LEPAGE CONTRACTING LTD., Appellant v LANCE MCCUTCHEON, Respondent and THE DIRECTOR OF EMPLOYMENT STANDARDS, Respondent

LRB File No. 111-19; February 5, 2020

Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

The Appellant:	Lynden Lepage
For the Respondent Lance McCutcheon:	No one appearing
For The Director of Employment Standards:	Steven Wang and Clair McCashin

Appeal from Decision of Wage Assessment Adjudicator – Standard of review – *Canada v Vavilov* – Appeal brought pursuant to section 4-8 of *The Saskatchewan Employment Act* – Question of law – Statutory appeal mechanism – Appellate standard of review – Correctness standard.

Wage assessment directs payment for public holiday pay and vacation pay – Agreement to increase wage to account for pay – Agreement contrary to purpose of Act – Agreement invalid – Adjudicator's conclusion upheld.

Offsets – Whether purchases made from a third party – Finding of fact – Narrow jurisdiction to review findings of fact – No basis to overturn decision.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On May 2, 2019, the Employer, Lepage Contracting Ltd., filed a Notice of Appeal from an Adjudicator's decision on a wage assessment issued in favor of an Employee, Lance McCutcheon ["McCutcheon"]. That Appeal comes before the Board pursuant to section 4-8 of *The Saskatchewan Employment Act* ["Act"]. These are the Board's reasons in relation to that Appeal.

[2] On January 17, 2019, the wage assessment was issued against the Employer in the amount of $13,921.81. Most of the assessed total was comprised of amounts for public holiday pay and vacation pay deemed not to have been paid due to the Employer's failure to comply with section 2-37 of the Act. Section 2-37 requires an employer to clearly set out the amount paid for public holiday pay and vacation pay on a statement of earnings provided to an employee. The Employer appealed the wage assessment, stating that McCutcheon was paid at a negotiated

hourly rate that included public holiday pay and vacation pay and that this agreement operated to McCutcheon's benefit.

[3] The appeal of the wage assessment was heard on April 9, 2019. At the hearing, the wage assessment was varied to $16,403.73 by agreement of the parties.[1] In his decision dated April 25, 2019 ["Decision"], the Adjudicator varied the agreed upon wage assessment to $15,903.73, representing a $500 offset pursuant to clause 2-36(2)(f) of the Act.

[4] The Employer appeals from the Adjudicator's Decision on a variety of grounds, which may be summarized as follows:

a. The Adjudicator erred in concluding that the vacation pay (and holiday pay) was not paid and "slandered" the Employer as a result;

b. The Adjudicator erred in interpreting the evidence and that error would have made a difference to the result (for instance, the phone call with Jesse Peddle[2], and the witness evidence about the vacation and holiday pay);

c. The Adjudicator erred in his assessment of "the amounts outstanding that Lance owes to my business"; and

d. The Adjudicator bullied the Employer, the Director failed to disclose the timesheets of the Employee, the Employer lacked any information about subpoenaing witnesses and received no cooperation from the Adjudicator in this respect, and the Employer lacked information about the necessity of having a lawyer or legal aid present.

[5] The hearing of the within Appeal was held on November 7, 2019. Counsel for the Director appeared and made representations at the hearing, arguing that the Adjudicator's Decision was reasonable. Lynden Lepage ["Lepage"], Director of Lepage Contracting Ltd., appeared for the Employer. McCutcheon was aware of the scheduled date for the hearing but did not appear on his own behalf.

[6] At the hearing, Lepage advised the Board that he had not agreed to the wage assessment increase to $16,403.73. Lepage did not raise this issue through the Notice of Appeal or provide further clarification. The Board must therefore proceed on the basis that there was an agreement.

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[1] In the Decision at 3, the Adjudicator states that the parties "agreed that the wage assessment was incorrect and was amended to $16,403.73 by agreement".
[2] Referred to in the Adjudicator's Reasons as Jesse Peddue.

Argument on Behalf of the Parties:

Employer/Lepage

[7] Lepage argues that the Adjudicator failed to take into account certain crucial and decisive evidence. The Adjudicator's conclusion on setoffs was internally inconsistent in that he allowed a setoff for cigarettes but not for any other goods. McCutcheon stole from Lepage, which will be proven in a court of law, and the Adjudicator should have taken this "fact" into account. Lepage admits to having erred in failing to set out the amounts for public holiday pay and vacation pay, but the negotiated hourly wage resulted in an equivalent compensation and so Lepage should not be liable for those amounts.

Director

[8] According to the Director, the Board lacks jurisdiction to hear this Appeal, as it was brought pursuant to a question of fact, rather than a question of law as required by section 4-8 of the Act. Alternatively, if the Board finds that it has jurisdiction, it should apply the reasonableness standard of review. Applying that standard, the Adjudicator's Decision is reasonable for two primary reasons.

[9] First, the Adjudicator relied on subsection 2-37(3) of the Act, which sets up a rebuttable presumption that wages and other amounts that are not included in the statement of earnings have not been paid. The Employer failed to rebut the presumption that McCutcheon was not compensated for public holiday pay or vacation pay.

[10] Second, section 2-36 of the Act itemizes permissible deductions from an employee's wages, in addition to deductions permitted or required pursuant to law. The Director found that $500 was to be deducted, representing the value of the cigarettes that McCutcheon had purchased from the Employer. Clause 2-36(2)(f) permits deductions for voluntary employee purchases from an employer of any goods, services or merchandise. According to the Director, it was reasonable for the Adjudicator to conclude that the remaining setoffs did not fall under section 2-36.

Evidentiary Background:

[11] The Employer is in the business of performing residential construction and renovations in and around Loreburn, Saskatchewan. McCutcheon was an employee of the company from April 1, 2015 until December 12, 2018, at which time he voluntarily left his employment.

[12] At the hearing, Lepage testified that when he hired McCutcheon, he offered two compensation options, including a higher rate of pay that included vacation pay. McCutcheon chose to receive the higher rate of pay. Lepage called as witnesses two former employees who testified that they negotiated a higher hourly wage on the same terms. McCutcheon testified that he was not given these options.

[13] Lepage testified that after January 2016, McCutcheon's biweekly pay was reduced to account for a rent-to-own agreement between McCutcheon and his landlord. The Employer paid McCutcheon's cell phone bill, and McCutcheon used the company vehicle, which he damaged, for personal use. Lepage suggested that these items should be deducted from the wage assessment.

Applicable Statutory Provisions:

[14] The following provisions of the Act are applicable:

> ***2-1*** *In this Part and in Part IV:*
>
> *…*
>
> *(r)* ***"public holiday pay"*** *means an amount of money that is payable to an employee pursuant to section 2-32;*
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> *…*
>
> *(u)* ***"vacation pay"*** *means an amount of money that is payable to an employee pursuant to section 2-27;*
>
> *…*
>
> *(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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> *…*
>
> ***2-6*** *No 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.*
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> *…*
>
> ***2-15*** *Subject to this Part, an employer shall pay an employee his or her total wages payable in accordance with the terms and conditions of: (a) the employee's employment contract; or (b) if the employer is bound by a collective agreement, the collective agreement.*
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> *…*
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> ***2-27****(1) An employee is to be paid vacation pay in the following amounts:*
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> *(a) if the employee is entitled to a vacation pursuant to clause 2-24(1)(a), three fifty-seconds of the employee's wages for the year of employment or portion of the year of employment preceding the entitlement to the vacation;*

(b) if the employee is entitled to an annual vacation pursuant to clause 2-24(1)(b), four fifty-seconds of the employee's wages for the year of employment preceding the entitlement to the vacation.

(2) With respect to an employee who is entitled to a vacation pursuant to section 2-24 but who does not take that vacation, the employer shall pay the employee's vacation pay not later than 11 months after the day on which the employee becomes entitled to the vacation.

(3) The employer shall pay vacation pay to the employee in an amount calculated according to the length of vacation leave taken:

(a) at the employee's request, before the employee takes the vacation; or

(b) on the employee's normal payday.

(4) An employer shall reimburse the employee for any monetary loss suffered by the employee as a result of the cancellation or postponement of the vacation if:

(a) the employee has scheduled a period of vacation at a time agreed to by the employer; and

(b) the employer does not permit the employee to take the vacation as scheduled.

(5) A monetary loss mentioned in subsection (4) is deemed to be wages owing and this Part applies to the recovery of that monetary loss.

. . .

***2-32** (1) An employer shall pay an employee for every public holiday an amount equal to:*

(a) 5% of the employee's wages, not including overtime pay, earned in the four weeks preceding the public holiday; or

(b) an amount calculated in the prescribed manner for a prescribed category of employees.

(2) For the purposes of subsection (1), an employer shall include in the calculation of an employee's wages:

(a) vacation pay with respect to vacation the employee actually takes in the four weeks preceding the public holiday; and

(b) public holiday pay in an amount required pursuant to subsection (1) if another public holiday occurs in the four-week period mentioned in clause (1)(a).

(3) If an employee works on a public holiday, an employer shall pay the employee the total of:

(a) the amount calculated in accordance with subsection (1); and

(b) for each hour or part of an hour in which the employee is required or permitted to work or to be at the employer's disposal:

(i) an amount calculated at a rate of 1.5 times the employee's hourly wage; or

(ii) an amount calculated in the prescribed manner for a prescribed category of employees.

. . .

2-36*(1) Except as permitted or required pursuant to this Act, any other Act or any Act of the Parliament of Canada, an employer shall not, directly or indirectly:*

(a) make any deductions from the wages that would be otherwise payable to the employee;

(b) require that any portion of the wages be spent in a particular manner; or

(c) require an employee to return to the employer the whole or any part of any wages paid.

(2) In addition to deductions permitted or required pursuant to law, an employer may deduct from an employee's wages:

(a) employee contributions to pension plans or registered retirement savings plans;

(b) employee contributions to other benefit plans;

(c) charitable donations voluntarily made by the employee;

(d) voluntary contributions by the employee to savings plans or the purchase of bonds;

(e) initiation fees, dues and assessments to a union that is the bargaining agent for the employee;

(f) voluntary employee purchases from the employer of any goods, services or merchandise; and

(g) deductions for purposes or categories of purposes that are specified pursuant to subsection (3).

(3) For the purposes of clause (2)(g), the Lieutenant Governor in Council may specify purposes and categories of purposes by regulation or by special order in a particular case.

(4) No employer shall require an employee to purchase special clothing that identifies the employer's establishment.

(5) An employer who requires an employee to wear a special article of clothing that identifies the employer's establishment shall provide that special article of clothing free of cost to the employee.

2-37*(1) An employer shall provide a statement of earnings to an employee:*

(a) on every payday; and

(b) when making payments of wage adjustments.

(2) A statement of earnings required pursuant to subsection (1) must:

(a) clearly set out:

(i) the name of the employee;
(ii) the beginning and ending dates of the period for which the payment of wages is being made;

(iii) the number of hours of work for which payment is being made for each of wages, overtime and hours worked on a public holiday;

(iv) the rate or rates of wages;

(v) the amount paid for each of wages, overtime and public holiday pay and work on a public holiday, vacation pay and pay instead of notice;

(vi) the employment or category of employment for which payment of wages is being made;

(vii) the amount of total wages;

(viii) an itemized statement of any deductions from wages being made; and

(ix) the actual amount of the payment being made; and

(b) be in a form that:

(i) is separate from, or readily detachable from, any form of cheque or other type of voucher issued in the payment of wages; or

(ii) if an employee is provided with an electronic statement, permits the employee to print off a copy of the statement of earnings.

(3) Unless the contrary is established, wages and other amounts that are not included in a statement pursuant to subsection (2) are deemed not to have been paid.

. . .

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.

[15] The following provision of *The Employment Standards Regulations* ["Regulations"] is applicable:

25*(1) For the purposes of this section, "construction" means:*

(a) the construction, reconstruction, remodelling, repair, renovating, decoration or demolition of any building;

(b) the construction, reconstruction or repair of:

(i) any sewer, drain or gas work;

(ii) any electrical, plumbing or heating undertaking;

(iii) any road or highway or part of a road or highway; or

(iv) any other work of construction;

and includes services and undertakings that are incidental to the activities described in clauses (a) and (b).

(2) Subject to any agreement made pursuant to subsection (5), the minimum sum of money to be paid for public holidays by an employer to an hourly-paid employee employed in the construction industry is:

(a) if the employee does not work on a public holiday, 4% of the wages, exclusive of overtime and vacation pay, earned by the employee in each calendar year;

> *(b) if the employee works on a public holiday, the amount calculated in accordance with clause (a), plus an additional amount equal to 1.5 times the regular rate of wages of the employee for each hour or part of an hour that the employee works or is required to be at the employer's disposal on the public holiday.*
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> *(3) The employer shall pay the amount mentioned in clause (2)(a) to the employee on or before the earlier of:*
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> *(a) December 31 in the calendar year in which the public holiday occurs; and*
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> *(b) if the employee's employment is terminated, 14 days after the day on which the termination of employment takes effect.*
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> *(4) The employer shall pay the additional amount mentioned in clause (2)(b) to the employee in the pay period in which it is earned.*
>
> *(5) If, in the construction industry, a majority of the employees in an appropriate unit of employees of an employer are represented by a union for the purposes of bargaining collectively, the employer and the union may agree in writing to be governed by section 2-32 of the Act with respect to the calculation of minimum sums of money to be paid to an employee for a public holiday.*

Analysis:

Fresh Evidence

[16] Lepage brought to the Board a number of documents which, according to Lepage, did not factor into the Adjudicator's Decision and would have made a critical difference to the outcome of the hearing. The document package consisted of a number of photographs without dates and a number of invoices with dates ranging from June 26, 2015 to December 24, 2018.

[17] For the following reasons, the Board has decided that the proposed documents do not meet the test for fresh evidence.

[18] The principles governing the admission of fresh evidence are well-known, arising from the Supreme Court of Canada's decision in *Palmer v The Queen*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759 ["*Palmer*"], at 760:

> *(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial, (3) The evidence must be credible in the sense that it is reasonably capable of belief. (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.*

[19] Here, the first question is whether Lepage had the means to obtain the documents prior to the hearing before the Adjudicator. Lepage was in control of the creation and production of the

documents. In explaining their absence, Lepage stated that he did not have sufficient understanding of the process to properly prepare for the hearing. This is not a suitable explanation. Lepage did not explain why he did not exercise due diligence in attempting to understand the procedure, and in attempting to obtain and produce the necessary evidence.

[20] Furthermore, the documents in question do not bear on a decisive or potentially decisive issue in the hearing. First, the photographs do not shed any light on the deductions available or not available pursuant to clause 2-36(2)(f). Second, the invoices provide minimal, if any, additional information about the nature of the alleged amounts owing. A review of the formal Notice of Appeal to the wage assessment, which would have been before the Adjudicator, lists the same or similar goods, services, and merchandise. Finally, there is no way for the Board to assess the reliability of the documents in the absence of an affidavit or other sworn evidence. Given all of these factors, the Board is satisfied that the proposed fresh evidence "if believed" would not have affected the result.

[21] The Board notes that there is no suggestion that Lepage's right to procedural fairness was prejudiced by a direct refusal to admit relevant evidence.

[22] Finally, pursuant to subsection 4-8(1) of the Act, Lepage may appeal the Decision of the Adjudicator to the Board on a question of law. This raises a question as to whether, and in what circumstances, the Board can admit fresh evidence on an appeal on a question of law from an adjudicator's decision. However, due to the Board's determination on the proposed evidence, it is not necessary for the Board to consider this issue further.

Jurisdiction

[23] The Employer brings this Appeal pursuant to section 4-8 of the Act, which limits appeals of an adjudicator's decision to a question of law.

[24] The Director argues that the Board does not have jurisdiction to hear this Appeal because the Employer has brought the Appeal on questions of fact. The Director relies for this argument on the decision in *101254226 Saskatchewan Ltd. v Douglas Klymchuk and Government of Saskatchewan*, 2018 CanLII 8571 (SK LRB) ["*Klymchuk*"], in which former Vice-Chairperson Mitchell, Q.C., as he then was, outlined the relevant jurisdictional principles raised in that appeal:

> *[16] As set out above, subsection 4-8(1) of the SEA plainly limits appeals against an Adjudicator's decision respecting a wage assessment to "a question of law". It is essential,*

at the outset, to determine if the grounds of appeal presented in a notice of appeal disclose issues that can be characterized as a question of law.

[17] Most recently, in Teal Cedar Products Ltd. v British Columbia, 2017 SCC 32 (CanLII) [Teal Cedar Products], Gascon J., writing for the majority, stated at paragraph 43:

> *The process for characterizing a question as one of three principal types – legal, factual, or mixed – is also well-established in the jurisprudence (Canada (Director of Investigation and Research) v Southam Inc., 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 35). In particular, it is not disputed that legal questions are questions "about what the correct legal test is" ([Sattva Capital Corp. v Creston Moly Corp., 2014 SCC 53 (CanLII), [2014] 2 S.C.R. 633], at para. 49, quoting Southam, at para. 35); factual questions are questions "about what actually took place between the parties" (Southam, at para. 35; Sattva, at para. 58); and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts" (Southam, at para. 35; Sattva, at para. 49, quoting Housen v Nikolaisen, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235). [Emphasis added.]*

[18] Factual questions rarely meet the test for what may be characterized on appeal as a question of law. This is because in order to successfully appeal against an adjudicator's factual findings, an appellant must meet a very rigorous standard. That standard, first identified in Housen v Nikolaisen, [2002] 2 SCR 235, 2002 SCC 33 (CanLII) [Housen], where the Supreme Court of Canada per Iacobucci and Major JJ., holds that an appellate body may only interfere with finding of facts made by a lower tribunal – in this case, a wage assessment adjudicator – if the appellant demonstrates the tribunal committed "a palpable and overriding error in coming to a factual conclusion on accepted facts": Housen, at paragraph 21 [emphasis is original]. See also: Burton Aggregates Ltd. v Government of Saskatchewan, Executive Director, Employment Standards and Rae-Anne Hoflin, LRB File No. 272-16, 2017 CanLII 20063 (SK LRB) [Burton Aggregates Ltd.] at para. 23, and Anwar Group International Ltd. and Naveed Anwar v Jeannine Poulin and Director of Employment Standards, LRB File No. 171-15, 2016 CanLII 30541 (SK LRB).

[19] The Housen majority explained why such a high threshold must be satisfied before an appellate tribunal could, not should, interfere with factual findings made by a lower court or administrative tribunal. At paragraphs 23 and 25, Iacobucci and Major JJ. stated as follows:

> *We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts….*
>
> *. . ..*
>
> *Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual*

> *nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of face, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge – that of palpable and overriding error. [Emphasis in original.]*

[25] According to the Director, the main issue raised on this Appeal is whether the Adjudicator erred in preferring the evidence of McCutcheon, who testified that his hourly wage did not include vacation pay, over that of the Employer. This is a question of fact.

[26] While the Board acknowledges that, through this Appeal, the Employer raises issues of a factual nature, the framing of the Appeal alone should not justify the dismissal of the Appeal for want of jurisdiction. This Appeal was not drafted with the benefit of legal counsel. The Board must consider whether the Appeal discloses a question of law and if so, assess the merits of that question.

[27] Granted, the Board's power to review alleged factual errors, grounded in errors of law, is very narrow. Factual questions rarely meet the test for a question of law. A finding of fact may be grounded in an error of law if it is based on no evidence, made on the basis of irrelevant evidence or in disregard of relevant evidence, or based on an irrational inference of fact.[3]

[28] Finally, the Employer's Appeal also raises issues of procedural fairness, which may be characterized as questions of law and clearly engage the Board's jurisdiction.

Standard of Review

[29] This Appeal was heard prior to the release of the Supreme Court of Canada's decision in *Canada v Vavilov*, 2019 SCC 65 ["*Vavilov*"]. After *Vavilov* was issued, the Board provided the parties with an opportunity to file written submissions about the application of the new standard of review in the present case.

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[3] *P.S.S. Professional Salon Services Inc. v Saskatchewan Human Rights Commission et al*., 2007 SKCA 149 (CanLII), (2007), 302 Sask R 161 at paras 60-65 (leave to appeal to SCC dismissed [2008] SCCA No 69).

[30] Prior to *Vavilov*, reasonableness was the presumed standard of review on an appeal of an adjudicator's decision arising from Part II of the Act.[4] In accordance with *Vavilov*, the appropriate standard of review on appeals brought pursuant to a statutory appeal mechanism is determined in "reference to the nature of the question and to this Court's jurisprudence on appellate standard of review".[5] Here, the relevant statutory appeal mechanism exists at section 4-8 of the Act. Pursuant to section 4-8, an appeal from an adjudicator's decision on a wage assessment comes to the Board on a question of law. It is therefore incumbent on the Board to apply the standard of correctness in accordance with *Housen v Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235 ["*Housen*"].

[31] The Director submits that the Board is not a court, and so therefore the appellate standard of review is not applicable. The Director relies for this argument on the various references to "courts" throughout the *Vavilov* decision, and in particular to the following passage:

> *[37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision….*

[32] This Board derived the reasonableness standard from its application of the Supreme Court of Canada's decision in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47 ["*Edmonton East (Capilano)*"], in which a slim (5-4) majority rejected the notion that statutory appeal mechanisms rebut the presumption of reasonableness. A review of the reasons of then Vice-Chairperson Mitchell, Q.C. in *Thiele v Hanwel*, 2016 CanLII 98644 (SK LRB) ["*Thiele*"] makes this clear:

> *[28] Subsection 4-8(1) is a generic statutory appeal provision with language that is similar, if not identical, to language found in many federal and provincial statutes across Canada. Very recently the Supreme Court of Canada settled on "reasonableness" as the applicable standard of review in statutory appeals.*
>
> *[29] In Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47 ["Edmonton East (Capilano)"], the Court was called upon to determine the appropriate standard of review for appeals under section 470 of Alberta's Municipal Government Act ["MGA"]. This provision authorized appeals from decisions of a local assessment review board to the Alberta Court of Queen's Bench on "a question of law or jurisdiction of sufficient importance to merit an appeal". Both Alberta's Court of Queen's Bench and Court of Appeal determined that the appropriate standard of review for such matters was correctness.*
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> *[30] The Supreme Court (5:4) disagreed.[…]*

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[4] *Oil City Energy Services Ltd. v Fadhel*, 2018 CanLII 38250 (SK LRB) at para 13.
[5] *Vavilov* at para 37.

> *…*
>
> *[31] The majority went to consider whether a statutory right of appeal or a right to appeal with leave against an administrative tribunal's decision qualifies as a new category of matters subject to a standard of review of correctness. The Alberta Court of Appeal in this case concluded it did. However, Karakatsansis J. disagreed stating at paragraph 28 that such a result ran counter to "strong jurisprudence from this Court". She elaborated at paragraph 29 as follows:*
>
> > *[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, [2011] 1 S.C.R. 160; Bell Canada v. Bell Aliant Regional Communications, 2009 SCC 40, [2009] 2 S.C.R. 764; Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53, [2014] 2 S.C.R. 633; Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, [2015] 3 S.C.R. 147; ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission), 2015 SCC 45, [2015] 3 S.C.R. 219).*
>
> *[32] The majority acknowledged at paragraph 32 that the "presumption of reasonableness may be rebutted if the context indicates the legislature intended the standard of review to be correctness". However, after reviewing the language, and statutory context, of section 407 of the MGA, Karakatsanis J. determined the Alberta Legislature did not intend appeals brought pursuant to that legislative provision be subject to a correctness standard.*
>
> *[33] Applying the Edmonton East (Capilano) analysis here, I find the presumption of reasonableness operates.*

[33] In *Edmonton East (Capilano)*, the majority held that a statutory right of appeal does not qualify as a new category of matters subject to the correctness standard of review. The majority in *Vavilov* overturns this holding. By adopting the appellate standards of review, the Board applies the underlying principle of *Vavilov*, which is to demonstrate respect for the choice of the legislature in creating a statutory right of appeal.

[34] The Supreme Court in *Vavilov* did not directly address the standard of review applicable to matters of procedural fairness. Prior to *Vavilov*, issues of procedural fairness were reviewable on a correctness standard.[6] The Board should therefore continue to apply the standard of correctness to such matters.

Substantive Issues

[35] The Board begins its review by considering the primary issues identified by the Adjudicator in his reasons. The Adjudicator outlines two issues to be decided, as follows:

> *1. Does the legislation permit the employer to increase the employee's agreed rate of pay in lieu of paying the employee "holiday pay" as required by the legislation?*

[6] *Eagle's Nest Youth Ranch Inc. v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 (CanLII) at para 83.

> *2. Are payments that were made by the employer as set out in his Notice of Appeal eligible to be offset against the amount set out in the Wage Assessment?*[7]

[36] The Board will proceed to consider each of these issues, in turn.

Public Holiday Pay and Vacation Pay Issue

[37] In the current case, the assessed total was mainly comprised of amounts for public holiday pay and vacation pay that were deemed not paid. This aspect of the assessment was attributed to the Employer's failure to set out those amounts in the statement of earnings as required by clause 2-37(2)(v).

[38] Lepage admits that he failed to set out the amounts for public holiday pay or vacation pay, as required by section 2-37. In his defense, he insists that he was not aware of the requirement. He states that he negotiated with McCutcheon a rate of pay that was inclusive of those amounts and for that reason he has paid those amounts, they are not due and owing, and the wage assessment is wrong.[8]

[39] In assessing the correctness of the Adjudicator's Decision it is necessary to interpret section 2-37 of the Act, which reads:

> ***2-37****(1) An employer shall provide a statement of earnings to an employee:*
>
> *(a) on every payday; and*
>
> *(b) when making payments of wage adjustments.*
>
> *(2) A statement of earnings required pursuant to subsection (1) must:*
>
> *(a) clearly set out:*
>
> *(i) the name of the employee;*
>
> *(ii) the beginning and ending dates of the period for which the payment of wages is being made;*
>
> *(iii) the number of hours of work for which payment is being made for each of wages, overtime and hours worked on a public holiday;*
>
> *(iv) the rate or rates of wages;*

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[7] *Adjudicator's Reasons* at 4.
[8] The public holiday pay and vacation pay amounts were ostensibly included in the negotiated rate of $30 per hour. This is in contrast with the lower rate of $28.

> *(v) the amount paid for each of wages, overtime and public holiday pay and work on a public holiday, vacation pay and pay instead of notice;*
>
> *(vi) the employment or category of employment for which payment of wages is being made;*
>
> *(vii) the amount of total wages;*
>
> *(viii) an itemized statement of any deductions from wages being made; and*
>
> *(ix) the actual amount of the payment being made; and*
>
> *(b) be in a form that:*
>
> *(i) is separate from, or readily detachable from, any form of cheque or other type of voucher issued in the payment of wages; or*
>
> *(ii) if an employee is provided with an electronic statement, permits the employee to print off a copy of the statement of earnings.*
>
> *(3) Unless the contrary is established, wages and other amounts that are not included in a statement pursuant to subsection (2) are deemed not to have been paid.*

[40] An employer is required, pursuant to clause 2-37(2)(v), to provide a statement of earnings to an employee that clearly sets out the amount paid for each of wages, overtime and public holiday pay and work on a public holiday, vacation pay and pay instead of notice.

[41] The terms, "public holiday pay" and "vacation pay" are defined at section 2-1 of the Act:

> ***2-1*** *In this Part and in Part IV:*
>
> *…*
>
> *(r)* ***"public holiday pay"*** *means an amount of money that is payable to an employee pursuant to section 2-32;*
>
> *…*
>
> *(u)* ***"vacation pay"*** *means an amount of money that is payable to an employee pursuant to section 2-27;*

[42] An employer shall pay an employee for every public holiday an amount equal to the calculation set out at clause 2-32(1)(a), or an amount calculated in the prescribed manner for a prescribed category of employees pursuant to clause 2-32(1)(b). In relation to an hourly-paid employee in the construction industry, an employer shall pay for every public holiday a minimum sum of money in accordance with the calculations set out at subsection 25(2) of the Regulations.

[43] Both public holiday pay and vacation pay must be clearly set out on a statement of earnings. Despite this, the Adjudicator uses the terms "holiday pay" and "vacation pay"

interchangeably. To illustrate, although the preceding summary of issues refers to “holiday pay”, the subsequent conclusion refers to “vacation pay”:

> *As the vacation pay was not set out in a statement of earnings to the employee, and I am not satisfied that there is any evidence to the contrary, vacation pay is deemed not to have been paid.*

[44] The wage audit and resulting wage assessment appropriately address these concepts as separate minimum entitlements. The first page of the wage audit outlines the calculation of public holiday pay[9], whereas the second page outlines the calculation of vacation pay and total amounts owing.

[45] Lepage admits in his Notice of Appeal that he failed to set out the public holiday pay and vacation pay on the statements of earnings:

> *I am guilty of not showing the vacation pay or holiday pay on the stubs, and was unaware that this was the law, however this does not prove it was not paid. Lance claiming he was not paid vacation pay and holiday pay when he actually was is called “slander”.*

[46] He concludes that:

> *The Adjudicator erred in concluding that the vacation pay (and holiday pay) was not paid and “slandered” the Employer as a result;*
> *…*

[47] Lepage was aware that both public holiday pay and vacation pay were the subject of the wage assessment. The alleged agreement applied equally to both. While the Adjudicator does not explicitly distinguish between the two concepts, both were addressed through the evidence and submissions. The Adjudicator’s conclusion, which was to maintain the status quo of the wage assessment, applies to both equally.

[48] Next, the Board will turn to the overall analysis as disclosed by the reasons under review. To frame the analysis, the Adjudicator first asks whether the legislation permits the Employer to increase the employee’s agreed rate of pay in lieu of paying the employee “holiday pay” as required by the legislation. He then looks to subsection 2-37(3) which states:

> *(3) Unless the contrary is established, wages and other amounts that are not included in a statement pursuant to subsection (2) are deemed not to have been paid.*

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[9] The calculations were performed based on 4%, in accordance with the public holiday calculations set out at section 25 of the Regulations.

[49] In effect, the Adjudicator finds that subsection (3) is a full answer to the matter. For this reason, he proceeds to consider whether the contrary was established so as to rebut the presumption that the amounts were not paid.

[50] The Adjudicator summarizes and considers the evidence, noting that the respective witnesses gave contradictory testimony as to whether "vacation pay" was included in McCutcheon's hourly rate. He notes that each of the two Employer witnesses testified that they had entered into an agreement in which the hourly wage was inclusive of "vacation pay". McCutcheon testified that he was offered no similar option. The Employer had no timesheets or other records to substantiate the rate of pay or to substantiate his position that the disputed amounts were included in the overall compensation.

[51] The Adjudicator's conclusion on the evidence is brief:

> *As the vacation pay was not set out in the statement of earnings to the employee, and I am not satisfied that there is any evidence to the contrary, vacation pay is deemed not to have been paid.*

[52] In the absence of any evidence to the contrary, the Adjudicator reasons that "vacation pay" is deemed not to be paid and, consequently, is due and owing.

[53] The Adjudicator appears to have weighed the evidence and thereby determined that the Employer's evidence was not to be believed, at least with respect to McCutcheon's circumstances. The ostensible agreement simply never existed. The Adjudicator's reasons, however, do not provide a description about how the testimony of the witnesses informed this finding, for example, through an assessment of the witnesses' credibility. Nonetheless, for the following reasons, the Board finds that this deficiency in the Adjudicator's reasons is not determinative of this Appeal.

[54] At the outset of the analysis, the Adjudicator poses the question: *Does the legislation permit the employer to increase the employee's agreed rate of pay in lieu of paying the employee "holiday pay" as required by the legislation?* As the reasons go on, the Adjudicator focuses on the evidence presented, and does not return to his initial question. The problem is that the answer to this question, with a slightly different focus, is central to the determination in this case. The Board will therefore proceed to consider whether the legislation permits the Employer to increase the

rate of pay in lieu of setting out the amounts for public holiday pay and vacation pay, as per section 2-37.

[55] In considering this issue, the Board must be guided by the modern principle of statutory interpretation. This principle asks the Board to read the legislative text in its ordinary sense harmoniously with the scheme and objectives of the Act, in particular Part II, and the intention of the legislature. In doing so, the Board must be guided by the objective of Part II of the Act. Part II sets minimum standards to protect employees in 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.

[56] Part II sets out the statutory minimum employment standards for workers in Saskatchewan. No provision of an agreement that deprives an employee of the statutory minimum is permitted by law, as per section 2-6 of the Act:

> ***2-6*** *No 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.*

[57] The purpose of sections 2-23 through 2-32 is to ensure that employees are fairly compensated for vacation time and for the occurrence of public holidays. The objective of section 2-37 is to provide employees with information about whether and how much they are paid in respect of each of the required categories. The amount paid is to be “clearly set out” in the statement of earnings. The statement of earnings is to be provided to an employee. The information contained therein enables an employee to guard against a discrepancy in earnings and entitlements and to seek recourse if deprived of either.

[58] Section 2-37 requires that an employer set out in the statement of earnings provided to an employee the amount paid for public holiday pay and vacation pay. The language of section 2-37 is mandatory. Subsection 2-37(3) creates a presumption that amounts not included in a statement pursuant to subsection (2) are deemed not to be paid. To rebut the presumption, there must be evidence to the contrary establishing that those amounts not included in a statement have been paid. The question, then, is whether the presumption can be rebutted solely by establishing that an agreement was entered into allowing for an increase in an employee’s hourly rate of pay in lieu of setting out the amounts in issue. The Board finds that it cannot.

[59] The alleged agreement in this case operates in direct conflict with Part II of the Act. Part II sets standards for minimum employment entitlements and, together with Part IV, provides mechanisms to facilitate the enforcement of those standards. Section 2-37 is a mandatory statutory mechanism that guarantees employees the necessary information to enable them to monitor the statutory minimum amounts that are due and owing. Taking into account the purpose of the legislation, the Board agrees with the Director that such an agreement defeats the purpose of the statutory entitlements, as there is no accounting for whether the standards were met.

[60] Therefore, although the Adjudicator's reasoning is deficient, the result is correct. The alleged agreement, even if it did exist, was invalid. The Adjudicator was correct in upholding the wage assessment to the extent that it directed that the Employer pay to McCutcheon the amounts for public holiday pay and vacation pay that were not set out in the statements of earnings.

Offset Issue

[61] In relation to the requested offsets, the Adjudicator concludes:

> *Reviewing all of the offsets claimed in the Employer's Appeal, with the exception of the cigarettes, all of the payments made by the employer were paid to third parties.*
>
> *The employee agrees that he did purchase the cigarettes from the employer, which amount is still outstanding as at the date of the hearing, and I find the employer is entitled to an offset of $500 in this regard.*
>
> *All other setoff claims by the employer as set out in his Notice of Appeal are not permitted by Section 2-36 of the Act.*[10]

[62] In coming to this conclusion, the Adjudicator relies on Wimmer J.'s reasoning in *Holtet's Services Ltd. v Huard*, [1978] SJ No 234 (Sask Dist Ct):

> *12 Applying to the case at hand the reasoning in the judgments to which I have referred, I have, come to the conclusion that the effect of section 49(1) of The Labour Standards Act, 1977 is to prohibit an employer from making any deduction from the wages of an employee unless specific permission for the making of such a deduction can be found elsewhere in the Act or in the provisions of other legislation.*

[63] Section 2-36 provides for setoffs. Subsection (2) states that an employer may deduct from an employee's wages certain deductions in addition to deductions permitted or required pursuant to law. Clause (2)(f) allows for the deduction of voluntary employee purchases from the employer

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[10] At 12.

of any goods, services or merchandise. Purchases that are made involuntarily or made voluntarily from someone other than the employer (a third party) do not fall under clause (2)(f).

[64] In concluding that McCutcheon (voluntary) purchased the cigarettes from the Employer, the Adjudicator states:

> *The employee agrees that he did purchase the cigarettes from the employer, which amount is still outstanding as at the date of the hearing, and I find the employer is entitled to an offset of $500 in this regard.*[11]

[65] The Adjudicator focuses on whether the purchases were made from a third party, finding that the cigarettes fell under clause (f), while none of the remaining claims satisfied any of the specific allowable deductions set out in subsection (2). None of the remaining deductions related to goods, services or merchandise that were "purchased" from the Employer. Instead, they were purchased from a third party.

[66] On the ability to deduct payments for goods, services, or merchandise purchased from a third party, the Director relies on the Board's reasons in *Gina Meacher (Gee's Family Restaurant) v Hunt*, 2017 CanLII 43925 (SK LRB) ["*Meacher*"]:

> *[30] This issue can be disposed of quickly. The Adjudicator referred to subsection 2-36(2) of the SEA, and concluded that any monies the Employee owed to the Appellant for movies she had purchased could not be deducted from wages owing to the Employee.*
>
> *[31] At the hearing the Appellant appeared to accept the Adjudicator's holding on this point. Indeed, she advised the Board that she intended to seek to recover those monies by way of a small claims action.*

[67] Ultimately, the Adjudicator made a finding of fact, noted at page 12, that only the cigarettes were not purchased from third parties:

> *Reviewing all of the offsets claimed in the Employer's Appeal, with the exception of the cigarettes, all of the payments made by the employer were paid to third parties.*

[68] Lepage claims that this finding of fact was made in error, submitting that,

> *…Mr. McCutcheon had been taking materials and other goods and services from another side of my business, the retail store. …Mr. McCutcheon helped himself to goods and services and has failed to pay for them. So to speak if you work at a general store you get free cigarettes, food, hardware, lumber, gasoline, etc…No you don't this is called theft and is being investigated by both the RCMP and the CRA…*

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[11] *Ibid*.

> *…the cigarettes were taken from the shelf of my retail store, as were many other items that have been detailed in the submissions I brought forward at the hearing, and not ever paid for.*

[69] The aforementioned are claims of fact, and more specifically, claims that the Adjudicator was in error in finding as a matter of fact that only the cigarettes were not purchased from a third party. The Board's jurisdiction to review findings of fact is narrow, being restricted to findings that are grounded in an error of law. A finding of fact may be grounded in an error of law if it is based on no evidence, made on the basis of irrelevant evidence or in disregard of relevant evidence, or based on an irrational inference of fact. There is nothing to suggest that any of these thresholds have been met.

[70] Lepage suggests that the Adjudicator erred in ruling out any additional deductions. However, the Adjudicator found as a factual matter that, outside of the cigarettes, the remaining goods, services, and merchandise were purchased from third parties and not from the Employer. There is no basis upon which the Board can conclude that this inference was based on no evidence, on irrelevant evidence or in disregard of relevant evidence, or on an irrational inference of fact.

[71] The Adjudicator's reasons do not disclose consideration of whether any of the relevant purchases, save the cigarettes, were made involuntarily. However, having found that none of the goods, services, or merchandise, save the cigarettes, were purchased from the Employer, it was not necessary for the Adjudicator to then consider whether those purchases were made voluntarily.

[72] As in *Meacher*, Lepage also alludes to proving his damages in civil court. However, it seems that his primary motivation is to short circuit the civil claim route and instead obtain compensation through the current process. Lepage does not view the disputed amounts as amounts owing to him, but rather, as amounts not owing to McCutcheon. As he explains:

> *I will not be taking this to small claims court as I will never be paid any restitution by Mr. McCutcheon. It also brings into question the amounts of money that Mr. McCutcheon was advanced from my business so that he could have power in his home, have a drivers [sic] license so he could keep his job…etc. So these amounts just become nil as well? I think not.*

[73] An Appeal should not be used as an end run around the civil claims process.

Procedural Fairness

[74] On this Appeal, the Employer raises issues of procedural fairness, which are reviewable on a standard of correctness.

[75] Lepage's concerns about procedural fairness relate to the calling of witnesses, alleged bullying or apprehension of bias by the Adjudicator, the absence of legal representation, and the failure of the Director to provide full disclosure. On the issue of calling witnesses, Lepage suggests that he was hindered in subpoenaing witnesses due to the Adjudicator's failure to return his phone calls prior to the hearing. However, Lepage attended at the hearing and requested that the witnesses be called over the phone, was granted that request, and was able to question two witnesses in that manner. One of the witnesses was not available. Of the two witnesses called, both provided the very evidence upon which Lepage sought to rely. Even if Lepage was impeded in his ability to subpoena witnesses to personally appear at the hearing, that issue was rectified through the telephone testimony.

[76] On the issue of bullying or apprehension of bias, the reasons disclose no cause for concern. The allegation of bias arises mainly from the contents of the decision, namely the findings of fact and the subsequent conclusions, which are subject to this Appeal.

[77] The issue of legal representation is straightforward. Lepage does not suggest that he requested an adjournment for the purpose of obtaining legal representation. Lepage attended the appeal hearing without legal representation present, and then suggested that he could not afford a lawyer, and that he should have been afforded legal aid. Funded legal aid programs are unavailable for purposes of wage assessment appeals. There is no suggestion that Lepage attempted to have any other individual assist him in the proceedings.

[78] Lastly, Lepage complains about the failure of the Director to provide full disclosure of the Employee's timesheets. It is unclear how the disclosure of timesheets could have made a difference to the outcome, and in particular, how the timesheets could have made a difference to the determination of whether vacation pay was included in the wage calculation.

[79] For the foregoing reasons, the Board finds no failure of procedural fairness that would justify overturning the decision.

Conclusion:

[80] Given that the Adjudicator's Decision has been challenged by way of the statutory appeal mechanism set out at section 4-8 of the Act, the appellate standards of review apply in this case. To the extent that the Appeal raises a question of law, the applicable standard is correctness. Therefore, the main issue is whether the Adjudicator's Decision is correct.

[81] The key legal question, in relation to public holiday pay and vacation pay, is whether the Act permits the Employer to increase the Employee's agreed rate of pay in lieu of setting out those amounts in the statements of earnings. The Act does not so permit. On the question of offsets, the main issue arises from the Employer's disagreement with the Adjudicator's findings of fact. The Board cannot interfere with these findings.

[82] Lastly, there are no concerns with procedural fairness that would justify overturning the Decision under review.

[83] For the foregoing reasons, the Adjudicator's Decision is affirmed.

DATED at Regina, Saskatchewan, this **5th** day of **February, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson