GINA MEACHER o/a GEE'S FAMILY RESTAURANT, Appellant v. DEBRA HUNT and GOVERNMENT OF SASKATCHEWAN, DIRECTOR OF EMPLOYMENT STANDARDS, Respondents

LRB File No. 040-17; June 16, 2017

Vice-Chairperson, Graeme G. Mitchell, Q.C. (sitting alone pursuant to Section 9-95(3) of *The Saskatchewan Employment Act*, SS 2013, cS-15.1)

For the Appellant:	Self Represented
For the Respondent, Executive Director:	No one appearing
For the Respondent, Debra Hunt:	No one appearing

Appeal from Decision of Wage Assessment Adjudicator – Board determines that reasonableness is the standard of review for purposes of appeals under section 4-8(1) of *The Saskatchewan Employment Act*.

Appeal from Decision of Wage Assessment Adjudicator – Appellant challenges Adjudicator's findings of fact – Board adopts deferential approach to Adjudicator's factual conclusions – Board determines that Adjudicator made no palpable and overriding error.

Appeal from Decision of Wage Assessment Adjudicator – Appellant argued that monies owed to her by the Employee should be deducted from the amount in the wage assessment – Adjudicator concluded this deduction not authorized by subsection 2-36(2) of *The Saskatchewan Employment Act* – Board upholds Adjudicator's conclusion.

REASONS FOR DECISION

INTRODUCTION

[1] Graeme G. Mitchell, Q.C., Vice-Chairperson: Gina Meacher o/a Gee's Family Restaurant[1] [Appellant], pursuant to subsection 4-8(1) of *The Saskatchewan Employment Act*, SS 2013, cS-15.1 [*SEA*], appeals against a decision of an Adjudicator appointed under Part II of the *SEA*.

[1] The Appellant's first name in many of the documents relevant to this appeal was spelled incorrectly. It should read "Gina" and not "Gena". At the outset of the hearing, this error was formally corrected pursuant to sub-clause 6-112(4)(d) of the *SEA*.

[2] A wage assessment dated September 14, 2016 – Wage Assessment No. 8271 [Wage Assessment] – was issued against the Appellant respecting the Respondent, Debra Hunt [Employee] in the amount of $395.60 for unpaid wages and holiday pay. The Appellant appealed against this wage assessment pursuant to clause 2-75(1)(a) of the *SEA*.

[3] On December 2, 2016, this Board, pursuant to subsection 4-3(1) of the *SEA,* appointed Mr. Clifford Wheatley [Adjudicator] to adjudicate that appeal.[2] A hearing took place on January 25, 2017 at Moose Jaw, Saskatchewan.

[4] On February 10, 2017, the Adjudicator released his Decision in which he affirmed the Wage Assessment.

[5] On February 28, 2017, the Appellant appealed to this Board against the Adjudicator's Decision. In her Notice of Appeal, the Appellant set out the following grounds of appeal:

- *Debra [Hunt] not willing to partake in this matter;*
- *Not all paper work was submitted;*
- *Unfair questions without documents to back up debra's [sic] statements*
- *Randy Armitage's statements were only hearsay.*

[6] The appeal was heard on June 14, 2017. The Appellant appeared in person. Ms. Lee Anne Schienbein on behalf of the Respondent, Director advised the Board that her client would not participate in this appeal. The Employee who had declined to participate in the hearing before the Adjudicator, advised the Board she did not wish to participate in this proceeding either.

[7] At the hearing's conclusion, the Board reserved its decision. These Reasons for Decision explain why the Board has concluded that the Appellant's appeal must be dismissed.

FACTUAL BACKGROUND

[8] Early in his Decision, the Adjudicator helpfully summarized matters on which the parties could agree:

> *The parties agreed as follows:*

[2] LRB File No. 252-16.

> 1. *Debra Hunt was employed as a waitress/cook by Ms. Meacher carrying on business in Assiniboia, SK at Gee Gee's Ice Cream Parlour from April 1, 2016 to May 2, 2016.*
> 2. *That holiday pay was not paid to Ms. Hunt and the holiday pay is outstanding in the amount of $109.20.*
> 3. *The amount of wages at issue is the difference between the holiday pay that is acknowledged to be unpaid and the amount of the Wage Assessment.*

[9] To put this dispute in perspective, the Appellant is contesting the Adjudicator's finding that she owes the Employee less than $300 in unpaid wages – $286.40, to be exact.

[10] The Employment Standards Officer in charge of this matter, Mr. Randy Armitage testified at the hearing before the Adjudicator. He described how the amount in the Wage Assessment had been calculated. The Adjudicator summarized Mr. Armitage's testimony as follows at pages 5 – 7 of his Decision:

> *Mr. Randy Armitage, Employment Standards Officer, who investigated the complaint, stated that the Wage Assessment was calculated on the basis of the [Employee] working 9:00 a.m. – 6:00 p.m., Monday to Friday at minimum wage ($10.50/hour).*
>
> *The Employment Standards Officer's calculations are set out on [sic] Exhibit "E.E.4." The Wage Assessment indicated a shortfall of $395.60.*
>
> *The holiday pay that was agreed upon between the parties, as not having been paid, of $109.20 was included in the Wage Assessment amount.*
>
> *Mr. Armitage indicated that he obtained the hours of work from a statement from the [Appellant] during his investigation that these were the scheduled hours of the employee.*
>
> *The rate of pay at $10.50/hour is minimum wage and also was confirmed by the [Appellant's] pay slip which was given to the [Employee] at the time of payment [sic] her wages.*
>
> *The parties agreed that the Employment Standards Inspection Report should read April 1st, 2016 rather than March 23rd, 2016 as the start date for the employee.*
>
> *Mr. Armitage indicated that he had requested employment records from the [Appellant] regarding the [Employee], however, had to date received nothing. <u>This was confirmed by the [Appellant] that no records were given and that no records were available</u>. [Emphasis added.]*

[11] The Appellant's testimony is summarized at pages 7- 10 of the Adjudicator's Decision as follows:

The [Appellant], Gena [sic] Meacher, was sworn and gave evidence that Ms. Hunt was an employee from April 1st, 2016 to May 2nd, 2016.

When Ms. Hunt was employed she was scheduled to work Monday to Friday (5 days a week), 9:00 a.m. to 6:00 p.m. However, the business that Ms. Meacher was operating, Gee Gee's Ice Cream Parlour, did not require Ms. Hunt to be present for those hours and she was often sent home early.

On May 2nd, 2016 Ms. Hunt attended in the morning, stayed a short period of time and once she received her cheques she left the work place and did not return.

Ms. Meacher stated that the work agreement was that Ms. Hunt would be paid $1,500/month irrespective to how many hours she worked.

Ms. Meacher indicated that Ms. Hunt was scheduled to work from 9:00 a.m. to 6:00 p.m., however because of the slow periods in business that she did not work a full 40 hour week at any time.

Unfortunately, Ms. Meacher as the employer, did not have time sheets relating to Ms. Hunt. So, in addition to being in violation of Section 2-38 of [The Saskatchewan Employment Act], Ms. Meacher was unable to verify her position with respect to the hours worked by Ms. Hunt.

Ms. Meacher agreed that the pay slip documents attached to "Exhibit EE2" was a fax that she had sent to Armitage along with her Notice of Appeal.

Ms. Meacher was unable to explain the rate of pay on the pay slip document as being $10.50/hour as this was inconsistent with her original statement that the rate of pay was to be $1,500/month despite the hours worked.

In addition, Ms. Meacher was unable to explain as to why her position at the Hearing that the wage was at $1500/month was not consistent with the pay slip which, when adding up hours work, vacation pay and withholding pay would net in excess of $1900/month. [Emphasis added.]

Also, Ms. Meacher was unable to explain that, if the arrangement was indeed $1500/month why she signed the cheques paying Ms. Hunt $1568.66 net after deductions and without vacation pay being added in. Also the date of April 1st, 2016 which was Ms. Hunt's start date on the cheques was unexplained.

Ms. Hunt's letter to Mr. Armitage in EE2 was that the rate of pay of $1500/month for 40 hours/week which is inconsistent the pay slip given to Ms. Hunt, the employee.

In addition Ms. Hunt could not explain why this differentiated from her Notice of Appeal wherein it is stated that the arrangement with the employee was $1500/month for a 37 hour work week.

Ms. Meacher agreed that Ms. Hunt was not a supervisor but was an employee within the meaning of the legislation, but that Ms. Meacher did not consider an hourly rate or any overtime, only that it was a fixed wage of $1500/month. [Emphasis added.]

[12] The Appellant also testified that the Employee owed her money and this should be off-set against any unpaid wages owing to the Employee. As summarized by the Adjudicator at pages 10 and 11, she testified as follows:

> *Ms. Meacher also stated that she was entitled to a deduction of $297, from the Wage Assessment, because in April of 2016 Ms. Hunt had asked Ms. Meacher, while on a trip to Moose Jaw, to purchase some movies for her. Ms. Meacher agreed to purchase the movies for her and did so. The cost of the movies was a total of $297.*
>
> *Ms. Meacher indicated that Ms. Hunt had asked her to pick up to the movies and to deduct the amount from her pay cheques.*
> *. . . . .*
> *In summary, the [Appellant] took the position that all wages that were owing to Ms. Hunt were paid, with the exception of the holiday pay agreed upon, and Ms. Meacher is owed $297 for reimbursement of the movies purchased for Ms. Hunt.*

[13] In essence, the Appellant urged the Adjudicator to conclude that she, and not the Employee, was owed money, and to direct the Employee to reimburse her for that money. By my calculation, the amount the Appellant contended the Employee owed her was $187.73, *i.e.* $297.00 (the cost of the movies) - $109.27 (the Employee's unpaid vacation pay).

THE ADJUDICATOR'S DECISION

[14] The Adjudicator rejected the Appellant's testimony and affirmed the Wage Assessment.

[15] Respecting the Appellant's claim that the cost of the movies she purchased for the Employee should be deducted from the amount in the Wage Assessment, the Adjudicator ruled that it was without merit. He referenced section 2-36 of the *SEA* which in subsection 2-36(2) sets out the list of legitimate deductions an employer can make from an employee's wages. He tersely concluded at page 12 that "the deduction of the purchase price of the movies is not permitted from the employees' wages pursuant to the legislation".

[16] Respecting the Appellant's assertion that the Wage Assessment was incorrect because the Employee had received all monies due and owing to her – save for the unpaid holiday pay – the Adjudicator concluded that the evidence did not support it.

[17] He began by referring to section 2-75 of the *SEA* which pertains to appeals commenced before an adjudicator under Part II. In particular, subsection 2-75(9) states:

> ***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. [Emphasis added.]*

[18] The Adjudicator correctly characterized this provision as creating a rebuttable presumption of "correctness".

[19] However, he concluded that the Appellant failed to rebut this presumption because the evidence she presented was too confused and uncertain. He found at page 12 of the Decision that her evidence revealed "she had three versions of the wage agreement between herself and the employee".

[20] The Adjudicator identified these versions at page 13 of the Decision as follows:

> *In Exhibit "EE2" a document prepared by Ms. Meacher and forwarded to Mr. Armitage sets out that the wage agreement was for $1500/month for a 40 hour work week.*
>
> *This agreement is not reflected in the pay slip that was given to Ms. Hunt by Ms. Meacher and was attached to "Exhibit EE2".*
>
> *The Notice of Appeal from Ms. Meacher, the employer, states the wage arrangement was $1500/month for a 37 hour work week.*
>
> *The pay slip on its own sets out another wage agreement by virtue of the calculations therein.*
>
> *Unfortunately, the employer did not have any time sheets or documentation relating to the employment of Ms. Hunt and was unable to satisfactorily explain the three different wage agreements.[Emphasis added.]*

[21] As the onus to rebut the presumption of correctness set out in subsection 2-75(9) rested on the Appellant, and, as she failed to satisfy this onus, the Adjudicator was statutorily compelled to accept the Wage Assessment as accurate.

[22] As a consequence, and in accordance with sub-clause 4-6(1)(a)(i) of the *SEA*, the Adjudicator dismissed the Appellant's appeal.

ISSUE

[23] The sole issue on this appeal is whether the Adjudicator erred when he dismissed the Appellant's appeal against the Wage Assessment.

RELEVANT STATUTORY PROVISIONS

[24] The following provisions of the *SEA* authorize appeals from wage assessment adjudicators and outline the remedial powers of the Board on such appeals:

> ***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.*
> ***. . . . . .***
> *(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.*

[25] For purposes of this appeal, the following provisions of the *SEA* are also relevant:

> ***2-36****(2) In addition to deductions permitted or required pursuant to law, an employer may deduct from an employee's wages:*
>
> *(a) employee contributions to pension plans or registered retirement savings plans;*
> *(b) employee contributions to other benefit plans;*
> *(c) charitable donations voluntarily made by the employee;*
> *(d) voluntary contributions by the employee to saving plans or the purchase of bonds;*
> *(e) initiation fees, dues and assessments to a union that is the bargaining agent for the employee;*
> *(f) voluntary employee purchases from the employer of any goods, services or merchandise; and*
> *(g) deductions for purposes or categories of purposes that are specified pursuant to subsection (3).*
>
> *(3) For the purposes of clause (2)(g), the Lieutenant Governor in Council may specify purposes and categories or purposes by regulation or by special order in a particular case.*
>
> *. . . . .*
>
> ***2-75****(8) On receipt of the notice of appeal and deposit required pursuant to subsection (4), the director of employment standards shall forward to the adjudicator:*

> *(a) a copy of the wage assessment; and*
> *(b) a copy of the written notice of appeal*
>
> *(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.*

STANDARD OF REVIEW

[26] The standard of review for the purpose of appeals pursuant to subsection 4-8(1) of the *SEA* is "reasonableness". See especially: *Thiele v Hanwell*, LRB File Nos. 052-16 to 056-16, 2016 CanLII 98644 (SK LRB) at paras 26-34, and *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 SCR 293, 2016 SCC 47, at paras. 22-24 *per* Karakatsanis J.

[27] This Board also has a very limited power to review and revisit alleged factual errors committed by a wage assessment adjudicator. See: *Burton Aggregates Ltd. v Government of Saskatchewan, Executive Director, Employment Standards and Rae-Anne Hofli*n, LRB File No. 272-16, 2017 CanLII 20063 (SK LRB) at para. 23, and *Anwar Group International Ltd. and Naveed Anwar v Jeannine Poulin and Director of Employment Standards*, LRB File No. 171-15, 2016 CanLII 30541 (SK LRB). However, to successfully appeal against an adjudicator's factual findings, an appellant must meet a very rigorous standard. This standard was first identified in *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII), where the Supreme Court of Canada ruled that an appellate body may only interfere with finding of facts made by a lower tribunal – in this case, a wage assessment adjudicator – if the appellant demonstrates the tribunal committed "a palpable and overriding error in coming to a factual conclusion": *Housen*, *supra*, at para. 21 [emphasis is original].

[28] A similar standard of deference applies when an adjudicator's assessment of credibility is assailed. See *e.g.*: *Gross v Wawanesa Mutual Insurance Co.*, 2003 SKCA 49, 232 Sask R 232.

[29] As explained to the Appellant at the commencement of this appeal, these are the relevant standards of review against which her grounds of appeal are to be measured.

ANALYSIS AND DECISION

A. Did the Adjudicator Err by Rejecting the Appellant's Claim for Off-set?

[30] This issue can be disposed of quickly. The Adjudicator referred to subsection 2-36(2) of the *SEA*, and concluded that any monies the Employee owed to the Appellant for movies she had purchased could not be deducted from wages owing to the Employee.

[31] At the hearing the Appellant appeared to accept the Adjudicator's holding on this point. Indeed, she advised the Board that she intended to seek to recover those monies by way of a small claims action.

[32] Accordingly, in as much as it remains a live issue on this appeal, the Adjudicator's Decision was not only reasonable, it was also correct. He could not have arrived at any other conclusion.

B. Did the Adjudicator Err by Finding the Appellant failed to Rebut the Presumption in Subsection 2-75(9) of the *SEA*?

[33] As already stated, subsection 2-75(9) of the *SEA* stipulates that "in the absence of evidence to the contrary", the Wage Assessment is deemed to be accurate. This statutory provision creates a statutory presumption that can be rebutted by an appellant. However, an appellant bears the onus to prove on a balance of probabilities, *i.e.* it is more likely than not, that the amount identified in a wage assessment is inaccurate. In order to satisfy this burden, an appellant must present evidence that "is sufficiently clear, convincing and cogent". See: *FH v McDougall*, [2008] 3 SCR 41, 2008 SCC 53, at para. 46 *per* Rothstein J.

[34] It is plain from his Decision that the Adjudicator found the Appellant's evidence disputing the amount identified in the Wage Assessment lacked clarity and cogency. In fact, it appears four (4) different wage arrangements had been advanced at the hearing, and it was not possible for him to determine which one was correct. These arrangements are summarized below:

- $1,500/month regardless of hours worked;
- $1,500/month for 40 hours worked per week;
- $1,500/month for 37 hours worked per week,

- $1,568.66 net for one (1) months' work.

[35] At the hearing of this appeal, the Appellant came armed with certain documents that she had not brought to the hearing before the Adjudicator. Although these documents failed to meet the criteria for introducing fresh evidence on appeal laid down by the Supreme Court of Canada in *Palmer v The Queen*, [1980] 1 SCR 759, 1979 CanLII 8 (SCC), the Board invoked its power under clause 6-111(1)(e) of the SEA to relax strict rules of evidence, and permitted these documents to be introduced.

[36] The Appellant presented a document purporting to reflect the amount of a cheque made payable to the Employee for wages in April 2016. This amount was $1,568.66.

[37] The second document presented by the Appellant was a page from a Co-op Monthly Calendar for April 2016. On it were handwritten entries that the Appellant contended were the hours the Employee actually worked during that month.

[38] The Appellant submitted that these documents most accurately reflected the hours worked by the Employee and her compensation. She stated that the Adjudicator did not see these documents, and, if he had, he would have understood that no further monies were owed to the Employee, save for the amount owing for unpaid vacation leave.

[39] Even accepting these documents to be accurate, they do not resolve the compensation question. There was still evidence before the Adjudicator which indicated that other compensation arrangements possibly existed between the Appellant and the Employee. Moreover, it is clear from the Adjudicator's Decision that he was aware of the information contained in these documents and took it into account as he attempted to sort out the divergent evidence, a task that, ultimately, proved unsuccessful.

[40] As a consequence, the Appellant failed to displace the statutory presumption of correctness set out in subsection 2-75(9) of the *SEA* before the Adjudicator, and, further, failed to persuade the Board that the Adjudicator committed palpable and over-riding error in his factual findings.

[41] Accordingly, for these reasons, the Adjudicator's conclusions satisfy the reasonableness standard.

C. Conclusion

[42] For all of these reasons, the Board concludes that the Adjudicator's Decision satisfies the reasonableness standard and, pursuant to clause 4-8(6)(a) of the *SEA*, must be affirmed. Accordingly, the Appellant's appeal is dismissed.

[43] An appropriate Board Order will accompany these Reasons.

DATED at Regina, Saskatchewan, this **16th** day of **June, 2017.**

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson