

DECISION OF ADJUDICATOR

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



COMPLAINANT:

Richard Smith:

Represented by Shelley Stretch, Employment Standards Officer, 122-Third Avenue North,
Saskatoon, SK S7K 2H6.

RESPONDENTS:

101194203 Saskatchewan Ltd., o/a A1 Plumbing, Heating, & Electric; 9-2241 Hanselman Avenue,
Saskatoon, SK S7K 6A7; Sonja Marie Behari, being a director of 101194203 Saskatchewan Ltd.,
o/a A1 Plumbing, Heating, & Electric; 9-2241 Hanselman Avenue, Saskatoon, SK S7K 6A7; and
Birendra Mohan Behari, , being a director of 101194203 Saskatchewan Ltd., o/a A1 Plumbing,
Heating, & Electric; 9-2241 Hanselman Avenue, Saskatoon, SK S7K 6A7

Represented by Jared Epp, Robertson Stromberg LLP, Suite 600, 105-21st Street East, Saskatoon,
SK S7K 0B3.

Date of Hearing: December 9, 2014

Introduction:

The respondents were represented by Jared Epp of the Robertson Stromberg LLP firm. The employee was represented by Shelley Stretch of the Ministry of Labour Relations and Workplace Safety. I would like to thank both representatives for their able arguments and for focusing on the matters in issue.

Facts and Decision:

At the beginning of the hearing the parties agreed that employer was an existing Saskatchewan corporation and that at the relevant times Sonja Marie Behari, and Birendra Mohan Behari were directors of it. Richard Smith worked for 101194203 Saskatchewan Ltd., o/a A1 Plumbing, Heating, & Electric ('A1'), during the period of the audit. The parties also agreed that the correct amount of the Wage Assessment ought to have been \$11,069.62, rather than \$12,014.23.

Mr. Behari was the only witness for the employer and Mr. Smith was the only witness for the employee.

Mr. Behari purchased the corporation, which had previously been known as D & L. Although Mr. Behari owned the corporation, he really had very little to do with its operation. He candidly admitted that he simply wasn't involved in the running of the business. The company went from 35 employees when Mr. Behari purchased it to zero employees, where it is today. Mr. Behari indicated he lost approximately four million dollars, as a result of what he called 'mismanagement'.

The plumbing, heating and mechanical industry was new to Mr. Behari. When he purchased the company it was operating as a business. Mr. Smith had been working for D & L for ten years at this point. Mr. Smith drove a company vehicle during the time in question, up to approximately the middle of August, 2013. Subsequent to that date, he drove his own vehicle, for which he was paid \$600 per month, as well as some other benefits. These vehicles were equipped so that Mr. Smith could transport tools etc., to and from work sites.

Mr. Smith also testified that prior to Mr. Behari purchasing the company, employees were not paid overtime. At the time he believed the employer had a averaging of hours permit which allowed it to refuse to pay overtime rates. He now believes this to have been false. Since Mr. Behari purchased the company, employees were paid overtime, as the legislation requires.

Mr. Behari testified to all sorts of management problems. The company apparently had no method of monitoring employee hours. Employees simply tracked and recorded their hours, submitted them, and were paid for the hours they submitted.

Mr. Behari, who is clearly an astute businessperson, has now reviewed the way the company operated, including how time sheets were approved. He raises three objections to the Wage Assessment (# 6565) issued by the Director of the Labour Standards Branch, and suggests that the amount the Wage Assessment says is due to Mr. Smith should be reduced to zero

The first element of Mr. Behari's argument is that Mr. Smith sometimes charged commuting time, that is driving time between his home and the worksite, as time worked. The second element of Mr. Behari's argument is that all employees were entitled to a 30 minute unpaid meal break and Mr. Smith made no deduction for meal breaks when he submitted his hours. The third element of Mr. Behari's argument is that Mr. Smith at the time of his employment was a smoker, and Mr. Behari believes that time spent smoking should be deducted from the hours Mr. Smith submitted as work hours. I will deal with each element of Mr. Behari's argument in turn.

Mr. Behari's first argument that Mr. Smith sometimes charged commuting time, that is driving time between his home and the worksite, as time worked. The employer compared Mr. Smith's timesheets to data gathered by a GPS installed on the vehicle Mr. Smith drove, to determine when Mr. Smith charged for the time spent driving from his home in Saskatoon to the place Mr. Smith was supposed to report for work. Typically this was the jobsite, but sometimes it was the office for meetings. The employer's findings are summarized in a spreadsheet, filed Exhibit ER-1. The total amount of wages the employer says should be offset for the period during which he drove a company truck equipped with a GPS is \$1,815.80. In addition the employer suggests that I ought to ascribe an overcharge of \$200 per month for the three months during which Mr. Smith drove his own vehicle (which did not have a GPS). This would result in an additional offset of \$600, bringing the total related to this argument to \$2,415.80.

There is no doubt that typically the time an employee spends getting to work, and going home after work, is personal time, and the employee is not remunerated for it. This is not a rule however. Employers are free to make alternative arrangements if they choose. There are all sorts of reasons why it might benefit an employer to have an employee drive a particular vehicle outfitted to carry tools and equipment to and from the work site. For example, in this case, Mr. Smith testified that he often picked up material for the job on his way to the job site. He also testified that at times he considered himself 'on call' and would take work telephone calls in the evening and occasionally return to a job site after hours as a result. In addition, it is obvious that if the Mr. Smith parks the vehicle at his home, and in winter presumably plugs in the block heater, the employer is relieved of the cost of providing parking and power for vehicles that are at its disposal. In this case Mr. Smith testified that his supervisors once the company became A1, were Dean, then Derek

and then Jordon. Mr. Smith said: " I handed them [time sheets] to Dean until he got turfed, then Derek until he got turfed and then Jordan until I got turfed". Mr. Smith testified that Dean had originally told him to record his time as worked from the moment he started the truck until the moment he stopped it. All three of the supervisors Mr. Smith reported to at different times (Dean, Derek and Jordon) were aware of this, as well as being aware of the overtime Mr. Smith worked. None of these supervisors expressed any concerns to Mr. Smith. I accept Mr. Smith's evidence on this. By way of contrast, Mr. Behari testified that there was no system in place at A1 for monitoring the hours employees claimed and actually worked. He testified that he believed employees should only be paid once they arrive at the job site, and that pay should stop when they leave the job site. Mr. Behari also testified that he had no idea if Mr. Smith was on call, or if anyone ever asked him not to work overtime or if in fact he was working overtime. He also testified that he did not know if Mr. Smith had to take the truck home or leave it at the job site. In short, as Mr. Behari testified, he really had almost no knowledge of what employees were doing at this company. He was not involved in its day to day affairs. In analyzing matters after the fact, Mr. Behari has described the kinds of controls he believes a company should have in place – such as limiting overtime, paying only for time actually at the job site and so forth. The evidence put forth by Mr. Smith however is that A1, through its supervisors in fact authorized Mr. Smith to charge time driving between his home and the workplace as time worked. Perhaps this is because Mr. Smith often made stops for work on the way, perhaps it is because he considered himself on call at times. No evidence was presented as to why charging this time was permitted, only that it was permitted. The charges were known to all three of Mr. Smith's supervisors. They had been expressly authorized by at least the first of these supervisors (Dean) and no objection or change was made by subsequent supervisors. I accept all the evidence of both Mr. Behari and Mr. Smith in this respect, and conclude that the employer authorized Mr. Smith to charge time to and from the work site on those occasions he did. I note that, as pointed out by the employer, Mr. Smith charged this 'travel' time on 64 out of 236 days. There was no evidence as to why this time was only charged on these days. The employer suggested that this somehow indicates that something is improper about the charges on those 64 occasions. I do not accept that. Although there was no evidence directly on point, Mr. Smith did indicate that he sometimes picked up products for work and sometimes considered himself on call. I do not know whether or not these activities explain why 'travel time' was charged for only 64 out of 236 days. In my view the relevant factors are that Mr. Smith had been authorized by his supervisor to record the time as time worked, he did record his time as worked on those occasions, he submitted his hours to his supervisor, who in turn submitted them to the company for payment. The company did pay the hours, and no evidence was adduced at the hearing to indicate there was anything improper or unauthorized about the recording of hours.

Mr. Behari's second argument is that all employees were entitled to a 30 minute unpaid meal break and Mr. Smith made no deduction for meal breaks when he submitted his hours. The employer suggested that I should presume that Mr. Smith improperly claimed a 30 minute meal break as time worked, each 236 days. They say this would total 118,

which at Mr. Smith's wage of \$40.00 per hour would total \$4,720.00. The employer believes this to be a conservative estimate of the meal breaks that they believe were improperly recorded as work time.

In his testimony, Mr. Smith said that many times he did not eat anything all day at work, and sometimes ate in his truck as he went between jobs. No evidence whatsoever was presented that Mr. Smith took 30 minute meal breaks and then recorded that time as time worked. Mr. Behari suspects this is the case, but he admits he does not know. He simply assumes that Mr. Smith took meal breaks. Perhaps Mr. Smith in fact worked through lunch without eating, or perhaps he ate his lunch while he worked, or perhaps he used one of his 15 minute breaks to eat. Whatever the actual situation was, Mr. Smith's uncontradicted testimony, which I accept, is that he had been authorized by his supervisor to record his hours without a lunch break. He clearly did so with the full knowledge of the employer (although not of Mr. Behari personally), and the employer clearly paid him for this time without complaint. Mr. Behari admits that to the best of his knowledge no one ever told Mr. Smith not to work through the lunch break. I accept Mr. Smith's testimony as truthful when he says he was told it was acceptable to work through the lunch break, and that he did so. Of course an employer like Mr. Behari is free to instruct employees that they may not work through their lunch break, but that is not what happened in this case.

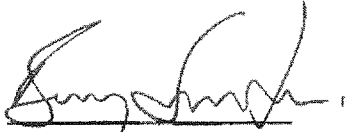
Mr. Behari's third argument is that Mr. Smith at the time of his employment was a smoker, and Mr. Behari believes that time spent smoking should be deducted from the hours Mr. Smith submitted as work hours. Mr. Smith admits he was a smoker at the time. He testified that he did not take specific breaks to smoke. He testified that sometimes he smoked on the job, such as when the homeowner was also a smoker. He testified that he would take a few puffs of a cigarette when he went to his truck to get a tool or a part, and would smoke when he went from job to job. Mr. Behari submitted no evidence to contradict this. Rather, Mr. Behari indicated that Mr. Smith worked a minimum of six hours on 222 days within the audit period. He suggests that allowing 30 minutes for smoke breaks per day, at \$40/hour would total \$4,440. With respect, this is idle speculation. Again, there is no evidence whatsoever that Mr. Smith took 30 minutes in break time to smoke.

Mr. Smith testified that he kept detailed records of his work time, and jobs he performed during that time. He admits he may have made the occasional error, which might have benefitted him or might have benefitted the company. He also testified that he wrote out his time sheets at home, on his own time. I accept all this evidence. I conclude that Mr. Smith accurately recorded his time worked as he was instructed to. As a result, I conclude that the employer has failed to adduce evidence of any error in the Wage Assessment.

Conclusion:

Wage Assessment # 6565 is confirmed in the amount of \$11,069.62.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 11th day of December, 2014.

A handwritten signature in black ink, appearing to read "Doug Surtees", written over a horizontal line.

Doug Surtees
Adjudicator