GOVERNMENT OF SASKATCHEWAN, EXECUTIVE DIRECTOR, EMPLOYMENT STANDARDS, Appellant v AARON MCKEOWN, Respondent and LPL MANAGEMENT LTD., Respondent

LRB File No. 174-19; November 14, 2019
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For the Appellant:	Steven Wang
For the Respondent, Aaron McKeown:	Self-represented
For the Respondent, LPL Management Ltd.:	Bonnie D. Cherewyk

> **Section 4-10 of *The Saskatchewan Employment Act* – Appeal from Decision of Wage Assessment Adjudicator – Appeal filed by Director – Board determines that reasonableness is the appropriate standard of review on existing appeal.**
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> **Appeal from Decision of Wage Assessment Adjudicator – Director argued that Adjudicator's interpretation of the Act, excluding layoff period from calculation of notice and wages owing, was unreasonable – Decision reducing notice period was unreasonable – Decision to be amended.**
>
> **Amendment of Decision of Wage Assessment Adjudicator – Omission of public holiday and vacation pay – Decision amended to include public holiday and vacation pay in Wage Assessment – Definition of "week" not considered – Decision amended in accordance with definition.**

REASONS FOR DECISION

Introduction:

[1] Barbara Mysko, Vice-Chairperson: The Director of Employment Standards ["Director"] has filed this appeal, pursuant to subsection 4-10 of *The Saskatchewan Employment Act* ["Act"], against a decision of an Adjudicator appointed under Part II of the Act. LPL Management ["Employer"] is a construction company that specializes in building, maintaining and repairing structures for grain-handling businesses in Saskatchewan. Aaron McKeown ["McKeown"] was an employee of that Employer during the material times.

[2] On April 30, 2019, a wage assessment was issued against the Employer in relation to McKeown in the amount of $3,628.27 for unpaid wages.[1] On June 18, 2019, an amended wage assessment was issued for $3,733.26. The Employer appealed the wage assessment and that appeal was heard by an Adjudicator on June 26, 2019. Quite properly, no issues have been raised with the Adjudicator's decision to review the amended wage assessment, dated June 18, 2019.

[3] The decision on that appeal was rendered on July 4, 2019. In that decision, the Adjudicator allowed the appeal in part, overturning the wage assessment, and awarding McKeown $678.76 of the previous total, broken down by $339.38 per day.

[4] The Adjudicator's reduction of the wage assessment was based on an interpretation of the Act in which the statutory amount owing is calculated after the sixth day of a work interruption, and not before. The Director says that this interpretation is unreasonable.

[5] The hearing on the present appeal took place on October 10, 2019. At the conclusion of the hearing, the Board reserved its decision.

Background:

[6] The factual background is straightforward. McKeown began working for the Employer on April 2, 2017. His employment contract set out a schedule that consisted of ten days of work followed by four days off, with 12 hours per day on site.

[7] The contract stipulated further: "From time-to-time, you may be asked to alter these hours to accommodate work requirements." On the initial appeal, the Adjudicator interpreted the Agreement such that hours of work were not guaranteed.

[8] According to an Employer witness, events such as inclement weather or equipment/material delays could result in an interruption of work and prevent a regular schedule. If workers did not work, they were not paid. Delays were not unusual.

[9] On September 18, 2018, McKeown provided two weeks of notice of his intention to begin working with another company. His expected last day of work was October 1, 2018. McKeown worked on September 18 and 19. As of September 20, he was scheduled to begin his period of four days off. Accordingly, he did not work on September 20, 21, 22, or 23.

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[1] Identical and duplicate wage assessments were issued in error on April 23 & 30, 2019.

[10] Although McKeown was scheduled to return to work on September 24, heavy rain prevented the work from proceeding. McKeown was advised by the "labour board" that if he gave notice to his current Employer he would nonetheless have to be available to work. He did not ask his Employer about this. McKeown waited out the notice period instead of attempting to work for the new employer. The necessary permits were held up due to the rain, and for a period of fourteen days, McKeown was out of work.

[11] McKeown was paid for his work for September 18 and 19 by cheque issued on September 28, 2018. He was not paid for any of the remaining time off.

[12] The following legislative provisions are applicable:

> ***2-1*** *In this Part and in Part IV:*
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> *…*
>
> *(l)* ***"layoff"*** *means the temporary interruption by an employer of the services of an employee for a period exceeding six consecutive work days;*
>
> *…*
>
> *(p)* ***"pay instead of notice"*** *means an amount of money that is payable to an employee pursuant to subclause 2-61(1)(a)(ii);*
>
> *…*
>
> *(v)* ***"wages"*** *means salary, commission and any other monetary compensation for work or services or for being at the disposal of an employer, and includes overtime, public holiday pay, vacation pay and pay instead of notice;*
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> *. . .*
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> ***2-60****(1) Except for just cause, no employer shall lay off or terminate the employment of an employee who has been in the employer's service for more than 13 consecutive weeks without giving that employee written notice for a period that is not less than the period set out in the following Table:*

Table

Employee's Period of Employment	***Minimum Period of Written Notice***
more than 13 consecutive weeks but one year or less	*one week*
more than one year but three years or less	*two weeks*
more than three years but five years or less	*four weeks*
more than five years but 10 years or less	*six weeks*
more than 10 years	*eight weeks*

> *(2) In subsection (1), "period of employment" means any period of employment that is not interrupted by more than 14 consecutive days.*

(3) For the purposes of subsection (2), being on vacation, an employment leave or a leave granted by an employer is not considered an interruption in employment.

(4) After giving notice of layoff or termination to an employee of the length required pursuant to subsection (1), the employer shall not require an employee to take vacation leave as part of the notice period required pursuant to subsection (1).

2-61*(1) If an employer lays off or terminates the employment of an employee, the employer shall pay to the employee, with respect to the period of the notice required pursuant to section 2-60:*

(a) if the employer is not bound by a collective agreement that applies to the employee, the greater of:

(i) the sum earned by the employee during that period of notice; and

(ii) a sum equivalent to the employee's normal wages for that period; or

(b) if the employer is bound by a collective agreement that applies to the employee, the entitlements provided for in the collective agreement.

(2) For the purposes of subsection (1), if the wages of an employee, not including overtime pay, vary from week to week, the employee's normal wages for one week are deemed to be the equivalent of the employee's average weekly wage, not including overtime pay, for the 13 weeks the employee worked preceding:

(a) the date on which the notice of layoff or termination was given; or

(b) if no notice of the layoff or termination was given:

(i) the date on which the employee was laid off or terminated; or

(ii) a date determined in the prescribed manner.

(3) If an employer lays off or terminates the employment of an employee at a remote site, the employer shall provide transportation without cost for the employee to the nearest point where regularly scheduled transportation services are available.

. . .

4-10 *The director of employment standards and the director of occupational health and safety have the right: (a) to appear and make representations on: (i) any appeal or hearing heard by an adjudicator; and (ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and (b) to appeal any decision of an adjudicator or the board.*

[13] In the decision rendered on July 4, 2019, the Adjudicator observed that the Employer did not provide written notice of layoff because the extent of the rain delay could not have been anticipated. There was no issue of the Employer "punishing" McKeown for having quit his job; there was simply no ongoing work. The Adjudicator also found that McKeown could have mitigated his loss by beginning to work with the new employer.

[14] The Adjudicator found that McKeown was laid off, but determined that it would be unfair and unreasonable to require an employer to pay notice to an employee beyond the period during

which the employee intended to work for that company. Therefore, McKeown could not be entitled to pay in lieu of notice for any period after October 1, 2018. The Director does not take issue with this latter part of the decision, that is, that McKeown was not entitled to pay after October 1, 2018. The Director concedes that this aspect of the Adjudicator's decision was reasonable and does not ask that it be overturned. There was no argument presented to the contrary.

[15] The Adjudicator concluded:

> *Based on the facts of this case, I therefore find that Mr. McKeown is entitled only to notice for the two days he would have worked after the six days interruption in work deemed him to be laid-off, or for September 30 and October 1, 2018.*
>
> *Decision at page 5.*

[16] In the result, the Adjudicator observed that the Employment Standards Officer's calculations concluded that McKeown's pay for the 13 weeks prior represented $22,060, broken down to $339.38 per day. The Adjudicator reduced the wage assessment from $3,733.26 to $678.76, representing two days' wages.

Arguments of the Parties:

[17] In arguing that the decision is unreasonable, the Director relies on the modern rule of statutory interpretation, which directs that where an Act is benefits-conferring, the provisions in question must be given a broad and purposive interpretation. The Adjudicator's interpretation of clause 2-1(l) and subsection 2-60(1) abridges the rights of employees, and is unreasonable, because it reduces the notice period by six days in the case of a layoff.

[18] In the appeal hearing, McKeown expressed his frustration about a system that he thought was supposed to protect employees. He found the Adjudicator's interpretation rather surprising, and believed that it was absolutely wrong. He expressed his gratitude for the advocacy of the Director's counsel.

[19] The Employer argues that the phrase "exceeding six days" means that the layoff, and therefore the notice requirement, comes into effect on the seventh day of an interruption. The provisions must be interpreted against the factual context, which in this case involves an unexpected delay in work, combined with an employment contract allowing for irregular work due to unanticipated delays. The Director's interpretation leads to a windfall for employees impacted by short term work interruptions. Instead, an employee who is impacted by a work delay of six days is entitled to no compensation, as compared to an employee who is impacted by a work

delay of seven days, who should be compensated for only one day, as opposed to each day missed.

Analysis:

[20] The Director's appeal is grounded on a question of law in accordance with the right to appeal a decision of an adjudicator to the Board, as set out at subsection 4-8(1).

[21] There is no controversy around the applicable standard of review in this case. The parties submit that reasonableness is the appropriate standard of review on appeals of an adjudicator's decision arising from Part II of the Act: *Oil City Energy Services Ltd. v Fadhel*, 2018 CanLII 38250 (SK LRB) at paragraph 13. The Board observes that this appeal does not raise any of the four *Dunsmuir* categories that would rebut the presumption that the applicable standard of review is reasonableness.[2] The main issue on appeal involves the appropriate interpretation of clause 2-1(l), section 2-60, and related provisions of the Act. Therefore, the standard of review is reasonableness.

[22] In reviewing a decision on the reasonableness standard, the Board is guided by the framework outlined in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII) and repeated in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 SCR 293, 2016 SCC 47 (CanLII):

> *[36] A decision cannot be reasonable unless it "falls within a range of possible, acceptable outcomes" (Dunsmuir, at para. 47, per Bastarache and LeBel JJ.). Reasonableness is also concerned with "the existence of justification, transparency and intelligibility within the decision-making process" (ibid.). […]*

[23] In a given case, the Board's decision must recognize the legitimacy of multiple possible outcomes. It is not for the Board to impose its preferred interpretation, but to decide whether the Adjudicator's interpretation is reasonable.

[24] Next, the Board turns to its assessment of the parties' substantive arguments.

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[2] In *Weisgerber v Maple Creek (Rural Municipality) No. 111*, 2018 CarswellSask 316, the Board notes at footnote 2:

> *In Thiele (para 30), the Board cited these four categories from the decision of the Supreme Court of Canada in Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47 (S.C.C.) (CanLII) at para 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".*

[25] The Director grounds its argument in statutory interpretation. The Board recently applied the modern rule of statutory interpretation in *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc.*, 2017 CanLII 44004 (SK LRB) ["*CUPE v URSU*"]:

> *[44] It is well-established that all questions of statutory interpretation must be determined by applying the modern rule of statutory interpretation. The Supreme Court of Canada per Brown J. recently summarized the modern rule in Krayzel Corporation v Equitable Trust Co., [2016] 1 SCR 273, 2016 SCC 18 (CanLII), at paragraph 15 as follows:*
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> > *[15] Statutory interpretation entails discerning Parliament's intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense in harmony with the statute's schemes and objects: Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21. Throughout, it must be borne in mind that every statute is deemed remedial and is to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": Interpretation Act, R.S.C. 1985, c.I-21, s. 12.*
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> *[45] Like the federal Interpretation Act, section 10 of The Interpretation Act, 1995, SS 1995, c I-11.2 [The Interpretation Act, 1995] is to similar effect.*
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> *[…]*
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> *[47] This elaboration, which first appeared in Ballantyne, supra, at paragraphs 19-20, is helpful in this case, and, for that reason, it is reproduced below:*
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> > *[19] The leading case with respect to statutory interpretation is the Supreme Court of Canada's decision in Re Rizzo & Rizzo Shoes Ltd., 1998 CanLII 837 (SCC), [1998] 1 SCR 27 [Rizzo Shoes]. A number of principles set out in that case are applicable to the case at hand, namely:*
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> > > *1. The words of an Act are to be read in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its objects, and the intention of the legislature (See: Rizzo Shoes at para. 87). (See also: Saskatchewan Government Insurance v Speir, 2009 SKCA 73 (CanLII) at para 20, 331 Sask R 250; and Acton v Rural Municipality of Britannia, No. 502, 2012 SKCA 127 (CanLII) at paras 16-17, [2013] 4 WWR 213 [Acton]).*
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> > > *2. The legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent or if it is incompatible with other provisions or with the object of the legislative enactment (See: Rizzo Shoes at para. 27).*
> > >
> > > *3. Any statute characterized as conferring benefits must be interpreted in a broad and generous manner (See: Rizzo Shoes at para. 21). This principle is enshrined in s.10 of The Interpretation Act, 1995, SS 1995, c I-11.2 (See: Acton at paras. 16-18).*
> > >
> > > *4. Any doubt arising from difficulties of language should be resolved in favour of the claimant (See: Rizzo Shoes at para. 36).*

> *[20] In Sullivan on the Construction of Statutes, 6th ed (Markham: LexisNexis, 2014) at 28-29, Ruth Sullivan sets out three propositions that apply when interpreting the plain meaning of a statutory provision:*
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> > *1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.*
> >
> > *2. Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.*
> >
> > *3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.*

[26] Part II of the Act provides minimum standards to protect employees in the context of their employment. It is remedial, benefits-conferring legislation. It must be interpreted in a broad and generous manner, and any doubt must be resolved in favour of the employee.

[27] The Board's task is to review the Adjudicator's reasons for the existence of justification, and transparency and intelligibility within the decision-making process. The Board 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". In performing this task, the Board must adopt a deferential standard, appreciating that those matters that go before an adjudicator may give rise to a number of possible, reasonable conclusions.

[28] The Board begins by considering whether the Adjudicator's decision discloses justification and transparency within the decision-making process. In this vein, the decision is in writing, and includes a summary of the evidence relied upon. The Adjudicator cited and relied upon clause 2-1(l) and subsection 2-60(1) of the Act.

[29] The Board turns to assessing the intelligibility of the Adjudicator's reasons, in the context of the aforementioned provisions. First, clause 2-1(l) of the Act defines "layoff" as meaning the temporary interruption by an employer of the services of an employee for a period exceeding six consecutive work days. The Adjudicator found that the interruption in this case met the definition of layoff. Second, subsection 2-60(1) provides that no employer shall lay off an employee who has been in the employer's service for more than 13 consecutive weeks without giving that employee written notice for a period that is not less than the period set out in the table. Each of

the applicable periods is described as a “minimum period of written notice”. Therefore, the applicable period is not less than the period set out in the table.

[30] The Adjudicator found that pay in lieu of notice is owed. The Adjudicator took note of the Employment Agreement, which “did not guarantee... a certain number of hours”, but relies on section 2-6 of the Act, which states that “[n]o provision of any agreement has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Part”. The Adjudicator acknowledged that the notice provisions are “intended to provide protection to employees from periods of uncertainty in their employment” and that McKeown remains entitled to the minimum standards set out in the Act.[3] The Adjudicator went on to state that the notice provisions are “directed, at least in part, at ensuring employees receive termination pay at a certain point after being laid off”.

[31] The Adjudicator found further that the applicable period is that which corresponds with the employee’s period of employment, being more than one year but less than three years plus a day. It is noteworthy that none of the parties has raised concerns with this finding. The only issue in dispute is the calculation of the period of notice.

[32] The Adjudicator concluded that McKeown is not entitled to pay in lieu of notice for the period after October 1, 2018, given that he had already tendered written notice, and thereby severed the employment relationship. The related paragraphs read:

> *I note that [McKeown] could have mitigated this loss by going to work for his new employer, PCL Construction, and would have done so but for the ‘advice’ he testified he received from the ‘labour board’.*
>
> *Based on the facts of this case, I therefore find that Mr. McKeown is entitled only to notice for the two days he would have worked after the six days interruption in work deemed him to be laid-off, or for September 30 and October 1, 2018.*
>
> *[emphasis included in original]*

[33] The Board must consider whether, in concluding that the notice period commences on the seventh consecutive day of a work interruption, the Adjudicator’s reasons fall within a range of possible, acceptable outcomes. In reviewing the legislation for this purpose, the Board is guided by the modern rule of statutory interpretation. According to the rule, it is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence

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[3] At page 4.

of a reason to reject it, the ordinary meaning prevails. The definition of layoff means an interruption for the period "exceeding", not "following", six consecutive work days. The ordinary meaning of the word "exceeding" is to be greater than, or to go beyond a limit; it is not an indication of the passage of time. "Exceeding" implies that the relevant period is in excess of six consecutive work days; it does not imply that the relevant period commences after six consecutive work days have passed. The notice period includes, rather than excludes, the period of the layoff.

[34] The Board must also consider the scheme of the Act, its objects, and the intention of the legislature. Along these lines, the Director cites *International Union of Elevator Constructors, Local 102 v Otis Canada Inc.*, 2016 CanLII 107585 (SK LA) ["*Otis*"], in support of its position. According to *Otis*, the minimum notice serves as a substitute for lost wages:

> *92. Thus, an interpretation of ss. 2-60 and 2-61 that this Grievor should have received either two weeks notice of his layoff and been allowed to work or all he was entitled to under the Collective Agreement for those two weeks of work is consistent with the grammatical and ordinary sense of the words and harmonious with the scheme of the act, the object of the act and the intention of the Legislature.*

[35] The Employer argues that the arbitration board in *Otis* did not interpret section 2-60 and clause 2-1(l) together, and that clause 2-1(l) provides support for the Adjudicator's approach in this case. But for the reasons already outlined, the interpretation of clause 2-1(l) does not detract from the findings in *Otis*. Clause 2-1(l) of the Act defines "layoff" as meaning the temporary interruption by an employer of the services of an employee for a period exceeding, not following, six consecutive work days.

[36] Furthermore, Part II of the Act is a benefits-conferring statutory scheme, designed to protect employees from periods of uncertainty in employment. Benefits-conferring legislation must be interpreted in a broad and generous manner. Doubt arising from difficulties of language, if there were any, should have been resolved in favour of McKeown.

[37] The Director argues that the Employer's interpretation would result in absurd consequences arising from the application of the legislation. The Board agrees with these concerns. "Pay in lieu" serves as a substitute for lost wages in cases where notice is not provided or where notice is insufficient to allow an employee to earn normal wages. An interpretation of the minimum period of notice for purposes of pay in lieu should extend to, and be defensible in relation to, the minimum period of written notice. If the Employer's interpretation were accepted, it would mean that in a given case involving a two-week notice period, an employer could be required to

provide written notice less than two weeks prior to the commencement of the interruption period. In a given case involving a one-week notice period, an employer could be required to provide notice only one day prior to the interruption period. This cannot be the intent of the legislation.

[38] For the sake of being thorough, the Board turns to assessing other, possible explanations for the Adjudicator's conclusion. These are either: (1) the suggestion that McKeown could have mitigated his loss by working for his new employer, or: (2) the "facts of the case" *writ* large.

[39] The Board turns to the first possible, explanation. The Director suggests that the duty to mitigate is included in the existing statutory scheme through subsection 2-74(4) of the Act, which reads,

> *(4) The amount of a wage assessment that the director of employment standards may assess is to be reduced by an amount that the director is satisfied that the employee earned or should have earned during the period when the employer or corporate director was required to pay the employee the wages.*

[40] However, there is no indication that the Adjudicator heeded the direction of subsection 2-74(4) to consider the amount that McKeown "should have earned" for the period of time in question. The Adjudicator gave no apparent consideration to any notional amounts that McKeown "should have earned" through his employment with the new employer prior to September 29. The Adjudicator did not deduct an amount, or provide any rational justification for deducting an amount, from the pay in lieu of notice. Furthermore, this explanation is wholly irreconcilable with the remainder of the decision, which awards two days' notice for September 29 and 30. The selection of these dates is entirely arbitrary unless if arising from a misapprehension of the definition of "layoff", as previously described.

[41] Alternatively, the Director suggests that the Adjudicator's reasons arise from a combination of the layoff definition and the facts of the case, which include the Employment Agreement and the variable hours. This is supported by the Adjudicator's reference to the "facts of the case". However, the facts of the case cannot justify a reduction in a statutory minimum period of notice established in benefits-conferring legislation, in the absence of a statutory basis for doing so. To be sure, subclause 2-61(1)(a)(ii) makes clear that, if an employer lays off an employee, the employer shall pay to the employee, with respect to the period of notice required pursuant to section 2-60 (and absent a collective agreement), the greater of: (i) the sum earned by the employee during that period of notice; and (ii) a sum equivalent to the employee's normal wages for that period. While an employer is not required to pay an employee twice, an employer

is required to pay at minimum the employee's normal wages for the period in question. The Adjudicator does not refer to section 2-61 of the Act, or the related clause 2-1(p), which defines pay instead of notice as an amount of money that is payable to an employee pursuant to subclause 2-61(1)(a)(ii). In sum, the facts of the case do not cure what is otherwise a misinterpretation that is incompatible with the scheme of the Act.

[42] In reviewing an adjudicator's decision for reasonableness, the Board adopts a deferential standard, appreciating that those matters that go before an adjudicator may give rise to a number of possible, reasonable conclusions. The Board does not easily overturn an adjudicator's decision on an appeal. The Board has reviewed the relevant statutory provisions, the scheme of the Act, the applicable case law, and the internal logic of the decision. The Adjudicator's conclusion that the notice period can be abridged, such that it crystalizes on the seventh day of the layoff does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts or the law.

[43] For the foregoing reasons, the Board has determined that the decision appealed from is not reasonable, and the appeal against the Adjudicator's decision should be allowed.

Disposition:

[44] The Board must therefore assess the appropriate disposition in relation to the decision under appeal. Clause 4-8(6)(a) allows the board to affirm, amend, or cancel the decision on appeal. The Board sees fit to amend the decision such that the notice period captured in the wage assessment is in accordance with the first day of the layoff, being September 24, 2018.

[45] As such, the wage assessment would require eight days of notice, from September 24 to October 1, 2018, to ensure that McKeown is paid for the entire period of notice that he is entitled to, up until his last expected day of work, and excluding the period that is not in issue.

[46] There are two final matters to address. The first is the calculation of the daily wage in assessing the amount of notice owed. In this respect, the Board relies primarily on the wage assessment calculation filed in evidence, the Adjudicator's findings, and the supplementary submissions of the parties. This assessment is facilitated by the Adjudicator's acceptance of the wage assessment calculations submitted in evidence.

[47] Having decided that only two days of notice was owing, the Adjudicator assessed the total owing based on a five-day week. In the absence of any explanation, it appears that in doing so,

the Adjudicator failed to take into account the definition of "week" in Part II of the Act, pursuant to clause 2-1(w):

> ***2-1*** *In this Part and in Part IV:*
> *…*
> *(w) "week" means:*
>
> *(i) for the purposes of sections 2-11, 2-12 and 2-17 to 2-20:*
>
> *(A) the period between midnight on a Saturday and midnight on the following Saturday; or*
>
> *(B) any other period of seven consecutive days that the employer has consistently used when determining the schedule of an employee; and*
>
> *(ii) for all other purposes, a period of seven consecutive calendar days.*

[48] Clause 2-1(w) defines "week" as a period of seven consecutive calendar days. The exceptions are explicit and itemized. "A period of seven consecutive calendar days" is a default definition that applies "for all other purposes". The comprehensive scope of the definition, contrasted with the specific exceptions, leaves little room for interpretation.

[49] Despite this, the Director argues that an average over two weeks, rather than one week, is more representative of McKeown's daily wage. Further, as the legislation is silent on the calculation of the daily wage, the Adjudicator's method was reasonable.

[50] However, subsection 2-61(2) states that if the wages of an employee vary from week to week, "the employees' normal wages for one week are deemed to be the equivalent of the employee's average weekly wage… for the 13 weeks the employee worked [.]" Clause 2-1(w) defines "week" as "a period of seven consecutive calendar days". Adopting the Director's approach would disregard the clear direction provided by the Act, which provides for a measure of predictability in the context of variable wages. The resulting predictability promotes the legislative objective to provide a degree of security to an employee who is experiencing uncertainty in employment. By requiring or allowing for an individualized and customizable definition of "week" in cases involving variable hours, the Director seeks a potentially incongruous result, contradicting the objective of the legislation.

[51] For the foregoing reasons, the average weekly wage, $1,696.92, should be divided by seven days, for a total daily wage of $242.42. This is not inclusive of public holiday pay or vacation pay.

[52] Second, in reviewing the relevant calculations, the Board noted that the Adjudicator failed to include public holiday pay or vacation pay in the assessment of the daily wage. The Employer has helpfully conceded this point. Nonetheless, the Board will proceed to outline its reasoning in amending the decision such that the wage assessment reflects the public holiday pay and vacation pay, not previously included.

[53] First, the wage assessment calculation entered in evidence makes clear that the Adjudicator simply multiplied the daily wage by two, to account for two days, without including the additional amount for public holiday pay or vacation pay, as itemized in the wage assessment calculation. No explanation was provided for this omission, and, as such, it appears to have been a simple oversight. As the inclusion of holiday pay is a statutory requirement, this oversight was unreasonable.

[54] On the calculation of the wages owing in respect of the period of notice required pursuant to section 2-60, subsection 2-61(2) states that,

> *(2) For the purposes of subsection (1), if the wages of an employee, not including overtime pay, vary from week to week, the employee's normal wages for one week are deemed to be the equivalent of the employee's average weekly wage, not including overtime pay, for the 13 weeks the employee worked preceding:*
>
> *(a) the date on which the notice of layoff or termination was given; or*
>
> *(b) if no notice of the layoff or termination was given:*
>
> *(i) the date on which the employee was laid off or terminated; or*
> *(ii) a date determined in the prescribed manner.*

[55] Clause 2-1(v) of the Act defines "wages" as "salary, commission and any other monetary compensation for work or services or for being at the disposal of an employer, and includes overtime, public holiday pay, vacation pay and pay instead of notice". As pointed out by the Director, subsection 2-61(2) modifies the definition of "wage" to exclude overtime while maintaining the remaining categories of pay. For public holiday pay, pursuant to section 2-32 of the Act and clause 25(2)(a) of *The Employment Standards Regulations*, McKeown is entitled to 4% of the wages, exclusive of overtime and vacation pay, earned by him in each calendar year. For vacation pay, pursuant to clause 2-27(1)(a) of the Act, McKeown is entitled to three fifty-seconds (3/52) of his wages for the year of employment or portion of the year of employment preceding the entitlement to the vacation.

[56] The appropriate amount of public holiday pay, based on $22,060, is $882.40 ($22,060 x 4%). The appropriate amount of vacation pay is $1,323.78 (($22,060 + $882.40) x (3/52)). Therefore, the total amount for the preceding 13 weeks is $24,266.18, and the weekly wage inclusive of public holiday and vacation pay is $1,866.63. This is entirely consistent with the wage assessment calculation, inclusive of public holiday and vacation pay.

[57] Divided by seven days, the daily wage is $266.66. The total amount owing, by the Employer to McKeown for the period from September 24 to October 1, 2018, is $2,133.29. Accordingly, the Adjudicator's decision is amended such that wage assessment #1-001449 is varied from $3,733.26 to $2,133.29, rather than from $3,733.26 to $678.76.

[58] The Board is grateful to the parties for their submissions in support of their respective positions, including their comprehensive supplementary submissions, which the Board has found particularly helpful.

DATED at Regina, Saskatchewan, this **14th** day of **November, 2019**.

LABOUR RELATIONS BOARD

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Barbara Mysko
Vice-Chairperson