WISH UPON A STAR EARLY LEARNING CENTRE INC., Appellant v BRETT FERTUCK, LYNDSEY PAWLIW, and DIRECTOR OF EMPLOYMENT STANDARDS, GOVERNMENT OF SASKATCHEWAN, Respondents

LRB File No. 176-20; May 31, 2021
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Appellant, Wish Upon A Star Early Learning Centre Inc.:	Grant Schmidt
The Respondents, Brett Fertuck and Lyndsey Pawliw:	Self-Represented
Counsel for the Respondent, Government of Saskatchewan, Director of Employment Standards:	Steven Wang

Section 4-8 of *The Saskatchewan Employment Act* – Appeal from Decision of an Adjudicator – Wage Assessment Appeal – Timeliness – Section 9-9 of *The Saskatchewan Employment Act* – Electronic Service – Representation of Director of Employment Standards – Appeal Remitted.

REASONS FOR DECISION

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an appeal brought pursuant to section 4-8 of *The Saskatchewan Employment Act* [Act]. The appellant is Wish Upon a Star Early Learning Centre Inc. [Employer]. The decision under appeal relates to an underlying appeal of a wage assessment.[1] The current Appeal was filed on November 20, 2020 and an amended Notice of Appeal was filed on November 23, 2020. The Director of Employment Standards [Director] has filed a reply and an amended reply. No submissions have been made by the employees.

[2] The underlying appeal was brought pursuant to section 2-75 of the Act. The decision of the adjudicator on that appeal was issued on November 12, 2020. In that decision, the adjudicator found that the appeal and the required deposit were filed out of time, and on that basis, declined to proceed to a hearing.

[1] LRB File No. 118-21 (wage assessment no. 1-000417).

[3] Now, the main ground of appeal is that the adjudicator failed to correctly apply section 9-9 of the Act which provides for electronic service of a document. The Employer says that there was no email address for service until July 2, 2020, and therefore the wage assessment could not have been served on the Employer until that date. When the Employment Standards Officer, on behalf of the Director, emailed the Employer attaching the wage assessment, he communicated that the Employer would have 15 business days from the confirmation of receipt to appeal the wage assessment. The Director and the Employer later agreed that the appeal was properly before the adjudicator. But then, the Director later took the position that the appeal was out of time.

[4] The Employer argues that the law of estoppel applies given the Director's clear representation that the Employer had 15 business days from the confirmation of receipt of the wage assessment. As the 15 business day timeline begins to run from the date of service, the appeal and the deposit were filed on time. The Employer asks that the decision be overturned and, due to serious errors, that it be referred to a new adjudicator for the purpose of conducting a hearing.

[5] The Director now takes no position with respect to the grounds of appeal, but does not oppose the requested relief, and does not oppose the matter being referred to a new adjudicator. No submissions were made by the employees.

[6] Pursuant to section 4-8, a decision of an adjudicator may be appealed to the Board on a question of law. The standard of review on a question of law is correctness. On this appeal there are two questions of law. First, did the adjudicator err in interpreting the principles of timeliness applicable to an appeal that is served pursuant to clause 9-9(2)(f) of the Act? Second, did the adjudicator err by overlooking the principle of estoppel in deciding that the appeal was not properly before him?

[7] The right to appeal a wage assessment arises from section 2-75 of the Act:

> ***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.

[8] The relevant timeframe for filing a notice of appeal is 15 business days after the date of service of a wage assessment.

[9] The wage assessment, and the covering letter to the Employer enclosing the wage assessment, are dated June 9, 2020. Both documents provide a version of the following information:

You are hereby directed to pay the total amount claimed within 15 business days after the date of service of this Wage Assessment or commence an appeal pursuant to section 2-75 of The Saskatchewan Employment Act…if you do not appeal this Wage Assessment to the Director of Employment Standards within 15 business days and if you do not remit the required deposit …with your appeal (see section 27 of The Employment Standards Regulations) the Wage Assessment will become a judgment against you.

[10] Enclosed with the wage assessment were the relevant provisions of the Act and *The Employment Standards Regulations*.

[11] In the decision under appeal, the adjudicator observed that the wage assessment was emailed to the Employer on June 9, 2020, that 15 business days from June 9, 2020 expired on June 30, 2020, and that the appeal and deposit arrived by mail in the Yorkton Employment Standards office on July 7, 2020.

[12] Section 2-28 of *The Legislation Act* provides the following with respect to the computation of time:

> ***2-28****(1) A period expressed in days and described as beginning or ending on, at or with a specified day, or continuing to or until a specified day, includes the specified day.*
>
> *(2) A period expressed in days and described as occurring before, after or from a specified day excludes the specified day.*
>
> *(3) A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens.*
>
> *(4) In the calculation of time expressed as a number of clear days, weeks, months or years or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days are excluded.*
>
> *(5) A time limit for the doing of anything that falls or expires on a holiday is extended to include the next day that is not a holiday.*
>
> *(6) A time limit for registering or filing documents or for doing anything else that falls or expires on a day on which the place for doing so is not open during its regular hours of business is extended to include the next day the place is open during its regular hours of business.*
> *…*

[13] Assuming that the wage assessment was served on June 9, 2020, it was correct for the adjudicator to identify June 30, 2020 as being the last date on which the appeal could be filed. The Employer argues that it was not served with the wage assessment on June 9, 2020 because it had not yet filed an email address and therefore its email address was not an address for service according to the Act. Rather, the wage assessment was not served until July 2, 2020 (or July 3, 2020) when the Employer acknowledged service as instructed by the Director on June 9, 2020. The relevant instructions read:

> *Good morning Joanne. Attached is the Wage Assessment that you can present to the board. Once you have confirmed receipt of this email you will have 15 business days to appeal the amount of the Wage Assessment. …*

[14] Having received these instructions, the lawyer for the Employer acknowledged receipt of the wage assessment by letter to the Director on June 30, 2020.

[15] After the appeal was filed, the adjudicator was selected to hear the appeal pursuant to subsection 4-3(3) of the Act. This occurred on August 11, 2020. The subsequent events provide some insight into why, what might appear to be a relatively straightforward matter, has become less so. Following his selection, the adjudicator reached out to the parties to inquire about compliance with section 2-75 of the Act, indicating that, first, an email was used for service of the wage assessment and, second, the appeal was filed more than 15 business days after the date that the email was sent. The adjudicator asked whether the parties agreed that the matter was properly before him.

[16] The Director, in response, agreed that the matter was properly before the adjudicator, and so the adjudicator carried on. The parties consented to a delay in scheduling due to personal matters. Then, on October 20, 2020, the Director wrote to the adjudicator opposing the appeal on the basis that it had been filed late. The adjudicator, not expecting this turn of events, advised that he would be providing a decision on the "validity of the appeal" upon receipt of the Employer's reaction. The adjudicator reached out to counsel for the Employer and received no reply. After about 12 days with no response, he proceeded to prepare the decision.

[17] In the decision, the adjudicator states:

> *The documents revealed that the wage assessments were e-mailed to Wish Upon a Star on June 9, 2020. The appeal and deposit generated by Mr. Grant Schmidt arrived by mail in the Yorkton Employment Standards office on July 7, 2020.*
>
> *I advised the parties that 15 business days from June 9, 2020 expired on June 30, 2020. Further, I advised that I had a concern over the use of e-mails for communication when the strict timelines are to be adhered.*
>
> *On August 20, 2020 I asked the parties if they wanted to debate the question of timeliness or would they agree the matter was properly before me and a hearing scheduled.*
>
> *Both Mr. G. Schmidt and Mr. D. Schmidt agreed that the appeals were properly before me and a hearing could be scheduled.*
>
> *[intervening events]*
>
> *On October 20, 2020 I received an e-mail from Employment Standards Officer Dale Schmidt. The e-mail provided a written submission on behalf of the Director of Employment*

> *Standards and an Adjudicated Decision made by Adjudicator Leslie Sullivan on November 7, 2019.*

[18] The Employer relies on section 9-9 of the Act, as recently amended, which now explicitly provides for electronic service if an address for service in a proceeding has been filed respecting the person to be served:

> ***9-9****(1) In this section, "director" means the director of employment standards appointed pursuant to Part II, the director of occupational health and safety appointed pursuant to Part III or the director of labour relations appointed pursuant to Part VI.*
>
> *(2) Unless otherwise provided in this Act, any document or notice required by this Act or the regulations to be served on any person other than the director may be served:*
> *…*
> *(f) by sending a copy of the document or notice by electronic transmission if an address for service in a proceeding has been filed respecting the person to be served.*

[19] The Employer also relies on the principle of estoppel, and specifically on the holding in *Maracle v Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 SCR 50, captured in the following passage, at 57:

> *The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In John Burrows Ltd. v. Subsurface Surveys Ltd., 1968 CanLII 81 (SCC), [1968] S.C.R. 607, Ritchie J. stated, at p. 615:*
>
> > *It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.*

[20] The Employer suggests that the principle of estoppel applies to administrative tribunals, and for this proposition refers to an article written by Professor Paul Daly[2] about the implications for administrative tribunals of *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 (CanLII), [2013] 2 SCR 125 [*Penner*] and *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 (CanLII), [2011] 3 SCR 422.

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[2] Paul Daly, "Does Penner Overrule Figliola? What's the Canadian law on Issue Estoppel?" (October 26, 2014).

[21] In the Board's view, the adjudicator's decision relies on well-established principles related to the timeliness of statutory appeals. A leading decision, which informed the adjudicator's decision, is *Brady v Jacobs Industrial Services Ltd,* 2016 CanLII 49900 (SK LA) [*Brady*]. *Brady* outlines the salient principles, as follows:

> *49. As an adjudicator under the Act, I only have the authority delegated to me by the Act. If authority is required for this proposition, I refer to Atco Gas and Pipelines v. Alberta [2006] S.C.R. 140 where, at paragraph 35, the Supreme Court of Canada says that tribunals created by statute cannot exceed the powers granted to them by their enabling statute, they must adhere to the statutory jurisdiction and they cannot trespass in areas where the legislature has not assigned them authority. I have already noted above that the statutory requirements for an appeal are mandatory, including the time limit within which to file an appeal. Any authority to permit me to extend or waive the time limit for the appeal must be found in the Act.*
>
> *50. The law in Saskatchewan is clear that any substantive right to extend the time for an appeal must be found in the statute creating the right of appeal: Jordan v. Saskatchewan (Securities Commission), SK CA, March 21, 1968; Wascana Energy Inc. v. Rural Municipality of Gull Lake No. 139 et al., 1998 CanLii 12344 (SK CA).*
>
> *51. There is no express provision anywhere in the Saskatchewan Employment Act that gives authority to the adjudicator or to anyone else to extend or waive the time limits for an appeal. s. 4-4(2) says an adjudicator may determine the procedures by which an appeal or hearing is to be conducted. This provision deals only with an adjudicator's ability to control procedural matters in an appeal hearing and does not allow an adjudicator to extend the time for filing the appeal. A delegated power that allows a decision-maker to make rules of practice and procedure does not extend to allowing the decision-maker to alter a statutory time limit: Bassett v. Canada (Government) et al., 1987 CanLii 4873 (SK CA).*
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> *52. s. 4-4(5) says a technical irregularity does not invalidate a proceeding before or by an adjudicator. Failure to comply with a statutory time limit, however, is not a technical irregularity. It is a substantive matter that goes to jurisdiction: Baron Metal Industries Inc. [1999] OLRB Rep May/June 363. Furthermore, at the point the appeal is filed, it is an appeal filed with the Director, so at that point it is not yet a proceeding before or by an adjudicator.*

[22] The adjudicator correctly interpreted these principles, generally. However, in interpreting these principles, he did not consider the effect of the Director's representation. The Director made clear that the wage assessment would not be considered served until receipt had been confirmed. The Employer acted on that representation and acknowledged service at a later date. The Employer's reliance on that representation has now operated to its detriment.

[23] According to clause 9-9(2)(f), whether electronic service was effected depends on whether an address for service in a proceeding had been filed respecting the person to be served. The adjudicator found that service occurred but in doing so, either overlooked the requirement that an

address for service was to be filed respecting the person to be served or concluded without specifying that the address to which the email was sent was the address that was filed.

[24] The Director's email of June 9, 2020 seems to acknowledge that an address had not been filed respecting the person to be served. Alternatively, the Director made a mistake, and meant to communicate, incorrectly, that the assessment was not served until it was acknowledged. Either way, the Director communicated that the appeal period had not yet begun to run. The Employer relied on that representation and acknowledged service at a later date. The Director later sought to rely on its own misrepresentation by taking the position that the appeal was out of time.

[25] Whatever the cause, there is a fundamental unfairness in the Director's attempt to benefit from its earlier representation – one which the Employer relied upon and which reasonably could be interpreted to mean that the requirements of clause 9-9(2)(f) had not been satisfied, that is, an email address had not been filed. It is therefore understandable that the Director has chosen not to take a position on this appeal.

[26] The adjudicator did not take the effect of this representation into account in deciding that the requirements of section 9-9 had been met, and therefore erred in law.

[27] To be clear, this does not amount to a finding that there was a technical irregularity that should have been remedied pursuant to subsection 4-4(5) of the Act, as suggested by the Employer.

[28] The Employer is not free of blame for the manner in which the events have unfolded. In particular, the Employer could have acted in a more responsive manner. If the Employer had responded when asked, it would have had an opportunity to bring the estoppel principles to the adjudicator's attention. However, given the Director's approach, and given the unexpected turn that the case had suddenly taken, the adjudicator could have provided a better opportunity to the Employer to make submissions.

[29] The Employer asks that, due to the adjudicator's failure to adjudicate, this matter be referred to a new adjudicator for the purpose of conducting a hearing. The selection of an adjudicator is made pursuant to subsection 4-3(3) of the Act:

> *(3) On being informed of an appeal or hearing pursuant to subsection (2) and in accordance with any regulations made pursuant to this Part, the registrar shall select an adjudicator.*

[30] This case does not involve a failure to comply with the deadlines set out in section 4-7 of the Act, nor did the Employer raise section 4-7 in argument. The adjudicator made a decision with respect to whether the appeal was properly before him and decided that it was not; the Employer has appealed that decision. A decision has been issued; therefore, there is no failure to adjudicate.

[31] The Employer brought this appeal pursuant to section 4-8 of the Act. Subsection 4-8(6) sets out the Board's authority on an appeal:

> *(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.*

[32] Section 4-8 does not give the Board authority to order the selection of a different adjudicator. The Employer has suggested that, if a court had been hearing this matter it would have been obvious that remitting the matter back to the same adjudicator was inappropriate. However, the Board is not a court. Being a tribunal, the Board has only the authority delegated to it by the Act: *Atco Gas and Pipelines v Alberta* [2006] SCR 140.

[33] Even if the Board's interpretation of subsection 4-8(6) is incorrect, there is no basis for ordering a re-selection in this case. The Employer cites the adjudicator's misidentification of the date of his selection as a ground of appeal, and as further evidence of a compounding of errors, but such an error is immaterial. And, although a material error has been found, errors happen. The circumstances of this case, while seemingly straightforward, were complicated by the conduct of the parties. There is nothing on the record to indicate that the adjudicator will do anything other than consider the parties' positions and the issues objectively.

[34] Accordingly, pursuant to clause 4-8(6)(b) of the Act, the matter is remitted to the adjudicator for amendment of the decision such that the Notice of Appeal and the deposit are found to have been filed within the statutory 15 business day timeline. The matter will proceed to be heard according to the selection made pursuant to subsection 4-3(3) of the Act on August 11, 2020.

DATED at Regina, Saskatchewan, this **31st** day of **May, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson