101254226 SASKATCHEWAN LTD., Appellant v DOUGLAS KLYMCHUK and GOVERNMENT OF SASKATCHEWAN, EXECUTIVE DIRECTOR OF EMPLOYMENT STANDARDS, Respondents

LRB File No. 192-17; February 14, 2018

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:	No-one appearing
For the Respondent, Executive Director:	Lee Anne Schienbein and Nathanial Scipioni, Student-at-Law
For the Respondent, Douglas Klymchuk:	Appearing by telephone

Appeal from Decision of Wage Assessment Adjudicator – Appellant only appeals against Adjudicator's findings of fact – Board reviews Notice of Appeal and Appellant's Written Submission and concludes it lacks jurisdiction under section 4-8(1) of *The Saskatchewan Employment Act* to hear this appeal.

Appeal from Decision Wage Assessment Adjudicator – Alternatively, 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's agent failed to appear at appeal hearing – Board dismissed the appeal rather than adjourn hearing to a later date.

REASONS FOR DECISION

INTRODUCTION

[1] **Graeme G. Mitchell, Q.C., Vice-Chairperson:** 101254226 Saskatchewan Ltd. [Appellant], pursuant to subsection 4-8(1) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [*SEA*], appeals against a decision of an Adjudicator appointed under Part II of the *SEA*.

[2] A wage assessment dated May 10, 2017 – Wage Assessment No. 8637 [Wage Assessment] – was issued against the Appellant respecting the Respondent, Douglas

Klymchuk [Employee] in the amount of $1,393.60 for unpaid holiday pay. The Appellant appealed against this wage assessment pursuant to clause 2-75(1)(a) of the *SEA*.

[3] On June 26, 2017, this Board, pursuant to subsection 4-3(1) of the *SEA,* appointed Mr. Ralph Ermel [Adjudicator] to adjudicate that appeal.[1] A hearing took place on August 21, 2017 at Regina, Saskatchewan.

[4] On September 1, 2017, the Adjudicator released his Decision in which he affirmed the Wage Assessment.

[5] On September 21, 2017, the Appellant appealed to this Board against the Adjudicator's Decision. Its' Notice of Appeal set out the following grounds of appeal:

- *Acc. Section 2-63 Mr. Klymchuk fail to give two weeks notice;*
- *Section 2-27 – Section 2-29 – Vacation pay has been paid & clearly shown on weekly invoices.*

[6] In addition, the Appellant asked for a suspension of the Adjudicator's Order "[b]ecause my former employee [Mr. Klymchuk] has done some damages to the truck & I filed the complaint with RCMP. But waiting for my decision."

[7] This appeal was heard on February 13, 2017. Ms. Lee Anne Schienbein and Mr. Nicholas Scipioni appeared on behalf of the Respondent, Executive Director. The Employee appeared by telephone. However, Mr. Harpinder Singh who had filed the Notice of Appeal on behalf of the Appellant, failed to attend the hearing. After a short adjournment during which Mr. Singh was contacted by the Board's Registrar, the Board was advised that Mr. Singh upon receiving the Brief of Law filed by the Respondent, Executive Director, decided not to attend.

[8] At the hearing's conclusion, the Board dismissed the appeal for lack of jurisdiction. After reviewing the Notice of Appeal, it was readily apparent to the Board that the Appellant simply wanted to reargue the case Mr. Singh had presented to the Adjudicator. Rather than adjourn the matter for Mr. Singh to do so in person, the Board dismissed the appeal with reasons to follow. These are those reasons.

[1] LRB File No. 123-17.

THE ADJUDICATOR'S DECISION

[9] The Adjudicator wholly rejected Mr. Singh's testimony on behalf of the Appellant, preferring, instead, to believe the Employee's version of events. As a consequence, he affirmed the Wage Assessment.

[10] The Adjudicator summarized the relevant evidence, and the issues to be decided, beginning at page 6 of his Decision as follows:

> *Despite the volume and the details provided by the parties, there are only four issues that are pertinent to the question of whether or not the Wage Assessment is valid. Those four items are the invoices, the pay stubs, the text messages and whether Mr. Klymchuk quit without notice.*
>
> *Mr. Klymchuk's testimony is that not only had he never seen the invoices until after his employment, also he had never signed them. He claims that his signature was forged.*
>
> *I am not a hand writing expert, however, when I compare the signature from the Driver's License to the signature on the invoices, they are quite dissimilar. As an observation, I'm surprised there is a signature on the last invoice dated September 24, 2016. My surprise is that somehow during Mr. Klymchuk's leaving the company premises on September 20, 2016, Mr. Singh had Mr. Klymchuk sign the invoice.*
>
> *Mr. Singh's testimony is that Mr. Klymchuk signed all the invoices, many of those signatures were obtained in front of him (Singh).*
>
> *The pay stubs are self evident. They do show regular earnings, EI, CPP and income tax deductions. <u>They do not show vacation pay</u>. My assignment will be to determine if the Appellant has proven the contrary has been established.*
>
> *Exhibit EE2 is a printed copy of several text message exchanges, allegedly, between Mr. Singh and Mr. Klymchuk.*
>
> *Mr. Singh is prepared to own up to the first exchange….*
>
> *. . . . .*
>
> *Mr. Singh denies participate in the exchanges beginning October 13, 2016, 8:09 p.m. onward. He claims Mr. Klymchuk broke into his truck and used his (Singh) phone to produce the text messages attributed to him (Singh). He also claims it was done September 20, 2016.*
>
> *As with hand writing, I am not a tech person, however, with my limited knowledge I am skeptical that it is possible to produce text messages in September and make it look like they were sent in October.*
>
> *Regarding, whether Mr. Klymchuk quit with no notice, both Mr. Singh's and Mr. Klymchuk's testimony is that, on September 20, 2016, Mr. Klymchuk offered to work out his notice, but Mr. Singh refused the offer. Mr. Singh's appeal did not*

> *reference his allegation that Mr. Klymchuk quit with no notice and since his testimony agrees with Mr. Klymchuk's assertion he offered to work out the notice I'm only considering the vacation pay issue. [Emphasis added.]*

[11] The Adjudicator's Decision and Order are found at pages 7 and 8. They are reproduced in full below:

> *On the balance of probabilities, I am accepting the testimony of Mr. Klymchuk regarding the text messages found in Exhibit EE2. That is that the text messages (green for Klymchuk and grey for Singh) are as they appear and were sent by each of them during that period in October of 2016. Having accepted Mr. Klymchuk's testimony I, therefore, in the balance of probabilities, reject Mr. Singh's notion that Mr. Klymchuk manipulated his (Singh's) phone.*
>
> *The text message from Mr. Sing "I think u did not get me first time buddy. No vacation pay for temporary employees. U got paid all stat holidays. That all my friend" says it all. Further the pay stubs provided by the Company do not reflect vacation pay throughout Mr. Klymchuk's employment.*
>
> *I'm cannot to [sic] conclude that the invoices were manipulated by Mr. Singh, however, with Mr. Klymchuk [sic] signature on the last one brings a concern regarding them all. At any rate, I'm satisfied that on the balance of probabilities, that the text messages in EE2 are accurate and that as stated by himself, Mr. Singh did not pay Mr. Klymchuk vacation pay.*
>
> *Give the absence of vacation pay on the pay stubs, Mr. Singh, as per Section 2-37 of the [SEA], must prove the contrary and it is my decision that has not happened.*
>
> *Therefore, I am allowing the Wage Assessment of $1,393.59 and rejecting the appeal.*

[12] 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

[13] 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

[14] 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.*

[15] 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.

JURISDICTION OF THE BOARD

A. Relevant Legal Principles

[16] As set out above, subsection 4-8(1) of the *SEA* plainly limits appeals against an Adjudicator's decision respecting a wage assessment to "a question of law". It is essential, at the outset, to determine if the grounds of appeal presented in a notice of appeal disclose issues that can be characterized as a question of law.

[17] Most recently, in *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 [*Teal Cedar Products*], Gascon J., writing for the majority, stated at paragraph 43:

> *The process for characterizing a question as one of three principal types – legal, factual, or mixed – is also well-established in the jurisprudence (Canada (Director of Investigation and Research) v Southam Inc., [1997] 1 S.C.R. 748, at para. 35). In particular, it is not disputed that legal questions are questions "about what the correct legal test is" ([Sattva Capital Corp. v Creston Moly Corp., 2014 SCC 53, [2014] 2 S.C.R. 633], at para. 49, quoting Southam, at para. 35); factual questions are questions "about what actually took place between the parties" (Southam, at para. 35; Sattva, at para. 58); and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts" (Southam, at para. 35; Sattva, at para. 49, quoting Housen v Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235). [Emphasis added.]*

[18] Factual questions rarely meet the test for what may be characterized on appeal as a question of law. This is because in order to successfully appeal against an adjudicator's factual findings, an appellant must meet a very rigorous standard. That standard, first identified in *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 [*Housen*], where the Supreme Court of Canada *per* Iacobucci and Major JJ., holds 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 on accepted facts": *Housen*, at paragraph 21 [emphasis is original]. See also: *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) [*Burton Aggregates Ltd.*] 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).

[19] The *Housen* majority explained why such a high threshold must be satisfied before an appellate tribunal could, not should, interfere with factual findings made by a lower

court or administrative tribunal. At paragraphs 23 and 25, Iacobucci and Major JJ. stated as follows:

> *We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts….*
>
> *. . . . .*
>
> *Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of face, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge – that of palpable and overriding error. [Emphasis in original.]*

[20] 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.

[21] These, then, are the jurisdictional principles relevant on this appeal.

B. Position of the Parties

1. The Appellant's Position

[22] In Written Submissions dated February 5, 2018, Mr. Singh, on behalf of the Appellant stated:

> 1. *According to section 2-63, the employee has to give the 2 week notice prior to quitting to [sic] job. In this case, the employee fail [sic] to give 2 week notice. Moreover, he admit his mistake. But the adjudicator rush the decision and completely neglect this point.*
>
> 2. *According to section 2-27 and section 2-29, the vacation pay is [sic] clearly states on weekly invoices and they are signed by the employee. And weekly invoices are part of pay stub. If vacation pay is paid on invoices only that does mean I have to pay twice to employee.*
>
> 3. *The employee has done the [sic] plenty of damage to my truck. He should be responsible to get it fixes [sic]. But I have not heard anything from adjudicator.*
>
> *Kindly accept my letter and do further investigation.*

2. The Executive Director's Position

[23] Counsel for the Executive Director filed a helpful Written Brief of Law. The Executive Director offered two (2) alternative bases upon which the Board could dismiss the Appellant's appeal. First, counsel argued that as the instant appeal raised only questions of fact, it should be dismissed for want of jurisdiction. In addition to subsection 4-8(1) of the SEA, counsel for the Executive Director invoked *Teal Coal Products*.

[24] Second, and in the alternative, counsel for the Executive Director submitted that when the Adjudicator's Decision is reviewed on a reasonableness standard, it cannot be faulted. The Adjudicator clearly identified the correct legal issues, applied the legal tests correctly to factual findings that disclose no palpable or over-riding error. On this aspect of the appeal, counsel relied on *Housen*; *Burton Aggregates Ltd.*, and *Thiele v Hanwell*, LRB File Nos. 052-16 to 056-16, 2016 CanLII 98644 (SK LRB) [*Thiele*].

C. Analysis and Decision

[25] Applying this rigorous analysis to this appeal, the Board concludes that the Appellant's Notice of Appeal, together with its formal written submissions forwarded to the Board's Registrar by Mr. Singh clearly demonstrate that it wishes simply to re-argue "about what actually took place between the parties" to quote *Teal Cedar Products*. As a consequence, the Appellant is advancing only questions of fact which do not clothe this Board with jurisdiction to consider them. Accordingly, this appeal must be dismissed for want of jurisdiction.

[26] This finding is sufficient to dispose of this appeal. However, for the sake of completeness, the Board will briefly address whether the Adjudicator's Decision would otherwise survive appellate review.

[27] The Board is satisfied that the relevant standard of review for appeals pursuant to subsection 4-8(1) of the *SEA* is "reasonableness". See especially: *Thiele,* 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. See also: *Weiler v Saskatoon Convalescent Home*, 2017 SKCA 90, at para. 23 *per* Jackson J.A.

[28] When the Adjudicator's Decision is considered in its entirety, it satisfies not only the reasonableness standard of review, but also the correctness standard: *Weiler*, *ibid*. The Adjudicator was alive to the relevant legal issues; canvassed the evidence presented at the hearing; carefully weighed it; made credibility findings adverse to the Appellant, and applied the correct legal standards. In short, the Board is satisfied that the Adjudicator committed no error, let alone an error of law, in reaching the decision he did.

D. A Final Issue – Dismissal vs. Adjournment

[29] In conclusion, the Board wishes to explain its rationale for dismissing the appeal in Mr. Singh's absence, rather than adjourning it to a later date.

[30] To begin, an appellant does not have an absolute right to an oral hearing. Nothing found in Part IV of the *SEA* or in the common law principles of natural justice dictate that in all circumstances an appellant is entitled to a right of audience before this Board. While this Board's usual practice is to accord appellants in wage assessment appeals the opportunity to appear before it and make oral submissions, this is not a legal requirement. What is important is that the Board make an informed decision on all the information presented to it.

[31] In this matter, Mr. Singh knew the date and time of the appeal hearing, and prior to that hearing filed a Written Submission as requested by the Board. This document simply replicated the grounds of appeal set out in the Appellant's Notice of Appeal, and offered no further elaboration or additional information. Plainly, the Appellant lacked any substantive basis upon which to challenge the Adjudicator's findings and ultimate conclusions.

[32] When Mr. Singh failed to appear for the hearing, the Board's Registrar communicated with him to determine if he intended to appear. He advised the Registrar that he thought the Board had already made its decision and, in any event, he was too far away from Regina and could not attend.

[33] Taking all these factors into consideration, especially the fact that Mr. Singh wanted only to dispute the Adjudicator's findings of fact, the Board chose to dismiss the appeal outright, rather than adjourn it to a later date convenient to all parties. Adjourning this matter would not have been a wise use of the Board's resources or, for that matter, those of the Executive Director's counsel. More importantly, it would postpone the Employee's ability to recover the outstanding vacation pay to which he is lawfully entitled.

[34] For these reasons, the Board decided to dismiss the Appellant's appeal, rather than adjourn the hearing.

E. Board's Order

[35] For all of these reasons, the Board concludes it lacks jurisdiction to decide the Appellant's appeal. Accordingly, this appeal is dismissed and, pursuant to clause 4-8(6)(a) of the *SEA*, the Adjudicator's Decision must be affirmed.

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

DATED at Regina, Saskatchewan, this **14th** day of **February 14, 2018.**

LABOUR RELATIONS BOARD

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