Saskatchewan
Labour Relations Board

RIVERSIDE ELECTRIC LTD., Appellant v BRYCE SCHLAMP, Respondent and GOVERNMENT OF SASKATCHEWAN, DIRECTOR OF EMPLOYMENT STANDARDS, Respondent and GEORGE TSOUGRIANIS and STEVEN P. CASSIDY, Interested Parties

LRB File No. 110-22; December 1, 2022
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Appellant, Riverside Electric Ltd.:	Steve Seiferling and Walker Paterson, Student-at-Law
For the Respondent, Bryce Schlamp:	Self-Represented
Counsel for the Respondent, Government of Saskatchewan:	Alyssa Phen and Savannah Downs, Student-at-Law
Counsel for Interested Parties, George Tsougrianis And Steven P. Cassidy:	Steve Seiferling and Walker Paterson, Student-at-Law

Appeal of Adjudicator's Decision – Section 4-8 of *The Saskatchewan Employment Act* – Wage Assessment Appeal – Matter Remitted to Adjudicator.

Reasonable Apprehension of Bias – Employment Standards Officer Disagreed with Counsel's Interpretation of the Law – No Evidence of Bias.

Procedural Fairness – Role of Director of Employment Standards on Appeal of a Wage Assessment – Statutory Scheme – *Baker* Factors – Director Participation Not Procedurally Unfair.

Resignation or Termination – *Beggs* Test – Absence of Resignation Does Not Equate to Termination – Necessary to Determine Specific and Unequivocal Act for Termination.

Subsistence of Employment Relationship – Leave of Absence – No Analysis of Key Issue.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to a Notice of Appeal filed on June 30, 2022 by Riverside Electric Ltd. [Employer],

pursuant to section 4-8 of *The Saskatchewan Employment Act* [Act]. The Employer appeals an Adjudicator's wage assessment appeal decision, dated June 21, 2022, in LRB File No. 047-22. There is no issue as to the timeliness of this appeal.

[2] The background to the appeal is as follows. On March 2, 2022, the Director of Employment Standards [Director] issued to the Employer and two of the Employer's corporate directors a wage assessment in the amount of $11,212.34 in favour of an employee, Bryce Schlamp [Mr. Schlamp or Employee]. The Employer commenced an appeal of the wage assessment pursuant to section 2-75 of the Act. That appeal was set for a hearing before the Adjudicator and was heard on June 7 and 8, 2022. The Adjudicator's decision amended the wage assessment to $8,159.26.

[3] The hearing on the appeal of the Adjudicator's decision was held on September 12, 2022. The Employer and the Director filed briefs, appeared at the hearing, and made oral submissions. The Employee appeared but did not make submissions.

Adjudicator's Decision:

Evidence:

[4] The following is only a summary of the Adjudicator's description of the evidence.

[5] The Employer is an electrical contractor operating in Saskatchewan. In March 2020, at the outset of the Covid-19 pandemic in Saskatchewan, Mr. Schlamp was a part-time employee of the Employer. He had commenced his employment as an apprentice in 2011 and started full time employment on June 19, 2015. On March 23, 2020, he sent a text message to one of the owners of the company, stating:

> *Hey George I texted Janessa to let her know. After work today I'll come talk to you but I'm going to stay home with all this crazy stuff since I've had pneumonia before*

[6] He did not return to work after this text message was received.

[7] Mr. Tsougrianis testified to the following:

a. Nothing was heard from the Employee for two to three weeks after the text was received.
b. On April 13, the Employer texted the Employee to make arrangements to pick up the truck and tools.

c. The Employer prepared a record of employment [ROE]. The ROE in evidence is dated March 31, 2020. It includes the notation “leave of absence” with no end date. The Employer thought that it was necessary to indicate “leave of absence” for the Employee to benefit from CERB. The Employee did not request a leave of absence.
d. On May 11, the Employee contacted Mr. Tsougrianis requesting that he start working. The text stated:

> *Hey George with things starting to open up again, I was hoping I could come back to work fairly soon here. How are things looking as far as work?*

e. The Employer’s reply was a request to speak in person.
f. On May 29, the Employee texted the Employer again asking whether he could come to work.
g. On June 8, the Employee again texted the Employer inquiring about work.
h. On June 8, the Employee met with Mr. Cassidy.
i. As a result of the Employee’s departure, the Employer had to hire new staff to perform the work. There was “plenty of work in the time frame of when he left and thereafter”.

[8] The Employee testified to the following:

a. Sometime before March 23, 2020, he received a letter from the Employer addressed to all employees, pertaining to the prevailing circumstances with Covid-19. The document states that employees had the option to remain home and that the Employer “fully supports your decision”. It also provided information on applying for unemployment benefits through the federal government.
b. He then decided to stay home due to concerns for his health.
c. He did not provide a resignation to the Employer.
d. On May 11, he met with Mr. Tsougrianis. Mr. Tsougrianis suggested that they did not have adequate work to justify his return and suggested he stay on CERB.
e. On June 8, he met with Mr. Cassidy where again it was indicated that there was insufficient work.
f. He requested to return to work on May 11, May 29, and June 8. Each time the Employer indicated that there was insufficient work.
g. He began to work for a new employer towards the end of July 2020.
h. He did not provide any medical information to the Employer in relation to his decision to stay home.

Adjudicator's Decision:

Analysis:

[9] At the outset of the Decision, the Adjudicator addressed the Employer's objection to the role of the Director in the proceeding. In response to the objection, the Adjudicator made the following comment, at 4:

> *I advised that I would be applying section 4-10 of the Saskatchewan Employment Act which gives the Director of Employment Standards the right to appear and make representations on any appeal or hearing heard by an Adjudicator.*

[10] The Adjudicator defined the issue to be decided as follows:

> *The issue to be decided in this matter is whether the Employee voluntarily left his employment with the Employer or was the Employee dismissed without cause and therefore owed severance pay by the employer in accordance with the Act.*

[11] In considering this issue, the Adjudicator relied on *Beggs v Westport Foods Ltd.*, 2011 BCCA 76 [*Beggs*] for the test to determine whether there has been a termination or a voluntary resignation. After quoting from the case, the Adjudicator summarized his understanding of the test:

> *Summary: The test for voluntary resignation (as opposed to dismissal) is objective, focusing on the perceptions of a "reasonable employer" of the intentions of the employee based on what the employee actually says or does or, in some cases, on what he or she fails to say or do. Among the relevant circumstances are the employee's state of mind, any ambiguities in relation to the conduct which is alleged to constitute "resignation" and, to a certain degree, the employee's timely retraction, or attempt[ed] retraction, of his or her "resignation".*[1]

[12] The Adjudicator found as a fact that the text message received on March 23, 2020 was "ambiguous at best"[2]. He observed that, despite several meetings and texts, the Employer made "no comment with respect to why the employee was there, other than to say that there was not adequate work".[3] He went on to conclude that the test for resignation had not been met, at 21:

> *I do not see how the employee Mr. Schlamp, could have interpreted the text messages and facts as he knew them in any other way other than to conclude that he had been terminated. He saw no reason to contact the employer after reaching such conclusion after trying several times to get a return to work date.*
>
> *I also find it strange the Employer said nothing to the Employee that they were of the view that Mr. Schlamp had quit, when in all his texts and at the meeting at the Employer's*

[1] *Adjudicator's Decision*, June 21, 2022 at 19.
[2] *Ibid*.
[3] *Ibid* at 19-20.

> *premises, he was asking to be scheduled back to work. How could they not know, by his conduct, Mr. Schlamp was thinking he was still employed by them. That issue was not raised by them at any time.*
>
> *A simple phone call or text could have confirmed the resignation one way or the other. The employer chose to do nothing.*
>
> *Applying the above law, it is clear that the tests of Resignation by the Employee had not been met, therefore he was wrongfully dismissed.*
>
> *As a result, I find the employee Mr. Schlamp was terminated by the employer Riverside Electric Ltd. without cause. Applying Section 2-60 of The Act, he is entitled to the benefits as set out therein.*

[13] On the question of bias, the Adjudicator described the two arguments that were before him as follows:

a. The Employment Standards Officer demonstrated bias by issuing the wage assessment after being presented with Mr. Seiferling's argument stating that a wage assessment should not be pursued; and by
b. Issuing the wage assessment against the Employer and the corporate directors instead of just the Employer.[4]

[14] On the first issue, the Adjudicator was succinct. He concluded that the Employment Standards Officer had not been persuaded by the arguments put forward and therefore proceeded to issue the wage assessment.

[15] On the second issue, the Adjudicator reviewed sections 2-68 and 2-74 of the Act. He then stated that he had adjudicated wage assessment appeals in which the corporation had ceased to exist by the time of the appeal. He observed that the naming of the Employer's directors was prudent and not indicative of bias.

[16] On the question of quantum, the Adjudicator found that there was a period of continuous employment with the Employer from June 19, 2015 to July 2020, a period in excess of five years. Pursuant to section 2-60 of the Act, the Employee was therefore entitled to six weeks' pay in lieu of notice. The parties had agreed that the average wage earned by the Employee was $1,301.46 per week. The Adjudicator found that vacation pay should be added to the wages owing, pursuant to the definition of wages in clause 2-1(v) of the Act and then added vacation pay at a rate of three weeks per 52 weeks, totaling $450.50.

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[4] *Ibid* at 21 and 22.

Preliminary:

Terminology:

[17] During the hearing of the present appeal before the Board, counsel for the Employer frequently relied on the term "layoff" in his description of the Adjudicator's findings. When asked about this, counsel explained that he was using the terms "layoff" and "termination" interchangeably and stated that the law in Saskatchewan does not distinguish between those concepts except to the extent that a layoff is temporary and a termination is permanent. Given counsel's explanation, the Board is satisfied that the Employer is not arguing that the Adjudicator found that a layoff, as distinct from a termination, had occurred in this case. Nor does the Decision provide any support for such an interpretation of the Adjudicator's findings.

[18] The Board mentions this seeming incongruity for the following reasons. If a layoff had occurred on or after May 22, 2020, which is when section 44.3 of *The Saskatchewan Employment Standards Regulations* came into force, then the Employer might have chosen to rely on the protections afforded by that provision.[5] Section 44.3 exempted employers from notice requirements pursuant to section 2-60 respecting layoffs during a public emergency period. At the same time, the Director might have reverted to what was its previous position, that is, that a layoff had occurred at the end of the grace period after the state of emergency was lifted. However, at no point has the Employer suggested that the Adjudicator failed to take section 44.3 into account, nor has the Director argued that the Adjudicator erred in not finding that there was a layoff. Therefore, these are not issues before the Board.

[19] Given this, the Board will use the word "termination" when necessary for clarity in describing the Employer's argument.

Arguments:

Employer:

Procedural:

[20] The Adjudicator erred in law by concluding that the Director did not display a reasonable apprehension of bias and did not exceed the role of a Director by representing the Employee at the hearing. The email exchange between the Officer and counsel for the Employer demonstrates that the Officer was clearly interested in, and invested in, the outcome of this case. The Officer

[5] Section 44.3 of *The Saskatchewan Employment Standards Regulations* has since been repealed.

demonstrated an inability or unwillingness to consider the evidence before her and created a new category of layoff or termination that does not exist in law. The absurdity of the decision alone demonstrates that the Officer had prematurely determined that there was a layoff or termination.

[21] In the hearing, the Officer advocated for the Employee. A statutory tribunal should be patently neutral. By stepping in to represent the Employee at the hearing before the Adjudicator, the Officer demonstrated that she had made up her mind about the decision that ought to be made.

[22] The Employer brought to the Adjudicator's attention the Supreme Court of Canada's decision in *Northwestern Utilities Ltd. et al v Edmonton*, 1978 CanLII 17 (SCC) [1979] 1 SCR 684 [*Northwestern Utilities*], which states at 709-10:

> *It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. […]*
>
> *In the sense the term has been employed by me here, "jurisdiction" does not include the transgres-sion of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contem-plated in our judicial traditions.*

[23] Despite this case, the Adjudicator concluded that the Officer could appear and make representations, based on section 4-10 of the Act.

[24] The role of a statutory decision maker in an appeal of the decision maker's own decision is very limited. The decision maker is confined to making submissions on jurisdiction and clarifying the record. These limitations prevail even in cases where a right to appear is provided by statute. Instead of respecting these constraints, the Officer made significant substantive representations as the *de facto* representative for the Employee. She essentially ran an appeal of her own decision.

[25] Due to the reasonable apprehension of bias of the Director, the decision of the Adjudicator should be quashed and the Board should substitute its own decision.

Substantive:

[26] From the Employer's perspective, the Decision suggests that an employee can initiate one's own termination. This cannot be the case. For the Employee to be successful, he needs to show that there was a layoff or a termination. Both a layoff and a termination are initiated only through action on the part of the Employer. As explained in *Canada Safeway Ltd. v RWDSU, Local 454*, [1998] 1 SCR 1079,

> *[74] The suspension of the employer-employee relationship contemplated by the term "layoff" arises as a result of the employer's removing work from the employee.*

[27] There was no evidence that the Employer took any action to lay off or terminate the Employee. The Employee unilaterally decided to stop working for the Employer. Following the initial text message, the Employee ceased coming into work; nonetheless, the Employer continued to perform work and had work available for the Employee to perform.

[28] Furthermore, the Employee never requested a statutorily protected leave of absence. His choice to stay home cannot be considered a leave request.

[29] Even if he did make a request for a leave of absence, no return date was specified, meaning that the leave was indefinite. With an indefinite leave of absence there is no obligation to return the Employee to work. As such, there could be no layoff or termination. Section 2-60, which sets out the required notice upon layoff or termination, would not apply.

[30] The Employer states that, at the hearing before the Adjudicator, the Director did not argue that the Employee was eligible for a protected leave pursuant to the Act, and even if the Director had so argued there was no basis for such a finding. Therefore, there was no obligation to return the Employee to work.

Quantum:

[31] In the alternative, the Employer argues that the quantum found to be owing is incorrect. The Adjudicator erred in awarding the equivalent of six weeks' notice instead of four. The Employee's final working day, by his own choice, was March 23, 2020. Accepting that day as the end date, the relevant period of employment was greater than three years but fewer than five. The Employee would then be entitled to four weeks' pay in lieu of notice.

[32] Lastly, the Employer advised the Board that it was no longer pursuing the argument, set out in the Notice of Appeal, that vacation pay should not be included in the quantum.

Costs:

[33] Due to the reasonable apprehension of bias, the Employer is seeking costs on a solicitor-client basis against the Director. There is nothing in Part II of the Act that prevents the Board from granting an award of costs. The Board has the ability to award costs in a proceeding before it.

Director of Employment Standards:
Procedural:

[34] The first issue is whether the Adjudicator erred in law by permitting the Officer to participate in the hearing and make submissions. *Northwestern Utilities* has been overtaken by *Ontario (Energy Board) v Ontario Power Generation Inc*., 2015 SCC 44 (CanLII), [2015] 3 SCR 147 [*Ontario Power*]. In *Ontario Power*, the Court established a discretionary approach to determining the appropriate role for an administrative decision maker in an appeal of its decision. In exercising this discretion, the Court considers the statutory scheme and then "balance[s] the need for fully informed adjudication against the importance of maintaining tribunal impartiality".[6] Among the factors to be considered in this case, the structure of the Act is the most significant. The Act makes clear that the role and function of the Director are completely different from those of an adjudicator selected pursuant to Part VI or of this Board.

[35] The second issue is whether the Adjudicator erred in law by concluding that the Officer did not demonstrate a reasonable apprehension of bias. First, an allegation that the Director or an employment standards officer was biased would often be irrelevant on an appeal before an adjudicator, which is a *de novo* hearing. Second, the test for reasonable apprehension of bias sets a high threshold and the Adjudicator applied the test correctly.

Substantive:

[36] The third issue is whether the Adjudicator erred in law in determining that the Employer terminated the employment relationship. On this issue, there is no extricable error of law. The Adjudicator relied on the test for voluntary resignation (as opposed to dismissal) as set out in *Beggs*. This is the correct analysis for determining whether the Employee resigned. This analysis finds support in the case law as outlined in *Nutrien Ltd. v United Steelworkers, Local 7689 (Dale Hansen)*, 2021 CanLII 54674 (SK LA) [*Hansen*]. In applying the law, the Adjudicator made findings of fact which led him to conclude that the Employee did not resign.

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[6] *Ibid* at para 57.

[37] Lastly, there are no extricable errors of law in the Adjudicator's findings which led to his conclusion that the termination was effective as of July 2020.

Applicable Statutory Provisions:

[38] The following statutory provisions are applicable:

> ***2-1*** *In this Part and in Part IV:*
>
> *. . .*
>
> *(f) "**employee**" includes:*
>
> *(i) a person receiving or entitled to wages;*
>
> *(ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;*
>
> *(iii) a person being trained by an employer for the employer's business;*
>
> *(iv) a person on an employment leave from employment with an employer; and*
>
> *(v) a deceased person who, at the relevant time, was a person described in any of subclauses (i) to (iv);*
>
> *but does not include a person engaged in a prescribed activity;*
>
> *(g) "**employer**" means any person who employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who, in the opinion of the director of employment standards, either:*
>
> *(i) has control or direction of one or more employees; or*
>
> *(ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees;*
>
> *(h) "**employment leave**" means a leave mentioned in Subdivision 11 of Division 2 that an employee is entitled to;*
>
> *…*
>
> *(p) "**pay instead of notice**" means an amount of money that is payable to an employee pursuant to subclause 2-61(1)(a)(ii);*
>
> *. . .*
>
> *(t) "**total wages**" means all remuneration that the employee is paid or entitled to be paid by his or her employer but does not include:*
>
> *(i) bonuses payable at the discretion of the employer; or*
>
> *(ii) tips or other gratuities;*
>
> *. . .*
>
> *(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;*
>
> *. . .*

2-46*(1) Subject to subsection (2) and section 2-49, an employee shall provide at least four weeks' written notice to his or her employer of:*

(a) the day on which the employee intends to commence an employment leave; and

(b) the day on which the employee intends to return to work from the employment leave.

(2) The obligation to provide four weeks' written notice pursuant to subsection (1) does not apply:

(a) to bereavement leave, compassionate care leave, critically ill child care leave, crime-related child death or disappearance leave and citizenship ceremony leave;

(b) if the date of commencement of the employment leave or the date of return to work from the employment leave is not known and cannot be reasonably known by the employee;

(c) with respect to the notice required for the employee's return to work, if the employment leave was for 60 days or less; or

(d) if the prescribed circumstances apply.

(3) If an employee is not required to provide four weeks' written notice in accordance with subsection (2), the employee shall provide the employer with notice as far as possible in advance of the date the employee intends to commence the employment leave or of the date the employee intends to return to work, as the case may be.

. . .

2-48*…*

(4) At the expiration of an employment leave and subject to subsection (5), an employer shall reinstate an employee to the same job the employee held before going on employment leave, without any loss of accrued seniority or benefits or reduction in rate of pay….

. . .

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*
> >
> > *. . .*
>
> *. . .*

2-68*(1) Subject to subsection (2), notwithstanding any other provision of this Act or any other Act, the corporate directors of an employer are jointly and severally liable to an employee for all wages due and accruing due to the employee but not paid while they are corporate directors.*

(2) The maximum amount of a corporate director's liability pursuant to subsection (1) to an employee is six months' wages of the employee.

(3) Subject to subsections (4) and (5), a corporate director's liability pursuant to this section is payable in priority to any other unsecured claim or right in the corporate director's property or assets, including any claim or right of the Crown.

(4) The payment priority set out in subsection (3) is subject to section 15.1 of The Enforcement of Maintenance Orders Act, 1997.

(5) A corporate director who is an employee of the corporation is not entitled to the benefit provided to employees by subsection (3).

. . .

2-74*(1) In this Division,* ***"adjudicator"*** *means an adjudicator selected pursuant to subsection 4-3(2).*

(2) Subject to subsection (4), if the director of employment standards has knowledge or has reasonable grounds to believe or suspects that an employer has failed or is likely to fail to pay wages as required pursuant to this Part, the director may issue a wage assessment against either or both of the following:

> *(a) the employer;*
>
> *(b) subject to subsection (3), a corporate director.*

(3) The director of employment standards may only issue a wage assessment against a corporate director if the director has knowledge or has reasonable grounds to believe or suspects that the corporate director is liable for wages in accordance with section 2-68.

(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.

(5) The employer or corporate director has the onus of establishing the amount by which an award should be reduced in accordance with subsection (4).

(6) If the director of employment standards has issued a wage assessment pursuant to subsection (2), the director shall cause a copy of the wage assessment to be served on:

(a) the employer or corporate director named in the wage assessment; and

(b) each employee who is affected by the wage assessment.

(7) A wage assessment must:

(a) indicate the amount claimed against the employer or corporate director;

(b) direct the employer or corporate director to, within 15 business days after the date of service of the wage assessment:

(i) pay the amount claimed; or

(ii) commence an appeal pursuant to section 2-75; and

(c) in the case of a wage assessment issued after money has been received from a third party pursuant to a demand issued pursuant to Division 4, set out the amount paid to the director of employment standards by the third party.

(8) The director of employment standards may, at any time, amend or revoke a wage assessment.

Analysis:

Issues:

[39] The issues for the Board to determine are as follows:

1. Jurisdiction and Standard of Review;
2. Whether the Adjudicator erred when he permitted the Employment Standards Officer to participate in the hearing;
3. Whether the Adjudicator erred when he found no bias on behalf of the Employment Standards Officer;
4. Whether the Adjudicator erred in finding that the Employer terminated the Employee's employment.

Jurisdiction and Standard of Review:

[40] This appeal was brought pursuant to subsection 4-8(1) of the Act, which limits the right to an appeal to a question of law.

[41] It is well settled that issues of procedural fairness raise questions of law. The Court in *Knapp v ICR Commercial Real Estate*, 2019 SKQB 59 (CanLII) made the same observation:

> *[20] It is now well settled that issues related to the impartiality of the decision maker in question, or an alleged breach of the principles of natural justice and procedural fairness committed by that decision maker, raise questions of law. Respecting issues of procedural fairness, the Federal Court of Appeal in Canadian Pacific Railway Company v Canada (Attorney General), 2018 FCA 69, [Canadian Pacific Railway] had this to say about characterizing such issues as questions of law. Writing for the court, Rennie J.A. stated:*
>
> > *[46] Procedural fairness has been described as "the cornerstone of modern Canadian administrative law" (Dunsmuir v. New Brunswick, 2008 SCC 9, at para. 79, [2008] 1 S.C.R. 190 (Dunsmuir)) and whether that duty has been fulfilled has, for decades, been treated as a legal question for the Court to answer (Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, 1978 CanLII 24 (SCC), [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671 (Nicholson); Knight [Knight v Indian Head School Division No. 19, 1990 CanLII 138 (SCC), [1990] 1 SCR 653] at 682; [Baker v Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817] at 837–841; [Mavi v Canada (Attorney General), 2011 SCC 30, [2011] 2 SCR 504] at para. 42). Deference is but one criterion amongst many that informs the content of fairness, but it is irrelevant in answering the question as to whether fairness has been met. Dunsmuir itself is an authority for the point. [Emphasis in original]*
>
> *[21] Similarly, concerns respecting the impartiality of a decision maker plainly constitute a question of law for appeal purposes. See for example: Bell Canada v Canadian Telephone Employees Association, 2003 SCC 36 at para. 21, [2003] 1 SCR 884 [Bell Canada], and authorities cited there. In Bell Canada, the Supreme Court of Canada per McLachlin C.J. and Bastarache J., observed that the right of a litigant to an impartial decision maker is an entitlement subsumed within the general requirements of procedural fairness. As such, issues impugning the impartiality of an administrative decision maker also qualify as questions of law for purposes of s. 72 of the Act.*

[42] Furthermore, a question of fact may be grounded in an error of law if the finding is based on no evidence, is based on irrelevant evidence or in disregard of relevant evidence or is based on an irrational inference of fact.[7]

[43] In *Saskatchewan v Martell*, 2021 CanLII 122408 (SK LRB) and *Christine Ireland v Nu Line Auto Sales & Service Inc*., 2021 CanLII 97414 (SK LRB), the Board undertook a full exercise in statutory interpretation to determine the Legislative intent with respect to the Board's role in

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[7] *Canadian Natural Resources Limited v Campbell*, 2016 SKCA 87 (CanLII) [*CNR*] at para 12*; P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149 at paras 60–65.

appeals of adjudicators' decisions pursuant to Part II and III of the Act, respectively. In doing so, the Board determined that the standard of review to be applied on such appeals is correctness.

[44] Although neither of these decisions specifically stated that the correctness standard of review applies to questions of procedural fairness, which are questions of law, there is no reason to depart from the correctness standard in respect of such questions. The Legislative intent, as disclosed by the statutory framework, does not suggest that any exceptional treatment of procedural fairness questions is warranted.

[45] In applying the correctness standard of review to questions of law, the Board's role is to determine whether the Adjudicator identified the correct test and applied it correctly[8], whether the Adjudicator erred in law in relation to a factual matter, and whether the Adjudicator was correct in finding that the procedure followed was fair.

Did the Adjudicator err when he permitted the Employment Standards Officer to participate in the hearing?

[46] The first substantive question is whether the Adjudicator erred when he permitted the Employment Standards Officer to participate in the hearing.

[47] To begin, it may be helpful to understand that the Director has the authority to delegate to any person the exercise of any powers given to the Director and to fulfill any of the Director's responsibilities, pursuant to section 2-80. Pursuant to subsection 2-81(1), employment standards officers, or the category thereof, are appointed by the Minister for the purpose of enforcing Part II.

[48] Next, the reasoning in *Northwestern Utilities* has clearly been overtaken by *Ontario Power.* The Director accepts that *Ontario Power* is applicable to this case and to the Director's role. In *Ontario Power*, the Ontario Energy Board had appealed the decision of the Court of Appeal overturning its decision to disallow certain payment amounts in the context of a rate application. The Board argued the merits of the case at a hearing of the appeal before the Supreme Court of Canada.

[8] *Abbey Resources Corp. v Saskatchewan Assessment Management Agency*, 2022 SKCA 63 (CanLII) at para 14.

[49] The Court addressed those circumstances in which the statute "does not clearly resolve the issue" as to the tribunal's participation on appeal.[9] The Court clarified that, in contrast with the approach taken in *Northwestern Utilities*, an appellate body exercises discretion in deciding the appropriate role for a tribunal on an appeal. In exercising that discretion, the decision maker must balance "the need for fully informed adjudication against the importance of maintaining tribunal impartiality".[10]

[50] The Court identified a list of factors, described as non-exhaustive, that are relevant in its exercise of discretion:

> *[59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:*
>
> > *(1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.*
> >
> > *(2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.*
> >
> > *(3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.*

[51] The Court also described circumstances in which it may be appropriate for a tribunal to participate in an appeal: cases in which the tribunal participates to explain how an interpretation of a statutory provision might impact another provision within the regime, or to explain the "factual and legal realities of the specialized field in which they work"; or, cases in which there is no other party opposed to the party challenging the decision. The Court's reasons did not suggest that these circumstances encompass a closed list of the cases in which a tribunal may participate.[11]

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[9] *Ontario (Energy Board) v Ontario Power Generation Inc*., 2015 SCC 44 (CanLII), [2015] 3 SCR 147 [*Ontario Power*] at para 59.
[10] *Ibid* at para 57.
[11] *Ibid* at paras 53, 54.

[52] There is a distinction between regulatory tribunals and "tribunals whose function it is to adjudicate individual conflicts between two or more parties".[12] "[T]he importance of fairness, real and perceived" weighs against granting standing to tribunals in the latter category.[13]

[53] The statutory regime is a key part of the analysis in defining the role of a tribunal in an appeal:

> *[55] Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.*

[54] In the case of the Ontario Energy Board, the statute did not fully resolve the matter because it did not expressly grant standing or limit it "to jurisdictional or standard-of-review arguments", and instead stated only that "[t]he Board is entitled to be heard by counsel upon the argument of an appeal".[14]

[55] The Court found that the Board acted properly in arguing the merits of the case, observing that it was the only respondent in the initial review; it was exercising a specific regulatory role (which the Court reviewed at some length); and the nature of utilities regulation reduced any concerns that might arise about partiality.

[56] Given the Court's direction in *Ontario Power*, the Adjudicator's task in the appeal under consideration was to determine whether the statute had fully resolved the matter, and if not, to exercise his discretion to define the proper role of the Employment Standards Officer, or more accurately, the Director, on the appeal.

[57] The Adjudicator did not consider whether the statute had fully resolved the matter or apply the factors outlined in *Ontario Power*. Instead, he relied only on section 4-10 of the Act as permitting the Director to appear and make representations.

[58] In assessing whether the statute fully resolves the matter, it is necessary to determine what the "matter" is in the present case. The Employer does not rely on subsection 2-87(3) of the Act to argue that the Director acted unreasonably while exercising the power to represent an

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[12] *Ibid* at para 56.
[13] *Ontario Power* at para 56, citing *Henthorne v British Columbia Ferry Services Inc*., 2011 BCCA 476, 344 DLR (4th) 292, at para 42.
[14] *Ibid* at para 53.

employee. The Employer's complaint is that the Officer, on behalf of the Director, acted as the "*de facto* representative" of the Employee in error and while doing so made "significant substantive representations" on behalf of the Employee. According to the Employer, the Director has no standing to make representations on behalf of an Employee.

[59] Based on the content of the Decision, the style of cause, and the parties' representations, it is clear that the Director participated in the appeal hearing for the purpose of defending the wage assessment which was issued in favour of the Employee. Therefore, the "matter", or question to be determined, is whether the Director is entitled to participate in a wage assessment appeal for the purpose of defending the wage assessment.

[60] In making this determination, the relevant provisions of the statute are to be interpreted in accordance with the modern principle of statutory interpretation. In other words, the words of the Act are to be read in "their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature".[15]

[61] The Court of Appeal for Saskatchewan has held that, in applying the modern principle, it is necessary to form "an initial impression as to meaning" from the text of the provision:

> *[59] Under the modern principle, the court first forms an initial impression as to the meaning of a legislative provision from its text (i.e., its "grammatical and ordinary sense"). Then, so as to infer what the Legislature intended to enact, the court will take into account the purpose of the provision and all relevant context. As this suggests, the latter part of the inquiry involves the contextual determination of legislative intent.*[16]

[62] Section 2-87 of the Act is explicit that the Director "has standing" to represent "any or all employees of an employer" in proceedings respecting an appeal of a wage assessment and a hearing mentioned in section 2-75, the latter being a hearing before an adjudicator with respect to a wage assessment. The only express limit on the Director's standing to do so is the requirement to act in a reasonable manner, pursuant to subsection 2-87(3). Section 2-87 also states that the Director "has standing" to make a representation on behalf of the Government of Saskatchewan.

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[15] See, subsection 2-10(1) of *The Legislation Act*; *University of Saskatchewan v Administrative and Supervisory Personnel Association*, 2021 CanLII 12946 (SK LRB) at para 59.
[16] *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77 (CanLII).

[63] The wording of section 2-87 suggests that the Director's standing, as set out, is not subject to the discretion of the Adjudicator. The express grant of both standing to make a representation on behalf of the Government and to represent any and all employees would suggest that the Director has standing to defend the wage assessment that has been issued in favour of the employee, as long as its participation is "reasonable". The Director's standing "to represent" is specific to employees, as opposed to employers.

[64] The specificity of the grant expressed in section 2-87 cannot be overlooked. It is a basic presumption of statutory interpretation that "every word and provision found in a statute is supposed to have meaning and function".[17] For this reason, the Board should avoid "adopting interpretations that would render any portion of a statute meaningless or pointless or redundant".[18] The content of section 2-87 should not be rendered meaningless.

[65] Nor is there any provision in the Act that could be said to detract from, minimize, or contradict section 2-87. To be sure, section 4-10 gives both the Director of Employment Standards and the Director of Occupational Health and Safety the right to appear and make representations on any appeal or hearing heard by an adjudicator. Section 4-10 is similar to the provision that was considered in *Ontario Power*, which stated that the Ontario Energy Board was "entitled to be heard by counsel upon the argument of an appeal".

[66] Section 4-10 does not imply limits on section 2-87. Instead, it provides for a general right to appear and make representations on any appeal or hearing heard by an adjudicator. It is not restricted to proceedings respecting an appeal of a wage assessment or a hearing mentioned in sections 2-75 or 2-76. The scope of standing contained in section 2-87 is not repeated in and does not find an equivalent in Part III. Section 4-10 extends to all appeals or hearings heard by an adjudicator, including Part III appeals.

[67] The next part of the inquiry requires a "contextual determination of legislative intent". In making this determination, the Board will consider all relevant context including the scheme and object of the Act. As will be seen, much of this analysis will naturally overlap with the factors outlined in *Ontario Power*.

[68] Part II of the Act is a benefits-conferring, or rights-conferring, statutory scheme, designed to protect employees from periods of uncertainty in employment. The wage assessment

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[17] Ruth Sullivan, *Sullivan on the Construction of Statutes, 6th ed.* (Markham: LexisNexis, 2014) at § 8.23.
[18] *Ibid*.

framework acts as an institutional safeguard against employer abuses of power. By its existence, Part II recognizes the power imbalance between employers and employees. The purpose of section 2-87 is to ensure that these employees, most of whom are self-represented, are sufficiently protected by the regime that is meant to protect them.

[69] In issuing a wage assessment, the Director is not only seeking to recover wages for an employee but is seeking to act in the public interest by upholding provincial employment standards. When issuing the wage assessment, the Director is not held to an onus of proof on a balance of probabilities. The wage assessment is based on knowledge, "reasonable grounds", or suspicion (section 2-74). Consistent with this, the Director can amend or revoke the wage assessment at any time (subsection 2-74(8)).

[70] If not collected by an employee, moneys received become public funds. The Director shall keep a record of all moneys paid to the Director by employers and corporate directors, pursuant to section 2-90. If money received on behalf of an employee has not been paid to the employee for the reasons as set out at subsection 2-90(2), the money, on the order of the Minister, becomes the property of the Crown and is paid into the general revenue fund.

[71] In the current case, the Director's decision to issue a wage assessment could be described as an adjudicative one, but it did not result from a formal hearing such as the one under review in the current appeal. Later, the Director was not participating in a judicial review of the Director's own decision, but rather, was participating in a *de novo* adjudicative hearing on an appeal of that decision before an administrative tribunal.[19]

[72] The Director also exercises investigative, regulatory, and enforcement functions. The Director may negotiate and settle differences between an employer or corporate director and an employee and receive settlement moneys on behalf of an employee (section 2-88); the Director is responsible for collecting funds and registering judgments in the Court of King's Bench.

[73] Pursuant to section 2-83, employment standards officers have extensive inspection powers, and pursuant to section 2-84, investigative powers. An officer may also conduct a compliance audit if required by the Director, pursuant to section 2-86.

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[19] *S.C. v Mamawetan Churchill River Regional Health Authority & Government of Saskatchewan*, 2015 CanLII 90508 (SK LRB) at para 24.

[74] Although the Director and the employment standards officers are to carry out their responsibilities in good faith, their roles are not equivalent to that of an adjudicator selected pursuant to Part IV or this Board. Instead, they act in the public interest to enforce the minimum standards set out in Part II.

[75] All of these foregoing observations provide support for the conclusion that the Director may participate fully in the appeal to defend the wage assessment that has been issued in favour of the employee. As such, the Act clearly resolves the matter.

[76] An application of the *Ontario Power* factors provides further support for the Director's participation as described.

[77] First, although the appeal is otherwise opposed, it cannot be said that the usual employee who participates in an appeal of a wage assessment has the necessary knowledge and expertise to fully make and respond to arguments made in that context. This observation is not intended to be a critique, but rather, an observation about the employee-employer power dynamic and the circumstances of self-representation. By granting the Director the discretion to represent employees and to make representations on behalf of the Government, the statute provides a safeguard against unjust outcomes in the appeal of a wage assessment.

[78] As described, in issuing the wage assessment, the Director does not act only as an adjudicator in the proceeding that is the subject of the appeal. The Director's role cannot be reduced to simply adjudicating individual conflicts between two parties. The Director exercises significant investigative, regulatory, and enforcement functions within a benefits-conferring regime with a general, public interest orientation. Imposing unnecessary constraints on the role of the Director could result in an unfair and inefficient process with an undesirable outcome.

[79] In summary, in wage assessment appeals there is a relatively greater emphasis on fully informed adjudication and a relatively lower emphasis on the impartiality of the Director.

[80] In conclusion, while the Adjudicator did not approach the issue in the correct manner, he did not err in deciding to permit the Director to participate in the appeal hearing, including for the purpose of defending the wage assessment.

Did the Adjudicator err in law when he found no bias on behalf of the Employment Standards Officer?

[81] In *DeMaria v Law Society of Saskatchewan*, 2015 SKCA 106 (CanLII) [*DeMaria*], the Saskatchewan Court of Appeal considered whether a decision of what was then the Court of Queen's Bench correctly found that there was no reasonable apprehension of bias on the part of the Law Society's Admissions and Education Panel or the Benchers.[20] The Board will take a similar approach here, that is, it will consider whether the Adjudicator correctly dismissed the allegation of reasonable apprehension of bias on the part of the Officer.

[82] The Adjudicator did not engage at length with the Employer's argument about reasonable apprehension of bias or even use the complete phrase "reasonable apprehension of bias". However, the effect of his decision was to dismiss the allegation. The Adjudicator's reasoning with respect to the first issue was as follows:

> *The employer alleges bias in the decision and conduct of Ms. Smith, the Employment Standards Officer for:*
>
> *a) Issuing the wage assessment after being presented with Mr. Seiferling's argument stating that a wage assessment should not be pursued.*
>
> *It would seem that Ms. Smith, after her investigation into the employee's complaint, did not find Mr. Seiferling's argument compelling enough to not exercise her Discretion in favour of the employee and issue the wage assessment.*
>
> *I do not see any bias in Ms. Smith's decision in this regard.*

[83] With respect, it cannot reasonably be argued that the Adjudicator correctly applied the law with respect to this issue. The Adjudicator did not even mention the applicable test.

[84] The onus of demonstrating a reasonable apprehension of bias lies with the party that alleges it: *DeMaria*, at para 25. In this case, the party alleging bias is the Employer.

[85] In considering whether the onus has been satisfied, the applicable test is whether "an informed person, viewing the matter realistically and practically and having thought the matter through" would conclude that the decision maker would not decide fairly: *Committee for Justice and Liberty et al. v National Energy Board et al*., 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394. As noted by the Court of Appeal in *DeMaria*, at para 23:

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[20] *DeMaria v Law Society of Saskatchewan*, 2015 SKCA 106 (CanLII) at para 9.

> *…de Grandpré J. also said: "The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'."*

[86] It has been observed that the duty of impartiality extends to a broader range of actors than those who are acting judicially:

> *At one time, the duty of impartiality was required only of decision-makers who were adjudicating or acting "judicially." However, since the decisions in Nicholson and Martineau, procedural fairness has been required in connection with a much broader range of administrative decision-making. Further, the requirement of impartiality has been confirmed as one aspect of procedural fairness. As de Grandpré J. stated in Committee for Justice and Liberty:*
>
> > *The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and that of its technical advisors. The basic principle is of course the same, namely that natural justice be rendered. But its application must take into consideration the special circumstances of the tribunal.*
>
> *And, as one commentator has stated:*
>
> > *The doctrine of bias catches the aberrant cases, the cases where a decision maker goes beyond the parameters of partiality and conduct considered acceptable in a particular context. The limits are different for professional self-regulation than they are for industrial relations on a tripartite model. They are different for peer review in universities than they are for energy licensing, and they are different for expropriation than they are for municipal planning.*
>
> *Accordingly, in each case the courts will be required to make a functional and pragmatic analysis of the administrative decision-making in question. In particular, the court must assess both the extent to which impartiality in the decision-maker is necessary, and where the judicial standard is inappropriate, fashion a test for bias that takes into account such factors as the nature of the decision to be made and the issue to be decided, the character of the decision-maker, and the impact of the impugned action on the individual.*
>
> *Of course, the notion of bias connotes some improper influence on the decision-maker, or "an impermissible partiality." Therefore, not every predisposition in a decision-maker to exercise a power one way rather than another is to be deprecated. For example, even though not bound by stare decisis, an agency may legitimately be predisposed to follow its previous decisions interpreting a particular provision of its enabling statute, in the interests of consistency. Similarly, it is often desirable that members of administrative agencies develop some general policies that they bring to the exercise of any statutory discretion: an "open mind" cannot be equated with an empty head.*

[87] The rule must be applied "in a way that is responsive to the institutional context in which the impugned decision-makers operate": *DeMaria*, at para 30 citing *IWA v Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 SCR 282.

[88] Clearly, the duty of impartiality is an aspect of procedural fairness. The Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] set out five factors to assist in determining the content of procedural fairness in a particular context. These are:

1. The nature of the decision and the decision-making process employed;
2. The nature of the statutory scheme and the precise statutory provisions;
3. The importance of the decision to the individuals affected;
4. The legitimate expectations of the party challenging the decision;
5. The nature of the deference accorded to the body.

[89] The Employer argues, in part, that the Officer advocated for the Employee in the appeal hearing, thereby demonstrating that she had made up her mind about the decision that ought to be made. As explained in the earlier section, the statutory scheme explicitly permits the Director's participation in the appeal hearing, and the Director's participation, or that of the delegate, was not improper. Given the Board's conclusion on this point, this aspect of the Employer's argument has no traction.

[90] The Employer also argues that both the email exchange between the Officer and counsel and the absurdity of the Officer's conclusion about whether any wages were owing demonstrate that the Officer was interested, and invested in, the outcome of this case.

[91] The Adjudicator concluded that the Officer "did not find Mr. Seiferling's argument compelling enough to not exercise her discretion in favor of the employee and issue the wage assessment".[21]

[92] Obviously, the Adjudicator found that the matter was so straightforward that it did not warrant significant analysis. This is understandable. In short, there was nothing in the email exchange that disclosed a reasonable apprehension of bias; rather, the Officer simply did not agree with counsel's assessment. It is not suggestive of bias for a decision maker to not be persuaded by a lawyer's argument. Even a decision which is wrong does not establish bias. Decision makers are often found to be wrong without also being found to be biased. Even so-called "absurd" decisions are generally not indicative of bias without something more.

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[21] *Decision* at 22.

[93] An analysis of the *Baker* factors confirms that the procedural protections guaranteed by the Officer's initial decision are not at the high end of the spectrum. The nature of the decision under scrutiny, relating to the narrow issue of whether to issue a wage assessment, is such that a formal adjudicative decision-making process was not required. Nor was it necessary for the Officer to provide a detailed explanation for rejecting the Employer's arguments. It was sufficient for the Officer to receive and consider the Employer's arguments and to provide a description of her thought process in arriving at her conclusion. The principal consequence of the Officer's decision was financial and was subject to the constraints set out in section 2-60. It was also subject to a *de novo* appeal. The Employer did not have a legitimate expectation that the Officer would take any additional action in response to the Employer's submissions.

[94] In the Board's view, an informed person, viewing the matter realistically and practically and having thought the matter through would not conclude that there was a reasonable apprehension that the Officer was biased in concluding as she did that the wage assessment should be issued. There is nothing in the email exchange between counsel and the Officer that would suggest anything other than the Officer's disagreement with counsel's argument.

[95] Finally, the Employer argued before the Adjudicator that there was evidence of bias in the decision to issue the wage assessment against the Employer and the two corporate directors. In the Board's view, an informed person, viewing the matter realistically and practically and having thought the matter through, would not conclude that there was a reasonable apprehension that the Officer was biased in choosing to name the corporate directors as respondents to the wage assessment. The authority to issue a wage assessment against a corporate director is available with relatively minimal preconditions. As per sections 2-74 and 2-68, the Director need only suspect that the wages became due and accruing to the employee but not paid while the corporate directors were serving in their capacity as corporate directors.

[96] In conclusion, although the Adjudicator incorrectly applied the law, his decision to dismiss the reasonable apprehension of bias allegations was correct.

Substantive:

[97] The Adjudicator identified the substantive issue to be determined as follows:

> *The issue to be decided in this matter is whether the Employee voluntarily left his employment with the Employer or was … dismissed without cause and therefore owed severance pay by the [E]mployer in accordance with [the Act].*[22]

[98] The Adjudicator did not identify as an issue to be determined whether the Employer terminated the Employee for just cause, for example, due to job abandonment. Nor does the Employer suggest that the Adjudicator failed to consider whether the Employer had terminated the Employee's employment for just cause, which, if established, would have spared the Employer from the obligation to provide notice pursuant to section 2-60 of the Act.

[99] Instead, the Employer denies taking "any willful action to remove [the Employee] from his employment" and asserts that there was no evidence which could have persuaded the Adjudicator that the Employer had terminated the employment relationship. The Employer argues that the Employee was not on a leave of absence but had resigned. The Employee's "choice to 'stay home' rather than reporting to work, without more (a proper leave request and an approval from the employer, or a statutory basis for the request), cannot be considered a leave request." The Employer relies for this argument on *Crane Canada Inc. v UA, Local 170*, (1993), 33 LAC (4th) 236 [*Crane Canada*], in which it was said that "a lay-off is not an absence based on the employee's needs or wishes. It is dictated by the decision of the employer to curtail or suspend its operations."[23]

[100] The Employer makes an alternative argument that, even if the Employee could be said to have been on a leave of absence, it was an indefinite leave, and therefore there was no obligation to return the Employee to work. Therefore, there could be no layoff or termination and no requirement, pursuant to section 2-60, to provide notice. Furthermore, the leave was not protected pursuant to the Act, and therefore, there was no obligation to return the Employee to work. Essentially, the employment relationship was severed when the Employee took an indefinite leave of absence, that is, there was no obligation to return the Employee to work, and therefore there was no termination.

[101] The first issue raised by the Employer is that the Adjudicator erred in finding that the Employee did not resign. According to the Employer, the Employee should be found to have resigned because he was absent from work by choice; both a layoff and a termination can be found only if the Employer has taken actions to initiate them.

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[22] *Ibid* at 4.
[23] *Crane Canada Inc. v UA, Local 170*, (1993), 33 LAC (4th) 236 [*Crane Canada*] at para 13.

[102] The Director argues that this argument fails to raise a question of law. In the Board's view, the Employer's argument consists of an overly simplistic description of the law but does raise a question about whether the Adjudicator correctly identified and applied the legal test. Therefore, the Board will consider whether the Adjudicator correctly identified and applied the legal test in determining that the Employer terminated his employment.

[103] The Adjudicator identified the correct legal tests to be applied when determining whether an employee resigned and when determining whether an employer terminated the employee's employment. The case that the Adjudicator relied upon, *Beggs*, is a leading case that sets out the tests that are to be applied in such circumstances.

[104] However, the Adjudicator misapplied the law in *Beggs* in a few ways, described as follows.

[105] First, the Adjudicator applied the tests as alternatives by default. To illustrate, the Adjudicator summarized the test for resignation and applied that test to determine whether the Employee had resigned. He did not use the phrase "reasonable employer" but his analysis suggests that he assessed the perceptions of a reasonable employer based on what the Employee said or did, failed to say or failed to do, the Employee's state of mind, and the ambiguities of the situation. His approach was consistent with the guidelines set out in *Beggs*. The Board does not find any material error of law in the Adjudicator's analysis as to whether the Employee had resigned.

[106] After considering whether the test for resignation had been met, the Adjudicator found that "it is clear that the tests of Resignation by the Employee had not been met, therefore he was wrongfully dismissed."[24] In finding as much, the Adjudicator did not engage in a complete analysis of whether the test had been met for termination. Instead, he simply concluded that the test for termination was met when the test for resignation was not.

[107] Certain passages demonstrate that the focus of the Adjudicator's reasoning was on whether the Employee had resigned and not on whether the test was met for termination:

> *The employer made arrangements to pick up the corporate tools and Truck from the employee many days later. With several meetings and text messages thereafter with the employee, the employer made no comment with respect to why the employee was there, other than to say that there was not adequate work to have Mr. Schlamp return to work with the company. At no time did the employer discuss the fact that they had thought that*

[24] *Decision* at 21.

> *Mr. Schlamp had quit his employment with them, and instead told him that there was inadequate work.*
>
> *In July of 2020 Mr. Schlamp sought and obtained employment with another employer having concluded that he had been fired from Riverside Electric.*
>
> *I do not see how the employee Mr. Schlamp, could have interpreted the text messages and facts as he knew them in any other way other than to conclude that he had been terminated. He saw no reason to contact the employer after reaching such conclusion after trying several times to get a return to work date.*
>
> *I also find it strange the Employer said nothing to the Employee that they were of the view that Mr. Schlamp had quit, when in all his texts and at the meeting at the Employer's premises, he was asking to be scheduled back to work. How could they not know, by his conduct, Mr. Schlamp was thinking he was still employed by them. That issue was not raised by them at any time.*
>
> *A simple phone call or text could have confirmed the resignation one way or the other. The employer chose to do nothing.*
>
> *[Applying] the above law, it is clear that the tests of Resignation by the Employee had not been met, therefore he was wrongfully dismissed.*
>
> *As a result, I find the employee Mr. Schlamp was terminated by the employer Riverside Electric Ltd. without cause. Applying Section 2-60 of The Act, he is entitled to the benefits as set out therein.*[25]

[108] The foregoing analysis discloses the Adjudicator's findings, both implicit and explicit, that the Employee did not intend to resign, that he did not confirm with the Employer that he was resigning, and that it was not reasonable for the Employer to conclude that the Employee had resigned. None of these findings responds directly to the question as to whether the Employer terminated the Employee's employment.

[109] In *Beggs,* the Court observed that, in the decision subject to appeal, a similar approach had been taken:

> *[39] Unfortunately, the trial judge appears to have moved from a finding that the respondent did not resign, to a finding that she was wrongfully dismissed. The absence of any reference to the appellant's evidence from its two witnesses, Mr. Ward and Mr. Book, which evidence she accepted as "truthful and candid", about their lack of knowledge that the respondent was absent because of health problems, resulted in an incomplete assessment of the evidence. In short, the trial judge failed to fully address the factual complexities of the case or make any findings of fact regarding when and by what act the respondent was dismissed.*

[25] *Ibid* at 19-21.

[110] Unlike in *Beggs*, the Adjudicator did not fail to make reference to the evidence of the Appellant (in this case the Employer), generally. However, to find that there was a termination, it was necessary to determine that the requirements of the relevant test had been met. It was necessary for the Adjudicator to apply the test to determine whether a termination had occurred.

[111] In deciding whether the Employer had terminated the Employee, the Adjudicator was obliged to consider whether the Employer communicated in a manner consistent with the description cited in *Beggs*:

> *[37] David Harris summarizes the distinction between the two methods in his text Wrongful Dismissal, loose-leaf (consulted on 13 January 2011), (Toronto: Thompson Canada Ltd. 1989) at pages 3-4, 3-5 and 3-9:*
>
> *§3.0 Dismissal*
>
> *Summary: Dismissal is a matter of substance, not form. It is effective when it leaves no reasonable doubt in the mind of the employee that his or her employment has already come to an end or will end on a set date*
>
> *...*
>
> *The crucial factor in assessing the effectiveness of a dismissal is the clarity with which it was communicated to the employee. Mr. Justice Macfarlane of the British Columbia Court of Appeal stated the law in this regard as follows in Kalaman v. Singer Valve Co. (1997), 1997 CanLII 4035 (BC CA), 31 C.C.E.L. (2d) 1, 93 B.C.A.C. 93, 151 W.A.C. 93, 38 B.C.L.R. (3d) 331, [1998] 2 W.W.R. 112, 97 C.L.L.C. 210-017, 1997 Carswell BC 1459, [1997] B.C.J. No. 1393:*
>
> *A notice must be specific and unequivocal such that a reasonable person will be led to the clear understanding that his or her employment is at an end at some date certain in the future. Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case. (p. 11 [C.C.E.L.]; emphasis added)*

[112] The question before the Adjudicator was whether the Employer had communicated the termination in a manner that was "specific and unequivocal such that a reasonable person will be led to the clear understanding that his or her employment is at an end at some date certain in the future". The Adjudicator was obliged to identify the specific and unequivocal act by the Employer that, objectively viewed, amounted to a termination. It was the Employer's expressed, not actual, intention that mattered.

[113] The Adjudicator did not demonstrate through his reasons that he considered whether there was a specific and unequivocal act by the Employer that, objectively viewed, amounted to a termination.

[114] To be sure, the Board has considered the foregoing passage, in which the Adjudicator found that only one interpretation of the facts was available to the Employee:

> *I do not see how the employee Mr. Schlamp, could have interpreted the text messages and facts as he knew them in any other way other than to conclude that he had been terminated. He saw no reason to contact the employer after reaching such conclusion after trying several times to get a return to work date.*[26]

[115] However, it is not at all clear from this passage that the Adjudicator turned his mind to whether the Employer committed the required specific and unequivocal act. Instead, what he seems to be saying is that the Employee appropriately concluded, based on the factual circumstances, that he had been terminated. By comparison, the Court in *Beggs* found at para 41:

> *…By denying the respondent's assertion that she had not quit her job in the face of medical evidence that she was unable to work, the appellant effectively dismissed the respondent. It was, in my view, the August 17, 2009 letter that constituted the clear and unequivocal act of dismissal….*

[116] The Adjudicator was obliged, after finding that there was no resignation, to turn to an assessment of the Employer's actions and to make a determination about those actions. The Board is not suggesting that the Adjudicator applied a subjective test, which also would have been in error,[27] but that the Adjudicator did not identify the specific and unequivocal act by the Employer that, objectively viewed, amounted to the Employee's termination.[28] The Adjudicator's error in this respect was an extricable error of law. In the absence of this analysis, the Board cannot conclude that the Adjudicator's decision was correct.

[117] Next, the Board will consider the Employer's alternative argument. Here, the Employer argues that, even if the Employee could be found to have taken a leave of absence, the leave of absence was of an indefinite duration. According to the Employer, when an employee is on an indefinite leave of absence there is no obligation to return the employee to work. In other words, even if the Employer consented to the absence, if the leave of absence was of indefinite duration, then there was no obligation to return the employee to work. The Employer also argues that the purported leave of absence was not a "protected" leave resulting in a return-to-work obligation.

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[26] *Ibid* at 20.
[27] *Beggs v Westport Foods Ltd.,* 2011 BCCA 76 [*Beggs*] at para 36.
[28] *Ibid* at para 38.

[118] In making this argument, the Employer misstates the applicable law. Whether an employee has a right to return after being absent from the workplace depends on the circumstances.

[119] In particular, the legislation envisages a return-to-work obligation in the case of an indefinite "employment leave". "Employment leave" is defined at clause 2-1(h) of the Act as meaning "a leave mentioned in Subdivision 11 of Division 2 that an employee is entitled to". Section 2-46 contemplates circumstances in which an employee cannot reasonably know their return date and stipulates that, in these circumstances, the usual periods of notice are inapplicable, and the employee shall provide for notice as far as possible in advance of the date the employee intends to return to work.

[120] Next, under Part II, an "employee" includes a person on an employment leave. The use of the word "include" in the definition of "employee", particularly in contrast with the use of the word "means" in the definition of "employer", suggests that the definition of employee is non-exhaustive. The categories of "employee" comprise an open list. Therefore, an "employee" could include a person who is not on an employment leave but is on another category of leave.

[121] Section 2-60 establishes the notice required for employees who have been in the employer's service for more than 13 consecutive weeks. It sets out the minimum periods of written notice in accordance with the employee's period of employment. The phrase "period of employment", according to subsection (2), "means any period of employment that is not interrupted by more than 14 consecutive days". Subsection (2) excludes certain types of absences from the definition of an interruption:

> *(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.*

[122] If the minimum interruption in employment immediately precedes the termination, an employee is not eligible for pay in lieu of notice unless the employee is found to have been on vacation, an employment leave, or a leave granted by an employer.

[123] The Employer's argument raises an issue as to the basis upon which the Adjudicator found that there was an eligible subsisting employment relationship after March 2020. The Adjudicator did not make an express finding that the Employee was on a leave. Instead, he only found that the Employee did not resign. However, even if he did not resign, if his employment was interrupted

for a period of more than 14 consecutive days and he did not qualify for the categories in subsection (3), then he was not eligible for notice under section 2-60.

[124] It was necessary for the Adjudicator to make a determination as to whether the Employee was on a leave, whether definite or indefinite, that was granted by the Employer. There was conflicting evidence before the Adjudicator as to whether a leave was granted, but that issue was not resolved. By not making this determination, the Adjudicator erred in law.

Quantum:

[125] In another alternative argument, the Employer argues that the Adjudicator erred in his determination of the quantum of damages owing. The Employer suggests that, if the Board decides that the Adjudicator's decision was correct, that is, it was correct to find that the Employee was terminated in June, the Board should refrain from relying on June as the end month of the Employee's employment. Instead, the Board should rely on March 23, 2020 as the end date, which is the date that the Employer says that the Employee resigned. The apparent reason that this argument is being urged upon the Board is that, if accepted, the period of employment, and therefore the amount owing, would be reduced.

[126] The Board does not accept this argument. Moreover, the Board cannot determine a quantum owing, if any, without deciding the outstanding issues, as outlined in these Reasons. As will be explained, the Board will not make those decisions but will instead remit the matter to the Adjudicator to so decide.

Costs:

[127] Lastly, the Employer argues that it should be awarded costs on a solicitor-client basis against the Director, stating that the Board has authority to award costs in a proceeding before it and observing that there is nothing in Part II of the Act that prevents the Board from granting an award of costs on this appeal.

[128] The Board recently considered the issue of awarding costs on an appeal in *Andritz Hydro Canada Inc. v Timothy John Lalonde and Director of Occupational Health and Safety*, 2021 CanLII 61031 (SK LRB) [*Lalonde*]. There, the Board succinctly disposed of the issue, as follows:

> *[30] The Board rarely orders a party to compensate another party for legal expenses, and when it does, it relies on clause 6-104(2)(e) of the Act which applies only to monetary loss suffered by an employee, an employer or a union as a result of a contravention of Part*

> *VI, the regulations made pursuant to Part VI or an order or decision of the Board. None of those criteria applies here.*
>
> *[31] Subsection 4-8(6) of the Act sets out the powers of the Board on an appeal from an adjudicator, and it does not include a power to order costs.*
>
> *[32] Pannu Bros. Trucking, referred to by the Employer, was a decision under the Canada Labour Code, which specifically stated, in clause 251.12(4)(c), that a referee may award costs. A similar power does not appear in the Act.*
>
> *[33] Accordingly, the request for costs is denied.*

[129] The Employer has not identified any authority that contradicts the Board's decision in *Lalonde*. There is no power to award costs. Nor would it be appropriate to do so.

Conclusion:

[130] For the foregoing Reasons, the Board finds that the Adjudicator's decision is not correct. The Employer asks that the Board substitute its own decision for that of the Adjudicator.

[131] Pursuant to clause 4-8(6)(b) of the Act, the matter is remitted to the Adjudicator for amendment of the decision in accordance with the direction provided in these Reasons. Although remitting the matter will extend the time to a final decision, the outcome of this matter is not inevitable and, by remitting the decision, it remains with the Adjudicator to apply the law to the facts of this case.

[132] An appropriate order will be issued with these Reasons.

DATED at Regina, Saskatchewan, this **1st** day of **December, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson