

DECISION OF ADJUDICATOR



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

COMPLAINANT: Mahmoud Al Sayed
Represented by Dale Schmidt, Labour Standards Officer

RESPONDENTS: Prairie Oasis Travel Plaza Inc., P.O. Box 8, Dafoe, SK S0K 1C0;
Terrence Fazakas, being a Director of Prairie Oasis Travel Plaza
Inc., P.O. Box 186 Raymore, SK S0A 3J0; and
Sandra Fazakas, being a Director of Prairie Oasis Travel Plaza Inc.,
P.O. Box 369 Raymore, SK S0A 3J0

DATE OF HEARING: July 28, 2014

PLACE OF HEARING: Courthouse
410 Avenue C
Wynyard, Saskatchewan

Introduction:

The respondents, hereinafter 'the employer', were represented by Terrence Fazakas. The complainant, hereinafter 'the employee' was represented by Dale Schmidt. There were no preliminary objections as to jurisdiction or other matters.

At the beginning of the hearing, Mr. Schmidt indicated that the amount of the Wage Assessment should be lowered from \$7,010.06 to \$6,570.94 due to an error in the audit involving the date of a pay increase provided to the employee. This is the amount indicated on Exhibit EE7, which is a spreadsheet of earnings during the audit period.

Facts and Decision:

Mr. Al Sayed was employed at the employer's convenience store, which sold among other things gas and food. Mr. Al Sayed was so employed during the audit period detailed in Exhibit EE7, which was from Sept 29, 2012 to October 12, 2013. The existence of the employer corporation was admitted by Mr. Fazakas.

There are four areas of dispute between the employer and the employee. The first is Mr. Al Sayed's correct wage. The second is the inclusion of hours worked by Mr. Al Sayed in the audit. The third is Mr. Al Sayed's entitlement to overtime pay at a rate of 1.5 times his usual wage. The fourth is the employer's allegation of misconduct. Specifically Mr. Fazakas alleges Mr. Al Sayed stole from the employer and damaged Mr. Fazakas' vehicle on the day that Mr. Al Sayed was fired. I shall deal with these issues in the order I have listed them.

Mr. Al Sayed's correct wage

Mr. Al Sayed was offered a job at the wage of \$14.85 per hour. This offer was made by way of a document titled 'Annex 2 Employment Contract'. It was filed as Exhibit EE2. EE2 was signed by Mr. Al Sayed and by Mr. Fazakas' wife Sandra who is a corporate director and a respondent in this matter. This contract is dated November 21, 2011. This wage of \$14.85 per hour is again used in a letter on the employer's letterhead addressed to Mr. Al Sayed dated June 13, 2012, from 'Rena Simpson Manager'. Mr. Fazakas testified that the \$14.85 figure was used in error. He testified that \$14.85 would have been the appropriate wage for a position the employer considered a 'skilled' position, such as a cook. The employer considered Mr. Al Sayed's position running the cash register to be 'unskilled' and therefore the correct wage should have been \$11.00 per hour for an employee such as Mr. Al Sayed who worked a night shift. The \$11.00 per hour figure appears on a letter on the employer's letterhead addressed to Mr. Al Sayed dated June 18, 2012, from both 'Sandra Fazakas Employer/Operator' and 'Rena Simpson Manager'. This letter, which is Exhibit EE4, indicated the earlier use of a wage of \$14.85 was an error. It purports to offer Mr. Al Sayed an 'unskilled' job as a

Sandwich Maker/Cashier' and says 'if you are willing to accept the offer please let us know.'

It is clear that a contract was formed when Mr. Al Sayed accepted the offer of employment at \$14.85 per hour on November 21, 2011. All the elements of contract formation were present; there was a clear offer, acceptance, intention to create legal relations, and consideration. The contract was unaffected by the legal concept of mistake. The employer, at the time of the offer, made the offer it intended to make. This was not a case where one party made a mistake as to terms that was 'snapped up' by the other party. In this case it could well be reasonable for an employer to consider a sandwich maker/cashier position to be skilled, or for an employer to remunerate such a position at a rate of \$14.85 per hour. In other words, unlike a 'snapping up' case, such as *Hartog v. Colin & Shields*, [1939] 3 All E.R. 566 (Eng. K.B.), there is nothing to indicate to a party in Mr. Al Sayed's position that there is anything wrong with the \$14.85 offer.

This doesn't mean that the terms of employment could not be altered at a future date. However, here there was no evidence presented that the contract term as to wage, was ever altered. Mr. Fazakas did not write or deliver to Mr. Al Sayed, the letter filed as Exhibit EE4. Mr. Fazakas indicated that he believed this letter was given to Mr. Al Sayed, but he did not see that happen. Mr. Al Sayed testified that he never saw this letter until after his employment had been terminated. There is therefore no evidence before me that Mr. Al Sayed's employment contract was ever renegotiated with respect to wage, or that Mr. Al Sayed's employment at \$14.85 per hour was terminated, and replacement employment at \$11.00 was offered and accepted.

It would have been an easy matter for the employer to document Mr. Al Sayed's agreement to work for a lower wage. One way this could have been done is that Mr. Al Sayed could have been required to sign the second offer (Exhibit EE4). Of course a subsequent agreement could have also been proven by someone who was present giving oral evidence as to what transpired. However, neither Sandra Fazakas nor Renae Simpson gave evidence, and as I said, Mr. Al Sayed denied ever have seen the letter before his employment was terminated. Mr. Fazakas asked Mr. Al Sayed why he didn't complain when he received his pay cheques, and saw that he was being paid less than \$14.85. In answer, Mr. Al Sayed testified that he did regularly complain about being paid less than \$14.85 per hour. I accept Mr. Al Sayed's testimony as truthful on this point. I also accept Mr. Al Sayed's testimony that he didn't quit as a result of being paid less because he needed his job. Mr. Al Sayed received a work permit, and was legally in Canada in part because he had a job with the employer. I accept Mr. Al Sayed's testimony that he didn't push the dispute any further because of the precarious position he was in. Mr. Al Sayed also testified that he never agreed to work for the lower \$11.00 per hour rate. I also accept this evidence as truthful. Therefore I conclude that Mr. Al Sayed's actual wage rate for the period of the audit was \$14.85 per hour.

The inclusion of hours worked by Mr. Al Sayed in the audit

Mr. Fazakas testified that Mr. Al Sayed usually came to work before he was actually scheduled to start his shift. This point was not in dispute, as Mr. Al Sayed also testified he regularly came in about a half hour prior to his shift. He said he did this because he liked to sit and have a cup of coffee before starting his night shift. Mr. Al Sayed testified that he often helped out on the cash register during this period before his shift began. He says sometimes this was because another worker or a manager asked him to help out, and sometimes simply because he saw there were things to be done. If I had to determine whether these periods of approximately one half hour before Mr. Al Sayed's shifts counted as time worked, I would have found that there was insufficient evidence for me to determine that the employer permitted the employee to work, because the employer knew (or ought reasonably to have known) that the employee was working and that the employer did not cause the employee to stop working (*The Saskatchewan Employment Act*, Section 2-2). However, these pre-shift periods of approximately 30 minutes each do not form any part of the Wage Assessment (see Exhibit EE7). No evidence challenging any other hours included in the audit was presented. Therefore I conclude that the audit (Exhibit EE7) correctly calculates the number of hours for which Mr. Al Sayed should be remunerated, and that this number of hours is accurately reflected in Wage Assessment # 6460.

Mr. Al Sayed's entitlement to overtime pay at a rate of 1.5 times his usual wage

The employment contract (Exhibit EE2) stipulates Mr. Al Sayed will be paid 1.5 times his regular wage for any hours worked over 40 hours per week. Of course, *The Saskatchewan Employment Act* section 2-18 requires employers to pay overtime (which section 2-1 (o) determines as 1.5 the regular wage) when an employee works more than 40 hours per week or 8 hours per day. The employer here failed to pay overtime. Mr. Fazakas testified that the employer previously had an averaging of hours permit. Whether the employer previously had such a permit or not, no evidence was presented that the employer was excused from paying Mr. Al Sayed overtime in accordance with sections 2-1 (o) and 2-18 of *The Saskatchewan Employment Act*. Therefore I conclude that the audit (Exhibit EE7) correctly calculates the number of hours for which Mr. Al Sayed should be remunerated at an overtime rate of 1.5 times his regular wage, and that this is accurately reflected in Wage Assessment # 6460.

The employer's allegation of misconduct

Mr. Fazakas alleges Mr. Al Sayed stole from the employer and damaged Mr. Fazakas' vehicle on the day that Mr. Al Sayed was fired. This issue seemed to dominate the relationship between Mr. Fazakas and Mr. Al Sayed. Mr. Fazakas suspected Mr. Al Sayed of stealing from the employer. This suspicion was caused at least in part, by a complaint from at least one other employee, and by Mr. Al Sayed's penchant for perfectly balancing the cash at the end of his shift.

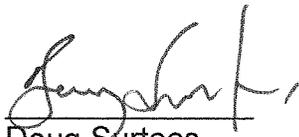
Because of his suspicion Mr. Fazakas took steps to gather evidence against Mr. Al Sayed. This evidence consisted of sending in 'secret shoppers' and making and reviewing video recordings of Mr. Sayed working at the cash register.

At the store where Mr. Al Sayed was employed, some items are rung into the cash register by way of scanning a bar code. Other items, such as coffee, cinnamon buns and sandwiches have no bar code. Instead there is a key corresponding to each such item. The cash register does not have any price display visible to the customer. The customer must therefore rely on the employee to tell them the total amount of the order. When an item such as a sandwich is purchased, the cashier presses the 'sandwich' button on the cash register, and the price is automatically entered. Mr. Fazakas alleges that Mr. Al Sayed would sometimes fail to ring in the non-bar code items. There was no inventory control system in place for these items. In addition, Mr. Fazakas testified that Mr. Al Sayed would fail to scan some items being purchased, but would still charge for the items. Mr. Fazakas also testified that Mr. Al Sayed would use the 'no sale' button many times during his night shift. The allegation here is that by doing so, Mr. Al Sayed could access the cash and provide a customer with change, without ever ringing anything into the cash register. Mr. Fazakas testified that 'secret shoppers' he hired observed that Mr. Al Sayed failed to ring in some of the items they purchased. These allegations, if proven, could provide the employer with just cause to terminate Mr. Sayed's employment. They could also result in a court ordering Mr. Sayed to repay an amount of money to the employer. Even if proven however, they do not affect the Wage Assessment. Wage Assessment # 6460 does not include any time in lieu of notice. Therefore it is not necessary for me to make any finding regarding just cause. I make no comment regarding the employer's allegations of employee theft. Likewise it is unnecessary for me to make any comment on the employer's allegation that the employee drove into Mr. Fazakas' vehicle as the employee was leaving the place of employment following his termination.

Conclusion:

The respondent/employer's appeal is dismissed, and Wage Assessment #6460 in the amount of \$6,570.94 is hereby confirmed.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 31st day of July, 2014.



Doug Surtees
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.

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.