

LRB File No. 151-17

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



**Appellants:**

Burkatsky Transport Ltd.; John J. Burkatsky, being a director of Burkatsky Transport Ltd.; and Christeen Burkatsky, being a director of Burkatsky Transport Ltd.

**Respondent:**

Director of Employment Standards

**Date of Hearing:** September 12, 2017

**Place of Hearing:** Boardroom 10.1  
122 Third Avenue North  
Sturdy Stone Building  
Saskatoon, Saskatchewan

## Introduction

1. The Director of Labour Standards (the 'Director') issued Wage Assessment # 8579, dated June 27, 2017, ordering Burkatsky Transport Ltd.; John J. Burkatsky, being a director of Burkatsky Transport Ltd.; and Christeen Burkatsky, being a director of Burkatsky Transport Ltd. (the 'appellants') to pay \$2,960.66 to Devon Brisbin. The Appellants appeal this Wage Assessment.

2. Prior to the hearing, the Director confirmed that the appeal was made within the 15 day time period provided by *The Saskatchewan Employment Act* (the 'Act').

3. No objections were made regarding my jurisdiction to hear this matter.

4. Employment Standards Officer Ron Byers represented the Director at the hearing. John Burkatsky and Christeen Burkatsky were both present at the hearing, representing themselves and Burkatsky Transport Ltd. The former employee Devon Brisbin was also present at the hearing. John Burkatsky and Devon Brisbin testified.

5. The appellants' Notice of Appeal is a letter dated July 18, 2017, signed by 'John and Christeen Burkatsky' (ER-1). In addition a letter dated Feb. 9, 2017 from John Burkatsky to Ron Byers (including a one page screen shot of a text message) was filed as Exhibit ER-2, and I consider this to be part of the appellants' appeal.

6. The Appellants' appeal is based on their claim that Devon Brisbin did not actually work the hours he claims to have worked. In addition to the disputed hours, the Wage Assessment also contains other amounts, specifically: annual holiday pay and statutory holiday pay for the entire period of employment, overtime pay and a payroll deduction of \$203.18 which represented half of the cost of a tow truck used to pull a vehicle Mr. Brisbin was driving. At the hearing the appellants candidly admitted liability for these amounts. The appellants also admitted liability for 25 hours worked by Mr. Brisbin on July 12 (4 hours), July 15 (6 hours), July 18 (6 hours), July 19 (6 hours) and July 29 (3 hours). The parties agreed that Mr. Brisbin did work for the employer, and that he was paid \$20.00 per hour.

## Issues

7. Is the employer responsible to pay wages for the disputed 50 hours of work claimed by the employee?

## Decision

8. This dispute is largely caused by the employer's failure to maintain adequate records of the hours the employees worked. No reliable record of the hours the employee worked was presented at the hearing. Mr. Burkatsky indicated that he had employees write the hours they worked in a notebook in his shop. However no such notebook, or other records were entered

into evidence. One would expect an employer to have records which would indicate the hours employees worked, some indication of the work performed, and some sort of notation as to where the hours worked were to be charged (for example to a particular customer's job or as shop time). None of this was entered in evidence in this dispute.

9. The Employment Standards Officer prepared an Audit Template (Exhibit EE-3) based on the hours the employee said he worked. As I indicated above, all but 25 such hours are disputed by the employer. Unfortunately the Audit Template (Exhibit EE-3) indicates the year the hours were alleged to have been worked in as 2017. This is an error as the hours are alleged to have been worked in 2016. This error only came to light near the end of the hearing. Although this error affects the day used as the end of the week, I note that overtime amounts were a result of the employee working more than 8 hours in a day, as opposed to working more than 40 hours in a week. Therefore the overtime amounts claimed would not be affected by this error. It appears that the dates (as opposed to the days of the week) are correctly listed. July 16 and 17 for example did fall on a weekend during 2016 (but not 2017).

10. In this case the employee says that he worked on certain days. The employer disputes some of these claims. The Employment Standards Officer prepared an Audit Template based on the hours the employee claimed he worked. I will summarize the evidence with respect to each of the dates.

11. Mr. Burkatsky had provided Mr. Brisbin with a key to the shop. Mr. Brisbin says this key is how he was able to work at times when the shop was closed. Therefore Mr. Burkatsky's claim that the employee must not have worked at times when the shop was closed does not resolve the matter. It is possible that the employee let himself into the shop, and worked while the shop was closed.

12. The employee says he worked on July 13. The employer says that the employee was in the shop that day, but was being permitted to work on his personal vehicle in the shop. Mr. Brisbin says he did in fact work on his personal truck, but did not record this time as time worked. The employee claims he worked for 3 hours that day, but could not indicate what he worked on. No further evidence was provided by either the employer or the employee.

13. The employee says he worked on July 14. The employer says he was in Saskatoon on that day and as a result the shop was closed and no one worked. Again the employee says he worked for 3 hours that day, but could not indicate what he worked on. No further evidence was provided by either the employer or the employee.

14. The employee says he worked 10.5 hours on each of July 16 and 17. Those days were on a weekend, and the employer says shop was closed, and no one worked on the weekend. No further evidence was provided by either the employer or the employee.

15. The employee says he worked 8 hours on July 18 and 10 hours on July 19. The employer agrees that the employee worked those days, but says the employee did not start as early as

claimed. The employer did not suggest what time the employee did start work. No further evidence was provided by either the employer or the employee.

16. The employee says he worked during the period of July 20-26. John Burkatsky says he was on holiday with Christeen Burkatsky during this period, and that no one was permitted to work in his shop while he was gone.

17. The total hours in this Wage Assessment are 75 regular hours and 8.5 overtime hours. Of these, the employer admits 25 hours were worked. The rest are disputed. Mr. Brisbin testified that he spent all these disputed hours working on one particular vehicle, described as the 'black Pete'. Mr. Brisbin does not have the same level of training as a mechanic as Mr. Burkatsky. When asked what work he performed during the disputed period, Mr. Brisbin initially listed several jobs such as working on the bushings, daytime running lights, brakes and so forth. Mr. Burkatsky indicated that those were jobs the two of them did together. When asked again what jobs he performed on the black Pete by himself, Mr. Brisbin said "I did smaller jobs that I could do myself". He then said he didn't record what jobs he did, and in fact he could not remember what work he did on the black Pete. Mr. Burkatsky testified that absolutely no work appeared to have been done on the black Pete during the time he was away.

17. Mr. Burkatsky testified that the black Pete appeared to be in the identical condition when he returned from his holiday as when he left. He further testified that he had not given Mr. Brisbin permission to work at the shop at times when Mr. Burkatsky was not there. Mr. Burkatsky said that if Mr. Brisbin was at the shop while he (Mr. Burkatsky) was away, he (Mr. Burkatsky) was unaware of it, and is unaware of any work which was completed during that time. I accept Mr. Burkatsky's evidence on these points.

18. The root cause of this dispute is the employer's failure to keep appropriate records of the hours the employee worked. I would suggest that the reason the Act casts an obligation on employers to keep records is precisely to avoid situations like this, where neither the employee nor the employer is really sure exactly what hours the employee worked.

19. As an adjudicator, my starting point is the Wage Assessment. Unless there is evidence, which establishes on a balance of probabilities that the Wage Assessment is incorrect, I must uphold it. The Act, says:

2-17 (9) The copy of the wage assessment provided to the adjudicator in accordance with subsection (8) is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing, without proof of the signature or official position of the person appearing to have signed the wage assessment.

20. With respect to the hours claimed by the employee during the period of July 20-26, I do find evidence to the contrary. I accept the testimony of Mr. Burkatsky that he was out of town during that period, and further that he had not authorized any work to take place in his shop while he was on holidays and that in fact no work had been done on the black Pete during that

period. I find on a balance of probabilities the employee did not perform any work during that period.

21. With respect to the rest of the hours claimed I am unable to conclude on a balance of probabilities that the Wage Assessment is incorrect. I accept that Mr. Burkatsky is telling the truth as he is aware of it. However, I find that the fact is that Mr. Burkatsky simply is not aware of whether or not the employee worked during these hours. In the absence of evidence to the contrary, I am unable to alter the Wage Assessment.

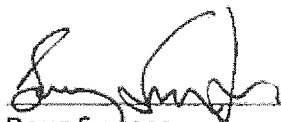
22. Therefore I conclude that the Wage Assessment should be altered by eliminating any hours recorded for the period of July 20-26. This is 22 regular hours and 1½ overtime hours.

23. The employee was paid \$20.00 per hour. This means the audit allocates \$440.00 for the 22 hours of regular time and \$45.00 for the 1½ hours of overtime, for a sub-total of \$485.00. In addition public holiday pay at .05 totals \$24.25 and annual holiday pay at .057692 totals \$37.31 for a total of \$546.56. As I have concluded that the employee did not work these 22 regular hours and 1½ overtime hours, I reduce the Wage Assessment by \$546.56.

#### **Conclusion**

24. The Wage Assessment of \$2,960.66 is hereby reduced by \$546.56 to \$2,414.10. The employer is required to pay the employee \$2,414.10.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 2<sup>nd</sup> day of October, 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](http://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.

(1) 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.