Saskatchewan

Labour

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June 27, 2007

REGISTERED

Erin L. Hubich
23 Spiess Bay
REGINA SK S4R 7N9

Dear Sir/Madam:

Re: Labour Standards Wage Assessment Appeal Hearing

Enclosed is the adjudication decision with respect to the above.

If you are not satisfied with the decision, relevant sections of *The Labour Standards Act* and regulations are quoted for your information on the reverse side of this notice.

Yours truly,

Registrar of Appeals
The Labour Standards Act

cc: Loretta Jennings, (306) 787-2435

DECISION OF ADJUDICATOR
IN THE MATTER OF A HEARING
PURSUANT TO s.s. 62.1 and 62.2 OF
THE LABOUR STANDARDS ACT, R.S.S. 1978, c. L-1 (as amended)

COMPLAINANT:	Erin L. Hubich
RESPONDENT:	Director, Labour Standards Branch Represented by Loretta Jennings, Labour Standards Officer and Shelley Burwood, solicitor 626385 Saskatchewan Ltd. o/a Poverino's Pasta Grill Peter Tudda, Director
DATE OF HEARING:	March 26, 2007 and May 22, 2007
PLACE OF HEARING:	3rd Floor Boardroom 1870 Albert Street Regina, Saskatchewan

I. INTRODUCTION

On March 26, 2007, the hearing was convened at Regina, Saskatchewan to determine some procedural matters and to set a date for the hearing to be conducted. The Appellant, Erin J. Hubich (also referred to as "the employee), represented herself with the assistance of Larry Hubich. Ms. Loretta Jennings, Labour Standards Officer, represented the Director, Labour Standards Branch. Mr. Curtis Onishenko appeared as solicitor for the Respondent, 626385 Saskatchewan Ltd. o/a Poverino's Pasta Grill and the Respondent, Peter Tudda (collectively also referred to as "the employer") by telephone. The parties agreed that the hearing be held on May 22, 23 and 24, 2007 in Regina, Saskatchewan concurrently with *Hay et. al.* v. *626385 Saskatchewan Ltd. o/a Poverino's Pasta Grill and Peter Tudda.*

On May 15, 2007, Mr. Onishenko sent a letter to the Registrar of Appeals to my attention advising that his firm was withdrawing from representation of Mr. Peter Tudda.

On May 22, 2007 this matter was reconvened in Regina, Saskatchewan. Ms. Hubich appeared on her own behalf, assisted by Mr. Larry Hubich. Ms. Loretta Jennings represented the Director, Labour Standards Branch together with Shelley Burwood, solicitor. The employer did not appear at the hearing and did not send a representative. Being satisfied that the employer had notice of the hearing, the hearing was conducted in the employer's absence.

Two wage assessments were issued by the Director. The first wage assessment, issued on January 4, 2007, was replaced by a second wage assessment, issued on February 16, 2007. It is the second wage assessment that is before me. The wage assessment, prepared pursuant to s. 60 of *The Labour Standards Act* R.S.S. 1978, c. L-1 (as amended) (herein "the *Act*"), is for $764.62.

II. THE DISPUTE

Does the wage assessment include all of the wages to which the employee is entitled?

III. FACTS

i. Evidence For Erin J. Hubich

Ms. Hubich calculated the wages owed to her by the employer as $1,172.36.

Ms. Hubich was employed as a server at the employer's restaurant. Her first day of work was November 2, 2005 and her last day of work was October 28, 2006. During the months of September to April, inclusive, Ms. Hubich was a student at the University of Regina, taking two or three classes a semester. Attending classes did not conflict with her work hours and her classes were selected around her work schedule. The restaurant did not open until 11 a.m. and she took her classes in the morning when the restaurant was closed.

The employer posted a schedule for the workers one week in advance stating start times. When the employees reported to work, they went into the lounge and sat at a table. Employees were individually asked to start work. The actual time that the employee started to work was written down on a time sheet and the employee was paid from the time the employee actually started work and not from the time that the employee reported for work. Ms. Hubich testified that she always reported to work on time, as scheduled, and sat ready and willing to work until asked to commence work. No minimum call out as required by s. 2(4)and (5) of *The Minimum Wage Regulations* RSS c. L-1 Reg 8, was paid to the employees.

Ms. Hubich entered all her scheduled hours on a calendar. She then wrote the actual hours that she worked on the same calendar. Her record keeping allowed her to recreate her work hours and her scheduled work hours. Ms. Hubich entered into evidence as Exhibit A-1 a summary of her hours of work, her scheduled start time, the times for which she was did not receive pay to which she was entitled, and the amounts that she was shorted on her pay cheques. She summarized the sums she claimed as due and owing to her as follows:

Total amount owed in 3 hr (sic) minimum and improper start times = $679.73

Total amount owed for unpaid wages b/w Nov 1-9th = $111.30
Total amount owed for unpaid overtime = $52.16
Total amount owed for unpaid public holiday pay = $186.52
Total amount owed for unpaid annual holiday pay @ 3/52 = $30.35
Total amount owed for unpaid termination pay = $112.30

Total amount owed to me from Poverinos = $1,172.36

ii. Evidence For The Director, Labour Standards Branch

Ms. Jennings based the wage assessment on the employer's payroll records and the evidence provided to her by Ms. Hubich. She introduced her hand written calculations of the times that Ms. Hubich worked into evidence as Exhibit R-1. The employer's payroll records were introduced into evidence as Exhibit R-2. The audit of Ms. Hubich's hours of work and pay was introduced into evidence as Exhibit R-3. The audit provides for the same overtime pay, public holiday pay and termination pay as is set out in Exhibit A-1. The audit also assessed for the improper start times when Ms. Hubich reported to work on time and was given a delayed start time.

The main discrepancy between the audit and Exhibit A-1 is caused by the manner in which the minimum call out was calculated. Pursuant to s. 2(7) (a) of *The Minimum Wage Regulations*, the audit includes payment of the minimum call out only for the months of May to August, inclusive, and does not provide for the payment of the minimum call out for the months of September to April, inclusive, being the months in which Ms. Hubich attended university.

VI. ARGUMENTS

Ms. Hubich argues that s. 2(7) (a) of *The Minimum Wage Regulations*, does not apply to a university student. If the definition is intended to include university students, she argues, the Regulations would have said so. The words "school student" she assert, refer to students attending secondary school. The list set out in s. 2 (7) includes other jobs that are related to elementary or secondary schools and makes reference to *The Education Act, 1995* SS c. E-0.2.

She pointed to the definition of school and pupil contained in *The Education Act, 1995* and argues that these definitions should be referenced in interpreting s. 2 (7) (a).

Ms. Burwood argues that the main issue to be determined is whether the words "school student" used in s. 2(7)(a) of *The Minimum Wage Regulations* includes a university student. The words "school student" and "regular attendance" are not defined in the Regulation. The definition of "school" in the Merriam-Webster dictionary includes university, she states. She also argues that the plain meaning of the word "school" includes university. Section 23(2) of *The Labour Standards Regulations, 1995* SS c. L-1 Reg 5, defines "full-time student" as a person who is registered for at least 60% of a full course load as a pupil within the meaning of *The Education Act* or as a student at a university, regional college, private vocational school or the Saskatchewan Institute of Applied Science and Technology. Given all of this, Ms. Burwood argues that the words "regular attendance" in s. (2)(7)(a) of *The Minimum Wage Regulations*, mean that the student is taking at least 60% of a school load and the words "school student" include university students.

VII. ANALYSIS

Ms. Hubich argues that she should receive the minimum call out pay specified in s. 2 of *The Minimum Wage Regulations* for the months in which she was taking university classes. To determine how Ms. Hubich should have been paid for minimum call outs, I must first determine the meaning of s. 2(7) (a) of *The Minimum Wage Regulations.* The relevant portions of s. 2 read as follows:

> (4) Subject to subsection (7), for the period commencing on September 1, 2005 and ending on February 28, 2006, every employee who is required to report for duty, other than for overtime, shall be paid a minimum sum of $21.15, whether or not the employee is required to be on duty for three hours on that occasion.
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> (5) Subject to subsection (7), for the period commencing on March 1, 2006 and ending on February 28, 2007, every employee who is required to report for duty, other than for

overtime, shall be paid a minimum sum of $22.65, whether or not the employee is required to be on duty for three hours on that occasion.

(7) Subsections (4) to (6) do not apply to an employee who is:
(a) a school student in regular attendance during the school term;
(b) a janitor;
(c) a caretaker;
(d) a building cleaner;
(e) a noon-hour supervisor employed by a board of education as defined in *The Education Act, 1995* or by a conseil scolaire as defined in that Act; or
(f) a person employed to operate a vehicle that is:
(i) registered pursuant to *The Vehicle Administration Act;* and
(ii) used as a school bus for the transportation of students to and from a school as defined in *The Education Act, 1995.*

No definition of the phrase "school student" or "regular attendance" is set out in the Regulation.

Ms. Burwood asks me to consider the definition of full time student contained in s. 23(2) of *The Labour Standards Regulations, 1995.* Section 23 specifically referenced s.45.1 of the Act and s. 24 to 26 of that Regulation. The definition is restricted by its wording to specific sections and no intent is shown in this *Regulation* or *The Minimum Wage Regulations* that the definition apply to s. 2 (7)(a) of *The Minimum Wage Regulations.* If the Legislature intended the definition used in *The Labour Standards Regulations, 1995*, to be incorporated into *The Minimum Wage Regulations*, the Legislature would have so specified. The meaning of s. 2 (7)(a) of *The Minimum Wage Regulations* must therefore be determined by application of the principles of statutory interpretation.

Section 10 of *The Interpretation Act, 1995* S.S. c. I-11.2 provides that:

> Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects.

The Supreme Court of Canada considered the approach that should be taken in interpreting labour standard legislation in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, 1992 CanLII 102

(S.C.C.), a case that involved interpreting the Ontario labour standards legislation. Section 10 of the Ontario *Interpretations Act* R.S.O. 1980, c. 219 is worded similarly to s. 10 of the Saskatchewan Interpretations Act. The Court found that:

> Section 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination. . . .
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> . . . Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.

In interpreting s.2(7)(a) I must favour the meaning that extends the protection of the legislation to as many employees as possible.

The rules of statute interpretation provide that the words should be given their plain and ordinary meaning within the context of the statute. Where there is more than one plain and ordinary meaning of a word, the meaning to be used to interpret the statute must be determined from the meaning of the statute as a whole. Section 7 confers a right on employees that entitles them to be paid a minimum amount of wages when they are called to work. In this instance, s. 2(7)(a) is part of a list that includes two other classes of employees that would only be employed by a school as defined in *The Education Act, 1995.* The list of exceptions enumerated in s. 2(7), other than s. 2(7) (a), reference specific jobs that by their nature may not require an employee to be on the job for three hours. For example, by its nature, the job of noon-hour supervisor employed by a board of education, would only last for one hour at a time. To require an employer to pay a minimum sum for a call out to this position would be unfair to the employer. Why the Legislature has determined that students should also be exempt from the minimum call out payment is less clear. Presumable, the Legislature wants to permit students to

be able to work after school without the employer being required to pay for hours of work that the student may not have been available to work because he or she is attending school.

Section 7(2)(a) makes reference to "school students" and not just "students". The plain meaning of the word student is broad enough to include students in high school or attending a post-secondary institute such as university. However, the section refers to "school students", which has a more restricted meaning. The word "school" is being used as an adjective to modify the word "student". Although the word "school" can be taken to be broad enough to include university or other post-secondary institutions, "school" is generally used to refer to a primary or secondary school. This is reflected in other Saskatchewan legislation. *The Education Act*, which governs primary and secondary education, refers to schools. Institutes of higher learning are generally referred to as colleges or universities or technical schools. This distinction is made in s. 23(2) of *The Labour Standards Regulations, 1995*. Ordinarily, the words "school student" would not be used to describe someone who attends a post-secondary student. Rather such a student would be described in reference to the learning institute that student attends. For example, someone attending university would be called a university student. The Supreme Court of Canada has directed me to use the interpretation that extends the protection of the *Act* to as many employees as possible. I find that the phrase "school student" means a student who attends primary or secondary school.

Ms. Hubich attended university during the course of her employment. Section 2(7)(a) does not apply to her and she is entitled to be paid the minimum call out amount for the months during which she attended university. I accept Ms. Hubich's calculation of the wages owed to her except for her calculation of annual holiday pay. She is entitled to annual holiday pay at the rate of 3/52 of $1,142.01, being $65.89. I find that Ms. Hubich is entitled to wages as follows:

Wages for minimum call out	$ 679.73

Unpaid wages for November 1 to 9, 2006	$ 111.30
Unpaid overtime	$ 52.16
Unpaid public holiday pay	$ 186.52
Unpaid annual holiday pay	$ 65.89
Unpaid pay in lieu of notice	$ 112.30
Total	$1,207.90

VIII. CONCLUSION

The appeal is allowed. The employer, 626385 Saskatchewan Ltd. o/a Poverino's Pasta Grill, shall pay wages in the amount of $1,207.90 to the employee, Erin J. Hubich.

Dated at the City of Regina, in the Province of Saskatchewan, this 22nd of June, 2007.

Maureen S. Dumonceaux

The Parties are hereby notified of their right to appeal this decision pursuant to section 62.3(l) of The Labour Standards Act.

s. 62.3 (1) An employer, a corporate director, an employee named in a wage assessment or the director on behalf of employees may, by notice of motion, appeal a decision of the adjudicator on a question of law or of jurisdiction to a judge of the Court of Queen's Bench within 21 days after the date of the decision.

(2) An employer, a corporate director, an employee named in a wage assessment or the director on behalf of employees may, with leave of a judge of the Court of Appeal, appeal the decision of a judge of the Court of Queen's Bench on a question of law or of jurisdiction to the Court of Appeal within 30 days after the date of the decision.

(3) Unless otherwise ordered by a judge of the Court of Queen's Bench, or in the case of an appeal taken pursuant to subsection (2), a judge of the Court of Appeal, enforcement of the decision of the adjudicator or the decision of the judge of the Court of Queen's Bench is not stayed by the appeal.

(4) The record of an appeal consists of:
(a) the wage assessment;
(b) the notice of appeal served on the registrar of appeals;
(c) the written decision of the adjudicator,
(d) the notice of motion commencing the appeal to the Court of Queen's Bench; and
(e) in an appeal to the Court of Appeal, the decision of the Court of Queen's Bench and the notice of appeal to the Court of Appeal. 1994, c.39, s.33.