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

APPELLANTS:	**WARNER TRUCK INDUSTRIES LTD. and COREY BUBNICK and GRAHAM WARNER, as Directors of WARNER TRUCK INDUSTRIES LTD.**
RESPONDENTS:	**CLAYTON DOVE and the DIRECTOR OF EMPLOYMENT STANDARDS**
DATE OF HEARING:	**March 14, 2023**
PLACE OF HEARING:	**3rd Floor Boardroom 1870 Albert Street Regina, Saskatchewan**

LRB File No. 194-22, Wage Assessment File No. 1-000624

I. INTRODUCTION

Wage Assessment No. 1-000624 directed Warner Truck Industries Ltd. (Warner Industries or the Company) and Corey Bubnick and Graham Warner as directors of the Company to pay $4,768.00 in unpaid wages to Clayton Dove or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act). Graham Warner appealed the Wage Assessment on behalf of the Appellants.

On March 14, 2023, the following individuals attended the hearing:

- Graham Warner, Co-owner and Director of Warner Industries;
- Corey Bubnick, Co-owner and Director of Warner Industries;
- Rob Clark, IT Manager at Warner Industries;
- Susan Devries, HR Manager at Warner Industries;
- Clayton Dove, former employee at Warner Industries;
- Tami Dove, Clayton Dove's wife; and
- Andrew Langgard, Employment Standards Officer.

II. THE DISPUTE

On November 7, 2022, a Delegate on behalf of the Director of Employment Standards issued Wage Assessment No. 1-000624, representing unpaid wages for Clayton Dove, against the Company and its directors. On November 24, 2022, Graham Warner filed a Notice of Appeal on behalf of himself, the Company, and Corey Bubnick, claiming the Wage Assessment ought to be dismissed due to errors.

III. PRELIMINARY MATTERS/OBJECTIONS

At the beginning of the hearing, I explained the process to the parties. There were no objections to proceeding with the hearing.

Tami Dove indicated she did not intend to testify. When Graham Warner objected to her remaining in the hearing room as an observer, she agreed to leave. I made an order for exclusion of witnesses meaning Corey Bubnick and Susan Devries also left the room until each of them provided their testimony.

IV. THE FACTS

The parties started by agreeing that Clayton Dove had been the Maintenance Coordinator for Warner Industries from April 17, 2017 to May 5, 2022, earning $27.50 per hour.

The parties then tendered evidence by way of sworn testimony and documents. Graham Warner (Graham), Corey Bubnick (Corey), and Susan Devries (Susan) testified on behalf of the Appellants. Clayton Dove (Clayton) testified on behalf of the Respondents.

The following exhibits were tendered and entered into evidence:

Employer Exhibits (Appellants)

ER-1 Copy of internal Warner Industries emails dated May 9, 2022, explaining mileage correction for deduction from Clayton Dove's final paycheck;
ER-2 Copy of Code of Business Conduct for Warner Industries Group of Companies and Acknowledgment signed by Clayton Dove;
ER-3 Agreement dated May 5, 2022, signed by Clayton Dove and Graham Warner regarding reimbursement for personal usage of van;
ER-4 Copies of three reimbursement cheques to Clayton Dove with Expense Reports attached;
ER-5 Copy of email dated December 30, 2021, with two attachments, from Norm Peel to Warner Industries employees regarding raise in km reimbursement rate;
ER-6 Copy of Google Maps image depicting routes and km from Warner Industries in Saskatoon to Clayton Dove's house;
ER-7 Copies of lease invoices from Warner Leasing Company Ltd. for van used by Clayton Dove;
ER-8 Copies of Affidavits provided by Corey Bubnick, Robert Clark, and Norm Peel;
ER-9 Copy of Payroll Data for Clayton Dove; and
ER-10 Copy of Invoice from Warner Leasing Company Ltd. illustrating van rental charges to Clayton Dove at retail rate.

Employee Exhibits (Respondents)

EE-1 Copy of Receipt and appeal deposit cheque from Warner Industries;
EE-2 Copy of service documents for Wage Assessment by email and registered mail;
EE-3 Copy of ISC Saskatchewan Corporate Registry Profile Report for Warner Truck Industries Ltd.;
EE-4 Copy of Clayton Dove's statement dated February 2, 2023; and
EE-5 Copy of Clayton Dove's final paystub.

V. ARGUMENT

After presenting evidence, the parties agreed to file written arguments via email by March 21, 2023, and I adjourned the hearing pending receipt of the same. The parties filed their written arguments on time.

The Appellants' argument in favour of dismissing the Wage Assessment for Clayton Dove is summarized as follows:

- Clayton transferred to the Company's Saskatoon branch in or about June of 2021. He knew company vehicles were not for personal use. He had the Company's permission to use the van to travel back and forth from Saskatoon to Regina, Moose Jaw, and Swift Current for work.
- In the past, Clayton had used company vehicles for personal use at a cost.
- The van used by Clayton was an asset of Warner's affiliated leasing and rental company and the rent for the vehicle was charged to the Company. The van was rented to the public before and after Clayton's employment.
- Due to an error, Clayton was overcharged for his personal trips, 68 instead of 33 trips. The deduction of $4,768 from his final paycheck ought to have been $3,648 instead.
- Section 2-36 of the Act specifically provides that an employer may make deductions from wages of an employee in respect of voluntary purchases by the employee of goods, services, or merchandise from the employer.
- There can be no argument this was not a "voluntary purchase" by Clayton of a "good" or "service" that is generally offered by Warner to the public, and to its employees.
- The voluntariness of the transaction is reflected by:
    - It is a regular part of Warner's business to lease/rent vehicles and equipment for personal and public use as a "service" or as "goods."
    - Clayton utilized Warner's services in the past through rental of vehicles and equipment.
    - The van in question is part of Warner's fleet of vehicles that was available for public rental before Clayton was hired and after he was terminated.

  - It is patently false that the voluntariness was removed by an alleged threat by Graham during the termination meeting: "It was Mr. Dove who indicated in his termination meeting that it would be easiest to have Warner effect a payroll deduction for the cost of his personal use of the van. I then made the comment, following his suggestion, that this approach would be preferable to making the situation more difficult for him if the matter was not resolved. My comment simply confirmed the voluntary offer made by Mr. Dove for the goods and services he utilized was a good choice."
- The two cases provided by Employment Standards are distinguishable.
- The intent of the Act is to ensure employers cannot arbitrarily deduct from wages owed to employees and nothing done by Warner in this case runs afoul of that general philosophy. This was not a case where an employer exercised a set-off for damage to equipment or shortfall on receipts that were to be obtained by the employee from customers. The deduction was allowed because Clayton made a voluntary purchase of use of transportation services generally offered by Warner Industries at a cost, both to the public and to its employees.
- The Employment Standards Officer based the Wage Assessment on the following erroneous findings:
  - The company van was an asset of Warner Truck Industries and could not be rented to the public.
  - The use of a rented vehicle could not be classified as a goods purchase.
  - Clayton never intended to pay for the personal use of the rented van.
  - During the termination meeting, Graham made a threatening remark to Clayton to sign the agreement to pay a discounted reimbursement amount for his personal use of the van
  - Clayton was terminated for unauthorized use of a company vehicle.
- Clayton is not credible, and the evidence supports this because:
  - He claimed he was terminated for unauthorized use of a company vehicle which he was not.
  - He claimed the vehicle was not available to the public for lease or rental, which it was.
  - He claimed other employees used company vehicles for personal use without evidence to support his claim.
  - He claimed he did not use the van for personal use, which he did.
  - He claimed he maintained 10 buildings but when pressed could only identify 9.
  - He said he did not contact Graham for an explanation of the increased amount of the deduction because he did not trust him after the termination meeting. When asked about this, he said Graham was always suing people including employees, but then could not provide applicable examples.
  - He lied about telling people he lived in Osler instead of Neuhorst.

    - He lied when he said Graham threatened him to sign a reimbursement agreement during the termination meeting.
- Clayton tried to justify his personal use of the van by "Implied Authorization." He knew he was not allowed to take the vehicle to his home.
- In 43 years of operating its Saskatchewan business, this is the first appeal process Warner has ever had to participate in.
- The appeal ought to be allowed and the deduction should be corrected from $4,768 to $3,648.

The Respondents' argument in favour of upholding the Wage Assessment for Clayton Dove is summarized as follows:

- The employer relies on section 2-36(2)(f) of the Act in support of its $4,768 deduction from Clayton's final pay. The employer alleges Clayton made a voluntary purchase when he drove the company van from the Saskatoon branch to his home in Neuhorst for the period of August 2021 to May 2022. The Director takes the position this amount must be repaid.
- The mileage reimbursement for Clayton's use of a company vehicle cannot reasonably be considered a "voluntary purchase" within the meaning of the Act. Clayton testified that he never intended to purchase, lease, or rent the van he used during the course of his employment.
- Clayton didn't do the things (providing license, signing a contract) that might indicate a lease or rental situation.
- The vehicle was not rented to the public—the Company doesn't rent vans full of maintenance tools and equipment to the public. Clayton didn't purchase a good, service or merchandise from his employer.
- The employer's records do not support a purchase. The signed agreement (ER-3) and Norm Peel's email (ER-1) use the term "reimbursement," not purchase, lease or rental.
- A purchase is different from a reimbursement. Since it was a reimbursement and not a purchase, it does not come within section 2-36 of the Act.
- Even if the deduction is considered a purchase, it still must be voluntary to fall within section 2-36 of the Act. The employer failed to establish the voluntary nature of the deduction for several reasons:
    - Clayton testified that he signed the reimbursement "agreement" (ER-3) under pressure from Graham. He testified that when he did not sign as quickly as Graham wanted, Graham said he could make life more difficult for him if he didn't sign it. Clayton said he understood this to be an implied threat of legal action. Clayton provided more detailed testimony regarding Graham's words and conduct and his evidence ought to be preferred where their evidence diverged.
    - An agreement signed under duress cannot be considered voluntary. It was the employer's idea to recoup the vehicle mileage from Clayton's

wages. The employer had prepared ER-3 prior to the termination meeting. When Clayton hesitated, Graham made a threatening statement to coerce him into signing. Clayton had no choice, lest he face possible civil or criminal proceedings.

- The document Clayton signed (ER-3) provided for a reimbursement of $3,874. Once the employer discovered the difference in kms between its original calculation using Osler instead of Neuhorst, they amended the amount to $4,768. There is no evidence they attempted to contact Clayton to update ER3 and have him agree to the new total being taken off his final cheque. The employer unilaterally recalculated and deducted the new amount without Clayton's consent.
- In addition, the mileage rate is in question because the Company's rate changed from $0.45 per km in 2021 to $0.50 in 2022 and yet Clayton was charged the $0.50 rate for kms driven from August to December of 2021. The employer didn't follow their own mileage reimbursement policy which undermines the voluntariness of this deduction.
- Even the revised total of $4,768 proved to be incorrect. Clayton does not agree with the employer's calculations. Since the employer failed to provide him with sufficient opportunity during the termination meeting to properly review the calculations, Clayton did not discover the full extent of the inaccuracies until after he filed his Employment Standards complaint. The employer acknowledged the calculations that formed the foundation of their mileage reimbursement deduction were incorrect and conceded they charged Clayton for too many trips.
- There is nothing voluntary about this deduction. The calculations that underpin the deduction were proven to be wrong. It is impossible for an employee to voluntarily agree to a wage deduction when the amount itself is in dispute.

- Caselaw provides that a purchase by an employee must have been made from the employer and not from a third party (*Director of Labour Standards re: Jerry Witherspoon* v. *G. Ungar Construction Co. Ltd. et al.* (SKQB) 2007) and that an employer is prohibited from making any deduction from wages unless specific permission for the deduction can be found in the Act or other legislation (*Holtets Service Ltd.* v. *Huard* [1978] S.J. No. 234).
- Even if it is determined that Clayton's mileage reimbursement is a voluntary purchase, it still cannot be deducted from his wages because this "purchase" was not made from his employer, but from a third party, Warner Leasing Company Ltd.
- The Saskatchewan Court of Appeal in *Meyers* v. *Walter Cycle Co. Ltd.* [1990] 5 WWR 455 held the Act is not to be used as a mechanism for employers and employees to settle accounts except in the narrow circumstances identified in the Act. This type of dispute is more appropriately addressed in other forums such as Small Claims Court.
- The Wage Assessment should be upheld, and the appeal should be dismissed.

VI. ANALYSIS AND DECISION

The Wage Assessment claims the Appellants owe wages to Clayton in the amount of $4,768. The Respondents contend the sum of $4,768 was unlawfully deducted from Clayton's wages. The Appellants contend they had the right to make the deduction, although they admit to a mistake with respect to the amount of the deduction. The issue to be determined is whether section 2-36 of the Act permitted the Company to make the deduction in question from Clayton's final pay.

I found all four witnesses to be credible. The discrepancies between their accounts of conversations and events were understandable. It is not uncommon for people to view the same set of circumstances differently, especially in stressful or emotionally charged situations, such as a termination meeting.

Based on the evidence, I make the following findings of fact:

- Clayton worked for Warner Industries as Maintenance Coordinator from April 17, 2017 to May 5, 2022. At the time of his termination, he was earning $27.50 per hour.
- On April 17, 2017, Clayton signed an Acknowledgement that he received and understood the Company's Code of Business Conduct and Employee Agreement regarding the operation of vehicles and equipment (ER-2).
- When Clayton began working for the Company, he lived in Regina and worked mostly in Regina. His position required some travel including to Moose Jaw, Swift Current, and Winnipeg. The Company provided him with a half-ton to use at first and then a van, where he kept and/or transported tools and supplies required for the job. The Company rented the van in question from Warner Leasing Company Ltd. (ER-7)
- While living in Regina, there were times when Clayton sought permission to take the van home so he could leave on a road trip early the next morning without having to go into work to pick up the van. This arrangement was approved by Graham or Rob as long as it made sense for the Company. There was no issue with Clayton's use of the Company vehicle while he resided in Regina.
- When employees used their own vehicles for work, they were entitled to reimbursement from the Company. The rate of reimbursement changed from 45 cents per km in 2021 to 50 cents per km in 2022 (ER-5). In 2020, Clayton was reimbursed on at least three occasions (ER-4).
- When Clayton's wife obtained a job in Saskatoon, he negotiated a new arrangement with the Company. Initially, he was going to leave his position, but he ended up agreeing to stay on until they could find a replacement for him. Clayton worked in Saskatoon, including some travel, from July 1, 2021 to May 5, 2022 (although Clayton took some holidays before starting).

- Graham and Rob were Clayton's supervisors in Regina. Corey was his supervisor in Saskatoon, although Clayton continued to deal mainly with Graham and Rob even after he moved.
- Clayton never lived in Saskatoon. He moved to an acreage outside of Saskatoon, so he commuted to Saskatoon and back for work. He used the van for his commute. There was some confusion on the employer's part about Clayton living in Osler, but it was Neuhorst all along.
- As time went on, Clayton made it clear to the Company that he wanted to work part-time and only in Saskatoon. He did not want to travel anymore. This arrangement became unsustainable for the Company.
- In preparation for the termination meeting, Graham learned Clayton had been driving the van to and from work in Saskatoon since he left Regina in the summer of 2021.
- On May 5, 2022, Corey called Clayton into his office. Graham and Rob were there too; it was a termination meeting.
- Clayton was terminated on May 5, 2022.
- During the meeting, Graham presented Clayton with a piece of paper detailing a mileage calculation for Clayton's use of the van to commute to and from work in Saskatoon, but Clayton was not provided with a copy to keep. After some discussion, Clayton signed off on having the sum of $3,874 deducted from his final paycheck, representing reimbursement for personal use of the van (ER-3).
- In addition to standard lawful deductions, the Company deducted $4,768 from Clayton's final paycheck (EE-5), representing reimbursement for personal use of the Company vehicle. Clayton was not provided with an explanation for the increased amount of the deduction.

The Employee Agreement: Operation of Vehicles & Equipment and Code of Business Conduct (ER-2) state: "Vehicles and equipment are not for personal use," and that Warner Industries' equipment and assets "can only be removed from Warner Industries' premises with authorization." I find that Clayton knew the rules regarding use of company vehicles and that he followed these rules while working in Regina. Once he moved to Saskatoon, he no longer follow these rules. Clayton did not ask for permission to use the van for commuting from his home to Saskatoon and back. Corey knew Clayton was taking the van home every night and, despite being a co-owner of the Company and one of Clayton's supervisors, did not ask him to stop. Corey assumed Clayton's personal use of the van was part of Clayton's arrangement with Graham and/or Rob.

The evidence establishes the employer decided to terminate Clayton's employment because he no longer wanted to work full-time or travel outside of the Saskatoon area. The Company did not have enough maintenance work in Saskatoon to justify keeping him on and there was no other viable role for him with the Company. The evidence also establishes it was not until Graham made the decision to terminate Clayton's

employment, that he learned Clayton had been using the van to commute to and from the Saskatoon branch.

An employer is limited to making deductions from an employee's wages that are permitted or required by law. Section 2-36(2)(f) of the Act provides that in addition to deductions permitted or required by law, an employer may deduct from an employee's wages "voluntary employee purchases from the employer of any goods, services or merchandise." The question then becomes was the employer's deduction from Clayton's pay (representing reimbursement for his personal use of the company vehicle) permitted by this section of the Act?

Based on the evidence, I believe Clayton's termination came as a surprise to him but that a part of him *was* relieved. With that said, I also believe the termination meeting was uncomfortable and stressful for Clayton. He was not expecting it so when he was called in to Corey's office and found both Graham and Rob there, it is reasonable to believe he was caught off guard. I do not believe it was Clayton's idea to sign an agreement regarding the deduction from his final pay for his personal use of the company van. Graham testified that he discovered Clayton had been commuting with the van against company policy when he was preparing for the termination meeting. After advising Clayton they were letting him go, Graham presented him with an agreement to sign (ER-3), allowing the Company to deduct $3,874 from his final pay. Even if I believe there were no threats or intimidation on Graham's part, it makes no sense that the deduction was Clayton's idea. Clayton was neither provided with a copy of the calculations in advance of the meeting, nor provided with a copy to take with him after the meeting. Clayton was not given time to reflect on whether the employer's mileage calculations accurately reflected his van usage or whether he agreed with the rate they were charging him. I accept that whether it was the employer's intention or not, Clayton felt pressure to sign the agreement during the meeting. Under the circumstances, I do not find the deduction from Clayton's pay to be the result of a "voluntary" purchase.

Moreover, the amount deducted from Clayton's pay, that being $4,768, was not the amount discussed during the termination meeting. The amount proposed by the employer and agreed to by Clayton (voluntarily or not) was $3,874. How can the purchase be voluntary when the employer unilaterally changed the amount of the purchase? And to further muddy the waters, the evidence at the hearing established the employer overcharged Clayton for his use of the van. The employer charged him for more than 30 commutes that he did not make. The evidence established the employer charged Clayton for trips between his home and Saskatoon on days where he was on a job in Moose Jaw. Again, these circumstances do not warrant a finding of "voluntary" purchase within the meaning of the Act.

Based on the foregoing, I do not find it necessary to determine whether Clayton's use of the van can be considered a "purchase" within the meaning of the Act, and if so,

whether such purchase can amount to a purchase "from the employer" because the Company rented the van from a third party. The deduction fails on the "voluntary" aspect before the "purchase" aspect even comes into play.

Although my decision does not turn on it, I also question whether the Company acquiesced to Clayton's personal use of the van once he moved to Saskatoon. Corey, one of the directors of the Company, knew Clayton was driving the van to and from work and chose not to address it. Both Clayton and Corey knew the rules regarding the operation of company vehicles, and yet Corey did not ask Clayton, Graham, or Rob if Clayton was authorized to take the van home. At no time did Corey (who knew Clayton was taking the van home) direct Clayton to leave the van in Saskatoon. As one of Clayton's bosses, Corey ought to have asked the question, at the very least. Had he done so, there might have been a few days of unauthorized use of the van rather than nine months of unauthorized use.

In summary, the Appellants have not established the deduction in the amount of $4,768 from Clayton's final pay was permitted by the Act. If the employer chooses to pursue Clayton for reimbursement for unauthorized use of the company vehicle, they will have to do so elsewhere.

VII. CONCLUSION

The appeal is dismissed, and the Wage Assessment is upheld.

DATED in Regina, Saskatchewan, this 15th day of May, 2023.

Jodi C. Vaughan
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.