

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



May Carruthers  
COMPLAINANT/EMPLOYEE

-AND-

102002973 Saskatchewan Corp., o/a Fuller's  
APPELLANT/EMPLOYER

DATE OF HEARING:           October 29, 2018  
                                  January 14, 2019  
                                  January 23, 2019  
                                  February 15, 2019

PLACE OF HEARING:       Moose Jaw, SK

LRB FILE:                   No. 184-18  
WAGE ASSESSMENT:       No. 1-000093

## **INTRODUCTION**

This matter was heard before me on October 29, 2018, January 14 & 23, 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.

Mr. Daniel Corbett, Employment Standards Officer represented The Employment Standards Department.

The Complainant/Employee, May Carruthers attended and gave evidence on her behalf.

The Appellant/Employer, 102002973 Saskatchewan Corp., o/a Fuller's was represented by Jim Fuller and Denis Benoit.

Mr. Fuller gave evidence on his behalf and 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 \$11,630.96.

**I. PRELIMINARY MATTERS**

There were no preliminary matters raised by the parties.

**II. AGREED FACTS**

May Carruthers was an employee of the Appellant and was employed from January 23, 2017 to October 25, 2017.

Parties agreed that the training rate of an employee was \$15/hr.

The regular rate of pay for employees was \$18.67/hr changed to \$19.10/hr in November of 2017.

The employees worked 12 hours per day and a permit from Labour Standards Officer was obtained by the employer permitting the 12 hour

days. Overtime commenced after 12 hours or after the total monthly amount of hours was exceeded. (SEE employee exhibit "3")

### **III. DISPUTE**

1. The issue to be determined is whether or not the amount or any part of the amount, as set out in the Wage Assessment, is due and owing to the employee.
2. Is the employer entitled to deduct for accommodation expenses incurred by Ms. Carruthers when she stayed in the employer's trailer, in the sum of \$1,500/month for each of the 5 months that Ms. Carruthers resided in the trailer.
3. Is Ms. Carruthers estopped from pursuing this claim as there was a previous claim through the Employment Standards Office for the same issue which was resolved between the parties by way of payment of monies from the employer to Ms. Carruthers.

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

Mr. Jim Fuller gave sworn evidence on his behalf as Director and that of the Corporation as follows:

He has been operating a Freight Business since 1998, currently known as Fuller's. The company operates out of Alida, Saskatchewan and covers a daily, somewhat circular route, between Alida, Regina, Weyburn and Estevan, returning to Alida in the evening daily. This route is covered week days using Mr. Fuller's five ton truck.

The Employees were to work from 10am to 10pm, such information being communicated to the employees at the commencement of their work and on many days thereafter.

The Employee's day commenced at approximately 10am in Alida, Saskatchewan and the Employee made pick ups and deliveries to and from Regina as well as in the City of Regina. The Employee's always try to leave the City of Regina by 5:00pm. An Employee makes approximately 18-20 stops (deliveries or pickups per day).

A Coop Gas Card is available to the employee for fueling purposes during their delivery day. This card is used when required by the employee.

There is a dispatcher at the corporate office who receives calls for pickups and deliveries and the same is then forwarded onto the driver of the truck by way of a text.

During a crucial period regarding this issue, Tanya Hjelmeland was the dispatcher for Fuller's. Ms. Carruthers was hired as a driver commencing work on January 23, 2017. The first 6-8 days Ms. Carruthers trained with another driver, Debbie.

Around February 1, 2017 to April 15, 2017 Ms. Carruthers moved into a camper owned by the company that was located in the company office/shop in Alida, SK.

The employer and employee did not have any arrangements with respect to rent or payments thereof.

When the employer returns to work he notices Ms. Carruthers leaving early (before 10am), sometimes as early as 8:30am.

During a discussion with Ms. Carruthers he indicated that she was not to start work before 10am as the shift was only 12 hours long. Mr. Fuller confirmed that Tanya had explained these hours to Ms. Carruthers when she was hired.

The employer did advise the employees that they could leave before 10am if they had personal matters to attend to or if they wished to do shopping or the like when they were in Regina. However, the employees would not be paid for this personal time.

On October 25, 2017 Ms. Carruthers gave notice that she was leaving her employment.

The employer also noticed the employee Andrew Fuller to be leaving early as well and further explained the hours of work to Mr. Fuller as well.

As a further consequence of the employer noticing the employees starting early, he created employer exhibit "ER30" which set out the hours of work and it was posted around the middle of October 2017 at the office for the employees to review.

The employer knows that the employees, Carruthers and Fuller saw the notice as they approached the employer to have a meeting to discuss the notice.

At no time was the employer approached by either Ms. Carruthers or Mr. Fuller to pay overtime.

Ms. Carruthers had previously worked for Mr. Fuller as a van driver in Regina for some 5 years.

Ms. Carruthers was terminated after the 5 year period due to some involvement in illegal distribution of drugs.

The company terminated the use of the van in Regina around the same time.



Mr. Fuller stated he did not know for certain if Tanya told Ms. Carruthers that she was only going to be paid for 12 hours per day and the hours of work but assumed so.

The employer discussed a number of concerns relating to Employer Exhibit "ER19", indicating that the hours of work for Ms. Carruthers as claimed under the wage assessment could not have actually taken place because the number of hours, time for refueling and location of refueling.

The employer indicated that any days where there was a claim for 15-16 hours the hours were fabricated and confirmed as such by the fuel records.

November 7, 2017 the employer received an Employment Standards complaint relating to Ms. Carruthers which was resolved by the payment of \$700.00 to satisfy the claim on November 8.

The Employer was of the view that the claim now being made is duplication and should be dismissed accordingly.

**EMPLOYER CROSS EXAM:**

The employer was cross examined by Mr. Corbett on behalf of Ms. Carruthers.

The employer disputes the May 22, 2018 hours payable to the employee; however, the department takes the issue that the employer created the record and is bound.

The employer agreed that he has no record of what the employees did on a daily basis if they left before 10am.

The employer agree that the employees returned after 10pm in the evening some days; however, were never paid for overtime as it was the employer's understanding that they would be paid overtime once the monthly hours were exceeded and this never occurred during the period of employment.

The employer was unaware what the employees did if they left early to go to Regina before 10am.

The employer took the position that he was to pay the employees for 12 hours per day and only pay overtime if they employee exceed the monthly hours set out in the Labour Standards Authorization (EE3).

The employer agreed that he had never asked for rent or any reimbursement from Ms. Carruthers regarding accommodation expenses for Ms. Carruthers.

The employer restated that none of the employees were required to come in before 10am and this was confirmed by his posted notice (ER30).

There were not any deliveries or pickups required before 10am and if the employees made any, it was not required by the customers.

The employer was away from February to May of 2017 in the United States and Tanya was responsible to manage the day to day operations of the company.

**V. DEBBIE FULLER – WITNESS FOR EMPLOYER**

Debbie Fuller was sworn and gave evidence that she was a dispatcher for Mr. Fuller's trucking company from June 2011 to June 2015 and as well she was a driver.

She is a sister of Mr. Fuller, the Appellant/Employer.

She advised that there was no requirement to make any deliveries in Alida, SK before 10am and certainly not at 8am.

That the 12hrs a day that the drivers worked 10am to 10pm was adequate to do the job, and she never worked any overtime nor did she ever make a claim for overtime.

When she was working at the corporation no one worked any overtime and no one make a claim for overtime.

Ms. Fuller also advised that no one worked on statutory holidays. Drivers could go to work early if they had personal things to do, however, all

employees were aware that they could not make claim for their personal time.

Ms. Carruthers stayed with her for some 8-9 days after commencing work at the company thereafter staying at the trailer in the shop.

Ms. Carruthers would leave for work earlier than 10am, however, Ms. Fuller was unaware as to where Ms. Carruthers went or what she did.

Ms. Fuller advised that Tanya Hjelmeland was fired from the company in October or November of 2017 for stealing from the company.

Ms. Fuller learned of this conduct from Ms. Hjelmeland herself.

Ms. Fuller was aware that Mr. Jim Fuller had told Tanya and May Carruthers that it was unnecessary to leave the shop before 10am.

Under cross examination Ms. Fuller advised that she had never worked with Andrew Fuller or May Carruthers.

May Carruthers stayed with her when, May commenced work in Alida, that Ms. Fuller was not expecting any rent or reimbursement from May.

That during her time with the corporation she only once saw Andrew in at work before 10am.

## **VI. KAREN MITCHELL – WITNESS FOR EMPLOYER**

Karen Mitchell was sworn and gave evidence as follows:

Ms. Mitchell has been a friend of Jim Fuller for some 2 years.

Ms. Mitchell heard Jim talking about Andrew and his terms of employee at Jim's house when Andrew was hired.

She indicated that he was to be paid \$225/day for 12 hours of work per day, the time being 10am to 10pm on the work days, and was to be trained by May Carruthers. Andrew could leave early if he wanted to but would not get paid.

Ms. Mitchell also had occasion to see the first and second warnings that were given by Jim to Andrew. She discussed both the warnings with Jim, who advised that Andrew had refused to sign the written documents. However, she never saw the termination notice.

She knows Tanya Hjelmelang and was aware that she was terminated from Fuller's for theft.

She was away in the United States with Jim from November 16, 2017 to April 17, 2018 and that Tanya was in charge of the companies operation during that time.

## **VII. DARCY MCCRIMMON – WITNESS FOR EMPLOYER**

Darcy McCrimmon was sworn as a witness and gave evidence as follows:

Mr. McCrimmon now works for Jim as a driver and has done so for a period of approximately 4 months. He normally works 12 hours per day, 10am to 10pm; however, on occasion works past 10pm in the evening.

Mr. McCrimmon has no problem doing the scheduled route within the 12-13 hour range daily and has never needed 15 hours to do the route.

### **VIII. TANYA HJELMELAND – WITNESS FOR EMPLOYEE**

Tanya Hjelmelang was called by the Employee and gave sworn evidence as follows:

She was employed by Fuller's from August 2011 to December 2018 as a bookkeeper/dispatcher.

She commenced employment at 8am. During May Carruthers time with the company May would come into the office around 8am for coffee and would leave about 8:00-8:30am and return to the shop between 10:00-10:30pm.

Tanya never had any conversations with Jim about driver start times.

Tanya did the payroll and was told to put in 8 hours per day on the time sheets even through the employees were paid a daily rate, as



apparently the computer program required 8 hours to be inserted and would not accept anything else.

As the payroll required hours and not per diem the company spreadsheets with respect to time and employee hours make no sense and do not reflect what was actually occurring.

The time sheets reflect an 8hr day whether the employee worked 8hrs or 15hrs.

Tanya confirmed that she wrote a letter to Employment Standards in response to a complaint to them by Curtis Porter, which indicated the start time as being 10am.

Tanya indicated that she wrote the letter under Jim's instructions even though the facts stated there in were a lie and she did not sign it but Jim did.

During Tanya's time with Fuller's she indicated that every driver left around 8:30am.

Tanya was of a view that because the employees were paid by the day that the start time was irrelevant.

On November 22, 2017 there was a Notice to Drivers posted in the work place which had been authored by Jim.

Tanya confirmed that she had been terminated for creating a false document, theft from Jim and a relationship with another driver.

This termination took place on December 5, 2017.

Tanya was not present for Andrew's hiring but did know that he was being paid the same as May Carruthers on a per diem basis.

In May of 2017 May trained Andrew and they started at approximately 8:30am each day and returned around 10:00pm.

## **IX. EVIDENCE OF THE EMPLOYEE**

May Carruthers gave sworn evidence as follows:

That she had worked for Fullers for several years in 2006.

In 2006 she drove the same route commencing at 8:30am and arriving back in Alida at approximately 10:30pm

Her evidence relating to the most recent employment with Fullers which was commenced on January 23, 2017 was that she was not told by Mr. Fuller about any hours of employment and never had any discussions with Jim Fuller about her time of driving.

Mr. Fuller would often see her leave at approximately 8:30am and spoke to her on several mornings prior to her leaving for her shift.

Ms. Carruthers kept track of her hours on a calendar where she wrote the total hours worked for the day but did not include her start or end time on the days she recorded her hours.

Ms. Carruthers never had any conversations with Mr. Fuller about overtime.

The Ms. Carruthers never saw "Employer Exhibit 30" as her employment ended on October 25, 2017 and this exhibit was posted sometime in November.

Ms. Carruthers, after leaving her employment in October 2017 made a Labour Standards complaint for the months of February, April and May of 2017 regarding overtime hours.

She was paid in full for this claim by Mr. Fuller. The amount that she was paid was \$681.15.

Under cross examination Ms. Carruthers stated that she was employed by Tanya who was representing Fullers at the time of the commencement of her employment. She was to be paid \$225/day for a 12 hour day.

Ms. Carruthers said that when she worked for Fullers in 2006 she came into work at 8:30am and did that for some 2-3 years until she left the Corporation.

When cross examined on the calendar on which she had kept track of her hours at work it was disclosed that she transcribed the hours and some comments from one calendar to another calendar.

No one besides her had seen either of the calendars until this present claim with Labour Standards was made.

When she commenced work in 2017 she was never told by Jim to leave at 8:30am.

Ms. Carruthers was cross examined in regards to fuel records and timing of refueling by her and Ms. Carruthers was unable to reconcile her claims for time worked relative to times she refueled the truck.

Ms. Carruthers trained Andrew Fuller when he commenced employment. Andrew Fuller and Ms. Carruthers did not discuss hours or overtime when working together.

Ms. Carruthers stated that she did not expect overtime when she was working as she was being paid on a per diem basis of \$225 rather than an hourly rate.

Under redirect cross examination by Mr. Corbett, Ms. Carruthers confirmed that the two calendars were prepared by her relating to her work times did not coincide and she was not able to explain the differences.

## **X. ANALYSIS/DECISION**

### **OVERTIME:**

The issue relating to overtime is unusual. The employer saw the employees leaving early every day (that is about 8:30am) yet took the position that he didn't think that they were working overtime but that they were taking personal time during the day, each and every day.

The employer also says that if it was overtime he did not authorize it.

This position by the employer flies in the face of the definition of "permit to work" as set out in Section 2-2 of The Act.

Clearly the employer either knew or ought to have known the employees were working and did not cause the employees to stop working. The employer just looked the other way.

It became very clear at the hearing that the employer's records were wrong, incomplete and unreliable.

The Wage Assessment was based in part on the erroneous information in the employer records.

Therefore the Wage Assessment is incorrect. Consequently the rebuttal of the presumption of correctness of the Wage Assessment under Section 2-75(9) has been met.

The evidence relating to the daily start times and end times is, not surprisingly, in conflict.

A review of all the evidence and documents clearly shows the employer payroll records were, at best, woefully inadequate and did not meet the requirements as set out in Section 2-38 of The Act. However, the employee's record keeping was equally as inadequate and both sets of record keeping are unreliable.

A review of the oral evidence of the parties and witnesses to determine what overtime, if any, was owing to employees is necessary.

In the evidence, not surprisingly, the employer minimized any amount owing to the employee and the employee overstated the amounts they felt were owing.

I find May Carruthers was not a creditable witness as she was extremely vague on her hours and drive times when asked in examination in chief and on cross examination.

I am unable to reconcile the hours claimed by her with the gas records or her own calendar entries regarding time worked.



The two calendars kept by the employee covering the same period are not reconcilable with each other. The employee wrote in the total amount of hours and did not include the start or end times on a daily basis.

The employee was also not able to reconcile the pay stub she received with the hours she wrote on her calendars.

The calendars are clearly wrong and I conclude from the totality of the evidence her overtime hours as claimed have been overstated and I find that she worked from 8:30am – 10:00pm on the days that she claimed that were in excess of 12hrs. (ie: 13.5 hours)

## **XI. ESTOPPEL**

The employer claims that the employee is estopped from claiming overtime hours or any compensation for the period of February, March and April of 2017 as these amounts were previously the subject of another Employment Standards investigation and wage assessment in November of 2017. This

wage assessment was paid by the employer and amounted to \$681.15 that was paid to the employee.

The employee says that she should not be estopped for remaking a claim for that period as pursuant to Section 2-6 of The Act says that, "no agreement is valid if it deprives the employee of a benefit under the legislation."

However, Section 2-88 says that the Director of Employment Standards may negotiate and settle any difference between the employee and the employer and this section, by using the words, "notwithstanding any other provision of this part", overrides Section 2-6 of The Act.

Upon reading the pertinent Sections in The Act I find that Section 2-88 does override Section 2-6 and Ms. Carruthers is not able to make a further claim for overtime during the period of February, March and April.

A calculation of the employees overtime was that, she worked 125 days in the period of January to October (her date of commencement and last day of work). In February, April and May she worked 48 days therefore she is

entitled to (125-48) 77 days at 1.5hrs overtime (13.5hrs per day -12hrs), which equals 115.5hrs x \$28.01 = \$3,235.15. Plus 3/52 vacation pay \$186.64 for a total of \$3,421.79.

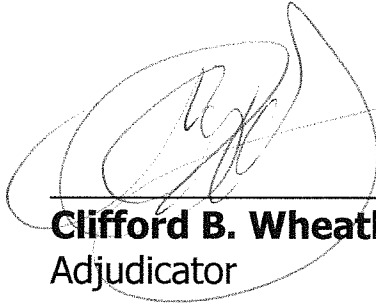
If I am wrong about the interpretation of Section 2-88 as it related to Section 2-6 of The Act, I have calculated the number of days worked with overtime in February, April and May to be 48 days @ 1.5hrs per day equals 72hrs of overtime.  $72 \times \$28.01 = \$2016.72$ , plus vacation pay of \$116.34. She was paid \$681.15 so the amount becomes \$2,133.06-681.15=\$1,451.91.

This would be in addition to the \$3,421.79 awarded for the balance of her Wage Assessment.

## **XII. CONCLUSION**

The appeal if granted in part and the Wage Assessment is amended to the amount of \$3,421.79.

Dated at Moose Jaw, in the Province of Saskatchewan, this 21<sup>ST</sup> of February, 2019.



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**Clifford B. Wheatley**  
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 <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.