



DECISION OF ADJUDICATOR

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

COMPLAINANT:

Dale Sharp:

Represented by Andrew Langgard, Employment Standards Officer, Ministry
of Labour Relations and Workplace Safety

RESPONDENTS:

Dale Jackson Trucking Ltd., 506 4th Avenue West, Kindersley, Sask., S0L
1S0 and Dale L.J. Jackson, being a director of Dale Jackson Trucking
Ltd, 506 4th Avenue West, Box 447, Kindersley, Sask., S0L 1S0

Date of Hearing: June 29, 2016

Place of Hearing: Sturdy Stone Building
Boardroom 10.1
122 Third Avenue North,
Saskatoon, Saskatchewan,

Introduction:

The complainant/employee ('employee') was represented by Andrew Langgard, an Employment Standards Officer with the Ministry of Labour Relations and Workplace Safety. The respondent/employer ('employer') was represented by Tammy Anderson. There were no objections as to my jurisdiction to hear the matter. I would like to thank Ms. Anderson and Mr. Langgard for the professional manner in which they presented their respective positions. The employer admitted the existence of Dale Jackson Trucking Ltd. As a current Saskatchewan corporation. The Corporate Registry Profile Report (Exhibit EE-1) establishes the same. I note that EE-1 shows that Ms. Anderson is now a director of the corporation. The Wage Assessment however does not name her.

Issue:

The employer and the employee had an agreement whereby the employer would pay the employee a higher wage than the employee would otherwise earn, but would not pay overtime. The issue is whether such an agreement is permitted by *The Saskatchewan Employment Act*.

Facts:

There were only two witnesses. Dale Sharp and Tammy Anderson. I found Mr. Sharp's testimony to be evasive and self-serving. I found Ms. Anderson's testimony to be direct and truthful. Wherever Mr. Sharp's testimony and Ms. Anderson's testimony differ, I accept Ms. Anderson's testimony as accurate.

Mr. Sharp began working for the employer during May of 2014. His employment ended October 2, 2015. The audit period is the last 12 months of employment.

Mr. Sharp was hired by Dale Jackson, and the two agreed that Mr. Sharp would be paid an hourly wage of \$32/hour. This wage would be paid for each hour worked, even if the employee worked what would be considered overtime. I accept Ms. Anderson's statement that at the time this was the way all of the employer's truck drivers were paid, and that such an agreement to pay 'straight time' is not uncommon in the trucking industry. I accept Ms. Anderson's testimony that this wage was set at a higher rate than it would have been had overtime pay been anticipated.

The Employment Standards Regulations (being Chapter S-15.1 Reg. 5) specifies certain conditions which must be met in order for an agreement to be a Modified Work Agreement, within the meaning of the legislation. A Modified Work Agreement allows employers and employees to alter the calculation of overtime pay. Among other things, this Regulation provides:

9 (3) An agreement must:

- (a) be in writing;
- (b) be signed one week before the start date provided in the agreement by:
 - (i) the employer; and
 - (ii) the employee or a majority of the group of employees subject to the agreement, as the case may be;
- (c) specify the number of weeks over which the hours will be averaged;
- (d) specify the daily hours of work after which an employee becomes entitled to overtime;
- (e) specify the work schedule that reflects the daily and weekly hours of work agreed to by the parties; and
- (f) provide for a start date and an expiry date for the agreement.

The evidence discloses that although there were discussions about signing a Modified Work Agreement, no such agreement (within the meaning of the Act) was formalized. This was the employer's error, which Mr. Sharp was all too happy to take advantage of. Since the requirements of this Regulation were not complied with (including that agreement be in writing and be signed), I must conclude that no valid Modified Work Agreement was entered into between Mr. Sharp and the employer.

The employer works in the oil patch. I accept Ms. Anderson's statement that the employee's could work many hours for half a month, and then work very few the other half because they cannot work when it is rainy. Ms. Anderson believes that a higher 'straight time' wage is more favourable to the employees, and I accept that this is her honest belief. I accept that this agreement to be paid straight time was willingly entered into by Mr. Sharp, and the other employees. I also accept Ms. Anderson's testimony that the employer accepted Mr. Sharp's submission of the number of hours he had worked without question, and that Mr. Sharp was not required to work overtime.

The Saskatchewan Employment Act section 2-6 says:

No provision of any agreement has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Part.

One of the benefits provided by the Part is the right to receive overtime pay in certain circumstances. Subsection 2-17 says:

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.

The Audit Sheet prepared by Mr. Langgard and filed as Exhibit EE-3 correctly calculates the wages, which are owing if overtime as determined by the Act, must be paid. Even though Mr. Sharp was not required to work overtime, he was permitted to work overtime, and so he comes within section 2-6.

This leads to the conclusion that the agreement between Mr. Sharp and the employer whereby Mr. Sharp would be paid \$32.00 per hour on a straight time basis is void *unless* this agreement is more favourable than the conditions provided by the relevant Part of the legislation, within the meaning of section 2-7 of *The Saskatchewan Employment Act*. That section reads:

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:

1. (a) more favourable rates of pay or conditions of work;
2. (b) more favourable hours of work;
3. (c) more favourable total wages; or
4. (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. [emphasis added]

The concept of 'more favourable conditions' has been considered many times by the courts. In an adjudication under the now replaced *Labour Standards Act*, I believed an arrangement whereby truck drivers with a known route

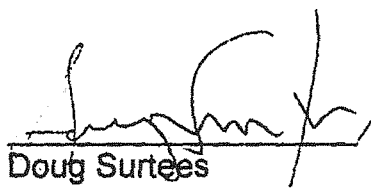
would receive a monthly salary (derived from the average length of time to complete the routes) was more favourable to the employees as they would receive a fixed amount of money every month. The Court of Queens Bench¹ and the Court of Appeal² said I was wrong. Those courts pointed out that the law is that in making such a determination the decision maker is not to consider all aspects of the agreement, and in effect determine whether as a whole the employee is better off. Such an approach would allow more favourable aspects of the agreement to off-set other aspects where the agreement was less favourable than the conditions provided by the legislation. This is not the correct approach. The correct approach is to consider the specific provisions of any agreement.³ In this instance the specific provision would be the right to overtime pay.

In this case, I must conclude based on the court decisions I have cited, as well as subsection 2-7 (3) that the agreement to pay straight time is not more favourable to the employee, and therefore has no force or effect (pursuant to section 2-6). An employee is clearly better off receiving overtime pay than not receiving overtime pay. The result is that overtime must be paid to this employee pursuant to subsection 2-17. This overtime was correctly calculated in the Audit Sheet prepared by Mr. Langgard and filed as Exhibit EE-3.

Conclusion:

Wage Assessment # 7891 is confirmed in the amount of \$17,659.21.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 5th day of July, 2016.


Doug Surtees
Adjudicator

¹ *Bolen v. DJB Transportation Services Inc.*, [2009] S.J. No. 23 (Sask. Q.B.).

² *Bolen v. DJB Transportation Services Inc.*, [2010] S.J. No. 200 (Sask. C.A.).

³ See supra note 1 at paragraphs 18-24 citing *Meyer v. Thyssen Mining Construction of Canada Ltd.* (1984), 37 Sask. R. 280 (Sask. C.A.); *Echo Bay Mines Ltd. v. Marren*, [1997] N.W.T.R. 256 (S.C.); *Canada Safeway Ltd. v. Director, Labour Standards Branch (Sask.)* (1994), 117 Sask. R. 163 (Q.B.) and *Dzuba v. Luscar Ltd.* 2005 SKQB 135.

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.