

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

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



Appellants:

Savanna Trees & Interiors Ltd.; Adam Houghton, being a director of Savanna Trees & Interiors Ltd.

AND

Respondent:

the Director of Employment Standards

Date of Adjudication: April 20, 2021

Date of Decision: April 21, 2021

[1] The Director of Employment Standards issued a Wage Assessment, dated December 2, 2020 (No. 1-000462) against the Appellants, Savanna Trees & Interiors Ltd. ('Savanna') and Adam Houghton, being a director of Savanna Trees & Interiors Ltd. ('Mr. Houghton').

[2] Wage Assessment No. 1-000462 ordered Savanna and Mr. Houghton to pay Seamus Boucher \$413.56 in unpaid wages.

[3] The Appellants appealed Wage Assessment No. 1-000462 by way of a letter dated December 22, 2020 bearing an 'Employment Standards' date stamp indicating it was received by Employment Standards on December 22, 2020 and a 'Labour Relations Board' stamp indicating it was received by the Labour Relations Board' on December 22, 2020.

[4] In that letter, the Appellants stated the following as the grounds of appeal:

"The grounds for this appeal are as follows:

1. Found conversation between myself and Seamus acknowledging that he will obtain a GST # and that he would invoice my company;
2. My Company is only set up for subcontracting payment;
3. He was well aware of the terms and only lied to labour standards because I stopped offering him work due to his lack of communication and punctuality;
4. He also failed to get his GST It and I am still waiting for his invoice;
5. He harassed me and threatened me for a couple month; demanding cash that day or else."

[5] I was selected as an Adjudicator in this matter by way of an Appointment Order dated March 31, 2020 and signed by the Labour Relations Board Registrar.

[6] Violet Harris-Tomlin confirmed that she was the Director's Delegate. She represented the Director of Labour Standards, and not the employee, Seamus Boucher.

[7] The parties agreed to a hearing date of April 20, 2021. The hearing was held electronically over Zoom. Exhibits were emailed to me in advance and were numbered according to the order of filing.

[8] Mr. Houghton attended the hearing and confirmed that he represented himself and Savanna. Ms. Harris-Tomlin attended the hearing representing the Director of Employment Standards, as the Director's Delegate. Seamus Boucher did not attend the hearing. Doug Long, an employee of the Employment Standards Division attended the hearing as an observer but did not take part in the hearing itself.

Issue:

[9] The issue in this dispute is whether Seamus Boucher worked for the Appellants as an independent contractor or as an employee.

Facts and Analysis:

[10] Prior to the hearing, Ms. Harris-Tomlin filed as exhibits an inspection report letter to Mr. Houghton dated '03 November 2020' with accompanying pages from a Canada Revenue Agency website

titled 'Employee or Self-employed', and a copy of adjudication decision LRB File No. 028-17 written by Ted Koskie ('Fresh Energy Concepts') [EE-1]; a letter to Mr. Houghton dated 'Dec 2, 2020' and accompanying Wage Assessment (#1-000462) [EE-2], an email delivery receipt dated 'Monday, December 7, 2020' indicating delivery of an email to 'savannatrees@yahoo.com' [EE-3], a Profile Report from Saskatchewan Corporate Registry indicating Mr. Houghton is a director of Savanna Trees & Interiors Ltd. [EE-4], an email from Mr. Houghton containing a transcript of text conversation between Mr. Houghton and Seamus Boucher [EE-5], and a screen capture of conversation between Mr. Houghton and Seamus Boucher [EE-6]. I note that after the hearing Mr. Houghton texted me part of the conversation contained in EE-5, to ensure that I had seen it. The material Mr. Houghton texted me is entirely contained within EE-5, so I have not included that text as a separate exhibit.

[11] At the start of the hearing, Mr. Houghton stated that he represented himself and Savanna. He agreed that Savanna is a Saskatchewan corporation, and that he is the sole director of the corporation. He also agreed that Seamus Boucher did work for the Appellants as described [in EE-1], that is for 23 hours with remuneration set at \$17/hour. Both Mr. Houghton and Ms. Harris-Tomlin agreed that the only issue in dispute is whether Seamus Boucher did the work as an independent contractor (as Mr. Houghton claims) or as an employee (as Ms. Harris-Tomlin claims). If Mr. Boucher was an employee, the amount stated in the Wage Assessment is due and owing. If Mr. Boucher is an independent contractor, the Director of Employment Standards does not have jurisdiction to issue the Wage Assessment appealed from.

[12] Mr. Houghton says that he told Seamus Boucher to get a GST number, and for Seamus Boucher to invoice him for the hours he worked. Mr. Houghton also said that Seamus Boucher agreed to get a GST number, but failed to do so. I accept this as fact.

[13] Mr. Houghton said that it was his intention to only hire individuals who would work as sub-contractors, and to not hire any individuals as employees. I also accept this as fact.

[14] The relevant legislation is *The Saskatchewan Employment Act* (Statutes of Saskatchewan, 2013, Chapter S-15.1, as amended). Subsections 2-1 (f) and (g) define 'employee' and 'employer' for the purposes of the legislation. They read as follows:

(f) "employee" includes:

- (i) a person receiving or entitled to wages;*
- (ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;*
- (iii) a person being trained by an employer for the employer's business;*
- (iv) a person on an employment leave from employment with an employer; and*
- (v) a deceased person who, at the relevant time, was a person described in any of subclauses (i) to (iv);*

but does not include a person engaged in a prescribed activity;

(g) "employer" means any person who employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who, in the opinion of the director of employment standards, either:

- (i) has control or direction of one or more employees; or*
- (ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees;*

[15] These definitions do not tell us the factors to consider to determine if a person is an 'employee' as opposed to an 'independent contractor'. Court decisions or 'case law' as they are known tell us how to make that determination.

[16] I find Adjudicator Koskie's decision in LRB File No. 028-17 'Fresh Energy Concepts' (filed as part of EE-1) to be an expertly written summary of the case law.

[17] The appropriate test to determine if a person is an employee or an independent contractor is a two-step test. The first step is to ask which type of relationship the parties intended to create. I have already found as a fact that the Appellant intended to create a relationship of Seamus Boucher being an independent contractor. It is more difficult to determine Seamus Boucher's intention, particularly because he was not at the hearing and therefore could not provide evidence. However, I do have the transcripts of communication between Mr. Houghton and Mr. Boucher. In those conversations, Mr. Boucher says that he does not know how to apply for a GST number. He says 'What's the gst number used for' to which Mr. Houghton replied 'Paying your taxes'. At one point Mr. Boucher said that he did not know how to write an invoice. I am unable to conclude from the evidence that Mr. Boucher had an intention to be an independent contractor. In fact, there is no evidence that Mr. Boucher understood the difference between an employee and an independent contractor.

[18] If Mr. Boucher intended to work for the Appellants as an independent contractor, I would have to turn to the second part of the two step test. I will assume for the purpose of this analysis that Mr. Boucher did intend to be an independent contractor. The second step is to examine the evidence and determine if the reality of the relationship reflects the parties' intentions. In other words, even if the parties intended Mr. Boucher to be an independent contractor, did they in fact structure the relationship so that he was in fact an independent contractor?

[19] In order to apply this second step of the test, the Fresh Energy Concepts decision says it is necessary to look at factors such as who has control over the work, who has the chance of profit and the risk of loss, whose tools are being used and so forth. I accept this as an accurate statement of the law.

[20] In Exhibit EE-1, Ms. Harris-Tomlin lists seven factors, summarized from the Canada Revenue Agency webpage, which she says are commonly referred to when determining whether a person is an employee or an independent contractor. I accept these seven factors as being an accurate summary of case law. These seven factors are:

1. The level of control the payer has over the worker's activities;
2. Whether the worker provides the tools and equipment;
3. Whether the worker can sub-contract the work or hire assistants;
4. The degree of financial risk the worker takes;
5. The degree of responsibility for investment and management the worker holds;
6. The worker's opportunity for profit;
7. Any other relevant factors, such as written contracts.

[21] In the present case, it is clear from the text conversations, and from Mr. Houghton's statements that Mr. Houghton determined when and if Mr. Boucher would work, including what time he would start, what time he would finish, whether or not Mr. Houghton would allow him to take breaks, and if so when and where those breaks would be taken. Mr. Houghton supplied any equipment Mr. Boucher required. Mr. Boucher was required to perform the work personally. Mr. Boucher was paid a pre-determined amount (\$17.00) for every hour he worked. This amount was arrived at after Mr. Houghton asked Mr. Boucher 'What kind of wage you looking for?' [Exhibit EE-6]. Mr. Boucher had no investment or risk in the business and would not share in any profit of the business. In short, Mr. Houghton appears to have controlled every aspect of what Mr. Boucher did and how he did it while he was at work. At one point, Mr. Houghton said to Mr. Boucher that he had:

" 1 job lined up right now and it's a pretty big one.

Not something you should start on"


This indicates that Mr. Houghton determined which jobs he felt Mr. Boucher was capable of working on.

[22] Mr. Houghton exercised absolute control over Mr. Boucher's workday including whether or not Mr. Boucher would work, how and when he would work if he did, when and if Mr. Boucher would take rest/lunch breaks. Mr. Houghton took all the risk of loss and would reap all the gain of profit of the jobs undertaken. Mr. Houghton supplied all required equipment. There was no written contract between Mr. Boucher and the Appellants, and there was no evidence of any delineation of Mr. Boucher's responsibilities (other than to do what Mr. Houghton told him to do). Given these factors I have no doubt whatsoever that Mr. Boucher was the Appellant's employee within the meaning of *The Saskatchewan Employment Act* ss. 2-1 (f) and that the Appellants were his employer within the meaning of ss. 2-1 (f) of that Act.

Decision:

[23] Wage Assessment No. 1-000462 is confirmed in the amount of \$413.56.

Dated at the City of Saskatoon, in the Province of Saskatchewan this 21st day of April, 2021.



Doug Surtees
Adjudicator

The Parties are 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 viewed 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.

(2) A person who is directly affected by a decision of an Adjudicator on an appeal pursuant to Part III 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 or the director of occupational health and safety, 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 and the director of occupational health and safety have 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.