

DECISION OF ADJUDICATOR
IN THE MATTER OF A HEARING
PURSUANT TO SECTIONS 2-75 AND 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT

Labour Relations Board File No. 118-21
Wage Assessments # 1-004004 and 1-004015



Complainants: Brent Fertuck and Lyndsey Pawliw.
Represented by ESO Dale Schmidt.

Respondent: Wish Upon A Star Learning Centre Inc.
Represented by Grant Schmidt of
Fisher & Schmidt Law Office

Dispute: The Director of Employment Standards is claiming that the Notice of Appeal filed by Wish Upon A Star did not meet the 15 business day time frame, nor did the submission of the \$500.00 deposit.

On June 9, 2020 I was selected to adjudicate the above two wage assessment appeals. Two employees (Brett Fertuck and Lyndsey Pawliw) of *Wish Upon A Star Learning Centre Inc.* (Ituna, SK) are claiming pay in lieu of notice.

After contacting the parties (Employment Standards Officer, Dale Schmidt representing the Director of Employment Standards) and Grant Schmidt, lawyer representing *Wish Upon A Star*, I received the documentation needed to determine if the appeals had been perfected.

The documents revealed that the wage assessments were e-mailed to *Wish Upon A Star* on June 9, 2020. The appeal and deposit generated by Mr. Grant Schmidt arrived by mail in the Yorkton Employment Standards office on July 7, 2020.

I advised the parties that 15 business days from June 9, 2020 expired on June 30, 2020. Further, I advised that I had a concern over the use of e-mails for communication when the strict timelines are to be adhered.

On August 20, 2020 I asked the parties if they wanted to debate the question of timelines or would they agree the matter was properly before me and a hearing scheduled.

Both Mr. G. Schmidt and Mr. D. Schmidt agreed that the appeals were properly before me and a hearing could be scheduled.

On September 8, 2020 I had a full knee arthroplasty and the parties agreed to wait for my recovery for the hearing to be scheduled. I estimated late October to early November for the timeframe.

On October 20, 2020 I received an e-mail from Employment Standards Officer Dale Schmidt. The e-mail provided a written submission on behalf of the Director of Employment Standards and an Adjudicated Decision made by Adjudicator Leslie Sullivan on November 7, 2019.

The submission on behalf of the Director claims:

1. The wage assessment on behalf of Brett Fertuck and Lyndsey Pawliw was provided to *Wish Upon A Star* corporate director Joanne Burak at 11:18 am on June 9, 2020.

2. The appeal from *Wish Upon A Star* legal counsel was received by the Yorkton Employment Standards office on July 6, 2020.
3. The 15 business day appeal period pursuant to the Act expired at the end of business day June 30, 2020.
4. Therefore, the employer (*Wish Upon A Star*) failed to comply with the requirements of section 2-75(2) and (3) of the Act and therefore the appeal is invalid and should be dismissed.
5. And/or the Director submits that the employer failed to comply with the section 2-75(4) of the Act by failing to provide a deposit of \$500.00 and therefore the appeal is invalid and should be dismissed.

The case provided by the Director describes a situation where an employer filed their written appeal on time but did not provide the deposit within the requisite 15 days. There the Adjudicator Leslie Sullivan ruled the appeal invalid.

Upon receipt of the Ministry's submission, I e-mailed counsel for *Wish Upon A Star* requesting his reaction. This request was made on October 20, 2020. Having no response from Mr. Grant Schmidt I telephoned his office October 27, 2020 and left a message with his receptionist to call me regarding the Ministry submission. On October 29, 2020 I e-mailed Mr. G. Schmidt again requesting his response.

I have concluded (as I write this on November 2, 2020) that either *Wish Upon A Star* counsel is not going to provide a response or does not wish to provide one.

Discussion:

The Saskatchewan Employment Act, effective March 16, 2020, was amended to include clause (f) to Section 9- 9(2). That amendment is as follows:

"(f) by sending a copy of the document or notice by electronic transmission if an address for service in a proceeding has been filed respecting the person to be served".

On June 9, 2020 Employment Standards Officer Dale Schmidt e-mailed Joanne Burak at *Wish Upon A Star Early Learning Centre Inc* (e-mail address joeliason@hotmail.com). The e-mail reads "Good Moring Joanne. Attached is the wage assessment that you can present to the Board. Once you have confirmed the receipt of this e-mail you will have 15 business days to appeal the amount of the Wage Assessment. Thank you. Dale"

On July 3, 2020 *Wish Upon A Star* counsel, Grant Schmidt, e-mailed Employment Standards Officer, Dale Schmidt. In the e-mail Grant Schmidt indicates an attachment containing the Notice of Appeal. The deposit, he states, "will be mailed from Melville Post Office today".

Mr. Grant Schmidt also filed with the Court of Queen's Bench an "Acknowledgment of Service" which states receipt of the Wage Assessments on June 30, 2020.

In the "Decision of Adjudicator" provided by the Ministry in support of their submission and sent to me on October 20, 2020, Adjudicator Sullivan quotes from a decision made by Adjudicator Anne Wallace QC in *Brady v. Jacobs*, 2016 CanLII 49900(SELA) ["Brady"] on August 1, 2016. That quote is as follows:

When the Saskatchewan Employment Act came into effect, the case law was clear that time limits are to be interpreted as mandatory and relief against failure to meet a time limit is not available unless expressly stated in the Act. If the legislature intended there be any relief from the time limit {for appeal} ...it could easily have included an express provision. Indeed, where the legislature intends to provide jurisdiction to waive or extend time limits, it does so expressly... For example, the legislature has provided specific authority for the Court of Queen's Bench to extend the time for making an application to set aside an order or judgment.

Adjudicator Wallace concluded that if the legislature did not give any similar power to an adjudicator to extend the time limits, the Adjudicator cannot imply such authority.

Decision: Based on the Act's amendment of 9-9(2)(f) and the foregoing, both the notice of appeal and the deposits did not meet the 15 business day time frame and are therefore invalid.

Signed this 12th day of November, 2020



Ralph Ermel
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 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.