Decision of Adjudicator

In The Matter of an Adjudication

Pursuant to Section 2-75 and 4-6 of

The Saskatchewan Employment Act.

Wage assessment # 1-00573 LRB File No. 021-21

Complainant: Kelvin Gurr
Represented by Daniel Corbett
Employment Standards Officer

Respondent: North 40 Ranch and Stables Ltd.
Represented by Director Curtis Metz

Observer: Katka Veroba, Employment Standards Officer

Date of Hearing: April 21, 2021

Place of Hearing: Virtual Conference, initiated by the Adjudicator from his home in Regina SK.

Introduction

I was appointed as Adjudicator on March 31, 2021 and notified the parties on April 6, 2021. The Ministry provided relevant appeal documents on April 6 and I was able to determine that Section 2-75(1) and (2) were complied with.

Given the current pandemic, it was agreed that I convene a virtual meeting on April 21. I received evidence documents by e-mail on April 9, 2021. The documents consisted of an Employment Contract letter signed by Mr. Gurr on September 11, 2018, North 40's appeal letter, Mr. Gurr's timesheets and pay stubs and the Ministries Wage assessment calculations.

Early in the process Mr. Corbett requested that newly hired Employment Standards Officer, Katka Veroba, be allowed to observe the hearing. I had no objection and neither did the Respondent.

Preliminary Matters

Mr. Corbett and Mr. Metz agreed that North 40 Ranch Ltd. is a registered company in the Province of Saskatchewan

I requested and received permission to record the hearing.

The parties agreed there was no dispute regarding the Ministry's calculations as they pertain to the wage assessment.

Lastly, I outlined how the hearing would unfold and my expectations for conduct.

Dispute

The parties agreed that the dispute to be resolved concerns whether a modified hours of work arrangement was properly in place for the calculation of overtime (Sections 19 and 20) or did Section 2-18 apply.

Evidence of the Employer

Mr. Metz was to call his office manager (Shantell Wagman) as a witness, however, she was unable to attend. I indicated to him that if she wished to file a statement, I would accept one by e-mail provided I received it by close of business Friday April 23, 2021. I also indicated that my consideration of the statement would be less than had she testified in person since Mr. Corbett does not have the ability to cross examine.

Note: On April 22, 2021 Mr. Metz e-mailed that Shantell would not be providing a statement.

Mr. Metz was then affirmed, and he provided the following evidence:

Mr. Gurr began working, as a driver, in September of 2018. With every new hire Shantell Wagman would take the employee through all the details of their employment arrangement. Part of that explanation was regarding hours of work and pay periods. Mr. Metz maintains that Mr. Gurr would have been told that pay periods are monthly and that overtime was paid only when hours worked exceeded 160 in a four-week period. In other words, and averaging arrangement was in place at this workplace.

Mr. Gurr signed an "Employment Contract" document on September 11, 2018 and again upon return from lay-off on Jan 1, 2019. Mr. Metz claims this document shows Mr. Gurr's agreement to the averaging arrangement.

The relevant paragraph in both documents reads as follows:

"Pay periods are on a monthly basis, from the 1st of the month to the last day of the month. Cheques will be prepared and issued to the employee within the first 5 business days of the following month."

Mr. Metz is satisfied that Mr. Gurr understood the averaging arrangement as he continued to work and he regularly cashed his pay cheques. Therefore, by condoning the practice he cannot go back on it now and claim overtime after 40 hours in a week or 8 hours in a day.

Mr. Metz likened this "condoning" to a former Employment Standards case where his company terminated an employee for cause. The Employee's case was raised to the Ministry and an adjudicator found "pay in lieu" was to be paid since the Employer had condoned the Employee's behaviour and therefore did not show "cause".

The company had at least three staff meetings during Mr. Gurr's tenure and questions were answered regarding employment. Mr. Gurr could have questioned the overtime provisions at any time. Instead he went to the Ministry after quitting.

Cross-examination

Mr. Corbett asked, where in the document signed by Mr. Gurr on September 11, 2018 and January 1, 2019 does it mention overtime. Mr. Metz agreed that overtime is not mentioned. However, he went on to say that Shantell had made it clear that overtime was calculated on the basis of the 160 hours in a four-week period.

Mr. Metz went on to say that Labour Standards told him averaging can take place over 80 or 160 hours. Mr. Metz was never made aware that overtime must be paid for all hours worked over 12 in a day while working in an averaging situation.

Mr. Corbett asked Mr. Metz if an employee agreed to work for less money than minimum wage, would that amount to condoning. Mr. Metz agreed that an employee in that situation would be owed the difference.

Re-direct

None.

Evidence of the Employee

Mr. Corbett called Mr. Gurr as a witness and he was sworn. He provided the following evidence as he answered Mr. Corbett's questions:

He started working at North 40 in September of 2018, as a driver of various large equipment vehicles. He was told by Shantell that his wage would be $25/hr. He does not remember OT being discussed and nothing specific about 160 hours. He did sign the contract referenced by Mr. Metz. He worked at least 5 days a week and often 6 or 7. Many days were in excess of 12 hors. He worked some night shifts as well, and weekends too.

He was too busy to figure out how his OT was being paid, his cheques were cashed and this all he worried about. After he quit, he began to think about his OT and went to the Ministry and ended up filing the complaint.

Cross-examination

In response to questions from Mr. Metz, Mr. Gurr indicated that he doesn't recall being told by the Employer how OT would be calculated. He remembers another employee questioning how OT was calculated. Eventually he did contact the Ministry.

Re-Direct

None

Final Argument

Mr. Metz feels he was mislead by the Ministry when he was told his averaging arrangement was legal. Further, he feels the Ministry could have been more helpful in explaining how averaging and modified work hours schedules need to be set. He argues that Mr. Gurr was well aware of the 160 hours averaging period and as such there can be no violation and appeal should be granted.

Mr. Corbett argued that an agreement to average work hours (Section 2-19 of the Act) must comply with the stipulation cited in 9(1) of the Regulations. More specifically:

1. Employees have to agree to the arrangement
2. The arrangement must specify the number of hours of the averaging period, and daily number of hours after which overtime applies.
3. The arrangement must be in writing and signed by both the employer and employee.
4. An averaging arrangement requires a "permit" (Section 2-20) from the Director
5. Section 2-19, 2-20 of the Act and 9(1) of the regulations detail the requirements for the Employer.

Mr. Corbett went on to indicate that the Act also limits the hours worked at 12 in a day without the payment of overtime. North 40 only paid OT after 160 hours in a four-week period.

In response to Mr. Metz's "condone" argument, Mr. Corbett reference Section 2-6 of the Act. This section prevents employers from depriving employees of their right to benefits of the Act.

In conclusion, Mr. Corbett argued that the wage assessment should be upheld, and appeal denied.

Mr. Metz concluded the hearing by re-emphasising that Mr. Gurr should have raised questions about overtime while he was still working and because he didn't shouldn't be able to challenge now.

I thanked the parties for their cooperation and respectful approach and closed the hearing.

Analysis

Summary of the Employer evidence:

- Employee signed an employment contract agreeing to an averaging arrangement
- Employee had arrangement for hours of work and overtime explained on several occasions
- Employee condoned the arrangement by not raising concerns and cashing his pay cheque

Summary of the Employee's evidence:

- Employment contract signed in September of 2018 and January of 2019 does not reference either hours of work or overtime
- None of the requirements set out in the Act, regarding modified hours of work arrangement of averaging of hours were implemented by the employer.

Decision

I am satisfied that North of 40 Ranch honestly believed the hours of work and overtime arrangement provided for Mr. Gurr was legal and above board.

I also can accept Mr. Gurr's evidence that he had so issue with the arrangement until he had time to reflect following leaving the job.

I understand the difficulty Mr. Metz spoke of in trying to navigate the Act in order to put together all the necessary criteria to produce an acceptable modified or averaging schedule.

I can also appreciate the Ministry's limited resources to assist, thus placing most of the responsibility on the employer.

Regardless, after removing all the excuses, assumptions and blame, the fact of this matter is that Sections 2-18, 2-19 and 2-20 along with Regulation 9 were not followed by North of 40 Ranch Ltd.

Therefore, Mr. Gurr's right to a forty-hour week, eight hours day was violated by the administration of an invalid "averaging" arrangement.

The appeal is denied and the wage assessment of $991.33 is owed to Mr. Gurr by North of 40 Ranch and Stables Ltd.

Dated at Regina, in the Province of Saskatchewan this 4th day of May, 2021.

Ralph Ermel
Adjudicator