

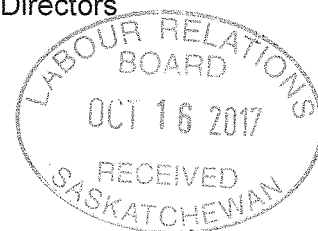
DECISION OF ADJUDICATOR
IN THE MATTER OF AN APPEAL
PURSUANT TO SECTION 2-75 WITH RESPECT TO A DECISION OF
AN EMPLOYMENT STANDARDS OFFICER PURSUANT TO
THE SASKATCHEWAN EMPLOYMENT ACT,
R. S. S. S-15.1 (as amended)

APPLICANT: B & B Construction Inc. and Directors

RESPONDENT: John Gola

and

Director of Labour Standards
Ministry of Labour Relations and Workplace Safety



DATE OF HEARING: May 15, 2017

PLACE OF HEARING: Saskatoon, Saskatchewan

I. INTRODUCTION

This is an appeal by B & B Construction Inc. (hereinafter referred to as B & B) with respect to a Wage Assessment issued by the Respondent, the Director, Employment Standards Branch, Ministry of Labour Relations and Workplace Safety, on January 25, 2017. The Wage Assessment required the Applicant to pay John Gola the sum of \$761.54 representing unpaid wages during John Gola's term of employment with B & B. The Wage Assessment was prepared pursuant to s. 2-74 of *The Saskatchewan Employment Act*, R.S.S. S-15.1 (as amended).

This matter was heard before me on May 15, 2017. The Applicant was represented by Todd Kulczycki, Asset Manager for B & B. Present for the Respondent at the Hearing was Dale Schmidt, Department of Employment Standards. The employee John Gola was present and provided evidence. Also present was his wife, Twila Gola. Ms. Gola was a spectator.

II. PRELIMINARY MATTERS

All parties remained present throughout the hearing and there were no other preliminary issues.

Mr. Schmidt revised the Wage Assessment and the new amount was \$676.92. While the employer had an issue with the application by Mr. Schmidt of the Regulations (referred to below), there was no issue with this amended amount, should I find in favour of the employee.

III. THE ISSUE

The issue at this Appeal Hearing was straightforward. B & B was in the business of heavy construction and due to the nature of the work, on days of inclement weather, there was often no work. Mr. Gola requested pay for times that he had reported for work on dates throughout his employment with B & B, when no work was readily available.

This appeal is therefore with respect to the interpretation and application of *The Minimum Wage Regulations, 2014* pursuant to *The Saskatchewan Employment Act* R.S.S. S-15.1 (as amended).

Regulation 3(8) states:

(8) Subject to subsection (9), every employee who is required to report for duty, other than for overtime, shall be paid a minimum sum equal to three times the employee's hourly wage, whether or not the employee is required to be on duty for three hours on that occasion.

Regulation 3(9) provides an exception which does not apply to the employment of Mr. Gola.

The question to be answered is: on the dates in question, was Mr. Gola required to report for duty and therefore entitled to the sum of three times his hourly wage for those days?

The employer seeks to shift the onus to the employee – that is, on the dates in question, the employee should have known to not attend work without being notified by his employer. Conversely, the employee argues that without notice from his employer, he must assume that he should go to work.

IV. EVIDENCE

There was some evidence provided by the employer and the employee which was not relevant to the issue. For example, Mr. Kulczycki lead evidence regarding the circumstances of the termination of Mr. Gola's employment with B & B and as this was not an issue at this hearing, I will make no reference to it.

V. EVIDENCE OF APPLICANT

Evidence of Todd Kulczycki

Mr. Kulczycki was the only witness called for the employer. Mr. Kulczycki had worked his way up the ranks of B & B from Foreman to Supervisor to Asset Manager. He was well acquainted with all aspects of the business and familiar with Mr. Gola's qualifications and job performance which he stated were good. B & B is a heavy construction business working in the areas of, among other things, excavation, base gravel installation and paving. All B & B's work is in cities, towns or villages – not highway work. When the weather is poor, usually due to precipitation, most (but not all) work outdoors would be cancelled due to either safety concerns or difficulties performing certain jobs in muddy conditions.

Mr. Kulczycki testified that it was up to employees to know when the weather was too bad for work and the onus was on the employee to contact his supervisor or foreman to confirm whether there was work that day. In 2015 and 2016, employees were verbally instructed that they should not show up for work if the weather was bad. Furthermore, the employees were told that if they did not show up for work when the weather was questionable, there would be no discipline imposed. Mr. Kulczycki said this direction was given at a pre-work meeting and that to the best of his recollection, Mr. Gola was there although he could not recall how many employees were there or whether they were paying attention.

During cross-examination by Mr. Schmidt, Mr. Kulczycki allowed that the weather policy was sometimes misunderstood. He agreed that Mr. Gola would have a different supervisor or foreman depending on the nature of the job for that day or week. Mr. Kulczycki further testified that, largely because of Mr. Gola's claim, B & B has now put in place a written

policy advising employees on how to deal with bad weather days. This written policy was instituted in 2017(ER1) and states:

“Days in which the weather is questionable, it is advised that employees contact their supervisors before reporting to work, as such days may result in a late start time.”

While I have issues with the onus being on the employee, it is a start in the right direction. But the fact that there is now such a written policy certainly confirms that the verbal policy may not have been adequately communicated to all employees and may have even been misunderstood by some.

VI. EVIDENCE OF THE RESPONDENT

Evidence of John Gola

The only witness on behalf of the employee was Mr. Gola. He worked for B & B for approximately one year from September 2015 to September 2016. He was a heavy equipment operator and over the course of that employment, he had numerous supervisors, depending on the job. There were rainy days when there was work for him to do, such as hauling gravel, and rainy days when there was no work. As a result, unless he knew otherwise, he would show up for work. Regarding the issue at hand, Mr. Gola provided a list of dates in 2015 and 2016 (EE 1) that he reported for duty and was sent home as there was no work readily available. All those instances involved inclement weather. Mr. Gola provided his calendar, which is in the form of a daily diary (EE 1, 2 & 3), where he had written on each day of the week the hours he worked that day. Mr. Gola testified that he filled this diary out on at least a weekly basis and sometimes daily. Included in the diary were the days Mr. Gola went to work and was sent home. These are referred to as “rain days”. Mr. Gola testified that on many of these days, he was not the only employee who showed up for work – often several employees would be sent home at the same time.

On regular work days, employees filled out their time cards at days’ end in the coffee room. On questioning by Mr. Kolczycki, Mr. Gola said he did not fill out the time cards for on rain days because he did not actually work those days. Mr. Gola testified that B & B was a good employer and treated him well. Mr. Gola had readily found new employment after he left B & B.

In cross-examination Mr. Kulczycki challenged Mr. Gola to show that Mr. Gola was being untruthful about his knowledge of the verbal rain days policy. Mr. Kulczycki also suggested to Mr. Gola that the diary entries had been made up after the fact. I found Mr. Gola believable when he described his manner of record keeping; this is an easy and standard method by which many employees keep track of hours worked to ensure these hours jibe with those indicated on pay stubs. Mr. Kulczycki cross-examined Mr. Gola at length about each diary entry. For example, he asked Mr. Gola questions about what he was doing the day before or the day after a rain day. Mr. Gola attempted to give details of each of those 'rain days', which was somewhat difficult, given the lapse of time between the making of the entries and the hearing. This cross-examination did not raise any concerns about the legitimacy of Mr. Gola's claim. I found Mr. Gola to be truthful in his account that he made the entries in his diary very close in time to the rain day and therefore, these entries were accurate. I do not agree with B & B's suggestion that Mr. Gola knew the rain day policy and went to work anyway either to have coffee with his co-workers or because his wife did not want him at home.

Mr. Kulczycki attempted to show that the claim of Mr. Gola was in bad faith as he waited until he no longer worked for B & B before filing his complaint with Employment Standards. Mr. Kulczycki argued that on the days Mr. Gola showed up and was sent home due to inclement weather, the onus was on Mr. Gola to raise the need for B & B to comply with s. 3(8) of the Regulations. Mr. Kulczycki argued that Mr. Gola should have checked on the weather during the night to ensure he knew not to attend work. In other words, B & B's position was that it was up to the employee to determine whether he should go to work, not the employer. Mr. Kulczycki allowed as how it would have been simple to put a system in place whereby employees were notified to not attend for work. Mr. Kulczycki asked me to consider that if I found in favour of the employee, other B & B employees might also file similar claims with Employment Standards and B & B would have to adjust its generous overtime policy to recoup those losses.

None of these arguments were persuasive. My finding is that the employer, B & B failed to comply with Regulation 3(8) of *The Minimum Wage Regulations, 2014*. Mr. Gola is entitled to three hours pay for each day that he showed up for work and was sent home.

VI. CONCLUSION

The appeal is dismissed and the Wage Assessment, as amended, is hereby upheld.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 13th day of October 2017.

A handwritten signature in black ink, consisting of a large, stylized initial 'L' followed by a cursive 'S' and a long horizontal flourish extending to the right.

Leslie T.K. Sullivan, Q.C.
Adjudicator

Exhibit List

Employer Exhibit	Item
ER 1	Employee Information Sheet/Employer Policies
ER 2	John Gola -request for time off Aug. 27-29, 2016
Employee Exhibit	Item
EE 1	John Gola – summary of rain days Oct. 2015 – Aug. 2016 & diary notes attached
EE2	John Gola – diary notes Nov. 2015
EE 3	John Gola – diary notes June 2016

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.