

IN THE MATTER OF AN APPEAL OF WAGE ASSESSMENT
NUMBER 7527 PURSUANT TO SECTION 2-75 OF THE
SASKATCHEWAN EMPLOYMENT ACT, S.S. 2013, c.
S-15.1, AS AMENDED, (THE "SEA");

AND IN THE MATTER OF A SCHEDULED HEARING
PURSUANT TO SECTION 4-2 OF THE SEA



BETWEEN:

1682011 ONTARIO INC., %_a Lyonheart Logistics,
and SADAT MOHAMED MIAN;

APPELLANTS,

AND:

TIMOTHY JAMES PRIOR,

RESPONDENT
(COMPLAINANT).

ADJUDICATOR'S DECISION
April 10, 2016

T. F. (TED) KOSKIE, B.Sc., J.D.

Representatives: Sadat Mohamed Mian, for himself and 1682011 Ontario Inc.

Timothy James Prior, for himself

Paul de Bruin, Employment Standards Officer, for the Director of
Employment Standards

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I. INTRODUCTION

[1] 1682011 Ontario Inc., %_a Lyonheart Logistics, ("Lyonheart") and Sadat Mohamed Mian ("Mian") appealed¹ (the "Appeal") Wage Assessment No. 7527² (the "Assessment") issued pursuant to section 2-74 of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 (as amended) (the "SEA") by the Director of Employment Standards (the "Director") on November 4, 2015.

[2] The Assessment directed Lyonheart and Mian to pay fifteen thousand five hundred and seventy-two dollars and thirty-one cents (\$15,572.11) to Timothy James Prior ("Prior").

[3] By Order dated December 14, 2015, the Labour Relations Board ("LRB") selected me to hear and determine the Appeal.

II. FACTS

[4] Lyonheart is an Ontario body corporate with registered office situate at Brampton, Ontario.³ It carries on the business of, *inter alia*, transporting crude oil from lease properties to batteries. Mian is the sole shareholder, director and officer of Lyonheart.⁴

[5] Husky Energy Inc. ("Husky") contracted with Heavy Crude Hauling L.P. ("Heavy Crude") to transport crude oil from various leased fields to various batteries. Heavy Crude subcontracted some of that work to Lyonheart.

¹Exhibit E-2, Appeal dated November 13, 2015, and received November 16, 2015

²Exhibit E-1, Wage Assessment No. 7527 dated November 4, 2015

³Exhibit P-1, Corporation Profile Report dated October 5, 2015

⁴Evidence in Chief, Mian

[6] Lyonheart hired Prior on February 2, 2014. It appears he commenced work on February 6, 2014. Prior testified his duties were to “haul oil” from various Husky leases to various batteries in Saskatchewan—all North of North Battleford, Saskatchewan. He said he basically “drove in circles” all day long.

[7] Prior testified that at the time of being hired, Mian told him he would be paid twenty-five dollars (\$25.00) per hour. He said there was no discussion of overtime. Prior made no reference in his testimony in chief to any other terms of his engagement.

[8] Under cross-examination, Prior testified that:

- a) when he first spoke with Mian, he advised that he wanted to earn as much as he could and therefore wanted “a lot” of hours;
- b) Mian would e-mail him his “load list,” but would not direct him as to the order in which to attend to same—that decision was left for Prior;
- c) he would tell Mian which days he wanted to work, although he said this was “not all the time”;
- d) acknowledging he needed to ensure the daily job got done, he rarely started at the regular, daily, start time of 7:00 p.m.—he started when he wanted to;
- e) except for a H₂S monitor, he had and, therefore, supplied his own personal protective equipment;
- f) Mian asked him to supply his own tools, but he did not—Mian gave him his tools to use;

- g) if there was a spill on site, he was to call Mian; and
- h) he was never restricted from working for anyone else at the same time as working for Lyonheart—however, saying he did not have time, he did not.

[9] Mian's version of his preliminary discussions with Prior is different. He testified:

- a) Prior said he wanted to work "a lot of hours" and make "lot of money" in order to get rid of his financial problems and buy a truck;
- b) Prior "presented" as a young man "desperately struggling" to "put his life back on track";
- c) they "worked out a solution for his problem" and decided on a rate of twenty-seven dollars (\$27.00) per hour flat rate, with no deductions, as a contractor;
- d) the rate for drivers was twenty-five dollars (\$25.00) per hour and overtime after eight (8) hours;
- e) it is a "common practice for businesses to minimize on overtime payments, as they are costly";
- f) Lyonheart had plenty of options to get other drivers; and
- g) the "arrangement" was specifically made to benefit Prior, as Lyonheart "could have very easily gotten this work done at twenty-five dollars (\$25.00) per hour.

[10] Prior testified that after his first two (2) weeks of work, he asked Mian when he would be paid. He said Mian told him that Lyonheart "holds" two (2) weeks pay and Prior

would need to wait another two (2) weeks.

[11] Prior testified that, at the end of the first month, Mian said:

- a) Lyonheart could not pay him as an employee;
- b) Prior needed to incorporate a corporation—Mian gave Prior a government telephone number to call about incorporation;
- c) if Prior worked for Lyonheart for three (3) months, it would reimburse him for the costs of incorporation;⁵ and
- d) Prior needed to provide Lyonheart with an invoice and GST number.

[12] Prior said he did not understand the gravity of what Mian was asking of him. He says he proceeded to incorporate 101251942 Saskatchewan Ltd. (the “# Co.”), a Saskatchewan body corporate.

[13] Mian showed Prior how to complete the invoices for the # Co. In fact, the first invoice was completed by and in Mian's writing.⁶ Prior testified the invoice simply reflects the number of hours worked, as recorded in the log books, multiplied by the hourly rate of thirty dollars (\$30.00) per hour for the periods up and until the period reflected in the July 15, 2014 invoice, when the hourly rate increased to thirty-one dollars (\$31.00) per hour.⁷ The rates were never adjusted to reflect overtime. The invoices were paid by cheques

⁵Lyonheart did, in fact, reimburse these costs—see Exhibit P-2, Lyonheart cheque for \$215.00 dated April 5, 2014

⁶Exhibit P-4, Invoice #253301 dated February 28, 2014

⁷Exhibit P-4, # Co. Invoices

from Lyonheart.⁸

[14] Prior testified:

- a) Lyonheart owned and was responsible for the repair of the truck and equipment he used, with the exception of the protective equipment—coveralls, boots, hard hat and safety glasses—he wore;
- b) Lyonheart and Heavy Crude directed his work;
- c) he could not hire someone to do his work—Heavy Crude would not allow it; and
- d) he had no investment and no financial risk with the work he did.

[15] Mian testified that Lyonheart normally hires employees. It only made this contractor “arrangement” to accommodate Prior’s request for more hours. Lyonheart agreed to this process to pay more.

[16] Mian testified to what he said were the differences between employees and the arrangement with Prior. He said:

- a) employees cannot take the truck they are operating home—Prior could;
- b) Lyonheart provided employees—but not Prior—with safety equipment;
- c) employees—but not Prior—were paid less, but were paid overtime;

⁸Exhibit P-2, Lyonheart cheques

- d) employees had less freedom than Prior; and
- e) Prior was paid a safety bonus that was not available to employees.

[17] Lyonheart claims that Prior has overcharged for hours. It says:

- a) global position records⁹ show log book discrepancies that have caused seventy-eight and nine-tenths (78.9) hours that should not have been billed;¹⁰ and
- b) the invoices over billed forty-nine (49) hours.¹¹

Lyonheart also claims one hundred and three dollars (\$103.00) per month for “insurance” and five hundred dollars (\$500.00) per month for “usual employer charge,” each for seven (7) months.

III. DISPUTE

[18] The principle issue here is whether Prior is an employee within the meaning of section 2-1(f) of the *ESA*.

[19] If I find Prior to be an employee, the issues become the amounts, if any:

- a) owing by Lyonheart to Prior for overtime and holiday pay; and
- b) to be deducted therefrom.

⁹Exhibit D-4, DWS Entry Listings

¹⁰Lyonheart did not point out the dates for these hours

¹¹It appears as though Lyonheart’s calculation should be 32.5, not 49 hours

IV. DECISION

[20] I rule that Prior is an employee of Lyonheart.

[21] I rule that Lyonheart and Mian owe Prior fifteen thousand five hundred and seventy-two dollars and twenty-eight cents (\$15,572.28), comprising the following:

- a) fourteen thousand seven hundred and twenty-two dollars and eighty-eight cents (\$14,722.88) for overtime pay; and
- b) eight hundred and forty-nine dollars and forty cents (\$849.40) for annual holiday pay.

[22] I find that no sum is deductible from the amount owing from Lyonheart and Mian to Prior.

[23] The appeal is dismissed.

[24] I vary the Assessment to reflect the amounts reflected in paragraph twenty-one (21) above.

V. REASONS

A. ACT

[25] The relevant provisions of the *SEA* are as follows:

Interpretation of Part

2-1 In this Part and in Part IV:

- ...
- (f) "employee" includes:
- (i) a person receiving or entitled to wages;
 - (ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;
 - (iii) a person being trained by an employer for the employer's business;
 - (iv) a person on an employment leave from employment with an employer; and
 - (v) a deceased person who, at the relevant time, was a person described in any of subclauses (i) to (iv);

but does not include a person engaged in a prescribed activity;

- (g) "employer" means any person who employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who, in the opinion of the director of employment standards, 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;

- ...
- (o) "overtime" and "overtime pay" mean:
- (i) pay at a rate of 1.5 times an employee's hourly wage; or
 - (ii) pay at a prescribed rate for a prescribed category of employees;

- ...
- (r) "public holiday pay" means an amount of money that is payable to an employee pursuant to section 2-32;

- ...
- (u) "vacation pay" means an amount of money that is payable to an employee pursuant to section 2-27;

- (v) "wages" means salary, commission and any other monetary compensation for work or services or for being at the disposal of an employer, and includes overtime, public holiday pay, vacation pay and pay instead of notice;
- ...

Application of Part

2-3(1) This Part applies to all employees and employers in Saskatchewan other than:

- (a) subject to subsections (2) and (3) and to the regulations made pursuant to this Part, those employees whose primary duties consist of actively engaging in farming, ranching or market gardening activities; and
- (b) those employees or employers, or categories of employees or employers, excluded in the regulations made pursuant to this Part from all or portions of this Part.

...

Agreements not to deprive employees of benefits of Part

2-6 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.

More favourable 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.

...

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).

...

Annual vacation periods and common date

2-24(1) Every employee is entitled:

- (a) subject to clause (b), to an annual vacation of three weeks after the completion of each year of employment with an employer; and
- (b) to an annual vacation of four weeks after the completion of 10 years of employment with an employer and after the completion of each subsequent year of employment with that employer.

(2) An employer may use a common date for calculating vacation entitlement of all employees but only if the common date does not result in a reduction of any employee's rights pursuant to this Subdivision.

...

Vacation pay

2-27(1) An employee is to be paid vacation pay in the following amounts:

- (a) if the employee is entitled to a vacation pursuant to clause 2-24(1)(a), three fifty-seconds of the employee's wages for the year of employment or portion of the year of employment preceding the entitlement to the vacation;
 - (b) if the employee is entitled to an annual vacation pursuant to clause 2-24(1) (b), four fifty-seconds of the employee's wages for the year of employment preceding the entitlement to the vacation.
- (2) With respect to an employee who is entitled to a vacation pursuant to section 2-24 but who does not take that vacation, the employer shall pay the employee's vacation pay not later than 11 months after the day on which the employee becomes entitled to the vacation.
- (3) The employer shall pay vacation pay to the employee in an amount calculated according to the length of vacation leave taken:
- (a) at the employee's request, before the employee takes the vacation; or
 - (b) on the employee's normal payday.
- (4) An employer shall reimburse the employee for any monetary loss suffered by the employee as a result of the cancellation or postponement of the vacation if:
- (a) the employee has scheduled a period of vacation at a time agreed to by the employer; and
 - (b) the employer does not permit the employee to take the vacation as scheduled.
- (5) A monetary loss mentioned in subsection (4) is deemed to be wages owing and this Part applies to the recovery of that monetary loss.

When public holiday occurs during a vacation

2-28 If one or more public holidays set out in section 2-30 occur during the period of any vacation that an employee has been permitted by the employer to take pursuant to this Part:

- (a) the period of that vacation must be increased by one working day with respect to each public holiday; and
- (b) the employer shall pay to the employee, in addition to the vacation pay that the employee is entitled to receive, the wages that the employee is entitled to be paid for each public holiday.

Payment of vacation pay on ending of employment

2-29(1) If the employment of an employee ends, the employer shall pay to the employee the vacation pay to which the employee is entitled pursuant to this Part within 14 days after the day on which the employment ends.

- (2) If the employment of an employee ends, the employee is entitled to vacation pay calculated in accordance with section 2-27 on the wages earned by the employee with respect to which the employee has not previously been paid vacation pay.

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

Public holidays

2-30(1) In this section:

- (a) "Family Day" means the third Monday in February;
- (b) "Saskatchewan Day" means the first Monday in August.
- (2) For the purposes of this Part, the following are public holidays in Saskatchewan:
 - (a) New Year's Day;
 - (b) Family Day;
 - (c) Good Friday;
 - (d) Victoria Day;
 - (e) Canada Day;
 - (f) Saskatchewan Day;
 - (g) Labour Day;
 - (h) Thanksgiving Day;
 - (i) Remembrance Day;
 - (j) Christmas Day.

(3) In this Part, a reference to a public holiday is a reference to one of the days mentioned in subsection (2) or to a day substituted for that day in accordance with section 2-31.

...

Public holiday pay

2-32(1) An employer shall pay an employee for every public holiday an amount equal to:

- (a) 5% of the employee's wages, not including overtime pay, earned in the four weeks preceding the public holiday; or
- (b) an amount calculated in the prescribed manner for a prescribed category of employees.
- (2) For the purposes of subsection (1), an employer shall include in the calculation of an employee's wages:
 - (a) vacation pay with respect to vacation the employee actually takes in the four weeks preceding the public holiday; and

- (b) public holiday pay in an amount required pursuant to subsection (1) if another public holiday occurs in the four-week period mentioned in clause (1)(a).
- (3) If an employee works on a public holiday, an employer shall pay the employee the total of:
 - (a) the amount calculated in accordance with subsection (1); and
 - (b) 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:
 - (i) an amount calculated at a rate of 1.5 times the employee's hourly wage; or
 - (ii) an amount calculated in the prescribed manner for a prescribed category of employees.

Deductions and special clothing

2-36(1) Except as permitted or required pursuant to this Act, any other Act or any Act of the Parliament of Canada, an employer shall not, directly or indirectly:

- (a) make any deductions from the wages that would be otherwise payable to the employee;
- (b) require that any portion of the wages be spent in a particular manner; or
- (c) require an employee to return to the employer the whole or any part of any wages paid.

(2) In addition to deductions permitted or required pursuant to law, an employer may deduct from an employee's wages:

- (a) employee contributions to pension plans or registered retirement savings plans;
- (b) employee contributions to other benefit plans;
- (c) charitable donations voluntarily made by the employee;
- (d) voluntary contributions by the employee to savings plans or the purchase of bonds;
- (e) initiation fees, dues and assessments to a union that is the bargaining agent for the employee;
- (f) voluntary employee purchases from the employer of any goods, services or merchandise; and
- (g) deductions for purposes or categories of purposes that are specified pursuant to subsection (3).

(3) For the purposes of clause (2)(g), the Lieutenant Governor in Council may specify purposes and categories of purposes by regulation or by special order in a particular case.

(4) No employer shall require an employee to purchase special clothing that identifies the employer's establishment.

(5) An employer who requires an employee to wear a special article of clothing that identifies the employer's establishment shall provide that special article of clothing free of cost to the employee.

Statement of earnings required

2-37(1) An employer shall provide a statement of earnings to an employee:

- (a) on every payday; and
 - (b) when making payments of wage adjustments.
- (2) A statement of earnings required pursuant to subsection (1) must:
- (a) clearly set out:
 - (i) the name of the employee;
 - (ii) the beginning and ending dates of the period for which the payment of wages is being made;
 - (iii) the number of hours of work for which payment is being made for each of wages, overtime and hours worked on a public holiday;
 - (iv) the rate or rates of wages;
 - (v) the amount paid for each of wages, overtime and public holiday pay and work on a public holiday, vacation pay and pay instead of notice;
 - (vi) the employment or category of employment for which payment of wages is being made;
 - (vii) the amount of total wages;
 - (viii) an itemized statement of any deductions from wages being made; and
 - (ix) the actual amount of the payment being made; and
 - (b) be in a form that:
 - (i) is separate from, or readily detachable from, any form of cheque or other type of voucher issued in the payment of wages; or
 - (ii) if an employee is provided with an electronic statement, permits the employee to print off a copy of the statement of earnings.

(3) Unless the contrary is established, wages and other amounts that are not included in a statement pursuant to subsection (2) are deemed not to have been paid.

Employer to keep record of wages, hours worked, etc.

2-38(1) No employer shall fail to keep:

- (a) records showing the particulars of every unwritten contract dealing with wages or other monetary benefits to which any employee is entitled;
 - (b) a copy of every written contract or other document dealing with wages or other monetary benefits to which any employee is entitled; and
 - (c) records showing the following with respect to each employee:
 - (i) the full name, sex, date of birth and residential address of the employee;
 - (ii) the name or a brief description of the job or position of the employee;
 - (iii) the rate of wages of the employee expressed in terms of wages per hour, day, week, month or other period;
 - (iv) the total wages paid to the employee for each week or other pay period;
 - (v) the time when the employee's work begins and ends each day and the time when any meal breaks allowed to the employee each day begin and end;
 - (vi) the total number of hours worked by the employee each day and each week as well as the total number of hours each day and each week that the employee is required to be at the disposal of the employer;
 - (vii) every deduction made from the wages of the employee for any purpose whatever and the purpose for which each deduction was made;
 - (viii) the date of each payment of wages to the employee;
 - (ix) the date of commencement of the employee's employment and, if applicable, the date the employment ends;
 - (x) the date on which the employee becomes entitled to each vacation;
 - (xi) the dates on which each vacation period is taken by the employee;
 - (xii) the amount paid to the employee with respect to each vacation to which the employee is entitled and the date of payment;
 - (xiii) the amount paid to the employee with respect to each public holiday and the date of payment;
 - (xiv) if applicable, the amount paid to the employee on the ending of the employment and the date of payment;
 - (xv) any other prescribed matters or matters that the minister may require.
- (2) Every employer shall provide the records mentioned in subsection (1) to an employment standards officer when requested by the officer.
- (3) Every employer shall keep a register of every employee whose work is ordinarily

performed at home setting out:

- (a) the address where that work is performed; and
- (b) the portion of the work performed by the employee that was performed at home.
- (4) The records that an employer is required to keep pursuant to this section respecting an employee must cover the most recent five years of the employee's employment.
- (5) If an employee's employment ends, the employer shall retain the records mentioned in subsection (4) for a period of two years after the date on which the employee's employment ended.
- (6) An employee's employment is deemed not to have ended for the purposes of subsection (5) if the employee is employed again by the employer within six months after the date on which the employment of the employee ended.
- (7) The records required by this section may be incorporated in any wage record that the employer is required to keep pursuant to any other Act.

...

Corporate directors liable for wages

2-68(1) Subject to subsection (2), notwithstanding any other provision of this Act or any other Act, the corporate directors of an employer are jointly and severally liable to an employee for all wages due and accruing due to the employee but not paid while they are corporate directors.

- (2) The maximum amount of a corporate director's liability pursuant to subsection (1) to an employee is six months' wages of the employee.
- (3) Subject to subsections (4) and (5), a corporate director's liability pursuant to this section is payable in priority to any other unsecured claim or right in the corporate director's property or assets, including any claim or right of the Crown.
- (4) The payment priority set out in subsection (3) is subject to section 15.1 of *The Enforcement of Maintenance Orders Act, 1997*.
- (5) A corporate director who is an employee of the corporation is not entitled to the benefit provided to employees by subsection (3).

...

Wage assessments

2-74(1) In this Division, "adjudicator" means an adjudicator selected pursuant to subsection 4-3(2).

- (2) Subject to subsection (4), if the director of employment standards has knowledge or has reasonable grounds to believe or suspects that an employer has failed or is likely to fail to pay wages as required pursuant to this Part, the director may issue a wage assessment against either or both of the following:

- (a) the employer,
 - (b) subject to subsection (3), a corporate director.
- (3) The director of employment standards may only issue a wage assessment against a corporate director if the director has knowledge or has reasonable grounds to believe or suspects that the corporate director is liable for wages in accordance with section 2-68.
- (4) The amount of a wage assessment that the director of employment standards may assess is to be reduced by an amount that the director is satisfied that the employee earned or should have earned during the period when the employer or corporate director was required to pay the employee the wages.
- (5) The employer or corporate director has the onus of establishing the amount by which an award should be reduced in accordance with subsection (4).
- (6) If the director of employment standards has issued a wage assessment pursuant to subsection (2), the director shall cause a copy of the wage assessment to be served on:
- (a) the employer or corporate director named in the wage assessment; and
 - (b) each employee who is affected by the wage assessment.
- (7) A wage assessment must:
- (a) indicate the amount claimed against the employer or corporate director;
 - (b) direct the employer or corporate director to, within 15 business days after the date of service of the wage assessment:
 - (i) pay the amount claimed; or
 - (ii) commence an appeal pursuant to section 2-75; and
 - (c) in the case of a wage assessment issued after money has been received from a third party pursuant to a demand issued pursuant to Division 4, set out the amount paid to the director of employment standards by the third party.
- (8) The director of employment standards may, at any time, amend or revoke a wage assessment.

...

Adjudicator - duties

4-2 An adjudicator shall:

- (a) hear and decide appeals pursuant to Part II and conduct hearings pursuant to Division 5 of Part II;
- (b) hear and decide appeals pursuant to Division 8 of Part III; and
- (c) carry out any other prescribed duties.

Selection of adjudicator

4-3(1) The director of employment standards and the director of occupational health and safety shall inform the board of an appeal or hearing to be heard by an adjudicator.

(2) On being informed of an appeal or hearing pursuant to subsection (1), the board shall select an adjudicator.

Procedures on appeals

4-4(1) After selecting an adjudicator pursuant to section 4-3, the board shall:

- (a) in consultation with the adjudicator and the parties, set a time, day and place for the hearing of the appeal or the hearing; and
- (b) give written notice of the time, day and place for the appeal or the hearing to:
 - (i) in the case of an appeal or hearing pursuant to Part II:
 - (A) the director of employment standards;
 - (B) the employer;
 - (C) each employee listed in the wage assessment or hearing notice; and
 - (D) if a claim is made against any corporate directors, those corporate directors; and
 - (ii) in the case of an appeal or hearing pursuant to Part III:
 - (A) the director of occupational health and safety; and
 - (B) all persons who are directly affected by the decision being appealed.

(2) An adjudicator may determine the procedures by which the appeal or hearing is to be conducted.

(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.

(4) An adjudicator may determine any question of fact that is necessary to the adjudicator's jurisdiction.

(5) A technical irregularity does not invalidate a proceeding before or by an adjudicator.

(6) Notwithstanding that a person who is directly affected by an appeal or a hearing is neither present nor represented, if notice of the appeal or hearing has been given to the person pursuant to subsection (1), the adjudicator may proceed with the appeal or the hearing and make any decision as if that person were present.

(7) *The Arbitration Act, 1992* does not apply to adjudications conducted pursuant to this Part.

Powers of adjudicator

4-5(1) In conducting an appeal or a hearing pursuant to this Part, an adjudicator has the following powers:

- (a) to require any party to provide particulars before or during an appeal or a hearing,
 - (b) to require any party to produce documents or things that may be relevant to a matter before the adjudicator and to do so before or during an appeal or a hearing;
 - (c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:
 - (i) to summon and enforce the attendance of witnesses;
 - (ii) to compel witnesses to give evidence on oath or otherwise;
 - (iii) to compel witnesses to produce documents or things;
 - (d) to administer oaths and affirmations;
 - (e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the adjudicator considers appropriate, whether admissible in a court of law or not;
 - (f) to conduct any appeal or hearing using a means of telecommunications that permits the parties and the adjudicator to communicate with each other simultaneously;
 - (g) to adjourn or postpone the appeal or hearing.
- (2) With respect to an appeal pursuant to section 3-54 respecting a matter involving harassment or a discriminatory action, the adjudicator:
- (a) shall make every effort that the adjudicator considers reasonable to meet with the parties affected by the decision of the occupational health officer that is being appealed with a view to encouraging a settlement of the matter that is the subject of the occupational health officer's decision; and
 - (b) with the agreement of the parties, may use mediation or other procedures to encourage a settlement of the matter mentioned in clause (a) at any time before or during a hearing pursuant to this section.

Decision of adjudicator

4-6(1) Subject to subsections (2) to (5), the adjudicator shall:

- (a) do one of the following:
 - (i) dismiss the appeal;
 - (ii) allow the appeal;
 - (iii) vary the decision being appealed; and

- (b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.
- (2) If, after conducting a hearing, the adjudicator concludes that an employer or corporate director is liable to an employee or worker for wages or pay instead of notice, the amount of any award to the employee or worker is to be reduced by an amount that the adjudicator is satisfied that the employee earned or should have earned:
- (a) during the period when the employer or corporate director was required to pay the employee the wages; or
 - (b) for the period with respect to which the employer or corporate director is required to make a payment instead of notice.
- (3) The employer or corporate director has the onus of establishing the amount by which an award should be reduced in accordance with subsection (2).
- (4) If, after conducting a hearing concerned with section 2-21, the adjudicator concludes that the employer has breached section 2-21, the adjudicator may exercise the powers given to the Court of Queen's Bench pursuant to sections 31.2 to 31.5 of *The Saskatchewan Human Rights Code* and those sections apply, with any necessary modification, to the adjudicator and the hearing.
- (5) If, after conducting a hearing concerned with section 2-42, the adjudicator concludes that the employer has breached section 2-42, the adjudicator may issue an order requiring the employer to do any or all of the following:
- (a) to comply with section 2-42;
 - (b) subject to subsections (2) and (3), to pay any wages that the employee has lost as a result of the employer's failure to comply with section 2-42;
 - (c) to restore the employee to his or her former position;
 - (d) to post the order in the workplace;
 - (e) to do any other thing that the adjudicator considers reasonable and necessary in the circumstances.

B. ANALYSIS

1. EMPLOYEE OR INDEPENDENT CONTRACTOR

[26] I have reviewed the jurisprudence governing this issue in 10119093

Saskatchewan Ltd. v Selimos.¹² At the outset, I believe it is fair to say there is no one conclusive test that can be applied uniformly to every case to decide whether an individual is an employee or an independent contractor. However, the central question that must be answered in each case is whether the person who is performing services is truly an individual in business on his or her own account.

[27] To answer this central question, we ought to follow a two (2) step process. The first is to determine the intention of the parties in order to ascertain what type of relationship the parties intended to create. The second involves an analysis of the facts of the case to determine if the objective reality reflects that intention. The factors to consider in this second step are control over the work, ownership of tools and equipment, the chance of profit and the risk of loss. However, the relative importance accorded to each factor will be dependent upon the facts and circumstances presented in each case.

a. Intention

[28] Mian argues there was a mutual agreement between Lyonheart and Prior. At the outset, he says Lyonheart did not follow its normal practice. That would have been to hire Prior as an employee. Rather, it responded to Prior's stated need for more money by engaging him as an independent contractor. Mian says Prior was treated differently than an employee and benefitted by reason of same.

[29] Prior responds by saying he was, in essence, simply following the structure being presented to him by Mian. He argues he did not understand the "gravity" of what Mian "was asking him to do."

¹²LRB No. 101-15; see also *Director of Labour Standards v Acanac Inc.*, 2013 SKQB 21 (CanLII); *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 SCR 983, 2001 SCC 59 (CanLII); *Canadian Union of Public Employees, Local 3911 v Athabasca University*, 2014 ABQB 292 (CanLII); *Wood v. Enbridge Gas Distribution Inc., et al*, 2011 ONSC 5494 (CanLII)

[30] The Director argues it is really Lyonheart that intended to structure the relationship so that Prior would be regarded as an independent operator. That way Lyonheart did not have to pay for overtime and annual holidays and make source deductions from its payments to Prior as it did with other employees. The Director did not dispute Prior viewed the structure as accommodating his desire for more pay and, therefore, intended same. However, regardless of whether it was mutual or not, the Director challenged the legality of any such agreement.

[31] Motivation and intention are certainly pieces of the puzzle. However, the real question is what the parties genuinely intended.

[32] It very much appears as though Lyonheart wanted to find a way to put more money in the hands of Prior. However, it is also apparent Lyonheart decided it could only do so by creating a structure where it did not have to pay overtime, annual holiday pay, and matching EI and CPP contributions. I am satisfied that is why Mian advised Prior on how to set up a corporation and invoice for work. It was a convenient mechanism to accomplish what was perceived to be needed. I am satisfied that is why Lyonheart reimbursed Prior's incorporation costs.

[33] As for Prior, the matter was somewhat symbiotic. He also wanted Lyonheart to find a way to put more money in his hands. When Mian proposed the structure it did, Prior gave it no thought. It was simply a means to an end.

[34] I therefore believe the parties were *ad idem* as far as motivation was concerned. However, I am not persuaded the intention of both parties was such that Lyonheart was retaining the services of Prior as a person who was performing those services truly as an individual in business on his own account. On the evidence, I am satisfied Prior believed he was performing his services as an employee. He simply saw the structure created by Lyonheart as a clever way of setting up payment.

[35] Even if I were to accept Lyonheart's position, which I do not, I could not rely on same as determinative of the issue.

b. Control over the Work

[36] From the authorities,¹³ we can glean the following about control:

- a) the difference between the relations of a principal and agent and of employer and employee is a principal has the right to direct what the agent has to do, but an employer has not only that right, but also the right to say how it is to be done; and
- b) inadequacies with the control test can surface when, for example, in the case of:
 - i) an independent contractor, we see a contract contain detailed specifications and terms for the task in question is to be carried out—this could cause greater control with an independent contractor, as would be the normal expectation in a contract with an employee, even though a literal application of the test might find the actual control should be less; or
 - ii) highly skilled and professional employees who possess skills far beyond the ability of their employers to direct.

[37] Lyonheart argues Prior had as much control as an independent contractor could have under the circumstances. Mian argued this was evidenced by the fact that Prior:

- a) could tell Mian the days he wanted to work;

¹³*Supra*, footnote 12

- b) started work when he wanted to, even though there was a regular 7:00 p.m. start time;
- c) was free to decide the order in which to attend to the load list e-mailed to him;
- d) could take home the truck he was operating;
- e) had more freedom in carrying out his tasks; and
- f) was never restricted from working for anyone else at the same time as working for Lyonheart.

[37] In response, the Director argued Prior and Lyonheart fit within the definitions of "employee" and "employer," respectively in the *SEA*. He argued:

- a) Prior was a person receiving or entitled to wages;
- b) Prior was a person whom Lyonheart permitted, directly or indirectly, to perform work or services normally performed by an employee;
- c) Lyonheart had control or direction of Prior; and
- d) Lyonheart was responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, Prior.

[38] In essence, the Director argues Lyonheart and Mian maintained control. If issues arose, Prior answered to Lyonheart.

[39] I am satisfied the evidence points to Prior performing his work in a manner different

than the typical employee might. However, the evidence was never clear whether these differences were the result of a different relationship or simply Lyonheart indulgences or Prior taking liberties from time to time.

[40] On the issue of control, the evidence points to Prior carrying out the duties one would expect of an employee. Mian and Lyonheart have not persuaded me the evidence points to control consistent with what is expected for an independent contractor.

c. Ownership of Tools and Equipment

[41] The authorities¹⁴ say an examination of the ownership of tools and equipment is a long-standing conceptual element to be considered by the trier of fact in determining whether or not there is employee status.

[42] Mian argued:

- a) Prior supplied his own personal protective equipment; and
- b) he asked Prior to supply his own tools.

He says he only allowed Prior to use Lyonheart's tools and H₂S monitor because Prior did not supply them.

[43] On the other hand, the Director argues that all aspects of the business—including the trucks, tools and equipment—are owned and supplied by Lyonheart. All expenses, including repairs and fuel are paid by Lyonheart. He argues Prior owns and supplies nothing but the protective clothing he wears. Consequently, he argues this issue must be

¹⁴*Ibid.*

resolved in Prior's favour.

[44] I prefer and accept the Director's argument.

d. Chance of Profit and Risk of Loss

[45] On this point, the Director argued:

- a) all aspects of the business are owned by Lyonheart;
- b) Prior made no capital investment;
- c) Prior's income came from wages, not a legitimate business invoice;
- d) Prior had no chance of profit;
- e) Prior no liability for the business—that was Lyonheart's responsibility and it answered to Heavy Crude; and
- f) Prior had no risk of loss.

[46] On the other hand, Mian argues Prior's income came from his business. He argues the # Co.'s invoices includes bonuses. That was his chance of profit and risk of loss. I do not accept that. I am satisfied on the evidence that the invoices merely reflect an hourly rate to be paid by Lyonheart to Prior. If one divides the total amount invoiced by the "units" stated, one gets the hourly rate.

[47] I am satisfied on the evidence that Prior took no risk from performance of business. He had no chance of profit. His income came from an hourly wage. there was no chance

of profit in the traditional business sense.

[48] In essence, Lyonheart only relies on the invoicing to support its argument on this point. It refers to no other evidence. In my view, this does not point to Prior being an independent contractor.

e. Conclusion

[49] In addressing the two steps, including the fourfold test for the latter, and, more to the point, in determining the debate in this matter, it is necessary to view the totality of the relationship between Prior and Lyonheart from an “above the forest” perspective. In that context and on a focused examination of the true nature of the components of the relationship between Prior and Lyonheart, the analysis leads me to the conclusion that Prior was, in real terms, an employee of Lyonheart. The # Co. was nothing more than a sham and failed attempt to insulate Prior from such a status. It is a veil that I tear down.

2. OVERTIME & ANNUAL HOLIDAY PAY

[50] Based on the records maintained by Prior,¹⁵ the Director conducted an audit¹⁶ and determined the following:

Date (All in 2014)	Max. Hrs. Worked Before OT	Hrs. Worked	OT Hrs.	OT Rate	Amount Owed
Feb. 6 - 15	56	117	61	\$12.75	\$777.75

¹⁵*Supra*, footnote 7

¹⁶Exhibit P-3, ES Audit

Feb. 16 - 28	72	153	81	\$13.65	\$1,105.65
Mar. 1 - 15	80	155	75	\$13.65	\$1,023.75
Mar. 16 - 31	88	136	48	\$13.65	\$655.20
Apr. 1 - 13	72	130.5	58.5	\$14.09	\$824.27
Apr. 22 - 30	56	118.5	62.5	\$14.11	\$881.88
May 1 - 15	88	200	112	\$14.09	\$1,578.08
May 16 - 31	80	109	29	\$14.09	\$408.61
June 1 - 15	80	178	98	\$14.09	\$1,380.82
June 16-26	72	136.5	64.5	\$14.09	\$908.81
July 6 - 15	56	119.5	63.5	\$14.09	\$894.72
July 16-31	96	197.5	101.5	\$14.09	\$1,430.14
Aug. 1 - 15	80	110	30	\$14.09	\$422.70
Aug. 15-23	48	112	64	\$14.09	\$901.76
Sept. 1-15	80	188.5	108.5	\$14.09	\$1,528.77
Totals	1104	2161	1057		\$14,722.88

[51] The Director's calculation gave a total amount of fourteen thousand seven hundred and twenty-two dollars and ninety-one cents (\$14,722.91) for overtime pay owing for overtime. It should have been fourteen thousand seven hundred and twenty-two dollars and eighty-eight cents (\$14,722.88) for overtime pay.

[52] The Director calculated eight hundred and forty-nine dollars and forty cents (\$849.40) to be owing for annual holiday pay. I find that calculation accurate.

[53] Mian argued Prior overcharged for hours. He says:

- a) global position records¹⁷ show log book discrepancies that have caused seventy-eight and nine-tenths (78.9) hours that should not have been billed;¹⁸ and
- b) the invoices over billed forty-nine (49) hours.¹⁹

[54] Although Mian did give a breakdown by invoice of the allegation set forth in paragraph 53(b), he just gave totals for each invoice. He did not explain where his numbers came from. As well, he did not point out the dates for the hours reflected in all of paragraph 53. Finally, he did not explain the relationship between the allegation set forth in paragraphs 53(a) and 53(b). I do not know if Mian alleges they are cumulative or overlap. It must also be noted that Mian testified that while global position records accurately gave positions and dates and times, they were not a reliable way to determine the actual time working.

[55] The Director argues that:

- a) Lyonheart failed to keep records as required by section 2-38 of the *SEA*; and
- b) Prior kept records, which Lyonheart used at least to calculate regular wages.

The Director suggests I should prefer the records of Prior. I agree.

[56] I find as a fact Lyonheart and Mian owe Prior fifteen thousand five hundred and seventy-two dollars and twenty-eight cents (\$15,572.28), comprising the following:

¹⁷*Supra*, footnote 9

¹⁸Lyonheart did not point out the dates for these hours

¹⁹It appears as though Lyonheart's calculation should be 32.5, not 49 hours

- a) fourteen thousand seven hundred and twenty-two dollars and eighty-eight cents (\$14,722.88) for overtime pay; and
- b) eight hundred and forty-nine dollars and forty cents (\$849.40) for annual holiday pay.

3. DEDUCTIONS

[57] Lyonheart also claims he paid one hundred and three dollars (\$103.00) per month for seven (7) months for "insurance" for Prior. He asks that I deduct this sum from any amount I determine to be owing to Prior. He also asks that I deduct five hundred dollars (\$500.00) per month for seven (7) months for what he calls a "usual employer charge." He has given no explanation of what this "usual employer charge" is.

[58] The Director takes the position any such deductions are prohibited by section 2-36 of the *SEA*. I agree.

[59] I find that no sum is deductible from the amount owing from Lyonheart and Mian to Prior.

Dated at Saskatoon, Saskatchewan, on April 10, 2016.



T. F. (TED) KOSKIE, B.Sc., LL.B.,
ADJUDICATOR

VI. NOTICE

The parties are hereby notified of their right to appeal this decision pursuant to section 4-8 of *The Saskatchewan Employment Act*, S.S. 2013. c. S-15.1 (as amended), which reads as follows:

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 11 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.