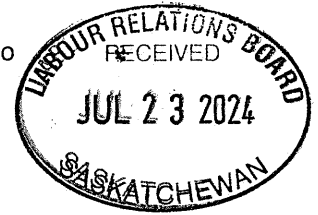


Decision of Adjudicator in the Matter of an Adjudication pursuant to
Sections 2-75 and 4-6 of *The Saskatchewan Employment Act*
LRB File No. 191-23
Wage Assessment No. 1-000701



COMPLAINANT: Ryan Silverson
Represented by Kellie Smith, Employment Standards Officer

RESPONDENTS: Ohana Homes and Construction Inc.
Represented by Christen Johnson, Director; and
Moira Keijzer-Koops, Nychuk & Co.

DATE OF HEARING: July 10, 2024 at 9:30 a.m.

PLACE OF HEARING: Third Floor Board Room
1870 Albert Street, Regina, SK

i. Preliminary Matters

The parties agreed to allow two Employment Standards Officers to observe the hearing. Allysia Finn from the Regina Office and Christine Rusnak from the Yorkton Office were introduced.

ii. The Dispute

There are two issues in dispute, the first is whether the Complainant ("Ryan") was a Corporate Director, and therefore not an employee. The second issue is if Ryan is determined to be an employee, evidence regarding the Wage Assessment issued on his behalf by Employment Standards will be examined.

The Wage Assessment alleges that Ohana Homes and Construction Inc. ("Ohana Homes") owes Ryan \$16,626.06 for unpaid overtime, vacation and sick leave.

iii. Evidence of the Employer

Ms. Keijzer-Koops tabled a binder (black) with 25 tabs. It was marked Exhibit ER1.

Ms. Keijzer-Koops ("Moira") called Christen Johnson ("Christen") and she was affirmed.

Christen provided the following evidence:

She is the founder of Ohana Homes and is the President and CEO.

Ryan was a Director of the company and as such not entitled to overtime. Due to a clerical error made by Ohana Homes's legal firm, Ryan did not appear on the ISC Registry as a Director until August 23, 2023. Nevertheless Ryan was a Director and Shareholder from 2021 onward.

Their business relationship was set up to be for her to provide the investment and Ryan to get the work done.

She worked with Ryan at two other construction companies, before they decided to join together at Ohana Homes in July 2021. She had started the company in April of 2021. Ryan agreed to start as an employee, and then become a Director and Shareholder. Tabs ER2 and ER3 are the legal documents and are signed by Ryan and Christen. Both are dated October 2021.

The understanding was that the two of them as Directors were also employees who would work together to do whatever was necessary to grow the company.

Her responsibilities were to promote sales, meet with clients, find houses, handle administration, oversee office staff of which there were two besides her and Ryan. Ryan was to oversee construction, prepare estimates for renovation costs, schedule trades sub-contractors, get sales, etc.

On April 25, 2021 she and Ryan entered into an Employment Contract for his services. Ryan, as Director of Construction Operations, would receive \$102,000 annual salary. He was provided an advance of \$ 20,000 to finish his own personal kitchen renovations in exchange for photos of it for Ohana Homes to use for advertising. He never followed through on either.

The Employment Contract (ER Tab 5) under point 61 allowed overtime to be worked only with prior written approval from her.

During Ryan's employment period she authorized overtime only once (ER Tab 13). In an email to Ryan on May 3, 2022 she approved overtime solely for the month of May. The approval was for the Longworthy project.

The Employment Contract in point 61 allowed overtime to be banked and used for additional vacation or sick time.

Ryan was to provide detailed timesheets showing the job worked on, and the time spent. He was to turn in the timesheet at the end of each two week pay period. In the beginning he did that but soon filed timesheet(s) late and with no detail.

His timesheets (ER Tab 8) show how she went through them and corrected them. Overtime not approved was removed etc. She went through each of the timesheets with him so he knew unapproved overtime would not be banked nor paid out.

She kept a running record (ER Tab 7) of Ryan's daily activities, vacation and sick leave, overtime hours and activity. Her record shows Ryan is owed 48.31 hours for vacation and 88 hours overtime. Ryan was employed from July 5, 2021 to January 9, 2023.

Ryan was paid bi-weekly. ER Tab 9 contains all the earning statements for his employment period. Sometimes Ryan was paid before he put in his timesheet(s). His cheques were never adjusted because he was on salary. There was never a situation where he was under hours.

The 2021 operation was normal with both looking for work and marketing. Once work was obtained Ryan would make sure it was done. They met every Tuesday morning to get caught up. Nothing went ahead without them both agreeing first.

In March of 2022 Ryan wanted to buy a trailer for his tools etc. She loaned him \$11,000 with the understanding that he would pay it back within two weeks when he got his income tax refund (ER Tab 12). He knew the company's cash flow was poor yet he never paid the money back. She had to deduct it from his pay. He still owes over \$4,000 on it (ER Tab 17).

In December of 2022 he asked for a letter of reference so he could get a loan to refinance his house. When get got that loan he'd pay back Ohana Homes for the trailer advance. That never happened either.

In January of 2023 she ran out of money. Ryan was on sick leave, during which she paid his regular salary, and she could not continue to pay it. She advised him with four weeks' notice he would move from regular salary to a commission by project basis (ER Tab 14).

In February, while on paid leave Ryan put a lien on a house they had renovated and were in the process of selling. This was called the Longworthy House.

This is the house that Ryan under estimated the cost for renovating by 2.5 times.

He was paid salary while she and two other investors put up the money. All lost money except Ryan.

Ryan resigned on February 28, 2023 one week after filing his Employment Standards complaint.

She believes that as a Director and a Shareholder he had no right to overtime (ER Tab 25).

Cross Examination:

Responding to Kellie Smith's questions Christen provided the following evidence:

At the start of Ryan's employment overtime policy was clearly laid out with him. It was to be approved prior to working in writing and taken as time in lieu.

Regarding ER Tab 8 she discussed with Ryan, all the amendments made to the time sheets when she made them.

Regarding the USA, she was aware that Ryan did not sign off on it. See ER Tab 14.

Regarding her spread sheet ER Tab 7, she kept all of Ryan's employment details, he had a copy of it.

Note: At this point Kellie tabled for exhibit a binder (white) with 26 tabs including several sub tabs. It was marked EE1.

She agrees that EE Tab 3 is the Employment Contract she signed together with Ryan.

She recognizes EE Tab 10A as the email she sent to Allysia Finn May 31, 2023.

She acknowledges EE Tab 10C and 10D and 10E, which all demonstrate Ryan never signed the USA.

She recognizes EE Tab 5 as the original ISC registry showing Ryan as an Officer and Shareholder.

She recognizes EE Tab 18 as the letter she sent to Ryan on April 29, 2022. The letter details an overpayment to him in his salary for the first 13 pay periods of his employment. The letter also details repayment. She agrees that matter has been taken care of.

She describes the end of their working relationship as very disappointing. She feels that Ryan took advantage of her and betrayed her trust on many occasions. It ended when on January of 2023 she determined the company could no longer keep him on full salary. In an email sent to Ryan on January 11, 2023 (EE Tab 20) while he was on paid leave, she advises that in four weeks he will be moved from full salary to a commission by project.

She recognizes EE Tab 23 as the Employment Standards Inspection Report sent to her August 14, 2023. As well as EE Tab 24 as the Wage Assessment notice dated November 6, 2023.

She recognizes EE Tab 6 as the revised ISC registry showing Ryan as a Director and Shareholder effective May 31, 2022. Date of the revision is August 23, 2023.

She recognizes EE Tab 11 as Ryan's original time sheets submitted to her and agrees it is her signature on each.

She recognizes EE Tab 14 as Ryan's timesheets she amended. She did not amend them after the fact but rather at the time he submitted.

She recognizes EE Tab 15E. It is her explanation to Allysia Finn regarding her amendment to Ryan's timesheets in EE Tab 14. The email describes the kinds of activities Ryan included as time worked for example golfing with clients and chiropractor appointments.

She recognizes EE Tab 15C, where in the fourth paragraph she indicates to Allysia Finn by email on March 16, 2023 that she has no problem paying out Ryan's overtime and vacation.

She recognizes EE Tab 15D and 17 that pertain to the \$11,000 loan to Ryan for his trailer and that there is \$4,713.08 remaining to be paid back.

Redirect – none

Moira called John Czynea as her last witness and he is sworn. Responding to her questions he provided the following evidence:

He met Ryan through Ryan's employment at #1 Oak. Ryan asked him if he was interested in investing in a reno project. It seemed like a good idea, so he and another investor (Scott) put up money.

Christen found the home on Longworthy and Ryan came up with an estimate for renovation. Only trouble was Ryan was off by a mile on the estimate and we lost money. He was unaware that Ryan had no risk as he was being paid salary by Ohana for this project. He understood Ryan was a Director of Ohana and in investor like the rest in this project.

Cross Examination:

Responding to Kellie's questions John indicated he was unaware that Ryan was drawing a salary for this project. With Ryan having no risk it became a big problem especially with his estimate being 2.5 times too low.

iv. Evidence of the Employee

Kellie Smith called Ryan Silverson as her witness and he was sworn. In response to her questions, he provided the following evidence:

He filed his Employment Standards complaint online.

He started on July 5, 2021 with Ohana Homes. He signed an Employment Contract on April 25, 2021. Point 45 of the contract states upon termination the employee will be paid any outstanding compensation including vacation and overtime. He was not paid out these when he resigned.

Referring to EE Tab 7, Resolution in Writing of the Shareholder, stating him as the Director, he denies signing it. He believes Christen forged his signature digitally. There are no witnesses on the signing page.

Referring to EE Tab 10F, which is an email from himself to Kellie regarding whether he was a Director of Ohana Homes or not, he testifies that he never was a Director and he never signed any documents referred to in that tab.

He worked normally Monday to Friday 7 a.m. or 7:30 a.m. to 3:00 p.m. or 3:30 p.m. A normal 40-hour week. He did work some overtime, longer days or on the weekend, sometimes on a stat, whatever was needed to keep the project going.

All his timesheets were completed weekly and approved by Christen. Christen approved all his overtime.

Referring to EE Tab 11 as all the time sheets he provided to Christen up to his resignation. After he left, she changed them all. See the second page April 11 to 17, her writing is under his recording.

Referring to EE Tab 13 as the original spreadsheet unaltered by Christen while ER Tab 7 is the one she produced after he left. EE Tab 13 shows his overtime accumulation to be 374.25 hours while ER Tab 7 shows it to be 88 hours.

Referring to EE Tab 20, which is an email from Christen to him on January 11, 2023, he acknowledges receiving the email and refers to the second page, #3 near the bottom where Christen says "I am also aware of your accumulated overtime, vacation and sick time up to this point." To this point he has not been paid a cent for overtime.

Referring to EE Tab 12 which are all the Earnings Statements he received along with each cheque. Attached to each cheque was his approved timesheet. He acknowledges the last statement shows he still owes Ohana Homes \$4,713.08 for the trailer loan.

Referring to EE Tab 22 as his last cheque from Ohana Homes dated January 26, 2023. Christen stopped payment and he never did get it or another penny from Ohana Homes.

Referring again to EE Tab 20, Christen's January 11, 2023, email page 2, #3, Christen changed his employment status from employee to sub-contractor. Referring to EE Tab 21, his response was to resign.

He acknowledges receipt of Employment Standards letter of November 6, 2023, to Ohana Homes regarding his Wage Assessment. The letter is EE Tab 24.

Cross Examination:

Ryan provided the following evidence responding to Moira's questions:

Ohana Homes used sub-contractors hired by Christen. He supervised their work. Ohana Homes had a carpenter-helper (Riley) who he supervised and signed his timesheets, which would then be approved by Christen.

Referring to EE Tab 13 (spreadsheet of his overtime, vacation and sick leave) he received an updated version from Christen, every month by email.

Referring to EE Tab 7 and how Christen could have forged his signature, he has no idea how many electronic signatures Christen has to make to make his look different each time on the Shareholder Agreement. He doesn't know how "Doc-a-sign" works.

Referring to the Option Agreement in EE Tab 7, that is not his signature. He never signed any of them.

Redirect:

Referring to ER Tab 24, letter to Christen from Gates Law, apologizing for the clerical error which missed putting Ryan on the ISC registry as a Director, he testified it was not an error because he never signed anything to become a Director.

v. Final Argument

Both parties requested my approval to file written arguments. I agreed with the proviso I would have those arguments emailed to me by 5:00 p.m. Wednesday July 17, 2024.

I then thanked the parties for their presentations and closed the hearing.

As was agreed at the close of the July 10, 2024 hearing, I received written arguments from Ms. Keijzer-Koops and Ms. Smith, by email the afternoon of July 17, 2024.

The argument put forward by Ohana Homes is summarized as follows:

1. Ryan was a Corporate Director, Shareholder and/or Manager of Ohana Homes and as such not eligible to earn overtime.

2. His incredible claim that Ms. Johnson forged his signature on every document except the Employment Contract goes to credibility.
3. He has provided no evidence other than his word that he worked all the overtime and that all corporate documents were forged also goes to credibility.
4. He refused to sign the USA, so why didn't Ms. Johnson forge his signature to that document as well? Also goes to credibility.
5. His considerable claims for overtime pay further detract from his credibility. Evidence shows Ms. Johnson approved overtime only once, that being for the month of May 2022. Given the few projects which Ohana Homes has during his employment, Ms. Johnson does not believe there was enough work to keep him busy full time let alone to bank considerable overtime. At his former employer, he ostensibly oversaw dozens of homebuilding projects every year, while at Ohana Homes he only had four in a year and a half.
6. The Employment Contract at Clause 61, clearly states that any overtime can only be banked and must be approved by the employer. In effect any overtime received can only be used as time in lieu and not paid out.
7. His false claims for overtime which included golfing and other time related tasks without properly filling out his timesheets is improper and amounts to time theft.

Ohana Homes' argument concludes with a request to dismiss the Wage Assessment because Mr. Silverson was not entitled to overtime as a Corporate Director and because there is no creditable evidence to determine if any overtime hours were actually worked. Further if overtime was worked it had not been approved.

Ms. Smith's argument on behalf of the Complainant is summarized as follows:

1. The *Saskatchewan Employment Act* assures that employees are paid as per their Employment Contract.
2. The Act does not apply to employees who perform services that are entirely of a management duty. In accordance with Section 3(4) of the Act's Regulations, Mr. Silverson would have been found exempt from the payment of overtime. However, Ohana Homes and Construction Inc. has approved the payment of overtime to the Complainant. The original time sheets, submitted by Employment Standards in EE Tab 11, were signed by the Employer on the date indicated on the timesheets. The Employer's evidence is that she approved overtime for the Complainant. The Employer has also submitted records of timesheets (ER Tab 8) and of banked overtime and vacation pay. The records matched each other except that Employers were affected with a sharpie and whiteout. Both sets of timesheets were previously signed and approved by the Employer. The Ministry deems the Employees' timesheets more creditable.
3. The Ministry also determined that records for worked overtime kept by the employee were, also on the balance of probabilities, more creditable than the Employers.
4. Section 4 of the Employment Contract states the Employer will pay outstanding vacation and banked time.
5. Ms. Johnson determined the Complainants hours of work and assigned the work. She approved the timesheets and paid the Complainant. She approved overtime, hired and fired staff. Therefore, she was the Employer and Mr. Silverson the employee.
6. Evidence submitted regarding whether Mr. Silverson was a Director of Ohana Homes or not is inconclusive.

7. Mr. Silverson's annual salary of \$102,000 equates to an hourly rate of \$49.04. His evidence shows 249.5 hours of overtime owed and annual vacation of 39.5 hours. He owes Ohana Homes \$4,713.08 from a loan received for purchasing a trailer.

In closing Ms. Smith reiterated that it was the Director of Employment Standards position that the Wage Assessment be upheld and the appeal by Ohana Homes and Construction Inc. be dismissed.

vi. Analysis

Despite his claims otherwise, Ryan Silverson was a Corporate Director and Shareholder of Ohana Homes. His claim of forgery does not stand up to Christen's testimony and submitted documentation.

In the absence of the Employment Contract there would be no application of the *Saskatchewan Employment Act*.

However, Ms. Johnson entered into that contract (EE Tab 3) on April 25, 2021 with a start dated of July 5, 2021 with Ryan Silverson.

The Contract's pertinent points:

6. The Employee agrees to abide by the Employer's rules, regulations, policies and practices including those concerning work schedules, vacation and sick leave, as they may from time to time be adopted or modified.
12. Normal Hours of Work being 40 hours a week.
13. However, the Employee will, on receiving reasonable notice from the Employer, work additional hours and/or hours outside the Employee's Normal Hours of Work, as deemed necessary by the Employer to meet business needs of the Employer.
61. Overtime hours may be worked at the approval of the Employer. These overtime hours can be banked by the Employee and used, with approval for additional vacation and/or sick time.

Ms. Johnson's unchallenged testimony was that prior to Ryan starting work, he was advised that overtime had to be approved in writing prior to it being worked. Further that she only approved overtime once, that being for the month of May 2022.

Ms. Johnson also testified, again unchallenged, that prior to Ryan's employment started, she advised him that his bi-weekly timesheets were to be in on time and to include details of the jobs worked on and time spent on each. She testified that he followed that direction for a while and then the timesheets were filed late and with no detail. That's when she began to change them in his presence, hence the "sharpie" marks in ER Tab 8.

Ms. Johnson listed a number of examples which go to the credibility of Ryan Silverson and were unchallenged.

The first example was when Ryan accepted the \$20,000 advance (see Employment Contract point 52), he told Ms. Johnson that he would use it to renovate his own kitchen and provide photos for Ohana Homes to use for advertising. Neither happened.

Secondly, he borrowed \$11,000 to buy a trailer, promising to repay Ohana Homes in two weeks when he received his income tax refund. He never made a payment, so Ms. Johnson began to deduct from his salary. He owed over \$4,000 at his resignation.

Thirdly, he told Ms. Johnson he'd pay back the \$11,000 loan by refinancing his house, so she wrote him a letter of reference for the bank (ER Tab 5). Mr. Silverson again never followed through with repayment.

Evidence before me includes essentially two sets of books. There is Ms. Johnson's rendition of Ryan's timesheets, with her amendments in sharpie ink, along with her testimony that she made the amendments in Ryan's presence. Also, there is Ms. Johnson's rendition of Ryan's employment history in a spreadsheet that shows (ER Tab 7) Ohana Homes owing Ryan 88 hours of overtime and 48.31 hours vacation.

The second set of books are Ryan's rendition of his timesheets (EE Tab 11). His testimony is that these are the sheets he submitted and that Ms. Johnson accepted and approved them as submitted. Further to his rendition of his ongoing employment history which he testified Ms. Johnson kept and provided him a copy every pay period shows he is owed 394.25 hours over overtime and 39.5 hours of vacation.

Mr. Silverson's employment lasted 18 months. Testimony from Ms. Johnson, again unchallenged, was that during this time frame Ohana Homes had only four jobs, three of which were short term, three-month contracts and one flip house (Longworthy). Her point being there was not enough work to warrant overtime.

vii. Decision

With the signing of the Employment Contract, Ms. Johnson became the "Employer" and Mr. Silverson became the "Employee". She hired him, assigned his work, supervised his work, reviewed and approved his time sheets including overtime work, sick, vacation and other leaves.

The relevant evidence documenting the Employer-Employee relationship for this Employment Standards Complaint is Ms. Johnson's unchallenged testimony that any overtime had to be approved in writing prior to being worked, ER Tab 13, which is an email from Ms. Johnson with a confirmed receipt from Mr. Silverson, approving overtime solely for the month of May 2022.

There is no other evidence of overtime being approved by Ms. Johnson in writing, although ER Tab 7 (Christen's spread sheet of Ryan's work hours) shows overtime in July and December of 2022 and January of 2023, producing a total of 88 hours when converted by 1.5.

Therefore, my decision is that on the balance of probabilities the credibility of Ms. Johnson evidence outweighs the credibility of Mr. Silverson.

The appeal is upheld with the Wage Assessment is amended as follows:

From ER Tab 7 Ryan is owed 48.31 hours annual vacation and 88 hours (after converting by 1.5) for overtime.

$88 \times \$49.04 = \4315.52

$48.31 \times \$40.04 + \2369.12

Total \$6684.64

Annual vacation pay $\$6684.64 \times 3/52 = \385.65

Total \$7070.29

Ryan's outstand debt for the trailer loan advance: \$4713.08

Total owed by Ohana Homes and Construction Inc.: \$2357.21

Dated at Regina in the Province of Saskatchewan, this 23rd day of July, 2024.



Ralph Ermel
Adjudicator