

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. 1000086
LRB File No. 171-18



COMPLAINANT: Rodney McIsaac
Represented by Daniel Corbett
Employment Standards Officer

RESPONDENT: Barr Water and Vacuum Service Ltd.
Represented by Barry Olney
Director

DATE OF HEARING: September 28, 2018 @ 10:00 a.m.

PLACE OF HEARING: Upper Floor Board Room
123-1302 3rd Street
Estevan, Saskatchewan

1. INTRODUCTION

Present at the hearing were Mr. Olney, Mr. Corbett and observer Leesa Pankewich. Ms Pankewich is employed by the Ministry as an Intake Officer. Mr. Olney had no objections to her presence.

Mr. Corbett advised that the Complainant and one witness would be connected by telephone.

Mr. Olney advised that he had three witnesses he would connect by telephone.

I advised the parties that my role was to provide an impartial settlement by written decision within 60 days of this hearing date. I also advised of my expectations for behaviour and that I would provide a forum such that both parties would provide all their evidence without concern to formalities.

II. PRELIMINARY OBJECTIONS

None

III. THE DISPUTE

The Complainant is claiming that he was employed for several weeks in February and March of 2018 for which he was never paid. The Wage Assessment for \$1,305.30 is made up of regular pay at minimum wage, overtime, public holiday pay and annual vacation pay.

IV. FACTS

i. EVIDENCE OF EMPLOYER

Mr. Olney was sworn and provided the following testimony:

- He is unsure of the exact dates, but early in 2018 a current employee (Rob Nordal) advises that he has a friend who is looking for work. Mr. Nordal says he worked with this fellow in Alberta and that he is coming to Estevan but has no place to live. Mr. Nordal then asked if his friend could live with him.
- Next thing the friend (Rodney Mclsaac) is in Regina at the airport and Rob wants to leave work and go get him.
- There is no way he will let Rob off work so he goes to Regina himself and brings Rodney to Estevan.
- He lets Rodney stay in his trailer with Rob for three weeks. After three weeks he can see that the two are getting on each other's nerves, and trouble was brewing so he takes Rodney to Regina and pays for a plane ticket to Fredericton just to get rid of him.
- The three weeks Rodney lived with Rob is the time claimed for wages. As far as he is concerned Rodney was never hired and if Rodney did work, he never knew about it and never approved it.

Cross Examination

In response to questions from Mr. Corbett, Mr. Olney provided the following evidence:

- He picked Rodney up from the airport in Regina only to keep Rob happy. It had nothing to do with a job, it was all about Rob. He was afraid he would lose Rob if he didn't allow Rodney to come.
- He did not know what Rodney was doing, he knew he never hired Rodney to work. He assumes Rodney rode with Rob in the truck at times. He did not know if Rodney drove the truck by himself.
- There was no agreement that he would give money to Rob for Rob to pay Rodney.
- He drove Rodney back to Regina because he could see trouble brewing and had to get rid of him.
- Rob was always after him to hire Rodney, but why would he pay double for one work site. If he had hired Rodney he would have assigned him to another work site.

- He paid for Rodney's flight to Fredericton because he was afraid Rob would have went with him. He didn't want to lose Rob because it is difficult to staff that site especially in the winter.

Re-direct

None

Mr. Olney telephoned Ms Dena Nelson and she was affirmed. She is his Company's bookkeeper.

In response to questions from Mr. Olney, Ms Nelson provided the following testimony:

- She doesn't know Rodney Mclsaac, she has no paper work for him. She remembers Rob Nordal as being an employee at one time.

Cross Examination

Mr. Corbett asked about the Company's training policy and Ms Nelson replied that she was unaware of any policy. She does payroll based on instructions from Barry.

Re-direct

None

Mr. Olney telephoned Arron Hanson and there was no answer.

Mr. Olney tabled a letter signed by Mr. Hanson and it was marked ER1. Mr. Corbett requested that if Mr. Hanson is not reached by telephone that I give ER1 little weight as cross examination could not be completed.

Mr. Olney then telephoned Clint White and he was affirmed.

In response to questions from Mr. Olney, Mr. White provided the following:

- He has been employed by Barr for 24 years and has completed all sorts of duties including truck driving.

- Mr. Mclsaac came to Estevan to visit his friend Rob Nordal. Mr. Mclsaac was looking for work while he lived with Rob at the shack. Mr. Mclsaac came with nothing, there was no work at Barr for him. Mr. Mclsaac was never an employee and was not in training.

Cross Examination

Mr. White provided the following evidence in response to questions from Mr. Corbett:

- He suspects Mr. Mclsaac rode around with Rob in the truck. He has taken wives and girlfriends with him in the truck for company.

- Mr. Mclsaac came from Nova Scotia looking for work and lived with Rob at the rig.

- To his knowledge Rodney never took the truck by himself. He does not know if Rodney had a license.

- New drivers get paid for training but they are usually by themselves.

Re-direct

- Trainees get paid when they are hired. This guy (Rodney) was never hired.
- He has no idea what kind of shape the relationship between Rodney and Rob was like at the end.

ii. EVIDENCE OF EMPLOYEE

Mr. Corbett telephoned Mr. Rodney Mclsaac and he was affirmed.

In response to Mr. Corbett's questions he provided the following testimony:

- He had worked with Rob Nordal in Grand Prairie and Rob told him Mr. Olney needed a water truck operator.
- He phoned Mr. Olney and was offered a job so he flew to Regina. Mr. Olney had told him there was more than one company truck idle.
- He was given a ride from the Regina Airport to Estevan by a part courier and the next day he started work. He worked with Rob a couple of days training on Rob's truck, then he had a truck of his own and worked 8 or 20 hours a day.
- He worked with Rob finishing the first hole and for all of the second hole. Holes typically took seven days.
- He did the third hole by himself.
- While he never heard from Barry again, Barry should have known he was working. He called Barry several times trying to get the paper work done, but Barry never took his calls nor returned them.

Note: Mr. Corbett produced a document that Mr. Mclsaac confirmed was a re-construction of his hours worked from February 9 to March 2, 2018. Document was marked EE1.

- He constructed EE1 in July of 2018. He claims he worked more hours than he put down on EE1.

I asked Mr. Mclsaac how he could claim he was working 8 - 20 hours a day when only two days had 8 or more hours claimed and how it could be possible with only one truck at the site. He responded that he and Rob took turns working days and nights.

- He left because he was not getting paid and that he had no problem with Rob.
- Mr. Olney came to the work site and picked him up. They went to Regina and Mr. Olney paid for his flight. On the way to Regina Mr. Olney told him he'd be paid by cheque or bank deposit, but that never happened.
- After he was home he called Mr. Olney many times over a month and then filed the complaint with the Ministry.
- Rob told him Barry owes him money as well.

- He thinks he should be paid \$300.00 per day. Rob was sick and he worked for him.

Cross Examination

Mr. Olney agreed that it was a Courier Company that brought Mr. Isaac to Estevan not himself.

I again asked Mr. Isaac if I understood his testimony that he worked with Rob for the first two holes and the third hole by himself and he agreed.

I then asked how many trucks work at that site and he replied "only one, he and Rob took turns working days and nights". He went on to reiterate that he under claimed the hours on his time sheet (EE1) and that he mostly worked 10 hour days.

Re-direct

- He has a Class 3 license, however, no one ever asked to see it. He also has a safety ticket, but again no one asked to see it either.

Mr. Corbett tried calling Rob Nordal but there was no answer.

I asked Mr. Olney to call Ms Nelson again.

I asked her the drill she goes through when a new hire is made. She replied that she gets all the necessary information from Barry, she plugs it into the software and then generates a cheque when Barry texts her the number of days worked. She never received any information from Barry regarding Rodney Mclsaac.

Mr. Corbett makes another attempt to telephone Mr. Nordal and he answers. He is affirmed and provided the following evidence from questions by Mr. Corbett:

- He was employed by Barr from January 6 to March 4, 2018 as a water truck driver at Rig #4.

- He met Rodney while working at Grand Prairie.

- He left Grand Prairie to work for Barry and shortly after Rodney contacted him to see if there was work there for him.

- He told Barry and Barry said "yes", so he gave each the other's phone number.

- Rodney arrives and moves in with him. They worked together for two or three days and then Rodney was on his own.

- Rodney used his truck for loads as they split the work. Rodney also worked for him when he was sick.

- He told Barry that Rodney was doing ok and assumed Barry and Rodney would get the employment status worked out.

- Barry would ask him how Rodney was doing and he would say "fine".

- Barry never told Rodney to stop working. He gave Rodney \$500.00 of his own money for Rodney working his sick days.

Cross Examination

- When Barry paid him, they would go to the bank and cash the cheque so he would have the cash. Barry always gave him the cheque stub. Barry does not owe him any money.

Re-direct

None

I asked Barry if Rodney phoned him about work before he came to Estevan. Barry replied that Rodney did phone him, but it was to ask if it was alright if he lived with Rob.

Final Argument

Mr. Olney apologized if he exhibited rude or aggressive behaviour during the hearing.

He reiterated that Rodney was never hired. He was allowed to live with Rob and if any work was performed it was without his knowledge and/or approval.

Mr. Corbett acknowledges that there is no paper trail or payroll information showing Mr. Mclsaac was an employee. However, Section 2-1(f) sets out the definition of an "employee".

Part (ii) of this Section states "a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;"

Section 2-2 states that "permits to work" if the employer
(a) knows or ought reasonably to know that the employee is working; and
(b) does not cause the employee to stop working.

The testimony is clear that Rodney was working and therefore should be paid.

Mr. Olney brought Rodney to Estevan to work and he did work.

Mr. Corbett closed by indicating the Wage Assessment is for hours worked at minimum wage rather than \$250.00 per day. It is fair and reasonable, and Mr. Mclsaac is entitled to it.

Mr. Olney had no further comment, so I thanked the parties for their presentations and closed the hearing.

V. SUMMARY OF EVIDENCE

Olney

- Employee Nordal asks permission for a friend (Mclsaac) to live with him (Nordal) in the company trailer.

- Permission is granted as he (Olney) is afraid if it is denied, Nordal will quit. Recruiting for this kind of work at this time of year is very difficult.

- Mclsaac was never offered work or hired. If work was performed by Mr. Isaac he (Olney) was unaware of it.

- There was no need for a second employee at that site as there was only one truck assigned there. If Mclsaac had been hired he would have been assigned to another site with another truck.

Nelson

- She does book keeping and payroll for Barr.
- She never met Mclsaac, had no paper work for him, does remember Nordal.
- She responds only to directions from Olney and did not received any regarding Mclsaac.

Hanson

- Well Site Supervisor, could not be reached by telephone, but Olney tabled an e-mail (ER1) that states that Mclsaac was not employed by Barr, but that Mclsaac did visit and lived with Nordal for 2 to 3 weeks.

White

- 24 year employee of Barr.
- Mclsaac was a visitor of Nordal's for a short period of time during which he (Mclsaac) looked for work. There was no work at Barr for him.
- Mclsaac probably accompanied Nordal in the truck. It is not unusual for haulers to take company with them on the job.
- Mclsaac was never an employee.

Mclsaac

- Nordal told him Olney needed a truck driver so he phoned Olney and was offered a job so he travelled to Estevan and started work the next day.
- Nordal trained him for a couple of days then he and Nordal took turns using the truck, one on days and one on nights.
- He kept trying to get a hold of Olney to get his hiring papers completed but Olney did not contact him.
- He quit because he wasn't getting paid. During the ride to Regina he was told by Olney that his wages would be paid by cheque or bank deposit. It never happened.
- He was never asked to produce his drivers license or safety certificate.

Nordal

- Employed by Barr January 6 - March 4, 2018.
- Mclsaac contacted him to see if there was any work at Barr. Olney was contacted and told him there was work.

- He gave Mclsaac Olney's telephone number.
- Mclsaac arrives and moves in with him. He believes Mclsaac has been hired and allows him to work. He assumes Olney and Mclsaac will work out the employment status.
- Was sick for two days and paid Mclsaac \$500.00 out of his own pocket for covering him.

VI. DECISION

Evidence from the Complainant and his witness allege that there was an offer for employment made by Barr Water and Vacuum Service to Mr. Mclsaac and that Mr. Mclsaac worked.

Evidence from the Respondent and his witnesses allege that there was no such offer, there was no work available and that if Mclsaac worked the Company was unaware of it so could not tell him to stop.

There is no evidence the Company knew about Nordal's two sick days. Given that Nordal paid Mclsaac out of his own pocket is an indication that he knew Mclsaac was not an employee.

Olney's assertion that he wouldn't pay two people to do the work of one, adds to the credibility of Hanson's statement in ER1. His understanding is that Mclsaac was a visitor.

Finally, the fact that there was only one truck at the site points in the direction that Mclsaac was not an employee.

On the balance of probabilities, I find the case presented by the Respondent, Barr Water and Vacuum Service to be the more plausible.

Therefore, the Appeal is allowed and the Wage Assessment of \$1,305.30 is denied.

Dated at Regina, in the Province of Saskatchewan, this 9th of October, 2018.



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.

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.