesses to minimize on overtime payments, as they are costly";*
- f) *Lyonheart had plenty of options to get other drivers; and*
- g) *the "arrangement" was specifically made to benefit Prior, as Lyonheart "could have very easily gotten this work done at twenty-five dollars (\$25.00) per hour."*

(10) *Prior testified that after his first two (2) weeks of work, he asked Mian when he would be paid. He said Mian told him that Lyonheart "holds" two (2) weeks pay and Prior would need to wait another two (2) weeks.*

(11) *Prior testified that, at the end of the first month, Mian said:*

- a) *Lyonheart could not pay him as an employee;*
- b) *Prior needed to incorporate a corporation-Mian gave Prior a government telephone number to call about incorporation;*
- c) *if Prior worked for Lyonheart for three (3) months, it would reimburse him for the costs of incorporation; and*
- d) *Prior needed to provide Lyonheart with an invoice and GST number.*

(12) Prior said he did not understand the gravity of what Mian was asking of him. He says he proceeded to incorporate 101251942 Saskatchewan Ltd. (the "# Co."), a Saskatchewan body corporate.

(13) Mian showed Prior how to complete the invoices for the # Co. In fact, the first invoice was completed by and in Mian's writing. Prior testified the invoice simply reflects the number of hours worked, as recorded in the log books, multiplied by the hourly rate of thirty dollars (\$30.00) per hour for the periods up and until the period reflected in the July 5, 2014 invoice, when the hourly rate increased to thirty-one dollars (\$31.00) per hour. The rates were never adjusted to reflect overtime. The invoices were paid by cheques. Lyonheart did, in fact, reimburse these costs.

(14) Prior testified:

- a) Lyonheart owned and was responsible for the repair of the truck and equipment he used, with the exception of the protective equipment-coveralls, boots, hard hat and safety glasses-he wore;
- b) Lyonheart and Heavy Crude directed his work;
- c) he could not hire someone to do his work-Heavy Crude would not allow it; and
- d) he had no investment and no financial risk with the work he did.

(15) Mian testified that Lyonheart normally hires employees. It only made this contractor "arrangement" to accommodate Prior's request for more hours. Lyonheart agreed to this process to pay more.

(16) Mian testified to what he said were the differences between employees and the arrangement with Prior. He said:

- a) employees cannot take the truck they are operating home - Prior could;
- b) Lyonheart provided employees - but not Prior - with safety equipment;
- c) Employees - but not Prior - were paid less, but were paid overtime;
- d) employees had less freedom than Prior; and
- e) Prior was paid a safety bonus that was not available to employees.

(17) Lyonheart claims that Prior has overcharged for hours. It says:

- a) global position records' show log book discrepancies that have caused seventy eight and nine-tenths (78.9) hours that should not have been billed; and
- b) the invoices over billed forty-nine (49) hours.

Lyonheart also claims one hundred and three dollars (\$103.00) per month for "insurance" and five hundred dollars (\$500.00) per month for "usual employer charge," each for seven (7) months.

Relevant statutory provision:

[5] Relevant statutory provisions are as follows:

Interpretation of Part

2-1 In this Part and in 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;

Appellant's arguments:

[6] The Appellant argued that the Adjudicator had erred in his determination that Prior was an employee and not an independent contractor. The Appellant conducted a line by line analysis of the decision of the Adjudicator and took exception to some of the findings by the Adjudicator in his decision.

Respondent's arguments:

[7] The Respondent made no arguments in respect of the Appellant's appeal. He merely noted that the process had taken a considerable amount of time and he looked forward to receiving the monies owed to him.

Executive Director's arguments:

[8] The Executive Director provided a written Brief which we have reviewed and found helpful. In the Executive Director's submissions, she supported the decision of the Adjudicator. The Executive Director argued that the Adjudicator had formulated the correct test concerning whether a person is an employee or independent contractor and that he did not err in his application of the correct law to the facts as found.

Analysis:

The Standard of Review

[9] In its decision in *Wieler v. Saskatoon Convalescent Home*,¹ the Board established that the appropriate standard of review on appeals from decisions of Adjudicators is:

- a) *In respect of questions of law, the standard will be correctness;*
- b) *In respect of questions of mixed law and fact, the standard will be reasonableness' and*
- c) *In respect of questions of fact which may be considered errors of law, the standard will be reasonableness.*

[10] The Appellant argued that the Adjudicator had applied the wrong legal test to his determination of whether or not the Respondent was an employee or an independent contractor.

[11] Beginning at paragraph [26] of his decision, the Adjudicator cited the Mr. Justice Smith's decision in *Director of Labour Standards v. Acanac Inc.*², which was an appeal of a decision of the same Adjudicator who dealt with this adjudication.

[12] In his decision in *Acanac*, Mr. Justice Smith concluded at paragraph [37] that the standard of review is well settled, where the issue is one of the employee-employer relationship, as being reasonableness. Accordingly, I will apply this standard of review.

¹ [2014] CanLII 76051 (SKLRB)

² [2013] SKQB 21 (CanLII)

Was the Adjudicator's Decision Reasonable?

[13] Mr. Justice Smith reviewed the current state of the law regarding employer-employee relationships. He concluded at paragraph [54] as follows:

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 also 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.

[14] The Adjudicator followed this statement of the law. At paragraph [27] of his decision he says:

To answer this central question, we ought to follow a two (2) step process. The first is to determine the intention of the parties in order to ascertain what type of relationship the parties intended to create. The second involves an analysis of the facts of the case to determine if the objective reality reflects that intention. The factors to consider in this second step are control over the work, ownership of tools and equipment, the chance of profit and the risk of loss. However, the relative importance accorded to each factor will be dependent upon the facts and circumstances presented in each case.

[15] The Adjudicator then went on to review the parties' intention as well as the four (4) factors outlined in the *Acanac* decision. Based upon this analysis and the facts presented, the Adjudicator concluded that the relationship was that of an employer-employee and not an independent contractor relationship.

[16] The reasonableness standard was described by Bastarache and LeBel JJ. In *Dunsmuir v. New Brunswick*³ at paragraphs 47-49:

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial

³ [2008] SCC 9 (CanLII)

review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

48 ...What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (Mossop, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554 at p. 596, per L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 286 (quoted with approval in Baker, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para. 65, per L'Heureux-Dubé J.; Ryan, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247 at para. 49).

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers....

[17] The reasonableness standard requires that the decision under review be justifiable, transparent, and intelligent within the decision making process. Additionally, it must "fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

[18] We were not directed to any aspects of the decision which could be considered as being unreasonable. The Adjudicator analyzed the evidence and facts, applied the appropriate law to those facts and reached a conclusion based upon that analysis. The decision and the conclusions reached by him are reasonable and are consistent with the analysis in *Acanac*, *supra*.

[19] The decision of the Adjudicator is affirmed.

DATED at Regina, Saskatchewan, this **3rd** day of **November, 2016**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson