LRB File No. 146-19

IN THE MATTER OF AN ADJUDICATION
PUSUANT TO SECTION 2-75 AND 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT

Quick Pro Personnel Ltd., and
Rasikh Kaleem, being a director of Quick Pro Personnel Ltd.
APPELLANTS

AND

The Director of Employment Standards

RESPONDENT

Date of Hearing: July 25, 2019

Location of Hearing: Room 9.2; Sturdy Stone Centre; 122 Third Ave. N, Saskatoon; Sask.

Date of Decision: July 29, 2019

[1] Wage Assessment (file number 1-000242, hereinafter the 'Wage Assessment') was issued by the Director of Employment Standard's Delegate on May 24, 2019. It directed Quick Pro Personnel Ltd., and Rasikh Kaleem, being a director of Quick Pro Personnel Ltd. (hereinafter the 'appellants') to pay Garry Giesbrecht the sum of $1,979.40.

[2] Lane Zabolotney represented the appellants. Stephen Moorgen was the Director's delegate in this matter. He did not represent Mr. Giesbrecht. Doug Long of the Ministry of Labour Relations and Workplace Safety was also present. I would like to thank the parties for their very able presentations.

Issues

[3] There are two issue in this matter. The first issue is whether the computation of the hours that Mr. Giesbrecht worked (as contained in the audit documents and incorporated into the Wage Assessment) is accurate. The second issue is whether or not an exemption to the requirement to pay overtime (contained at s. 13 of *The Employment Standards Regulations*, RRS c. S-15.1 Reg. 5 [the 'Regulations']) applies to Mr. Giesbrecht's employment.

Facts

[4] Few relevant facts were in dispute, but there were some differences in the testimony of Mr. Kaleem and Mr. Giesbrecht with respect to exactly what was agreed to around the time that Mr. Giesbrecht was hired by Mr. Kaleem. I accept that the employer agreed to pay Mr. Giesbrecht a wage of $28.00 per hour as a truck driver.

[5] Mr. Kaleem owns a company which hauls petroleum products in the oil patch in the Kindersley area. Mr. Giesbrecht had recently left a driving job in Alberta when he called Mr. Kaleem. Mr. Kaleem was interested in hiring him, and they met at a 'Tim Hortons' to discuss employment. Mr. Kaleem outlined the duties involved. The hiring process was all done orally.

[6] Mr. Giesbrecht started working for the appellants as an employee on October 15, 2018. Mr. Giesbrecht resigned as an employee, and began working for the appellants as an independent contractor on December 1, 2018. On January 16, 2019, Mr. Giesbrecht informed Mr. Kaleem that he would no longer provide any services to Mr. Kaleem's company. The audit period, and therefore the Wage Assessment relate only to the period of employment (October and November) and not to the time Mr. Giesbrecht was an independent contractor.

[7] Mr. Giesbrecht filled out time sheets every day or two. These 'Daily Time Sheets' indicated the ticket number, the company whose product was being transported, the land description of the origin and the destination for each trip, the cubic metres being transported, the product being hauled and the start and finish time for each trip. The ticket number basically serves like an invoice. This information was needed to track payments between Mr. Kaleem's company and the company whose product was being hauled. Mr. Kaleem was concerned about

the cubic metres being hauled as this related directly to his company's revenue, but was not as concerned about the hours worked by Mr. Giesbrecht.

[8] The time sheets all record Mr. Giesbrecht as starting work and finishing work exactly on the hour or the half hour. Mr. Giesbrecht originally testified that all the documents were accurate, but in answer to questions indicated that he 'rounded' the time to the nearest hour or half hour. Mr. Giesbrecht testified that he never took a break to eat or for any other purpose during any of his shifts.

Resolution of the First Issue: Hours Worked

[9] The appellant suggested that Mr. Giesbrecht was padding his hours. It is true that an employee 'rounding hours' and never taking a break for meals or other purposes seems suspicious. However, the fact is that Mr. Kaleem did not question these factors during the employment relationship. The employer is responsible for keeping accurate records [*The Saskatchewan Employment Act* ('*Act*') s. 2-38]. Mr. Kaleem testified the company did not keep any other records. The *Act* at 2-75 (9) says:

> The copy of the wage assessment provided to the adjudicator in accordance with subsection (8) is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing...[emphasis added]

[10] The Wage Assessment was based on the audit. The audit was based on the time sheets completed by Mr. Giesbrecht and turned in to Mr. Kaleem. Although there was a suggestion that the time as recorded was suspicious, there was no evidence to suggest what specific hours were not worked. I realize that this is because Mr. Kaleem wasn't scrutinizing the time sheets as carefully as he might have. The fact remains though, that in the absence of evidence to the contrary, I must accept the Wage Assessment, which reflects the time recorded in the audit and the time sheets. Therefore, I conclude that the employee should be credited as working the hours included in the audit, and reflected in the Wage Assessment. If Mr. Giesbrecht is entitled to overtime, the Wage Assessment is correct.

Resolution of the Second Issue: Entitlement to Overtime

[11] The second issue in this matter is whether or not Mr. Giesbrecht is entitled to overtime. While most employee are entitled to overtime because of the provisions of 2-17 and 2-18 of the *Act*, there are exceptions. The employer made an excellent argument that this employee in not entitled to overtime, because he was an "oil truck driver" within the meaning of 2(1)(p) and 13 of *The Employment Standards Regulations*, RRS c. S-15.1 Reg. 5 [the 'Regulations']), and he terminated his employment. The Act and the Regulations effectively create an overtime 'bank' which results in employees 'depositing' hours when they work for example more than 40 hours in a week, and then 'withdrawing' those hours when they work fewer than 40 hours in a week. There is then a settling of accounts once a year, or upon termination of the employment by the

employer. If Mr. Giesbrecht is an 'oil truck driver', as defined in the Regulations, the appellant submits that no overtime is payable.

[12] 'Oil truck driver' is defined at 2(1)(p) of the Regulations:

> **"oil truck driver"** means an employee who is employed principally in delivering gasoline, lubricating oils and other petroleum products by truck from a refinery, bulk filling station or other similar premises to farms, garages or automobile service stations, but does not include an employee who regularly travels in the course of his or her duties to two or more cities, towns or villages that are at least 20 kilometres apart;

[13] Section 13 of the Regulations makes it clear that the overtime provisions of s. 2-17 and s. 2-18 of the *Act*, do not apply to persons employed as oil truck drivers, with the definition of the Regulations..

[14] The argument against finding that Mr. Giesbrecht was employed as an oil truck driver is as follows. First to be an oil truck driver, one must be employed principally in delivering gasoline, lubricating oils and other petroleum products [emphasis added]. Mr. Giesbrecht was employed principally in hauling 'Emulsion' and 'Water' (a petroleum by-product in this case). It may be that the products being hauled would satisfy this first part of the definition. I have concerns about this since the phrase is "gasoline, lubricating oils and other petroleum products". If any petroleum products were sufficient to meet this part of the test, I believe the legislator would have said "gasoline, lubricating oils or other petroleum products". However, given my conclusion on the rest of the test, I need not decide this.

[15] In the next part of the test, the driver must be one who hauls the product "from a refinery, bulk filling station or other similar premises to farms, garages or automobile service stations". In this case the product primarily was hauled from the well to a battery (a battery is a collection of tanks) and in the case of waste water, from the battery to a water disposal station. I will assuming for the moment that these oil patch premises are 'similar to' refineries and bulk filling stations within the meaning of the section. This brings me to the hurdle which I see as insurmountable for the appellant's argument. The product must be hauled to "farms, garages or automobile service stations". I note that unlike the description of where the product is hauled from, the description of where it is hauled to does not contain the phrase "or other similar premises". The principle "expressio unius est exclusio alterius" would suggest that since 'similar premises' were specifically included when the first location was described, the fact that 'similar premises' are not mentioned when the destination is described suggests that I must not consider 'similar premises' as being included when determining which destinations are within the definition. Mr. Giesbrecht was not employed to haul product to "to farms, garages or automobile service stations" but rather to other oil patch locations. Mr. Giesbrecht's employment simply does not come within the definition of 'oil truck driver' in the Regulations.

[16] The appellant suggested that previous case law (including *Sim & Stubbs Holdings v. Hill* (LRB File No. 149-15); October 15, 2015, which is binding on me) is distinguishable as previous

cases did not consider the effect of the final phrase in the definition: "but does not include an employee who regularly travels in the course of his or her duties to two or more cities, towns or villages that are at least 20 kilometres apart". The appellant suggests this demonstrates that the exemption was to assist companies working in the oil patch, as most other trucking firms would be excluded from the definition by this limitation. I agree that this limitation would exclude most other trucking firms from the definition. However, this additional limitation does not negate the previous limitations. In my view, the requirement that the product be hauled "to farms, garages or automobile service stations" completely excludes drivers hauling product to oil patch locations. If the exemption is to be expanded to include the oil industry, the legislature will have to introduce that change.

[17] Therefore I conclude that Mr. Giesbrecht is not an 'oil truck driver' within the meaning of the Regulations, and is entitled to overtime. I have already concluded that I have no basis upon which to vary the number of hours which went into the calculation of the Wage Assessment. Therefore, I dismiss the appeal, and confirm the Wage Assessment

Conclusion

[25] The appeal is dismissed, and the Wage Assessment is confirmed in the in the full amount of $1,979.40.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 29th day of July, 2019.

Doug Surtees
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 or hearing pursuant to Part II, the wage assessment or the notice of hearing;
(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;
(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 considers appropriate.

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.