



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

Appellants:

Kusina Restaurant Ltd.;

Marites Delos Reyes, being a director of Kusina Restaurant Ltd.;

Frances Javier-Fawcett, being a director of Kusina Restaurant Ltd.; and

Marylin Fuentes, being a director of Kusina Restaurant Ltd.

Respondents:

Abraham Garcia, and Director of Employment Standards

Date of Hearing: August 21, 2018

Location of Hearing: Sturdy Stone Building; 122 Third Avenue North; Saskatoon;
Saskatchewan (with telephone attendance)

Date of Decision: August 31, 2018

[1] Wage Assessment # 8947 (hereinafter the 'Wage Assessment') was issued by the Director of Employment Standard's Delegate on December 12, 2017. It directed Kusina Restaurant Ltd.; Marites Delos Reyes, being a director of Kusina Restaurant Ltd; Frances Javier-Fawcett, being a director of Kusina Restaurant Ltd.; and Marylin Fuentes, being a director of Kusina Restaurant Ltd. (hereinafter the 'appellants') to pay Abraham Garcia the sum of \$13,687.44.

[2] Ms. Javier-Fawcett and Ms. Joyce Watts represented the appellants. The respondent Abraham Garcia, represented himself. Doug Long was the Director's delegate in this matter. He did not represent Mr. Clark.

[3] Ms. Javier-Fawcett and Ms. Joyce Watts attended via telephone. They were in Nipawin, Saskatchewan. Abraham Garcia, also attended via telephone. He was in the Philippines. Mr. Long attended in person. There were no objections to the hearing proceeding in this manner.

Issues

[4] At the start of the hearing the parties agreed there were two issues in dispute. The first issue is whether Mr. Garcia was an employee or a volunteer. The second issue, which only becomes relevant if I find Mr. Garcia was an employee, is whether or not the record of hours (Exhibit EE-1) purportedly worked is adequate.

Was Mr. Garcia an employee?

[5] The Saskatchewan Employment Act (hereinafter the 'Act') defines employee:

2-1

(f) "employee" includes:

(i) a person receiving or entitled to wages;

(ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;

(iii) a person being trained by an employer for the employer's business;

(iv) a person on an employment leave from employment with an employer; and

(v) a deceased person who, at the relevant time, was a person described in any of subclauses (i) to (iv);

but does not include a person engaged in a prescribed activity;

[6] Ms. Javier-Fawcett and Mr. Garcia have actual knowledge of the services performed by Mr. Garcia. Unfortunately not all of their evidence is reconcilable. It is clear that Mr. Garcia had been working in Alberta prior to coming to Saskatchewan in February. His work permit was expiring in March. He met Ms. Javier-Fawcett and she and her husband agreed to sponsor Mr. Garcia and assist him in getting a work permit through the Saskatchewan nomination process, which Ms. Javier-Fawcett believes to be 'easier' than in other provinces. Be that as it may, Mr. Garcia did not obtain a work permit and eventually returned to the Philippines.

[7] Whether or not Mr. Garcia was legally entitled to work in Canada, my job is to determine if he was an 'employee' within the meaning of the Act. If he was, the Act requires that he be paid.

[8] Mr. Garcia testified that he and Ms. Javier-Fawcett agreed he would be paid \$10.00 per hour for working in the restaurant, and would receive a raise once he obtained a work permit. Ms. Javier-Fawcett testified that Mr. Garcia was a volunteer, that is someone who works with no expectation of pay. On this matter, I accept the evidence of Mr. Garcia. I reject Ms. Javier-Fawcett's testimony that she and Mr. Garcia agreed he would be a 'volunteer' at the restaurant.

[9] It is clear that Mr. Garcia did work in the restaurant. He developed a menu, picked up some goods and served as a cook. In fact, one of Ms. Javier-Fawcett's concerns was that he was in her words, being 'mean' to the staff while he was training them.

[10] It is clear that Ms. Javier-Fawcett provided Mr. Garcia with money from time to time. Ms. Javier-Fawcett says she did this because of a "Filipino cultural trait called "Utang na Loob" ... The essence of Utang na Loob is an obligation to appropriately repay a person who has done one a favor..." (quoted from Ms. Watts' letter to the Director dated January 5, 2018). As I understand this argument, Ms. Javier-Fawcett takes the position that Mr. Garcia did her a favor by volunteering in the restaurant so she did him a favor by giving him money from time to time. I do not accept this as factually accurate. As I stated above, I find that Ms. Javier-Fawcett and Mr. Garcia had an agreement whereby he would work in the restaurant and would be paid for the work.

[11] I conclude that Mr. Garcia was an employee. Ms. Javier-Fawcett permitted (within the meaning of the Act) Mr. Garcia to perform work and provide services normally performed by employees. Since nothing in the Act limits its protection to those legally entitled to work in Saskatchewan, Mr. Garcia is entitled to be paid for the hours he worked. This brings me to the second issue.

Is the record of hours worked adequate?

[12] The appellants take the position that the record of hours Mr. Garcia submitted to the Director's delegate is adequate. Ms. Watts analysed the hours submitted during Mr. Long's investigation, and as a result some hours were shown to be in error, and were removed. This occurred prior to the Wage Assessment being issued and so does not affect the matter before me.

[13] Ms. Watts suggests the time sheets are a fabrication. She suggested that EE-1 appears to have been copied out at one time. I do not know if it was or not. Mr. Garcia was not asked the question. I have not seen the original document, and the photocopy entered as Exhibit EE-1 does not appear unusual on its face. The mere allegation that the time sheets (EE-1) are fabricated, is no evidence that they were.

[14] The Act places a statutory duty on employers to keep appropriate records including at 2-38 (1)(c)(vi) "the total number of hours worked by the employee each day and each week ...". The employer failed to do so – or at least there was no evidence submitted that the employer had

its own records. Therefore the only evidence submitted with respect to hours worked is that submitted by Mr. Garcia. In saying this I have not forgotten the payroll analysis conducted by Ms. Watts. Ms. Watts however had no personal knowledge of the hours Mr. Garcia worked. Her very thorough analytical work did discover some errors, and these were later accounted for as I mentioned above.

[15] The Act at 2-75 (9) says:

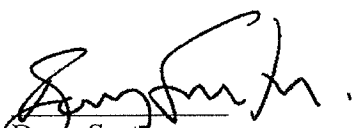
The copy of the wage assessment provided to the adjudicator in accordance with subsection (8) is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing...

[16] Given that I have concluded that Mr. Garcia was an employee, and given that the Wage Assessment was based on the records kept by Mr. Garcia (Exhibit EE-1), as adjusted to account for the errors Ms. Watts pointed out, and given that no evidence was submitted contrary to the Wage Assessment in this regard, I am obligated to uphold the Wage Assessment.

Conclusion:

[17] The Appeal is dismissed. The Wage Assessment in the amount of \$13,687.44 is confirmed.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 31st day of August, 2018.


Doug Surtées
Adjudicator

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 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, 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.