

**DECISION OF ADJUDICATOR**



**IN THE MATTER OF A HEARING PURSUANT TO PART IV of**

***THE SASKATCHEWAN EMPLOYMENT ACT, CHAPTER S-15, SS, 2013***

**IN RESPECT OF A MATTER ADVANCED PURSUANT TO SECTIONS 62.1 & 62.2 OF THE**

***LABOUR STANDARDS ACT, CHAPTER L-1, RSS, 1978 (AS AMENDED) (REPEALED)***

**LRB FILE # 132-15; Adjudicator file # 2015-04**

**Wage Assessment # 7291; Complaint # 41645**

**PARTIES TO THE ADJUDICATION HEARING:**

- a) COMPLAINANTS / APPELLANTS:** DALE JACKSON TRUCKING LTD.; DALE JACKSON, BEING A DIRECTOR OF DALE JACKSON TRUCKING LTD.; TAMMY ANDERSON, GENERAL MANAGER [APPELLANT REPRESENTATIVE]
- b) RESPONDENT:** GOVERNMENT OF SASKATCHEWAN, DIRECTOR, EMPLOYMENT STANDARDS, REPRESENTED BY RON BYERS, EMPLOYMENT STANDARDS OFFICER; AND
- c) RESPONDENT:** WARREN KIDNEY [EMPLOYEE], self-represented

**ADJUDICATOR:** MARIA LYNN FREELAND

**PLACE OF HEARING:** Saskatoon, SK

**DATE OF HEARINGS:** A) Thursday September 24, 2015

B) Friday October 16, 2015

**DATE OF DECISION:** December 10, 2015



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## **I. INTRODUCTION**

This employment standards adjudication hearing was commenced on Thursday September 24, 2015 in the Sturdy Stone Centre Building in Saskatoon, SK pursuant to the provisions of the *Saskatchewan Employment Act*. Partway through the hearing, it was adjourned at the request of the Appellant to afford her an opportunity to seek legal advice and further prepare her case. This request was opposed by the representative of the Executive Director. It was also opposed by the Employee, Warren Kidney, self-represented employee. After consideration of submissions by all parties, the request for an adjournment was granted by the adjudicator. The employment hearing was reconvened and concluded on Friday October 16, 2015.

## **II. PRELIMINARY MATTERS**

- a) Ronald Byers (Employment Standards Officer) advised that he represented the Director in the application and enforcement of the *Labour Standards Act* and the *Saskatchewan Employment Act*; Mr. Byers confirmed that he did not represent the employee.
- b) Tammy Anderson advised that she was General Manager for Dale Jackson Trucking Ltd. and was the representative for Jackson Trucking Ltd. and for Director, Dale Jackson Trucking for the purpose of the hearing[s]; Dale Anderson was not present at either of the 2 hearings.

- c) The Employee Warren Kidney was present on his own behalf at both hearings.
- d) There were no additional preliminary matters or objections.

### III. THE DISPUTE

Subsequent to the conclusion of his employment with Dale Jackson Trucking Ltd., [the Appellant/ Employer], Warren Kidney [the Respondent/Employee] completed a Complaint to the Ministry of Labour Relations and Workplace Safety. [EXHIBIT - EE - # 3]. It was entitled “**Formal Complaint Form**”; #41645. This document was received on October 3, 1914 at Swift Current, Saskatchewan, conducted by interview, signed by “Employment Standards Division Representative Signature by Judi” and referred to Ron. [5 page document].

The claim was for:

- a) Overtime pay ; and
- b) Annual Holiday Pay.

Pursuant to section 2-74 of the *Saskatchewan Employment Act*, the Director of Employment Standards determined that the employer failed to pay overtime pay for 595 hours at the rate of \$16.00 per hour for a total of \$9,520.00; in addition, the Director determined that the employer failed to pay annual holiday pay in the amount of \$385.81 [0.057693 (3 wks.%)]. Thus, the total amount assessed was \$9,905.81 [Employment Standards Inspection Summary, Complaint # 41645]. [EXHIBIT # EE -1 and EE - #6]. As a result of this wage assessment, the employer appealed the decision pursuant to section 2-75 of the *Saskatchewan Employment Act*. In accordance with the appeal provisions of the legislation, the wage assessment was appealed by way of “**NOTICE OF APPEAL**” from the employer dated May 29, 2015

and stamped "RECEIVED" on 2015 by the Ministry of Labour Relations and Workplace Safety on May 29, 2015. [EXHIBIT ER- #1] I was appointed adjudicator pursuant to section 4-3(1) of the legislation.

An adjudication hearing was commenced on September 24, 2015. Partway through the hearing, there was a request for the adjudication hearing to be adjourned at the request of the Appellant/Employer to afford her the opportunity to seek legal advice and further prepare her case. This request for an adjournment was opposed by the representative for the Executive Director and by the Employee. All parties had an opportunity to present submissions regarding the merits of the request for an adjournment. Notwithstanding the objections, the adjudicator determined that considering all of the presentations and circumstances, it was appropriate that the hearing be adjourned. It was reconvened, conducted and concluded on Friday October 16, 2015.

#### IV. THE ISSUES

The 4 issues to be determined are as follows:

- ISSUE #1: Is the Employee/ Respondent entitled to money owing to him for overtime pay?
- ISSUE #2: Is the employer exempt from the requirement to pay overtime if the employee is determined to be an "oil truck driver" within the definition of the legislation?
- ISSUE #3: Is the Employee/Respondent owed any money for annual holiday pay?
- ISSUE #4: Was the proper procedure followed by representatives of the Ministry and if not, does any deviation from proper procedure affect the outcome of the adjudicator's decision, and if so, in what way?



## V. THE FACTS

### a) EVIDENCE OF THE APPELLANT/EMPLOYER

The position of Tammy Anderson, [General Manager and representative of the both the Company and Director at the hearing] was well summarized by her letter of October 15<sup>th</sup>. 2015. [EXHIBIT # ER - 2]

With respect to the claim for overtime wages, she states as follows:

1. Warren Kidney entered into a modified work agreement with Dale Jackson Trucking Ltd. upon being hired as a class 1 driver.
2. In that agreement Warren Kidney agreed to a \$32/ hr flat rate, instead of a rate of \$22/hr regular rate and \$33/hr overtime rate.
3. It is impossible for Dale Jackson Trucking Ltd to run as a business at a \$32/hr regular rate and a \$48/ OT rate, while some other hauling companies may be able to, we are unique in the fact that we don't get revenue from the tankers we haul because we do not own them, making our revenue less as an oil hauling company.
4. The average works out as this as a 14 hour day:
  - A.  $22 \times 8 = 198$  TOTAL:  $374 - 33 \times 6 = 198$  Total = 374
  - B.  $32 \times 14 = 448$ .
5. In knowing this Warren Kidney agreed to a flat rate of \$32/hr FLAT RATE modified work agreement the entire duration of his employment without discussing or bringing any concerns to Dale Jackson
6. Warren Kidney accepted the agreement for 8 consecutive months in a row by accepting his pay cheque with pay stub and all information regarding his wage
7. Warren Kidney quit and ended his employment with Dale Jackson Trucking still not stating his concerns over wages
8. After quitting Warren Kidney asked to be rehired and when he was told that this was not an option, it was then that he stated he may go to the Labour Board, using the agreement of the flat rate against Dale Jackson Trucking
9. In many conversations via phone and texting Warren Kidney repeatedly stated that he found the wage was fair and the he was not pursuing a claim with Labour Standards with Tammy Anderson, General Manager of Dale Jackson Trucking
10. There was no communication from that point until a Wage Assessment was sent registered mail and was received on May 27, 2015, 8 months after employment had ended with Warren Kidney
11. Tammy Anderson sent an appeal May 29, 2015 to Labour Standards

12. In starting the appeal Tammy Anderson had no proof of hours except pay stubs, time cards were nor handed in or were misplaced by previous administrator for Dale Jackson Trucking
13. It was also in the auditing of Dale Jackson Trucking that it was found that Warren Kidney had charged unauthorized items at various businesses to Dale Jackson Trucking, this was never deducted
14. It was also noted that Warren Kidney on several occasions used company truck and company gas card as personal transportation to travel from Kindersley, Sk to Eston, Sk, this was never deducted or added to his year-end payroll forms.
15. There was no time deducted not from his hours for meals or breaks
16. Tammy Anderson has copies of cheques totaling \$2250 in extra wages paid out that were not deducted and Dale Jackson Trucking was taxed on it as a bad debt.

With respect to the issue identified above concerning procedural issues and objections, Ms. Anderson's letter succinctly outlines her objections as follows:

**LABOUR STANDARDS AND THE WAGE ASSESSMENT PROCESS:**

1. Dale Jackson trucking Ltd did not receive a request for documentation regarding Warren Kidneys OT claim
2. Employment Standards Officer did not investigate the claim alleging unpaid wages, Warren Kidney DID NOT provide all required documents and information for the claim
3. Employment Standards Officer DID NOT give Dale Jackson Trucking a report setting out payments and instructions
4. Wage Assessment was sent without any back up information except for Labour Standards Act that sets out why complaint was alleged
5. Warren Kidney did not fill out or file a formal complaint, which he MUST do when

Ms. Anderson elaborated on the above mentioned objections in her affirmed testimony. She maintained that there was a "modified work agreement" for overtime pay to be included in the stated hourly rate of \$32.00 per hour. Ms. Anderson acknowledged that she was not present when Warren Kidney was hired by Dale Jackson and did not have any 'first -hand' direct knowledge of what was discussed at the meeting as she was not present at the time.



Ms. Anderson also testified that Mr. Kidney's truck driving duties included hauling oil, water and gravel.

b) **EVIDENCE OF THE EMPLOYEE**

The Employee, Warren Kidney testified on his own behalf. He was affirmed prior to his testimony. He was also cross-examined by Tammy Anderson at the conclusion of his submissions.

Mr. Kidney testified that he attended at the business premises of Dale Jackson Trucking Ltd. to apply for a position as a truck driver. He met Director and Owner Dale Jackson "in the shop" where people were having pizza and drinks.

According to the evidence of Mr. Kidney, he was hired that day by Mr. Jackson as a truck driver at the pay rate of \$32.00 per hour. The issue of overtime pay in addition to the regular hourly rate was not discussed. When Mr. Kidney received his first pay cheque, he inquired about the absence of overtime pay. The Employer advised the Employee that overtime was not required to be paid. Mr. Kidney testified that he "took them at their word" regarding over-time pay and that he did not take any further action as he was not familiar with labour legislation.

Mr. Kidney worked for Dale Jackson Trucking Ltd. for the period of January 7, 2014 to August 27, 2014. Pay stubs presented at the hearing [EXHIBITS EE # 4 and ER # 6] confirm that Mr. Kidney was paid an hourly rate of \$32.00 per hour and that no overtime was paid. Mr. Kidney's last day of work was August 27, 2014. He testified that the reason he quit his position as truck driver for the company was that "...there was simply too much drama." He did not elaborate with respect to what he meant by "...too much drama"; it was not relevant to the issues to be determined at the hearing.

Subsequent to termination of employment, Mr. Kidney filed a complaint with the Labour Standards Branch (as it was then named) for an employment claim in the following amount:

**Complaint #: 41645**  
**Amount of claim: \$9,905.80**  
**Date: October 3, 2014**

## **VI. LEGISLATION**

As indicated elsewhere in this decision, Mr. Kidney was employed from January 7, 2014 until August 27, 2014. The *Labour Standards Act* was in place when Mr. Kidney began his employment. This legislation was replaced by the *Saskatchewan Employment Act* effective April 29, 2014. Given that two legislative regimes were in place during the period of employment, it is important to note that both parties are entitled to the substantive provision of the Labour Standards Act but that the appeal provisions are pursuant to the provisions of the *Saskatchewan Employment Act*. It is, however, helpful to consider the particulars of both legislation in some circumstances notwithstanding they are not determinative nor binding, depending on the applicable dates and governing legislation in place at the time.

**SEE:** *United Food and Commercial Workers, Local 1400 and Wal-Mart Canada Corp. and Saskatchewan Labour Relations Board*, 2010 SKCA 123 (SK CA 2010).

### **ISSUE #1: OVERTIME AND MODIFIED WORK ARRANGEMENT PROVISIONS**

The provisions with respect to overtime payable are found in ss. 6-9 of the *Labour Standards Act*



### **Hours of work and overtime pay**

6(1) Subject to sections 7, 9 and 12, no employer shall, unless he complies with subsection (2), require or permit any employee to work or to be at his disposal for more than eight hours in any day or 40 hours in any week.

(2) Subject to sections 7 and 9, an employer who requires or permits an employee to work or to be at his disposal for more than eight hours in any day or 40 hours in any week shall pay to that employee wages at the rate of time and one-half for each hour or part of an hour in excess of eight hours in any day, or 40 hours in any week, during which he requires or permits the employee to work or to be at his disposal.

(3) In applying subsection (2), where the total of the daily excesses differs from the weekly excess, the employer shall make payment in respect of the greater excess.

(4) The hours during which an employee is required or permitted to work or to be at the disposal of his or her employer are deemed not to include any meal break allowed to employees if notice of the meal break is given in accordance with subsection 13.1(1) and if the employee is not in fact at the disposal of his or her employer during the meal break.

(5) For the purpose of calculating the wages of an employee on an hourly basis in order that the employee may receive the wages to which he is entitled pursuant to

this Act, the following rules apply:

1 Where the employee is paid his wages on a daily basis, the hourly wage of the employee shall be the regular wages of the employee for one day divided by the number of hours of the day during which the employee is required or permitted to work or to be at the disposal of his employer, and in no case shall the number of hours exceed eight;

2 Where the employee is paid his wages on a weekly basis, the hourly wage of the employee shall be the regular wages of the employee for one week divided by the number of hours of the week during which the employee is required or permitted to work or to be at the disposal of his employer, and in no case shall

the number of hours exceed 40;

3 Where the employee is paid his wages on a monthly basis, the hourly wage of

the employee shall be the regular wages of the employee for one month multiplied by 12 and divided by the figure received when 52 is multiplied by the number of hours of the week during which the employee is required or permitted to work or to be at the disposal of his employer, and in no case shall the number of hours exceed 40;

4 Where the employee is paid his wages on a basis other than an hourly, daily, weekly or monthly basis, the hourly wage of the employee shall be determined in accordance with the regulations.

### **10-hour day**

7(1) For the purpose of confining hours of work within four days in any week, upon receiving a written authorization from the director and subject to any conditions that he may prescribe, an employer may, in any occupational classification, require or permit any employee to work or to be at his disposal for 10 hours in any day without paying him wages at the rate of time and one-half, but where an employee works or is at his employer's disposal for more than 10 hours in any day or 40 hours in any week, the employer shall pay the employee wages at the rate of time and one-half for the time worked in excess of those times.

(2) No authorization pursuant to subsection (1) is necessary where the employer:

(a) obtains the written consent of the trade union representing the employees; and

(b) does not require or permit the employee to work or to be at his disposal for more than 10 hours in any day or 40 hours in any week without paying him wages at the rate of time and one-half for the time worked in excess of those times.

### **Meaning of "permit any employee to work"**

8 Where an employer has knowledge that an employee is working and he does not cause him to stop working, he shall be deemed to have permitted such an employee to work within the meaning of the expression "permit any employee to work" as used in sections 6 and 7.

### **Averaging**

9(1) Upon receiving a written authorization from the director and subject to any conditions that he may prescribe, an employer may, in any occupational classification, require or permit any employee to work or to be at his disposal in excess of eight hours in any day or 40 hours in any week without paying the employee wages at the rate of time and one-half, but the average number of hours worked by that employee over any period of weeks that may be prescribed by the director must not exceed eight hours in any day or 40 hours in any week, unless the employee is paid wages at the rate of time and one-half for the time worked in excess of those times.

(1.1) Notwithstanding any other provision of this Act, where the director grants an authorization pursuant to subsection (1), the director shall determine when the employer is required to pay wages to the employees at the rate of time and one-half and shall specify that in the authorization.

(2) No authorization pursuant to subsection (1) is necessary where:

(a) the employer obtains the written consent of the trade union representing the employees; and

(b) the average number of hours worked by an employee over any period of weeks that may be consented to by the trade union does not exceed eight hours in any day or 40 hours in any week, unless the employee is paid wages at the rate of time and one-half for the time worked in excess of those times.

Similar provisions are included in the *Saskatchewan Employment Act*

**The provisions with respect to overtime pay and modified work arrangements are also found in ss. 2-17 to 2-20 of the *Saskatchewan Employment Act***

## **Hours of work and overtime pay**

### **Overtime pay**

2-17(1) An employer shall pay an employee overtime pay for each hour or part of an hour in which the employee is required or permitted to work or to be at the employer's disposal that exceeds the hours determined in accordance with sections 2-18, 2-19 and 2-20.

(2) When calculating overtime pay, an employer:

(a) is not required to include any meal break allowed to an employee if:

(i) notice of the meal break is given in accordance with section 2-11;

and

(ii) the employee is not at the disposal of the employer during the meal

break;

(b) shall not take into account any time the employee works or is at the employer's disposal on a public holiday;

(c) shall reduce the time when overtime is payable by eight hours for each public holiday occurring in a week; and

(d) shall pay to the employee the greater of:

(i) the total of overtime pay required pursuant to this Subdivision that is calculated on a daily basis; and

(ii) the total of overtime pay required pursuant to this Subdivision that is calculated on a weekly basis.

### **Overtime pay after eight hours and 40 hours**

2-18(1) Unless an employee is working in accordance with a modified work arrangement or in accordance with an averaging authorization that satisfies the requirements of section 2-20, an employer shall pay the employee overtime for each

hour or part of an hour in which the employer requires or permits the employee to work or to be at the employer's disposal for more than:

(a) 40 hours in a week; or

(b) either of:

(i) eight hours in a day if the employer schedules the employee's work in accordance with clause (2)(a); or

(ii) 10 hours in a day if the employer schedules the employee's work in accordance with clause (2)(b).

(2) For the purposes of determining the 40 hour per week maximum pursuant

to subsection (1), the employer may require or permit the employee to work or be

at the employer's disposal for either:

(a) eight hours in a day for no more than five days in a week; or

(b) 10 hours in a day for no more than four days in a week.

(3) Notwithstanding section 2-7 or subsections (1) and (2), in the prescribed circumstances and subject to the prescribed conditions, an employer and an employee may agree that the employee may bank overtime hours.

(4) Not Yet Proclaimed.

### **Modified work arrangement**

2-19(1) Subject to subsection (2), an employer shall pay an employee overtime for

each hour or part of an hour in which the employer requires or permits an employee

to work or to be at the employer's disposal that exceeds:

(a) the prescribed hours of work; or

(b) with respect to employees who have a union as their bargaining agent, the hours as agreed to by the employer and the union.

(2) Subsection (1) applies if the employer requires the employee to be at the employer's disposal for more than 40 hours in week.

(3) The agreement mentioned in clause (1)(b) must require the payment of overtime if the hours an employee is required or permitted to work or to be at the employer's disposal exceed on average 40 hours per week.

(4) If the agreement mentioned in clause (1)(b) does not satisfy the requirements of subsection (3), the employer shall pay overtime in accordance with section 2-18.

**Authorization re overtime**

2-20(1) An employer may apply in writing to the director of employment standards for an authorization to pay overtime in accordance with the provisions set out in the authorization.

(2) On receipt of an application pursuant to subsection (1), the director of employment standards may issue the written authorization applied for if the director is satisfied that the requirement of subsection (4) is met and that it is appropriate to do so.

(3) If the director of employment standards issues a written authorization pursuant to subsection (2), the director:

(a) shall determine when the employer is required to pay overtime to an employee; and

(b) may impose any conditions that the director considers appropriate on the written authorization.

(4) The director of employment standards may only issue a written authorization if the number of hours an employee is required or permitted to work or to be at the employer's disposal without being paid overtime does not exceed, on average, 40 hours in a week.

(5) The employer shall provide notice of the written authorization to every employee who will be working in accordance with the written authorization by:

(a) personally giving it to the employee;

- (b) posting it in the workplace;
  - (c) posting it online on a secure website to which the employee has access;
  - or
  - (d) providing it in any other manner that informs the employee of the notice.
- (6) No employer who receives an authorization pursuant to this section shall fail to:
- (a) pay overtime in accordance with the terms and conditions of the authorization; or
  - (b) comply with any conditions imposed on the authorization by the director of employment standards.
- (7) Subject to subsections (8) to (12), the director of employment standards may, at any time, cancel an authorization issued pursuant to this Part if the director is satisfied that:
- (a) a condition of the authorization has been breached; or
  - (b) the authorization is no longer necessary or advisable.
- (8) Before cancelling an authorization pursuant to subsection (7), the director of employment standards shall:
- (a) give the employer to whom the authorization has been issued written notice of the director's intention to cancel the authorization and the reasons for the proposed cancellation; and
  - (b) provide the employer with an opportunity to make written representations, within 30 days after the notice mentioned in clause (a) is served, as to why the authorization should not be cancelled.
- (9) The director of employment standards is not required to give an oral hearing to any employer to whom notice has been given pursuant to clause (8)(a).
- (10) After the expiry of the period mentioned in clause (8)(b), the director of employment standards shall provide a written decision to the employer.
- (11) The director of employment standards is not required to comply with subsections (8) to (10) if the employer requests that the authorization be cancelled.
- (12) The employer shall provide to every employee who was working in accordance with the authorization notice of the cancellation of the authorization by:
- (a) personally giving it to the employee;
  - (b) posting it in the workplace;
  - (c) posting it online on a secure website to which the employee has access;
  - or
  - (d) providing it in any other manner that informs the employee of the



notice.

**ISSUE #2: DEFINITION OF "OIL TRUCK DRIVER"**

"Oil truck driver" is defined in S-15.1 Reg 5 S, 12(p) as follows:

(p) "oil truck driver" means as employee who is employed principally in delivering gasoline, lubricating oils and other petroleum products by truck from a refinery, bulk filling station or other similar premises to farms, garages or automotive service stations, but does not include an employee who regularly travels in the course n of his or her duties to two or more cities, towns or villages that are at least 20 kilometers apart;"

**ISSUE #3: ANNUAL HOLIDAY PAY**

The provisions with respect to Annual Holiday Pay are found in ss. 2, 31, 33 & 35 of the *Labour Standards Act*

**Annual Holiday Pay**

2 (a) "annual holiday pay" means an amount of money to which an employee is entitled pursuant to subsection 33(1) or section 35;

2 (d) "employee" means a person of any age who is in receipt of or entitled to any remuneration for labour or services performed for an employer;

2 (e) "employer" means any person that employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who either:

- (i) has control or direction of one or more employees; or
- (ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees;

2(l) "pay" means remuneration in any form;

2(m) "rate of wages" means the basis of calculation of wages;

2(q) "total wage", in respect of any period of employment of an employee, means all remuneration that an employee is paid or entitled to be paid by his employer, whether or not payment is actually made during that period of employment, in respect of the labour or services that he performs for his employer during that period of employment, and includes:

- (i) sums deducted from such remuneration for any purpose whatsoever;

- (ii) remuneration in respect of overtime work that he performs for his employer during that period of employment;
- (iii) remuneration of any annual or special holiday that his employer permits him to take during that period of employment;
- (iv) the cash value of any board or lodging received by the employee as part payment of wages during that period of employment;

2(q.1) "wage assessment" means a wage assessment issued by the director pursuant to section 60;

2(r) "wages" means all wages, salaries, pay, commission and any other compensation for labour or personal services, whether measured by time, piece or otherwise, to which an employee is entitled;

30(1) Every employee to whom this Act applies is entitled:

- (a) subject to clause (b), to an annual holiday of three weeks after each year of employment with any one employer;
- (b) to an annual holiday of four weeks after the completion of ten years of employment with one employer and after the completion of each subsequent year of employment with that employer

31(1) Where an employee is entitled to an annual holiday under section 30:

- (a) the employer shall permit the employee to take the entire annual holiday to which he is entitled within 12 months after the date on which he becomes entitled to it;

33(1) An employee is entitled to receive annual holiday pay in the following amounts:

- (a) if the employee is entitled to an annual holiday pursuant to clause 30(1)(a), three fifty-seconds of the employee's total wages for the year of employment immediately preceding the entitlement to the annual holiday;

33(1.1) With respect to an employee who is entitled to an annual holiday pursuant to section 30 but does not take that annual holiday, the employer shall pay to the employee the employee's annual holiday pay not later than 11 months after the day on which the employee becomes entitled to the annual holiday;

35(1) If the employment of an employee terminates, the employer of the employee shall, with fourteen days after the effective date of the termination, pay to the employee the annual holiday pay to which he or she is entitled pursuant to this Act

35(2) If the employment of an employee terminates, the employee is entitled to annual holiday pay calculated in accordance with section 33 with respect to all total wages earned by the employee with respect to which the employee has not previously been paid annual holiday pay

35(3) Subsection (2) applies whether or not an employee has completed a year of employment.

**The *Saskatchewan Employment Act* also provides that “more favorable conditions” prevail to the benefit of an employee**

**More favorable conditions prevail**

2-7(1) In this section, “more favourable” means more favourable than provided by this Part, any regulations made pursuant to this Part or any authorization issued pursuant to this Part.

(2) Nothing in this Part, in a regulation made pursuant to this Part or in any authorization issued pursuant to this Part affects any provision in any other Act,

regulation, agreement, collective agreement or contract of services or any custom

insofar as that Act, regulation, agreement, collective agreement, contract of services

or custom gives any employee:

(a) more favourable rates of pay or conditions of work;

(b) more favourable hours of work;

(c) more favourable total wages; or

(d) more favourable periods of notice of layoff or termination.

(3) Without restricting the generality of subsection (2), if an employer is obligated

to pay an employee for time worked on a public holiday or pay an employee overtime,

no provision of any Act, regulation, agreement, collective agreement or contract of

service and no custom that provides for the payment of wages for work on a public

holiday or for overtime at less than 1.5 times the employee’s hourly wage shall be

considered more favourable to an employee.

**Section 10 of the *Interpretation Act*, Chapter I-1.2, SS, 1995 provides:**

10. Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects.

VII. ANALYSIS

ISSUE # 1: CLAIM FOR OVERTIME PAY

It is important to observe that there are no written notes or written agreement with the respect to the Employer's claim of an arrangement to pay Mr. Kidney at the rate of \$32.00 per hour and the Employer's claim that the agreement was for this \$32.00 to include overtime. [Ms. Anderson referred to this as a "Modified Work Arrangement".] Furthermore, it is important to note that the representative, Tammy Anderson, who testified on behalf the Employer was not present at the interview between Mr. Kidney and Mr. Jackson. The Owner and Director Dale Anderson who conducted the job interview and finalized pay arrangements with the potential employee did not attend nor testify at either of the two hearings. According to Mr. Kidney, there was no agreement that the \$32.00 would include both regular and overtime pay. The evidence of the Employee is consistent with all of the documentation provided including Mr. Kidney's paystubs.

Ms. Anderson did not provide an explanation as to the advantage or reason for her claim of a modified work arrangement. There was a complete lack of first hand testimony on the part of the Employer regarding the events and arrangements and the reasons therefore. Mr. Anderson, Owner and Director of the Company and the representative who conducted the interview and finalized the hiring of Mr. Kidney and the pay arrangements had two opportunities to participate and provide testimony in the adjudication hearing process. He did not. In these circumstances, the Employee, who was present at both hearings, testified, and was available for cross-examination should receive the benefit of the doubt on the numerous crucial different version of events, arrangements and agreements.

With respect to the assertion by the Employer representative, Tammy Anderson that the parties agreed upon a "modified pay agreement", it should be noted that this evidence was

not accepted by the adjudicator after consideration that Tammy Anderson was not present at the job interview, the affirmed testimony of Mr. Kidney and the absence of testimony by director and owner Dale Jackson notwithstanding 2 opportunities for Mr. Jackson to attend and testify. Furthermore a modified work arrangement must be in compliance with the applicable legislative requirements; in this case, it was not. Thus, I dismiss the employer's claim that the parties agreed that the pay rate of \$32.00 was to include both regular and overtime pay.

Section 75 of ***The Labour Standards Act*** prohibits any agreement from depriving an employee of any right or benefit provided by the legislation. Case law supports the position that failure by an employee to accept certain remuneration lessor than the amount mandated by legislation cannot be used as a successful defense by the employer for failure to pay the required compensation. An employee cannot waive their entitlements under ***The Labour Standards Act***.

**See:** *Len v Woodlawn Regional Park Authority*, 2000 SKQB 94 (CanLII), 2000 SKQB 94, (2000) 192 Sask R 1 (SKQB).

**See:** *Burmeister v Regina Multicultural Council* (1985) 40 Sask R 183 (SKCA).

**See:** *Watson v Wozniak et al operating as W5 Eld'r Care Homes*, 2004 SKQB 339 (CanLII) (SKQB).

Furthermore, the Saskatchewan Court of Appeal in *College of Medicine of the University of Saskatchewan et al* clearly indicate that any attempt or agreement to circumvent ***The Labour Standards Act*** is unlawful.

**See:** *Pearlman v The College of Medicine of the University of Saskatchewan et al* 2007 SKQB 64 (CanLII) (SKQB).

After consideration of the written documentation and verbal evidence of both the representative of the Employer and the Employee and the Exhibits [including the pay stubs for Mr. Kidney confirming an hourly pay rate of \$32.00 per hour and no overtime paid], filed by all parties, closing submissions made by the parties and the applicable legislation, I determine that Mr. Kidney was hired at the rate or \$32.00 per hour. In addition, it is undisputed that Mr. Kidney worked for the company from January 7, 2014 – August 27, 2014. He was paid an hourly rate of \$32.00 per hour; he was not paid any overtime during his period of employment. In my opinion, he is entitled to overtime and annual vacation leave pay for these hours that he was employed.

After review and consideration of the Legislative provisions of both the *Labour Standards Act* and the *Saskatchewan Employment Act*, Mr. Kidney was entitled by law to be paid overtime for each day when he worked more than 8 hours per day or 40 hours per week, whichever is the greater. The Executive Director determined that the failure to pay overtime as required by law resulted in the following amounts owing to the Employee:

**OVERTIME: 95 hours at the rate of 16.00 per hour for a total of \$9,520.**

**ANNUAL VACATION LEAVE PAY: \$385.81 90. [0.057692 (3 wks %)].**

**TOTAL AMOUNT ASSESSED: \$9,905.81**

It is important to note that there was no request to the Executive Director to the *LSA* or pursuant to the provisions of the *SEA* for an exemption to the provisions of the legislation for a “modified Work Arrangement”. Furthermore, Tammy Anderson was not present at the job interview when the hourly wage was discussed and negotiated between the employee and employer. The owner and director, Dale Jackson, who conducted the interview did not attend or testify at either of the two Employment Adjudication Hearings.

Accordingly, after consideration of all the verbal testimony and written documentation as well as the applicable legislation, I determine that the Employee is entitled to his claim for overtime and additional Annual Vacation Leave pay in the amounts determined by the Executive Director.

## **ISSUE # 2: "OIL TRUCK DRIVER"**

With respect to the employer's assertion that the company was not required to pay overtime as the employee was an "oil truck driver", I find that this position is not substantiated by the evidence when applied to the legislation.

"Oil truck driver" is defined in S-15.1 Reg 5 S, 12(p) as follows:

(p) "oil truck driver" means an employee who is employed principally in delivering gasoline, lubricating oils and other petroleum products by truck from a refinery, bulk filling station or other similar premises to farms, garages or automotive service stations, but does not include an employee who regularly travels in the course of his or her duties to two or more cities, towns or villages that are at least 20 kilometers apart;"

The evidence of both witnesses was that in addition to hauling oil, the employee also hauled water and gravel. Accordingly I do not find that the above exemption applies in this case.

A similar issue arose with respect to the definition and application of "oil truck driver" in the case of "Employment Adjudication decision of *Warren Hill v Sim and Stubbs Holdings Limited*, LRB File #076-15 Decision of Adjudication, Dated July 10, 2015"; this decision was appealed to the Saskatchewan Labour Board. After reviewing and upholding the Adjudicator decision, Chairperson of the Saskatchewan Labour Relations Board Kenneth Love, Q.C. made the following poignant comments that are applicable to the case presently under consideration:

"[21] It is trite law that employees may not contract out of the benefits provided by the *Labour Standards Act* {Note footnote #8 of paragraph [21] which provides the

following particulars: *See Pearlman v. University of Saskatchewan (College of Medicine)* [2006 SKCA 105 (Can LII) and *R. v. Dominion Bridge* [1999] SKCA 12261 (Can LII)]. Once the determination was made that the exemption for “oil truck drivers” was not applicable, the conclusion reached by the Adjudicator that the Respondent “could not and did not, agree to forego overtime pay” followed logically and reasonably. The reasons given and the analysis conducted by the adjudicator fell within the realm of reasonable outcomes.”

**SEE:** Employment Adjudication decision *Warren Hill v Sim and Stubbs Holdings Limited*, LRB File #076-15 Decision of Adjudication, Dated July 10, 2015.

**SEE:** Sim and Stubbs Holding Ltd. Appellant v. Warren Hill & Government of Saskatchewan, Executive Director, Employment Standards, Respondents, Appeal to Saskatchewan Labour Relations Board; LRB File # 149-15, October 15, 2015

**ISSUE #3: ANNUAL HOLIDAY PAY**

Based on the evidence accepted, the documentation provided and the legislative requirements, it is my conclusion the employee is entitled to be paid the appropriate amount for “Annual Holiday Pay” in accordance with the legislation and calculations as provided by the representative for the Executive Director.

**ISSUE #4: PROCEDURAL FAIRNESS**

With respect to the issue raised by the Appellant/Employer in the Notice of Appeal, I have reviewed all of the written documentation as well as the verbal testimony and do not accept the Respondent/Employer claim that there is any procedural reason to dismiss, modify, further review or reevaluate the claim as outlined in the Notice of Appeal letter. After consideration of all matters, it is

my view in this case, the “Principles of Natural Justice” and fairness in quasi-judicial tribunals have been in compliance with the law of Administrative Justice.

“**Natural Justice**” is described in the “*Adjudicator Manual for Labour Standards Wage Assessment Appeal Hearings*” at page 3 as follows:

“Beyond the requirements of the legislation, the courts expect you to follow many unwritten principles of administrative law, often called *natural justice* or *procedural fairness*.

Failure to do so can cause your decision to be set aside by the courts.

Natural Justice means that the law requires you to give all parties a fair hearing. A fair hearing takes place when:

- the parties to the hearing are given proper notice of the hearing
- all parties to the hearing are given a fair chance to present their case and arguments
- the adjudicator is not biased and seems free from bias
- the adjudicator who hears the case decides the case

Overall, you must conduct (and appear to conduct) the hearing fairly.”

It is my view that these principles can also be applied to the process of the events, actions, correspondence and documentation precluding the hearing. As stated earlier in this decision, it is very important to recognize that the Employment Standards Officer represents the Executive Director of the Ministry of Labour Relations and Workplace Safety; the Officer’s responsibility is to ensure compliance with the *Labour Standards Act* and *The Saskatchewan Employment Act*. The Officer does not represent either the employee or employer.

After a careful review of all of the actions, correspondence, investigation and documentation in this case, I find that there was no injustice or prejudice to the employer either before or during or after the hearings. The employer was afforded every opportunity to respond and reply to the claim by the employee both prior to the hearing and at the 2 hearings. As indicated earlier, the employer was granted an adjournment midway through the first hearing

uate to obtain legal advice and further prepare their case. This request for an adjournment was opposed by both the employee as well as the representative of the Executive Director. After consideration of submissions of all three parties, the adjudicator did, however, grant the employer's request for an adjournment. In my opinion, there was no miscarriage of justice in the proceedings before, during or after the hearing or any actions that prevented the employer to present their case. The Representative for the Executive Director was well prepared, fair, courteous, and professional throughout the hearings.

#### VIII. CONCLUSION:

After careful review of all the documentation, testimony and evidence as well as written and oral submissions, it is my conclusion the Employee is clearly to be paid overtime for the hours worked in accordance with the legislation and regulations as well as the appropriate annual vacation leave pay. These are the minimum standards of employment and remuneration that are available to employees. I also find that there was no exemption to pay overtime pursuant to the definition of "oil truck driver" as the evidence confirmed that Mr. Kidney's employment duties were not within the provisions of this definition. I also find that there was no violation of the Principles of Natural Justice or procedural fairness before, during or after the entire employment investigation. Thus, with respect to issue #4 identified above, it is my conclusion that all proper procedures and protocols were followed.

#### IX. INTEREST AND COSTS

- a. **Interest:** Interest may be awarded in accordance with section 62.2(2) of the *Labour Standards Act* and Regulation 31 of *The Labour Standards Act Regulations*. The

method of calculation is provided for in section 6 of *The Pre-judgment Interest Act*. The applicable interest rate is determined in accordance with *The Pre-judgment Interest Act*. The interest rates for the time period in question are published in *The Gazette*. Pursuant to the provisions of the legislation, there will be interest awarded on the amount of \$9,905.81 from August 27, 2014 (the employee's last day of work) to December 10, 2015 (the date of adjudication judgment).

- b. **Costs:** In accordance with section 62(2) (3) of *The Labour Standards Act*, no costs will be awarded.

**X. DECISION**

The employee will be awarded wages for overtime pay and annual vacation leave pay in the amount of \$9,905.81 plus interest calculated in the amount pursuant to the above cited legislation. There will be no award for costs.

Dated this 10th day of December, 2015.

*ORIGINAL SIGNED BY.*

✓ ADJUDICATOR – Maria Lynn Freeland, BA, JD, Mediator, LL M (Candidate)

## **APPENDICES**

### **1. LIST OF EXHIBITS**

#### **2. SECTIONS 4-8, 4-9 & 4-10 OF THE SASKATCHEWAN EMPLOYMENT ACT REGARDING THE PARTIES' RIGHT TO APPEAL**

### **1.0 LIST OF EXHIBITS**

#### **1.1 Exhibits Filed On Behalf of the Employer [Exhibits ER # 1 to Exhibits ER #6]:**

ER-1 Copy of s. 12 (p) Regulations of Saskatchewan Employment Act Regulations (s. 15.1 reg 5) defining "Oil Truck Driver".

ER-2 Document dated October 15, 2015 entitled "Warren Kidney Wage Assessment Appeal"; submitted by Tammy Anderson, General Manager, Dale Trucking Ltd. outlining the employer's position with respect to:

- a) Overtime wages; and
- b) Labour Standards and the Wage Assessment Process.

ER-3 5 page print out from the Government of Saskatchewan website entitled "Saskatchewan Government of Saskatchewan"; "File an Employment Standards Complaint".

ER-4 2 page print out from the Government of Saskatchewan website entitled "Saskatchewan Government of Saskatchewan"; "Employment Standards Investigations".

ER-5 One page document showing copies of 4 cancelled cheques with 2 handwritten notations as follows

- 5.1 Cheque # 1165 dated 08-29-2014 in the amount of \$150. The name of the addressee on the cheque is illegible;
- 5.2 Cheque # 21699 dated 07-14-2014 in the amount of \$300.00 payable to Ilene May Luther;
- 5.3 Cheque # 1173 dated 09-12-14 in the amount of \$450.00 payable to Warren Kidney;
- 5.4 Cheque # 909 dated 04-08-2014 14 in the amount of \$450.00 payable to Warren Kidney;
- 5.5 Handwritten Notation referencing Cheque # 1165 to Patricia Ann Not on August 29, 2014 for \$450.00;
- 5.6 Handwritten Notation referencing Cheque # 1173 to Warren Kidney on September 12, 2014 for \$450.00.

ER-6 8 pages of pay stubs by Dale Jackson Trucking Ltd. regarding employee Warren Kidney.



## **1.2 Exhibits filed on behalf of the employee (EE- #1 to EE- # 7)**

EE -1 Copy of "Employment Standards Inspection Report" completed by Ron Byers, Employment Standards Officer [Complaint # 41645] date opened October 3, 2014; date printed April 15, 2015.

EE - 2 Copy of "Wage Assessment" by Director's Delegate, Ministry of Labour Relations and Workplace Safety.

EE-3 "Formal Complaint Form" dated October 3, 2014 (3 pages number 3, 4 & 5) and enclosing copy of ss. 2-6 SEA.

EE-4 Pay Stub for Warren Kidney for pay period 06/30/2014 in the amount of \$3460.91 indicating regular pay rate @ \$32.00 per hour.

EE-5 Correspondence from Ron Byers, Employment Standards Officer dated October 7, 2014 to Dale Jackson, Director and Dale Jackson Trucking Ltd. regarding complaint by Warren Kidney and requesting the Employer to forward a copy of Warren Kidney's payroll records and daily time sheets for the period of January 27, 2014 to August 27, 2014.

EE-7 Copy of letter from Dennis Benoit to Dale Jackson Trucking Ltd. and Dale Jackson, Director dated April 16, 2015 (2 pages) indicating enclosure of Inspection Report outlining Employee Standard's Assessment.

## **2.0 SECTIONS 4-8, 4-9 & 4-10 OF THE SASKATCHEWAN EMPLOYMENT ACT REGARDING THE PARTIES' RIGHT TO APPEAL**

The parties have the right to appeal the decision of the adjudicator to the LABOUR RELATIONS BOARD pursuant to the ***SASKATCHEWAN EMPLOYMENT ACT***.

### **SECTIONS 4-8, 4-9 & 4-10 OF *THE SASKATCHEWAN EMPLOYMENT ACT* REGARDING THE PARTIES' RIGHT TO APPEAL**

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.

(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III 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 or hearing pursuant to Part II, the wage assessment or the notice of hearing;

(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;

(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 considers appropriate.

**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 or the director of occupational health and safety, 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.

**4-10** The director of employment standards and the director of occupational health and safety have 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 the decision of an adjudicator or the board.