

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

Wage Assessment No. 9121(c)  
LRB File No. 125-18



COMPLAINANT: Jim Pravda  
Represented by Shelley Stretch  
Employment Standards Officer

RESPONDENT: A.V. Shuttle Cab Ltd.  
Represented by Vasil Arnaut  
Director

DATE OF HEARING: October 12, 2018 @ 11:00 a.m.

PLACE OF HEARING: Board Room 91  
Sturdy Stone Building  
122 3rd Avenue N  
Saskatoon, Saskatchewan

**1. INTRODUCTION**

Present were Mr. Arnaut, Ms Stretch and Mr. Pravda. I was advised by Ms Stretch that she had a telephone conversation with Mr. Wayne Soroka earlier this morning. Mr. Soroka was to accompany Mr. Arnaut at this hearing, however, he had understood the hearing was to start at 10:00 a.m., so he scheduled another appointment for 11:00 a.m. He advised Ms Stretch that he believed he could attend by 11:30 a.m.

Ms Stretch then offered to present the Complainant's case first so as to save time waiting for Mr. Soroka. Mr. Arnaut had no objection.

I advised the parties that this hearing was a continuation from the adjournment of July 13, 2018.

I reiterated my remarks from July 13 in that my role is to provide an impartial decision to their dispute. Further I expected their presentations to be cordial and respectful. Lastly, I advised that I have 60 days to provide a written decision for the Saskatchewan Labour Relations Board.

## II. PRELIMINARY MATTERS

Mr. Arnaut inquired as to whether we were here to determine what happened or what didn't happen?

I replied that my role may well be to determine both on the balance of probabilities.

## III. THE DISPUTE

The Wage Assessment alleges that annual vacation pay in the amount of \$16,355.12 is owed to Mr. Pravda by A.V. Shuttle Cab Ltd.

A.V. Shuttle Cab Ltd disputes that Mr. Pravda was an employee for the purposes of the Saskatchewan Employment Act.

## IV. FACTS

### i. EVIDENCE OF EMPLOYEE

Ms Stretch called Mr. Pravda as a witness, he was sworn and provided the following evidence:

- His name is James M. Pravda.
- He started working for Arnaut, he believes, in 2000.
- In, he believes, 2001, Arnaut started his own business with one cab. As business grew so did the number of cabs, to 2 then 3, then 4. He was a driver at that time.
- Around 2008, Arnaut incorporated A.V. Shuttle Cab Ltd. and the issue of "employee" began to be discussed, and a ruling by CRA was received deeming workers to be "employees".
- His employment ended in August of 2016 when Arnaut sold A.V. Shuttle Cab Ltd.
- While he worked for A.V. Shuttle Cab Ltd. his title was "Manager".
- As Manager he performed a variety of duties: handled the phones, did dispatch, wrote contracts for clients like Saskatchewan Public School Board, hired drivers, trained drivers, performed customer relation duties, handled complaints and drove as well.
- He was paid 50% commission and received periodic bonuses.
- His schedule was Monday to Friday with weekends off. There were no posted schedules.
- Their clients consisted mainly of regular daily and weekly scheduled fares and those who used their service for their transportation needs.
- If he was sick he worked anyways. Their clients' children had to get to school. The only time he didn't work was when he had his heart issues. Arnaut always approved his absences.

- His leaves were always without pay and occurred during school breaks, summer and at Christmas. He did get bonuses at Christmas but no vacation pay. Arnaut always approved his leaves.
- He was often contacted during his leaves by phone to do work.
- Drivers reported to him and he reported to Arnaut.
- He reported all money collected on a "trip sheet" and turned it over to Arnaut. He received 50% as commission and was paid weekly at first and then bi-weekly.
- A.V. Shuttle Cab Ltd owned the shuttles, paid the gas, licenses and maintenance.
- He was allowed to take his shuttle home but could not use for personal driving unless Arnaut approved.
- He did not wear a uniform but was provided business cards with A.V. Shuttle Cab's logo on them. The back of the card was used to provide receipts.

Note: Wayne Soroka arrived at this point (11:25 a.m.).

- His name did not appear on the business cards.
- Clients paid by cash or charged the fare. Those that charged were billed monthly by Arnaut.
- The shuttles did not have meters. Clients were charged a flat rate plus a km charge. He had the authority to vary the charge depending on circumstances i.e. unusually long wait time. Drivers could not vary the charges but could get him to approve a change for them. The flat rate could only be changed by Arnaut.
- The only tools he brought to his work were a cell phone, blue tooth device, note book and pen.
- He did not own any part of the company and did not have a GST number or a WCB account.
- Regarding the CRA ruling, Arnaut after going independent, told him CRA had ruled on "employee" status and that T-4's would now be issued.
- in 2011 CRA reviewed his expenses and told him he had to get a declaration signed by Arnaut.

Note: Ms Stretch tabled a document which was marked EE1, entitled "Declaration of Conditions of Employment".

- He took the form to Arnaut and explained it to him and Arnaut signed it on January 11, 2011.
- Because of this he didn't file income tax for two years. Arnaut then came to him and tells him CRA says he is an "employee". He then filed his income tax and paid thousands of dollars in penalties and interest.
- He did talk to Arnaut about the difference between an "employee" and a "independent contractor", but he never asked about annual vacation pay because he knew times were tough for A.V. Shuttle Cab Ltd.

- He knows A.V. Shuttle Cab Ltd. paid EI but not CPP. He is unaware of any body working for A.V. Shuttle Cab Ltd. that had deductions taken from their pay.
- He never told Arnaut he wanted to remain as an independent contractor.

## ii. EVIDENCE OF EMPLOYER AND FURTHER EVIDENCE

Note: At this point I had Arnaut and Soroka sworn, as it became evident they were giving evidence as they attempted to cross examine Pravda.

### Cross Examination

Mr. Arnaut began by establishing that Pravda, Soroka and Stretch all hold him in high regard in the way he has dealt with them.

Mr. Soroka testified that in all his years with Radio Cab, the topic of EI, and annual vacation pay never came up. It was understood that drivers paid their own EI.

They were all self-employed receiving commission on a 50% basis. CPP and WCB were never an issue and were never paid. Maybe around the year 2000 drivers got a T-4 for their share.

Mr. Pravda advised that he never had deductions taken from his pay cheques which were paid based on 50% commission and he never got a T-4.

Mr. Arnaut testified that A.V. Shuttle Cab Ltd never had a contract with the Public School Board. Also, he paid Pravda bonuses twice a year (summer and Christmas) in 2014, 2015 and 2016 in the amounts of \$1,000, \$1957, \$1,000, \$3,000, \$1,900 and \$1,100. The total of \$8,957 was for annual vacation pay.

Mr. Pravda responded by advising that he doesn't recall receiving that many bonuses, and that Arnaut never characterized them as vacation pay. He (Pravda) treated them as a gift in recognition of good work.

In response to Mr. Arnaut's questions as to why he waited 10 months after the sale of A.V. Shuttle Cab Ltd. to file his complaint with the Ministry, Mr. Pravda testified that he was unaware he had a right to annual vacation pay until he had a conversation with another employee.

Ms Stretch asked Arnaut what he did after receiving the CRA ruling. He replied that he asked his drivers to continue as self-employed and asked them to sign an "Independent Contractor Agreement". (Marked EE2).

Mr. Arnaut does not remember how he learned of the CRA ruling. He remembers signing the "Declaration" for Pravda (EE1), but that did not change his status as he was on commission and therefore not an "employee".

Mr. Arnaut contests the Wage Assessment tabled by Ms Stretch and marked EE3. He believes Pravda's service was broken when A.V. Shuttle Cab Ltd. started up in 2011 and Pravda came over to work for the new company. That means calculations should be made at 3/52 rather than 4/52.

In response to my question, Mr. Arnaut agreed that Pravda worked for him continuously from at least 2001, although with Radio Cab Pravda was working for them.

Mr. Pravda advised that even with Radio Cab, he worked for and was paid by Arnaut. The vehicle he drove at Radio Cab was owned by Arnaut.

### iii. FINAL ARGUMENT

Mr. Arnaut firmly believes that someone being paid on a commission basis cannot be an "employee". Pravda was on 50% commission from the beginning to the end, so the Wage Assessment should be denied.

Ms Stretch tabled a written argument which she summarized by suggesting that the Ministry had successfully demonstrated that Mr. Pravda was an employee and therefore entitled to annual vacation pay.

She went on to innumerate the conditions that existed to prove Mr. Pravda was an employee and not an independent contractor. Those conditions were:

1. A.V. Shuttle Cab Ltd. owned the vehicle he operated, paid for the gas, licenses and maintenance.
2. All tools necessary for the job were provided by the company save his cell phone and blue tooth.
3. As a Manager he had a great deal of discretion for decision making but final authority rested with the owner, Mr. Arnaut.
4. He had no choice in route, hours of work or time off, but rather followed Mr. Arnaut's directions.
5. Clients transported by Pravda were not his clients but those of A.V. Shuttle Cab Ltd. Fares collected by him were turned over to the company, and the company billed clients who had charge accounts. The company paid him 50% commission on the portion taken in by his work.
6. Pravda had no investment in the company so had no risk for loss.

Given these conditions under which Mr. Pravda worked, Ms Stretch concluded that he was an "employee" as defined by the Saskatchewan Employment Act Section 2.1(f) and therefore is entitled to annual vacation pay as per Section 2-24(1), 2-27(1) and (2).

Note: During the July 13, 2018 hearing Ms Stretch indicated the period used to calculate owing annual vacation pay was January 1, 2014 to the date of the sale August 31, 2016.

I thanked the parties for their co-operation and presentations and declared the hearing completed.

## V. ANALYSIS

Both parties acknowledged that Pravda drove shuttles owned by Arnaut continuously for approximately 14 years. There is conflicting testimony as to whether Radio Cab paid Pravda during his stint there or Arnaut. Both agree, however, that Arnaut owned the vehicle. Pravda also took on managerial duties while he drove for A.V. Shuttle Cab Ltd. from its inception, in 2011, until Arnaut sold it in 2014.

Pravda was paid a 50% commission from start to finish, by Arnaut. There were no deductions made from his pay nor did he receive annual holiday pay.

There was agreement that Pravda received bonuses, but the number and the amount was not agreed. Nor was there agreement on the reason Arnaut gave out the bonuses. Arnaut claimed they were for annual vacation pay while Pravda claimed they were for recognition of good service. Neither party provided any evidence that demonstrated the number or the amount of the bonuses.

During these approximately 14 years, the topic of "employee" and "independent contractor" came up in conversations between Pravda and Arnaut. It is unclear how many or how often, but it is clear there was no change in relationship.

Both parties also agree that at some point Canada Revenue Agency ruled Pravda was an "employee". It is unclear when or how that ruling was delivered or to whom. It is clear that there was no change in the relationship as a result of the ruling.

## VI. DECISION

In the Supreme Court of Canada decision in the Ontario Appeal regarding Sagay Industries in 2001 (this case provided by Ms. Stretch), on page 12, paragraph 47, the Court wrote:

"Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks."

Pravda's evidence regarding his conditions of employment were uncontested by Arnaut. While Pravda was given a fair amount of autonomy, there is no question that Arnaut was in control. Pravda provided almost no equipment, had no employees, took no financial risk, had no opportunity for profit and had no final control over his hours of work or work assignments.

Mr. Arnaut's argument that Mr. Pravda was an independent contractor because he was paid on commission is not the sole determinant for defining such a relationship.

Therefore, it is my decision that Mr. Pravda was an employee within the meaning of the Saskatchewan Employment Act as defined in Section 2.1(f). As such he is entitled to annual vacation pay as per Sections 2-24(1)(b), 2-27 (1) and (2).

Mr. Pravda filed his complaint with the Ministry on June 6, 2017. This complaint was, as per Section 2-89(3), made within the proper time frame and subsequently the Ministry issued a Wage Assessment (9121(c)) on Mr. Pravda's behalf. The time frame used to calculate the assessment for unpaid vacation pay, was January 1, 2014 to July 29, 2016 as per Section 2-89(2)(b) and 2-27(c).

As shown in EE3 the Wage Assessment was calculated using 4/52 as Mr. Pravda had more than 10 years of continuous service with Mr. Arnaut.

Mr. Arnaut did not object to the figures the Ministry used for Mr. Pravda's earnings for the assessment period.

Therefore, the appeal is denied and the Wage Assessment of \$16,358.12 is upheld.

Dated at Regina, in the Province of Saskatchewan, this 25th of October, 2018.



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Ralph Ermel  
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](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.