



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

APPELLANTS: **STREAMLINE OILFIELD SERVICES LTD.
and KELLY BRADY, ROGER HARDY,
JASON PETERSON and KIM PETERSON, as
directors of Streamline Oilfield Services Ltd.**

RESPONDENTS: **TIM MCDONALD and DIRECTOR OF
EMPLOYMENT STANDARDS,
EMPLOYMENT STANDARDS DIVISION,
MINISTRY OF LABOUR RELATIONS AND
WORKPLACE SAFETY**

Calen Nixon, Lawyer with MLT, Appearing for Streamline Oilfield Services Ltd. and its directors

Daniel Corbett, Employment Standards Officer, Appearing for the Director of Employment Standards, Employment Standards Division, Ministry of Labour Relations and Workplace Safety

DATE OF HEARING: **September 2, 2016**

PLACE OF HEARING: **3rd Floor Boardroom
1870 Albert Street
Regina, Saskatchewan**

LRB File No. 117-16; Wage Assessment No. 7981

I. INTRODUCTION

This is an appeal of a Wage Assessment brought by Streamline Oilfield Services Ltd. (Streamline) and its four directors, Kelly Brady, Roger Hardy, Jason Peterson and Kim Peterson. Wage Assessment No. 7981 directed the Streamline and its directors to pay \$14,809.25 to Tim McDonald or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act).

On September 2, 2016, the following individuals attended the hearing:

- Kelly Brady (Kelly), co-owner, Manager and director of Streamline, witness for the Appellants;
- Stephanie Brady (Stephanie), co-owner (Kelly Brady's wife) and Streamline's Office Manager, witness for the Appellants;

- Don Sanders (Don), Streamline's Senior Fleet Coordinator, witness for the Appellants;
- Jason Metz (Jason), Streamline's Dispatcher, witness for the Appellants;
- Calen Nixon, Lawyer for the Appellants;
- Tim McDonald (Tim), Complainant, former Streamline employee, witness for the Respondents;
- Kyle Hoffman (Kyle), former Streamline employee, witness for the Respondents;
- Jonathan Symes (Jonathan), former Streamline employee, witness for the Respondents (appeared by telephone);
- Daniel Corbett, Employment Standards Officer; and
- Randy Armitage, Employment Standards Officer (observer).

II. PRELIMINARY MATTERS/OBJECTIONS

The parties agreed witnesses would provide testimony at the hearing in person except for Jonathan, who would provide his testimony by telephone.

The parties also agreed to an Order for exclusion of witnesses. Prior to opening statements, all witnesses were excluded from the hearing room except Stephanie and Tim. Aside from Stephanie and Tim, each witness was permitted to remain in the room only after he or she had testified.

As part of my introductory comments, I indicated the employer had the onus of showing me how the Wage Assessment was incorrect. Mr. Nixon objected. He argued that in the context of the Ministry's investigation, the Appellants were not provided with the opportunity to respond to the evidence relied upon by the investigator regarding the "managerial character" of the employee's services and as a result, the employer's natural justice right to be heard was violated. He argued the hearing was therefore a *trial de novo* and the Wage Assessment was owed no deference.

In response to Mr. Nixon's objection, I said I would not give deference to the Wage Assessment. I explained, however, that the Employer was required to meet the burden imposed by section 2-75(9) of the Act which states: "The copy of the wage assessment provided to the adjudicator in accordance with subsection (8) is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing...."

It is unfortunate the Appellants feel they were not permitted to fully participate in the investigation stage of the process. This belief may be due, in part, to the wording of Mr. Corbett's letter dated March 4, 2016 (EE5) wherein he refers to various employees who "testified." As I understand the investigation process, the Employment Standards Officer interviews the Complainant and other employees in order to determine whether the Act may have been contravened. If there is a potential contravention, then the

employer is asked to respond to the allegations. All of this occurs before a Wage Assessment is issued. Based on the wording of the letter, the employer might have believed they were denied the opportunity to participate in the investigation given they were not present when the employees “testified” and were therefore denied the opportunity to cross-examine the employees and/or to present their own evidence. To be fair, in the same letter, Mr. Corbett invited the employer to provide evidence that might amend his assessment and the Wage Assessment was not issued until April 20, 2016.

Ultimately, the goal is for the parties to feel they have had the opportunity for a full and fair hearing of the issues. Determinations regarding the managerial character of an employee’s services are not always easy to make. I advised the parties that in my view this was the best forum for such evidence to be presented and challenged, and for a determination to be made.

III. THE DISPUTE

On April 20, 2016, the Director of Employment Standards issued Wage Assessment No. 7981 against Streamline and its directors. The Appellants appealed pursuant to section 2-75 of the Act.

In a six-page Notice of Appeal dated May 12, 2016, the Appellants outlined their position that Tim was a member of management, exempting him from the statutory entitlement to overtime. Alternatively, they submitted the quantum of overtime calculated by Employment Standards is incorrect.

IV. THE FACTS

At the beginning of the hearing, the parties agreed to the following basic set of facts:

- Streamline Oilfield Services Ltd. is a registered business in Saskatchewan.
- Tim was employed at Streamline from November of 2012 to July 21, 2015.
- Tim was initially employed as a truck driver. In December of 2012 or January of 2013, he became a full-time Dispatcher at a salary of \$5,250 per month. His salary was increased in April of 2013 to \$6,500 per month.
- In May of 2015, Tim was demoted to gravel truck driver, earning \$28.00 per hour. He resigned in July of 2015.

The parties tendered evidence by way of sworn and affirmed testimony and documents. Four witnesses testified for the Appellants – Stephanie Brady, Don Sanders, Jason Metz and Kelly Brady. Three witnesses testified for the Respondent – Tim McDonald, Kyle Hoffman and Jonathan Symes.

The following exhibits were entered into evidence:

Employer Exhibits (Appellants)

ER1 – Streamline Oilfield Services Ltd. Exhibit Book containing 20 exhibits (Tabs 1-20)

Employee Exhibits (Respondent)

EE1 – Disciplinary Action Form for Clay Desjardins dated Sept 10, 2015 (2 pages)

EE2 – Disciplinary Action Form for Clay Desjardins dated Dec 7, 2015 (2 pages)

EE3 – Tim’s Work Calendar June 2014 – July 2015 (7 pages)

EE4 – Tim’s Activity/Hours records for May – July 2015 (3 pages)

EE5 – Letter dated March 4, 2016 to MacPherson Leslie & Tyerman LLP from Daniel Corbett with Employment Standards Inspection Summary attached (4 pages)

EE6 – Streamline’s Reprint Payroll Register for Tim (6 pages)

EE7 – Officer Worksheet prepared by Daniel Corbett (2 pages)

V. ARGUMENT

The Appellants and Respondents filed written arguments on September 9, 2016.

The Appellants’ argument is summarized as follows:

- Streamline is a medium-sized family business in rural Saskatchewan specializing in hauling and transfer of dangerous fluids.
- Dispatchers are the main point of contact for all field employees, customers and Rural Municipalities. They are the primary emergency contact.
- Dispatchers are considered front-line management working a unique 5-day on 5-day off schedule with expected office hours of 6:30 a.m. to 5:30 p.m., dependant on work levels.
- Tim began as a driver and relief Dispatcher and was promoted to full-time Dispatcher in December of 2012.
- Don was the first Dispatcher. He subsequently became the Senior Fleet Coordinator.
- Due to incidents leading to a lack of trust, Tim was demoted to the non-management position of gravel truck driver on May 21 or 22 of 2015. In this position, he earned an hourly wage instead of a monthly salary.
- As Dispatcher, Tim was responsible for overseeing day-to-day operations. He directly supervised about two dozen drivers and was the primary business contact person. He also trained new Dispatchers and performed compliance site inspections.
- Tim shied away from disciplining staff but other Dispatchers have taken a more active role (Kyle and Jason).

- When Tim was first promoted to Dispatcher, he received a monthly salary of \$5,250 and a fuel card. Upon his initiative, he requested a raise and received an increase to \$6,500 beginning in April 2013.
- In Tim's role as Dispatcher, he regularly performed or had the opportunity to perform all of the managerial services indicia identified in the *Westfair Foods* decision, apart from the supervision of a collective agreement.
- The two privileged managerial factors, supervision and right to discipline, were central aspects of the Dispatcher position and were performed by Tim.
- Supervision: Tim supervised around two dozen drivers during the workday, including factors such as driver work hours, occupational hazards and access to municipal roads. Tim would direct the drivers as to when and how the work would be completed. He provided leadership and executed training documents. He was the first point of contact for emergency incidents.
- Discipline: Tim had the authority to terminate an employee for just cause. He had the right to discipline drivers, a right that was exercised by other Dispatchers.
- Evaluation of Subordinates: Tim evaluated the safety preparedness of subordinates with on-site inspections.
- Independence: Tim had the authority to approve drivers' extra charges. He consulted with other managers, administrative staff and mechanics to ensure the timeliness and availability of services. He had control over his own schedule, taking breaks at his discretion and had the authority to finish dispatch-related duties from home at the end of the day. He had a key to the office and was not required to wait for drivers to finish routes. The employer entrusted its business decisions to him when he was on call.
- Involvement in Hiring, Promoting and Firing Process: Tim was consulted when new Dispatchers were hired or promoted. Dispatchers fulfill an administrative role and sign off on employee forms.
- Managerial Compensation and Negotiation of Salary: He negotiated his raise in 2013 to \$6,500 per month or \$78,000 per year in addition to a fuel card which was consistent with other members of the management team with similar experience. The drivers supervised by Dispatchers are paid a percentage of each job or hourly wages.
- Participation in Business Planning: Because Dispatchers exercise complete control over day-to-day operations, they provide insight to the owners on equipment and personnel needs of Streamline to meet the demands of the customers.
- A pre-requisite for the management position of Dispatcher with Streamline is first-hand knowledge about oil and gas hauling and equipment. A Dispatcher must be a capable operator in addition to a skilled communicator and an intelligent decision-maker. This distinguishes the Dispatcher from drivers and even other kinds of dispatching positions.

- If Tim is found not to have been a manager, his overtime hours were improperly calculated. Based on evidence from Tim and two former employees, Employment Standards determined an average day to be 14 hours. The employer did not have a punch card or clock for Dispatchers because they were considered management and not subject to overtime. Their supervisory and safety responsibilities involve some longer, flexible hours and they work a unique five days on, five days off schedule as a result. The evidence establishes the hours determined by the ESO were overstated. Eleven hours per work day is a more appropriate estimate. Kyle Hoffman testified a Dispatcher's day would end at 5:30 or 6:00, corroborating the testimony of the employer's witnesses. This testimony undermines Tim's credibility. Tim's hours ought to be discounted accordingly.

The Respondents' argument is summarized as follows:

- Tim is owed overtime for the hours he worked as a Dispatcher, additional overtime for the hours he worked as a gravel truck driver and public holiday premium pay for the hours he worked on public holidays.
- The majority of the \$14,809.25 assessment comes from the overtime hours he worked as a Dispatcher. Tim's duties as a Dispatcher were not entirely of a managerial character and therefore he is entitled to overtime pay.
- Fourteen hours per day is a reasonable number of hours worked each day based on the evidence.
- Tim was moved from driver to Dispatcher in January 2013.
- Streamline has two Dispatchers who work on rotating shifts. Kyle was the other Dispatcher who worked for Streamline while Tim was there. Both Tim and Kyle testified there was no mention of the position being a management position when they were hired.
- The Dispatcher Job Description does not mention it being a management position (ER1, Tab 3).
- When he hired Tim, Kelly testified he was looking for someone with experience in a truck, a good attitude and good at dealing with people. He did not mention looking for management skills, management experience or management qualifications.
- Supervision and Direction of Other Workers: Tim did not have any authority over drivers that one would expect of a supervisor. Both Tim and Kyle testified Don was the supervisor of the drivers and this is supported by paperwork including EE1 and EE2. When Kelly was asked who the supervisor of the drivers was, his first answer was Don. Tim, Kyle and Jonathan testified there were three shifts for the drivers (A, B and C) and Don was responsible for scheduling. Only Don had authority to move a driver from one shift to another. Dispatchers had no true decision-making power over scheduling drivers. Tim, Kyle and Jonathan testified all driver vacation requests go through Don. There was no evidence that Tim received or approved a vacation request.

- **Discipline of Subordinates:** Tim, Kyle and Jonathan testified the Dispatcher was not involved in the discipline process. There is no evidence of Tim disciplining anyone. A disciplinary meeting held for Clay Desjardins involved Clay, Kim Peterson and Don (EE1). There was no Dispatcher at this meeting. According to Tim, Kyle and Jonathan, firings were handled by Kelly and Don and not Dispatchers. When Clay Desjardins was fired, there is no indication on the discipline form (EE2) that a Dispatcher was involved. While Jason, the current Dispatcher, may be involved in terminating employees (ER1, Tab 18), this has no impact on Tim. Tim and Kyle both testified they had no involvement in performance evaluations. Safety compliance was Krissy Cleasby's responsibility.
- **Hiring and Promoting of Subordinate Staff:** Tim, Kyle and Johnathan testified they were not involved in the hiring process. Tim and Kyle testified the directors of the company and Don were responsible for hiring staff. There is no evidence Tim had input on raises or promotion of drivers.
- **Independence and Discretion in Performing Assigned Duties:** Tim worked a 5-day on 5-day off schedule and was assigned duties. There is no evidence he had flexibility with his schedule or duties. If he needed to leave for a personal appointment, he would need to clear it with Don first.
- **Negotiating Remuneration Individually Rather Than Collectively:** Tim was not in a position to negotiate his salary. He and Kyle were offered the position at a certain salary, without negotiation. Tim received a raise but any employee can ask for a raise. Although Stephanie testified that managers receive salaries and non-management employees are paid hourly or by percentage of the load, Kyle contradicted her testimony by testifying he earned a salary as a mechanic. Whether an employee is paid salary or not has no bearing on whether the employee is a manager. There is no evidence Tim had any say in how drivers were paid or the level of remuneration of any employees.
- **Participation in Carrying Out the Employer's Budgets and Performance Requirements:** Tim, Kyle and Jason testified they were not involved in creating Streamline's budgets. Tim had no input and was not privy to the budgets. Tim and Kyle testified Don and Mr. Stokes were responsible for the Streamline's equipment and performance needs.
- **Emergency Situations and Decision-Making Authority:** Dispatchers were the first point of contact for drivers in emergency situations but they had no independent authority to make decisions. Tim and Kyle testified they would pass information about an emergency on to Don or Kelly to decide how to deal with the situation. Dispatchers were merely conduits between drivers and management.
- **Operational Role v. Administrative and Leadership Role:** Tim and Kyle testified they dealt with calls from customers and then passed on load and location information to the drivers. Dispatchers had operational role and not administrative or leadership role.
- **Public Holidays:** The only record of Tim's hours is the calendar created by Streamline (EE3) indicating his 5 days on, 5 days off schedule. When a Public

Holiday fell on his 5 days, he did not get a day off. He worked on the following Public Holidays: September 1, 2014, February 16, 2015 and May 18, 2015.

According to section 2-32(3)(b) of the Act, hours worked on a Public Holiday must be paid at a rate of time and a half. While he received “holiday pay,” he should have received two payments – the holiday pay as well as the time and a half for the hours actually worked on the holiday.

- Hours of Work: There is no record of Tim’s hours of work in contravention of section 2-38(1) of the Act. The employers’ testimony about Dispatchers’ hours was inconsistent. Stephanie said the Dispatcher arrives between 6 and 6:30 a.m. and go home when the work is done. Don said the hours were 7:00 a.m. to 7:00 p.m. Jason said the Dispatcher arrives before 7:00 a.m. and leaves by 6:00 a.m. but can continue dispatching from home. Kelly said the hours were from 6:30 or 7:00 a.m. until 5:00 or 6:00 p.m.
- Employee testimony about hours by Tim and Kyle was that they started at 6:00 a.m. and this was confirmed by Jonathan. They testified there were no lunch breaks and that they worked until the last truck came in, usually 8:00 or 9:00 p.m. but could be as late as 11:00 p.m.
- Because the employer failed to keep records and to provide consistent testimony, Tim and Kyle’s testimony ought to be accepted as fact. In the audit sheet (EE7), Employment Standards used 6:00 a.m. to 8:00 p.m. or 14 hours per day for its calculations. An hourly wage was calculated per section 17 of the Employment Standards Regulations by dividing Tim’s \$6,500 salary by the total hours he worked for each pay period.
- On May 11, 2015, Tim’s position changed from Dispatcher to driver (\$28 per hour). The timesheets (EE4) show overtime was calculated incorrectly. He is owed additional overtime in accordance with section 2-18(1)(b) of the Act.
- Tim performed very little, if any, management functions and is therefore entitled to overtime while he was a Dispatcher. Fourteen hours per day is a reasonable average.

VI. ANALYSIS AND DECISION

The starting point for this appeal is the Wage Assessment. Typically, an Employment Standards Officer prepares a worksheet outlining the calculation for wages forming the basis of a Wage Assessment. Daniel Corbett’s Officer Worksheet (EE7) calculated the total wages (including overtime, public holiday, and annual holiday pay) owed from July 1, 2014 to July 17, 2015 as \$107,147.11. Mr. Corbett determined Tim received \$92,337.86 from Streamline during this time period, leaving an outstanding balance of \$14,809.25. This is the amount claimed in the Wage Assessment.

By all accounts, Tim worked overtime hours while employed at Streamline. Witness testimony establishes he worked a 5-day on, 5-day off schedule. During his days on, he worked anywhere from 11 to 15 hours per day, depending on the day and season. Section 2-7(3) of the Act requires an employer to pay an employee a minimum of 1.5

times the employee's hourly wage for overtime or hours worked on a public holiday. Sections 2-17 and 2-18 provide that an employee is entitled to overtime pay calculated on a daily or weekly basis, whichever is greater, "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 40 hours in a week or eight hours in a day. Section 3(4) of the *Employment Standards Regulations* creates a managerial exemption to overtime pay for an employee who performs services that are "entirely of a managerial character."

The main issue to be determined is whether or not Tim was a manager at Streamline. The bulk of the wages claimed in the Wage Assessment relate to overtime wages earned while he was a Dispatcher. If he was a manager while employed as a Dispatcher, then he falls within the managerial exemption for overtime pay and his claim for overtime would be limited to his last months of employment when he was demoted to gravel truck driver (May 11, 2015 to July 21, 2015). The portion of his claim relating to public holiday pay is not dependent upon whether or not he was a manager. Under the Act, he is entitled to it.

MANAGERIAL CHARACTER

Whether or not an employee is a manager is a question of fact. Relevant case law reveals that all aspects of the job must be considered in order to determine if sufficient managerial character exists. In *Westfair Foods Ltd. v. Saskatchewan (Director of Labour Standards)* (1995), 136 Sask. R. 187 (QB), Justice Klebuc identified a list of functions and characteristics associated with management positions, including:

- (1) the supervision and direction of other workers;
- (2) the discipline of subordinates, individually or as part of a management team;
- (3) evaluating the performance of subordinates;
- (4) hiring and promoting of subordinate staff;
- (5) some independence and discretion in performing assigned duties;
- (6) supervision of a collective agreement, where the work place is unionized;
- (7) negotiating remuneration individually rather than collectively;
- (8) level of remuneration, vis-à-vis, non-managerial staff;
- (9) participation in carrying out the employer's budget and performance requirements.

According to Justice Klebuc, the list was neither meant to be all inclusive nor must each criterion be found to exist before an employee's position can take on a managerial character. He felt the functions of supervision and right to discipline were of fundamental importance.

In *Balzer v Federated Co-operatives Limited*, 2014 SKQB 32, Justice Laing referred to the factors outlined in *Westfair Foods* and adopted the reasoning of the Ontario Superior Court in *McCracken v Canadian National Railway*, 2010 ONSC 4520. In addition to

adopting similar indicia identified in *Westfair Foods*, the Court in McCracken held, “an employee’s title or job description is not determinative of whether the employee is a manager, and his or her status is determined by what the employee does or has been charged to do in the business enterprise.” The Court also said, “the degree of autonomy and decision-making authority needs to be significant, but it need not be absolute or unfettered, and a manager may have to report to and be supervised by more senior managers and officials in the organization.”

What constitutes “of a managerial character” varies according to the facts of each case. In this case, the evidence leads me to conclude Tim McDonald was a manager while he was employed as a Dispatcher for Streamline. I base this conclusion on the following analysis.

1. Supervision and Direction of Other Workers

The evidence establishes that as Dispatcher, Tim worked 5-days on, 5-days off. When he was on, he was responsible for arriving at work early in order to figure out when, where and how the day’s work would get done. He would look at the list of booked jobs, field calls from customers, and start communicating to drivers which loads they were taking and where they were going. Before he could figure out who was taking which particular load where, Tim had to determine how his drivers would deliver their loads, taking into account the weight restrictions imposed by RM’s, road closures, bans and construction. Once he figured it out, Tim would communicate with his drivers (24+) and assign tasks accordingly.

The Respondents take the position that Don Sanders, as Senior Fleet Coordinator, supervised and managed the drivers, not Tim or Kyle. Tim said he was not responsible for supervising the drivers and that he really had no authority over them. He merely relayed information. In case of emergency, he said he simply redirected the information and had no role in deciding what to do or how. If a driver had an equipment issue, he did not tell them what to do about it. Both Tim and Kyle said Don was the only person who had the authority to move a driver from one shift to another.

Don testified that a main part of his role involves sales and that much of his time is spent securing contracts. He also hires and trains new Dispatchers and ensures Streamline has enough equipment on the road. When a problem arises with the drivers, he said the Dispatchers consult with him if need be but they are the ones who supervise and manage the drivers on a more immediate/direct basis.

Jason Metz said he was supervised by the Dispatchers when he was a driver and that he became the immediate supervisor for the drivers once he was promoted to Dispatcher. He said that as a Dispatcher he has the authority to authorize a shift-change but that he could not recall any drivers ever requesting one. He also said that when he was a driver and needed a day off, he would clear it with the Dispatcher. This actually happened when he was having some family troubles. He did not go to Don with a vacation request

because as a lease/operator, the most time he took was a day off here or there and for these days he asked Tim or Kyle, not Don. He also testified that he has the authority to authorize a day off for a driver and that this is usually done verbally.

The evidence establishes, as Dispatcher, Tim was in constant communication with the drivers about how the day was going. Obviously, things did not always go according to plan and he had to troubleshoot. In the case of an emergency, the Dispatcher was the person to contact. I believe Tim and Kyle played a more important role than simply relaying information and doing what they were told. As Dispatchers, they were the first point of contact and I believe they helped decide what to do, in consultation with other members of management. If the owners and other members of management were not immediately available, it makes sense that it would have been up to them to make a decision on behalf of Streamline and to see to its execution. With respect to whether or not Tim had the authority to authorize a shift change, there is no evidence that any drivers requested a shift change so it is difficult to know for sure. While I accept that Don was higher up in the management chain than Tim or Kyle, I believe that it was the Dispatchers who supervised and directed the drivers on a day-to-day basis.

2. Discipline of Subordinates

Testimony on behalf of the Appellants was consistent regarding Dispatchers having the authority to discipline drivers – anywhere from having them not go to a certain location, to sending them home for the day, to firing. The Appellants' witnesses admitted that Tim did not like conflict and was not comfortable disciplining drivers. Because Streamline's management acted as team, this was not considered to be a problem. The Respondents took the position that Dispatchers were not involved in making or carrying out any important decisions, including with respect to the disciplining of drivers. They argued regardless of the role Jason, the current Dispatcher, has taken on, Tim did not discipline drivers.

The evidence establishes other Dispatchers have embraced this role, including Kyle Hoffman and Jason Metz. For example, the employer presented a Disciplinary Action Form (ER1, Tab 8) describing an incident where Kyle sent a driver home after he acted out in anger in the dispatch office following a disciplinary meeting with Kim Peterson and Don Sanders (EE1). The form signed by Kyle includes the following headings: "Manager Name: Kyle Hoffman Manager Title: Dispatcher". Although Kyle Hoffman was not involved in the initial disciplinary meeting, he had the authority to send the driver home after he reacted inappropriately to and in front of Kyle following the meeting. The Appellants presented additional evidence showing Jason Metz, Streamline's current Dispatcher, embracing a disciplinary role (ER1, Tabs 15-18).

The evidence establishes that Dispatchers at Streamline have the authority to discipline subordinates but that this role was not embraced by Tim. The evidence also shows that corrective action was rarely required. In any event, Tim did not discipline drivers while he was a Dispatcher.

3. Evaluation of Subordinates

The evidence establishes that if/when driver evaluations were needed, they were completed by the owners or Don Sanders. While Tim was not involved in performance evaluations per se, he was responsible for performing site-inspections or safety checks on the drivers (ER1, Tab 12). Tim performed these inspections on days where he was not dispatching. Given that Streamline's business involved the hauling dangerous liquids, I accept that safety inspections were a key component of driver evaluation. Safety standards, and consequently safety inspections, were important to the day-to-day operations of the business. Streamline had to maintain its standing with respect to safety requirements or it would lose and/or go out of business.

4. Hiring and Promoting of Staff

The evidence establishes Dispatchers did not have a large role to play in the hiring or promoting of staff but that Tim was responsible for training new employees (ER1, Tab 5). Stephanie, Don and Kelly testified that Tim's input on hiring and promotions was considered if and when he weighed in. For example, Tim provided his recommendation on Tom Gordon's promotion from driver to Dispatcher and his opinion was taken into account. He also provided his opinion on other drivers from his previous place of employment. Tim's input, however, was not required and he was not expected to hire staff because part of Don's role as Senior Fleet Coordinator was the hiring of drivers. Both Stephanie and Don indicated that if Tim felt strongly about hiring someone, he could have done it and his decision would have been backed by them and the owners. There is no evidence that Tim personally hired anyone while employed as a Dispatcher with Streamline.

5. Degree of Independence and Discretion in Performing Duties

The evidence establishes that as Dispatcher, Tim was usually the first person in the office, arriving between 6 and 6:30 a.m. He would have a list of jobs booked from the day before and would start fielding calls from other operators and customers. It was Tim's responsibility to figure out the day's schedule and assign tasks to drivers. He had to be knowledgeable about hours of service, legal and safety requirements, and make his decisions with these factors in mind. In order to determine trucking routes, he would be dealing with as many as 10 or 12 RM's with different weight restrictions, not to mention road closures, bans and construction. Tim had to problem-solve and figure out how to get the work done if Streamline were short trucks. The goal was to accommodate the clients and not have to turn away work. It was Tim's role to work through any issues, often in consultation with Dustin Stokes (Shop Manager and Mechanic), and to keep things running.

Undoubtedly, Tim's degree of independence and discretion increased when he was promoted to Dispatcher and decreased when he was demoted to gravel truck driver. As a Dispatcher, his independence and discretion were not on par the with the truck drivers, but rather with other managers including Stephanie Brady, Office Manager, and Dustin Stokes, Shop Manager. He had a key to the office and the discretion to

determine when he arrived each morning and left each evening. Because he needed to direct the drivers who started arriving by 7 a.m., he usually arrived before then. While some drivers might not finish until 8, 9 or 10 p.m., he could go home at 5 or 6 p.m. and continue to dispatch the last drivers from home. He did not need to check in with anyone in upper management about any decisions he made either from the office or from home. Tim was not asked to keep track of his hours. The owners considered him a member of the management team and trusted that he would work the hours he needed to in order to get the job done.

I find Tim had significant independence in performing his duties. Barring exceptional circumstances, he did not seek permission or advice on how to direct the drivers. He ensured everything that needed to be done was done. He decided who went where and how many loads each driver took. He dealt with customers and determined how best to meet their needs. He played a key role with customers as the representative of Streamline who was in contact with them on a daily basis. He ensured all laws, by-laws and safety regulations were followed.

With respect to non-daily tasks such as vacation requests, I accept that while a vacation request would be handled by Don, Tim had the authority to grant a driver's request for a day off. Although the evidence suggests Tim shied away from confrontation, I find he had the authority to discipline drivers. He did not exercise this authority and said he never had reason to discipline a driver. The fact that other Dispatchers have embraced this role makes it more likely than not that he also had the authority to discipline drivers. Given that management acted as a team, his preference not to discipline drivers was not considered a problem. The owners recognized that everyone has their strengths and dealing with confrontation was not Tim's.

Tim denied playing any role in emergencies other than relaying information but I believe Tim was more involved with problem-solving than he let on. In addition to making a myriad of daily decisions, I believe Tim was involved in determining what to do in case of emergency and how best to do it quickly. It makes sense that he would have consulted with the owners and other members of management in order to determine the best course of action.

According to Tim, he had no flexibility in his duties or schedule. He said he was directed by Don to be at work by 6:00 a.m. and that he was not allowed to leave until the last truck was parked. He said he was required to be the last person at the office and had to lock up when he left. He said he needed permission from Don Sanders if he were to leave for a personal appointment. Tim's testimony about the lack of flexibility in carrying out his duties does not mesh with the testimony of most of the witnesses on this point. Even Kyle admitted Dispatchers could leave the office when they chose and could continue dispatching from home with their company phone/radio. I find it more likely than not that Tim asked Don to fill in as Dispatcher during personal appointments

rather than being required to ask Don for permission to attend the appointment in the first place.

Although Tim did not seem to remember much about conducting site inspections or training other employees, the documentary evidence establishes that Tim did both (ER1, Tabs 5 and 12) and that Dispatchers had the authority to authorize extra time/charges claimed by drivers (ER1, Tab 14). On days where Tim was not dispatching, he was responsible for performing site inspections/safety spot inspections. On these occasions, he would show up on a surprise basis and conduct inspections on the drivers in order to ensure they were following Streamline's and the customer's requirements. He documented these inspections and Streamline kept the documents as proof they were meeting safety standards on an ongoing basis (ER1, Tab 12). Given the dangerous nature of Streamline's business, I accept that safety is a priority for Streamline and that Dispatchers play a key role in ensuring safety standards are met. As a Dispatcher, Tim was charged with both administrative and leadership roles.

Employers need to be able to trust their employees and managerial positions warrant an extra level of trust. Managers often work independently, making decisions that affect the overall operations of the company. They are not usually required to keep time sheets or account for their time in the same manner that other employees might be required to. When Tim became Dispatcher, this was a promotion. When he was demoted to gravel truck driver due to several trust-related issues, he returned to a lower level position where trust and good judgment were not quite as important. The Disciplinary Action Form for Tim (ER1, Tab13) states: "Because Tim was considered management it was decided that we would offer him a job as a driver. As there was concern from the drivers that he had broken their trust and they had lost respect for him...Tim accepted a position as a gravel truck driver and seemed thankful and a little relieved to be done with the stress of dispatching." I accept that Streamline's owners and upper management demoted Tim because they could no longer trust him in a position of authority. It makes sense that once trust was broken, Tim's level of independence and discretion was decreased.

6. Supervision of Collective Agreement

This function is not applicable as Streamline's workplace is not unionized.

7. Negotiation of Remuneration Individually

As a driver, Tim was paid an hourly wage. When he was promoted to Dispatcher in December of 2012, he was offered a salary of \$5,250 plus a fuel card. Initially, he did not negotiate his salary but after working for several months, he asked the owners (Kelly Brady and Jason Peterson) for a raise. In April of 2013, his salary was increased to \$6,500 per month plus a fuel card. This raise in salary affected only him. It was not negotiated as a raise in salary for all Dispatchers. His raise was negotiated individually and it was granted because his contributions were valued.

8. Level of Remuneration

According to the evidence, Dispatchers generally make more money than drivers but this is dependent on the time of year. Tim worked a 5-day on 5-day off schedule – unique to Dispatchers. His 5 days on were long but were followed by 5 days off. Before he was demoted, he was earning a monthly salary of \$6,500. His salary was not dependent upon the number of hours he worked or the number of loads that were hauled in a given day, week or month. Drivers are paid an hourly wage (in the range of \$28 per hour) or by percentage per load. Unlike the drivers, Dispatchers have a steady salary.

According to Stephanie, the level of Tim's salary was right in between hers and Dustin Stokes' salary. This testimony was not contradicted. I find that Tim's salary as Dispatcher was in line with the salaries of other lower level managers at Streamline.

9. Budgetary and Performance Requirements

Tim played no role in Streamline's budget. None of the witnesses suggested that he did. The owners dealt with the budget.

While case law establishes that a job description is not determinative of whether an employee is a manager, I do give some weight to the fact that Streamline's job description for Dispatcher (ER1, Tab3) lists the monitoring of personnel and performance of site inspections amongst the "Responsibilities" and it states under "Other Skills/Abilities":

- Team leadership and management skills
- Decision making and time management skills
- Effective verbal and listening communication skills.

Case law also establishes that a manager must have significant autonomy and decision-making authority. The evidence shows that Tim was charged with controlling the day-to-day operations of the company, from dealing with customers to directing the drivers in how to go about fulfilling the customer's needs. He had the responsibility of directing 24+ drivers on how to go about their day, including when it began, where and how they got there, and when it ended. He helped ensure that Streamline operated in a safe manner which is key for a trucking company in the business of hauling dangerous liquids.

While Tim operated with a significant level of autonomy, he was backed-up by owners and managers who were either on par with him or above him. Streamline's upper management consisted of the owners (but mainly Kelly and Jason Peterson) and Don Sanders. Middle/lower management consisted of Stephanie Brady as Office Manager, Dustin Stokes as Shop Manager and Tim McDonald and Kyle Hoffman as Dispatchers. Tim's discretion was not unfettered but I find he was a valued member of Streamline's management team.

Overall, I find the employee's witnesses minimized the managerial character of the Dispatcher's duties at Streamline. According to them, Tim had no real authority over the drivers and lacked discretion and independence in carrying out his duties. Tim fulfilled an operational role only, mainly relaying information. The evidence suggests that Tim played a bigger role at Streamline than this.

On the other hand, I do not find the employer's witnesses exaggerated Tim's duties or responsibilities in order to make him fit more neatly into the role of manager. Kelly admitted he did not necessarily look for management experience when hiring Tim. He said Tim was not expected to conduct performance evaluations for drivers and hiring, firing and disciplining were not important parts of his job. Although Tim had the authority to do any and all of this, the owners and other managers were able to handle these responsibilities, especially since hiring was the only one of these duties they did on a regular basis. Except in relation to safety, Streamline did not evaluate its drivers on an ongoing basis and they rarely needed to discipline drivers. Although some Dispatchers (Kyle and Jason) disciplined drivers on occasion, management acted as a team and Kelly, Jason Peterson and Don typically handled these types of situations.

Where discrepancies exist between the employer's and the employee's evidence, I preferred the evidence of the employer's witnesses because I believe they refrained from exaggerating Tim's role while the employee's witnesses down-played his role. After considering all of the evidence, I find Tim performed services of an entirely managerial character while employed as a Dispatcher at Streamline and consequently is not entitled to overtime pay for hours worked up to May 11, 2015.

OVERTIME

Tim is not entitled to overtime pay for the hours he worked as Dispatcher due to the managerial exemption found in the Regulations. Therefore, he is not entitled to overtime for pay for overtime hours worked from July 1, 2014 to May 10, 2015.

On May 11, 2015, Tim started working as a gravel truck driver for Streamline. He earned a wage of \$28.00 per hour. Mr. Corbett said Streamline did not calculate and pay overtime in accordance with the legislation. According to section 2-18(1)(b), overtime is payable after 8 hours in a day but the employer calculated overtime pay on a weekly basis instead. This was not in compliance with the legislation. For example, from May 11-14, 2015, Tim was paid 3.5 overtime hours for the week, however, on May 11th he worked 13.5 hours entitling him to 5.5 hours of overtime for that day alone. Stephanie acknowledged they may have calculated it incorrectly. The Act says the employee is entitled to overtime pay calculated on a daily or weekly basis, whichever is greater.

From May 11 to July 20, 2015, Streamline paid Tim for 17.5 overtime hours in May, 64 overtime hours in June and 17 overtime hours in July. According to Tim's timesheets (EE4), payroll information (EE6) and the legislation, he was owed 25.5 overtime hours in May (week 2 calculated daily at 11.5 OT hours and week 4 calculated weekly at 14 OT

hours), 62.5 overtime hours in June (week 1 calculated daily at 14 OT hours, week 2 calculated weekly at 25.5 OT hours, week 3 calculated daily at 10.5 OT hours and week 4 calculated daily or weekly at 12.5 OT hours) and 25 overtime hours in July (week 1 calculated weekly at 17 OT hours and week 2 calculated daily at 8 OT hours). During this time period, Streamline paid Tim for 98.5 overtime hours but he worked 113 overtime hours. He is therefore owed 14.5 hours of overtime calculated as follows:

$$\begin{aligned} \$28.00 \text{ per hour} \times 1.5 &= \$42.00/\text{hour} \\ \$42.00 \times 14.5 \text{ hours} &= \$609.00 \end{aligned}$$

PUBLIC HOLIDAY PAY

Section 2-32(3)(b) of the Act says that hours worked on a public holiday must be paid at a rate of 1.5 times the employee's hourly wage. When Tim's 5 days on fell on a public holiday, he did not take the day off so he is entitled to public holiday pay for the hours he worked on those days. According to the evidence (EE3 and EE4), Tim worked two public holidays, September 1, 2014 and February 16, 2015, and did not receive public holiday premium pay for these days (EE6). Mr. Corbett argued Tim also worked May 18, 2015. Although he was scheduled to work that day as Dispatcher, this changed when he was demoted to gravel truck driver on May 11, 2015. He did not end up working on May 18 as originally scheduled, as evidenced by his timesheet (EE4).

In order to calculate the public holiday pay owing to him, it is necessary to come up with an hourly wage. Tim earned \$6,500 per month as a Dispatcher and on the months in question, worked 15 days per month (EE3). Dispatchers were not required to record their hours. Witness testimony about the number of hours worked per day was inconsistent but generally had them working between 11 and 15 hours per day. They started work each day around 6 a.m. It is the end time that varies drastically, especially since dispatchers continued to dispatch from home until the last truck was parked, even if they left the office between 5 or 6 p.m. Their hours also varied depending on the weather and the season. The Act requires employers to keep track of the total number of hours worked by their employees. Streamline did not do this for its dispatchers. Under the circumstances, I will give the employee the benefit of the doubt regarding his hours and accept Mr. Corbett's proposal of using 14 hours per day as the average, for the purposes of calculating public holiday pay.

Tim's hourly wage for purposes of calculating public holiday pay is calculated as follows:

$$\begin{aligned} \$6,500 \text{ per month divided by } 15 \text{ days worked} &= \$433.33 \text{ per day} \\ \$433.33 \text{ divided by } 14 \text{ hours} &= \$30.95 \text{ per hour} \end{aligned}$$

Tim's hourly wage multiplied by 1.5 is \$46.43. Tim worked 14 hours on each of the two public holidays in question so he is owed \$650.02 ($\46.43×14) $\times 2 = \$1,300.04$ in public holiday pay.

VII. CONCLUSION

The appeal is allowed and the Wage Assessment is varied to reflect the outstanding amount owed to Tim McDonald as \$1,909.04. The Appellants are ordered to pay \$1,909.04 to Tim McDonald.

DATED in Regina, Saskatchewan, this 31st day of October, 2016.



Jodi C. Vaughan
Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at www.saskatchewan.ca.

Right to appeal adjudicator's decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

- (a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
- (b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

- (a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;
- (c) the notice of appeal filed with the director of employment standards pursuant to Part II;
- (d) any exhibits filed before the adjudicator;
- (e) the written decision of the adjudicator;
- (f) the notice of appeal to the board;
- (g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

- (a) affirm, amend or cancel the decision or order of the adjudicator; or
- (b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

- 4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.
- (2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.
 - (3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards has the right:

- (a) to appear and make representations on:
 - (i) any appeal or hearing heard by an adjudicator; and
 - (ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and
- (b) to appeal any decision of an adjudicator or the board.