



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

Cole Hamilton

COMPLAINANT/EMPLOYEE

-AND-

High Power Diesel Performance Inc.

APPELLANT/EMPLOYER

DATE OF HEARING: July 6, 2018

PLACE OF HEARING: Regina, SK

## **INTRODUCTION**

This matter was heard before me on July 6, 2018 in Regina, Saskatchewan.

I am satisfied there has been compliance with subsections 2-74(6), 2-75(2) and 2-75(3) of *The Employment Standards Act* (the 'Act'). Therefore I have determined that I do have jurisdiction to hear this matter.

Mr. Jas McConnell, Employment Standards Officer represented The Employment Standards Department.

The Complainant/Employee, Cole Hamilton attended and gave evidence on his behalf.

The Appellant/Employer, High Power Diesel Performance Inc., was represented by Morris Schab. Mr. Schab gave evidence on his behalf and that of the Corporation.

The Wage Assessment was prepared pursuant to the Saskatchewan Employment Act s.s.2014 c.s-15.1, herein after referred to as "The Act" is for \$32,816.64.

**I. PRELIMINARY MATTERS**

There were no preliminary matters raised by the parties.

**II. THE DISPUTE**

The sole issue to be determined is whether Mr. Hamilton was an employee of High Power Diesel Performance Inc. or was he an independent contractor.

**III. EVIDENCE OF THE EMPLOYER**

Mr. Morris Schab gave evidence on his behalf and that of the Corporation, High Power Diesel Performance Inc. as follows:

Both he and Mr. Hamilton had worked for Cole Hamilton's father, Terry Hamilton, from appx 2012-2016. Mr. Terry Hamilton was operating as Regina Industrial Diesel which operated out of a large building at 1025 Wellington Road, Regina, SK. There were 5 employees working for the Corporation including, Terry Hamilton, Cole Hamilton and Morris Schab.

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Mr. Terry Hamilton ran into financial difficulty and in September of 2016 advised the employees that he was closing down his business and did so late September, early October 2016.

Subsequent to receiving the advice that Mr. Terry Hamilton was closing down his business, Mr. Schab held a meeting with himself, Terry Hamilton, Cole Hamilton and the other 2 employees of Regina Industrial Diesel Inc., suggesting that the 5 of them continue to rent the building, which included a front area and a shop area, as subcontractors and pay for it by dividing up the rent, utilities and insurance 5 equal ways.

The arrangement had Mr. Schab, who was the only individual of the 5 that had financial means, paying the rent, utilities and insurance. Then the others would pay him monthly a 1/5<sup>th</sup> share as subcontractors.

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All of the parties agreed to this arrangement. Mr. Terry Hamilton advised, during the meeting, that consent of the landlord/owner of the building premises, Derek Williams, would have to be contacted and consent to the same.

The landlord, Mr. Williams was contacted and agreed to the arrangements for the 5 subcontractors to continue to lease the premises.

The parties were to each do their own work, run their own business, and then pay their respective shares of the rent, utilities and insurance to Mr. Schab on a monthly basis.

Mr. Schab Incorporated a Corporation called High Power Diesel Performance Inc. of which he became a Director. This Corporation was Incorporated in the Province of Saskatchewan and the effective date of the Incorporation was October 14<sup>th</sup>, 2016.

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In December of 2016 Mr. Schab had heart troubles and required an operation. Mr. Schab did not return to work until January 6<sup>th</sup>, 2017.

Shortly after Mr. Schab returned to work he locked the premises, effectively locking out the 4 other parties, because their share of the rent and expenses had not been paid to Mr. Schab.

On January 26, 2017 Cole and Terry Hamilton took the contents of the building and stock from the premises. Mr. Schab contacted the RCMP; however they were of a view that it was a civil matter and did not become involved.

At some point, when Mr. Schab was away, Mr. Cole Hamilton had, by email, asked to be paid. Mr. Schab advised Mr. Cole Hamilton that he was not an employee and would not be paid.

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Each of the subcontractors had their own tools for the purposes of doing their own work; however, the larger equipment such as jacks and hoists, which were located in the rented premises, were owned by Terry and Cole Hamilton and were used on a communal basis, rent free, by all subcontractors when required. This arrangement had been agreed to by the Hamiltons.

It was agreed at the initial meeting between the parties that Mr. Schab would be the "face" of the business and he would, in addition to doing his own mechanical work, handle the invoicing and payments of all the parties. In other words, he would do the accounting and invoicing for the 5 subcontractors.

Each of the parties sought out their own clients and did their own work on their own jobs.

There was no written lease or subcontracts with any of the parties regarding the above arrangement.

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Each of the customers that were engaged by the subcontractors was aware that they were dealing directly with the individual doing the work on their vehicle.

None of the subcontractors, including Mr. Cole Hamilton, received direction from, or were controlled by Mr. Schab.

No time sheets relating to work done by Mr. Cole Hamilton were ever received by Mr. Schab.

Mr. Schab presented bills for rent and utilities each month and they were put into individual slots in a file box on the business premises. Mr. Schab did not receive payment from any of the subcontractors for any of the invoices including Mr. Cole Hamilton.

Mr. Schab prepared Employer Exhibit "2". This was prepared at the request of Mr. Cole Hamilton in order that Mr. Cole Hamilton could obtain rented premises for him to reside in.



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Mr. Schab said that he prepared this document at the request of Mr. Cole Hamilton, and the contents were not true as Mr. Cole Hamilton was not employed by him; however, Mr. Schab wished to assist Mr. Cole Hamilton in obtaining housing accommodations.

Employer Exhibit "1" is an Affidavit of the Landlord, Derek Williams, prepared at the request of Mr. Schab. The Sworn Affidavit sets out that the landlord was aware of the arrangement between Mr. Schab and the other 4 subcontractors, wherein they requested authorization for subletting of the premises, consent for which, was required by him as landlord.

The Affidavit specifically states that Mr. Williams was at a meeting between Mr. Schab and Mr. Cole Hamilton wherein particulars of Mr. Hamilton's sublet from Mr. Schab were discussed.

Mr. Williams came away from that discussion with the conclusion that Mr. Cole Hamilton was not an employee but would be a subcontractor using the premises on that basis.

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Mr. Williams had agreed to this arrangement.

Had Mr. Cole Hamilton been an employee this discussion would not have taken place nor would Mr. Willaim's consent have been required.

#### **IV. EVIDENCE OF THE EMPLOYEE**

Mr. Cole Hamilton gave evidence that, prior to October 2016, he had worked for his father, Terry Hamilton, as an employee.

After his father went out of business, Cole Hamilton was part of a group of 5 employees that held a discussion relating to renting the existing premises (were Mr. Terry Hamilton had his business) and continuing to operate the business with the 5 of them in the building..

Mr. Cole Hamilton said that he advised Mr. Schab at that meeting that he did not want to be a subcontractor but an employee.

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In response to Mr. Cole Hamilton's statement ( that he wanted to be an employee and not a subcontractor), Mr. Schab said no, he did not want any employees as that was why Mr. Terry Hamilton was in financial trouble.

Mr. Cole Hamilton said that his father owned the major repair equipment, such as hoists and jacks in the rented premises.

When Mr. Schab took over the premises all the other parties except him were subcontractors. He was the sole employee of Mr. Schab.

Mr. Cole Hamilton never received any monies from Mr. Schab despite his request in December to receive payment.

Mr. Cole Hamilton had his own Bay to work from and did his own work on various customers vehicles, such work never being billed out or charged to the clients, nor did he advise Mr. Schab of the work that he did.

Mr. Cole Hamilton never completed any timesheets, or any of the other usual employee documentation.

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He guesstimated his hours of work, as set out on Employee Exhibit "5," based on emails that he had between friends and the peoples' vehicles he was working on, as well as viewing security tape footage over a several week period to see when he was in the building.

The audit sheet prepared by the Labour Standards Department was based on Mr. Cole Hamilton's guesstimates from emails, security footage as to the amounting owing under the Wage Assessment.

The rate of \$35/hour was guesstimated from "industry standards" as there was never any agreement between Mr. Cole Hamilton and Mr. Schab as to an hourly rate for Mr. Cole Hamilton.

Mr. Cole Hamilton never received any money from Mr. Schab.

**V. ANALYSIS/DECISION**

The issue to be determined is: was the relationship between the parties that of an employer/employee or that of a subcontractor/contractor.

Looking firstly at whether or not there was a contact of employment between Mr. Schab and Mr. Cole Hamilton I find that there was not.

Reviewing the evidence of each of the parties it is clear that there was never a meeting of the minds on the terms of any Employment Contract.

Mr. Schab said that there was not a contract and Mr. Cole Hamilton says that there was.

The parties never agreed upon a rate of pay, hours of work, benefits or any other terms of employment.

Hours worked were never kept track of and no time sheets or invoices were ever submitted. Mr. Cole Hamilton was never paid over a period of 3.5 months and only inquired about payment once during that period of time.

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Mr. Schab advised that he never intended to employ Mr. Cole Hamilton and told him on several occasions that he was not an employee.

The Affidavit of Mr. Derek Williams states that there was not an employer/employee relationship but that of a subcontractor relationship.

I find Mr. Schab's evidence to be creditable and where his evidence is in conflict with Mr. Cole Hamilton's, I prefer Mr. Schab's evidence throughout as being more creditable.

I find that there was never an employment contract or service agreement between the parties; however, this does not end the matter. One must look at the actual relationship between the parties during the time involved or what was actually taking place "on the ground".

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The case of *The Director of Environmental Standards v. Acanac Inc.* 2013

SKQB 21, applied a fourfold test of:

Control

Ownership of Tools

Chance of Profit

Risk of Loss

The evidence of Mr. Cole Hamilton was that he did work on vehicles that were returning work from his father's business, as well, he worked for other customers who came and went, as well as his friends.

There is no evidence of control of Mr. Schab over Mr. Cole Hamilton in any way.

Mr. Cole Hamilton owned and used his own tools, with the exception of the jacks and hoists, which his father and/or he owned.

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Mr. Cole Hamilton did work on private vehicles as well as those of his friends and never submitted invoices or time sheets relating to this work to Mr. Schab.

Mr. Cole Hamilton was working on his own regarding these jobs and had a chance of profit and/or a risk of loss in this regard.

As a result in applying the Law to the Facts, I find that, "on the ground" conduct shows that Mr. Cole Hamilton was a subcontractor and not an employee.

There are also issues with the Wage Assessment such that it is not reliable in its calculation due to evidence to the contrary adduced by both parties.

First there is a claim against the Corporation for the week of October 8<sup>th</sup>, 2016.



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The Corporation was not Incorporated until October 14, 2016 and Mr. Schab was not a Director until that time. Resultantly there is no legal entity to claim against as the Corporation and Director did not exist at the time.

The rate of pay is unknown, and the "industry standard" has been used.

The hours claimed and rate of pay are guess work on the part of the employee.

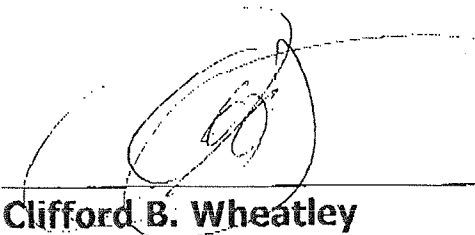
There are wages claimed after the business closed or shutdown, as well, as before the Company and Director existed.

As a result the Wage Assessment amount seems arbitrary at best.

**VI. CONCLUSION**

The appeal is allowed and the Wage Assessment is set aside

Dated at Moose Jaw, in the Province of Saskatchewan, this 14<sup>th</sup> of  
July, 2018.



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**Clifford B. Wheatley**  
Adjudicator

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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 <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.
- (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.