



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: Terra Impact Management Saskatoon Inc.

RESPONDENT: Corinne Labrecque
and
Director of Labour Standards
Ministry of Labour Relations and Workplace Safety

DATE OF HEARING: January 17, 2017

PLACE OF HEARING: Saskatoon, Saskatchewan

I. INTRODUCTION

This is an appeal by Terra Impact Management Saskatoon Inc. (hereinafter referred to as TIMS) with respect to a Wage Assessment issued by the Respondent, the Director, Employment Standards Branch, Ministry of Labour Relations and Workplace Safety, on August 15, 2016. The Wage Assessment required the Applicant to pay Corinne Labrecque the sum of \$5,435.96 representing pay in lieu of notice. 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 January 17, 2017, with written arguments provided by February 6, 2017. The Applicant was represented by its Director, Tim Underwood. Present for the Respondent at the Hearing were Adam Farion and Doug Long, Department of Employment Standards. The employee Corinne Labrecque was present as were Joe Heilman and Stacey Taylor, who were called as witnesses on behalf of the Applicant.

II. PRELIMINARY MATTERS

It was agreed that all parties, including those giving evidence, could remain present throughout the Hearing. Mr. Farion amended the amount of the Wage Assessment to: \$5,555.76, the calculations for which were explained in Exhibit EE-1.

III. THE ISSUE

By way of background, Corinne Labrecque had been employed by Prairie Distributors Inc. (hereinafter referred to as PDI) since 2003. She had been employed by the predecessors to PDI since the 1990's. On June 30, 2015 PDI ceased operations and Ms. Labrecque thereafter was an employee of TIMS. This appeal is therefore with respect to the interpretation and application of S.2-10 of *The Saskatchewan Employment Act*:

S. 2-10 For the purposes of this Part, if a business or part of a business is sold, leased, transferred or otherwise disposed of and an employee continues to be employed at the business after the sale, lease, transfer or disposition, the employee's employment is deemed to be continuous.

The two main questions to be answered are:

- 1) Was PDI sold, leased, transferred or otherwise disposed of in relation to TIMS?
- 2) Was the employee continuously employed at the same business following the transition from PDI to TIMS?

Should I find that the employment of Ms. Labrecque was continuous, then having worked more than 10 years, she would be entitled to eight weeks pay in lieu of notice as indicated in the amended Wage Assessment (S. 2-60(1) of *The Saskatchewan Employment Act*).

IV. EVIDENCE

i. EVIDENCE OF APPLICANT

Evidence of Joe Heilman

Joe Heilman was the first witness called by Applicant.

Mr. Heilman was also the father of the employee Corinne Labrecque. This aspect is pertinent only insofar as Mr. Underwood argued that due to the father/daughter relationship, it was likely that Mr. Heilman and his daughter, the employee, had manipulated or fabricated evidence. There was no proof of this allegation whatsoever.

Overall, it was difficult to follow the evidence of Mr. Heilman, due to the nature of his examination-in-chief. Despite calling Mr. Heilman as a witness for the Applicant, Mr. Underwood regularly and aggressively challenged the answers provided by Mr. Heilman. When Mr. Underwood got an answer he disagreed with, he would attempt to change the information by making statements that he expected would be considered as evidence, even though he was not testifying, nor did he testify. As the result was very confusing, I am referring to only those parts of Mr. Heilman's evidence which are relevant to the issues. It should be noted that despite the manner of questioning and frequent challenges to his credibility, Mr. Heilman answered all questions as directly and honestly as he could.

Mr. Heilman had been General Manager and Vice President of operations of Prairie Distributors Inc. That business, in a nutshell, was to provide laundry and dry-cleaning supplies, parts and service to businesses in and around the Saskatoon area. Mr. Heilman was named as a Director on the Saskatchewan incorporation documents but he testified that he was a Director in name only. He was named as a Director only to conform to the Saskatchewan residency requirements, but he had no directorial functions; he was the Office Manager for PDI in Saskatoon. He also dealt with most financial matters such as payables and receivables.

The office duties were shared by Corinne Labrecque and Stacey Taylor. Ms. Labrecque's duties generally included receivables, costing, dangerous goods issues, MSDS (material safety and data sheets), machinery quotes and correspondence to customers. Her duties did not encompass source reduction or CRA matters. Ms. Taylor was less senior as she started six years after Corinne did.

The accountant for PDI was Ogum Ugogi. He was in Calgary, Alberta and he was primarily responsible for: ROE's, payroll, CRA remittances, cheques and all financial matters.

On June 30, 2015, PDI ceased operations and on July 1, 2015, TIMS took over those operations. The evidence of Mr. Heilman never made clear how this change of operations happened. There was no sale, no contract and the details of any prospective consideration were unclear. Mr. Heilman stated that it was not a sale of the company, but a sale of the assets. Having said that, no sale ever took place. While an Agreement for Sale was drafted several months after the fact, it was never executed.

In any event, after some negotiation, on July 1, 2015 TIMS took over the business. All the employees stayed; on June 30, 2015, they were the employees of PDI and on July 1, 2015, the same individuals were the employees of TIMS. Prior to this change in management, Mr. Heilman stated he had secured assurances from TIMS that no employees would be let go. On the Monday following June 30, 2015, all the former PDI employees were in the same jobs, the customers of the company stayed the same and the location was the same. This transition was handled the same way as previous changes of ownership over the years.

Mr. Underwood questioned Mr. Heilman at length about the personnel involved in PDI, his role as a Director and Manager, whether he properly disclosed that information to TIMS, what financial problems were experienced by PDI and the competency of Ms. Labrecque to manage PDI, TIMS, or for that matter, any business. As information of this nature was not relevant to the issues it will not be reviewed in this decision.

On July 1, 2015 TIMS began operations. By that time the business had had six different owners. Corinne Labrecque had been with the company under different employers.

Corrine Labrecque and other employees received no training during the time PDI ran operations other than sessions put on by suppliers or product seminars; all employee training (such as office management) had been done while in the employ of the companies which were the precursor to PDI. Mr. Heilman agreed that under TIMS there was more formal training to teach office management, inventory control and accounts receivable.

Mr. Heilman maintained that Corrine Labrecque was qualified to manage the PDI office due to her twenty-six years of experience. She had commenced her employment in 1990. She was qualified to do all office managing duties but could not do accounting. Ms. Labrecque was not managing the business but was managing the office as an employee and had throughout her career with PDI always been paid overtime. In April 2016 Mr. Underwood said there would be no more overtime, that is, employees would not be authorized to work overtime. Overtime pay was not an issue at this hearing.

Evidence of Stacey Taylor

Stacey Taylor was the next witness for TIMS. Her evidence was brief. She was a current employee of TIMS who had also worked at PDI with Corinne Labrecque for twenty years. Ms. Taylor highlighted some of the differences between Ms. Labrecque's duties under PDI versus her duties while working for TIMS. At PDI, Ms. Labrecque was not responsible for payroll or remittances but her duties included attending to the order desk, reception, general typing, entering inventory into the system and secretarial duties. After TIMS took over, other employees from TIMS came to Saskatoon to train her and Ms. Labrecque in TIMS's office management systems.

That concluded the evidence of the Applicant. As noted, Mr. Underwood did not testify.

Evidence of the Respondent

Evidence of Corinne Labrecque

One witness was called on behalf of the Employee – Ms. Labrecque. Prairie Distributors Central Inc. was started in 2003 and provided dry cleaning and laundry equipment and parts to dry cleaning plants and large laundry facilities such as nursing homes and hospitals. The owner was Nas Hasani. At PDI, her duties included: costing inventory, accounts receivable, reception, order desk, machinery quotes and product orders. Her hours were 8:00 am to 4:30 pm and she received overtime for any work after 4:30 pm. Both Joe and Nas authorized the overtime.

The last day Ms. Labrecque worked for PDI was June 30, 2015. She did not resign. The next day, July 1, 2015, was her first day of work for TIMS (note that July 1st was a statutory holiday so she did not actually work until the next business day). There was no transition required: the customers, product and services were the same with TIMS as they had been under PDI. Prior to the change in management, she had been told by Mr. Heilman that her position was to continue and that her duties would likely expand.

After April 1, 2016, no overtime was authorized. On April 28, 2016, she was advised by Mr. Underwood that she was laid off due to lack of sales.

Her evidence on cross-examination by Mr. Underwood was that under PDI she was a general office person and that she was told that under TIMS her duties would be expanded. These extra duties would include: accounting, payroll and remittances. She had been aware since about April 2015 that it was possible the company would change hands. After TIMS took over management, she received additional training from TIMS personnel – in accounting and other programs. This additional training took more than 1½ days. Ms. Labrecque testified that her job description at TIMS was comparable to PDI, with the addition of accounting. The two businesses were similar, although TIMS began to expand the range of services it provided. For example, PDI only picked up laundry waste, whereas TIMS expanded to general waste management. The client list was not proprietary, it was provided to Environment Canada and therefore was in the public domain.

Ms. Labrecque was provided with a Record of Employment (ROE) on her last day with PDI. TIMS argued that by providing ROE's to its employees, PDI was effectively terminating their employment. TIMS should be considered a new and different employer and therefore the employee cannot claim continuous employment. There was no evidence presented as to when or whether an ROE must be issued when management changes hands. There was no evidence as to the effect of issuing an ROE to that employee when management changes. As well, the actual ROE was never filed as evidence. Therefore, any finding as to the significance of this ROE to the ultimate issues would be speculative.

Analysis and Decision

Both parties referred to the decision of Zellers Inc v United Food and Commercial Workers International Union, Local 1518, 2012 CanLII 68305 (BC LRB), a decision of the British Columbia Labour Relations Board (BCLRB NO. B243/2012). That decision dealt with the concept of 'continuous employment' in the context of the sale of one retail giant (Zellers) to another (Target). The facts of that case are significantly different than the case at bar. The BCLRB found that there was no discernable continuity of the Zellers business at the Brentwood Mall and that Target acquired very little from Zellers. Additionally, there was at least a six-month hiatus between the closing of the Zellers' store and the opening of the Target store at the same location.

In its decision, the BCLRB provided guidance in assessing whether a transfer of business has occurred at para. 69:

In Lyric Theater Ltd., BCLRB No. 38/80, [1980] 2 Can LRBR 331, the Board identified a number of factors or indicia to consider in determining whether a transfer of business has occurred. These include: transfer of assets; transfer of goodwill; transfer of a logo or trademark; transfer of customer lists; transfer of accounts receivable, existing contracts or inventory; any promises to maintain a good name or refrain from competing; whether the same employees are performing the same work; whether there is a hiatus in the business between the two companies; and whether

customers of the predecessor are now serviced by the putative successor.

The list of factors is not exhaustive, nor will any individual factor or collection of factors be in themselves sufficient for the Board's determination."

On behalf of TIMS, Mr. Underwood argued that there was no transfer, sale or lease of PDI to TIMS, nor was PDI 'otherwise disposed of'. The overall arrangement with respect to the takeover (for lack of a better term) of PDI by TIMS was never made clear in the evidence. An Agreement of Sale was prepared months after the fact and never signed. What happened was that one day the business was being run by PDI and the following day, it was being run by TIMS. The assets and inventory all became the property of TIMS. Both management and the employees knew it was going to happen and it was a seamless almost overnight transition. It was the same business, with the same employees. The customer list was the same. The products and services provided were the same. The location was the same. Business went on as usual. My finding is that, therefore, PDI was disposed of. PDI had ceased to function as a business and its operations were immediately taken over and subsequently performed by TIMS.

Mr. Underwood also argued that Ms. Labrecque's position fundamentally changed when TIMS took over and that therefore her employment cannot be considered 'continuous'. It is correct that while she was working under TIMS, after some training, Ms. Labrecque's office duties were expanded from those duties she had under PDI. She had been an office person and with additional training by TIMS, became an office manager. I do not find that this was a fundamental change in her job description; rather her duties were enhanced with additional training while she was working for TIMS. Even if this was a fundamental change, I agree with the comment of Mr. Farion that even if Ms. Labrecque had been an office manager for PDI and then was a janitor with TIMS, S. 2-10 of The Act would still apply.

My finding is that the employee, Corinne Labrecque, was continuously employed from her start date with PDI in 2003 through to her formal termination from TIMS

on April 28, 2016. As such she is therefore entitled a total of 8 weeks pay in lieu of notice, as per S. 2-60 the Act, minus any amounts already paid.

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 2nd day of June 2017.

A handwritten signature in black ink, consisting of a large, stylized initial 'L' followed by a long, sweeping horizontal line that extends to the right.

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

Exhibit List

Employer Exhibit	Item
ER 1	Unsigned Inventory Sale Agreement (April 1, 2016)
ER 2	ROE May 12, 2016
ER3	Decision of Employment Standards officer
Employee Exhibit	Item
EE 1	Amended Wage Assessment Calculations
EE2	ISC Corporate Registry PDI
EE 3	ISC Corporate Registry TIMS
EE 4	Employment Agreement (April 1, 2013)
EE 5	Email for Nas to Corrine
EE 6	Layoff notice
EE 7	Final paystub

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.