BURTON AGGREGATES LTD., Appellant v GOVERNMENT OF SASKATCHEWAN, EXECUTIVE DIRECTOR, EMPLOYMENT STANDARDS, and RAE-ANNE HOFLIN, Respondents

LRB File No. 272-16; April 6, 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:	Waylyn Burton as agent
For the Respondent, Executive Director:	Lee Anne Schienbein and Lisa Smart, Student-at-Law
For the Respondent, Rae-Anne Hoflin:	No one appearing

Appeal from Decision of Wage Assessment Adjudicator – Board determines that reasonableness is 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 – Board reviews Adjudicator's conclusion that Appellant is the proper Employer and finds it satisfies the reasonableness standard.

REASONS FOR DECISION

INTRODUCTION

[1] **Graeme G. Mitchell, Q.C. , Vice-Chairperson:** Burton Aggregates Ltd. [the "Appellant"] pursuant to subsection 4-8(1) of *The Saskatchewan Employment Act*, SS 2013, cS-15.1 [the "*SEA*"] appeals against a decision of an Adjudicator appointed under Part II of the *SEA*.

[2] A wage assessment dated September 12, 2016 – Wage Assessment No. 8263 – was issued against the Appellant respecting the Respondent, Rae-Anne Hoflin ['Rae-Anne"] in

the amount of $3,243.41 for unpaid wages and holiday pay. The Appellant appealed against this wage assessment pursuant to subsection 2-75(1)(a) of the *SEA*.

[3] On October 14, 2016, this Board appointed Ms. Karen Ulmer to adjudicate these appeals. Adjudicator Ulmer heard this appeal on November 15, 2016. At the opening of the hearing, the Employment Standards Officer withdrew the original wage assessment and introduced an amended wage assessment. This amended assessment lowered the Appellant's financial liability to $3,084.23.

[4] On November 25, 2016, in a thorough and closely reasoned Decision, Adjudicator Ulmer dismissed the Appellant's appeal. She affirmed the amended wage assessment introduced at the hearing.

[5] On December 6, 2016, the Appellant appealed to this Board. In its Notice of Appeal, the Appellant set out the following ground of appeal:

> *All the evidence is stated in our evidence. Rae-Anne Hoflin has no proof that she did any of the work she stated. She was hired under false pretense and her dates don't add up. Under definition of the law Shauna Kadler would also be considered an employer and should be held responsible.*

[6] The Appellant also sought a stay of the Adjudicator's Order pending the conclusion of its appeal. The Appellant elaborated on this request in its Notice of Appeal as follows:

> *As a business owner it is hard to justify paying wages if there was no work completed, Rae-Anne Hoflin and sister in law Shauna Kadler worked together to defraud us of thousands of dollars.*

[7] The appeal was heard on March 31, 2017. Mr. Waylyn Burton, the Appellant's owner and manager appeared as its agent. Ms. Lee Anne Schienbein and Ms. Lisa Smart, an articling student with the Saskatchewan Ministry of Justice, appeared on behalf of the Respondent, Executive Director. Ms. Smart ably presented oral submissions on behalf of this Respondent.

[8] At the conclusion of this hearing, the Board reserved its decision. These Reasons for Decision explain why this Board has concluded that this appeal must be dismissed.

FACTS

[9] The Adjudicator reviewed the circumstances surrounding this dispute in some detail in her Decision. This was no small feat! As she lamented at page 9:

> *The two sides in this case disagree about virtually everything, including the period of employment, job title, job duties, wages, hours worked and work done. How two parties could be in an employer/employee relationship with so little understanding between them is incomprehensible.[Emphasis in original.]*

[10] For purposes of this appeal, only a brief summary of the facts is warranted. The following chart summarizes the salient facts as found by Adjudicator Ulmer.

November 10, 2015	*Rae-Anne signed a "Letter of Employment Offer Contract" with the Appellant. It stated that her start date would be December 1, 2015, she would be paid $21.50/hour and guaranteed 40 hours work a week. She would be a probationary employee for the first three (3) months.*
December 1, 2015	*Rae-Anne's official start date. At that time, she was writing university exams so did not commence full-time employment on that date.*
December 2015	*During this month she was assigned work by Shauna Kadler who also was employed by the Appellant. In December, Rae-Anne was paid $1,200 by e-transfers from Shauna's bank account. When she inquired about this, Shauna advised that these were "advances", i.e. she would be reimbursed for these expenditures by the Appellant.*
January 2016	*Together with Shauna, Rae-Anne met Waylyn Burton at his home office near Krydor, Saskatchewan in early January. She was there to photograph equipment and inventory in anticipation of merging the Appellant's business with a local First Nation's company. Rae-Anne did not discuss her hiring, wages, hours of work or job duties with Mr. Burton.*
January 16, 2016	*The Appellant paid Rae-Anne $1,413.94 by e-transfer. She believed this e-transer was payment for work done during the period of December 28, 2015 to January 8, 2016.*
January 30, 2016	*The Appellant paid Rae-Anne $1,272.53 by e-transfer. She believed this e-transfer was payment for work done during the period of January 11 to January 22, 2017.*
Week of February 1, 2016	*Shauna was in Las Vegas, Nevada, attending a conference but she telephoned Rae-Anne and gave her instructions in order to complete the construction work and requested that Rae-Anne drive by a couple of Waylyn Burton's rental properties.*
February 15, 2016	*The Appellant paid Rae-Anne $1,413.94 by cheque. She believed this cheque was to compensate her for work done during the period of January 25, 2016 to February 5, 2016. This cheque was returned to Rae-Anne's bank marked "insufficient funds".*
February 19, 2016	*The Appellant terminated Rae-Anne, a few weeks prior to the conclusion of her probationary period. The Appellant also terminated Shauna that same day.*
Subsequent to February 19, 2016	*Together with Shauna, Rae-Anne prepared a "To-Do List" which Adjudicator Ulmer accepted as evidence of work she performed for the Appellant during the period of January 26, 2016 to February 18, 2016. This document was entered into evidence at the hearing and marked as "Employer Exhibit #1".*

February 29, 2016	*Rae-Anne exchanged e-mails with Waylyn Burton respecting work she had stated she had completed on January 28, 2016. This e-mail was entered into evidence at the hearing and marked as "Employer Exhibit #6".*
March 2, 2016	*Rae-Anne exchanged another e-mail with Waylyn Burton explaining work she had completed on an Apprenticeship Binder and spreadsheets. This e-mail was entered into evidence and marked as "Employer Exhibit #3".*

THE ADJUDICATOR'S DECISION

[11] In spite of the many inconsistencies in the testimony given before her, Adjudicator Ulmer quickly cut to the chase. She identified the central issue as follows at page 9:

> *Despite all the confusion between the parties, the only issue is did Rae perform work for Burton Aggregates for which she has not been compensated, and how much should that compensation be.*

[12] She began by noting the confusion in the evidence about events surrounding Rae-Anne's hiring and the particular circumstances of her first month of employment. However, she determined that these circumstances, while curious, did not detract from relevant evidence which supported Rae-Anne's version of the events, and which she accepted as accurate. Adjudicator Ulmer concluded at pages 10 and 11 of her Decision as follows:

> *However, the initial circumstances of Rae's hiring are irrelevant; at some time in late December or early January, Waylyn accepted Rae as a employee. Perhaps Shauna misled him about Rae's qualifications as bookkeeper, or perhaps he simply heard what he wanted to hear, but Waylyn believed Rae was going to undertake the accounting work for Burton Aggregates.*
>
> *. . . . . .*
>
> *Waylyn obviously knew Rae was working for him by January as he authorized two pay cheques for her, on January 15 and January 30, and transferred the funds to her by e-transfer. If he looked closely at the amount, he would have seen he was paying more than $18 an hour.*
>
> *. . . . . .*
>
> *Despite his confusion and rising annoyance, Waylyn continued to pay Rae with the cheque that came back NSF on February 12.*
>
> *Much of the confusion suffered by Waylyn could have been avoided in a multitude of different ways. He could have met with Rae in person to review the work she was doing, or provided a list of job duties, or demanded written reports from Rae. He is the owner and manager of the company; ultimately it is his responsibility to ensure that the employees are doing the work he requires them to do.*
>
> *Meanwhile under Shauna's direction, Rae believed she was performing the duties she had been hired to do.*

[13] Earlier in her Decision, Adjudicator Ulmer had commented on Mr. Burton's disturbing lack of oversight of his business operations. In particular, she highlighted legal obligations resting on employers about which he appeared to lack knowledge. Again, at pages 9 and 10:

> *During the testimony at the Hearing, it was evident that Waylyn was not aware of what Shauna did day to day; he gave her tasks to do, but did not necessarily inspect the effort or the results. As an example, Waylyn assumed Shauna was providing pay stubs (statement of earnings) to his employees, but was unaware that she had abandoned doing so out of frustration with accounting software she was using. He also seemed unaware that as an employer, he was required by law to maintain records of employment for every employee, including statements of earnings for each pay period (The Employment Standards Act [should refer to The Saskatchewan Employment Act],s.2-37). Arguing that he told an employee to do this and the employee failed to do so is not a valid excuse. [Emphasis added.]*

[14] Adjudicator Ulmer accepted the "To Do List" which Rae-Anne had prepared with the assistance of Shauna as "an accurate record" of the hours she had worked. She acknowledged the discrepancies that came to light during the testimony between what appeared in that document and what actually transpired. However, she concluded at page 11 that those discrepancies did "nothing to contradict this evidence."

[15] In arriving at this conclusion, Adjudicator Ulmer stated at page 11:

> *Waylyn was not present when Rae was working with Shauna, so he has little or no basis to question the hours she worked. Rae testified that she kept busy with what she could do, including researching grants and finishing the office renovations. Rae copied the written work she had accomplished on a USB drive for Waylyn to pick-up (referred to in the email of March 2, 2016, Employer Exhibit #3), although he did not bother to do so. It may not have been the work Waylyn hoped she would do, but she did complete it. I find that the hours recorded by Rae and used by the Employment Standards Officer in calculating her claim are accurate.*

[16] Ultimately, Adjudicator Ulmer concluded at page 11 that Rae-Anne was an unwitting victim caught up in the monumental "failure of communication" between Shauna and Mr. Burton. She determined that:

> *[Rae-Anne] was doing the work her manager requested her to do, and which she believed to be for the benefit of the company. She deserves to be compensated for that work*.

[17] In light of these findings, Adjudicator Ulmer ruled at page 12 that "[Rae-Anne"] is entitled to be paid at the rate of $21.50/hour for the work she performed for the [Appellant]". Accordingly, she directed the Appellant to pay Rae-Anne $3,084.23.

ISSUES

[18] In her helpful Brief of Law, counsel for the Executive Director identified two (2) issues on this appeal as follows:

- The Appellant failed to identify an error of law in the Adjudicator's Decision, and
- The Wage Assessment is presumed to be accurate in the absence of evidence to the contrary.

[19] In the course of the hearing before the Board, another issue appeared to emerge. The Appellant alleged that in reality Shauna Kadler, and not the Appellant, was Rae-Anne's employer. Mr. Burton argued that, as such, Shauna was legally responsible for the amount due and owing to Rae-Anne. This issue was only tangentially raised in the Notice of Appeal and, out of generosity to the Appellant, the Board will also address it below.

RELEVANT STATUTORY PROVISIONS

[20] 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.*

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

> ***2-1*** *In this Part and in Part IV:*
> *. . . . .*

> *(g)* ***"employer"*** *means any person who employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal 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;*
>
> *(ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by one or more employees[.]*
>
> *. . . . .*
>
> ***2-75****(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.*
>
> *. . . . . .*
>
> *(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

[22] The standard of review operative on appeals pursuant to subsection 4-8(1) of the *SEA* was considered in *Thiele v Hanwell*, 054-16; 056-16; 055-16; 052-16 & 053-16, 2016 CanLII 98644 (SK LRB) ["*Thiele*"], at paragraphs 26-34. In *Thiele*, *supra*, the Board reviewed the very recent decision of the Supreme Court of Canada in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 SCR 293, 2016 SCC 47 ["*Edmonton East (Capilano)*"], and concluded at paragraph 33 that "reasonableness" was the appropriate standard of review on such appeals.

[23] This Board has a very narrow power of review of alleged factual errors committed by a wage assessment adjudicator. See *e.g.*: *Weiler v Saskatoon Convalescent Home,* 2014 CanLII 76051 (SK LRB), 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). To successfully appeal against an adjudicator's factual findings, an appellant must satisfy a very rigorous standard. In *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII), the Supreme Court of Canada determined that an appellate body may only interfere

with finding of facts made by a lower tribunal – in this case, a wage assessment adjudicator – if it can be demonstrated the tribunal committed "a palpable and overriding error in coming to a factual conclusion": *Housen*, *supra*, at para. 21 [Emphasis is original].

[24] Writing for the majority, Iacobucci and Major JJ. elaborated at paragraphs 5 and 6 as follows:

> *What is palpable error? The New Oxford Dictionary of English (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The Cambridge International Dictionary of English (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The Random Dictionary of the English Language (2nd ed. 1987) defines it as "reality or plainly seen" (p. 1399).*
>
> *The common element in each of these definitions is that palpable is plainly seen.*

ANALYSIS AND DECISION

A. Appeal of Adjudicator's Findings of Fact

[25] Mr. Burton's principal argument against Adjudicator Ulmer's ruling was that he adamantly disagreed with her factual conclusions. He asserted that Rae-Anne fabricated her evidence at the initial hearing. This line of argument presumably was intended to bolster the Appellant's accusation in its Notice of Appeal that Rae-Anne and Shauna Kudler colluded to defraud it "of thousands of dollars". Mr. Burton offered no independent proof of these allegations. Rather, he appeared only to repeat allegations and arguments he had previously made before Adjudicator Ulmer.

[26] Counsel for the Executive Director at page 11 of her Brief of Law submits that the Appellant is simply "taking issue with the findings of fact made by the Adjudicator" and fails to raise a viable question of law. Accordingly, she submits this Board is without jurisdiction to decide this issue.

[27] The Board concludes that there is no merit to this ground of appeal advanced by the Appellant. Adjudicator Ulmer reviewed the evidence presented to her in a laudable manner and made appropriate findings of fact supported by testimony she found to be credible. She did not become derailed by any irrelevant or inadmissible evidence. Indeed, Mr. Burton failed to

demonstrate any aspect of Adjudicator Ulmer's decision that could remotely be described as demonstrating "palpable and overriding error" in making her factual conclusions.

[28] As a consequence, this ground of appeal must be dismissed.

B. Did the Adjudicator Err in Finding the Appellant and Not Shauna Kudler Was Rae-Anne's Employer for Purposes of the *SEA*?

[29] Mr. Burton submitted that Shauna Kudler, and not the Appellant, was Rae-Anne's employer, and, as such, should be held financially liable for the amount reflected in the wage assessment. This particular ground of appeal raises a legal issue, and Adjudicator Ulmer's decision must be reviewed on the reasonable standard. See especially: *Edmonton East (Capilano)*, *supra*, and *Thiele*, *supra*.

[30] Adjudicator Ulmer considered this question towards the end of her Decision. She reproduced the definition of "employer" set out in subsection 2-1(g) of the *SEA*. She applied the appropriate legal test, namely the "control and direction" test which has been identified by this Board and the civil courts as the correct test for determining this question. See for example: *Saskatchewan (Employment Standards) v Black Gold Boilers Ltd.*, LRB File No. 049-16, 2016 CanLII 98643 (SK LRB), at paras. 59-60; *Mian v Prior*, LRB File No. 096-16, 2016 CanLII 79632 (SK LRB), and *Director of Labour Standards v Acanac Inc.*, 2013 SKQB 21, 411 Sask R 306, at para. 54.

[31] On the issue of whom, at law, qualified as Rae-Anne's employer, Adjudicator Ulmer concluded at page 11 as follows:

> *Waylyn gave significant responsibility to Shauna. Rae looked to Shauna to direct her work for the company. Shauna lied to Waylyn about what Rae was doing, and to Rae about the type of work Waylyn wanted Rae to do. Shauna appears to have had a great deal on her plate that she was not equipped to deal with, but instead of asking for help, she resorted to deception. Rae was caught between Waylyn and Shauna; the failure of communication was not her fault or her responsibility. She was doing work her manager requested her to do, and which she believed to be for the benefit of the company. She deserves to be compensated for that work.*

[32] This paragraph must be read in conjunction with Adjudicator Ulmer's conclusions respecting the seriously dysfunctional employer-employee relationship that already existed between Mr. Burton and Shauna.

[33] When all these considerations are taken into account, the Board is satisfied that Adjudicator Ulmer's conclusion is reasonable. Mr. Burton plainly abdicated his supervisory responsibilities over, not only Rae-Anne, but also Shauna. He cannot now seek to escape legal and financial liability for Rae-Anne's unpaid wages and holiday pay because of his complete lack of attention to the more mundane aspects of his business operations.

[34] As a consequence, this ground of appeal, too, must be dismissed.

C. Conclusion

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

[36] An appropriate Board Order will accompany these reasons.

DATED at Regina, Saskatchewan, this **6th** day of **April, 2016.**

LABOUR RELATIONS BOARD

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