ONSITE OILFIELD SERVICES INC. and BRAD WALKER, DIRECTOR OF ONSITE OIL SERVICES INC., Appellant v. GOVERNMENT OF SASKATCHEWAN, DIRECTOR, EMPLOYMENT STANDARDS and WILLIAM CUNNINGHAM, Respondents

LRB File No.: 158-17; March 9, 2018

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

For the Appellant	Ms. Karen Walker
For the Respondent, Director Employment Standards:	Ms. Lee Anne Schienbein and Mr. Nathanial Scipioni
For the Respondent, William Cunningham	Self Represented

Section 4-8 of *The Saskatchewan Employment Act* – Appeal of an adjudicator's decision – Director of Employment Standards appeals against a decision of an Adjudicator in respect of a Wage Assessment made by the Director. Board reviews statutory scheme related to appeals by Director of Employment Standards and Director of Occupational Health and Safety.

Time limits for filing of Appeal – Employer argues that Director's appeal was filed outside of the fifteen (15) business day period for appeals under section 4-8 of *The Saskatchewan Employment Act* – Board reviews provisions and its prior decisions.

Standard of Review – Board reviews the standard of review as enunciated by the Supreme Court in ***Edmonton City v. Edmonton East (Capilano) Shopping Centres Ltd.***[1] and determines that the standard of review of a decision of an Adjudicator should be reasonableness.

Decision of Adjudicator – Board reviews Adjudicator's decision on reasonableness standard. Board determines that the Adjudicator erred in failing to consider and apply section 2-89(2) of *The Saskatchewan Employment Act* that her decision was unreasonable – Decision remitted to Adjudicator to be reconsidered.

[1] 2016 SCC 47

REASONS FOR DECISION

Background:

[1] The Executive Director, Employment Standards (the "Director") issued wage assessment No. 8121 pursuant s. 2-74 of *The Saskatchewan Employment Act* (the "*SEA"*) which directed Onsite Oil Services Inc. ("Onsite") and Brad Walker, ("Walker") a Director of Onsite, to pay the sum of $18,435.40 to William Cunningham ("Cunningham"). Onsite and Walker appealed the wage assessment to an adjudicator as provided for in s. 2-75 of the *SEA*.

[2] The Adjudicator appointed to hear the appeal rendered her decision on July 13, 2017. The Adjudicator allowed the appeal, in part, and varied the wage assessment to order payment of the sum of $16,736.14 to Cunningham. Onsite and Walker then appealed the adjudicator's decision to the Board pursuant to s. 4-8 of the *SEA*.

[3] The Director also filed a Notice of Appeal dated September 8, 2017. In his Notice of Appeal, the Director took the view that the Adjudicator had erred by not applying section 2-89(2) of the *SEA* to the calculation of wages due to Cunningham.

[4] At the hearing of this matter, Onsite and Walker raised a preliminary objection to the Notice of Appeal filed by the Director on the grounds that it was untimely and not filed within the time limited for appeals to the Board pursuant to section 4-8(3)(a) of the *SEA*.

Facts:

[5] In her outline of the facts of the case, the Adjudicator noted that the parties agreed on very little. She noted that the only agreed facts were as follows:

a) Onsite Oil Services Inc. is a registered business in Saskatchewan;
b) Cunningham worked for Onsite starting in 2014 and ending August 26, 2015; and
c) Cunningham is a US Citizen who was already working in Canada when he was hired by Onsite. The Company ultimately hired him through the Temporary Foreign Worker Program ("TFWP").

[6] The Adjudicator received numerous documents and heard testimony from Karen Walker for Onsite. Cunningham also testified. Daniel Corbett also appeared representing the Director.

[7] The Adjudicator made findings of fact based upon the testimony and documents provided to her. The Board will reference those findings, as necessary, in the Reasons which follow.

Relevant statutory provision:

[8] Relevant statutory provisions are as follows:

> ***Commencement of appeal to adjudicator***
>
> ***2-75****(1) Any of the following may appeal a wage assessment:*
>
> *(a) an employer or corporate director who disputes liability or the amount set out in the wage assessment;*
>
> *(b) an employee who disputes the amount set out in the wage assessment.*
>
> *(2) An appeal pursuant to this section must be commenced by filing a written notice of appeal with the director of employment standards within 15 business days after the date of service of a wage assessment.*
>
> *(3) The written notice of appeal filed pursuant to subsection (2) must:*
>
> *(a) set out the grounds of the appeal; and*
>
> *(b) set out the relief requested.*
>
> *(4) If the appellant is an employer or a corporate director, the employer or corporate director shall, as a condition of being eligible to appeal the wage assessment, deposit with the director of employment standards the amount set out in the wage assessment or any other prescribed amount.*
>
> *(5) The amount mentioned in subsection (4) must be deposited before the expiry of the period during which an appeal may be commenced.*
>
> *(6) Subsections (4) and (5) do not apply if moneys that meet the amount of the wage assessment or the prescribed amount have been paid to the director of employment standards pursuant to a demand mentioned in section 2-70.*
>
> *(7) An appeal filed pursuant to subsection (2) is to be heard by an adjudicator in accordance with Part IV.*
>
> *(8) On receipt of the notice of appeal and deposit required pursuant to subsection (4), the director of employment standards shall forward to the adjudicator:*
>
> *(a) a copy of the wage assessment; and*
>
> *(b) a copy of the written notice of appeal.*

(9) The copy of the wage assessment provided to the adjudicator in accordance with subsection (8) is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing, without proof of the signature or official position of the person appearing to have signed the wage assessment.

(10) On the final determination of an appeal, the amount deposited pursuant to subsection (4):

(a) must be returned if the employer or corporate director is found not to be liable for the wages; or

(b) must be applied to the wage claims of the employees if the determination is in favour of the employees in whole or in part and, if there is any part of the amount remaining after being applied to those wage claims, the remaining amount must be returned to the employer or corporate director.

. . .

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; 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.*

Preliminary Objection:

[9] The Board has recently dealt with a similar issue in *The Director of Employment Standards v. Maxie's Excavating and Bridgette*[2]. In that case, the Board concluded that the Director is bound by the same time limitations as other Appellants, which is fifteen (15) business days after the date of service of the decision of the Adjudicator. In that case, the Director had formed the intention to appeal prior to the expiry of the time limited for appeal, had signed the Notice of Appeal, but did not mail the Notice of Appeal until after the date for appeal had expired. For the reasons set out in that case, the Board concluded that the Director had sufficient compliance with the statutory time frame, such that a dismissal of his appeal was not warranted.

[10] In this case, we have no evidence to support a conclusion that the Director had formed the intent to appeal or had signed the Notice of Appeal within the time provided for appealing. The Director's Notice of Appeal is dated September 8, 2017 and the Adjudicator's decision was made on July 13, 2017 and received by the Board that same day. There are 39 business days between July 13 and September 8, 2017. This is well outside the time prescribed for appeals to be filed.

[11] Absent any mitigating factors such as were the case in the *The Director of Employment Standards v. Maxie's Excavating and Bridgette* the appeal must be found to have been filed outside of the time limited for the filing of appeals and must be dismissed.

[12] The issue of whether or not the Director's appeal was timely, however, is somewhat moot, insofar as Onsite and Walker adopted the Director's concerns regarding section 2-89(2) of the *SEA* which limits wage recoveries to wages which became payable within the last 12 months of employment.

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[2] LRB File No. 194-17 (unreported)

The Appeal by Onsite and Walker:

[13] The Notice of Appeal filed on behalf of Onsite and Walker raises four (4) issues. They are:

(a) Whether a performance bonus should be included as regular wages for calculation of an overtime rate;

(b) Whether a shift bonus/travel allowance should be included as regular wages for calculation of an overtime rate;

(c) Whether Cunningham should receive pay instead of notice; and

(d) How errors in the above three items lead to an overcalculation of overtime pay.

[14] At the hearing of the appeal, Onsite and Walker adopted the Director's position with respect to section 2-89(2) of the *SEA*.

Jurisdiction of the Board and Standard of Review:

[15] The Board's jurisdiction on appeals from an Adjudicator's decision is limited to questions of law. The Board identified three (3) categories of questions of law that could be considered in its seminal decision in *Wieler v. Saskatoon Convalescent Home*[3]. Those three (3) categories of questions are:

(a) Questions of law alone;

(b) Questions of mixed fact and law; and

(c) Findings of fact which may be reviewable as questions of law.

[16] In *Wieler*, the Board applied differing standards of review to each of these categories in accordance with the standard of review as then established by the Courts. Since that decision, the Supreme Court has provided its opinion regarding appeals in relation to questions of law in *Edmonton City v. Edmonton East (Capilano) Shopping Centres Ltd.*[4]. In that decision, the Supreme Court allowed an appeal from the determination by both the Alberta Court of Queen's Bench and the Alberta Court of Appeal which had determined the standard of review "on a question of law or jurisdiction of sufficient importance to merit an appeal" to be correctness.

[3] 2014 CanLII 76051 (SK LRB)

Madam Justice Karakatsanis, writing for the majority adopted the standard of reasonableness. At paragraphs 21-24 she said:

> *[21] The [Dunsmuir v New Brunswick, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190] framework balances two important competing principles: legislative supremacy, which requires the courts to respect the choice of Parliament or a legislature to assign responsibility for a given decision to an administrative body; and the rule of law, which requires that the courts have the last word on whether an administrative body has acted within the scope of its lawful authority (paras. 27-31).*
>
> *(1) Presumption of Reasonableness*
>
> *[22] Unless the jurisprudence has already settled the applicable standard of review (Dunsmuir, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so the standard of review is presumed to be reasonableness (Movement laïque Québécois v Saguenay (City), 2015 SCC 16 (CanLII); [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.*
>
> *[23] The Dunsmuir framework provides a clear answer in this case. The substantive issue – whether the Board had the power to increase the assessment – turns on the interpretation of s. 467(1) of the MGA, the Board's home statute. The standard of review is presumed to be reasonableness.*
>
> *(2) Categories That Rebut the Presumption of Reasonableness*
>
> *[24] The four categories of issues identified in Dunsmuir which call for correctness are constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or vires", and issues "regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58-61). When the issue falls within a category, the presumption of reasonableness is rebutted, the standard of review is correctness and no further analysis is required (Canadian Artists' Representation v National Gallery of Canada, 2014 SCC 42 (CanLII), [2014] 2 S.C.R. 197, at para. 13; McLean v British Columbia (Securities Commission), 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, at para. 22). [Emphasis added.]*

[17] Madam Justice Karakatsanis then went on at paragraph 29 to confirm that the standard of review should be no different whether a statutory right of appeal with leave against

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[4] 2016 SCC 47

an administrative tribunals decision qualified as a new category of matters to which the correctness standard should be applied. She said:

> *[29] At least six recent decisions of this Court have applied a reasonableness standard on a statutory appeal from a decision of an administrative tribunal (McLean; Smith v. Alliance Pipeline Ltd., 2011 SCC 7 (CanLII), [2011] 1 S.C.R. 160; Bell Canada v. Bell Aliant Regional Communications,2009 SCC 40 (CanLII), [2009] 2 S.C.R. 764; Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 (CanLII), [2014] 2 S.C.R. 633; Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44 (CanLII), [2015] 3 S.C.R. 147; ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), 2015 SCC 45 (CanLII), [2015] 3 S.C.R. 219).*

She then concluded that the appropriate standard of review was reasonableness. Following the analysis suggested in *Edmonton East (Capilano)* to the statutory provisions in the *SEA*, this Board has also concluded that the reasonableness standard should be applied to appeals of Adjudicator's decisions under Parts II and III of the *SEA.*

[18] However, before the Board can embark upon a review of the Adjudicator's decision, I must consider if the notice of appeal raises a question of law in one of the categories outlined above.

Does the Notice of Appeal Raise a Question of Law?

[19] Onsite and Walker, in essence, in their Notice of Appeal, disagree with a number of findings of fact as well as the application of those facts to the statutory provisions which were interpreted by the Adjudicator in her decision. Among them is the inclusion of a performance bonus within the regular wage earnings of Cunningham for the purposes of calculation of the amounts due to him. Similarly, Onsite and Walker disagree with the inclusion of Bonus/Travel time within the calculation of wages by the Adjudicator. Onsite and Walker also took the view that Cunningham had been provided notice that he would be laid off months before the lay off actually occurred and that should serve as his notice period rather than him being provided pay in lieu of notice by the Adjudicator. Finally, Onsite and Walker disagreed with the inclusion of the performance bonus and bonus/travel time within the regular hourly wage with the result that it inflated the overtime rate applied by the Adjudicator.

[20] Each of the issues raised in the Notice of Appeal is an appeal against a finding of fact by the Adjudicator and is not a pure error of law. Reviewable questions of fact that may be reviewable as questions of law were described by the Saskatchewan Court of Appeal in *P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission*[5] as follows:

> *…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.*

[21] In *Whiterock Gas and Confectionary v. Swindler*[6], Mr. Justice Chcoine quoted extensively from the Court of Appeal's decision in *P.S.S.* At paragraphs 34-39 he says:

> *[34] While The Labour Standards Act limits appeals to this Court to questions of law or jurisdiction, 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. In P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission), 2007 SKCA 149 (CanLII), 302 Sask. R. 161, (P.S.S.) Cameron J. explained how findings of fact may be subject to review as errors of law. He stated (at paras. 60-61):*
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> > ***60*** *It is clear that the appeal against the decision of the tribunal comes down to its findings of fact. This is not to say that there is, therefore, no tenable ground for review of the decision, but it must be understood that the decision is only reviewable to the extent the findings of fact upon which it rests are attended by error of law.*
> >
> > ***61*** *The import of this was remarked upon in City of Regina et al. v. Kivela, 2006 SKCA 38 (CanLII), (2006), 266 D.L.R. (4th) 319 (Sask. C.A.), a case involving an appeal from the decision of a human rights tribunal. Speaking for the Court, Smith J.A. said:*
> >
> > *The traditional view, in these circumstances, is that the tribunal's factual determinations are subject to review only if and to the extent that findings constitute errors of law, as when there was no evidence before the tribunal that, viewed reasonably, was capable of supporting the tribunal's finding. (p. 343)*
> >
> > ***62*** *This ties in with the notion that "an unreasonable finding of fact" falls to be categorized as an error of law for the purposes of judicial review in the classical sense, and with the associated notion that when errors of law are open to judicial review unhindered by a privative clause then "unreasonable errors of fact", though no others, are subject to review: Blanchard v. Control Data Canada Ltd., 1984 CanLII 27*

[5] 2007 SKCA 149 (CanLII)

[6] 2014 SKQB 300 (CanLII) at para 34

> *(SCC), [1984] 2 S.C.R. 476 at 494-95. It also ties in with the further notion that a tribunal "errs in law" if it ignores relevant evidence or evidence it is required to consider: Woolaston v. Minister of Manpower and Immigration,1972 CanLII 3 (SCC), [1973] S.C.R. 102; Canada (Director of Investigation and Research, Competition Act) v. Southam,1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748 at para. 41: "If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law." (Underlining added)*

[35] Cameron J. also referred to the case of Metropolitan Entertainment Group v. Nova Scotia (Workers Compensation Appeals Tribunal), 2007 NSCA 30 (CanLII), (2007), 278 D.L.R. (4th) 674, where the right of appeal, as in this case, was confined to questions of law or jurisdiction, and the appeal was based on a challenge to findings of fact. In that case, the Nova Scotia Court of Appeal also concluded (at para. 15) that there are situations where mis-stating or making egregious factual errors will amount to an error in law.

[36] Cameron J. further explained the rational for the proposition that findings of fact are capable of amounting to errors of law as follows, at para. 65:

> ***65*** *In any event, it is evident from the foregoing that findings of fact are capable of giving rise to a question of law for the purposes of a right of appeal so confined. It is instructive in this regard to recall that the facts as found are one thing, the process by which they are found is another, and it is here where a decision is most apt to be seen as giving rise to a question of law. Why? Because the fact-finding process, or method by which facts in dispute are determined in judicial and quasi-judicial settings, is underpinned by principle, as supplied by both statutory implication and common law. …*

[37] Cameron J. went on to describe the parameters of a hearing under The Saskatchewan Human Rights Code, S.S. 1979, c. S. 24.1 in the following terms, at para. 66:

> ***66*** *The Code provides for a hearing of disputed complaints by a tribunal, namely a lawyer in good standing with at least five years experience, or a person having experience and expertise in human rights law. A tribunal charged with the duty of inquiring into such a complaint is required by the Code to afford the parties the full opportunity to present evidence and make representations through counsel or otherwise. Subject to the power in the tribunal to receive and accept evidence and information on oath, affidavit, or otherwise as it considers appropriate, whether admissible in a court of law, there is little to distinguish the hearing from a trial. Similarly, there is little to distinguish the function of the tribunal from the function of a judge, for the tribunal is to hear the complaint and decide it on the basis of the evidence before it, dismissing the complaint if unsubstantiated or, if substantiated, giving effect to it by way of order. Indeed, the orders of the tribunal are subject to entry in the Court of Queen's Bench as orders of that Court.*

> *[38] In my opinion, the function of an adjudicator under The Labour Standards Act closely mirrors the function of tribunal established pursuant to The Saskatchewan Human Rights Code. It therefore follows that the conclusions reached by Cameron J. in P.S.S. at paras. 67 and 68 are applicable to this case. He stated:*
>
> > ***67*** *As a matter of statutory implication, then, persons fastened with the duties and exercising the powers of a human rights tribunal when called upon to hear a complaint, are required as a matter of principle (much as judges are), to determine the facts in controversy on the basis of the relevant evidence before them (leaving aside matters of fact in relation to which they may take judicial notice). Hence, they are required in principle to consider and weigh the relevant evidence as the faculty of judgment commends when exercised impartially, fairly, in good faith, and in accordance with reason, bearing in mind the governing standard of proof and the location of the onus of proof.*
> >
> > ***68*** *It follows, that a tribunal cannot reasonably make a valid finding of fact on the basis of no evidence or irrelevant evidence. Nor can it reasonably make a valid finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence. To do so is to err in principle or, in other words, to commit an error of law. (In addition to the cases referred to above, see Toneguzzo-Norvell v. Burnaby Hospital, 1994 CanLII 106 (SCC), [1994] 1 S.C.R. 114 at p. 121; Wade & Forsyth, Administrative Law (7th ed.) (Oxford: Clarendon Press, 1994) at pp. 316-320; Jones & de Villars, Principles of Administrative Law (4th ed.) (Toronto: Thomson Carswell, 2004) at pp. 244-43 and 431-436; and Hartwig and Senger v. Wright (Commissioner of Inquiry), et al., [2007] S.J. No. 337, 2007 SKCA 74 (Sask. C.A.) (CanLII)). Nor can a tribunal reasonably make a valid finding of fact based on an unfounded or irrational inference of fact. (Underling added.)*
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> *[39] As regards the standard of review related to findings of fact, Cameron J. decided in P.S.S. that the reasonable simpliciter standard of review applied in that case. He stated, at para. 83, that "the issue whether a tribunal overlooked, disregarded or mischaracterized relevant material to the findings upon which its decision rests falls to be subjected to a 'significant searching or testing'." I intend to apply the standard of reasonableness in relation to the Adjudicator's finding of fact in this case also.*

[22] While the *Whiterock* case preceded the Supreme Court ruling in *Edmonton City v. Edmonton East (Capilano) Shopping Centres Ltd.*[7], Mr. Justice Chicoine nevertheless reviewed the decision on the basis of the reasonableness standard which the Board has adopted above.

[7] 2016 SCC 47

[23] In the *Whiterock* case, Mr. Justice Chicoine found that the refusal by the Adjudicator to view a video recording that showed employee dishonesty amounted to a reviewable error of law. He says at paragraphs 48 to 52 as follows:

> *[48] Had the Adjudicator reviewed the DVDs or allowed them to be played during the hearing, he would have observed that the surveillance system records the date and time at the same time as the activity that is being recorded. The surveillance camera in the office recorded Mr. Swindler leaving the office at 23:00:00 on March 2, 2011. The surveillance camera above the cash register recorded Mr. Swindler opening a drawer under the cash register and removing a package of cigarettes at 23:00:07 on March 2, 2011. This is approximately seven seconds after leaving the office. The surveillance camera in the office records Mr. Swindler re-entering the office at approximately 23:00:21 on March 2, 2011, with a cigarette in his mouth and a package of cigarettes in his hand.*
>
> *[49] There is no question that the video corroborates Ms. Gopher's testimony that the theft of a package of cigarettes occurred on March 2, 2011, at which date Mr. Swindler was an employee of Whiterock. Given the express provision in s. 62.1(3) of The Labour Standards Act which states that an adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate, there was no reason for the Adjudicator in this case not to accept into evidence the letter from the security company employee who copied the information recorded by the surveillance system onto a DVD to the effect that the information recorded by the surveillance system cannot be tampered with. This would necessarily include the date and time of the recording.*
>
> *[50] In addition to corroborating Ms. Gopher's testimony, the video clearly and unequivocally contradicts the evidence of Mr. Swindler to the effect that "as of the date of the video, his employment had already been terminated." This puts the lie to his explanation that the video shows him taking cigarettes without paying for them after he had been dismissed as an employee. The Adjudicator's refusal to view the video for himself meant that he ignored relevant evidence which proved, on a balance of probabilities, that Mr. Swindler was dishonest, not only in respect of the theft of the cigarettes while he was an employee, but also when he testified at the hearing. This refusal to view the video evidence constituted an error of law in the manner contemplated by Cameron J. in P.S.S. (at para. 68) wherein he stated that a tribunal cannot reasonably make a finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence.*
>
> *[51] The question which arises from the finding that Mr. Swindler did take a package of cigarettes without paying for them on March 2, 2011, is whether this is the kind of dishonesty which gives rise to a breakdown in the employment relationship. Iacobucci J. in McKinley makes the point that not every act of dishonesty will result in the dismissal of the employee and that the principle of proportionality must be applied. However, I am of the opinion that Mr. Swindler's act of dishonesty in taking a package of cigarettes without paying for them was serious and went to the core of the employment relationship. Ms. Gopher was entitled to expect that all of her employees, especially employees in supervisory positions, could be entrusted to care for and protect the assets of the business. Among Mr. Swindler's duties as a supervisor was to make an accurate count of the cigarette inventory on a daily basis in order to prevent theft and also to cash out at the end of the day. The theft of even one package of cigarettes by a manager in Mr. Swindler's position in my opinion warrants dismissal for just cause.*

> *[52] In consequence of my finding that the Adjudicator erred in law in failing to consider relevant evidence which proved at least on a balance of probabilities that Mr. Swindler committed a serious act of dishonesty while employed as a supervisor, I also conclude that Whiterock and Ms. Gopher did establish grounds to warrant dismissal for just cause. As a result, I will allow the appeal from the Adjudicator's finding confirming the Wage Assessment in relation to Mr. Swindler and rule that no amount is owed by Whiterock or Ms. Gopher to Mr. Swindler as pay in lieu of notice. It is not necessary for me to make any ruling on the issue whether overtime pay should have been included in calculating the amount of pay in lieu of notice and I decline to do so.*

[24] There is no such error in this case. Here, the Adjudicator went through each of the calculations which had been made by the Director and made determinations of fact with respect to them. The Notice of Appeal does not raise an error of law before me.

The Issues Raised:

[25] Even if the Notice of Appeal had raised an error of law, the Adjudicator did not reach an unreasonable conclusion in respect of the issues raised by Onsite and Walker.

[26] At page 14 of her decision, the Adjudicator noted that "[T]he bulk of the Wage Assessment relates to unpaid overtime". She also noted that Onsite had admitted to an error "by only calculating overtime over 8 hours per day and not weekly when hours exceeded 40 hours".

[27] The Adjudicator referenced the Employment Contract between Onsite and Cunningham with respect to the overtime issue. That contract provided that overtime would be paid at the $10.00 per hour. However, she disregarded this provision pursuant to section 2-6 of the *SEA* which prevents contracting out of the benefits of Part II the *SEA*.

[28] In that analysis, the Adjudicator also dealt with the issue of whether a $6.00 per hour "performance bonus" should form a part of the basic wage for calculation purposes. She noted that discretionary bonuses[8] were not to be included within the basic wage. She concluded that the "performance bonus" was not discretionary She concluded at page 15 of her decision that:

> *Whether a bonus is a discretionary bonus or not is a question of fact to be determined on a case by case basis. Based on the evidence, I find Will's $6 per hour performance bonus was non-discretionary and therefore does not fall within*

[8] See section 2-1(t)(i)

> *the exception set out in section 2-1(t)(i) of the Act. The $6 per hour bonus must therefore be included in the calculation for overtime pay.*

[29] She also dealt with the travel bonus at page 16 of her decision. She noted that Onsite agreed at the hearing that there was nothing discretionary about the travel bonus. If an employee showed up for work, it was paid. She noted that "…Will was promised and received the short shift/travel bonus as part of his wages".

[30] She also dealt with the issue of pay in lieu of notice on page 18 of her decision. She concluded that "[I]n this case, there is no clear evidence that Will received written notice of termination. Based on the circumstances, Will is entitled to 2 weeks' pay in lieu instead of notice in accordance with sections 2-60 and 2-61 of the Act".

[31] The analysis by the Adjudicator was in each case reasonable. The decision of the Adjudicator, in this case, does not fall within one of the "exception" categories outlined by Madam Justice Karakatsanis in *East (Capilano)*. Had it been necessary, the Board would have dismissed the appeal on the ground that the Adjudicator's decision met the test of reasonableness.

[32] That standard was defined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[9] at paragraph 47 as follows:

> *Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquiries into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*

[33] This leaves only the issue originally raised by the Director and which was adopted by Onsite and Walker at the hearing.

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[9] 2008 SCC 9, [2008] 1 SCR 190

Did the Adjudicator Err in Not Taking Section 2-89(2) into Account in her Decision?

[34] Section 2-89(2) provides as follows:

> *(2) Recovery of wages pursuant to this Part is limited:*
>
> *(a) to wages that became payable in the 12 months preceding the day on which the claim was made to the director of employment standards; or*
>
> *(b) if the employment with the employer has ended, to wages that became payable within the last 12 months of employment with that employer.*

[35] It is clear from the Adjudicator's decision that the Adjudicator awarded wage recovery for the period which differed from the calculations of wages due as calculated by the Director in his wage assessment. Pursuant to section 2-75(9), a Wage Assessment issued by the Director and forwarded to the Adjudicator, "is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing…". In light of that provision, the onus of proof is shifted to the Appellant to satisfy the Adjudicator that the amount shown on the wage assessment should be varied.

[36] The Adjudicator concluded that the wage assessment should be varied. At page 18 of her decision she says under the heading "The Calculations":

> *The Employment Standards Inspection Report, Hourly Rate Calculations and Officer Worksheet (ER10) formed the basis for the Wage Assessment. The Employment Standards Inspection Report lists Will's start date as August 1, 2014 and his end date as August 26, 2015, and for whatever reason says the Assessment covers August 24, 2014 to August 26, 2015. After considering the evidence, the only portion of the calculations that I disagree with is the amount credited to the employer as already paid, that being $112579.69. Mr. Corbett did not explain how he came up with this number When I add up the gross amounts paid to Will by Onsite from his paystubs (EES), covering pay periods from August 10, 2014 to September 5, 2015 (his last day of work was August 26 and fell within this pay period), I come up with $114, 278.95. I find that the employer is entitled to a credit for this amount.*
>
> *I agree with the assessment which determined the total amount owing as $131,015.09. After subtracting the amount paid by the employer, that being $114,278.95, I find that Onsite owes Will the sum of $16,736.14 in unpaid wages.*

[37] From this it is clear that the Adjudicator did not consider the limitations in section 2-89(2) of the *SEA*. In so doing, she committed an error in law by not following a direction in the statute which she was interpreting. When section 2-89(2) is considered, the reasoning in the above noted excerpt is not, in my opinion, reasonable.

[38] For these reasons, the appeal against the Adjudicator's decision is allowed in part and the matter will be remitted to the Adjudicator's to take into account section 2-89(2) of the *SEA*. An appropriate Order will accompany these reasons.

DATED at Regina, Saskatchewan, this **9th** day of **March, 2018.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson