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

Appellants:

Mike Gustus Realty Inc. and Mike Gustus, being a Director of Mike Gustus Realty Inc.,

Respondents:

Clayton McNally, and Director of Employment Standards;

Date of Hearing: April. 12, 2017

Place of Hearing: Boardroom 9.3
122 Third Avenue North
Sturdy Stone Building
Saskatoon, Saskatchewan

Preliminary Matters:

Lea Ann Schienbein of the Office of the Deputy Minister of Justice and Deputy Attorney General represented the Director of Employment Standards (the 'Director') with respect to the preliminary matter of my jurisdiction. The Employment Standards Officer who acted for the rest of the hearing was Randy Armitage. Davin Burlingham of the Wardell Gillis law firm acted for Mr. Gustus and Mike Gustus Realty Inc.

The Director of Employment Standards issued Wage Assessment # 8491. It was signed by the 'Director's Delegate' at Moose Jaw, Saskatchewan, dated January 27, 2017. It directed Mike Gustus Realty Inc., 1110- 3530 Millar Ave., Saskatoon, SK, S7P 0B6; and Mike Gustus, being a Director of Mike Gustus Realty Inc., 523 Budz Bay, Saskatoon, SK S7N 4N4 ('the appellants) to pay $5,262.02 in wages to Clayton McNalley.

Prior to the hearing, as directed by my Appointment Order signed by the Registrar of the Labour Relations Board (the 'Registrar') on January 23, 2017, I contacted the Director and confirmed compliance with subsections 2-74(6), 2-75(2), 2-75(3) 2'75(4) and 2-75(5) of *The Employment Standards Act.*

At the beginning of the hearing, Ms. Schienbein, on behalf of the Director raised a preliminary matter. The Director submits that the direction from the Registrar (referred to in the preceding paragraph) is an infringement upon my independence with respect to determining issues relevant to the appeal and also with respect to determining the procedures by which the appeal will be conducted. The Director did not take issue with my selection as adjudicator, with my impartially or with my jurisdiction to hear this appeal based on the appellant filing the proper notice within the prescribed time limits.

I will deal with this preliminary matter first, and then turn to the substantive appeal involving Clayton McNalley's claim to wages allegedly owing by Mike Gustus and Mike Gustus Realty Inc.

Preliminary Issues:

I see two issues raised by the Director's preliminary argument. The first issue is whether as an Adjudicator appointed under *The Employment Standards Act* I have the authority to decide the issue at all. If I do not, that is the end of it. If I do, I must then determine if the Registrar's directions to me in the Appointment Order signed by the Registrar on January 23, 2017 constitute an infringement on my independence.

Decision on Preliminary Issues

The Director submits that direction provided to me by the Registrar may fetter or purport to fetter my statutory powers or my independence in determining issues and procedures related to appeals.

It is clear that my authority to act in appeals such as this one comes directly from *The Saskatchewan Employment Act* (the *'Act'*). It is also clear that recent amendments to the *Act* give the Registrar authority to select an Adjudicator and set the time, day and place for the hearing in consultation with the Adjudicator and the parties. The Director objects to the recently introduced practise of the Registrar signing an Appointment document which purports to direct the Adjudicator to determine jurisdiction with respect to subsections 2-74(6), 2-75(2), 2-75(3) and if applicable 2-75(4) and 2-75(5) of the *Act*. If no jurisdiction is found the Adjudicator is to dismiss the appeal. If jurisdiction is confirmed, the Adjudicator is to determine the parties, consult with them regarding hearing logistics and complete a Hearing Notice form and return it to the ~~Director~~ (should say 'Registrar').. In addition, the Appointment document purports to require the Director to advise the Adjudicator if he represents any parties.

My jurisdiction comes from the *Act*, not from the Registrar or the Labour Relations Board. I only have authority to do those things which the *Act* says I can do. Adjudicators of course are not Judges. I do not believe that I have any jurisdiction with respect to any direction the Appointment document purports to provide to the Director, and so I will not comment on this aspect of the Director's submission.

I also do not believe that I have jurisdiction to determine if the Appointment document issued by the Registrar appears to fetter or actually fetters my statutory powers. I believe a court is the proper forum to determine these issues.

In the event that I am wrong, and I do have such jurisdiction, I will state what my ruling would have been. The sections referred to above describe how an appeal must be started. If it has not been started in the prescribed manner, an Adjudicator has no jurisdiction to hear the appeal. This is so not because of what the Registrar puts in the Appointment order, but because the *Act* says so. Therefore I do not think that this aspect of the Appointment document appears to fetter or actually fetters my statutory powers.

In cases where the Adjudicator confirms jurisdiction, the Appointment document purports to require the Adjudicator to determine the parties, consult with them regarding hearing logistics and complete a Hearing Notice form and return it to the ~~Director~~ (should say 'Registrar').. In order to hold a hearing the Adjudicator must determine the parties. Therefore I do not find anything problematic with this statement. The only way an Adjudicator can set a hearing date is by the agreement of the parties. Adjudicators have no authority to order parties to attend on a date, or at a location they did not agree to. Therefore the alleged requirement that the Adjudicator consult with the parties regarding

hearing logistics in order to set a hearing date does not seem to me to be problematic. An Adjudicator could in my view refuse to consult with the parties, in which case the Registrar would have to set the hearing date. I do not think that this aspect of the Appointment document appears to fetter or actually fetters my statutory powers.

In addition the Appointment document purports to require the Adjudicator to complete a Hearing Notice form and return it to the ~~Director~~ (should say 'Registrar'). I am not aware of any provision in the *Act* or any regulation which authorizes the Registrar to require an Adjudicator to complete a particular form. It may be that this power is ancillary to some other power the Registrar has. In any event, whether this is authorized or not, I do not believe that the Appointment document purporting to require me to fill out a form with basic information about the hearing either appears to fetter or actually fetters my statutory powers. Therefore if I did have jurisdiction to decide this issue, my conclusion would be that nothing in the Appointment document fetters my authority or appears to fetter my authority.

Substantive Issue

The first issue in the substantive matter under appeal is whether Clayton McNally was an employee of Mike Gustus Realty Inc. or an independent contractor performing services for Mike Gustus Realty Inc. If I find that Clayton McNally was not an employee of Mike Gustus Realty Inc., then *The Employment Standards Act* does not apply and the Wage Assessment ought not have been issued. However, if I find that Clayton McNally was an employee of Mike Gustus Realty Inc., *The Employment Standards Act* does apply. In such a case, I would then have to determine if the employer had just cause to dismiss Mr. McNally. The appellant maintains that Mr. McNally is not an employee, but if I find that he was, the appellant submits that it had just cause to terminate Mr. McNally's employment.

Facts and Decision:

Mr. McNally and Mike Gustus Realty Inc. signed a document, which was called a 'Compensation and Working Agreement'. It is basically a contract which sets out Mr. McNally's "Annual Salary", a "Bonus Plan" and a "Job Description". I put the words in quotation marks to indicate that these are the words used in the contract. The contract identifies Mike Gustus Realty Inc. as "RE/MAX Mike Gustus". The contract is signed by Mr. McNally and Mr. Gustus.

Mr. McNally began providing services to Mike Gustus Realty Inc. on September 16, 2011. The first contract was signed November, 2011. Both Mr. Gustus and Mr. McNally explained that a new contract was signed annually. The contract submitted in evidence (Exhibit ER-1; Tab 1) was signed December 3, 2015.

Mr. McNally's unchallenged testimony was that the job description was amended annually. The process was that Mr. McNally would take on additional duties throughout the year, and these duties would be added to the "Job Description" when the next

contract was signed. Mr. Gustus did not challenge this testimony, and I accept it as accurate.

In addition to this contract, a document called "NON-COMPETITION AND NON-SOLICITATION AGREEMENT" was also submitted in evidence (Exhibit ER-1; Tab 2). This contract was also signed December 3, 2015. The date appears to be '2018' but Mr. Gustus confirmed that it actually says '2016'. Mr. Gustus alleges that Mr. McNally has breached this Non-Competition and Non-Solicitation agreement. The Non-Competition and Non-Solicitation Agreement does not impact the issue of whether Mr. McNally was an independent contractor or an employee.

It is clear that Mr. Gustus and Mike Gustus Realty Inc. wanted Mr. McNally to be an independent contractor. Tamara Nesbitt, who is the Bookkeeper for Mike Gustus Realty Inc. testified that she regularly submitted GST to the Receiver General of Canada in relation to payments made to Mr. McNally. Evidence of this was submitted by the appellant as Exhibit ER-2. I would like to say that Ms. Nesbitt appeared to me to be absolutely truthful in her testimony. She clearly considered Mr. McNally to be an independent contractor. Ms. Nesbitt's opinion however, does not determine what the relationship is. The courts have developed tests to assist in determining whether the true nature of the relationship is one of independent contractor or employee. I accept that GST was remitted to the Receiver General of Canada in relation to payments made to Mr. McNally. While this is consistent with the relationship being one of independent contractor rather than one of employee-employer, it is not determinative on its own.

Mr. Gustus testified that Mr. McNally was an independent contractor. He testified that Mr. McNally had no company car or cell phone, and that he did not buy Mr. McNally a computer for his home. He said that Mr. McNally was free to come and go as he pleased, and that he could, and did, perform the required duties from anywhere in the world. Mr. Gustus testified that Mr. McNally did not have to even come into the office, unless he happened to have an appointment.

Mr. Gustus was concerned that his "Return on Investment" was lower than it should have been. He contracted with two parties, Mark Benefiel/Select Homes Coaching and Robert Trefethren/Hatch Realty) to advise him how to increase it. These parties basically offered 'coaching advise' to make a real estate business more effective. As part of this process, both Mr. Benefiel and Mr. Trefethren contacted Mr. McNally. Communication to Mr. Gustus from Mr. Benefiel was filed as Exhibit ER-1; Tab 14 and from Mr. Trefethren as Exhibit ER-1; Tab 15. Both of these communications appear to have been solicited by Mr. Gustus for the point of establishing that Mr. McNally was an independent contractor and in the event that he wasn't, that Mr. Gustus had just cause to terminate the employment. Mr. Benefiel characterized Mr. McNally lacking what he called 'basic relationship skills'. Mr. Trefethren says Mr. McNally violated "a sacred trust to Mike and his team" because some of his comments were critical of Mr. Gustus.

There is nothing improper about soliciting information from outside reviewers. However, the fact that these letters appear to have been solicited, that neither writer attended the hearing to give evidence and be cross-examined, and that the writers were only involved with one aspect of Mr. McNally's performance for a short period of time, leads me to place very little weight on these documents.

Mr. McNally testified that in addition to a land-line at the office, Mr. Gustus also paid for a cell phone for him to use. He testified that Mr. Gustus provided him with a laptop computer to use. He testified that he could and did perform his duties from locations other than the office on many occasions. He also testified that Mr. Gustus arranged many regular meetings with him, so that he would have to come into the office on many occasions. Perhaps most importantly, he testified that Mr. Gustus determined the nature of his duties, at times determined when he could be away. Mr. Gustus actually confirmed this when he said that he had told Mr. McNally that Mr. McNally could not take a vacation to Mexico in September, as others would be away from the office at that time.

Mr. McNally did not question the fact that he was paid GST (called "Sales Tax" on Exhibit ER-1; Tab 3), or that he received a T4A which indicated his income in Box 20 as "Self-employed commissions". Mr. McNally said he did not do his own taxes, and simply took all the payment information to his accountant.

I believe Mr. McNally to be an honest and truthful witness. I accept the testimony of Mr. McNally as truthful in every instance where his testimony and that of Mr. Gustus differ. The fact that the appellant remitted GST on payments to Mr. McNally, and the fact that it did not remit Canada Pension Plan or Employment Insurance are factors which lean towards being an independent contractor. I accept Mr. McNally's testimony that he did not consider whether the payment of GST and non-payment of CPP and EI made him something other than an employee. I likewise accept his statement that he did not consider whether there was any significance to his income being shown on a T4A as opposed to a T4.

Although the issue of whether a person is an employee or an independent contractor has been before the courts many times, the courts have not developed a single test to resolve all cases. There is no single factor which provides an answer to the question of whether a person is an employee or a contractor. The level of control over the workday, whether the worker provides required equipment and the worker's opportunity for profit are some of the important factors. (See *671122 Ontario Ltd. v. Sagez Industries Canada Inc.* SCC 2001) In this case, Mr. McNally was paid a salary of $50,000 per year. In addition, he had an opportunity to earn a bonus of $200 per sales transaction when more than 15 sales transactions per month were completed. This is not the same as taking a financial risk. It is simply a small amount of additional pay for those periods where additional sales transactions are completed. I accept Mr. McNally's evidence that he had little control over his work day. It is true he could often perform his duties from a location of his choice. It is also true that Mr. Gustus would regularly require Mr. McNally to be at the office for

meetings. Mr. Gustus provided a computer and telephone for Mr. McNally's use. Mr. Gustus added additional duties during the annual contract terms. These additional duties were then incorporated into the next year's contract. Mr. Gustus exercised the majority of control over when and how the work would be performed. Although Mr. McNally could often determine where he would work from, when it was convenient to Mr. Gustus he would control this as well be scheduling a meeting or cancelling Mr. McNally's vacation. Mr. Gustus was the one who really had the opportunity of profit and risk of loss. This is why he was concerned that in his words, his return on investment was not as high as it should have been. In order to increase this return on investment, Mr. Gustus engaged two consultants to coach Mr. McNally in an effort to increase the profitability of his company. Presumably the consultants' recommendations if made and implemented would have resulted in Mr. McNally being told how he should change the way he worked to increase Mr. Gustus' profits. This is entirely consistent with Mr. McNally being an employee, and not an independent contractor, and leads me to conclude that he is in fact an employee.

I must now determine if the employer had just cause to terminate Mr. McNally's employment. Weighing in favor of a conclusion that Mr. McNally was an independent contractor, and not an employee are the fact that GST based on the amount paid to Mr. McNally was remitted to the federal authorities, and the CPP and EI were not deducted. In addition, the fact that Mr. McNally's remuneration was reported on a T5 as 'Commission Earnings' supports finding he was an independent contractor, and not an employee.

These factors are not the only factors to consider however. What they really indicate is that Mike Gustus Realty Inc. did its bookkeeping as if Mr. McNally was an independent contractor and not an employee. This is clearly the case.

There is no simple or universally applicable test to distinguish an employee from an independent contractor. The factors cited by the Supreme Court in *671122 Ontario Ltd. v. Sagez Industries Canada Inc.* SCC 2001 include whether the worker provided his or her own equipment; whether the worker had his or her own helpers; the degree of financial risk taken by the worker; the degree of responsibility for investment and management held by the worker; and the opportunity for profit the worker had in the performance of work tasks. All of these factors support a conclusion that Mr. McNally was an employee, and not an independent contractor.

Mike Gustus exercised a great deal of control over Mr. McNally's work day. I find as a fact that, as Mr. McNally testified, Mike Gustus Realty Inc. provided Mr. McNally with the necessary equipment to do his work. This included a computer, a cell phone and an email account.

Mr. McNally did not have his own helpers. He was responsible to carry out all his duties himself.

Mr. Gustus as the owner of the business stood to earn a profit or incur a loss from the way his business was operated; Mr. McNally did not. Despite the appellant's attempts to characterize the bonus portion of the contract as Mr. McNally's exposure to risk, the fact is the bonus plan is simply that. It is an incentive to reward an employee for completing more than 15 transactions in a month. This is not an uncommon feature of employment relationships, and does not suggest that Mr. McNally was a contractor.

Mr. McNally had no responsibility for any investment in the business, or management of the business. Mr. McNally testified that Mr. Gustus exercised nearly complete control over how Mr. McNally carried out his duties, and I accept that evidence as truthful. I do not accept Mr. Gustus' testimony that Mr. McNally was entirely free to come and go as he pleased, and to take vacation whenever he wanted. Rather I find that Mr. Gustus exercised a level of control over Mr. McNally's work activity that is only consistent with an employment relationship.

I find that Mike Gustus was completely in charge of assigning Mr. McNally work related duties. New duties would be added as Mr. Gustus saw fit, and then would subsequently be recorded in the next annual written contract. While it is true that Mr. McNally was able to do much of his work from remote locations, this is primarily due to the nature of the work. Mr. Gustus provided the tools (cell phone and computer) for Mr. McNally to do this. Mr. Gustus had ultimate responsibility for determining when Mr. McNally was required to be in the office for meetings, or to cover because other workers were away from the office.

Finally, Mr. McNally had no opportunity for profit from the business. He was paid a salary. It is true as mentioned above that Mr. McNally did have the opportunity to earn a bonus when more than 15 transactions per month were completed. This is not the same thing as earning a profit from the business. The amount of profit earned by Mr. Gustus on each transaction is unrelated to the bonus structure.

Based on these factors, I conclude that Mr. McNally was an employee and not an independent contractor.

The appellant contends that it had just cause to terminate Mr. McNally's employment. As evidence for this allegation, the appellant submits the allegations made in the letters from Mr. Benefiel (Exhibit ER-1; Tab 14) and Mr. Trefethren (Exhibit ER-1; Tab 15). As I previously said these documents were created by individuals who were not at the hearing. They appear to have been solicited by Mr. Gustus for the point of establishing that Mr. McNally was an independent contractor and in the event that he wasn't, that Mr. Gustus had just cause to terminate the employment. I place no weight whatsoever on the allegations these two individuals made regarding Mr. McNally's work performance. If I had considered the documents, I would still have concluded that taken together they still fail to establish a level of insubordination sufficient to establish just cause. At most, they would justify an employee being warned with respect to his behavior.

Mr. Gustus testified that Mr. McNally resisted making changes in the way he worked. He testified that these changes were necessary in order for Mr. Gustus to increase his "return on investment". The appellant did not introduce evidence of any specific actions of Mr. McNally which would constitute just cause for immediate dismissal. Mr. Gustus confirmed that no progressive discipline occurred, and that Mr. McNally was never warned that his employment was in jeopardy. I conclude that the appellant has not established just cause for termination.

The appellant alleges Mr. McNally violated the Non-Competition and Non-Solicitation Agreement between himself and the employer. These allegations relate to Mr. McNally's conduct after he was terminated. I have no jurisdiction to enforce an agreement such as this.

Mr. McNally testified at the hearing that he was not paid $600.00 of bonus wages, owing under the contract. Mr. Armitage asked that this amount as well as an additional 3/52 annual holiday pay ($35.62) be added to the Wage Assessment total of $5,262.02. Finally, Mr. McNally testified that he earned no income during the notice period, and I accept this testimony.

Conclusion:

The appeal is dismissed. Wage Assessment # 8491 is varied to include unpaid bonus wages in the amount of $600.00 and annual vacation pay of $34.62 for a total of $5,896.64. ~~is in the amount of $5,262.02.~~ Wage Assessment # 8491 ~~in the amount of $5,262.02~~ is hereby confirmed.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 20th day of April, 2017.

(signed)_____
Doug Surtees
Adjudicator

The Parties are 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 viewed 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.

(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 of the adjudicator's decision or order with any directions that the board considers appropriate.

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 or the director of occupational health and safety, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards and the director of occupational health and safety have the right:

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and

(b) to appeal any decision of an Adjudicator or the board.