

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



Appellants:

DSR Custom Carpentry and Daniel Shane Robinson, being a director of DSR Custom Carpentry

Respondent:

Director of Employment Standards;

Date of Hearing: July 23, 2017

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

Introduction

1. Lee 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 was Doug Long. Ms. Schienbein appeared by telephone. Mr. Long and Mr. Robinson appeared in person.

Objection to Jurisdiction

2. The Director raised a preliminary objection. The Director's position is that I have no authority to hear this appeal as it was not commenced within the prescribed time limit. The Director further contends that I have no authority to enlarge the time period for appeal.

Issues

3. The issues for this preliminary objection therefore are:

1. Did the employer appeal Wage Assessment # 8627 within the statutory time limit set out *The Saskatchewan Employment Act*?

2. If not, do I have any ability to extend the time limit in the circumstances of this case?

Decision

4. The Director issued Wage Assessment #8627 directing DSR Custom Carpentry and Daniel Shane Robinson, being a director of DSR Custom Carpentry, to pay Josh Comeau \$5,409.73. This Wage Assessment was dated May 2, 2017. It was signed by Mr. Long as the 'Director's Delegate'.

5. Mr. Long provided affidavit evidence (Exhibit EE-1) that he served this Wage Assessment on DSR Custom Carpentry and Daniel Shane Robinson, as a director of DSR Custom Carpentry by personally delivering the original document to Mr. Robinson on May 5, 2017.

6. Mr. Long provided affidavit evidence (also Exhibit EE-1) that he received a Notice of Appeal from Daniel Shane Robinson on May 24, 2017.

7. Patricia Meyerhoffer, an Intake Officer with the Ministry of Labour Relations and Workplace Standards provided affidavit evidence (Exhibit EE-2) that she received by regular mail a cheque payable to the Director from DSR Custom Carpentry. This cheque was in the amount of \$500.00, and was marked 'Comeau Appeal'. The envelope was postmarked May 29, 2017. The letter was received May 31, 2017.

8. *The Saskatchewan Employment Act* (the 'Act') ss. 2-75(1) allows a corporate director to appeal a Wage Assessment if that corporate director disputes either liability or the amount of the wage assessment.

9. The time limit for the appeal is set by ss. 2-75(2). It says:

An appeal pursuant to this section must be commenced by filing a written notice of appeal with the director of employment standards within 15 business days after the date of service of a wage assessment.

10. A 'business day' is defined at 1-2(1)(b) to mean "a day other than a Saturday, Sunday or holiday".

11. *The Interpretation Act, 1995* defines 'holiday' thus:

"holiday" means:

(a) Sunday;

(b) New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, Saskatchewan Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day, and when one of those dates, other than Remembrance Day or Boxing Day, falls on a Sunday, it includes the following day;

(c) any day appointed by an Act of the Parliament of Canada or by proclamation of the Governor General or Lieutenant Governor as a public holiday; («jour férié»)

12. In 2017, Victoria Day was celebrated on May 22. Other than Sundays it was the only holiday that occurred during May, 2017.

13. *The Interpretation Act, 1995* ss. 24(3) provides the correct method of counting days to determine this appeal period. It applies in cases like this where the relevant statute provides a time period other than one said to be a number of 'clear' days, months or year, or one said to be 'at least' or 'not less than'. The wording in 2-75 of the Act requires that the appeal "*must be ...within 15 business days after the date of service of a wage assessment*". To calculate this appeal period, we do not count the day of service (May 5). We likewise do not count May 6 and 7, as they are not business days. Therefore Day 1 for the purpose of calculating the appeal period is May 8. Counting forward without counting Saturdays, Sundays or Victoria Day, leads to the conclusion that Day 15 is May 29. Therefore the appeal period did not end until May 29 was over. In other words, May 29 was within the appeal period and May 30 was outside it.

14. Mr. Long received Mr. Robinson's Notice of Appeal within the appeal period (Exhibit EE-1).

15. Mr. Robinson mailed the deposit cheque separately from the Notice of Appeal which was filed with Mr. Long. The postmark on the envelope visible in Exhibit EE-2 indicates Mr. Robinson mailed the deposit within the appeal period. The affidavit evidence (Exhibit EE-2) indicates the cheque reached the Ministry of Labour Relations and Workplace Standards after the appeal period.

16. Ms. Schienbein referred me to the *Brady v. Jacobs Industrial Services Ltd. and Director, Occupational Health and Safety, Ministry of Labour Relations and Workplace Safety* decision ('*Brady*') dated August 1, 2016. In that decision, Adjudicator Wallace made a number of findings, with which I agree. Although these findings were in the context of the Occupational Health and Safety provisions of the Act, I see no material difference between those sections and the ones I am considering.

17. In *Brady*, adjudicator Wallace points out that adjudicators appointed under the Act have no authority other than the authority granted to them by the Act [citing *Atco Gas and Pipelines v. Alberta*, [2006] S.C.R. 140 paragraph 35]. The Act does not provide adjudicators, or anyone else with any discretion to extend or waive time limits for appeals. Failure to observe a time limit is a substantive matter that goes to jurisdiction [citing *Baron Metal Industries Inc.*, [1999] OLRB Rep May/June 363]. Adjudicators would require express statutory authority to assert jurisdiction where a time limit was not observed [citing *Jordan v. Saskatchewan (Securities Commission)*, SK CA, March 21, 1968; *Wascana Energy Inc. v. Rural Municipality of Gull Lake No. 139 et al.*, 1998 CanLii 12344 (SK CA)]. No such statutory authority exists in Saskatchewan. I accept all these points as a correct statement of the current law in Saskatchewan.

18. Mr. Robinson pointed out at the hearing that he believed that mailing a cheque to Regina was the only method permitted to make the deposit. Mr. Robinson was mistaken in this belief. Ms. Schienbein and Mr. Long indicated that payment could have been made at the local office, in this case Mr. Long's office in Prince Albert. Mr. Robinson said at the hearing that no one from the Ministry of Labour Relations and Workplace Standards told him that other methods of payment were possible. He also said the Ministry's website lead him to conclude that no other method of payment was possible.

19. Mr. Robinson provided me with a 'rebuttal' email after the hearing. Ms. Schienbein indicated that she did not intent to reply to this rebuttal.

20. Mr. Robinson says: "The opinions / case law presented via telephone from previous hearings, were only partially submitted for my information less than one business day before the hearing." Mr. Robinson states his opinion that "it would be unreasonable to expect that the average SME employer would be so familiar with the pertinent case law and procedural technicalities so as to be able to defend themselves against proceedings such as this one." It is certainly true that few employers would be able to work their way through the legal research necessary to engage in this legal argument in a meaningful

way. However, Ms. Schienbein simply stated what the law is in Saskatchewan. She provided Mr. Robinson with a copy of the Brady decision in advance. She was not required to do so, and in the circumstances appears to have provided the information as early as possible. There was nothing unfair about the way the Ministry's case was presented.

21. Mr. Robinson also alleges that he was effectively misled by the Ministry. If the only way to make the deposit were to mail a cheque to Regina, I would have had great concerns that appellants would in reality have less than the 15 days the Act requires in which to make their appeal. This however is not the case, as the deposit could be made at local offices.

22. I do not consider this to be a case where legal concepts such as estoppel or officially induced error prevent the Ministry from relying on the 15 day time limit. I make no comment as to whether, in appropriate cases, those concepts may be used to extend the time period.

23. The Act makes it very clear that the right to appeal is conditional on making the deposit, and that the deposit must be made during the appeal period.

2-75 (4) If the appellant is an employer or a corporate director, the employer or corporate director shall, as a condition of being eligible to appeal the wage assessment, deposit with the director of employment standards the amount set out in the wage assessment or any other prescribed amount.

(5) The amount mentioned in subsection (4) must be deposited before the expiry of the period during which an appeal may be commenced [emphasis added]

24. The Act makes it clear that the deposit must be received by the Ministry the 15 day appeal period.

2-75 (5) The amount mentioned in subsection (4) must be deposited before the expiry of the period during which an appeal may be commenced. [emphasis added]

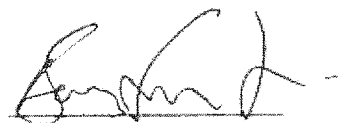
25. Mr. Robinson correctly points out that once he mailed the cheque, the funds were out of his hands and out of his control. However, the Act requires that the deposit must be received by the Ministry within the 15 day appeal period, not that it must simply be mailed within the 15 day appeal period.

26. Since the deposit was not received by the Ministry until after the 15 day appeal period, I must conclude that I have no jurisdiction to hear an appeal of Wage Assessment #8627. The appeal is therefore dismissed.

Conclusion:

27. The appeal is dismissed.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 28th day of July, 2017.



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 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.

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Carpentry

Respondent:

Director of Employment Standards;

EXHIBIT LIST

EE-1 Affidavit of Doug Long

EE-2 Affidavit of Patricia Meyerhoffer