

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



Allison Birkett

COMPLAINANT/EMPLOYEE

-AND-

Radiant Skin Clinic Medical Aesthetics and Laser Centre Inc.

APPELLANT/EMPLOYER

DATES OF HEARING: March 11, 2020
August 27, 2020

PLACE OF HEARING: Moose Jaw, SK

LRB FILE: No. 012-20
WAGE ASSESSMENT: No. 1-000327

INTRODUCTION

This matter was heard before me on March 11, 2020 and August 27, 2020 at Moose Jaw, Saskatchewan.

I am satisfied there has been compliance with subsections 2-74(6), 2-75(2) and 2-75(3) of *The Saskatchewan Employment Act* (the 'Act'). Therefore, I have determined that I do have jurisdiction to hear this matter.

Randy Armitage, Employment Standards Officer represented the Department of Employment Standards.

Complainant/Employee, Allison Birkett attended and gave sworn evidence on her behalf.

The Appellant/Employer, Radiant Skin Clinic Medical Aesthetics and Laser Centre Inc. and Amber Dawn Cameron, Director, were represented by Kenneth M. Corneau, Barrister and Solicitor. Amber Dawn Cameron gave sworn evidence on her behalf and that 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 \$7,014.03.

I. PRELIMINARY MATTERS

All parties agreed that the witness, Erin Bradish, who was being called by the Employment Standards Officer, would be called after the Employer's witness and Director, Amber Cameron gave evidence. This was to permit Ms. Bradish to give her evidence without having to be recalled at a later date, as her availability was limited.

II. AGREED FACTS

The parties agreed as follows:

1. Allison Birkett was an employee of the corporation from May 1, 2017 to May 1, 2018 (this is the period of time covered by the Wage Assessment);

III. DISPUTE

The issues to be decided is: What is the amount of money, if any, owing to the employee, Allison Birkett, by the employer.

IV. EVIDENCE OF THE EMPLOYER

The Director, Amber Cameron was sworn and gave evidence as follows:

Amber Cameron is the sole director and shareholder of the employer corporation.

The corporation does body sculpturing, injections and skin care, including laser esthetics and cool sculpturing, in addition to training staff and others for the above.

The corporation was started by Ms. Cameron in 2013.

Page 5 of 28

After an employee completes their online training, with respect to theory, the employee then goes to California to complete assessing and machine use training. The employee took the California training on January 31, 2018 to February 2, 2018. After completing the California training the employee comes back and works with Ms. Cameron until such time as the employee can work on their own.

The employer's records were kept by Erin Bradish who kept employee hours in a notebook.

At the end of each month the payroll would be turned over to the corporation's bookkeeping service who in turn would issue a payroll deposit and issue a pay statement to the employee. The payroll notations completed by Erin are set out under various tabs in Employer Exhibit 1. Also therein are the payroll statements that were issued by the bookkeeper to make payment to the employee.

The employee's rate of pay was \$20/hour and she was to receive a 10% commission on all income that was generated by the employee.

Page 6 of 28

The employee would from time to time purchase products and services from the employer. The employee would advise Erin as to what had been taken and Erin would enter that into her notations and deduct the same from the employee's net payroll prior to sending the statement to the bookkeeper.

Any tips would also be added to the employee's pay statement.

The booking system for clients was a Vagaro system, which was on the office computer and could be entered into by any of the employee's or employer.

From time to time the employer had promotions which would enable clients to purchase gift certificates and resultantly obtain certain percentages off the products and/or services. The employees commission would be based on the purchased price of the certificate not the face value of the certificate.

Page 7 of 28

The employer took issue with the Employment Standards Officer's wage assessment calculations indicating that as the computer program could be entered and altered by anyone at any time. So, using those records for payroll were inaccurate and the employer thought this explained why the Employment Standards Officer's audit sheet was not congruent with the employer's amount on the payroll.

The employer also set out several services that had been received by the employee that she was not charged for, these included hair removal and sculpturing. The employee should have been charged 1/2 price for these services.

Under cross examination, Ms. Cameron, stated that she did not know if the employee had been paid for the California training nor was, she aware if the employee had been paid for "shadowing" during her training.

Page 8 of 28

The employer stated that some tuition for the California training had been deducted from the employee, but the employer was not aware as to the amount.

The only time sheets available were those that were completed in the notebook by Erin Bradish and could have easily been altered by any of the parties.

Jill Hunt

Jill Hunt was sworn and gave testimony as follows:

Ms. Hunt confirms that she was an accountant with the employer's bookkeeping company and had been asked by the employer to complete a review of Ms. Birkett's payroll records.

The reason for the review was due to the Labor Standards Complaint being received by the employer.

Page 9 of 28

Ms. Hunt only had a summary of the records of total hours worked by the employee monthly in her office. Thereafter she relied on documents prepared by the employer, and oral statements of the employer to complete her review.

Any documents prepared by Ms. Bradish were not looked at by Ms. Hunt as they were never made available to her until seeing them for the first time at the hearing.

After discussions with the employer she revised the payroll records.

Prior to discussions with the employer the only information she had to complete the payroll review was a screenshot IE: Text of what was owing which she would have received from Ms. Bradish.

The main consequence of the new review/audit was to correct the employee's payroll to comply with the Labor Standards Act as to hours worked, call out times, statutory pay and included PST and GST.

Page **10** of **28**

Ms. Hunt confirmed that the summary notes and information used by Ms. Hunt to prepare the initial payroll records were not made available to her and any information on the iPad had been lost.

A summary of Ms. Hunts review/audit is set out in Tab 13 of the Employer Exhibit 1.

Under cross examination Ms. Hunt confirmed she had no records of employee purchases and was not aware that the deductions had been paid from the employee hours to offset employee purchases.

Ms. Hunt also did not know where the employer was getting the information that she was receiving in order to complete her review/audit.

She was also unaware of any deductions for PST and GST and did not have any information regarding cash advances except from the employer.

Page **11** of **28**

All the information Ms. Hunt used to complete the review/audit was provided by the employer and she was unable to rely on any other independent source for her information to use. She was unaware of where the employer was obtaining the new information to complete the review.

Ms. Hunt confirmed that she only reviewed Ms. Birkett's payroll records and not any other employee.

V. EVIDENCE OF THE EMPLOYMENT STANDARDS OFFICER

Erin Bradish

Erin Bradish was called by the Employment Standards Officer. Ms. Bradish gave evidence that she worked for the employer from June of 2016 to April of 2018 when she resigned.

During her employment she reported to Ms. Cameron. Her duties were to schedule clients and administration duties such as answering the phone and doing payroll.

Page **12** of **28**

The scheduling was done with a Vagaro system where she would enter in the appointments. This system did not record hours worked by the employee.

In order to determine commissions, Erin would go through the Vagaro booking system to determine who had worked on what clients. The hours credited as worked by the employee would be based on the clients booked.

Ms. Birkett worked the employer during the time that Erin Bradish was doing the administration and payroll. Ms. Birkett was paid \$20/hour, plus commission and tips all of which were calculated from the entries in the Vagaro system.

Cool sculpting was billed out at \$750/cycle (appx 1-hour treatment). The treatments were entered on Ms. Bradish's note sheet, as well as who the client was and the name of the employee doing the treatment.

Page **13** of **28**

Employee purchases and treatments from the employer were also put in the notebook. When doing the payroll up she would deduct the purchases and treatments from the hours of work of the employee. This was done before the information was sent to bookkeepers to do payroll.

Consequently, the payroll issued by the bookkeepers would not show the purchases or treatments deducted.

Invoices issued were not issued to the employee's regarding their personal purchases or treatments.

Erin Bradish would get payroll ready by adding up the hours and make the necessary deductions. She would show the result to the employer, and once approved would text the total hours to bookkeeper to complete the payroll and have cheques issued to the employees.

The hours of the payroll only reflected appointments unless there were other notes made on the Vagaro system by the employee's or employer.

Page **14** of **28**

She kept records by way loose leaf sheets which were then stapled together and kept in the office. When she left her employment, she left the records with the employer.

Under cross examination, she stated any tips that were shown in the Vagaro system were the ones done by credit card, if there were cash tips, the cash was given directly to the employee.

She confirmed that she had no way of knowing who used what cycles on any machines if they were not entered into the system.

She confirmed that the employer was not on site all the time when the employee, Ms. Birkett was working.

Ms. Bradish confirmed that if a customer paid cash the record of the customer and/or cycle could have been removed from the Vagaro system. If the sale was removed Ms. Bradish would not know of the removal so she could not credit the employee on their pay slip for hours worked.

Page **15** of **28**

Ms. Bradish also entered accounting records on an iPad which was at the workplace; however, somewhere towards the end of her employment with the employer, the iPad was upgraded. As a result, all records therein were deleted and were not recovered.

Ms. Bradish was present when the employee discovered that she was not being paid properly and was not getting commissions for a lot of the work she had done.

Under cross examination by the employer, Ms. Bradish confirmed that the payroll summaries set out in Exhibit ER 1, were prepared by her and were reviewed and approved by Ms. Cameron before being sent to the bookkeeper.

The bookkeeper would not receive a copy of the payroll summary sheet but only received the summary of this information.

Page **16** of **28**

Ms. Bradish would calculate commissions by reviewing the Vagaro for bookings and calculated cycles at \$750 or less and would take 10% of that for commissions for the employee.

Sometimes work was done, or the machine was used, and Ms. Bradish was not told. Subsequently this was not entered into her accounting sheets for payroll purposes.

Ms. Bradish confirmed that she would deduct the value of products or services used by the employee, by way of deducting the value by subtracting hours from the employee's work record before sending it to the accountant.

The employee would receive products at 1/2 price with tax not being charged.

Page **17** of **28**

A review of several payroll documents in the employers Exhibit 1, Ms. Bradish was unable to explain how numbers had been arrived at. She confirmed that certain writings on the documents were not hers and she was unaware of where those writings came from.

Without the content of the entries on the iPad she had nothing to compare to for review.

She was unaware of who paid for the tuition for the employees training in California.

Ms. Bradish was also unable to explain why there were not summaries for several months of the employee's time with the employer as she had created the summaries.

Ms. Bradish confirmed that there were no hours entered for the time the employee spent in California. That is, the employee was not paid a wage for her time in California for training.

Nick Marchessault

Nick Marchessault was called by the employer as their next witness.

The witness stated that he had been with the employer's bookkeeping firm as an Accountant since 2017 and as such had access to the firm's information regarding the employers account.

The witness looked at the documents held by the firm, Ms. Jill Hunt's documentation relating to her audit, the employer's evidence filed as Exhibit 1 and discussions with the employer.

As a result of this investigation he recalculated the employees pay calculations and summarized the same in Exhibit ER3. Mr.

Marchessault preferred to call his conclusions the results of a review, not an audit.

Mr. Marchessault admitted that the employer's records were not complete, but he was instructed to use those documents as well as Ms. Hunt's review and the employee documents that were available to him. He did not question the information but took it at face value.

Page **19** of **28**

Mr. Marchessault confirmed that there were no employee records of any nature, no employee time sheets and took the employers notes and oral statements at face value, as well as using some of the employee records.

In addition, he used the original pay stubs, Ms. Hunt's review and conclusions. Mr. Marchessault's review was completed on August 26, 2020, the day before the second hearing date of his file.

Mr. Marchessault was unaware of Ms. Bradish's evidence that her notes and records were not complete or had additions and deletions made by other parties. These documents were taken as hers, and were relied upon by Mr. Marchessault.

VI. EVIDENCE OF THE EMPLOYEE

Melissa McKay

Melissa McKay was sworn and gave the following evidence via Zoom: She worked for the employer, part-time in 2013-2014 and fulltime in 2015 to August 2017 for the employer as a laser technician.

She worked for the employer over much of the same time as worked by the employee, Ms. Birkett.

Ms. McKay stated that all employees had access to the Vagaro system, although each employee was limited to their own information.

Sometime after Ms. McKay left the employment of the employer she was contacted by Erin Bradish and advised that she and the other employees had not been in accordance with the Employment Standards Act. She would have filed a complaint with Labour Standards, however, was outside the limitation period when she learned of the discrepancies in pay by the employer.

Ms. Allison Birkett was sworn and gave the following evidence:

Ms. Birkett had worked for the employee from March of 2017 to April of 2018 which was the time frame of this Wage Assessment.

In April of 2018 Ms. Birkett resigned from her employment.

Page **21** of **28**

Ms. Birkett was trained to do the Cool Sculpting. She was trained online with a trainer from British Columbia as well as a course in California.

Ms. Birkett was to be paid \$20/hour, 10% of the commission on Cool Sculpting and to receive 100% of her tips.

Ms. Birkett kept track of her time at work in a personal calendar and kept track of all the people that were treated by her on a daily basis.

Each day she would also file this documentation in office files and on the office iPad. Her time would also be recorded on the Vagaro system.

All the products purchased from the employer were paid for through Ms. Bradish's accounting by deducting the payment from the tips and/or hours worked.

Page 22 of 28

When the information on the iPad was deleted, Ms. Birkett became very concerned about proper payment and attempted to recreate her employment information from the Vagaro system, her calendars and from the hard copies of any reports filed by her in the employer's office.

As a result of this recreation, Ms. Birkett discovered several discrepancies in her pay and requested to have a meeting with the employer, Amber Dawn Cameron. The meeting with the employer did not satisfactorily resolve the issues and thus Ms. Birkett contacted the Employment Standards Office.

VII. ANALYSIS/DECISION

In argument the employer stated it was their position that the employee had been overpaid. Mr. Cornea invited me to use the analysis done by Ms. Hunt or that of Mr. Marchessault to be evidence to the contrary for the purposes of challenging the Wage Assessment to conclude that the employee had been overpaid.

Page 23 of 28

The employee and Employment Standards Officer took the position that the employers records did not meet the Legislative requirements and were inadequate and insufficient to meet the burden necessary to challenge the presumption of correctness of the Wage Assessment and further that the employee records were consistent with the Wage Assessment and could be relied upon for that purpose.

The employers evidence shows three different calculations of the amounts that were owing to the employee with each calculation reaching a different conclusion.

Firstly, there were the original calculations done by the employer when issuing the payroll cheque to the employee. All the parties agree that these calculations are wrong as they do not comply with the Act.

Secondly, we have the calculations of Ms. Hunt which reached different amounts to be paid to the employee by the employer over the period at issue.

Page **24** of **28**

Lastly, we have the calculations by Mr. Marchessault which drew a different conclusion from the first two calculations.

The purpose of Ms. Hunts recalculation of the employee's wages was to bring the amounts owing to the employee to be in compliance with the Act.

Ms. Hunt's audit is unreliable as the only new information that was used by her audit was based totally on new information from the employer, none of it documented, all the employers documents had gone missing or were deleted therefore it was not a reliable, independent review/audit.

Ms. Hunt's audit only used information that was based on oral information from the employer, none of it documented, and therefore was not a reliable, independent review/audit.

Page **25** of **28**

Mr. Marchessault relied on the information used in the original calculations, and used Ms. Hunt's recalculations.

Mr. Marchessault also used information from the employee and as the employer records were either missing or had been deleted and were not available to him, it is clear that his recalculations came from unreliable information and I have no confidence in the conclusions reached by him.

I find it troubling that the employer evidence regarding the wage amounts and total amounts owed or overpaid is in conflict with itself.

Section 2-38 of The Act requires the employer to keep records in accordance with the section and provide the same to the Employment Standards Officer when requested. This was not done. The employer records were incomplete, wrong and had been deleted, lost or were never created in compliance with The Act.

Page **26** of **28**

The employee recreated her records from information recorded by her at the time she was working and retrieved what information she could from the computer program and hard copies of records in the employer's office. This included a record of daily hours worked by her. She is satisfied with Wage Assessment amount as being correct.

Section 2-75(9) of The Act states that the Wage Assessment is presumed to be correct unless there is evidence to the contrary.

I do not find that there has been any reliable evidence to the contrary presented at the hearings and as such the amount stated in the Wage Assessment is due and owing to the employee in the amount of \$7,014.03.

Page **27** of **28**

VI. CONCLUSION

The Wage Assessment is upheld in the amount of \$7,014.03.

Dated at Moose Jaw, in the Province of Saskatchewan, this 1st of
September, 2020.



Clifford B. Wheatley
Adjudicator

Page 28 of 28

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.