

**DECISION OF ADJUDICATOR  
IN THE MATTER OF AN ADJUDICATION  
PURSUANT TO SECTION 2-75 AND 4-6 OF  
THE SASKATCHEWAN EMPLOYMENT ACT**

**COMPLAINANT:**                   **GURSHARAN SINGH,  
Represented by Codi Chudyk, Lawyer for  
the Complainant**

**Lorne Deason, Employment Standards  
Officer**

**RESPONDENTS:**               **A3J CONSTRUCTION LTD. and  
JASWANT SINGH MANN, being a  
director of A3J Construction Ltd.**

**DATE OF HEARING:**       **May 14, 2014**

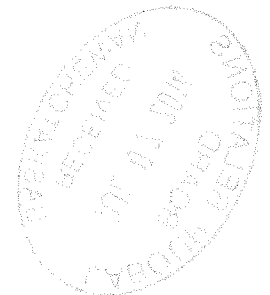
**PLACE OF HEARING:**      **3<sup>rd</sup> Floor Boardroom  
1870 Albert Street  
Regina, Saskatchewan**

**I.       INTRODUCTION**

This is an appeal by the Respondents, A3J Construction Ltd. ("the Company") and Jaswant Singh Mann ("Jaswant" or "the Respondent"), being a director of the Company, of a Wage Assessment issued by the Director of Labour Standards Branch on August 13, 2013 directing the Respondents to pay the sum of \$15,658.86 to the Complainant, Gursharan Singh ("Gursharan" or "the Complainant").

On May 14, the following individuals were present at the hearing:

Jaswant Singh Mann, Respondent and director of the Company;  
John Shergill, friend of the Respondent;  
Gursharan Singh, Complainant and former employee of the Company;  
Zia Aftab, Translator for the Complainant;  
Codi Chudyk, Lawyer for the Complainant;  
Lorne Deason, Employment Standards Officer; and  
Darla Shmanka, Employment Standards Officer (observer).



This appeal was originally scheduled to be heard on January 22, 2014; however, the Respondent contacted the Ministry of Labour Relations and Workplace Safety on January 16 and advised that he was unable to attend the hearing due to a medical condition. He provided a doctor's note dated January 13 indicating that he was under stress and required 2 weeks' rest.

A further doctor's note was provided on or about January 24 indicating that the Respondent required an additional 10-15 days of rest. On February 12 another doctor's note was produced indicating that he again required 2 weeks' rest. The Registrar of Appeals (as she then was) made several attempts to contact the Respondent. On March 10, the Respondent advised the Registrar that he was not well and would be visiting his doctor again the next day. Subsequently, the Respondent provided a doctor's note dated March 11 indicating that he required another two weeks' rest.

After multiple unsuccessful attempts to obtain potential hearing dates from the Respondent in March and April, the Registrar scheduled the appeal for May 14, 2014. The hearing notice dated April 15, 2014 included the following paragraph:

"Please Note: Given the Number of adjournments that have already been requested by Jaswant Singh Mann, the adjudicator has indicated that she intends to proceed on Wednesday, May 14, 2014, without further delay. No further doctor's notes will be accepted in support of adjournment requests. If Jaswant Singh Mann requires additional time due to medical concerns, he, or someone on his behalf, must attend the hearing and provide further and better medical evidence in support of an adjournment request. If Jaswant Singh Mann, or someone on the employer's behalf, does not attend the hearing on Wednesday, May 14, 2014, the adjudicator will proceed with the hearing and make a decision as though the employer were present."

I reference the procedural history of this matter in order to explain why I chose to avoid a further adjournment of this appeal despite allowing the Respondent one week following the hearing to file copies of missing pay stubs for October, November and December, 2012 and his calendar containing the record of his employees' hours. I then provided the Complainant and Respondent with one additional week to provide any written arguments. I advised the parties that the lack of opportunity for cross-examination would go to the weight that I would give these particular documents.

## **II. PRELIMINARY MATTERS/OBJECTIONS**

There were no objections.

The Wage Assessment was issued by the Director of Labour Standards under *The Labour Standards Act*. Before the appeal was heard, a new act was proclaimed, namely *The*

*Saskatchewan Employment Act* (“the Act”). The Act made no substantive changes to *The Labour Standards Act* in relation to meal breaks, overtime pay, vacation pay, public holiday pay or an employer’s responsibility to keep records.

### III. THE DISPUTE

On August 13, 2013 the Director of Labour Standards Branch issued a Wage Assessment against the Respondents in the amount of \$15,658.86 with respect to Gursharan Singh. The Wage Assessment directed the Respondents to pay this sum to the Complainant or commence an appeal pursuant to section 62 of *The Labour Standards Act*.

On August 20, 2013, KMP Law on behalf of the Respondents commenced an appeal of the Wage Assessment by sending a letter to the Registrar of Appeals, Labour Standards Division. The grounds of appeal are set out in the letter (“Notice of Appeal”) as follows:

“This appeal is based on evidence that the employee has misrepresented his work hours to Labour Standards. In particular the employer has evidence to establish that the employee misrepresented the hours he started each morning and that he included the time he was transported to job sites, before and after work.”

The sum claimed in the Wage Assessment represents unpaid regular wages, overtime pay, public holiday pay and annual holiday pay.

### IV. THE FACTS

At the beginning of the hearing, the parties agreed on the following basic facts:

- A3J Construction Ltd. is a legally registered company in Saskatchewan and Jaswant is its sole director.
- The Company employed Gursharan as a general construction labourer from October 22, 2012 to April 12, 2013.
- The Company employed Gursharan on a full-time basis.

The Respondents and Complainant tendered evidence by way of testimony (affirmed) and documents. Jaswant Singh Mann testified for the Respondents and Gursharan Singh testified for the Complainant. The following exhibits were entered into evidence on behalf of the parties:

#### **EMPLOYER**

ER1 – Copy of Written Statement prepared and signed by Kipanpreet Dari (1 page).

ER2 – Copy of Written Statement prepared and signed by Farwinder Dhaliwal (1 page).

ER3 – Copy of employer’s summary of hours worked by Gursharan (7 pages).

### **EMPLOYEE**

EE1 – Copy of pay stubs for pay periods 01/01/2013 – 01/04/2013 (4 pages).

EE2 – Copy of Labour Standards Inspection Report (2 pages).

EE3 – Gursharan’s notebook including record of hours worked.

Jaswant Singh Mann’s testimony is summarized as follows:

- John Shergill (“John”) introduced him to Gursharan.
- Gursharan provided inaccurate work sheets to John. He represented that he was an electrician.
- Gursharan worked as a labourer.
- The start and end times for work provided by Gursharan are incorrect. His employees do not start working at 8:00 a.m. in the winter. They do not start that early even in the summer.
- Gursharan lists finish times of 9:30 or 10:30 p.m. His employees never worked that late, summer or winter.
- Gursharan was a labourer and did not work alone. He was a helper. When others were on lunch breaks, Gursharan was too.
- He brought statements from co-workers of Gursharan’s, Kipanpreet Dari (ER1) and Farwinder Dhaliwal (ER2), to establish that start and end times were not what Gursharan has said, that employees took 1 hour lunch breaks and two 15 minute coffee breaks per work day, and that the only Saturdays worked by Gursharan were when he was making up for weekdays he had missed.
- His company is a construction company. He hires the employees. He pays the employees.
- He asks his foreman to advise him of the hours worked by the employees and then he fills out the time sheets. He asks the foreman who was there each day, the start time and finish time. He does not receive anything in writing from the employees.
- He pays his employees once per month.
- Gursharan took his paychecks without comment.
- Gursharan took tools from work and started working somewhere else. He did not give any notice that he was quitting.
- He checked in at his job sites so he knew when his employees were working.
- He sometimes drove Gursharan to work but not often.

- Gursharan spoiled many jobs and they had to spend extra time fixing what Gursharan did not do correctly.
- Gursharan would have received 6 or so paychecks.
- He has some full-time employees and some part-time employees and has a few jobs going at a time. He may have 6 or 7 jobs on the go at time and there could be 3-5 employees on each site.
- He provided his employees with a 1/2 hour lunch break although his employees take 1 hour. He also provides them with two 15-minute coffee breaks.
- He was at the job sites sometimes but he always checked with his employees at the end of the day to find out what time they finished.
- His employees did not have the option to keep working when others were not working. The understanding was that his employees worked together and took their breaks together.
- The workdays were Monday to Friday, 8 hours per day.
- The only occasions where employees would work on weekends was when they had traded for a weekday.
- He cannot be at the sites all of the time. He runs the Company, picks up materials, etc.
- ER3 is a summary he prepared based on records kept in his calendar. At the end of each day, he would check with the foreman and find out the hours worked and then he would record the hours in his calendar.
- He did not bring his calendar with him to the hearing. He is not a lawyer and did not realize he should bring it to the hearing.
- He did not bring copies of Gursharan's paychecks or stubs with him to the hearing.
- Gursharan worked with different foremen.
- None of his employees work overtime because he cannot afford it. He does not allow it.
- He does have an accountant for the Company.
- He did not pay public or annual holiday pay to Gursharan because he had not yet been employed for a year.
- They saw Gursharan working on somebody else's house on April 12, 2013. They phoned Gursharan and were told that he had another job.

Gursharan Singh speaks Punjabi. Zia Aftab acted as translator. Gursharan's testimony is summarized as follows:

- He came to Canada in October of 2012. John found him this job and provided him with a place to live. This was his first job in Canada.
- While he had experience as an electrician, he was hired as a construction labourer. It was a full-time job.
- He worked everyday, morning until night. He worked every Saturday.

- He recorded his hours in his notebook (EE3) everyday after he got home from work.
- He would sometimes see his boss once in the morning and once at night. Some days he did not see his boss at all.
- He was hired at \$18 per hour. He recorded his hours and told his boss how many hours he worked each month.
- His very first day, he worked from 9 a.m. to 4:30. His boss says he worked a bit more that day. His boss says there are days that he worked when he did not work (October 26, 2012 for example).
- His boss says he did not work on Saturdays but he worked every Saturday.
- On October 24, 2012, he did not work because he had an appointment. The day before, he let his boss know that he would not be at work the next day.
- He would take 20 – 25 minutes max for a lunch break. He brought his lunch with him. He does not remember anyone on his crew taking more than ½ hour for lunch. His boss was there at lunch once in a while.
- He was not told anything about overtime. He thought he was paid for the number of hours he worked.
- He did not take coffee breaks and he did not see anyone else take coffee breaks.
- He stopped working on April 12, 2013 and became self-employed at that time.
- He did not realize that he was not paid for all of his hours until he left his job.
- Other crewmembers did sometimes work on Saturdays. There might be 1-3 people working on a Saturday.
- When he was drywalling and insulating, he had to work until the job was done.
- Sometimes he worked alone. He would tape, mud and sand on his own.
- He was driven to and from work, even when he was working alone at a site.
- When nobody came to pick him up for work on April 13<sup>th</sup>, he thought they did not want him anymore.
- He did not receive overtime pay and was not paid for the Saturdays that he worked.

## V. ARGUMENT

The Respondents' argument is summarized as follows:

- John introduced the Complainant to the Respondent. Even though his Company was not that busy in the winter of 2012, the Respondent made a place for the Complainant as a construction helper.
- The Respondent initially offered the Complainant a wage of \$1,800 per month but on the request of John, he agreed to pay \$2,000 per month. He paid the Complainant \$600 for a few days in October and then paid him \$2,000 for November and \$2,500 for December 2012.
- The Respondent does not agree with the hours claimed by the Complainant.

- While he was employed, the Complainant never complained about his hours or salary.
- At the end of the workday on April 12, 2013, the Complainant said that he would be unable to work the next week because he was going to Winnipeg with friends. On Sunday, April 14<sup>th</sup>, the Respondent went to a customer's house in Harbour Landing to check on its progress and saw the Complainant working there. When he tried to call him the next week, there was no answer. The Respondent's understanding was that the Complainant no longer worked for the Company. A few days later, the Respondent heard that the Complainant had started his own business.
- The Respondents received a letter from Labour Standards claiming payment for hours he had never seen before. The Respondent talked to his other guys and they were surprised and shocked.
- The Respondents' employees never started work at 8:00 a.m. in the winter or summer.

The Complainant's argument is summarized as follows:

- The two employee statements provided by the employer should be given little to no weight because the employees were not present for cross-examination. The authenticity of the statements is questionable. The evidence is hearsay.
- There was a lot of contradictory evidence. The Complainant's evidence ought to be preferred because he presented as an honest, straightforward witness and exhibited other qualities making his version of events more believable.
- The Complainant entered into evidence his original notebook where he kept a record of the hours that he worked. The notebook is messy, worn and believable.
- Regarding start and end times, the employer testified that he did not require his employees to fill out time sheets. He would talk to the foreman and then record the hours relayed by the foreman in his calendar. The records of the employer look as if they were all prepared in one sitting. The employer was defensive when asked why he did not bring his calendar to the hearing.
- The information contained in the copies from the employer's calendar provided after the hearing was not subjected to cross-examination. The information has not been authenticated. Only inferences can be made from the information. For example, various letters likely represent initials of the employees who worked that day. It would be prejudicial to the Complainant to rely on a piece of evidence that may have been fabricated after the hearing and that has not been authenticated and tested for accuracy. The Complainant's right to cross-examine the employer about this evidence has been circumvented.
- The Complainant provided testimony regarding his hours and introduced his journal into evidence which was then available for cross-examination.

## VI. ANALYSIS AND DECISION

The parties agree that the Complainant was employed as a full-time general construction labourer from October 22, 2012 to April 12, 2013. The parties also agree that the Respondents did not pay any overtime pay, vacation pay or public holiday pay to the Complainant.

During this appeal, I heard a lot of contradictory evidence. Even the evidence regarding the Complainant's rate of pay was inconsistent. The Complainant says he was hired at \$18.00 per hour. The Respondent says he initially offered to pay the Complainant \$1,800 per month but agreed to pay him \$2,000 month. The Respondent subsequently raised his pay to \$2,500 per month in December of 2012. The employer did not bring copies of the Complainant's pay stubs with him to the hearing. The Complainant introduced into evidence copies of his pay stubs for the months of January – April, 2013. I provided the employer with the opportunity to produce the missing pay stubs after the hearing but he neglected to do so.

The evidence suggests that the Respondent spoke in terms of net pay when he says that he initially paid the Complainant \$2,000 per month and then \$2,500 per month. The evidence (notations contained in EE3) shows that the Complainant received the sum of \$600 for his October wages and \$2,000 for his November wages. There is no evidence establishing the Complainant's gross pay or hourly rate of pay for October and November 2012. Based on the pay stubs in evidence (EE1), the Complainant earned \$2,500.00 net per month or \$2,675.00 gross per month or \$16.72 per hour. Under the Act (and its predecessor) it is the employer's responsibility to keep records of an employee's rate of pay. Because there is no clear evidence establishing the Complainant's hourly rate of pay for October and November 2012 and because the employer chose not to produce this evidence, I find for the purposes of this appeal that the Complainant earned \$16.72 per hour while employed by the Respondents.

The main area of disagreement between the parties is with respect to the Complainant's hours of work. The Complainant claims that he worked many overtime hours. In addition to starting earlier and ending later on weekdays than what the Respondent admits, the Complainant says that he worked almost every Saturday. In support of his position, the Complainant offered his testimony and a personal notebook containing his record of hours worked while employed with the Company (EE3).

The Respondent claims that he cannot afford to pay overtime hours and therefore does not allow his employees to work overtime. He claims that the Complainant worked Monday to Friday, 8 hours per day. In support of his position, the Respondent offered his testimony, the written statements of two employees (ER1 and ER2), a summary of the Complainant's hours (ER3) and copies of pages from a calendar containing his record of hours worked by several of his employees.



The statements from two employees (ER1 and ER2) support the Respondent's position that the hours claimed by the Complainant are inaccurate. Both employees agree that the Complainant worked less hours than he claims and specifically, that they did not start work at 8:00 a.m. winter or summer, and that they took two 15-minute coffee breaks and a 1-hour lunch break per day. Kipanpreet Dari says that he picked the Complainant up and dropped him off everyday.

Under the circumstances, I find that I cannot give the statements a great deal of weight. The statements do not include any specific dates or times, including the dates that each of these employees were working on the same site as the Complainant. The Respondent testified that he operated 6 or 7 job sites at a time and that he may have anywhere between 3-5 employees on each site. As pointed out by Ms. Chudyk, these employees were not present for cross-examination. The Respondent's case could have been bolstered had he called the employees to testify in person. To be fair, however, the Complainant did not call any witnesses to support his position either.

Based on a review of the Complainant's notebook and the Respondent's calendar, I am satisfied that both are authentic documents. I accept that the Complainant, as a new immigrant to Canada, felt it important to keep track of his hours even though his employer did not ask him to. I also accept that the Respondent recorded hours of work in his calendar.

With that said, I have some concerns with the accuracy of both documents. The Complainant's evidence suggests that he started work most days at 8:00 a.m. and often indicates that he worked at least a ½ hour longer than what the Respondent claims. I believe that part of this discrepancy can be attributed to the fact that the Complainant included his travel time to and from work in the hours he recorded. I accept Mr. Dari's evidence that he drove the Complainant to and from work and find that the Complainant is not entitled to be paid wages for travel time in Regina. No evidence was lead regarding travel time. Given the size of Regina, I find that 45 minutes of travel time per day would account for the Complainant's travel time to and from work.

With respect to the Respondent's calendar, while I believe its authenticity, I also find that it is a self-serving document created by the employer. I doubt the accuracy of the hours recorded for a number of reasons. Firstly, the Respondents did not require their employees to fill out time sheets and therefore were totally reliant on foremen from various job sites to relay the Complainant's hours. Secondly, although the calendar suggests that start and end times fluctuated, almost without fail the hours of work for any given week add up to 40 hours once an hour for lunch is subtracted. Given the nature of the construction industry, I find this very hard to believe. Moreover, during the week of December 10<sup>th</sup>, 2012 when it looked as if there may actually be one hour of overtime recorded for the week, the entry for Thursday, December 13 was altered so that 10-7 was changed to 10-6 and 8 was changed to 7, resulting in the total number of hours for the week to add up to 40 instead of 41.

The Complainant says that he only took ½ hour lunch breaks and that he worked Saturdays. The Respondent maintains that his employees took an hour for lunch and did not work on Saturdays. Given that the Complainant claims to have worked every Saturday during his period of employment and that the hours worked on Saturdays constituted overtime hours, this was a significant issue requiring further and better evidence on the part of the employer in order to succeed on appeal. Unfortunately, the Respondents chose not to call any witnesses to support their case in this regard. Because a Wage Assessment was issued in this matter, the onus was on the employer to prove that the Wage Assessment is incorrect. With respect to the issue of whether the Complainant worked Saturdays, I find that the employer failed to meet its onus.

Both parties filed their written record of hours in support of their positions. Under the circumstances, I prefer the Complainant's record of hours worked to that of the Respondents. I find that the Complainant did, in fact, work Saturdays and take ½ hour lunch breaks. As indicated above, however, I find that the Complainant's hours are inflated by 45 minutes per day due to the travel time to and from work that he included as part of his work hours.

According to the Act, the employer is required to pay overtime pay, public holiday pay, and vacation pay, none of which was paid to the Complainant.

The Employment Standards Officer acknowledged the amounts credited to the employer as paid on the Officer Worksheet (EE2) were a bit low because at the time the calculations were undertaken, the figures he had been provided were the net wages paid to the Complainant and not the gross wages. Therefore, each paycheck in the amount of \$2,500 that he credited to the employer as "ALREADY PAID" ought to have been \$2,675 and the last paycheck credited ought to have been \$1,340 instead of \$1,255. The Employment Standards Officer still does not know the gross amounts of the first three paychecks but the net amounts were \$600 for October, 2012, \$2,000 for November, 2012 and \$2,500 for December, 2012. Because the net pay for December 2012 was \$2,500, I will infer that the gross pay for December was \$2,675, consistent with the 2013 paychecks. Given that the employer chose not to submit pay stubs for October and November 2012, the employer will receive credit for the net payments rather than the gross payments for those 2 months.

Based on the evidence presented during this appeal, the Complaint is owed \$11,804.25 in unpaid wages, calculated as follows:

REGULAR WAGES (937.75 hours at \$16.72 per hour)	\$15,679.18
OVERTIME PAY (322.50 hours at \$25.08 per hour)	\$ 8,088.30
PUBLIC HOLIDAY PAY (Regular at \$613.63 and Premium at \$620.73)	\$ 1,234.36
ANNUAL HOLIDAY PAY (3/52's of total wages)	\$ 1,442.41
SUB-TOTAL	\$26,444.25
ALREADY PAID (\$600 + \$2,000 + (\$2,675 x 4) + \$1,340)	\$14,640.00

TOTAL AMOUNT PAYABLE

\$11,804.25

**VIII. CONCLUSION**

The appeal is allowed in part. The Wage Assessment shall be varied to reflect that the Respondents owe the Complainant the sum of \$11,804.25.

DATED at the City of Regina, in the Province of Saskatchewan, this 7th day of July, 2014.



Jodi C. Vaughan  
Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at [www.saskatchewan.ca](http://www.saskatchewan.ca).

**Right to appeal adjudicator's decision to board**

- 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.
- (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 pursuant to Part II, the wage assessment or the notice of hearing;
  - (c) the notice of appeal filed with the director of employment standards pursuant to Part II;
  - (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

**Appeal to Court of Appeal**

- 4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.
- (2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.
- (3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

**Right of director to appeal**

4-10 The director of employment standards has 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.