

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

APPELLANTS: **IRE-OLUWA HEALTH SERVICES INC.**
(operating as We Care Home Health Services)
and ADEBUNMI ONASANYA, as director of
Ire-Oluwa Health Services Inc.

RESPONDENTS: **TRACY WOODBURY and the DIRECTOR OF**
EMPLOYMENT STANDARDS

DATE OF HEARING: **June 25, 2018**

PLACE OF HEARING: **3rd Floor Boardroom**
1870 Albert Street
Regina, Saskatchewan



LRB File No. 061-18, Wage Assessment No. 8992

I. INTRODUCTION

This is an appeal of a Wage Assessment brought by Ire-Oluwa Health Services Inc. (the Company) and its director, Adebunmi Onasanya. Wage Assessment No. 8992 directed the Company and its director to pay \$2,261.35 to Tracy Woodbury or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act).

On June 25, 2018, the following individuals attended the hearing:

- Adebunmi Onasanya (Bunmi), owner and director of the Company, witness for the Appellants;
- Leon Lapointe, accountant, support person and note-taker for Bunmi;
- Madison Donminguez (Madison), scheduler and Client Care Coordinator for the Company, witness for the Appellants;
- Tracy Woodbury (Tracy), former employee of the Company, witness for the Respondents;
- Jas McConnell (Jas), Employment Standards Officer;
- Kelli Smith, Employment Standards Officer in training, observer;
- Jennifer Draper-Forsythe, Program Integrity Officer, observer; and
- Michael Fink, Program Integrity Officer, observer.

II. PRELIMINARY MATTERS/OBJECTIONS

There were no objections to the observers. At the outset of the hearing, I made an order for exclusion of witnesses. Aside from the parties, Madison was the only witness expected to testify so she left the room until she was called by Bunmi to testify.

The parties revealed there was an ongoing civil matter involving the We Care franchise. I explained that my authority was limited to issues relating to the Wage Assessment and cautioned them to limit their evidence and arguments to matters pertaining to the appeal of the Wage Assessment.

Shortly after the hearing began, Bunmi objected to the introduction of documentary evidence concerning a client and an employee. She strenuously objected to Staff Assignment Sheets, Office Staff Time Sheets, and pay stubs (identified collectively as EE2) coming into evidence because the documents contained confidential information regarding a client (names and signatures) and Madison's payroll and hours. Bunmi was particularly concerned the client had not consented to this information being released. She also objected to the manner these documents were obtained by Tracy and to these documents not having been shared with her prior to the hearing.

With respect to Bunmi not receiving prior notice of the documents, Jas stated that it is Employment Standards' policy to share documentation only if an employer formerly requests it. Policy or not, I explained that it is always beneficial for the parties to share all pertinent information prior to the hearing. Because these documents were Company documents familiar to Bunmi, I did not find any prejudice in allowing them to form part of the record.

Bunmi raised valid concerns regarding confidentiality. As a registered nurse and business owner, she was concerned that confidential client information was obtained and used by Tracy and Jas without her former client's consent. She saw this a serious breach of patient confidentiality. While I acknowledged her concerns, I decided to allow the documents into evidence on the basis that I would black out all client names and personal information. I also indicated that I would not refer to any clients by name in my decision. Further, I assured Bunmi that I would not accept a client's signature as proof that a visit had in fact taken place at a specific time because the client was not called as a witness and I had no way of knowing if the client knew what she was signing.

With respect to how the documents were obtained, Madison confirmed she provided the documents to Tracy upon request. She did not realize Tracy would take them with her when she left. There is no evidence to suggest the documents were obtained illegally, but again, copies of these documents ought to have been provided to Bunmi prior to the hearing.

III. THE DISPUTE

On January 8, 2018, a Delegate on behalf of the Director of Employment Standards issued Wage Assessment No. 8992 in the amount of \$2,261.35 against the Company and its director. The Appellants appealed pursuant to section 2-75 of the Act.

Bunmi filed an appeal on behalf of the Appellants by way of a letter dated February 13, 2018 (the Notice of Appeal). In addition to raising concerns regarding Tracy's credibility, Bunmi's Notice of Appeal states:

However I would like to comment here that Tracy has a full understanding of her roles and responsibilities with the accompanied privileges as an Office Manager. Major part of her responsibility was to work and act in the full interest of the company. She also have a good understanding of the labour standards. Regarding the Minimum Call Out, so I want to believe that she took the contract fully prepared and committed to execute it herself as a Manager knowing very well that the Minimum call Out rules does not apply to her position.

The main issue is whether Tracy was entitled to minimum call out pay for any hours worked outside of regular office hours while she was working as Office Manager for the Company.

IV. THE FACTS

The parties agreed to the following basic facts:

- Bunmi is the owner and director of Ire-Oluwa Health Services Inc. and the Company is a registered business in Saskatchewan.
- In May of 2016, Bunmi hired Tracy as a cook (\$13/hour) for another company but quickly moved her to an administrative role (\$14/hour) with the Company, where Tracy received some training and became the Office Manager (\$16/hour) shortly thereafter.
- Tracy's last day of work was April 28, 2017.

The parties tendered evidence by way of sworn testimony and documents. Bunmi and Madison testified for the Appellants and Tracy testified for the Respondents.

The following exhibits were entered into evidence:

Employer Exhibits (Appellants)

None

Employee Exhibits (Respondents)

EE1 – Copy of Tracy's pay stubs (10 pages);

EE2 – Copy of payroll information including pay stubs, Office Staff Time Sheets, and Staff Assignment Sheets for Tracy and Madison (46 pages);

EE3 – Copy of officer worksheet (3 pages); and

EE4 – Copy of Tracy's calculations (3 pages).

V. ARGUMENT

The parties exchanged and filed written arguments on July 13, 2018.

The Appellants' argument is summarized as follows:

- The Company has been in operation since September 2006. Its main business is home care, looking after elderly people in their homes. The Company employs Registered Nurses, Licensed Practical Nurses, personal support workers, and office administrative staff. Honesty, integrity, fairness, and kindness are important to the Company and it strives to operate within the confines of labour regulations.
- As part of her training and job, Tracy understood the Company would only accept a contract or service request that took the 3-hour minimum call out period into consideration. Hence, any client that required services for less than 3 hours, was billed for a minimum of 3 hours. This was Company policy to ensure that employees were scheduled in accordance with prescribed labour laws around the 3-hour minimum call out.
- As Office Manager, Tracy's job included these responsibilities: training and supervision of staff, maintenance of employee files, client home visits, assessment of prospective housekeeping clients, and bookkeeping.
- Tracy really wanted to work with the client in question and was willing to go above and beyond. She was willing to make personal sacrifices and stated that this was her choice.
- Tracy discussed this contract with Bunmi. It required morning and supper pills at 9 a.m. and 5:30 p.m. The plan was for Tracy to drive to the client's place in the morning, during her office hours, and to leave work early (by 4:45 p.m.) with the Company car to give the supper pill and leave for home by 5:30 p.m. Tracy would then take the Company car home.
- Tracy said the contract would not cost the Company any additional payroll expense because she would be doing the work herself, all within her office hours. Tracy planned to make the contract work without having to disregard the Company's 3 hours minimum policy.
- Madison confirmed Tracy left work early (before 5 p.m.) on the days she was attending to the client. Madison also confirmed she gave Tracy petty cash for fuel for the Company car. Tracy confirmed she took the car home.
- With respect to the Staff Assignment Sheets indicating Tracy attended on the client at 7 p.m., the client was over 90 years old and resides in a retirement

home. Most retirement homes serve supper between 5 and 6 p.m. and supper drugs are administered with the meal. While there may have been rare instances requiring drugs at 7 p.m., this is not a usual occurrence. Tracy had full access to the scheduling software. She removed confidential Company documents (employee and client files) without permission and has a past criminal record so she may have changed the scheduling information to suit her purpose.

- Tracy's actions were morally wrong, unethical, and unprofessional.
- Tracy quit on Friday, April 28 and started work with We Care on May 1, 2017. Bunmi believes Tracy may have attempted to sabotage her business. When Tracy left, she threatened to sink the Company. After Tracy left, Bunmi discovered Tracy had failed to keep client charts up to date.
- Tracy's office hours were 8:30 a.m. to 5:30 p.m. At no time was the office aware that Tracy was not going directly from work to the client's place.
- Tracy would not have been allowed to take the Company car if the client visit was not supposed to be part of her regular office hours. They do not have the luxury of providing transportation to their staff for field work.
- Tracy said she did not report the minimum call out violation sooner because she feared she would lose her job. If she were so scared and intimidated, would she purposely sign up a contract that would cause the Company to lose money?
- Tracy was knowledgeable about labour standards and would have known she could make an anonymous complaint.
- Tracy's exit from the Company was well-planned. She unlawfully collected documents before leaving. Tracy betrayed her position of trust.
- Bunmi believed Tracy was promoting the Company by taking on the contract herself, without causing additional payroll expenses.
- No logical person would sign up a \$20 contract knowing they would have to pay an employee \$50 to execute it.
- At some point Tracy must have become unhappy with her job and decided to become an ally of the We Care franchisor in its attempt to take over her business.
- Tracy set up the contract in question within 6 weeks of her departure. During this time, she would have been in contact with We Care regarding their plan of taking over and employing her as Office Manager in Regina.
- Tracy is not credible and trustworthy.
- The Company paid all wages owed to Tracy.

The Respondents' argument is summarized as follows:

- Tracy is entitled to unpaid minimum call out pay.
- Tracy provided companionship to a client outside of her regular office hours.
- Most of Bunmi's testimony was contradicted by Madison and was not credible.

- Tracy submitted daily timesheets and staff assignment sheets showing she worked after hours providing companionship to a client. Most of these visits occurred between 7 and 7:30 p.m.
- Bunmi evaded answering questions.
- Bunmi said she would not have seen Tracy's timesheets but Madison said she gave all timesheets to Bunmi. Bunmi said the staff assignment sheets were incorrect but Madison said they were correct.
- Bunmi stated Tracy left work early enough to make up for hours worked on the weekend but this was contradicted by Madison. Even if this were true, Tracy is still entitled to minimum call out for weekends where she reported to work for 30 minutes.
- Bunmi had no evidence to support her testimony.
- Tracy had reasonable explanations for seeking the companionship contract and the hours she worked were confirmed by Madison. Tracy's evidence is more reasonable than Bunmi's. There is no evidence to contradict the time sheets and staff assignment sheets.
- Bunmi has not provided evidence to contradict the Wage Assessment. It should be upheld.

VI. ANALYSIS AND DECISION

The Wage Assessment is comprised of an accumulation of unpaid minimum call out pay (EE3) relating to post incidents (urine collection for drug and alcohol testing) and medication distribution/companionship appointments reported by Tracy. These appointments took less than 3 hours, typically 30 minutes. According to Tracy's testimony and to the Office Staff Time Sheets and Staff Assignment Sheets (EE2), some of these calls occurred on weekends but most of them occurred on weekday evenings between the hours of 7 and 7:30 p.m. The bulk of these visits involved Tracy's attendance on one client, outside of her regular office hours of 8:30 a.m. to 5:30 p.m.

Section 3(8) of *The Minimum Wage Regulations, 2014*, being Chapter S-15.1 Reg 3 of the Act, says that "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." Bunmi's position regarding minimum call out is two-fold. Firstly, she says that Tracy was a manager and is therefore exempt from the legislative minimum call out requirement. Secondly, she says that Tracy did not in fact work the hours she is claiming at the times she says she worked them, and is therefore not entitled to minimum call out pay.

The parties led some evidence on the issue of whether Tracy was an employee who performed services "entirely of a managerial character." Although she acknowledged holding the position of Office Manager, Tracy said she was not responsible for hiring

anyone, even though she sat in on interviews. She did not terminate any employees, but she was involved with discipline including issuing reprimands. She believes she was a supervisor rather than a manager. She could not come and go as she pleased. Her set office hours were 8:30-5:30. If she wished to change her schedule, she needed to ask permission. She made no financial decisions or purchases on behalf of the Company. She acknowledged having the authority to go out into the community and sign client contracts. Tracy was not responsible for scheduling other employees. She was paid an hourly wage.

Bunmi believes Tracy was a manager, coming and going as she pleased. If an employment contract or offer of employment existed, it would have been drawn up by Tracy. Bunmi does not have a copy of any employment contracts relating to Tracy's employment with her Company. Bunmi said that Tracy hired and fired employees, although she could not remember specifics. Tracy was responsible for bookkeeping and for supervising other office staff. Tracy was also responsible for making sure other employees kept their training up to date, for maintaining employee files, and for completing assessments for prospective housekeeping clients. She had the authority to sign contracts on behalf of the Company without seeking Bunmi's approval and she had use of the Company car. Until the day Tracy left, Bunmi trusted Tracy and believed she was promoting the Company, trying to increase business, and acting in the Company's best interests.

Based on a review of the law, it does not appear that anything turns on a determination of whether Tracy was part of the Company's management. Section 3(4) of *The Employment Standards Regulations*, being Chapter S-15.1 Reg 5, states: "**Except for sections 2-15 and 2-16**, Subdivisions 2 and 3 of Division 2 of Part II of the Act do not apply to an employee who performs services that are entirely of a managerial character" (emphasis added). Section 2-15 says an employer is obligated to pay an employee his or her total wages and section 2-16(1)(b) says that an employer must pay an employee "at least the prescribed minimum sum when the employee reports for duty." The prescribed minimum sum is set out in *The Minimum Wage Regulations, 2014* referred to above. Accordingly, the managerial exception carved out in *The Employment Standards Regulations* does not exempt an employee from having to pay minimum call out pay.

Had a managerial determination been necessary, I would have found based on the totality of evidence that Tracy was not an employee performing services "entirely of a managerial character." Although Tracy acted in a supervisory role, the evidence does not suggest she had a significant degree of autonomy or decision-making authority. Tracy's office hours were 8:30 to 5:30 and I do not accept that she came and went as she pleased. When she left early, it was for work-related appointments. She recorded her hours on an Office Staff Time Sheet and submitted them to Bunmi. Although Tracy was trained in bookkeeping, Madison acknowledged on cross-examination that Bunmi was in charge of payroll. Tracy supervised at least one other office staff member but

Bunmi said that she chose not to fire this employee even though Tracy wanted her fired. Tracy sat in on interviews and helped train employees after they were hired, but she did not do the hiring or firing. There is no evidence that Tracy was involved in performance evaluations or promotion of staff. Although she could enter into contracts on behalf of the Company, I find no evidence that she had any real say in the overall operation of the business, financial or otherwise. Like other non-managerial employees, Tracy earned an hourly wage. Perhaps there is additional information that could have been led to alter this finding of fact, but based on the information before me, I do not find that Tracy was a manager for the Company.

The parties disagree about whether they made suitable arrangements to make up for any hours Tracy may have worked outside of her regular office hours. Even if I accept that Tracy agreed to work evenings and weekends and to forgo minimum call out pay, such an agreement would be invalid. Likewise, if I accept that Tracy agreed to leave work early and to drive the Company car to make up for short evening or weekend calls, this agreement would directly contradict an employer's obligation to pay minimum call out pay and would, therefore, constitute an invalid agreement. Section 2-6 of the Act says: "No provision of any agreement has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Part."

The issue then becomes did Bunmi establish, on a balance of probabilities, that Tracy claimed compensation for hours worked on evenings and weekends that she did not, in fact, work?

Bunmi testified that Tracy had HR experience from her work in Ontario and that Tracy was well aware of labour standards in both Ontario and Saskatchewan. Tracy knew the rules when she entered into a 30-minute, twice daily medication and companionship contract for an elderly client. Because this was an unusual contract, Tracy told Bunmi that she planned to visit the client in the morning after she started her regular work hours and then leave work a half hour early to fit in the supertime portion of the contract before she left work for the day. Bunmi agreed to allow her to take the Company car as part of this arrangement. Tracy said the Company would benefit from the arrangement because no other staff would be required to fulfill the contract and she would complete the work within her regular office hours. Bunmi thought Tracy truly wanted to help this client.

Bunmi argued that it would have made no sense for her to agree to take on a contract where she was required to pay an employee for 3 hours for a 1/2 hour of work each evening. The contract would then end up costing her money instead of making her money. She does not believe that Tracy accurately recorded her time on her Office Staff Time Sheets and Staff Assignment Sheets (EE2). She stated that elderly clients typically take their medication with supper, around 5:00 p.m., and that retirement facilities do not serve supper between the hours of 7 and 7:30 p.m., as Tracy's documentation seems to suggest.

Bunmi was unable to say what time Tracy actually attended on the client, other than to explain it did not make sense that it would have been in the evening. She believes Tracy left work early and attended on the client so that she could end work at her regular time of 5:30 p.m. Madison confirmed that Tracy left the office by 5:00 p.m. on the days she was to meet with the client, but also could not say whether Tracy went straight from the office to the appointment or not. Madison provided Tracy with copies of the Staff Assignment Sheets (EE2) with times recorded for the appointment (most listed between 7:00 and 7:30 p.m. and some listed between 6:30 and 7:00 p.m.). On cross-examination, Madison agreed that after Tracy left, Helen took over with this client and met with her in the evenings between 7:00 and 7:30 p.m. Madison believed Helen could not have gone sooner because she was cooking for another company until 6:00 p.m. each day.

Tracy said she recorded her time accurately. She said the contract in question was drawn up to include an evening appointment between 7:00 and 7:30 p.m. and that Bunmi knew this. She acknowledged that she left the office a half hour early to make up for these appointments and for any scheduled weekend appointments. Tracy recorded her hours on the Office Staff Time Sheets and separated out the evening calls from the morning call because the morning call occurred during her regular office hours. Tracy said she did not say anything about Bunmi failing to meet the minimum call out requirements because she did not want to get fired.

According to the documentary evidence, the calls in question occurred either between 6:30 and 7:00 p.m. or 7:00 and 7:30 p.m. Tracy's Office Staff Time Sheets (EE2) for the last weeks of her employment show that she separated out .5 of her daily hours and listed them separately from her office hours as having been worked from 7:00 to 7:30 p.m. The Staff Assignment Sheets, prepared and printed out by Madison, list most of the evening calls from 7:00 to 7:30 and some of them from 6:30 to 7:00 p.m. Either way, the documentation suggests that evening appointments took place after regular office hours.

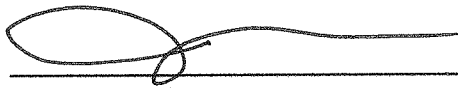
While I sympathize with the employer in this case, both because I believe Tracy was compensated for the hours she actually worked and because there appears to have been a meeting of the minds between employer and employee in this regard, their arrangement did not meet the requirements of the Act. As an employer who was in charge of her Company's payroll, Bunmi knew or ought to have known that Tracy was scheduling evening shifts to attend on a client. The Company's records clearly reflect this arrangement. I do not believe that Bunmi had any intention of cheating Tracy out of wages owed to her. The evidence leads me to believe that she and Tracy made an agreement whereby Tracy would fulfill the contract requirements and, in return, Tracy would leave the office early and have the use of the Company car. Unfortunately for Bunmi, this agreement is invalid under the Act.

The evidence supports Tracy's position that she repeatedly attended on a client in the evenings, outside of her regular office hours. There is no evidence to suggest the Wage Assessment is incorrect. Given the evidence and the law, the Wage Assessment must stand.

VII. CONCLUSION

The appeal is denied and the Wage Assessment is upheld. The Appellants are ordered to pay \$2,261.35. to Tracy Woodbury.

DATED in Regina, Saskatchewan, this 10th day of September, 2018.



Jodi C. Vaughan
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 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.