



DECISION OF ADJUDICATOR

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

COMPLAINANT: Kenton Kiselbach

RESPONDENTS: Redline Holdings Ltd;
Melinda DeBelser, being a Director of Redline Holdings Ltd; and
Trevor DeBelser, being a Director of Redline Holdings Ltd;

DATES OF HEARING: June 10, 2015

PLACE OF HEARING: Sturdy Stone Centre
8th Floor Boardroom,
122-3rd Avenue North
Saskatoon, SK

Introduction

1. The complainant, Kenton Kiselbach, hereinafter the 'employee' was represented by Daniel Kiselbach and Paul de Bruin. Doug Long from the Ministry of Labour Relations and Workplace Safety was also present. The respondents, Redline Holdings Ltd., Melinda DeBelser as a Director of Redline Holdings Ltd. and Trevor DeBelser as a Director of Redline Holdings Ltd. were represented by Trevor DeBelser.

2. There were no objections related to jurisdictional grounds.

Issue

3. The issue in dispute in this matter is Kenton Kiselbach's correct hourly wage.

Facts and Decision

4. The parties agreed on most relevant facts. I shall recite them here, indicating where there was disagreement.

5. Kenton Kiselbach was employed by Redline Holdings Ltd. [hereinafter 'Redline']. Redline is a Saskatchewan Corporation. Melinda DeBelser and Trevor DeBelser are its sole directors and shareholders (Exhibit EE-9).

6. Trevor DeBelser hired Kenton Kiselbach. Mr. Kiselbach worked for Redline for approximately one month (December, 2013). Mr. DeBelser acknowledges that Mr. Kiselbach has not yet been paid for his work.

7. When Mr. Kiselbach was hired, the plan was for him to drive a gravel truck. Mr. DeBelser testified that by the time the employee started work, Redline had lost the contract to haul gravel. When Mr. Kiselbach started working for Redline he was working on an oil truck. He was being trained, and so worked with two other drivers for the month of his employment.

8. Mr. DeBelser testified that Mr. Kiselbach was hired at a rate of \$10.00 per hour for regular time, and \$15.00 per hour for overtime. The parties agreed that the number of hours indicated on the inspection sheet is correct and that if \$10.00 per hour for regular time, and \$15.00 per hour for overtime is the correct wage, Mr. Kiselbach earned \$2,509.64 in total wages, all of which remains unpaid.

9. Contrary to Mr. DeBelser's testimony, Mr. Kiselbach testified that he was hired at a rate of pay equal to 25% of the revenue generated by the trucks during the time he worked. Daniel Kiselbach and Mr. de Bruin take the position that based on what the trucks earned during the time of Mr. Kiselbach's employment with Redline, if I apply the calculation the governing legislation requires me to, 25% of the trucks' earnings converts to an hourly wage of \$24.36 for regular time and \$36.54 for overtime. The

parties agreed that if \$24.36 for regular time and \$36.54 for overtime is the correct wage, Mr. Kiselbach earned \$6,144.42 in total wages.

10. After the employee worked for Redline for approximately a month, the employer terminated the employment. Mr. Kiselbach and Mr. DeBelser differed in their recollection of the exact manner of termination. This difference does not affect the issue between the parties, which is the employee's actual hourly wage, and so I do not need to determine who told Mr. Kiselbach his employment was over, or the exact words which were exchanged. The important point is simply that Mr. DeBelser terminated the employment. The parties agreed on this.

11. Mr. DeBelser did not pay Mr. Kiselbach any wages at all. He testified that he believed he had 14 days after the end of employment to do so. He further testified he believed that he was contacted by Labour Standards (as it was then known) within the 14-day period. When questioned, he admitted to being mistaken on this last point. Mr. DeBelser admits that as of the date of the hearing, Mr. Kiselbach has still not been paid any wages for the work performed.

12. Redline was contacted by the Ministry of Labour Relations and Workplace Safety (hereinafter the 'Ministry') on a number of occasions regarding their demands for records. Exhibit EE-4 is a copy of such a demand directed at Trevor DeBelser, dated January 16, 2014. Exhibit EE-5 is a copy of such a demand directed at Melinda DeBelser, also dated January 16, 2014. These demands were sent in the same envelope, a copy of which is Exhibit EE-6. Exhibit EE-8 is a copy of the Final Demand for Records, which was sent to Trevor DeBelser by registered mail. EE-7 is a copy of the envelope it was sent in, marked 'Return to Sender'. The reason indicated is 'Refused'. When Mr. DeBelser was asked why he did not comply with the demand for records, he indicated that he thought Melinda DeBelser, who is also a director of Redline, had sent the documents in to the Ministry. I find Mr. DeBelser's answers to be evasive. I do not accept his evidence, and find that for reasons known only to him, Mr. DeBelser had no intention whatsoever of complying with the Ministry's demands for records.

13. The Ministry indicated that as of the date of the hearing they have received no records related to Mr. Kiselbach's employment with Redline. I accept this as a fact. Redline did not produce any records of any sort at the hearing.

14. Mr. deBruin was able to complete the audit based upon information provided by the two truck drivers who were training Mr. Kiselbach, and the company that hired Redline's trucks. Mr. DeBelser did not present any evidence to call into question the calculation of wages by the Ministry, and in fact agreed that those calculations were correct. The only relevant point of dispute is with respect to what Mr. Kiselbach's agreed upon wage was.

15. Mr. DeBelser testified that the discussions with Mr. Kiselbach regarding his wage were oral. He testified that after Mr. Kiselbach arrived at the work location he told Mr.

Kiselbach that while he was being trained, his wage would be \$10 per regular hour and \$15 per overtime hour. In addition to these wages the employer provided the employee with accommodation. While this is a significant benefit, it is not relevant to the issue in dispute, which is the hourly wage.

16. Employers have an obligation to maintain records including records with respect to employees' wages. See s. 70 of *The Labour Standards Act* (which was in force at the relevant time).

17. Redline either failed to keep such records, failed to produce them, or both. At the hearing the employer was unable to produce any documents which would indicate the agreed upon wage was different than that to which Mr. Kiselbach says the parties agreed to. I find Mr. DeBelser's testimony with respect to the alleged agreement to a wage of \$10 for regular time and \$15 for overtime to be self-serving and contradicted by the email correspondence. Put bluntly, I do not believe Mr. DeBelser. I note that Mr. DeBelser denied there was any written communication about the wage, until presented with a record of the emails by Daniel Kiselbach. I do not accept Mr. DeBelser's testimony with respect to Mr. Kiselbach's hourly wage.

18. I accept Mr. Kiselbach's testimony with respect to the agreed upon hourly wage as accurate. Mr. Kiselbach testified that he had been offered a job as a driver. Exhibit EE-3 is an exchange of emails between Mr. Kiselbach and Mr. DeBelser. Mr. Kiselbach testified to their accuracy. Mr. DeBelser did not deny them.

19. Exhibit EE-3 shows that on November 18, 2014 at 11:49 am, Mr. Kiselbach wrote: "I want to know some more information about the job, before I drive there. Wages or pay rate ..."

The same day at 1:14 pm Mr. DeBelser replied:

"Ok. Start you at 25% of what the truck makes. About 25 per hour straight time. No rent..."

20. Mr. Kiselbach testified that he entered the contract of employment based upon these representations. I accept his testimony. Therefore I find as a fact that the parties agreed that Mr. Kiselbach would initially be paid 25% of the revenue the truck earned during the time he was assigned to it. No evidence was put forward that this contract was ever varied with respect to wages. Prior to starting both parties were aware that Mr. Kiselbach would be working on an oil truck as opposed to a truck hauling gravel, but no evidence was put forward that this change resulted in any change to the agreement as to wages. Therefore I find that no variation to Mr. Kiselbach's wage was suggested by Redline, or agreed to by the parties.

21. Having determined that the parties agreed to remuneration of 25% of truck revenue, it becomes necessary to convert this amount into an hourly wage. *The Labour Standards Regulations, 1995* s. 10 (in force at the relevant time), explains how to do this:

10(1) Subject to subsections (2) to (4), for the purposes of subsection 6(5) of the Act, where an employee is paid his or her wages on a basis other than an hourly, daily, weekly or monthly basis, the hourly wage of the employee is the amount obtained by dividing the wages of the employee earned during the week, exclusive of overtime, annual holiday pay and public holiday pay, by the lesser of:

(a) 40; and

(b) the actual number of hours worked during the week, exclusive of overtime.

(2) In no case shall an hourly wage be determined to be greater than five times the minimum wage or less than the minimum wage.

(3) Where an employee is paid wages on the basis of distance travelled, the employee's hourly wage for the purposes of subsection 6(5) of the Act is deemed to be the product of 64 and the rate per kilometre.

(4) The hourly wage for employees who are employed as salespersons and who receive all of their remuneration as commissions is the minimum wage.

22. The Ministry used time sheets completed by the two drivers with whom Mr. Kiselbach was training, to determine the number of hours worked. A copy was filed as Exhibit EE-13. The Ministry contacted the company that paid Redline for the work done by its trucks in order to determine the revenue earned by the trucks on the relevant days. Copies of the email correspondence providing this information is Exhibit EE-14 and Exhibit EE-15. Mr. DeBelser did not dispute or question the accuracy of this information. Therefore I accept this information as accurate.

23. There were two trucks involved. One of these trucks had revenue of \$9,598.62 during the relevant period. The other truck had revenue of \$9,430.19 during the relevant period. This means the total truck revenue during the relevant period was \$19,028.81. Twenty-five percent of \$19,028.81 is \$4,757.20.


24. The evidence shows that Mr. Kiselbach worked 195.25 hours during the relevant period. \$4,757.20 divided by 195.25 hours is \$24.36/hour. This would be Mr. Kiselbach's hourly wage for regular hours worked. \$24.36 multiplied by 1.5 works out to \$36.54 for overtime hours worked. Although the governing regulation in effect at the relevant time (*The Labour Standards Regulations, 1995 s. 10*) envisions determining the hourly wage on a weekly basis, I have applied this formula for the period of Mr. Kiselbach's employment. I have done this because the difficulty in obtaining data is entirely due to Redline's refusal to provide documents they were required to provide. The employee should not be disadvantaged by this. Therefore I find that the correct hourly wage for Kenton Kiselbach is \$24.36 for regular time and \$36.54 for overtime.

24. As agreed by the parties, a wage of \$24.36 for regular time and \$36.54 for overtime applied to the hours worked by Kenton Kiselbach, results in total earned wages of \$6,144.42. This is the exact amount of the Wage Assessment (#7136).

Conclusion

25. The appeal is denied. Wage Assessment #7136 is upheld. The employer shall pay Kenton Kiselbach \$6,144.42.

Dated at Saskatoon, Saskatchewan, this 24th day of June, 2015.


Doug Surtrees
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 to apply, the 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/government/legislation.

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;
 - (b) the notice of appeal filed with the director of employment standards pursuant to Part II;
 - (c) any exhibits filed before the adjudicator;
 - (d) the written decision of the adjudicator;
 - (e) the notice of appeal to the board;
 - (f) any other material that the board may require to properly consider the appeal;
 - (g) 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;
 - (h) 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.