

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



Lance McCutcheon  
COMPLAINANT/EMPLOYEE

-AND-

Lepage Contracting Ltd.  
APPELLANT/EMPLOYER

DATE OF HEARING: April 9, 2019

PLACE OF HEARING: Moose Jaw, SK

LRB FILE: No. 052-19  
WAGE ASSESSMENT: No. 1-000177

## INTRODUCTION

This matter was heard before me on April 9, 2019 in Moose Jaw, 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.

Doug Long, Employment Standards Officer represented the Department of Labour Standards.

Complainant/Employee, Lance McCutcheon attended and gave sworn evidence on his behalf.

The Appellant/Employer, Lepage Contracting Ltd., was represented by Lynden Lepage and gave evidence on his behalf as a Director and on behalf 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 \$13,921.81.

The parties agreed that the wage assessment was incorrect and was amended to \$16,403.73 by agreement.

## **I. PRELIMINARY MATTERS**

The employer indicated that he had three witnesses that he wished to call and wanted to do so by way of telephone. The parties were in agreement to hear evidence from the witnesses in this manner.

## **II. AGREED FACTS**

The parties agreed as follows:

1. Mr. McCutcheon was an employee of Lepage Contacting Ltd.
2. Mr. McCutcheon was employed by the employer from April 1, 2015 to December 12, 2018.
3. The employee voluntarily left his employment on December 12, 2018.

### **III. DISPUTE**

The issues to be decided are:

1. Does the Legislation permit the employer to increase the employee's agreed rate of pay in lieu of paying the employee holiday pay as required by the legislation.
2. Are payments that were made by the employer as set out in his Notice of Appeal eligible to be offset against the amount set out in the Wage Assessment?

### **IV. EVIDENCE OF THE EMPLOYER**

Mr. Lepage was sworn and gave evidence as follows:

The employee was hired as a foreman and commenced work on April 1, 2015.

Prior to commencing work the employer had a conversation with the employee, wherein the employer gave the employee the option to be paid \$28/hour plus vacation pay or \$30/hr which included vacation pay.

The employer's company did residential construction and renovations in the Loreburn, Saskatchewan area.

In May of 2015 Mr. McCutcheon was charged with driving while over .08 and a month later with driving while suspended. The employer paid the employee's fines and interlock costs relating to the .08 charge.

In June of 2015, Mr. McCutcheon made arrangements to purchase a house in Loreburn by way of a rent to own arrangement with the owner of the property.

The employer had to co-sign the purchase/rental arrangement.

The employer made payments for rent, taxes and insurance, repairs and subsequently took over the purchase agreement when Mr. McCutcheon left his employment.

From January of 2016 onward the employer was deducting \$240 or the equivalent of 8 hours, from the employees bi-weekly pay check and paid the same to the landlord by way of rent/purchase price of the property.

Once the employee left his employment, the employer continued to make the payments to the landlord and took over the purchase agreement. The employer wishes to offset these payments.

The employer also wishes to offset the cost of a cell phone and cell phone bill that he paid to a third party on behalf of Mr. McCutcheon when he was an employee of Lepage Contracting Ltd.

The employer also wishes to offset a number of charges relating to personal use of a company vehicle as set out in the Notice of Appeal document.

Also the employer wishes to offset insurance deductibles for damage caused by the employee to corporate vehicles.



The employer also wishes to offset \$500 for cigarettes that were supplied by the employer to the employee at his request over the course of his employment.

During the course of the employee's time of employment with the employer there were no time sheets completed by either party. The employer expected the employees to keep track of their hours and either telephone or text him with the total number on a biweekly basis so that the pay checks could be prepared by the employer.

No vacation pay, overtime or public holiday pay was paid to the employee by the employer during the employment period.

The employer called, Jesse Peddue, as a witness on behalf of the corporation by way of telephone.

The witness was a former employee of the corporation and advised that when he worked with the employer they had reached an

agreement whereby the employee would be paid \$25/hr and the sum would include vacation pay.

No time sheets were prepared by either party relating to this employee other than a notebook which was completed by the employee and given to the employer every two weeks for the purpose of preparing the employee's cheque.

The employer then called Tim Martin, also a former employee of Lepage Contracting Ltd.

As a former employee and prior to his employment he had a discussion with the employer relating to being paid \$24/hour and vacation pay or \$26 which included vacation pay.

The employee had opted for the \$26/hour rate of pay.



The employer also attempted to call, James Swedeberg, also a former employer by telephone. Mr. Swedeberg was unable to be reached and consequently did not give any evidence.

## **V. EVIDENCE OF THE EMPLOYEE**

Mr. McCutcheon was sworn and gave the following evidence:

He had worked for the employer from April 1, 2015 to December 23, 2018, when he voluntarily left his employment with the employer.

The employee stated that he did not have any conversation with the employer regarding being paid \$28/hour plus vacation pay or \$30/hr which included vacation pay. The employee stated that he was just paid \$30/hour and was not paid vacation pay. The employee did not submit a request for overtime.

The employee did not submit any time sheets as none were provided by the employer and he submitted his hours to the employer by way of text or telephone.

The employee admitted that he did charge cigarettes and that he did receive them from the employer, but was uncertain as to the amount that would be owed, but thought it was in the \$300-\$400 range.

The employee said that he had never been asked to make payments of any of the offsets claimed by the employer during his time with the employer.

The employee was aware that the employer was deducting monies from his cheque to be paid to the landlord for rent/purchase price of his residence.

The employee stated that he was evicted from the Loreburn property on by the landlord/owner and Mr. Lepage. The employee received a Notice to Vacate signed by both Mr. Lepage and the property owner.

**V. ANALYSIS/DECISION**

Is holiday pay permitted to be included in the employee's rate of pay?

The employer states that the holiday pay was included in the \$30/hour rate that was paid to the employee.

The employee disagrees that the holiday pay was included and that he was working for \$30/hour.

The employer does not have any time sheets or other records to substantiate the rate of pay or his position with respect to the holiday pay being included.

Section 2-37 of the Saskatchewan Employment Act requires that the employer must provide a statement of earnings to the employee, and sets out a number of requirements of what must be stated on the statement of earnings. One of which, is the amount paid for each of wages, overtime and public holiday pay and vacation pay.

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Subsection 3 states that, "unless the contrary is established, wages and other amounts that are not included in a statement pursuant to subsection 2 are deemed not to have been paid".

As the vacation pay was not set out in a statement of earnings to the employee, and I am not satisfied that there is any evidence to the contrary, vacation pay is deemed not to have been paid.

Consequently the vacation pay is due and owing to the employee, Mr. McCutcheon.

Reviewing all of the offsets claimed in the Employer's Appeal, with the exception of the cigarettes, all of the payments made by the employer were paid to third parties.

The employee agrees that he did purchase the cigarettes from the employer, which amount is still outstanding as at the date of the hearing, and I find the employer is entitled to an offset of \$500 in this regard.

All other setoff claims by the employer as set out in his Notice of Appeal are not permitted by Section 2-36 of The Act.

Section 2-36 sets out the deductions permitted by an employer from and employee's wage. This section in its previous form, The Labor Standards Act, has been discussed in various Saskatchewan Court decisions.

An Employer may not deduct monies owed to them by the employee except as permitted by The Act. SEE Holtet Service Ltd. v. Huard 1978, S.J. NO. 234, Mr. Justice Wimmer.

Mr. Justice Ottenbreit in a Fiat, dated October 1, 2017, from Witherspoon v. G. Ungar Construction Ltd.. Stated, "that the purchase by the employee must have been made from the employer". This is not the case here. A plain reading of the section does not extend to purchases from third parties on the employers account.

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The Court of Appeal in Myers v. Walter Cycle Ltd. (1990) 5 W.W.R. 455, stated the purpose of The Act. The Court held it is not a vehicle for Employers and Employees to settle accounts except in the limited situations and purposes allowed by the working of Sections 58 & 59. (now section 2-36 of the Act)

As all of the amounts with the exception of the cigarettes were paid by the employer to third parties, they are not deductible from the Wage Assessment.

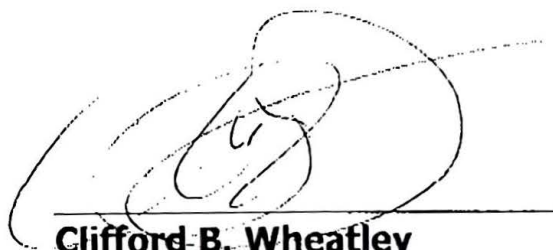
Unfortunately, the Employer must look to other civil remedies to recover his claims against the employee.



## VI. CONCLUSION

The Wage Assessment is varied to \$15,903.73 (\$16,403.73-\$500.00 for cigarettes).

Dated at Moose Jaw, in the Province of Saskatchewan, this 25<sup>th</sup> of April, 2019.



**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.