

LRB Filed. 240-17
WA# 8861

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



Dennis William Terry
COMPLAINANT/EMPLOYEE

-AND-

SaskEnergy Inc.
APPELLANT/EMPLOYER

DATE OF HEARING: February 8, 2018

PLACE OF HEARING: Regina, SK

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INTRODUCTION

This matter was heard before me on February 8, 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. Robin Brockett, Employment Standards Officer represented The Employment Standards Department.

The Claimant/Employee, Dennis Terry attended and gave evidence on his behalf and was represented by his lawyer, Dean Muma.

The Appellant/Employer, SaskEnergy Inc., was represented by Robert Haynes, Human Resource Vice President and Mark Guillt, Corporate Lawyer and their lawyers David Stack and Catherine Melnychuk.

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 \$57,902.58.

I. PRELIMINARY MATTERS

The Employment Standard Officer presented a document entered as "The Director's Exhibit". This document outlined the role of the Director at the hearing and documentation relating to service of the Wage Assessment and receipt of the Appeal documentation. Also included was a copy of the deposit of the Appellant.

II. THE DISPUTE

The issue between the Employer and Employee is whether or not the amount owed pursuant to the wage assessment comprises a, "short term incentive", awarded by the Employer to some of its Employees, falls within the exclusion of bonuses payable at the discretion of the Employer as set out in the definition of, "total wages".

Or, is the "short term incentive" a discretionary payment within the meaning of the definition of "total wages".

III. FACTS

The parties agreed to the following facts:

1. The parties agreed that the amount of the Wage Assessment is the correct amount for the "short term incentive" that is at issue between the parties herein.
2. The Employment Standards Officer advised that the Wage Assessment was calculated as being due and owing pursuant to Section 2-15(a) of The Act.

IV. EVIDENCE OF THE EMPLOYER

Robert Haynes, Sr. Vice President of Human Resources at SaskEnergy was sworn and gave the following evidence:

That SaskEnergy is a Saskatchewan Crown Corporation.

The Crown Investment Corporation in Saskatchewan, known as "CIC", is the holding company for Saskatchewan Crown Corporations including SaskEnergy and, as such, gives policy directions to the Crown Corporations.

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In 2009 CIC reviewed compensation of executive level Employees in Crown Corporations. This review culminated in the Subsidiary Crown Policy Manual, entered as Employer Exhibit "1". This Policy was updated on June 11, 2013 and was in place on the termination date of the Employee which was March 30, 2017.

The Policy sets out that total compensation of executives comprise of:

1. Base pay
2. Benefits
3. Short Term Incentive (known as STI)

This STI for April 1, 2016 to March 31, 2017 is what is at issue in this Appeal.

The amount of the short term incentive is calculated annually by the Corporation based on performance of SaskEnergy (75%) and individual performance of the Employee (25%).

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On page 7 of the Policy it states, "to be eligible for any STI payment the executive must be an active Employee at the end of the STI period i.e. March 31.

There is an exception to this term, that being set forward in a following paragraph on page 7 of the Policy Manual, "Treatment on Termination".

This exception permits the corporation to make payment of the STI to an Employee that was terminated without cause. This paragraph is permissive for the Employer.

The Employer agrees that the Employee was dismissed without cause on March 30, 2017. The Employer also agrees that, had the Employee had been an "active Employee" on March 31, 2017, he would have been eligible for the STI payment in the amount of the Wage Assessment of \$57,902.58.

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As Mr. Terry was terminated without cause on March 30, 2017 the Employer takes the position that he was not eligible for the STI for the previous fiscal year.

Mr. Haynes states that the date of termination of Mr. Terry was not determined with the STI in mind. Mr. Terry could not have been terminated without the approval of the SaskEnergy Board of Directors. This Board of Directors met on March 29, 2017 to approve Mr. Terry's termination. Apparently the company could not have terminated Mr. Terry before this meeting of the board. At this meeting, the board did not approve the STI for Mr. Terry.

Mr. Haynes agrees that the termination period in accordance with The Act, was a period of 6 weeks pay in lieu of notice commencing March 31, 2017.

Mr. Haynes indicated that the Corporation takes some 30-60 days to do the necessary calculations relating to the Corporations Fiscal Year in order to determine the STI payable to any Employees.

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In 2017 the board approved the STI March 31, 2017 payments to Employees on May 24, 2017.

Mr. Terry was hired by a letter of employment, Employer Exhibit "2", a letter dated March 16, 2009 to Mr. Terry. This was his first engagement with the Corporation, hired as Vice President at SaskEnergy.

On April 29, 2013 Mr. Terry was offered another position, that of Senior Vice President of TransGas. Mr. Terry accepted this position and worked in this position up to and including March 30, 2017. In both positions Mr. Terry was entitled to the STI payment.

Employer Exhibit "4" is a letter dated March 30, 2017 which is the termination letter that was handed to Mr. Terry on that date.

The termination letter sets out terms for notice in lieu of termination as Mr. Terry was terminated without cause.

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Paragraph 7 of the March 30, 2017 letter offers Mr. Terry the STI for 2016 and 2017.

Mr. Terry rejected the offer and on July 14, 2017 commenced legal action against the Employer. A defense was filed by SaskEnergy and the matter remains before the Court of Queen's Bench of Saskatchewan.

In previous years the STI was payable on December 31 as this was the Fiscal Year End for SaskEnergy. However, in 2016 the Corporate Fiscal Year End was changed to correspond with the Government Fiscal Year End of March 31, 2017.

Under cross examination Mr. Haynes agreed that if Mr. Terry had been employed on March 31, 2017, as an active Employee, he would have qualified for, and subsequently, received the STI payment in the amount of \$57,902.58 set out in the Wage Assessment.

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SaskEnergy did not pay Mr. Terry the STI payment as he was not an active Employee on March 31, 2017, within the meaning of the CIC Policy, Employer Exhibit "1".

III. EVIDENCE OF THE EMPLOYEE

Mr. Terry gave the following sworn evidence:

That Mr. Terry's employment contract while with SaskEnergy allowed him to participate in the STI program and, he did in fact, receive an STI payment each year he was with SaskEnergy except the last fiscal year of April 1, 2016 to March 31, 2017.

Mr. Terry was aware of the change in the Fiscal Year End of SaskEnergy sometime in late 2015.

That Mr. Terry qualified for the STI through his performance of 2016/2017 and he was of a view that he would be paid the STI once such payment was approved by the board.

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Under cross examination Mr. Terry admitted that he was aware of the CIC policy (Employer Exhibit "1"), however, he never did read the policy when he was an Employee.

V. ANALYSIS/DECISION

The STI, if payable in any given year, forms part of Mr. Terry's employment contract remuneration. As such, it comprises part of "total wages" within the meaning of The Act.

The Employment Standards Officer calculated the Wage Assessment in accordance with Section 2-15(a) of The Act.

The Employer agrees that Mr. Terry would have qualified for and been paid the STI for April 1, 2016 to March 31, 2017 Fiscal Year but for the fact that he was not an "active Employee" on March 31 due to his termination on March 30. March 31 being the date of qualification for the STI payment pursuant to the CIC Policy Manual.

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The issue is whether Mr. Terry is entitled to the STI for the year April 1, 2016 to March 31, 2017 due to his termination, without cause, on March 30, 2017.

Mr. Terry had met his personal goals under the terms of the STI for that period.

The Employer evidence was that Mr. Terry would have been paid the STI but for the "active employment" requirement of the CIC Policy Manual.

That is, as Mr. Terry was terminated on March 30, 2017, he was not "actively employed" on March 31, 2017, consequently he did not meet the CIC Policy requirement that, Employees being paid the STI must be active Employees on March 31 of the year for which payment is being considered.

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Under Section 2-60 of The Act, as Mr. Terry was dismissed without just cause, he was entitled to either notice for the period set out in the section (which the parties agreed was 6 weeks) or the Employer, pursuant to Section 2-61, can pay the Employee the 6 week amount in lieu of notice.

In this case the Employer choose to payout Mr. Terry rather than have Mr. Terry work the notice period of 6 weeks. This is the Employers choice under the Legislation. However, either way, Mr. Terry would have been "an active Employee" on March 31, 2017.

In applying the Employer's evidence to this fact, Mr. Terry would have been paid the STI by SaskEnergy.

If I am wrong in my conclusion that the notice period continues to keep Mr. Terry "active" within the terms of the Crown Investment Corporation Policy Manual, then one must look to the "discretion" clause of the Policy Manual relating to the payment of the STI when an Employee is terminated without cause.

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This discretionary section states, "when a member of the executive compensation framework is terminated without cause, consideration of payment should be given to payment of earned entitlements, including STI payments."

In Mr. Terry's termination letter, Employer Exhibit "4" dated March 31, 2017, Mr. Terry was offered payment of the STI for 2016/2017 year.

If SaskEnergy is taking the position that they could not have paid out the STI to Mr. Terry because he was not "an active Employee" on March 31, then the only alternative for this offer would be that SaskEnergy exercised its discretion under the aforementioned paragraph in the CIC Policy Manual.

I see no other way that the Employer could have offered this payment pursuant to the policy without exercising their discretion accordingly.

The terms of the offer of termination were rejected by the Employee.

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Subsequently, SaskEnergy paid Mr. Terry what they considered to be the statutory amounts in lieu of notice pursuant to Section 2-60 of The Act.

The STI was not included in this payment.

In short, the STI payment a the term of the contract of employment, Employer Exhibit "3". The payment was offered to Mr. Terry upon termination, pursuant to his contract and the CIC Policy Manual. Then the offer to pay the STI was withdrawn once Mr. Terry rejected the offer of termination.

The Employer exercised its discretion to pay the STI in one circumstance and not in another. There was no explanation in the evidence as to why this occurred.

One can speculate why the STI amount was put forward as an offer and then withdrawn. It appears that the Employer was using the payment of the STI as a negotiating tactic. In accordance with SaskEnergy's reading of the CIC policy, this offer would have had to have been an exercise of discretion within The Policy in order to do so.

In the Supreme Court of Canada Case, Bahasin v. Hrynew 2014 SCC 71, the Court held that, "when an employment contract includes a condition for the receipt by an Employee of a benefit under the contract, and the Employer has the discretion pursuant to the terms of the contract to frustrate the satisfaction of that condition, it becomes even more important for that discretion to be exercised fairly, reasonably and not arbitrarily.

Clearly, based on the evidence here, reasonableness and fairness, as described in the aforementioned case, dictate that payment of the STI should be made to Mr. Terry.

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VI. CONCLUSION

The appeal is dismissed and the wage assessment is stands in the amount of \$57,902.58.

Dated at Moose Jaw, in the Province of Saskatchewan, this 18th of February, 2018.



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.