JUDY'S KORNER TAVERN, Appellant v. KELI SAMOLESKI, Employee and EXECUTIVE DIRECTOR, EMPLOYMENT STANDARDS, MINISTRY OF LABOUR RELATIONS AND WORKPLACE SAFETY, Respondent

LRB File No. 189-14; November 19, 2014

Chairperson, Kenneth G. Love, Q.C., (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Appellant:	Ms. Elaine Anderson
For the Employee:	No-one appearing
For the Director of Employment Standards:	Ms. Lee Anne Schienbein

Employment Standards – Employee given raise and additional responsibility while owner on leave from business. Upon owner's return from leave from business, dispute arose over owner proposing to reduce employee's wages to former level.

Employee made application to Director of Labour Standards. Director issues a wage assessment for wages due. Employer appeals Director's wage assessment to adjudicator appointed under the former *Employment Standards Act*.

Adjudicator conducts hearing and makes a determination upholding wage assessment. Adjudicator determines that employee did not perform services that are entirely of a managerial character and was not, therefore, excluded from the benefit of the legislation. Employer appeals decision to the Board.

Section 3(4) of *The Labour Standards Regulations*

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: This is an appeal from the decision of an adjudicator appointed pursuant to Section 4-3 of *The Saskatchewan Employment Act* (the *"SEA"*). The Appellant appeals the decision of the adjudicator upholding a wage assessment

(the “wage assessment”) made by the Director of Employment Standards, which decision is dated June 23, 2014.

Facts:

[2] The following facts were found by the Adjudicator in his decision.

[3] The employee, Keli Samoleski, was employed by the Appellant, Judy’s Korner Tavern, in Frontier, Saskatchewan. The complainant had been employed by the Appellant for some years prior to the making of the wage assessment. The Adjudicator noted that the parties agreed that the employee’s last day of employment was June 13, 2013.

[4] In June of 2012, the principal of Judy’s Korner Tavern, Ms. Erickson, the adjudicator found, had promoted the employee from an employee to a manager. At that time, the employee’s wages were increased from $12.00 per hour during the week and $16.00 per week on the weekends to $16.00 per week for all of the hours that she worked. Ms. Erickson testified that this was done because she was requiring some medical assistance as well as that she was needed to help with her mother.

[5] In June of 2012, there were three (3) employees in total working in the business, as well as Ms. Erickson. The adjudicator found that following the promotion of the employee, there was a manager (the employee) and two additional employees. In September of 2012, one (1) of the two (2) other employees quit, leaving just the employee and one (1) other employee working.

[6] During the course of her employment, both before and after June 2012, the employee did bank deposits, shift scheduling for the other employees, ordered food, liquor and beer and acted as a bartender. The employee who was on the closing shift would decide when to close each night.

[7] In June of 2013, the employee requested leave from Ms. Erickson in order to have surgery. At that time, she was advised that upon her return from leave, that her wages would be reduced to the former wage level of $12.00 per hour during the week and $16.00 per

hour on weekends. Ms. Erickson advised her that she herself would be returning to work as the manager, as the bar was not doing well financially.

[8] The employee was not able to hire or fire employees. She did not do employee evaluations. She was independent in the same manner as other employees, but did not decide on levels of remuneration for herself or for the other employees. Nor did she participate in budgeting. She had no direction or control over the other employees and was required to run the business the way Ms. Erickson wanted the business to be run.

[9] In July of 2013, prior to her return to work, the employee and her husband were in the business as patrons. During that visit, there was a discussion with Ms. Erickson regarding her return to work and the amount she would be paid upon her return. There was some negotiation, but in the final result Ms. Erickson was unwilling to increase the employee's wages above the former wage level of $12.00 per hour during the week and $16.00 per hour on weekends. The discussion became heated and the employee and her husband left the premises.

[10] The employee took the position she was fired at the time due to the changes to her wages and that she and her husband were asked to leave the premises. The Adjudicator also noted that a credit application made by the employee on November 26, 2012, she described herself as a part-time bartender, not as a manager.

The Adjudicator's decision:

[11] After finding the facts as noted above, the adjudicator considered the provisions in the *SEA* and the former *Labour Standards Act* which define an employee who performs services that are entirely of a managerial character, which exempts such managers from the provisions of the statute.

[12] In determining if the employee was a manager, the Adjudicator reviewed *Westfair Foods Ltd. v. Saskatchewan (Director of Labour Standards),*[1] *Elcan Forage Inc. v. Weiler,*[2]

[1] [1995] S.J. No. 620
[2] [1992] 102 Sask. R. 197

Machtinger v. HOJ Industries Limited[3] and *Michael Hill v. Ronert C. Begg, Keith O'Shea, and Mr. Mechanic Sales and Service Ltd.*[4]

[13] From those cases, the Adjudicator determined that the fundamental indicia for determination of whether an employee's services are "of a managerial character", while not intended to be all inclusive were:

1. The supervision and direction of other workers;
2. The discipline of subordinates, individually or as part of a management team;
3. Evaluating the performance of subordinates;
4. Hiring and promoting of subordinate staff;
5. Some independence and discretion in performing assigned duties;
6. Supervision of a collective agreement, where the work force is unionized;
7. Negotiating remuneration individually rather than collectively;
8. Level of remuneration, vis a vis, non-managerial staff; and
9. Participation in carrying out the employer's budgets and performance requirements.

[14] The Adjudicator concluded that the criteria were not necessarily of equal weight, but that the functions of supervision and the right to discipline are of fundamental importance and were therefore of a greater significance.

[15] Based upon his evaluation of these criteria, the Adjudicator concluded that the employee did not perform services that were entirely of a managerial character. With a minor adjustment, he confirmed the wage assessment issued by the Director.

Appellant's arguments:

[16] The Appellant raised the following questions in her Notice of Appeal:

1. The Adjudicator erred by incorrectly applying the decision of Klebec, J.[5] in *Westfair Foods Ltd. v. Saskatchewan (Director of Labour Standards)* (1995) S.J. No 620 and failed to apply prior authorities.

[3] [1992] 1 S.C.R. 986
[4] [1982] Q.B. No. 686/86
[5] As he was then.

2. The Adjudicator erred in applying the indicia of “managerial character” and failed to acknowledge the Complainant’s participation in carrying out the Employer’s budgets and performance requirements.
3. The Adjudicator incorrectly reasoned that knowledge and intent of the Employer are indicia of “managerial character.” (page 12)
4. The Adjudicator erred in making a determination of constructive dismissal based on his finding of a “unilateral reduction in salary from $16.00/hour to $12.00/hour” despite testimony from both parties that the Employer did not propose to reduce wages for weekend hours, which comprise a significant portion of working hours in the respective workplace.
5. The Adjudicator made unreasonable inferences of fact which amount to an error in law.
6. Any other grounds that this board may allow.

[17] The Appellant provided a written argument which we have reviewed and found helpful. In her argument, the Appellant concentrated upon items 1-5 above.

[18] In respect to item 1 above, the Appellant argued that the Adjudicator applied the test set out in *Westfair* incorrectly. She argued that the Adjudicator applied case specific characteristics of the test to a unique fact situation. The Appellant argued that the determination of whether an employee is a manager is a question of fact, the correct test to be applied is a question of law.

[19] In respect of item 2, the Appellant argued that the Adjudicator had found facts in his decision which he misapplied to the proper test. The Appellant argued that the Adjudicator did not properly consider the employees actual duties in reaching his conclusion.

[20] The Appellant argued in respect of item 3 that the Adjudicator erred in making the following statement:

> *Also, I cannot reconcile the employer paying the employee overtime (when overtime was worked) if she was considered to be a manager.*

[21] The Appellant argued that the above statement was both difficult to understand and that the reasoning was not supported by any legal analysis. That, the Appellant alleged, amounted to an error of law.

[22] In respect to item 4, the Appellant argued that the Adjudicator failed to provide any support for his conclusion that the reduction in the employee's wages from $16.00 per hour to $12.00 per hour represented a constructive dismissal of the employee. The Appellant argued that the Adjudicator should have provided an analysis of the law related to constructive dismissal and argued that such analysis would have lead to a different conclusion than that reached by the Adjudicator.

[23] In respect to item 5, the Appellant argued that the Adjudicator made unreasonable inferences of fact which amounted to an error in law. In support, the Appellant cited *P.S.S. Professional Services v. Saskatchewan (Human Rights Commission).*[6]

Director's Arguments:

[24] The Director also provided a written argument which we have reviewed and found helpful. In the Director's analysis, the grounds of appeal where considered under three (3) headings. These were:

1. Whether the Adjudicator reasonably determined that Ms. Samoleski's employment was not managerial and that she was entitled to overtime?

2. Whether the Adjudicator reasonably concluded that Ms. Samoleski was constructively dismissed?

3. Whether issues #1 & 2 are questions of mixed law and fact such that the appropriate standard of review is reasonableness or if they are questions of law such that the appropriate standard of care is correctness.

[6] [2007] SKCA 149 (CanLII), 302 Sask. R. 161

[25] Dealing with the issue raised in heading 3 above, the Director argued that neither issue 1 or 2 were questions of law, but rather were questions of mixed law and fact. As such, the Director argued that the appropriate standard of review of the adjudicator's determinations was the standard of reasonableness. Furthermore, with respect to the standard of review for errors of fact which are reviewable as errors of law, the Director also argued that the appropriate standard of review is reasonableness. On this standard of review, the Director argued that the decision was both reasonable and defensible.

[26] In respect of heading 1, the Director argued that the Adjudicator reasonably determined that the employee's position was not entirely of a managerial character. In support the Director relied upon a recent decision by Laing J. in *Balzer v. Federated Co-operatives Limited, McKechney and Gust.*[7] The Director argued that the employee in this case did not satisfy the criteria identified by the Court in that case.

[27] In respect of heading 2, the Director argued that a unilateral change in the basic terms of an employee's employment may constitute constructive dismissal. The Director argued that there was no discussion or negotiation regarding the reduction in wages which was unilaterally imposed by the Appellant. In support, the Director cited *Farber v. Royal Trust Co.*[8]

Relevant statutory provision:

[28] Relevant statutory provisions are as follows:

> *The Saskatchewan Employment Act*
>
> ***Right to appeal adjudicator's decision to board***
>
> ***4-8****(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.*
>
> *(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to the board on a question of law.*
>
> *(3) A person who intends to appeal pursuant to this section shall:*
>
> *(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator;*

[7] [2014] SKQB 32
[8] [1997] 1 S.C.R. 846

and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;

(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.

The Labour Standards Regulations

3(4) Except for Sections 2-15 and 2-16, Subdivisions 2 and 3 of Division 2 of Part II of the Act do not apply to an employee who performs services that at entirely of a managerial character…

Analysis:

The Standard of Review:

[29] In *Barbara Wieler v. Saskatoon Convalescent Home,*[9] the Board considered the standard of review to be applied by the Board in respect of appeals from adjudicators appointed pursuant to *The Occupational Health and Safety Act, 1993*. The facts in that case, like this case,

[9] LRB File No. 115-14

arose prior to the proclamation of *The Saskatchewan Employment Act*, (the *"SEA") which* consolidated the adjudication and appeals processes under *The Occupational Health and Safety Act, 1993* and *The Labour Standards Act* (the "former *Acts*").

[30] This Board now[10] reviews decisions made by adjudicators pursuant to the former Acts pursuant to Section 4-8 of the *SEA*. In *Wieler*, the Board made the following determination regarding the standard of review:

> *[12] The first question for the Board to consider is what the applicable standard of review in this matter is. For the reasons which follow, we find the applicable standard of review of questions of law is correctness, for questions of mixed fact and law, reasonableness, and for questions of fact which may be considered errors of law, reasonableness.*

[31] In *Housen v. Nikolaisen,*[11] the Supreme Court of Canada described the different categories as follows:

> *101 Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.*

[32] In his decision in *Balzer v. Federated Co-operatives Limited, McKechney and Gust,*[12] Mr. Justice Laing pointed to Mr. Justice Klebec's decision in *Westfair Foods Ltd. v. Saskatchewan (Director of Labour Standards)*[13] was the most recent pronouncement by the Court of Queen's Bench in respect to Section 4(2) of *The Labour Standards Act*. Mr. Justice Laing, however, went on to consider other similar decisions made pursuant to *The Canada Labour Code.*[14] At paragraph [80] he says:

> *[80] At paragraph 81, Strathy J., in the foregoing decision,*[15] *adopted the criteria set out by Perell J. In McCracken v. Canadian National Railway 2010 ONSC 4520, [2010] O.J. No. 3466 (QL) at paragraphs 59 to 64 as follows:*

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[10] Previously under the repealed provisions, the Court of Queen's Bench reviewed decisions from adjudicators
[11] [2002] SCC 33, 2 S.C.R. 235, at para. 101 per Bastarache J.
[12] [2014] SKQB 32
[13] [1995] S.J. No. 620
[14] R.S.C. 1985 C. L-2
[15] *Brown v. Canadian Imperial Bank of Commerce* [2012] ONSC 2377

> *[59] The case law about who is a manager or who exercises a management function provides that this question is a question of fact for each case and in the context of the overall organization in which the person is employed …*
>
> *[60] Being a manager relates to the nature of the work actually performed …*
>
> *[61] An employee's title or job description is not determinative of whether the employee is a manager, and his or her status is determined by what the employee does or has been charged to do in the business enterprise …*
>
> *[62] An essential element of being a manager is that the person performs an administrative and leadership role and not just an operational role in the organization …*
>
> *[63] The case law reveals that certain activities or functions are regarded as management functions, such as representing the employer in collective bargaining or in discipline or grievance procedure, setting a budget, determining the organization's structure, determining the organization's policies; controlling day-to-day operations; determining staffing levels, supervising and reviewing the performance of subordinates, hiring and firing employees, and dealing with emergencies, but the mere presence of these activities is not enough and they must be accompanied by a significant level of autonomy and real decision-making authority and discretion …*
>
> *[64] The degree of autonomy and decision-making authority needs to be significant, but it need not be absolute or unfettered, and a manager may have to report to and be supervised by more senior managers and officials in the organization …*

[33] Whether or not an employee is a manager or not is a question of fact. All of the cases look at particular aspects of the job to determine if they show sufficient managerial character so as to have the position be one which is entirely of a managerial character.

[34] Whether the facts meet the legal test to be considered to a position which is entirely of a managerial character is a question of mixed law and fact. All of the first three items raised by the Appellant in her appeal fall within this classification. The standard of review for these decisions is reasonableness.

[35] There is no question that the Adjudicator identified the proper law to be applied when he reviewed and cited the decision of Mr. Justice Klebec in *Westfair Foods Ltd. v.*

Saskatchewan (Director of Labour Standards).[16] Similarly, Mr. Justice Laing, while not necessarily adopting the decision, noted that it was the most recent (until his decision in *Balzer*), determination made by the Court of Queen's Bench regarding the proper interpretation of Section 4(2) of *The Labour Standards Act*.

[36] In *Westfair*, Mr. Justice Klebec described the exercise in this case which is to correctly determine *The Labour Standards Act* provisions that exempted employees who were managerial in character. He went on to describe the proper interpretation of those provisions. At page 8 of that decision, he says:

> *The phrase services that are entirely of a managerial character contained in s. 4(2) of the Act has not been broadly considered. Mr. Justice Wright of this Court in Elcan Forage Inc. v. Weiler (1992), 102 Sask. R. 197 (Sask. Q.B.) concluded the exemption provisions contained in s. 4 of the Act must be strictly construed to insure rights extended by the Act to employees are not casually eroded. In Machtinger v. HOJ Industries Limited, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, the Supreme Court of Canada held that the labour standards legislation should be interpreted to extend protection to as many employees as possible. [Emphasis added]*

[37] Mr. Justice Klebec went on to say:

> *What constitutes "of a managerial character" for the purposes of s. 4(2) of the Act will vary according to the facts of each case. Hence, an all-encompassing definition for the phrase is impractical. However, a reference to those characteristics and functions indicative of, or at least associated with management positions, as indicia for determining whether an employee's services are of a managerial character are, in my view, appropriate. The indicium making up such criteria can readily be extracted from case authorities, dictionary definitions, reports of arbitration awards and legal writings on employment law. The fundamental ones in my opinion are:*
>
> *(1) the supervision and direction of other workers;*
>
> *(2) the discipline of subordinates, individually or as part of a management team;*
>
> *(3) evaluating the performance of subordinates;*
>
> *(4) hiring and promoting of subordinate staff;*
>
> *(5) some independence and discretion in performing assigned duties;*
>
> *(6) supervision of a collective agreement, where the work place is unionized;*

[16] [1995] S.J. No. 620

> *(7) negotiating remuneration individually rather than collectively;*
>
> *(8) level of remuneration, vis-à-vis, non-managerial staff;*
>
> *(9) participation in carrying out the employer's budgets and performance requirements.*
>
> *This list is not intended to be all inclusive; nor must each criterion be found to exist before an employee's position can take on a managerial character; nor is each criterion entitled to equal weight. To the contrary, in my opinion only the functions of supervision and right to discipline are of fundamental importance and therefore of greater significance.*
>
> *The word "performs" in s. 4(2), contemplates not only the services of a managerial character an employee performed but also those which reasonably flow from or which are associated with the position occupied by the employee. Hence, an employee cannot evade compliance with the minimum standards prescribed by the Act by giving the employee the title of "manager" or supervisor, nor can the employee bring herself or himself within the provisions of the Act by failing to perform functions that are reasonably required by the position occupied.*

[38] The Adjudicator in this case, then proceeded to review and apply the above noted criteria to determine if the character of the employee's position caused it to fall into the management classification. He determined based on the facts he found that it did not.

[39] At page 13, the adjudicator concludes:

> *…when reviewing the Westfair Foods Ltd. fundamental indicia of managerial character powers, only point number 5, which was some independence and discretion when performed assigned duties could be attributed to Ms. Samoleski; however her independence and discretion was no more than she had prior to being promoted nor was it any different from the other employees in the workplace.*

[40] Adjudicators appointed pursuant to the former *Acts* and now under the *SEA* are appointed for their expertise in the area of their adjudication, be it employment standards, occupational health and safety matters, or harassment complaints made to a special adjudicator. As such, the decisions made by these adjudicators are entitled to deference by this Board and the courts. [17]

[41] For a decision to be considered reasonable, it must fall within the range of possible outcomes in a particular case. In this case, the Adjudicator was charged with

[17] See *Dunsmuir v. New Brunswick [2008] 1 SCR 190, 2008 SCC 9 at paragraph 54*

determining if the employee was one "who performs services that are entirely of a managerial character". His determinations, based upon the facts as found, and the law as determined were, in our opinion, reasonable.

[42] The Adjudicator, at page 13 of his decision, also determined that the employee had been constructively dismissed. The Appellant takes issue with this determination. In the Appellant's submission, the Adjudicator failed to consider what the terms of the employment contract were and whether or not a fundamental term had been breached. Furthermore, the Appellant argued that the adjudicator should have applied a "fair and reasonable" test, citing *Doran v. Ontario Power Generation Inc*[18] and *Holgate v. Bank of Nova Scotia.*[19] The issue was important in this decision since notice pay would be payable to the employee if she was terminated or fired rather than having quit.

[43] In the *Holgate* decision, Mr. Justice Noble says at paragraph 17:

> *In law, the question of whether or not an employee has been unjustly dismissed is largely a question of fact. In determining whether or not an employee has been constructively dismissed it is necessary to look at all the circumstances and determine whether or not the employer's actions resulted in the employee being required to assume duties so substantially different from those which he had been engaged in as to amount to constructive dismissal. The cases are of some help although each case must be decided on its own facts. For example, the plaintiff referred me to Dibbin v. Canada Trust Co. (1988), C.C.E.L. 113; Roberts v. Versatile Equipment Co. (1987),1987 CanLII 4764 (SK QB), 16 C.C.E.L. 9; Reber v. Lloyd's Bank International Canada (1984), 1984 CanLII 712 (BC SC), 52 B.C.L.R. 90, and Tingle v. Bird Construction Company Limited (1983), 1983 CanLII 2245 (SK QB), 26 Sask. R. 20. In all of these examples, it was clear from the evidence that the plaintiff had suffered a downgrading or demotion from the position he was currently engaged in. Sometimes the downgrading was financial, in some cases it was a clear loss of authority and prestige; and in others, the evidence was clear the defendant deliberately demoted the employee to push him out of the position he was in. In most cases, the employer acted unilaterally without first consulting the employee. Even where the employee is offered a lesser alternative which he accepted but shortly after rejected, the courts have understandably sided with the employee (see Roberts, supra).*

[44] The significant fact found by the adjudicator in this case was that the employer had proposed to reduce the employee's wages (during the week) from $16.00 to $12.00. In his determination, this fact was sufficient to allow him to conclude that the employee had been constructively dismissed.

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[18] [2007] CanLII 49486
[19] [1989] CanLII 4660 (SKQB)

[45] The Appellant argued that the question should be one of degree of reduction in salary made. The Appellant argued that a 14 – 17% reduction in salary had been found not to be a fundamental breach, relying upon *Doran v. Ontario Power Generation Inc.*[20]

[46] While some greater analysis of the relevant law would have been preferable, the conclusion reached was not in variance with the law as outlined above. There was a downgrading of the position which was done unilaterally by the employer.

[47] As there was no error in the law that was applied, the issue must then be considered as an error of mixed law and fact on a reasonableness standard. Again, the conclusion reached by the Adjudicator fell within the range of possible outcomes and was not unreasonable.

[48] Finally, the Appellant argued that the Adjudicator made unreasonable inferences of fact which amounted to an error in law as set out by our Court of Appeal in *P.S.S. Professional Services v. Saskatchewan (Human Rights Commission).*[21] In respect of such errors, the standard of review is also reasonableness.

[49] In her written argument, the Appellant says in respect of this point:

> *In this case the Adjudicator erred on both points. First, at p. 5 he stated that, "when reviewing the Westfair Foods Ltd. fundamental indicia of managerial character powers, only point number 5, which was some independence and discretion when performed [sic] assigned duties could be attributed to Ms. Samoleski"; however, the Westfair decision conveys that remuneration vis-à-vis other employees is one aspect of the employment relationship to be considered. Yet, there is no indication remuneration was ever considered by the Adjudicator; and therefore, it is incorrect to say that indicium could not be attributed to the employee.*
>
> *Further, at p 5 the Adjudicator made the following statement of fact:*
>
> > *Ms. Samoleski in her capacity did some things different than other employees. She did the deposits, shift scheduling for employees and ordered the food, liquor and beer. (p. 5)*
>
> *However, in his reasons he concluded the following:*

[20] [2007] CanLII 49486
[21] [2007] SKCA 149 (CanLII), 302 Sask. R. 161

> *Also, when reviewing the Westfair Foods Ltd. fundamental indicia of managerial character powers, only point number 5, which was some independence and discretion when performed [sic] assigned duties could be attributed to Ms. Samoleski; however her independence and discretion was no more than she had prior to being promoted nor was it any different from the other employees in the workplace.*
>
> *The reasoning is patently incongruous with the earlier statement of fact. This is an unreasonable inference of fact and is, therefore, an error of law.*

[50] With respect, I do not agree that the conclusion reached by the adjudicator was unreasonable. The Appellant argues that the issue of remuneration is important and was not, in her submission, properly dealt with by the adjudicator. Additionally, the Appellant seeks to place more emphasis on other characteristics such as the finding that the employee "did some things differently than other employees".

[51] In the *Westfair* decision, Mr. Justice Klebec also pointed out that:

> *This list is not intended to be all inclusive; nor must each criterion be found to exist before an employee's position can take on a managerial character; nor is each criterion entitled to equal weight. To the contrary, in my opinion only the functions of supervision and right to discipline are of fundamental importance and therefore of greater significance.*

[52] It must be left to the Adjudicator to determine which factors he determines, based upon the context of the case under consideration, to be important. Unless it can be shown that the factual underpinnings and not the weight to be given to those facts are based on no evidence, irrelevant evidence, or that there was a disregard for or a mischaracterization of relevant evidence, an error does not arise. That is the case here.

[53] The Appellant has not shown that there was no evidence for the findings of fact by the adjudicator. Nor has the Appellant shown that the findings of fact were based upon irrelevant evidence. And finally, the Appellant has not shown that the adjudicator disregarded or mischaracterized any relevant evidence.

[54] For these reasons, the appeal is dismissed. An appropriate order will accompany these Reasons.

DATED at Regina, Saskatchewan, this **19th** day of **November, 2014.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson