Saskatchewan
Labour Relations Board

OLYMPIC MOTORS (SK) I CORPORATION, operating as AUTO GALLERY SUBARU, and THOMAS GLEN, as Director of OLYMPIC MOTORS (SK) I CORPORATION, Appellants v CASSANDRA FOWLER, Respondent and GOVERNMENT OF SASKATCHEWAN, DIRECTOR OF EMPLOYMENT STANDARDS, Respondent

LRB File Nos. 102-22 & 206-22; October 12, 2023
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Appellants, Olympic Motors (SK) Corporation and Thomas Glen:	Kevin C. Mellor
The Respondent, Cassandra Fowler:	Self-Represented
Counsel for the Respondent, Government of Saskatchewan:	Alyssa Phen and Johannes Myburgh, Student-at-law

Appeal of Adjudicator's Decision – Section 4-8 of *The Saskatchewan Employment Act* – Wage Assessment Appeal – Wage Assessment for Unpaid Overtime – Appeal Filed by Employer.

Allegations – Error of Law Based on Disregarding Evidence – Error of Law for Failure to Assess Credibility – Error in Interpretation of Case Law and Statute.

Determination – Error in Assessing Intent for Time Theft and Providing Reasons for Characterization of Evidence – Section 4-8(6)(b) – Remitted to Adjudicator.

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 December 28, 2022 by Olympic Motors (SK) I Corporation carrying on business as Auto Gallery Subaru [Company] and Thomas Glen [together, the Appellants], pursuant to section 4-8 of *The Saskatchewan Employment Act* [Act].

[2] The origin of this Appeal is in a Wage Assessment, dated May 25, 2022, issued in favour of Cassandra Fowler [Employee], in the amount of $13,173.03.[1] The Employee was employed by the Company as a Deal Processor from November 11, 2018 to June 30, 2021. The Company and

[1] Wage Assessment No. 1-000570.

Thomas Glen appealed the Wage Assessment on the basis that the Employee was a salaried employee and therefore not entitled to overtime and on the basis that the Wage Assessment did not clearly indicate the reason the amount was payable or identify the applicable provision of the Act.

[3] On July 20, 2022, the Board Registrar selected an Adjudicator for the hearing of the appeal. That appeal was heard on October 13, 2022 and the Adjudicator issued a decision on December 19, 2022.[2] In the decision, the Adjudicator noted that, at and after the hearing, the grounds of appeal shifted to include "an unaccounted-for payment of $1,750, time theft on the employee's part, and a lack of overtime hours worked by the employee".[3] The Adjudicator dismissed the appeal and upheld the Wage Assessment.

[4] On December 28, 2022, the Appellants also filed a Notice of Appeal[4] of the Adjudicator's decision[5] to uphold a Wage Assessment in favour of a former employee, Jeremie Katz. The appeal hearings in relation to the two employees had taken place at the same time[6], but the Adjudicator issued separate decisions. The Board's decision in relation to that matter was issued on October 12, 2023.

Adjudicator's Decision:

[5] The following is a summary of the Adjudicator's decision in this matter.

[6] The Adjudicator explained that the Appellants did not pursue the "salaried employee" argument at the hearing or in their written submissions. Nonetheless, she found that there was no basis in law for this assertion.[7]

[7] The Appellants' main argument was that the Employee was engaged in time theft. They argued that the Employee engaged in significant non-work activity while at work and did not work any overtime. They also argued that the Employee never complained about not being paid overtime.

---

[2] LRB File No. 102-22.
[3] *Decision*, at 2.
[4] LRB File. No. 207-22.
[5] LRB File No. 103-22, Wage Assessment No. 1-000568.
[6] *Decision,* at 2.
[7] *Ibid* at 9.

[8] The Adjudicator reviewed the evidence and concluded that the Company did not make it a general practice to pay overtime.[8] Despite payroll records showing overtime hours on the Employee's timecards and timesheets, she was never paid for her overtime hours.

[9] None of the Employee's direct supervisors were called as witnesses to explain the hours reflected on the timecards and timesheets. On the other hand, the Employee's evidence was credible[9] and "understated".[10]

[10] The Adjudicator found that there was "no clear evidence that the Employee took a one-hour lunch break except on the days that her timecards/timesheets showed she punched out". It was the employer's responsibility to manage the workplace, but no one spoke to the Employee about punching out for her lunch breaks.[11] The Company "ought reasonably to have known that Cassandra was working overtime hours and they did not cause her to stop working those hours".[12]

[11] The Adjudicator also considered and distinguished from the cases that were filed. She observed that those cases grappled with whether time theft could justify dismissing an employee for cause, not with denying an employee pay for overtime.

[12] The Adjudicator found that the Employee was not at her best during her last two months of employment but, despite "feeling overwhelmed and demoralized", came into work early and put in long days.[13] Although she was performing inappropriate personal internet searches on her computer, she "was physically at work and at her employer's disposal during the hours reflected on her timecards, timesheets, and in the Audit, and there is no evidence to the contrary." The Adjudicator concluded, based on the evidence, that the Employee was not "attempting to steal time from or defraud her employer".

[13] The Appellants sought that the Adjudicator extrapolate from the evidence from April 29 to June 30, 2021 to conclude that the Employee had committed time theft throughout her last year of employment.[14] The Adjudicator found that it would be inappropriate to do so.

[14] The Appellants argued that the Employee's evidence was not credible because she had not raised overtime while employed and then waited a long time before filing a complaint. The

---

[8] *Decision,* at 13.
[9] *Ibid*: "Cassandra's evidence was plausible and detailed enough to be believable."
[10] *Ibid* at 14.
[11] *Ibid*.
[12] *Ibid*.
[13] *Ibid* at 15.
[14] *Ibid* at 14.

Adjudicator rejected this argument. She concluded, based on the evidence, that the Company had never planned to pay for overtime and, for this reason, was not concerned about the hours that she was recording. She also observed that the Employee had made the claim to Employment Standards within the statutory time limit and was only limited to recovering wages that became payable within the last 12 months of employment, pursuant to section 2-89 of the Act.[15] She should not be faulted for exercising her rights under the Act.

[15] The Adjudicator also rejected the argument that the coworkers' evidence could not be believed due to their relationship.[16] In doing so, she observed that there was no evidence of collusion or dishonesty.[17]

[16] The following was the Adjudicator's conclusion:

> *Based on the evidence as a whole, I find that it is more likely than not that Cassandra worked the hours she claimed as set out in the Audit Sheet (EE-7). Despite some mismanagement of her time during her last two months of work, the evidence establishes Cassandra remained at her employer's disposal from early in the morning (anywhere between 6:10 and 6:45 a.m.) to the end of the workday usually between 4:30 and 5:00 p.m. but sometimes later). The employer never asked Cassandra to work shorter hours or directed her to punch out for one-hour unpaid lunch breaks. The Company's records support Cassandra's evidence that she consistently worked overtime hours throughout her time at Auto Gallery, and that she was not paid for her overtime hours.*
>
> *In summary, the Appellants have not established the Wage Assessment is incorrect.*

Grounds of Appeal:

[17] The Appellants raise the following grounds of appeal:

a. The Adjudicator did not properly consider admissions made by the Employee relating to time theft and taking more lunches than indicated on her time records.

b. The Adjudicator did not properly interpret the case law, including *Yorkton Cooperative Association v Retail, Wholesale Department Store Union*, 2016 SKQB 296 (CanLII) [*Yorkton Cooperative*].

c. The Adjudicator did not properly consider or interpret the Act and its Regulations in calculating overtime pay, including s. 2-1(o)(i), s. 2-1(j), and "section 17-1".

---

[15] *Ibid* at 15.
[16] *Ibid* at 15-16.
[17] *Ibid* at 16.

d. The Adjudicator did not properly evaluate the credibility of the witnesses.

e. The Adjudicator erred by referring to and confusing testimony adduced from Jeremie Katz for Cassandra Fowler's appeal.

f. The Adjudicator considered irrelevant evidence when justifying why the Employee was not responsible or accountable for time theft and/or not working for the Employer during regularly scheduled business hours.

g. The Adjudicator tried to justify the time theft instead of accepting the admissions of the Employee when admitting to time theft.

[18] Although the Appellants also alleged that the Adjudicator made an error in respect of a further credit of $1,750, they withdrew this ground of appeal at the hearing.

[19] In their oral argument, the Appellants ask that the decision be set aside and be remitted to another adjudicator. The Appellants argue that, because the Adjudicator's assessment of credibility is in question, it would not be appropriate to require the same Adjudicator to hear a remitted appeal. In seeking that the decision be remitted to an alternative adjudicator, the Appellants rely on the practice of the Federal Court of Appeal in remitting a decision to the Tax Court to be heard by a different decision-maker.

[20] Alternatively, the Appellants submit that this Board could make a correction to the Wage Assessment based on the record.

Arguments:

Argument of Appellants

[21] The intention of the Employment Standards legislation is to ensure a "fair and balanced labour and employment environment". It would be grossly unfair to force an employer to pay overtime to an employee who worked on personal business during her normal hours of work. If the employee has caused the need for overtime hours, the employer should not have to pay. Time theft is a serious breach of the employment relationship.

[22] The Adjudicator finds that the Employee was available to perform work during the time that she was performing personal internet searches. In coming to this conclusion, the Adjudicator diminished the seriousness of the Employee's conduct and contradicted the existing case law.

Moreover, the Adjudicator failed to consider how the time theft resulted in the Employee claiming overtime pay. If the Employee really needed to work overtime, then she would not have been able to spend time on the internet for personal reasons.

[23] The Employee's claim for overtime is extraordinary. For a significant period of time each day, she was at work but not working. As a result of the Wage Assessment, not only does she get paid for hours not worked at regular time, but she also gets paid overtime. It was a term, whether explicit or implicit, of the employment contract that she was required to work for the Company's benefit while at work.

[24] Granted, the evidence of the Employee's internet searches covered only the last two months of the Employee's employment. However, the Adjudicator should have extrapolated for the period prior to this because the Employee had admitted that she would have worked in the same fashion over the wage assessment period.

[25] The Company was required pursuant to the Act to provide the Employee with a lunch break, and the Employee took a lunch break each day during the assessment period. The Adjudicator did not acknowledge this fact.

[26] On the question of credibility, the Adjudicator failed to recognize the motivation of the coworkers to bring an overly zealous claim against the Company. Also relevant to credibility was the timing of the claim and the exorbitant amount of overtime that was claimed.

[27] Finally, the Adjudicator failed to address two major admissions of the Employee.

[28] The first is that she spent substantial time on non-work-related activities. Instead of addressing this admission, the Adjudicator substituted her rationale for the Employee's conduct. The Adjudicator's rationale is in direct conflict with the case law. The second admission by the Employee was that her quality of work was the same in the previous year as it was in the last two months of her employment. The Adjudicator's conclusion that the Employee did not engage in time theft contradicts these admissions.

Argument of Respondent, Fowler/Employee

[29] The Employee's argument is brief.

[30] She argues that she was available and willing to do the tasks she was given while in the office but on many days the work took longer than the hours for which she was scheduled. She was doing the job of three different people. She says that she submitted her time records. The Company never raised concerns with her internet browsing. It was the Company's responsibility to communicate its policies and ensure that the employees were complying with those policies.

[31] The Employee asks that the Wage Assessment be upheld, and the appeal be dismissed.

Argument of Respondent, Director of Employment Standards

[32] The Director submits that there are no reviewable errors of law in the Adjudicator's factual findings.

[33] First, the Adjudicator provided reasons explaining why she did not discount the Employee's evidence due to her relationships with former colleagues. The Appellants argue that the Adjudicator should have weighed this evidence differently. This argument does not raise a question of law.

[34] Second, the Adjudicator did not disregard the Employee's admission that she used her work computer to spend time on non-work-related activities. She addressed this issue extensively. She made findings that the Employee was working or at the Employer's disposal and that she was not attempting to steal time or defraud her Employer. These factual findings are not reviewable as questions of law.

[35] Third, the Adjudicator found that the Employee ate lunch but did not take her lunch breaks, except as was recorded in her records. The Appellant's assertion that the Employee took daily lunch breaks does not raise a question of law.

[36] Furthermore, sections 2-17 and 2-18 of the Act set out that overtime pay is required when an employer "requires or permits the employee to work or to be at the employer's disposal" in excess of the prescribed hours. If the Employee was permitted to be at the Employer's disposal, then it was irrelevant whether she ate lunch.

[37] Next, the Appellants argue that the Adjudicator should have extrapolated the information gathered from the Employee's computer to apply to the entire previous year of work. This argument does not raise a question of law.

[38] Finally, there is no legal basis for deducting amounts for time theft from the Wage Assessment. The issue of time theft arises in discipline or dismissal for cause due to the breakdown of the trust relationship between employer and employee. Therefore, even if the Appellants' claims of time theft were founded, which they are not, the Company would not be entitled to deduct the equivalent wages from the Wage Assessment as a remedy. The Act does not permit wage deductions for damages claims on behalf of an employer, whether by the employer, the Director, the Adjudicator, or this Board. The appropriate avenue would be through the civil claims process.

Applicable Statutory Provisions:

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

> ***2-1*** *In this Part and in Part IV:*
>
> . . .
>
> *(o)* ***"overtime"*** *and* ***"overtime pay"*** *mean:*
>
> *(i) pay at a rate of 1.5 times an employee's hourly wage; or*
>
> *(ii) pay at a prescribed rate for a prescribed category of employees;*
>
> ***2-2*** *For the purposes of this Part, an employer is deemed to have permitted an employee to work within the meaning of the expression "permits to work" or "permitted to work" if the employer:*
>
> *(a) knows or ought reasonably to know that the employee is working; and*
>
> *(b) does not cause the employee to stop working.*
>
> ***2-14****(1) Subject to subsections (2) and (4), an employer shall provide to an employee an unpaid meal break that is of at least 30 minutes' duration within every five consecutive hours of work.*
>
> *(2) An employer is not required to grant a meal break pursuant to subsection (1):*
>
> *(a) in unexpected, unusual or emergency circumstances; or*
>
> *(b) if it is not reasonable for an employee to take a meal break.*
>
> *(3) If the employer does not grant the meal break mentioned in subsection (1) and the employee works five or more consecutive hours, the employer shall permit an employee to eat while working.*

(4) An employer shall provide to an employee an unpaid meal break at a time or times necessary for medical reasons.

2-17*(1) An employer shall pay an employee overtime pay 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 that exceeds the hours determined in accordance with sections 2-18, 2-19 and 2-20.*

(2) When calculating overtime pay, an employer:

(a) is not required to include any meal break allowed to an employee if:

(i) notice of the meal break is given in accordance with section 2-11; and

(ii) the employee is not at the disposal of the employer during the meal break;

(b) shall not take into account any time the employee works or is at the employer's disposal on a public holiday;

(c) shall reduce the time when overtime is payable by eight hours for each public holiday occurring in a week; and

(d) shall pay to the employee the greater of:

(i) the total of overtime pay required pursuant to this Subdivision that is calculated on a daily basis; and

(ii) the total of overtime pay required pursuant to this Subdivision that is calculated on a weekly basis.

2-18*(1) Unless an employee is working in accordance with a modified work arrangement or in accordance with an averaging authorization that satisfies the requirements of section 2-20, an employer shall pay the employee overtime for each hour or part of an hour in which the employer requires or permits the employee to work or to be at the employer's disposal for more than:*

(a) 40 hours in a week; or

(b) either of:

(i) eight hours in a day if the employer schedules the employee's work in accordance with clause (2)(a); or

(ii) 10 hours in a day if the employer schedules the employee's work in accordance with clause (2)(b).

(2) For the purposes of determining the 40 hour per week maximum pursuant to subsection (1), the employer may require or permit the employee to work or be at the employer's disposal for either:

(a) eight hours in a day for no more than five days in a week; or

(b) 10 hours in a day for no more than four days in a week.

(3) Notwithstanding section 2-7 or subsections (1) and (2), in the prescribed circumstances and subject to the prescribed conditions, an employer and an employee may agree that the employee may bank overtime hours.

(4) Notwithstanding section 2-17, subsection (1) of this section and section 2-19, but subject to subsection (5), an employer shall pay an employee overtime if:

(a) the employee works, on average, fewer than 30 hours per week; and

(b) the employer requires or permits the employee to work or to be at the employer's disposal for more than eight hours in a day.

(5) If employees have a union as their bargaining agent and the employer and the union have agreed respecting the number of hours in a day or week that are to be worked before overtime is paid:

(a) subsection (4) does not apply to those employees; and

(b) the employer shall pay those employees overtime in accordance with the agreement.

…

***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.

…

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

(2) 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.

…

2-75*(1) Any of the following may appeal a wage assessment:*

(a) an employer or corporate director who disputes liability or the amount set out in the wage assessment;

(b) an employee who disputes the amount set out in the wage assessment.

…

(8) On receipt of the notice of appeal and deposit required pursuant to subsection (4), the director of employment standards shall forward to the adjudicator:

(a) a copy of the wage assessment; and

(b) a copy of the written notice of appeal.

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

…

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.*

…

Analysis:

[40] This appeal was brought pursuant to subsection 4-8(1) of the Act, which permits an appeal of an adjudicator's decision on a question of law. The Board has previously determined that the standard of review to be applied on such appeals is correctness.[18]

[41] Findings of fact may be found to be questions of law only if they were based on no evidence, on irrelevant evidence or in disregard of relevant evidence or based on an irrational inference of fact.[19]

---

[18] *Saskatchewan v Martell*, 2021 CanLII 122408 (SK LRB), *Christine Ireland v Nu Line Auto Sales & Service Inc*., 2021 CanLII 97414 (SK LRB).

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

[42] In the present case, the Board's role is to determine whether the Adjudicator identified the correct test and applied it correctly and whether the Adjudicator erred in law in relation to a factual matter.

[43] The issues raised by the Appellants are:

a. Did the Adjudicator commit errors of law by disregarding the following admissions made by the Employee:

   i. That she was committing time theft while at work;
   ii. That she would have worked in the same manner as she did in her last two months of work during the previous year;
   iii. That she took more lunches than were reflected in the Wage Assessment?

b. Did the Adjudicator commit errors of law by failing to properly assess the witnesses' credibility?

c. Did the Adjudicator err in interpreting the case law with respect to time theft? Relatedly, did the Adjudicator consider irrelevant evidence in justifying the Employee's conduct?

[44] In their written brief and oral argument, the Appellants did not address the allegation that the Adjudicator erred in interpreting the statute. When asked about this, the Appellants explained that they were maintaining this ground and that the error in interpretation flowed from the Adjudicator's failure to consider relevant evidence. In other words, the two grounds were interrelated.

[45] In fact, many of the issues raised by the Appellants are interrelated and can be roughly divided into four categories: alleged errors with respect to time theft, extrapolation, lunch breaks, and credibility. The Board will address each of these issues, in turn.

a. Did the Adjudicator commit errors of law in relation to the time theft issue?

[46] First, the Appellants allege that the Adjudicator disregarded the Employee's admission that she committed time theft while at work. The Adjudicator addressed this issue in the Decision.[20] She acknowledged the Employee's testimony to the effect that "she dealt with the

[20] *Decision*, at 14 and 15.

ongoing stress of her workload by distracting herself with personal internet searches."[21] She also observed that:

> *…Although she admitted these searches were inappropriate, she explained that while these searches were open on her computer, she was still available to do her work and was still doing her work. Although Cassandra was not as focused as she could have been at the end, I find she was doing the best she could at the time, under the circumstances. Cassandra was physically at work and at her employer's disposal during the hours reflected on her timecards, timesheets, and in the Audit, and there is no evidence to the contrary. Nobody from management took issue with her starting work early in the morning or with her not clocking out for one-hour unpaid lunch breaks. Based on the evidence, I do not believe Cassandra was attempting to steal time or defraud her employer.*[22]

[47] The Appellants argue that the Adjudicator did not address the Employee's admission that she spent substantial time on the internet, but instead substituted her own rationale. The Appellants argue further that there was no basis for the Adjudicator to find that because the Employee was available to work that she was, in fact, working.

[48] The Appellants rely on *Yorkton Cooperative*; *Canada Safeway Ltd. and U.F.C.W., Loc. 2000 (Mastin) (Re),* 2002 CanLII 78947 (BC LA) [*Canada Safeway*]*;* and *Unifor, Local 907 v Irving Paper Limited,* 2021 CanLII 122314 (NB LA) [*Irving Paper*]. They state that the context of the cases (whether they relate to dismissals for cause or not) is not the point. Rather, the case law demonstrates that incidents of time theft are treated with the utmost seriousness. The Adjudicator overlooked the seriousness of the Employee's misconduct. The Appellants argue that the Board should strictly and critically analyze the Employee's overtime claims given her conduct.

[49] First, there is no apparent arbitral or adjudicative consensus to the effect that excessive internet usage is the same as time theft.[23] Furthermore, some arbitrators (as in *Andrews*)[24] go so far as to explicitly distinguish between cases of time theft and cases of excessive internet usage. It cannot be said, however, that there is a binding precedent, or even a clear consensus, that excessive internet usage can never in any circumstances be time theft.[25] To illustrate, in *Fraser*, the arbitrator quoted the distinction made in *Andrews*, but then went on to consider the grievor's conduct. The determination in *Fraser* was made based on the facts.

---

[21] *Ibid* at 15.
[22] *Ibid.*
[23] See, for example, *Fraser Health Authority v H.S.A.B.C.*, 2011 CarswellBC 2993 [*Fraser*]; *Health Sciences Association of Saskatchewan v Sunrise Regional Health Authority*, 2012 CanLII 48715 (SK LA).
[24] *Andrews v Canada*, 2011 CarswellNat 3564, 2011 PSLRB 100 (Can PSLRB).
[25] *Fraser*, at para 29-31.

[50] In comparison, the appropriate *discipline* for excessive internet usage is not presumptive but depends on the context. The case law underscores this point.

[51] First, *Yorkton Cooperative*, which was a dismissal for cause case, was upheld on appeal because the termination was the only reasonable result: *Retail, Wholesale Department Store Union v Yorkton Cooperative Association*, 2017 SKCA 107 (CanLII). The Court of Appeal acknowledged that time theft in the employment context is a very egregious form of misconduct[26] but observed, contrary to the reasoning of the then Court of Queen's Bench, that the presumptive penalty for time theft appeared to have given way to a contextual approach.[27]

[52] Similarly, the arbitrator in *Irving Paper* rejected the notion that dismissal is the presumptive remedy in time theft cases but found that the "crucial question" in a given case is whether the employment relationship can be restored taking into account any mitigating factors.[28]

[53] Finally, *Canada Safeway* was a decision about an employee who had tampered with and incorrectly filled out her timecard, not one who had used the internet at work. The arbitrator observed that falsifying timecards is considered theft and fraud against the employer. It is well established that the intent for time theft is implied in the commission of the act. The cases have found the opposite in relation to excessive internet usage; if intent is to be found, it must be found on the facts.

[54] The Director relies on sections 2-36 and 2-74 to argue that, even if time theft had been founded, there is no basis for deducting such claims from a wage assessment. Section 2-36 sets out the allowable deductions from the wages that would otherwise be payable to the employee. In addition to deductions permitted or required pursuant to law, an employer may only deduct from an employee's wages those deductions that are set out therein. The Director argues that this section does not permit deductions for time theft or other forms of theft. There are no relevant deductions in the Regulations. Related claims are to be pursued through other avenues, such as civil or criminal proceedings.

[55] To be sure, this argument does not respond directly to the Appellants' assertion, which is that the Employee was not entitled to overtime pay. Section 2-17 states that an employer shall pay an employee overtime pay when the employee is required or permitted to work or to be at the

---

[26] *Retail, Wholesale Department Store Union v Yorkton Cooperative Association*, 2017 SKCA 107 (CanLII), at para 27.
[27] *Yorkton Cooperative Association*, at para 37.
[28] *Unifor, Local 907 v Irving Paper Limited*, 2021 CanLII 122314 (NB LA) [*Irving Paper*], at para 95.

employer's disposal in excess of the hours determined in accordance with sections 2-18, 2-19, and 2-20. The question, then, is whether the Employee was required or permitted to work or to be at the Employer's disposal for more than 40 hours in a week. According to section 2-2 of the Act, an employer permits an employee to work if the employer knows or ought reasonably to know that the employee is working and does not cause the employee to stop working.

[56] The question is not whether a deduction can be made but whether the employee was required or permitted to work or be at the employer's disposal for the number of hours claimed. The purpose of these compensatory provisions is to ensure that an employee is paid for time worked (or at the employer's disposal). If an employee is found to have, for example, committed fraud by falsifying time records, then it cannot be said that the employee worked during those hours. It would be antithetical to the statutory purpose to require an employer to pay the employee for the fraudulent time recorded and then pursue a claim for the same amount in civil court.

[57] The problem for the Appellants, however, is that excessive internet usage is usually treated as a productivity issue. Other productivity scenarios include, for example, employees engaged in water cooler conversations or making personal phone calls. The classic time theft cases, by contrast, tend to involve the falsification of timecards or falsification of benefits claims, for example, when an employee leaves work early without recording it, claims sick leave when not ill, or simply records time as worked when it was not.[29]

[58] Unlike the time theft cases, productivity concerns do not mean an employee was not working and therefore not entitled to wages. An employee who is unproductive is still considered to be working, but not "productively". As such, performance management and discipline up to termination are the appropriate vehicles for addressing such concerns.

[59] However, the Adjudicator's decision does not suggest that it was out of the realm of possibility to find that the Employee's excessive internet usage constituted time theft. Instead, she assessed the evidence and made a determination based on the evidence that the Employee did not have the intent required for a finding of time theft or of fraud.[30]

---

[29] Although not directly relevant here, remote work makes the monitoring of time worked more complicated, and the case law is beginning to respond to this: *Besse v Reach CPA Inc*., 2023 BCCRT 27.
[30] *Decision*, at 15.

[60] Given the Adjudicator's reasoning, it was necessary for her to consider the relevant facts in assessing intent. The case law suggests that intent in these cases has been assessed (even if reluctantly) based on a variety of factors, including:

- The nature of the internet usage in question, including when the employee was on the internet and using it for personal reasons;
- Whether the employee was at the worksite during the time in question;
- The nature of the employee's role and responsibilities and whether she continued to work during that time and was available to respond to the demands of the employer;
- The existence of an internet policy that was known to the employees;
- Whether the usage in question ran counter to the policy;
- Whether the employees punch timecards or not or actively record their hours;

[61] Given both the state of the law and the contextual nature of the inquiry, these factors are not necessarily mandatory or exhaustive.

[62] The Adjudicator's reasoning on this issue unfolds over the course of her reasons. As is apparent, she considered some of these issues, but not all. Although these factors are not necessarily mandatory, there are gaps in the Adjudicator's reasoning that equate to an error of law.

[63] Earlier in her reasons, the Adjudicator considered the definition of "permitted to work" and found that the Company permitted the Employee to work the hours that she worked – she raised the issue of overtime, was told to keep track of her hours[31], her timecards and timesheets showed that she was consistently recording overtime hours[32], there was no evidence of a written policy requiring overtime authorization (despite the Appellant's witness suggesting the Employee had not been authorized), and the Company did not "cause her to stop working those hours".[33] The Company even kept records of the total number of hours worked, in accordance with section 2-38, but then attempted to distance itself from those records.[34]

---

[31] *Ibid* at 12.
[32] *Ibid* at 13.
[33] *Ibid* at 14.
[34] *Ibid* at 13.

[64] The Adjudicator considered the Employee's conduct and found that it did not have an impact on whether she was entitled to claim overtime. She observed, first, that the cases filed in support of the time theft argument pertained to claims for dismissal for cause, not docked pay.[35] The Adjudicator considered the Employee's conduct in context and found that, despite the Employee's conduct, she was physically at work and at the Employer's disposal during the hours shown on her timecards, timesheets, and in the Audit.[36]

[65] She also found that, if there was an internet policy, it was not communicated or enforced. The Appellants' witness did not even become aware of the Employee's internet history until he began preparing for the hearing before the Adjudicator. The issue was not raised when the Wage Assessment was being prepared. Nor was there any objection to the hours that she was recording on her timecards and timesheets, nor any suggestion to the Employee that she should change her approach. The Company approved the Employee's timecards and timesheets, which identified the overtime hours she was claiming. The Adjudicator found that the likely explanation for management's apparent disinterest was that the Company had never intended to provide overtime pay, which was consistent with the Company's practice.

[66] In finding that the Employee did not have the requisite intent, the Adjudicator considered the Employee's motivation in conducting the internet searches, the stress that she was under, the finding of fact that the Employee was still available to do her work, and the finding of fact that management did not take issue with the Employee's hours.[37]

[67] Although the Adjudicator referred to the internet log, it is not apparent that she considered the extent of the Employee's internet usage in her determination of whether the Employee had the requisite intent. Nor is it clear whether the Employee was working, that is, whether she was performing the role that she was hired for, while she was surfing the internet. It is one thing to be engaged in personal internet searches when one's job is to be available to answer the phones. It is another thing to be engaged in repeated personal internet searches when one is supposed to be attending to specific tasks that are not getting done. It is more complicated when one's job is to do both passive and active tasks. However, this is the context that would need to be considered in making a determination about the requisite intent.

---

[35] *Ibid* at 14.
[36] *Ibid* at 15.
[37] *Ibid*.

[68] Also, it is unclear how the Employee's stress is relevant to a determination of whether she had the requisite intent for time theft. The Employee had indicated that she had surfed the internet to take a breather from "working stressful hours". If the Employee had repeatedly left the premises for an hour or two to take a breather and then recorded that time, it is difficult to imagine that her preceding stress would have excused her from having deliberately recorded the time that she had not worked.

[69] In conclusion, the Adjudicator considered whether the Employee had the requisite intent for time theft and found that she did not. In considering this issue, she should have considered the extent of the Employee's internet usage, the Employee's role, and whether she continued to perform the job she was hired to perform, despite surfing the internet. She should have fully considered whether the Employee's conduct was a productivity issue or a time theft issue. The Employee's stress was not relevant to this determination.

[70] The Board will remit this matter to allow the Adjudicator to complete this analysis.

b. Did the Adjudicator commit errors in relation to extrapolation?

[71] Next, the Appellants allege that the Employee had admitted that her work habits in the final two months of her employment were reflective of her habits throughout the year, and that the Adjudicator disregarded this admission. The Adjudicator addresses this argument in the Decision at page 14, where she states:

> *…the Appellants claim their analyses [are] not limited to April 29-June 30, 2021, because Cassandra 'admitted she worked in the same fashion over the wage assessment period.' I reject this characterization of the evidence and find no evidence to support the extrapolation argument. This type of extrapolation would be unfair to the employee.*

[72] In her summary of the Company's evidence, she explained:[38]

> *Josh confirmed he was the person who created the summary of Cassandra's non-work hours (ER-4). He explained the Company could not provide details from Cassandra's computer before April 29, because they disposed of her old computer. He thinks it is unreasonable that she just started doing non-work-related things on April 29th but admitted he could not prove it. He only became aware of Cassandra's browser history when preparing for the hearing, around the week of September 6, 2022. He did not raise the issue of her browser history or of non-work-related hours prior to issuance of the Wage Assessment. He believes there is a written policy regarding personal use of workplace computers in the Employee Handbook but could not remember what it says and did not have the document with him.*

[38] *Ibid* at 11.

[73] This passage makes clear that the Adjudicator did not accept the Appellants' characterization of the evidence as disclosing an admission by the Employee to have worked in the same fashion over the wage assessment period. It is not clear that the Adjudicator disregarded the evidence; she rejected the Appellants' interpretation. However, her reasoning begs the question: what was her interpretation of the evidence if it did not match that of the Appellants? This was not a case of no evidence, but of a different characterization.

[74] It was not sufficient for the Adjudicator to completely reject the Appellants' characterization without providing an explanation as to why. To be sure, the Adjudicator was not required to "detail the way in which each item [was] assessed"[39]; however, the absence of an explanation on this central issue means the Board is not aware of the basic contours of the evidence and is unable to review the reasons for correctness, for example, to determine that the inferences made were rational.

[75] When the matter is remitted, the Adjudicator shall provide reasons for her interpretation of this evidence.

c. Did the Adjudicator commit errors in relation to the lunches?

[76] Next, the Appellants allege that the Adjudicator disregarded the Employee's admission that she took more lunches than were reflected in the Wage Assessment.

[77] According to the timecards, the Employee clocked out for lunch approximately 11 times during the assessment period, which was a period of 243 days worked.

[78] The Adjudicator addressed the Employee's evidence on this issue, as follows:[40]

> *…When asked if she took lunch every day, she said no, but then agreed she may have taken more than the 40 lunch hours indicated on her timecards but could not remember that far back.*

[79] The Adjudicator acknowledged that the Employee admitted that she may have taken more than the hours recorded on her timecards. She found that this testimony was honest and the Employee's manner was "understated". In other words, the Employee's acknowledgement that she "may have" was not an admission that she did take more lunches but rather that her memory

---

[39] *R v Schaff*, 2017 SKCA 103 (CanLII), at para 33.
[40] *Ibid* at 12.

was imperfect. She also found that there was "no clear evidence that she took a one-hour lunch break except on the days that her timecards/timesheets showed she punched out"[41] and that "she ate lunch but…was working too".[42]

[80] By contrast, the Adjudicator did not accept the Employer's evidence on point, and understandably so. The Employer's witness, who was not the Employee's supervisor, was responsible for 11 dealerships, and was not on location every day, had testified that he had seen the Employee eating every day. Obviously, the Adjudicator found his observational abilities to be limited and his commentary unreliable.

[81] Although the Adjudicator found that only the Employee and the payroll clerk had seen her hours, the Adjudicator appeared to have recognized that this system was one which the Company had set up and was dependent upon. She also observed that no one had told the Employee that she should have been punching out for lunch.[43]

[82] The Adjudicator did not disregard the Employee's evidence about possibly having taken more lunches than those which were shown on her timecards. She considered that evidence and determined that it was not sufficient to establish that she had, in fact, done so.

[83] She found, instead, that the Employee was eating lunch but was working too. She based this conclusion on her findings of fact, having heard the testimony of witnesses, and having weighed their evidence.

[84] Furthermore, when an employee is at the disposal of the employer during a lunch breach, the relevant time is included for purposes of calculating the required overtime pay. Section 2-17 of the Act specifies, in relation to the overtime calculation, when a meal break is to be included and when it is not. Paragraph 2-17(2)(a)(ii) indicates that an employer is not required to include in the calculation of overtime a meal break if the employee is at the disposal of the employer during the meal break. Therefore, if the Employee was at the Employer's disposal during the meal break then the time associated with a meal break contributed to the calculation of her pay.

[85] There is no error disclosed by the Adjudicator's reasoning on this issue, except in the reference to 40 hours. However, the issue is whether the Adjudicator disregarded the Employee's admission that she took more than the recorded lunches. This was determined based on the

---

[41] *Ibid* at 14.
[42] *Ibid*.
[43] *Ibid*.

weight of the testimony, the fact that the time was recorded, and the acquiescence of the Employer. The number of recorded hours was not determinative.

[86] Overall, there is no basis to interfere with the Adjudicator's conclusion on this issue.

d. Did the Adjudicator commit errors in relation to credibility?

[87] In general, the Board finds no error of law under this ground (subject to paragraph 96). The Adjudicator addressed the primary issues raised by the Appellants, considered the evidence as a whole, and made credibility determinations based on relevant evidence.

[88] The Board's role in this appeal is to determine whether the Adjudicator committed an error of law. As mentioned, an error of law may be found if the Adjudicator's findings of fact were based on no evidence, on irrelevant evidence or in disregard of relevant evidence or based on an irrational inference of fact.

[89] Furthermore, it is well-established that findings of credibility and reliability are findings of fact.[44] The trier of fact is the person who is in the best position to make both credibility and reliability determinations. Accordingly, the appeal body, in this case the Board, pays deference to these determinations.

[90] The Adjudicator addressed the witnesses' credibility at various points throughout the Decision. At page 13, with respect to whether the Company was paying overtime, she found the employees' and the payroll administrator's testimony to be credible, consistent, and supported by the Company's records. The Adjudicator found that the Employee's evidence was "plausible and detailed enough to be believable". In the context of whether the Employee took lunch breaks, the Adjudicator observed her manner to be "understated", indicated that she did not get the impression that she was "embellishing" her responses, and found her answer that she might have taken more lunches but could not remember to be honest.

[91] The Adjudicator directly addressed the argument that the Employee was not credible because she had failed to raise overtime as an issue while she was employed and because of the delay in her bringing the complaint with Employment Standards. The Adjudicator found neither argument to be persuasive.[45] She observed that there was no evidence to suggest that the

[44] *R v Schaff*, 2017 SKCA 103 (CanLII), at para 42.
[45] *Decision*, at 15.

Company was open to paying overtime to most of its employees.[46] In other words, the Employee could not be faulted for not asking for something she was not going to get.

[92] To be sure, the Appellants argue that it is not credible to bring a claim for almost 500 hours of overtime almost a year after the employment has come to an end. The Adjudicator noted that the Employee had made the claim within the time set out in the Act and should not be faulted for doing so.[47] In other words, the Legislature has permitted claims to be brought within a specific timeframe and, it would be contradictory to find that a claim is unreliable simply because it was filed in the latter part of that timeframe.

[93] The Appellants argue that the Adjudicator "failed to recognize any motivation that the employee had to bring an overly zealous claim along with the ones brought by her co-workers". The Appellants suggest that the "co-worker relationship is sufficient for the Board to question whether their evidence is credible and what weight should be given to their testimony". However, the Adjudicator rejected the argument that the employees' evidence could not be believed because they were friends.[48]

[94] To be sure, the Appellants may be more concerned with the confluence of events (timing, coworker relationships, quantum) than with one issue alone. However, the Adjudicator explicitly found no evidence of collusion or dishonesty.

[95] None of these were evidentiary matters that the Adjudicator overlooked. Rather, they were inferences that the Appellants asked the Adjudicator to draw despite the Adjudicator finding that there was no evidence of collusion or dishonesty. The Adjudicator did not commit an error by choosing not to draw those inferences.

[96] To be sure, the Appellants also argue that the Employee's credibility was put in even greater question when she made admissions about surfing the internet while at work and taking more lunches than initially disclosed. It is not the role of the Board to reassess a witness' credibility. The Adjudicator made no error in disagreeing with the Appellants' assessment of the "lunch evidence". However, there is a direct relationship between intent to commit time theft and an employee's credibility. To the extent that the Adjudicator has not yet completed the analysis of

---

[46] *Ibid*.
[47] *Ibid*.
[48] *Ibid*.

the Employee's intent (as outlined in the foregoing sections), nor is the credibility assessment yet complete.

Combined Hearings:

[97] Lastly, the Appellants did not pursue the grounds of appeal pertaining to evidence adduced from or at Jeremie Katz's hearing. Although the Appellants made brief mention of this issue in their brief[49], they did not elaborate on their specific concerns, and provided no additional detail at the hearing or in their written argument.

[98] Furthermore, the decision indicates that the parties had discussed how to proceed with the hearing "in a manner that would allow the appeals to take place at the same time for efficiency, but still protect confidential information wherever possible". The parties had agreed that the exclusion of witnesses would apply only after the testimony of Carajo Fox.

[99] Fox's testimony to the effect that she was directed not to pay overtime to Katz (assuming this is the evidence of concern) was consistent with the Employee's payroll records, which showed that the Company did not pay her for overtime hours once, and with the evidence that several people knew she was working overtime hours.[50]

Conclusion:

[100] In conclusion, 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.

[101] Even if the Board has the authority to remit to a different Adjudicator pursuant to section 4-8, there is no compelling reason to do so. The Board has no concerns with the Adjudicator's ability to address the outstanding issues in an objective manner. Remitting to the existing Adjudicator will promote greater efficiency in the resolution of this dispute.

---

[49] *Appellants' Brief*, at 5.
[50] *Decision*, at 12.

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

DATED at Regina, Saskatchewan, this **12th** day of **October, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson