**SHAUNA-RAE MISSICK, Appellant v REGINA'S PET DEPOT, Respondent and THE DIRECTOR OF EMPLOYMENT STANDARDS, Respondent**

LRB File No. 191-19; February 27, 2020
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

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|---|---|
| For the Appellant, Shauna-Rae Missick: | Self-Represented |
| For the Respondent, | |
| Regina's Pet Depot: | Darlene Hincks |
| For the Respondent, | |
| The Director of Employment Standards: | No One Appearing |

**Appeal of Wage Assessment Adjudication – Termination of Contract without Notice – Assessment of Pay in Lieu of Notice, Vacation Pay, and Public Holiday Pay – Appeal of Assessment on basis of Independent Contractor status – Adjudicator finds worker was Independent Contractor – Wage Assessment overturned.**

**Appeal brought by worker pursuant to section 4-8 of *The Saskatchewan Employment Act* – Determination of Employee-Employer relationship – Application of Direction and Control test – Adjudicator's Decision affirmed.**

**Standard of Review – Wage Assessment Appeals – Correctness Standard.**

## REASONS FOR DECISION

**Background:**

**[1] Barbara Mysko, Vice-Chairperson:** This matter comes before the Board as an Appeal from an Adjudicator's decision pursuant to section 4-8 of *The Saskatchewan Employment Act* ["Act"] in relation to an initial appeal of a wage assessment.[1] The disputed wage assessment dated April 30, 2019 directs Regina's Pet Depot ["Pet Depot"] to pay the amount of $2,256.41 to Shauna-Rae Missick, pursuant to section 2-74 of the Act. Ms. Missick performed services as a pet groomer at Pet Depot during the material times. The Director of Employment Standards ["Director"] found that Ms. Missick was an employee of Pet Depot and that she was owed one week's pay in lieu of notice, as well as vacation pay and public holiday pay, after Pet Depot terminated her contract on February 20, 2019.

[1] Wage Assessment No. 1-00230.

**[2]** Pet Depot appealed the wage assessment on the basis that it was not in an employment relationship with Ms. Missick. A hearing was held on June 10, 2019. A decision was issued on August 7, 2019 ["Decision"]. In that Decision, the Adjudicator allowed the appeal and dismissed the wage assessment, finding that Ms. Missick was acting as an independent contractor, and not as an employee.

**[3]** In the Notice of Appeal, Ms. Missick outlines her concerns with the Decision:

> *I base my argument on the level of control I had. I fear the adjudicator made her decision based on testimony from Darlene Hincks, Lise Regnim, Kelley Barney and Rayna Hunt believing their words to be true and not even considering the facts that I provided or noted. I also fear the adjudicator has some of her information mixed up, seeing as certain events that were mentioned were mixed together. Proof that I provided to the employment standard Officer Andrew Langgard was not mentioned in report that could help in validating my case. Further details given on attached page…*

**[4]** This Appeal was heard on October 31, 2019. Ms. Darlene Hincks appeared on behalf of Pet Depot. Ms. Missick appeared on her own behalf. The Director did not appear. The sole issue on this Appeal is whether the Adjudicator's Decision, finding that Ms. Missick was not an employee of Pet Depot, was correct.

**Argument on Behalf of the Parties:**

**[5]** Ms. Missick argues that the Adjudicator disregarded and failed to properly weigh the evidence, and drew the wrong conclusion in relation to Ms. Missick's level of control over her working conditions. The Adjudicator chose not to believe Ms. Missick and mixed up the evidence. Overall, Ms. Missick claims that she was hired by someone who basically failed to honor an employment contract.

**[6]** Ms. Hincks, on behalf of Pet Depot, states that she is in complete agreement with the Adjudicator's Decision. She says that the Adjudicator properly assessed the relevant indicia of control and concluded correctly that Ms. Missick was an independent contractor during the material times. She asks that the Board affirm the Decision and dismiss this Appeal.

**Decision:**

**[7]** In the Decision under review, the Adjudicator described the issue before her, as follows:

> *The issue to be determined in this case is whether Shauna was an employee of Pet Depot or an independent contractor. If Shauna was an employee, she is entitled to the benefits*

*of the Act and the Wage Assessment must be upheld. If Shauna was an independent contractor, the Act does not apply and the Wage Assessment must be dismissed.*

**[8]** In the analysis of this issue, the Adjudicator relied primarily on the principles outlined in *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 SCR 983 ["*Sagaz*"].

**Applicable Statutory Provisions:**

**[9]** The following provisions of the Act are applicable:

> ***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;*
> *(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; or*
> *(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;*
> *…*
> ***2-15*** *Subject to this Part, an employer shall pay an employee his or her total wages payable in accordance with the terms and conditions of:*
> *(a) the employee's employment contract; or*
> *(b) if the employer is bound by a collective agreement, the collective agreement.*
> *…*
> ***2-74****(1) In this Division, "adjudicator" means an adjudicator selected pursuant to subsection 4-3(3).*
> *(2) Subject to subsection (4), if the director of employment standards has knowledge or has reasonable grounds to believe or suspects that an employer has failed or is likely to fail to pay wages as required pursuant to this Part, the director may issue a wage assessment against either or both of the following:*
> *(a) the employer;*
> *(b) subject to subsection (3), a corporate director.*
> *…*

> ***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.*
>
> *(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to the board on a question of law.*
>
> *(3) A person who intends to appeal pursuant to this section shall:*
>
> > *(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and*
> > *(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.*
>
> *(4) The record of an appeal is to consist of the following:*
>
> > *(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;*
> > *(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;*
> > *(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;*
> > *(d) any exhibits filed before the adjudicator;*
> > *(e) the written decision of the adjudicator;*
> > *(f) the notice of appeal to the board;*
> > *(g) any other material that the board may require to properly consider the appeal.*
>
> *(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.*
>
> *(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.*
>
> *. . .*
>
> ***4-10*** *The director of employment standards and the director of occupational health and safety have the right:*
>
> > *(a) to appear and make representations on:*
> > > *(i) any appeal or hearing heard by an adjudicator; and*
> > > *(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and*
> >
> > *(b) to appeal any decision of an adjudicator or the board.*

**Analysis:**

**Fresh Evidence**

**[10]** Ms. Missick brought to the hearing a stack of documents meant to provide proof of the Adjudicator's evidentiary errors. Upon review of this documentation, Ms. Hincks suggested that much of Ms. Missick's proposed new evidence was already before the Adjudicator in the initial appeal hearing. One of these documents was an email exchange between Ms. Missick and Ms.

Cindy Smith, referenced by the Adjudicator at page 8 of her Reasons for Decision. Another of these documents consisted of a series of price cards for individual grooms. While many of the price cards were entered as evidence, Ms. Missick was dissatisfied with the selective way in which they were entered. Lastly, Ms. Missick sought to tender pictures of signs posted on the glass window of the "groom room" outlining the "SPAW" prices, and at least one of these pictures was already in evidence.

**[11]** As for the genuinely fresh evidence, Ms. Missick sought to tender text messages sent between Ms. Missick and another groomer; and a series of online posts made by one of the groomers, followed by commentary by various members of the public.

**[12]** The principles governing the admission of fresh evidence are well-known, arising from the Supreme Court of Canada's decision in *Palmer v The Queen*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759 ["*Palmer*"], at 760:

> *(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial, (3) The evidence must be credible in the sense that it is reasonably capable of belief. (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.*

**[13]** It is apparent that Ms. Missick had the means to obtain those documents prior to the original hearing. Furthermore, there is no way for the Board to fairly assess the reliability of these documents, having been filed with no accompanying affidavit or other sworn evidence. Without the opportunity for cross examination and reply or rebuttal evidence, the Board's admission of these documents would create a procedural unfairness for Pet Depot. Ms. Missick has already had an opportunity for a hearing on this matter, and she essentially comes before the Board asking that her matter be reheard.

**[14]** Even if the foregoing documents were admissible, it is unclear how they could make any difference to the ultimate determination. The Adjudicator made clear that the groomers set their own prices, including the additional discretionary charges. The display of prices on the groom room window confirms this fact. As for the text message exchange, it contains some concerning statements, but, even if taken as a factual account of the disputed relationship (which is a considerable stretch), it provides only a mixed account at most. Furthermore, all three groomers

testified under oath at the original hearing. Ms. Missick had an opportunity to put this evidence to the groomers at the time of that hearing.

**[15]** For the foregoing reasons, the Board has decided that the proposed documents do not meet the test for fresh evidence.

**Jurisdiction**

**[16]** In the Appeal before this Board, I am restricted to considering questions of law, pursuant to subsection 4-8(1) of the Act. This is the limit of the Board's jurisdiction. It is therefore necessary to consider whether the within Appeal properly raises a question of law, or is confined to matters that are outside of the Board's jurisdiction. The Court in *1536378 Ontario Limited (B-Pro Grooming) v Canada (National Revenue)*, 2007 FCA 334 (CanLII) ["*B-Pro Grooming*"] considered a similar question, that is, whether "certain groomers were employees or independent contractors of B-Pro Grooming", at paragraph 5:

> *The conclusion of whether someone is an employee or an independent contractor is a question of mixed fact and law, in that it involves the application of a legal test to a set of facts. As such, the standard of review is one of palpable and overriding error, unless an extricable error of law can be identified, in which case a standard of correctness is used (Housen v. Nikolaisen, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235 at paragraphs 27-28).*

**[17]** The extricable question of law, in this case, is whether the Adjudicator applied the appropriate legal test in determining that the Appellant was not an employee.

**[18]** Ms. Missick asks the Board to review various, alleged factual errors, but the Board's jurisdiction to review such errors is limited. They must be found to be grounded in errors of law. Factual questions rarely meet the test for a question of law. A finding of fact may be grounded in an error of law only if it is based on no evidence, made on the basis of irrelevant evidence or in disregard of relevant evidence, or based on an irrational inference of fact.[2]

**Standard of Review**

**[19]** This Appeal was heard prior to the release of the Supreme Court of Canada's decision in *Canada v Vavilov*, 2019 SCC 65 ["*Vavilov*"]. After *Vavilov* was issued, the Board provided the parties with an opportunity to file written submissions about the application of the new standard

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[2] *P.S.S. Professional Salon Services Inc. v Saskatchewan Human Rights Commission et al.*, 2007 SKCA 149 (CanLII), (2007), 302 Sask R 161 at paras 60-65 (leave to appeal to SCC dismissed [2008] SCCA No 69).

of review in the present case. The Director did not appear at the hearing of this Appeal, but did file a brief of law in response to this query, taking the position that *Vavilov* does not apply to this Board.

**[20]** Prior to *Vavilov*, reasonableness was the presumed standard of review on an appeal of an adjudicator's decision arising from Part II of the Act.[3] This Board derived the reasonableness standard from its application of the Supreme Court of Canada's decision in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47 ["*Edmonton East (Capilano)*"], in which a slim (5-4) majority rejected the notion that statutory appeal mechanisms rebut the presumption of reasonableness. A review of the reasons of then Vice-Chairperson Mitchell, Q.C. in *Thiele v Hanwel*, 2016 CanLII 98644 (SK LRB) ["*Thiele*"] makes this clear:

> *[28] Subsection 4-8(1) is a generic statutory appeal provision with language that is similar, if not identical, to language found in many federal and provincial statutes across Canada. Very recently the Supreme Court of Canada settled on "reasonableness" as the applicable standard of review in statutory appeals.*
>
> *[29] In Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47 ["Edmonton East (Capilano)"], the Court was called upon to determine the appropriate standard of review for appeals under section 470 of Alberta's Municipal Government Act ["MGA"]. This provision authorized appeals from decisions of a local assessment review board to the Alberta Court of Queen's Bench on "a question of law or jurisdiction of sufficient importance to merit an appeal". Both Alberta's Court of Queen's Bench and Court of Appeal determined that the appropriate standard of review for such matters was correctness.*
>
> *[30] The Supreme Court (5:4) disagreed.[…]*
> *…*
> *[31] The majority went to consider whether a statutory right of appeal or a right to appeal with leave against an administrative tribunal's decision qualifies as a new category of matters subject to a standard of review of correctness. The Alberta Court of Appeal in this case concluded it did. However, Karakatsansis J. disagreed stating at paragraph 28 that such a result ran counter to "strong jurisprudence from this Court". She elaborated at paragraph 29 as follows:*
>
> > *[29] At least six recent decisions of this Court have applied a reasonableness standard on a statutory appeal from a decision of an administrative tribunal (McLean; Smith v. Alliance Pipeline Ltd., 2011 SCC 7, [2011] 1 S.C.R. 160; Bell Canada v. Bell Aliant Regional Communications, 2009 SCC 40, [2009] 2 S.C.R. 764; Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53, [2014] 2 S.C.R. 633; Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, [2015] 3 S.C.R. 147; ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), 2015 SCC 45, [2015] 3 S.C.R. 219).*

[3] *Oil City Energy Services Ltd. v Fadhel*, 2018 CanLII 38250 (SK LRB) at para 13.

> *[32] The majority acknowledged at paragraph 32 that the "presumption of reasonableness may be rebutted if the context indicates the legislature intended the standard of review to be correctness". However, after reviewing the language, and statutory context, of section 407 of the MGA, Karakatsanis J. determined the Alberta Legislature did not intend appeals brought pursuant to that legislative provision be subject to a correctness standard.*
>
> *[33] Applying the Edmonton East (Capilano) analysis here, I find the presumption of reasonableness operates.*

**[21]** In *Edmonton East (Capilano)*, the majority held that a statutory right of appeal does not qualify as a new category of matters subject to the correctness standard of review. The majority in *Vavilov* overturns this holding. In accordance with *Vavilov*, the appropriate standard of review on appeals brought pursuant to a statutory appeal mechanism is determined in "reference to the nature of the question and to this Court's jurisprudence on appellate standard of review".[4]

**[22]** Here, the relevant statutory appeal mechanism exists at section 4-8 of the Act. The Director's argument may arise from the notion that *Dunsmuir* does not govern review within administrative bodies. However, the Board has consistently relied on *Dunsmuir* and related principles in deciding appeals of wage assessment adjudications. By adopting the appellate standards of review, the Board applies the underlying principle of *Vavilov*, which is to demonstrate respect for the choice of the legislature in creating a statutory right of appeal, while being mindful of the existing case law. The correctness standard most closely aligns with the Board's past case law and the relevant statutory framework.

**[23]** As outlined, pursuant to section 4-8, an appeal from an adjudicator's decision on a wage assessment comes to the Board on a question of law. It is therefore incumbent on the Board to apply the standard of correctness in accordance with *Housen v Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235 ["*Housen*"].

**Substantive Issues**

**[24]** The test for determining whether an employment relationship exists, pursuant to Part II of the Act, begins with an application of the following definitions:

> ***2-1*** *In this Part and in Part IV:*
>
> *. . .*
>
> *(f) "employee" includes:*

[4] *Vavilov* at para 37.

> *(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;*
>
> *(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; or*
> *(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;*

**[25]** The definition of "employee" includes the enumerated classifications that are set out therein; the definition of "employer" means any person who satisfies the criteria that are set out therein. In determining whether a person is liable to an employee to pay wages, as an employer, it is necessary to determine whether an employee-employer relationship exists.

**[26]** To this end, clause 2-1(g)(i) directs the Adjudicator to consider whether Pet Depot qualifies as an employer by virtue of having "control or direction of one or more employees". There was no suggestion that Pet Depot was otherwise responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, Ms. Missick, as per clause 2-1(g)(ii) of the Act. Therefore, the only issue was, and remains, whether there are sufficient indicia of control or direction so as to establish an employee-employer relationship. While the Adjudicator did not explicitly consider clause 2-1(g)(i), she considered the factors for assessing control and direction, as set out in *Sagaz*.

**[27]** There, the Supreme Court of Canada set out the appropriate considerations for assessing whether a person is an employee or an independent contractor:

> *47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the*

> *degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.*
> *48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.*

**[28]** In *Saskatchewan (Employment Standards) v Black Gold Boilers Ltd*., 2016 CanLII 98643 (SK LRB) ["*Black Gold*"], a decision on an appeal from a wage assessment adjudication, the Board described the control and direction test identified in subclause 2-1(g)(i) of the Act:

> *59 I turn next to the Director's submission that the Respondent Anderson qualified as an "employer" in these circumstances by virtue of the "control and direction" test identified in subsection 2-1(g)(i) of the SEA. The application of this test is well-known in the employment law context. In McCormick v. Fasken Martineau Dumoulin LLP, 2014 SCC 39, [2014] 2 S.C.R. 108 (S.C.C.), for example, Abella J. described it this way at paragraph 25:*
>
> > *[25] Placing the emphasis on control and dependency in determining whether there is an employment relationship is consistent with approaches taken to the definition of employment in the context of protective legislation both in Canada and internationally: [Guy Davidov, "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection" (2002), 52 U.T.L.J. 357], at pp. 365-71. The Ontario Labour Relations Board, for example, uses a seven-factor test for determining if an employment relationship exists, based on indicia that relate mainly to control and economic dependency. Among other criteria, the Board asks whether the alleged employer exercises direction and control over the performance of work; imposes discipline; has the authority to dismiss employees; bears the burden of remuneration; and is perceived to be the employer (York Condominium Corp., [1977] OLRB Rep. 645; Adams, at p. 6-36.) That said, while significant underlying similarities may exist across different statutory schemes dealing with employment, it must always be assessed in the context of the particular scheme being scrutinized.*
>
> *60 More recently, in Mian and Prior, Re [2016 CarswellSask 704 (Sask. L.R.B.)], LRB File No. 096-16, 2016 CanLII 79632, Chairperson Love referred to the earlier decision of the Saskatchewan Court of Queen's Bench in Saskatchewan (Director of Labour Standards) v. Acanac Inc., 2013 SKQB 21 (Sask. Q.B.). There R.S. Smith J., after reviewing a large body of domestic and international jurisprudence on the question, enunciated the following test respecting the operation of the predecessor to subsection 2-1(g)(i) of the SEA:*
>
> > *[54] 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 consider and 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.*

**[29]** In *Burton Aggregates Ltd. v Saskatchewan*, 2017 CanLII 20063 (SK LRB) ["*Burton*"], another decision made pursuant to the reasonableness standard of review, the Board held that the "control and direction" test is the "correct" test for identifying the employer, as defined by clause 2-1(g):

> *[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.*

**[30]** In *Director of Labour Standards v Acanac Inc*, 2013 SKQB 21 (CanLII), R.S. Smith J. considered an appeal from a decision in which an adjudicator had set aside a wage assessment on the basis that the subject individual was an independent contractor, and not an employee. R.S. Smith J. reviewed the decision for reasonableness, and in so doing relied on the Supreme Court of Canada's decision in *Sagaz,* finding that a fourfold test is the "correct approach" in determining whether there is an employment relationship:

> *[47] The Supreme Court of Canada in Sagaz Industries, supra, has endorsed the elements of the fourfold test in setting out the correct approach to determining the existence of an employment relationship. Writing on behalf of the Court, Justice Major stated at para. 47:*
>
> > *... there is no universal test to determine whether a person is an employee or an independent contractor ... The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.*
>
> *[48] In Royal Winnipeg Ballet v. M.N.R., 2006 FCA 87, 264 D.L.R. (4th) 634, the Federal Court of Appeal added another dimension by holding that the intention of the parties can be more important than the Wiebe Door test suggests, saying that:*
>
> > *[64] ... it seems ... wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the Wiebe Door factors in the light of this uncontradicted evidence.*
>
> *…*
>
> *[54] 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 consider and 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.*

**[31]** In the present case, the Adjudicator considered the whole of the circumstances, including the factors outlined by the Supreme Court in *Sagaz*, such as level of control; ownership of

equipment; hiring of helpers; degree of financial risk and degree of responsibility for investment and management; and, opportunity for profit in performance of tasks. The Adjudicator assessed the extent to which the groomers, including Ms. Missick, had control over the grooming salon and the services that they provided, and, in particular, whether they set their own hours and prices. She examined whether the groomers owned their own tools and were responsible for maintaining and operating at their own expense any equipment provided by Pet Depot. She assessed the degree of financial risk and responsibility for investment and management, noting that the groomers invested their time and money to maintain the salon, had an opportunity to earn commission at higher rates and were paid in a method consistent with independent contractors.

**[32]** In her review of the evidence, the Adjudicator found the following as facts in relation to Ms. Missick:

> *…She negotiated her own contract and commission structure, worked independently from anybody at Pet Depot, set her own hours and prices, used her own equipment or borrowed items from her grooming partners, and was in charge of how or if she wanted to grow her business.*[5]

**[33]** "Based on the totality of the evidence", the Adjudicator concluded that Ms. Missick was an independent contractor and not an employee of Pet Depot. In arriving at this conclusion, she considered the applicable level of control and the opportunity for profits as disclosed in *B-Pro Grooming Academy*, and found that the existing facts were distinguishable from that case. This aspect of the Adjudicator's decision was well-reasoned and logical, and is in line with the existing case law considering whether an individual is an employee or an independent contractor.

**[34]** Moreover, the Adjudicator's conclusion is supported by the facts as found by the Adjudicator. Granted, Ms. Missick's Independent Contractor Agreement is not determinative of the issue; nor is the job ad placed by the company in SaskJobs. The groomers each had overall control over their fees, including the many discretionary fees that Ms. Missick charged to her clients. At least one of the groomers serviced primarily her own clients, who had followed her to Pet Depot when she moved there. Ms. Missick negotiated her own commission rate. She was able to hire an assistant. She, and all of the groomers took on the primary financial risk. Out of concern for their reputations, the groomers covered for Ms. Missick when she showed up late. Overall scheduling was left to the groomers' discretion. The equipment was primarily the

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[5] At 11.

groomers' responsibility. The groomers performed renovations on the space at their own expense, and without seeking approval or input. Ms. Missick chose whether to invest in her business and whether to create business cards, and she chose not to.

**[35]** Ms. Missick's main concern with the Adjudicator's decision pertains to issues of credibility and the weighing of evidence. Not only does the Board have a narrow jurisdiction to review questions of fact, but the Adjudicator has the great advantage of assessing the witnesses' testimony first-hand. Here, the Adjudicator weighed the evidence of four witnesses, including three groomers who "vehemently" denied their suggested employee status. In the end, the Adjudicator believed the evidence of the three remaining groomers, as well as Ms. Hincks.

**[36]** Ms. Missick has provided no basis upon which the Board can conclude that the Adjudicator drew conclusions based on no evidence, on the basis of irrelevant evidence or in disregard of relevant evidence, or based on an irrational inference of fact. Ms. Missick states that the Adjudicator misconstrued aspects of the evidence, but none of these alleged mistakes would have had a material effect on the ultimate conclusion. In relation to the email exchange with Ms. Cindy Smith, it is apparent that the Adjudicator was not persuaded by the mixed messages found in this one email exchange. On the issue of control, the Adjudicator found as a fact that "Darlene…would not have even known what was going on with Shauna except that the other groomers approached her for help".[6] Based on her review of the evidence, she believed the groomers' testimony that Ms. Hincks was not involved in managing the salon.

**[37]** The analysis of whether there was an employer-employee relationship involves a review of the totality of the relationship. Outside of the fourfold test, there is no definitive or exhaustive set of criteria; instead, the assessment is guided by common characteristics that are indicative of the quality of the relationship. The central question is whether the Adjudicator has conducted a "focused examination of the true nature of the components of the relationship" and then, having done so, whether the Adjudicator's findings coincide with the facts as found.[7] Each case must be assessed on its own merits. In this case, the Adjudicator's decision was correct.

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[6] At 6.
[7] See, *Acanac* at para 86.

**[38]** For the foregoing reasons, the Adjudicator's Decision is affirmed.

**DATED** at Regina, Saskatchewan, this **27th** day of **February, 2020.**

**LABOUR RELATIONS BOARD**

Barbara Mysko
Vice-Chairperson