



**STEVEN BONDY, Applicant v. SOUTH COUNTRY ESTATES DEVELOPMENT CORP. o/a
Saskatoon Event Centre, Respondent and GOVERNMENT OF SASKATCHEWAN,
EXECUTIVE DIRECTOR, EMPLOYMENT STANDARDS**

LRB File No. 162-17; December 21, 2017

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

For the Applicant:	Self Represented
For the Respondent, South Country Estates Development Corp:	Mr. Darren Hagen
For the Respondent, Executive Director Employment Standards:	Ms. Lee Anne Schienbein

Review of Adjudicator's Decision – Section 48 of *The Saskatchewan Employment Act* – Appellant files appeal raising a question of law regarding his ability to present his case before adjudicator. Board reviews standing of person named in wage assessment and role of Labour Standards Officer at hearing.

Natural Justice – Audi Alterem Partem – Board reviews procedure followed at hearing before adjudicator – Finds that person named in wage assessment issued by the Executive Director, Employment Standards was not granted full standing at the hearing of the appeal against the wage assessment – Appeal remitted to Adjudicator.

Nature of the Hearing before an Adjudicator- Board reviews process followed by adjudicator – Finds Adjudicator followed proper process in conducting a review of the determination by the Executive Director, Employment Standards in issuing wage appeal.

Standing – Board reviews the statutory standing afforded to the Executive Director, Employment Standards under section 2-87 of *The Saskatchewan Employment Act*.

Standing – Board reviews role and standing which should be afforded to persons directly affected by a wage assessment issued by Executive Director, Employment Standards.

REASONS FOR DECISION

Background:

[1] The Executive Director, Employment Standards (the “Director”) issued wage assessment No. 8331 pursuant s. 2-74 of *The Saskatchewan Employment Act* (the “SEA”) which directed South Country Estates Development Corp. (“South Country”) and Darren Hagen, (“Hagen”) a Director of South Country to pay the sum of \$1,134.37 to Steven Bondy (“Bondy”). South Country and Hagen appealed the wage assessment to an Adjudicator as provided for in s. 2-75 of the SEA.

[2] The adjudicator appointed to hear the appeal rendered his decision on July 27, 2017. The adjudicator upheld the appeal and set aside the wage assessment. Bondy then appealed the adjudicator’s decision to the Board pursuant to s. 4-8 of the SEA.

[3] Appeals to the Board are restricted to questions of law. In his appeal, Bondy identified the questions of law as follows:

1. *No representation. I was not allowed to cross-examine the respondent, only Mr. Dale Schmidt (of labour standards) was. Dale told me after the hearing that he did not represent me, and I was not allowed to represent me, then nobody represented me. I was hushed by the adjudicator when asked to speak.*
2. *I was not given the proper information package to be prepared for the hearing. I did not know procedure, the rules and the language.*
3. *I wasn’t able to provide all evidence. The only evidence I was allowed to bring forward was during the initial filing of the complaint and was not as [sic] to provide more before the hearing.*
4. *Evidence was lost by labour standards. Evidence I submitted previously was not brought forward with Mr. Schmidt at the hearing, who I thought represented me.*

[4] At the hearing of this matter, Bondy and South Country, through Hagen, responded to these grounds of appeal. The Director took the view that he would not object to the matter being remitted to the Adjudicator.

[5] The grounds of appeal and the arguments and facts alleged at the hearing of this matter raised an issue of procedural fairness as to whether Bondy received a fair hearing in accordance with the rules of natural justice. Since the only sworn evidence before the Board was the sworn appeal application by Bondy, the Board allowed Hagan and the Director to provide Affidavit evidence regarding what had occurred at the hearing. Hagan, the Director and Bondy all provided Affidavit evidence regarding the events that occurred at the hearing.

Summary of Affidavit Evidence provided:

Affidavit of Dale Schmidt

[6] Mr. Schmidt was the employment standards officer who represented the Director at the hearing of this matter. He deposed as follows:

1. Dale Schmidt, of the City of Yorkton, in the Province of Saskatchewan, MAKE OATH AND SAY AS FOLLOWS:

1. THAT I am an Employment Standards Officer for the Ministry of Labour Relations and Workplace Safety (the Ministry) in Saskatchewan, and as such have personal knowledge of the facts herein deposed, except where stated to be on information and belief, and where so stated I do verily believe the same to be true.

2. Pursuant to The Saskatchewan Employment Act (the Act), Wage Assessment 8331 in the amount of \$1,134.37 was issued on October 17, 2016, regarding wages owed by the Respondent (Employer) to the Appellant (Employee).

3. As the Employment Standards Officer assigned to the file, I conducted the initial investigation and completed an Inspection Report. Subsequently I issued a Wage Assessment on behalf of the Director of Employment Standards (the "Director").

4. The Respondent (Employer) appealed the Wage Assessment to an Adjudicator. I was also responsible to represent the Director for the appeal of the Wage Assessment to the Adjudicator. An Adjudicator, Ted Koskie, was assigned to hear the Appeal

5. A conference call was held with all parties and the Adjudicator on December 15, 2016. Specifically, Darren Hagen, Steven Bondy, Ted Koskie and me were all on the conference call. The Adjudicator set March 13, 2017 as the hearing date to be held in Saskatoon, SK. To the best of my knowledge only the available dates with all parties was discussed and I do not recall any questions raised with the adjudicator in regards to the hearing process by anyone on the call.

6. My usual practice is to explain the appeal process to an employee when an appeal of a wage assessment is received. The explanation includes that I represent the Director at the appeal and will call the employee as a witness. I do not specifically recall if I explained this to the Appellant when the appeal of the Wage Assessment was received.

7. Approximately one week before the Adjudication hearing, I contacted the Appellant by telephone and explained the usual hearing process to him., My explanation included the following: the hearing would be similar to a court proceeding; I would represent the Director; the Appellant would give evidence on his own behalf; I would ask him questions about his employment; the Appellant would be cross-examined by Mr. Hagen; the Adjudicator may ask the Appellant questions; Mr. Hagen would give evidence; Mr. Hagen would then be cross-examined by me; the Adjudicator may ask Mr. Hagen questions.

8. Just prior to the hearing commencing on March 13, 2017, I went through the questions I was planning to ask the Appellant with him.

9. During my investigation, I spoke with Darren Minisoffer who confirmed information to support the Appellant's claim for wages. During the telephone call mentioned in paragraph 7 of this Affidavit. I told the Appellant that I was unable to locate Mr. Minisoffer as a witness for the hearing. The Appellant indicated that he would also try to locate Mr. Minisoffer. Neither the Appellant or I was able to locate Mr. Minisoffer prior to the hearing.

10. Present at the hearing on March 13, 2017 were the Appellant, Mr. Hagen, the adjudicator and me.

11. The last question I asked the Appellant was if he had any further evidence or anything to add to this hearing. It is my usual practice to ask an employee this question at the end of his or her testimony. I do not recall if the Appellant provided any further evidence in response to this question.

12. Mr. Hagen provided sworn testimony. He did not "take the stand" per se but remained sitting at the table. Mr. Bondy did go to the "Witness chair at the front of the room and gave his sworn testimony from there.

13. I cross examined Mr. Hagen. I asked the Appellant if he had 'questions for Mr. Hagen. The Appellant wrote down three questions and I asked Mr. Hagen each of the questions: 1) Ask him if he has the receipt for the work done? 2) Who did the plumbing? 3) Did you pay anyone?

14. At the end of the hearing, the Appellant asked the Adjudicator if he could ask Mr. Hagen more questions. To the best of my recollection, the Adjudicator replied to the effect that the Appellant had his chance and we would be moving to final arguments.

15. I do not recall the Appellant asking me if he could have a lawyer or anyone else represent him. If I was asked, my usual response is yes.

16. I do not know what the Appellant is referring to in his Notice of Appeal #4 that "Evidence was lost by Labour standards", The Appellant testified to the hours he was claiming and his record of hours was provided at the hearing.

17. I make this Affidavit to provide information to the Labour Relations Board.

Affidavit of Darren Hagen

[7] Hagen, on his own behalf and on behalf of South Country, deposed as follows:

I, Darren Hagen, of the city of Saskatoon, make oath and say as follows:

1. I am the representative of South Country Estates Development Corp. and as such have personal knowledge of the following.

2. *That on or about December 15th, 2016 I attended a telephone conference call with the adjudicator, Mr. Ted Koskie. Steven Bondy also attended the conference call.*
3. *It is my recollection that during the telephone conference Mr. Koskie discussed the following: He said that the purpose of the conference was not to make a determination on the facts. He explained the process of the hearing to the participants. He explained that a hearing date would be set and that at the hearing the parties would have an opportunity to produce evidence and present their case for him to make a ruling. He asked how many witnesses each party would have. He discussed the length of time it would take for the hearing based on the information that was provided to him by Mr. Bondy and myself.*
4. *It was as the result of the aforementioned conference call and details discussed therein that hearing date was set and the proper allotment of time was set aside.*
5. *It is not logical for the adjudicator to set the date and time for a hearing without first knowing some thing about case including the number of witnesses, documents that may be produced as evidence, etc. It is my recollection that during the conference call Mr. Koskie specifically asked the participants the number of witnesses that they would be calling.*
6. *It appears that the Director is now attempting to produce hearsay evidence in paragraph 9 of Dale Schmidt's affidavit.*
7. *During the hearing on March 13th, 2017 I provided evidence and was subject to cross examination by Mr. Schmidt and further questioning by Mr. Koskie. It should be noted it is on the record that the Appellant was allowed to question me thru Mr. Schmidt and it is my recollection that such questioning in fact took place. Mr. Koskie was not permitting the same questions to be asked again that had already been answered on more than one occasion.*
8. *The Appellant was given every opportunity to prepare for the hearing. The process was outlined to him by Mr. Koskie and he was also advised of the process by Mr. Schmidt.*

Affidavit of Steven Bondy

[8] Bondy deposed as follows in his Affidavit in response to Hagen's Affidavit:

I, Steven Bondy Make an oath and affirm to the following:

Response to Daren Hagen's Affidavit:

I, Steven Bondy Make an oath and affirm to the following:

1. *My recollection of the December 15, 2016 conference call was to set a date of the hearing. Darren got very hostile during the phone call and Mr. Koskie had a hard time getting a word in. Mr. Koskie had to repeat a few times that the conference call wasn't to explain the matters of the appeal but to set a date of the hearing.*
2. *I was the only witness attending because Mr. Schmidt couldn't get in contact with Mr. Minosfer to witness. Mr. Schmidt should have witnessed to the confession of Mr. Minosfer during the hearing.*

3. *It wasn't in my understanding that I was able to question Mr. Hagen. I should have had the opportunity to question Mr. Hagen myself during the time of his questioning. Mr. Schmidt represents the Province and not me. I didn't have representation and didn't know I should have. I should have been able to self-represent and not had to question Mr. Hagen through Mr. Schmidt.*
4. *Mr. Schmidt and I didn't have a meeting to prepare for the hearing.*

Response to the Affidavit of Dale Schmidt:

1. *I recall the phone call operated the same way as Mr. Schmidt explained in this paragraph.*
2. *I think this explanation should have been conducted in formal meeting. The process was explained during my work shift on workhours. I wasn't explained my need for representation, which I believe was needed in this circumstance. This process didn't provide me a chance to counter any false claims Mr. Hagen and for me to question Mr. Hagen. I wasn't given this this opportunity*
3. *Mr. Hagen wasn't put on the witness stand like I was. Why would his testimony be less formal than my testimony, and twice the distance from the Adjudicator that he is answering to?*
4. *This is true.*
5. *Mr. Schmidt also indicated that Mr. Minisoffer confessed to hiring me as an employee. I believe Mr. Schmidt as an officer should have witnessed to his confession.*
6. *Mr. Schmidt did ask me for more evidence. I provided all evidence to Mr. Schmidt before the hearing. The copy Mr. Minisoffer's and my texts were provided as evidence to Mr. Schmidt but did not make it to the hearing.*
7. *This imbalance occurred through the whole hearing and not just in this example and is the reason for my appeal. I believe trial procedure is as important as testimony and should be followed properly to provide an equal balance between both parties.*
8. *Mr. Hagen provided no evidence to anyone else doing the plumbing at the building, he told the room that it was in his contract plumbing was to be done by the owner of the building, but didn't provide a copy of his contract.*
9. *I do not recall being asked to question Mr. Hagen. Any time I tried to speak up I was hushed by Mr. Schmidt or Mr. Koskie.*
10. *Mr. Schmidt didn't inform me that I could be represented, I was in understanding that Mr. Schmidt represented me. This was not explained.*
11. *A copy of Mr. Misnomer [sic] and my text wasn't provide as evidence which I submitted to Mr. Schmidt prior to the hearing. I wasn't informed that I had to have a copy of the evidence myself.*

Relevant statutory provision:

[9] Relevant statutory provisions are as follows:

Commencement of appeal to adjudicator

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 assessment;

(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.

(3) The written notice of appeal filed pursuant to subsection (2) must:

(a) set out the grounds of the appeal; and

(b) set out the relief requested.

(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.

(6) Subsections (4) and (5) do not apply if moneys that meet the amount of the wage assessment or the prescribed amount have been paid to the director of employment standards pursuant to a demand mentioned in section 2-70.

(7) An appeal filed pursuant to subsection (2) is to be heard by an adjudicator in accordance with Part IV.

(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.

(10) On the final determination of an appeal, the amount deposited pursuant to subsection (4):

(a) must be returned if the employer or corporate director is found not to be liable for the wages; or

(b) must be applied to the wage claims of the employees if the determination is in favour of the employees in whole or in part and, if there is any part of the amount remaining after being applied to those wage claims, the remaining amount must be returned to the employer or corporate director.

...

Director has standing as representative of employees

2-87(1) *The director of employment standards:*

(a) *has standing to represent any or all employees of an employer:*

(i) *in proceedings respecting an appeal of a wage assessment or a hearing mentioned in sections 2-75 and 2-76 before an adjudicator, the board or a court;*

(ii) *in proceedings pursuant to any other Act or any Act of the Parliament of Canada with respect to claims for unpaid wages; and*

(b) *may apply to a court to intervene in proceedings involving claims by or against employees, if in the opinion of the director the proceedings raise an issue of general importance to the rights and responsibilities of employers or employees.*

(2) *Subsection (1) does not require the director of employment standards to represent employees in any proceedings.*

(3) *In exercising the power set out in subsection (1), the director of employment standards shall act in a reasonable manner.*

...

Procedures on appeals

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*

(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.*

The Right to be heard (*Audi Alterem Partem*)

[10] What Bondy alleges in his appeal is that he was denied a fair hearing or right to be heard. This is a fundamental tenet of the concept of natural justice. What is Bondy's right to be heard in this instance?

[11] Section 2-75 of the *SEA* allows for the launching of an appeal by either the employer (or corporate director) named in a wage assessment or by an employee who is dissatisfied with the wage assessment. In this case, the Director made a wage assessment in favor of Bondy in the amount of \$1,134.37. That wage assessment, when made by the Director, is "proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing".¹

[12] As a result of the making of the wage assessment, even though he had not appealed the decision, Bondy, nevertheless had a direct interest in the outcome of the adjudication. Where a direct interest exists, that party should be accorded full standing at the adjudication hearing.

[13] The Director also has standing at the adjudication by virtue of section 2-87 of the *SEA*. That provision allows the Director, but does not obligate him, to "represent any or all employees... in proceedings respecting an appeal of a wage assessment... before an adjudicator". In so acting, subsection 2-87(3) requires that the Director "act in a reasonable manner".

¹ See section 2-75(9)

[14] Mr. Schmidt, in his Affidavit, acknowledges that he appeared at the hearing on behalf of the Director. It appears from his Affidavit that he was exercising the authority given to the Director in section 2-87(1) of the *SEA*. It is not clear from his Affidavit that he made this role clear to Bondy insofar as he says in paragraph 6 of his Affidavit that he explained “that I represent the Director at the appeal and will call the employee as a witness”. He goes on to say in paragraph 15 that he does not recall if Bondy asked if he could have a lawyer or anyone else present at the hearing. He deposes that if asked he would have said “yes”. This seems strange in the context, that is, if he was representing the employee, there would be no need for other external representation.

[15] There was obviously some confusion as to what role each of Mr. Schmidt and Bondy were to perform during the hearing. Bondy seemed to feel that Mr. Schmidt was not representing him. Mr. Schmidt seemed to be of the view that he was representing only the Director.

[16] The Director has the choice as to whether or not he will represent employees pursuant to section 2-87(2). He is not required to represent employees. However, when he does so, he must act in a reasonable manner. Furthermore, the representation is not “of the Director”, but rather of the employees.²

[17] That being said, where does that leave Bondy and his direct interest in the adjudication and his right to be heard? Does he have the right to be heard independently of his representation by the Director? May he lead evidence, cross-examine witnesses and make argument to the adjudicator?

[18] Normally, where a person has a direct interest in a matter before a court or tribunal, these questions are answered in the affirmative.

[19] However, the *SEA* gives the adjudicator some latitude in the procedures by which the appeal or hearing is conducted.³ However, in the conduct of the appeal or hearing, the adjudicator must insure that the right to be heard is respected. Adjudicators will have to determine at the outset of a hearing if the Director is representing the employee pursuant to section 2-87(2) or not.

² Section 2-87(1)(a) provides standing to the Director for this purpose.

³ See section 4-4(2) of the *SEA*

[20] The appeal is allowed and the matter remitted back to the adjudicator. It will be necessary for the adjudicator to determine, at the outset, if Bondy is satisfied that the Director will represent him fully, and, if he is not satisfied with the representation by the Director, to permit Bondy to enjoy full party status to present evidence, cross-examine witnesses, and to make argument.

DATED at Regina, Saskatchewan, this **21st** day of **December, 2017**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson