Saskatchewan
Labour Relations Board

STIMCO SERVICES INC., Appellant v ROBERT STEMAN and DIRECTOR OF EMPLOYMENT STANDARDS, GOVERNMENT OF SASKATCHEWAN, Respondents

LRB File No. 174-20; June 14, 2021

Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For the Appellant, Stimco Services Inc:	Brad Dul
The Respondent, Robert Steman:	Self-Represented
Counsel for the Respondent, Director of Employment Standards, Government of Saskatchewan:	Steven Wang and Jesse Van Eaton, Articling Student

Notice of Appeal – Wage Assessment Appeal by Employer – Appeal Dismissed by Adjudicator – Section 4-8 of *The Saskatchewan Employment Act* – Right to Appeal to Board on Question of Law – Request to Call Witness Evidence – No Procedural Unfairness – Issue of Jurisdiction Raised First Time on Appeal – Appeal Dismissed.

REASONS FOR DECISION

Introduction:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an appeal of a decision of an adjudicator. The adjudicator's decision pertains to a wage assessment issued pursuant to section 2-74 of *The Saskatchewan Employment Act* [Act] on June 11, 2020, in favour of the employee, Robert Steman [Steman].[1] The Employer, Stimco Services Inc., appealed the wage assessment pursuant to section 2-75 of the Act.

[2] On September 23, 2020, the adjudicator was selected, pursuant to subsection 4-3(3) of the Act, to hear the appeal. A hearing was held on the appeal on October 28, 2020. The adjudicator's decision, upholding the wage assessment, was issued on November 5, 2020. The appeal of that decision to the Board was filed on November 16, 2020.

[3] On the initial appeal, the Employer claimed that Steman was charging the company for his lunch time, contrary to section 2-14 of the Act, and that Steman was adding extra hours to his

[1] Wage Assessment No. 1-000418.

time sheet. As evidence, the Employer adduced a chart comparing apparent hours claimed by various employees for the purpose of demonstrating that Steman was padding his hours.

[4] Now, the Employer says that it wishes to call employees as witnesses to testify to Steman's padding of his hours and that by doing so, it expects to demonstrate good reason for the case to be "dismissed". The Employer outlines the basis for this request in the Notice of Appeal:

> *Stimco Services was not aware that a written explanation from an Employee was not able to be used as evidence in this matter. Stimco Services would like to bring the Employees forward to testify to the padding of hours by Mr. Steman.*
>
> *…*
>
> *We believe by bringing the Employees Brad Mayer and Brody Haygarth to testify to the padding of hours that you will see that two wrongs don't make a right and will dismiss the case. Stimco has no written Company policy that states lunches/dinner time is paid for, nor is there a company policy that states that an Employee gets paid eight hours a day.*

[5] Steman did not file a formal reply to the Notice of Appeal, but expressed to the Board some concern about having to take another day off work to attend the hearing. At the hearing, he summarized earlier evidence with respect to the time sheets, in the form of argument.

[6] The Director of Employment Standards [Director] opposes the appeal overall. The Director's position is straightforward. According to the Director, the Employer has not raised a question of law and therefore the Board has no jurisdiction to consider the matter. The appeal should be dismissed.

Analysis and Decision:

[7] This appeal was brought pursuant to section 4-8 of the Act, which limits the right to an appeal to a question of law. The standard of review in respect of an appeal on a question of law is correctness.

[8] The Director acknowledges, as per *Canadian Natural Resources Limited v Campbell*, 2016 SKCA 87 (CanLII) [*CNR*] (para 12), that a question of fact may be grounded in an error of law if the finding is based on no evidence or is made on the basis of irrelevant evidence or in disregard of relevant evidence, or is based on an irrational inference of fact. According to the Director, there is no indication that the adjudicator erred in any of the ways described in *CNR*.

[9] The Board finds that the Notice of Appeal raises a question of law only to the extent that it suggests that the adjudicator made the decision in disregard of relevant evidence, that is, the testimony of the employees, or to the extent that it raises an issue of procedural fairness.

[10] The Director argues that the Employer's request to call witnesses raises a question of fresh evidence. The Director relies on the description of the test for admitting fresh evidence as articulated in *M.H. v A.B*, 2019 SKCA 135 (CanLII), relying on *R v Palmer*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759 [*Palmer*]:

> *[16] In order for fresh evidence to be admitted, it must satisfy the test for admission set out in R v Palmer, 1979 CanLII 8 (SCC), [1980] 1 SCR 759 [Palmer]. Fresh evidence will only be admitted if:*
>
> > *(a) it could not, even with the exercise of due diligence, have been adduced at trial;*
> >
> > *(b) it is relevant in the sense that it bears upon a decisive, or potentially decisive, issue in the action;*
> >
> > *(c) it is credible, in the sense that it is reasonably capable of belief; and*
> >
> > *(d) it is of such a nature that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.*

[11] According to the Director, the Employer has provided no adequate explanation for why the witnesses were not brought before the adjudicator, relying instead on its assertion that it did not know that it had to call witnesses.

[12] At the hearing of the initial appeal, three witnesses testified. The employee testified on his own behalf and two witnesses testified on behalf of the Employer.

[13] In the decision, the adjudicator states at 8,

> *The employer confirmed that they were not intending to call Brody Haygarth and Brad Mayer as witnesses.*

[14] Brody Haygarth and Brad Mayer are the two employees that the Employer is now proposing to call as witnesses.

[15] The adjudicator then demonstrated that he had weighed the evidence before him, and had turned his mind to the Employer's decision not to call additional witnesses, at 13-4:

> *Now the employer states that the time sheets are inaccurate for the hours shown worked by the employee for the days he worked in the shop. And that some of the overtime claimed*

> *by the employee, when working in the shop or in the field, was not actually worked by the employee.*
>
> *The employer did not provide any independent evidence in this regard….*
>
> *The employer could easily have called one or more of the employees that worked with Mr. Steman in the field (Brody Haygarth and Brad Mayer), to confirm the discrepancy of hours as set out in the documents attached to the appeal, however, the employer [chose] not to call them as witnesses.*

[16] The adjudicator found that the Employer kept time sheets, and therefore records, of paying Steman for eight hour days. The time sheets were signed and accepted by the Employer. Now the Employer says that the time sheets it signed were inaccurate. The Employer did not provide any independent evidence of this. Steman testified that payment of eight hour days was a policy implemented because he was using his own tools for the benefit of the company.

[17] The adjudicator preferred Steman's evidence over that of the Employer (at 14):

> *…I accept that the employee was to be paid the minimum of 8 hours per day in the shop, whether he worked it or not, and that the overtime claimed in the time sheets was actually worked by the employee, and not padded.*

[18] He concluded that the Employer had not submitted sufficient evidence to establish evidence to the contrary as required by subsection 2-75(9) of the Act.

[19] The Employer has not filed a formal application for fresh evidence; however, the Employer made clear that at the heart of this appeal is the evidence that would arise from calling the employees as witnesses. The Employer suggested that it was not aware that the adjudicator would not rely on a written statement, but instead required testimony in person. At its core, the Employer's appeal is a request for a second opportunity to present evidence at the hearing of the initial appeal. An appeal to this Board is not an opportunity to correct mistakes made by the parties in the prior proceedings. There is no evidence that the employees could not have been called as witnesses at the hearing, and furthermore, it appears that the Employer had the opportunity to call them and chose not to.

[20] Moreover, there is no suggestion or evidence that the adjudicator conducted the hearing in a manner that was procedurally unfair. Again, the Employer had the opportunity to call witnesses, and did call witnesses to testify to issues raised by the appeal.

[21] Furthermore, the adjudicator relied on the fact that the time sheets were signed by the Employer. The adjudicator found that the Employer's suggestion that there was no policy allowing

for paid lunch was not credible, given the fact that the time sheets were signed. He preferred the evidence of Steman over that of the Employer and accepted that he was to be paid the minimum eight hours per day.

[22] Therefore, there is no indication that the adjudicator erred by disregarding relevant evidence, and no indication of an error of law.

[23] Lastly, the Employer raised an issue with the Board that was not included in the Notice of Appeal, or raised at any time during the prior proceedings. The issue relates to jurisdiction. According to the Employer, the company is engaged in interprovincial activities; therefore, this is a matter that automatically falls under federal jurisdiction.

[24] It is generally inappropriate to raise new issues for the first time on appeal; issues should be raised at the first opportunity so that they can be addressed in a timely manner. The Employer has provided no explanation for why it could not have raised this issue during the prior proceedings, whether at the time of the wage assessment or before the adjudicator. The Board notes that there is nothing in the record that could have alerted the adjudicator to any jurisdictional issue. The nature of the business, as described on the provincial Corporate Registry profile is oil and gas extraction.

[25] It would create a serious injustice to the other parties to re-open the matter for consideration of division of powers at this stage in the process.

[26] Furthermore, the Employer is wrong to suggest that interprovincial activities automatically place a company within federal jurisdiction. The Director correctly pointed out that there is a presumption of provincial jurisdiction over labour relations: *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union*, [2010] 2 SCR 696, 2010 SCC 45 (CanLII); as there is over conditions of employment: *Construction Montcalm Inc. v Min. Wage Com.*, 1978 CanLII 18 (SCC), [1979] 1 SCR 754.

[27] The functional test, developed in *Four B Manufacturing Ltd. v United Garment Workers of America*, 1979 CanLII 11 (SCC), [1980] 1 SCR 1031, applies. In applying that test to determine whether the presumption has been rebutted, it is necessary to examine the nature, operations and habitual activities of the entity in question. The Employer has presented no evidence or reason to suggest that there is any likelihood that the presumption would be rebutted, nor evidence or reason to believe that it has raised a serious challenge to provincial jurisdiction.

[28] Under the circumstances, the onus was on the Employer to raise the jurisdictional issue in the first instance, and to present evidence with respect to the nature, operations and habitual activities of the entity in order to establish its claim to federal jurisdiction. It has not done so; nor has it raised the issue in its Notice of Appeal before the Board.

[29] For the foregoing reasons, the appeal in LRB File No. 174-20 is dismissed, and the adjudicator's decision in LRB File No. 109-20, dated October 28, 2020, is affirmed.

DATED at Regina, Saskatchewan, this **14th** day of **June, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson