Saskatchewan
Labour Relations Board

ANWAR GROUP INTERNATIONAL LTD and NAVEED ANWAR, Appellants v. JEANNINE POULIN, Respondent and EXECUTIVE DIRECTOR – EMPLOYMENT STANDARDS, GOVERNMENT OF SASKATCHEWAN, Respondent

LRB File No. 171-15; February 19, 2016
Kenneth G. Love, Q.C., Chairperson (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant Employer	Mr. Ammad Anwar
For the Respondent Employee:	No–one appearing
For the Respondent Director of Employment Standards:	Ms. Lee Anne Schienbein

Appeal from a decision of an Adjudicator, LRB File No. 253-14 pursuant to *The Labour Standards Act* – Board reviews provisions of *The Labour Standards Act* and *The Saskatchewan Employment Act.*

Evidentiary findings by Adjudicator – Board reviews and confirms that evidentiary findings are the domain of the Adjudicator as finder of fact. Board reviews findings and determines that there were no errors that would constitute errors of law.

Award of Interest – Board reviews award of interest by Adjudicator – Board finds that authority cited by Adjudicator for award of interest was incorrect – Board varies decision to reflect appropriate authority for award of interest.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Chairperson: This is an appeal against a decision of an Adjudicator appointed pursuant to Section 4-3(2) of *The Saskatchewan Employment Act* , S.S. 2013, c.S-15.1 (the *"SEA"*). In the decision which is being appealed, the Adjudicator varied the decision of the employment standards officer (whose decision was the focus of the appeal) and

assessed the sum of Five Thousand, and Eighty-Five dollars and eighty-eight cents ($5,085.88) as owning to the Respondent. The Adjudicator also awarded interest on the aforesaid sum.

[2] The Applicant in this appeal, Anwar Group International Ltd. (the "Appellant") appealed the Adjudicators decision on August 17, 2015, alleging errors of law in the decision of the Adjudicator.

Facts:

[3] The Adjudicator set out the facts which he found at paragraphs 4-25 of his decision as follows

> *II. FACTS*
>
> *[4] AGI is a Dominion corporation, registered extra-provincially in Saskatchewan. It carries on the business of taxation, travel and tour consulting. Anwar is the sole shareholder, director and officer of AGI.*
>
> *[5] From the evidence, it would appear Ammad Anwar ("Am mad") and Anwar were, at the outset, the sole employees of AGI.*
>
> *[6] Anwar decided he needed clerical assistance and decided to hire a "Bookkeeper/Office Assistant." AGI placed an advertisement for the position on "saskjobs.ca."*
>
> *[7] Poulin applied for the job. Poulin testified that, during her interview, Anwar described:*
>
> *a) AGI's business as attending to clients' bookkeeping, income tax, immigration and tourism needs; and*
>
> *b) her duties as:*
>
> *i) bookkeeping-for approximately two hundred and sixteen (216) clients;*
>
> *ii) entering AR, AP, GST and PST within AGI's computerized accounting system; and*
>
> *iii) answering the telephone.*
>
> *Anwar really does not take issue with this listing of duties. He does, however, add filing and faxing to the list.*

[8] Poulin testified she agreed with Anwar to work, Monday, Tuesday, Wednesday,
Friday and Saturday of each week and that her normal work day would commence at
10:00 a.m. and conclude at 6:00 p.m. It does not appear they discussed her wage. I note, however, the ad said "$12.00 per hour depending on qualifications." I read from Poulin's testimony that she expected that salary rate. On the other hand, Anwar testified that Poulin was not familiar with the software-Simply Accounting-AGI used for bookkeeping. Until she was familiar with not only the software, but their office, it was Anwar's view AGI should pay her the lower rate of ten dollars and fifty cents ($10.50) per hour. Anwar says he proposed this to Poulin and she agreed.

[9] Poulin commenced work on January 16, 2013. She testified it was on that day that Anwar told her that:

a) she was "slow" with her work; and

b) he would pay her ten dollars and fifty cents ($10.50) per hour until she "sped up."

[10] Regardless of which version of the initial salary matter that I accept, it would appear that they had agreed on the ten dollar and fifty cents ($10.50) per hour number.

[11] Poulin worked the agreed upon days until April 12, 2013. On that day, Anwar went on holidays. Poulin testified that she then began to work seven (7) days per week-eight hours per day, with no meal break (she ate her meals at her desk). This continued until May 18, 2013. After that she did not work Sundays. That continued until the end of October 2013. After that, she did not work Saturdays.

[12] Sometime in July 2013, AGI increased Poulin's salary to eleven dollars ($11.00) per hour. AGI reflected this on her cheque dated July 19, 2013.

[13] Poulin testified that AGI never paid her for more than five (5) days per week.
She said Anwar had suggested that he give her days off-he called them "EDOs"-rather than extra pay. Poulin says neither happened.

[14] Poulin testified Anwar paid her five hundred dollars ($500.00) in cash-one
hundred dollars ($100.00) in each of June, July, August, September and October 2013. Poulin testified Anwar told her AGI made these payments because it could not afford to give her a raise. In addition, Anwar gave Poulin eight hundred dollars ($800.00). Poulin testified that she needed furnace oil and asked Anwar for money to buy same.

[15] Ammad testified that he commonly delivered Poulin's pay cheque to her. He said he would give her not only the cheque, but an additional one hundred dollars ($100.00) in cash. Both Anwar and Ammad said AGI paid a total of fifteen hundred dollars ($1,500.00) in cash to Poulin. Anwar testified AGI intended these cash payments not only as an expression of appreciation, but also to cover holiday pay and pay for statutory holidays. AGI did not report these cash payments on the T 4 that AGI prepared. As well, AGI provided no breakdown on the pay stubs giving detail of regular pay, holiday pay, etc. Anwar says it was a mistake not to have done so.

[16] Anwar speaks of the eight hundred dollar ($800.00) payment as a loan. He did deduct that amount for the final pay AGI tendered to Poulin.
[17] On December 4, 2013, Anwar told Poulin she was laid off. He told her he would pay her to December 6, 2013. Poulin did not work December 5 and 6, 2013, but AGI paid her for those days.

[18] Poulin testified that she asked Anwar as many as nine (9) times about being paid for the additional time she worked. Despite such requests, she says AGI made no such additional payment

[19] Poulin testified that AGI did not require employees to keep time records. However, she did keep track of her time on her own. I am satisfied from Anwar's testimony that he was aware Poulin was keeping her own time records. There is inconsistency, however, about where these records were stored. Poulin testified that she prepared the records every month and placed them in a file in Anwar's office. Anwar admits seeing the records for January, February and March, 2013, but says he has not seen records for the remaining months until they were produced for this hearing. Anwar goes further and says that he believes Poulin removed the records for January, February and March, 2013, and altered them. What appears to be clear, however, is that:

- *a) Anwar did not himself create and maintain time records for Poulin; and*
- *b) AGI did not pay Poulin a salary based on time records created by Poulin or anyone for that matter.*

[20] Anwar testified that he had agreed with Poulin that:
a) AGI would pay Poulin bi-weekly;

b) AGI would pay Poulin for forty (40) hours of work per week, regardless of whether she worked less than that number of hours; and

- *c) the salary payment plan would balance out for the weeks where Poulin worked more than forty (40) hours.*

[21] Poulin tendered an audit sheet showing the pay that, based on her time records, she believes is due and owing. According to that document, five thousand and seventy-five dollars and eighty-eight cents ($5,075.88)

remains due and owing from AGI to Poulin. This sum reflects the eight hundred dollar ($800.00) payment hereinbefore referred to, but does not account for the five (5), one hundred dollar payments ($1 00.00), totaling five hundred dollars ($500.00) previously referenced. The T4 statement prepared by AGI reflects the amount showing to be paid in the audit sheet, minus the eight hundred dollar ($800.00) and five hundred dollar ($500.00) payments just referenced.

[22] Both Anwar and Ammad take issue with Poulin's testimony concerning how much time she worked. First, they challenge the veracity of Poulin's records. For example, they say her records show individual(s) working on April 14, 18 and 28, and October 14, 2013, when those were days the office was closed. Second, they point to the two (2) week periods ending November 8, 2013-fifty-six (56) hours worked, November 22, 2013-seventy-two (72) hours worked and December 6, 2013-fifty-six (56) hours worked, and say AGI paid eighty (80) hours' salary for each of those pay periods. Third, they point to Poulin's testimony that no EDOs were earned for January, February and March, 2013. The [sic] further say a variety of other months-November 2013, for example-were simply not busy. Fourth, they point out that Poulin only raised the issue of additional pay in October 2013. Apparently that was when Anwar advised Poulin that he was negotiating the sale of his business and expected same to close December 1, 2013. If a business sale was imminent, Poulin might well expect she would not be able to recoup EDOs. So, it would be logical that she would look for payment instead.

[23] Anwar had prepared his own record of Poulin's time.8 This record was prepared in response to a request-following the complaint (the "Complaint") lodged by Poulin for payroll records from the Ministry of Labour Relations and Workplace Safety (the "Ministry").1o Anwar testified that this record was prepared and based upon Poulin's pay stubs and not time records. AGI did not tender the pay stubs. Anwar testified that they were no longer available as AGI maintained the stubs electronically and, after two (2) years the computer software deletes them. AGI gave no explanation why it did not make copies of the stubs. Poulin takes issue with the accuracy of the employers payroll record.

[24] Poulin tendered her last pay stub. Same:
a) reflects Poulin's pay to be eleven dollars ($11.00) per hour;
b) makes no reference to any holiday pay;
c) refers to payment of an eight hundred dollar ($800.00) loan.

[25] Poulin testified that she did not borrow money and did not sign any loan agreement.

[4] At paragraph [39] of his decision, the Adjudicator also made it clear that where there was conflicting evidence that he accepted and prefered the evidence given by the Respondent as being more credible.

Relevant statutory provision:

[5] Relevant statutory provisions are as follows:

> ***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.*

Employer's arguments:

[6] The Appellant filed a Brief of Law at the hearing of this matter which we have reviewed and considered in our decision. In that brief, the Respondent Employer argues that the Adjudicator did not properly assess the evidence at the hearing in accordance with law. Secondly, the Respondent Employer argues that there was bias on the part of the Director of Employment Standards insofar as the Labour Standards Officer present at the hearing represented the Respondent Employee and not the Respondent Director of Employment Standards.

[7] The Appellant also argued that the Adjudicator erred in his conclusion that the deduction of $800.00 from the Award was justified, but that the deduction of the additional $500.00 claimed by the Appellant was not justified.

Director of Employment Standards arguments:

[8] The Respondent Director of Employment Standards argued that the Adjudicator had not failed to properly review and consider the evidence as argued by the Appellant. Furthermore, the Respondent Director of Employment Standards argued that it was within the purview of the Adjudicator to prefer the evidence of the Respondent Employee to that of the Appellant on the basis of credibility.

[9] The Respondent Director of Employment Standards also argued that there had been no evidence of bias entered into the proceedings and that the decision made it clear that the Labour Standards Officer appeared at the hearing as a representative of the Director of Employment Standards.

[10] The Respondent Director of Employment Standards raised one issue not raised in the Notice of Appeal of the Appellant. That was that in the Director's submission, the Adjudicator had erred in the proper authority for the award of interest made on the wage assessment under adjudication.

Analysis:

The Role of Finders of Fact:

[11] In the case of *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*[1], the Supreme Court dealt with the respective roles of the trier of fact (in this case, the trial judge) and an appellate body overseeing those findings. In this case, the trial judge made certain findings of fact which were reviewed and otherwise interpreted by the British Columbia Court of Appeal. In her decision, Justice (as she was then) McLachlin, speaking for the Court, reversed the decision of the Court of Appeal and restored the judgment of the trial judge.

[12] The headnote to that decision reads, in part, as follows:

> *The Court of Appeal erred in interfering with the trial judge's conclusion on life expectancy. The different conclusions of the trial judge and the Court of Appeal arise mainly from the differing weight they put upon the American study. Although the principle of non-intervention of a court of appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue, this does not change the fact that the weight to be assigned to the various pieces of potentially conflicting evidence is essentially the province of the trier of fact. It was far from clear what weight the study should carry and, in the absence of a palpable or overriding error, the Court of Appeal should not have intervened. Further, the trial judge did not fail to consider, or misapprehend, some obvious feature of the evidence. The trial judge carefully considered the evidence of all the experts on the question of life expectancy, as well as the study. His concerns with respect to the applicability of that study, which led him to discount it to a greater degree than the Court of Appeal would have, do not support a conclusion that he ignored the study, in the absence of a demonstration that his concerns were totally without foundation. Finally, it was open to the trial judge to accept the evidence of the appellant's main expert witness, despite the adverse inference drawn from the appellant's counsel's failure to call the treating neurological pediatrician that the latter's evidence as to life expectancy would not favour the appellant.* ***The trier of fact may accept such evidence as he finds convincing, and an appellate tribunal ought not to interfere unless it is persuaded that the result amounts to a palpable or overriding error.*** [emphasis added]

[1] [1994] SCR 114, CanLII 106 (SCC)

Questions of Fact:

[13] This Board does not sit in appeal of decisions of Adjudicators. Our jurisdiction is restricted to review of errors of law. Accordingly our ability to review findings of fact made by the Adjudicator is extremely restricted.

[14] This Board has classified its jurisdiction over errors of law into three areas, each with its own standard of review[2]. The first of those is questions of law which are reviewed on a standard of correctness. The second is questions of mixed fact and law which are reviewed on the standard of reasonableness. The Third is questions of fact which may be considered errors of law for which the standard of review is reasonableness.

[15] The majority of the issues raised by the Appellant in this appeal relate to questions of fact or evidentiary findings by the Adjudicator. Our review of questions of law arises from the Court of Appeal for Saskatchewan's decision in *P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission*[3]. In that decision, the Court of Appeal stated that "findings of fact may be reviewable as questions of law where the findings are unreasonable in the sense that they ignore relevant evidence, take into account irrelevant evidence, mischaracterize relevant evidence, or make irrational inferences on the facts."

[16] In his decision, the Adjudicator carefully and fully outlined the witness testimony he heard and his findings arising out of that testimony. Unless there was an error such as that described by the Court of Appeal in *P.P.S. Professional Salon Services Inc.* we have no jurisdiction to review findings made by the Adjudicator in his decision.

[17] The Appellant did not argue that the findings of the Adjudicator breached the standards set out in *P.P.S. Professional Salon Services Inc.*, nevertheless, we have reviewed the findings and determinations made by the Adjudicator with these standards in mind. We find that the findings made by the Adjudicator were not unreasonable as he was in the best position as the finder of fact to make those determinations. We were not pointed to, nor did we see any relevant evidence which was ignored by the Adjudicator, nor did he take into account irrelevant evidence.

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[2] *Barbara Wieler v. Saskatoon Convalescent Home* [2014] CanLII 76051 (CanLII)
[3] [2007] SKCA 149 (CanLII)

[18] An argument may have been made out, but was not made, by the Appellant that the Adjudicator had mischaracterized the evidence related to timesheets and the $500.00 payments made to the Respondent Employee. However, our review of these conclusions reached by the Adjudicator, in the circumstances of the case, and the evidence presented, were reasonable.

[19] Nor, did the Adjudicator make any irrational inferences on the facts.

[20] The Appellant argued that the Adjudicator erred in his determination that he preferred the testimony of the Respondent Employee over that of the witnesses for the Appellant. This determination was for the Adjudicator to make as he was in the best position to make such determination in that he heard the evidence of the parties and saw their demeanor while testifying.

[21] It is not unusual for a finder of fact to be called upon to assess and weigh conflicting evidence from parties appearing before them. Making determinations such as this is their primary responsibility as the finders of fact in this process. Those findings cannot lightly be disturbed or interfered with by this Board and in this case I find no reason to do so. No palpable or overriding error has been demonstrated.

Was there bias on the part of the Adjudicator?

[22] The Appellant argued that the Ministry of Labour Standards (referred to as the "department of Labor Standards" by the Appellant in his brief) was biased from the start. This allegation related to the request by the Ministry for employment records from the Appellant followed closely by a demand to pay. Secondly, the Appellant argued that the Labour Standards Officer represented the Employee at the hearing before the Adjudicator not the Director of Labour Standards.

[23] The Board dealt with the issue of bias in its decision in *Koskie v. Child Find Sask. Inc.*[4] In that case the Appellant argued that there was a reasonable apprehension of bias arising as a result of an application made by the Appellant to compel the Adjudicator to issue her decision. That case summarized the test to be applied in respect to allegations of bias.

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[4] [2015] CanLII 90523 (SKLRB)

[24] This case is much simpler than the *Koskie* case. Here there is no conduct on the part of the Adjudicator to which a reasonable apprehension of bias, on the part of the Adjudicator, may attach. The Adjudicator is an independent person appointed by this Board under the statutory scheme for resolution of unpaid wages by employees. In *Elaine Germaine v. Saskatchewan Government Insurance*[5], our Court of Appeal said:

> *Finally, there must be serious grounds upon which to base a conclusion of bias, given that there is a strong presumption of judicial impartiality: S. (R.D.) supra; Arsenault-Cameron v. Prince Edward Island, 1999 CanLII 641 (SCC),[1999] 3 S.C.R. 851, Terceira v. Labourers International Union of North America, (2014), 2014 ONCA 839 (CanLII), 122 O.R. (3d) 521 (C.A.).*

[25] The allegations by the Appellant are insufficient in my judgment to constitute any reasonable apprehension of bias on the part of the Adjudicator given his role and responsibilities in respect of the Adjudication and having regard to the presumption of impartiality outlined in *Germaine*. There was no evidence to show any reasonable apprehension of bias on the part of the Adjudicator.

Did the Adjudicator Err in his Award of Interest?

[26] The Respondent Director of Employment Standards argues that the Adjudicator relied upon incorrect statutory authority for the award of interest made by him. At paragraph [36] of his decision, the Adjudicator says:

> *[36] I have set out the various provisions of the LSA[6] and SEA[7] that relate to the matters at issue herein. The LSA was repealed effective April 29, 2014, and replaced with the SEA. The LSA was the governing legislation in effect while AGI employed Poulin. However, I am satisfied that both my analysis and conclusions in this matter would be the same, regardless of which legislation applies. (footnotes added for clarity)*

[27] Having correctly determined that the *LSA* was the governing legislation, the Adjudicator went on at paragraph [58] c) to award interest based upon the *LSA* and section 40 the regulations thereunder.

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[5] [2015] SKCA 84 (CanLII)
[6] *Labour Standards Act* R.S.S. 1978 c. c. L- 15.1 (now repealed)
[7] *The Saskatchewan Employment Act*, S.S. 2013 c. S-15.1

[28] The Respondent Director of Employment Standards argues that Section 40 of the regulations is inapplicable in this case as it deals only with enforcement of a certificate based on a third party demand. Furthermore, the Director points out that the *SEA* does not provide for interest to be awarded on an appeal of a wage assessment.

[29] The Director of Employment Standards, however, acknowledges that the *LSA,* in Section 62.2(2)(a) does allow an adjudicator to award interest at a rate prescribed in the regulations. Section 31 of those regulations provides that the rate of interest published pursuant to section 4 of *The Pre-Judgment Interest Act*[8].

[30] Accordingly, the decision must be varied by substituting the following for paragraph [58] c):

> *[58] c) order, pursuant to Section 62.2(2)(a) that AGI and Anwar to pay interest on the sums owing from December 6, 2013, at the rate of interest prescribed pursuant to Section 31 of The Labour Standards Regulations, 1995, being the rate of interest published pursuant to Section 4 of The Pre-Judgment Interest Act.*

[31] The balance of the Appeal is dismissed.

DATED at Regina, Saskatchewan, this **19th** day of **February, 2016.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[8].S.S. 1984-85-86 c. P-22.2