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 JEREMIE KATZ, Respondent and GOVERNMENT OF SASKATCHEWAN, DIRECTOR OF EMPLOYMENT STANDARDS, Respondent

LRB File Nos. 103-22 & 207-22; 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, Jeremie Katz:	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 – Appeal Filed by Employer.

Wage Assessment for Unpaid Overtime – Allegation that Adjudicator Disregarded Relevant Evidence – Allegation that Employee Not Credible – Employee Worked Overtime at Lunch and Outside Scheduled Hours – Adjudicator Did Not Disregard Relevant Evidence – No Error.

Section 2-2 of *The Saskatchewan Employment Act* – Definition of "Permitted to Work" – Allegation that Adjudicator Applied Wrong Interpretation – No Error Found.

Section 17 of *The Employment Standards Regulations* – Employee Paid Hourly Wage and Commissions – Employment Standards Officer Applied Blended Rate – No Error.

Appeal Dismissed – Wage Assessment Upheld.

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] This appeal relates to an Adjudicator's decision[1] upholding a Wage Assessment[2] in the amount of $16,581.88 in favour of Jeremie Katz, a former employee of the Company [Employee]. The Wage Assessment was issued on May 11, 2022. On June 14, 2022, the Appellants filed a Notice of Appeal in relation to the Wage Assessment. Then, on July 20, 2022, the Board Registrar selected an Adjudicator for the appeal of the Wage Assessment. On October 13, 2022, a hearing was held in relation to that appeal. The Adjudicator's decision was issued on December 19, 2022.

[3] In the Notice of Appeal, the Appellants set out the following grounds:

> a. *That the learned adjudicator erred in law by not properly interpreting the Saskatchewan Employment Act and its regulations regarding the calculation of overtime pay and specifically s. 17-1 of the Regulations;*
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> b. *That the learned adjudicator erred in law by not properly assessing the credibility of the witnesses in relation to making a claim for significant overtime for an entire year without saying anything to the Employer;*
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> c. *That the adjudicator made an error of law in assessing the evidence regarding the alleged hours said to have been worked by the employee and in particular when the employee was schedule[d] to start and end work, that he never had overtime approved, that he never complained that he had not been paid overtime properly for an entire year and that he did have lunches more often than what he had explained to the assessment officer;*
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> d. *That the adjudicator made an error of law by not properly considering that the employer did pay overtime when it was worked[;]*
>
> e. *Such other grounds as counsel may advise and the Labour Relations Board may allow.*

[4] The Appellants seek, as remedy, the cancellation of the Wage Assessment.

[5] The Director participates in this appeal pursuant to clause 4-10(1)(a) of the Act and argues that the appeal should be dismissed.

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[1] Adjudicator's Decision dated December 19, 2022 [Decision].
[2] Wage Assessment No. 1-000568, dated May 11, 2022.

[6] Related to this matter is a Notice of Appeal filed by the Appellants in relation to LRB File No. 102-22.[3] There, the Adjudicator upheld a wage assessment issued in favour of a different employee of the same Company, Cassandra Fowler.

[7] The appeal hearings in relation to the two employees proceeded at the same time. The Adjudicator explained how those proceedings unfolded:[4]

> *The parties 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. We agreed the complainants (witnesses for the Director of Employment Standards) would be in the hearing room only when evidence relating to that individual was being presented. The parties agreed that Carajo Fox, who was the Payroll Administrator for the Company from March to June of 2021, would testify first, and that she would leave after giving her testimony. Since Carajo Fox's testimony would relate to both former employees, the parties agreed the exclusion of witnesses would take effect after her testimony. For Josh Jors' testimony, Cassandra Fowler would be excused from the room for the portion of testimony relating to Jeremie Katz, and vice versa.*

[8] Following the hearings, the Adjudicator issued a separate decision for each employee/wage assessment. As such, the Appellants filed a Notice of Appeal in relation to each of the Adjudicator's decisions. The Board issued its decision in relation to the Fowler matter (LRB File No. 206-22) on October 12, 2023.

Adjudicator's Decision:

[9] The following is a summary of the key points arising from the Adjudicator's Decision.

[10] First, the Adjudicator found that the following issues had to be determined in the matter before her:[5]

> *The issues to be determined in this case are whether Jeremie Katz worked overtime hours entitling him to overtime pay, and if so, did Employment Standards calculate his overtime pay properly?*

[11] Upon review of the evidence, the Adjudicator found that it was more likely than not that the Employee had worked the hours he claimed, as set out in the Audit Sheet.[6] Having found as much, the next issue was whether the Employee's overtime pay had been properly calculated.

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[3] LRB File No. 102-22, Wage Assessment No. 1-000570.
[4] *Decision,* at 2.
[5] *Ibid* at 9.
[6] *Ibid* at 12. Employee Exhibit No. 4 (EE-4).

[12] In answering the second question, the Adjudicator observed that the Employee was "neither strictly an hourly wage earner nor strictly a commission-based salesperson" but was both. She also found that his base hourly wage made up a relatively small part of his overall compensation.[7] She noted that, given the commissions, the Employee's hourly rate fluctuated each pay period. In attempting to calculate his hourly rate in accordance with subsection 17(1) of *The Employment Standards Regulations* [Regulations], the Employment Standards Officer [ESO] could not determine what portion of his wages had been earned during regular versus overtime hours.[8] As a result, the Employee's wages consisting of his hourly rate and commissions/bonuses were divided by "the total hours, regular and overtime".[9]

[13] In reviewing the Wage Assessment, the Adjudicator found that neither the Employee's base hourly salary nor the minimum wage accurately reflected his hourly wage, and relying on either would be unfair to the Employee and inconsistent with the purpose and intent of the Act.[10] The Adjudicator found that the Employee was paid a base wage of $11.50 per hour plus commissions and bonuses. His earnings far exceeded $11.50 per hour and minimum wage. Characterizing the Employee as an hourly employee would lead to an absurdly low hourly wage for the purpose of calculating his overtime pay. Given these considerations, the Employee fell "within the 'other' category contemplated by section 17(1) of the Regulations", that is, he was paid his wages on a basis other than an hourly, daily, weekly or monthly basis.[11] As such, it was proper for the ESO to apply subsection 17(1) of the Regulations in calculating the Employee's overtime pay.

[14] The effect of the Decision was that the Wage Assessment was upheld.

Arguments:

Argument of the Appellants

[15] The Appellants make three primary arguments.

[16] First, the Appellants argue that the Adjudicator made material errors of fact or failed to properly consider the evidence. They state that the Employee's evidence was self-serving and that the Adjudicator failed to consider the following in assessing his credibility: despite the large

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[7] *Decision,* at 12.
[8] *Ibid* at 13.
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid* at 14.

amount claimed, the Employee did not complain about not having been paid overtime; and, despite knowing how to make a claim, the Employee delayed bringing his complaint until a group of former co-workers with financial motive brought claims in close proximity.

[17] Furthermore, the Adjudicator disregarded evidence that the Employee took lunches but did not record those lunches on his timesheets. Josh Jors, the Operations Manager for the Company, testified that the Employee ate with him when he bought lunch for the staff. It is also not credible that the Employee did not take lunch for an entire year except during the last pay period and that he started work early and skipped lunch every day when he believed that the Company had a policy of not paying overtime.

[18] Finally, the Appellants argue that the Adjudicator disregarded evidence that the Company pays overtime.

[19] Second, the Adjudicator misinterpreted the phrase “permits to work”, defined by section 2-2 of the Act. The Company knew the Employee was not working during lunch and therefore did not pay him for any overtime in relation to that period. It is an unreasonable interpretation of the Act to require an employer to doggedly watch over employees to ensure they are properly clocking in and out.

[20] Third, and in the alternative, the Adjudicator erred in determining which hourly rate was applicable to the overtime calculation. If the Employee worked overtime hours, he did so to earn more money through commissions. Therefore, in relation to the period that would result in any overtime owing, the Employee should be considered a commissioned employee. Any amount owing would have to account for the fact that the Employee had already been compensated through commissions.

[21] The payroll administrator testified that she had calculated the Employee’s overtime pay based on his contracted hourly rate, not a blended rate. The Adjudicator should have done the same. Although he was not under two separate contracts, he performed two different roles with two different pay structures. As a salesperson he received only commissions.

[22] It is absurd to find that the Employee’s hourly rate for purposes of calculating overtime pay is almost four times higher than each of his hourly rate and the minimum wage. The sum cannot be greater than its parts. For the calculation at subsection 17(1), the Employee’s hourly rate was $11.50. Pursuant to subsection 17(4), if a salesperson receives all of his remuneration as commissions, that employee’s hourly wage is deemed to be the minimum wage. During the

assessment period, the minimum wage did not exceed $11.45 per hour. On either characterization (subsection (1) or (4)), the Employee's overtime amount would have been based on an hourly rate that was less than $12 per hour.

[23] The Wage Assessment altered the amount set out in the signed employment contract.

[24] The Adjudicator's decision failed to consider the benefit of being paid an hourly wage. It would be contrary to the intent of the Act to penalize an employer for providing a guaranteed hourly wage and, with it, some financial security. If upheld, the Adjudicator's decision could compel employers to pay employees only an hourly wage or by commission.

[25] Finally, the Appellants concede that a contract that specifically provides for a blended rate could come under subsection 17(1).

Argument of Respondent, Katz/Employee

[26] The Employee asks the Board to uphold the Adjudicator's Decision. He asserts that he gave his time, was dedicated to the Company, and that the Wage Assessment was appropriate.

[27] At the hearing, the Employee described the facts that he understood to be relevant to the determination of this appeal. The Board reminded the Employee that the Board did not have a transcript of the hearing and could not receive any evidence that was not on the record. To the extent that any aspect of the Employee's argument relied on evidence or facts not on the record, it has not been considered by the Board.

Argument of Respondent, Director of Employment Standards

[28] First, the Board's jurisdiction is limited to questions of law. The Appellants raise no error of law in relation to the Adjudicator's assessment of the evidence. The Appellants do not submit that any of the Adjudicator's factual findings were based on no evidence, irrelevant evidence, in disregard of relevant evidence, or on an irrational inference of fact.

[29] Next, subsection 17(1) of the Regulations is applicable to the facts of the present case. The Employee was paid an hourly rate of $11.50, plus commissions. Pursuant to clause 2-1(v) of the Act, wages include commissions. The Employee was paid on a basis other than hourly, daily, weekly, or monthly. Therefore, he falls within the "other than" category covered by subsection 17(1).

[30] In *Onsite Oilfield Services Inc. v Government of Saskatchewan*, 2018 CanLII 38243 (SK LRB) [*Onsite Oilfield*], the employee was provided remuneration in addition to an hourly rate. That additional remuneration was included in the calculation to determine the wages to which the employee was entitled. The Board should adopt the same approach in this case.

[31] The absurdity identified by the Appellants is that the overtime pay is too high and does not support economic growth in the province. However, there is no absurdity, as that term has been defined in the case law: the calculation is not "a ridiculous or frivolous consequence, is not extremely unreasonable or inequitable, is not illogical or incoherent and is not incompatible with other provisions or with the object of the [Act]".[12]

[32] Finally, if an employer can provide an ESO with records indicating the time of day during which commissions were earned, that information can be used to exclude wages earned during overtime hours. If no such records are presented, then it is assumed that the wages were earned uniformly throughout the hours worked. In this case, the Adjudicator adopted the ESO's assumption that the wages were earned uniformly. There was no error in that approach.

Applicable Statutory Provisions:

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

> ***2-1*** *In this Part and in Part IV:*
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> . . .
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> *(j) "hourly wage" means an amount an employee earns or is deemed to earn in an hour as determined in the prescribed manner;*
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> . . .
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> *(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;*
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> . . .
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> *(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;*
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> . . .

[12] *Director's Brief*, at 8.

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.

2-15 *Subject to this Part, an employer shall pay an employee his or her total wages payable in accordance with the terms and conditions of:*

(a) the employee's employment contract; or

(b) if the employer is bound by a collective agreement, the collective agreement.

2-16(*1) An employer shall pay an employee:*

(a) at least the prescribed minimum wage 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; and

(b) at least the prescribed minimum sum when the employee reports for duty.

(2) Subject to subsection (3), if an employer pays an employee on any basis other than by the hour, the employer is deemed to have satisfied clause (1)(a) if the employer has, for the period covered by the payday, paid the employee an amount at least equal to the amount TP calculated in accordance with the following formula:

$$TP = MW \times HW$$

where:

MW is the prescribed minimum wage; and

HW is the number of hours or parts of an hour in which the employee is required or permitted to work or to be at the employer's disposal during the period covered by the payday.

(3) An employer shall not include in the calculation made pursuant to subsection (2) any payment the employer made to the employee for the purposes of:

(a) annual vacation pay;

(b) any pay required pursuant to clause (1)(b) for an amount exceeding the time worked;

(c) the premium component of overtime and public holiday pay; or

(d) public holiday pay.

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.

4-8*(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.*

(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III or Part V may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all parties to the appeal.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;

(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;

(b.1) in the case of an appeal pursuant to Part V, any written decision of a radiation health officer or the director of occupational health and safety, respecting the matter that is the subject of the appeal;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III or Part V, as the case may be;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise. (6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.

4-10*(1) The director of employment standards and the director of occupational health and safety have the right:*

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and

(b) to appeal any decision of an adjudicator on a question of law or a question of mixed law and fact; and

(c) to appeal any decision of the board on a question of law.

(2) If the director of employment standards or director of occupational health and safety intends to appeal to the board pursuant to this section, that director shall:

(a) file a notice of appeal with the board within 30 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all parties to the appeal.

[34] The following provisions of the Regulations are applicable:

> ***16****(1) For the purpose of calculating the wages of an employee on an hourly basis in order that the employee may receive the wages to which the employee is entitled pursuant to Part II of the Act and the regulations, the rules set out in this section and section 17 apply.*
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> *(2) If the employee is paid wages on a daily basis:*
>
> > *(a) the hourly wage of the employee is the regular wages of the employee for one day divided by the number of hours of the day during which the employee is required or permitted to work or to be at the disposal of his or her employer; and*
> >
> > *(b) for the purposes of clause (a), the number of hours of the day must not exceed the number of non-overtime hours in a day.*
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> *. . .*
>
> ***17****(1) Subject to subsections (2) to (4), if an employee is paid his or her wages on a basis other than an hourly, daily, weekly or monthly basis, the hourly wage of the employee is the amount obtained by dividing the wages of the employee earned during the pay period, exclusive of overtime, vacation pay and public holiday pay, by the actual number of hours worked during the pay period, exclusive of overtime.*
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> *(2) In making a calculation for the purposes of subsection (1), an hourly wage is to be determined as being not greater than five times the minimum wage and not less than the minimum wage.*
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> *(3) If an employee is paid wages on the basis of distance travelled, the employee's hourly wage is deemed to be the product of 64 and the rate per kilometre.*
>
> *(4) If an employee is employed as a salesperson who receives all of his or her remuneration as commissions, the employee's hourly wage is deemed to be the minimum wage.*

Analysis:

[35] 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.[13]

[36] 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.[14]

[37] 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.

[38] There are three primary issues before the Board:

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[13] *Saskatchewan v Martell*, 2021 CanLII 122408 (SK LRB), *Christine Ireland v Nu Line Auto Sales & Service Inc*., 2021 CanLII 97414 (SK LRB).
[14] *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.

a. Did the Adjudicator commit an error in law in assessing the evidence?

b. Did the Adjudicator commit an error in law by maintaining the assessed overtime amount despite the evidence about his working hours?

c. Did the Adjudicator commit an error of law in determining which rate applied to the overtime calculation?

[39] The Board will address each of these issues, in turn.

a. Did the Adjudicator commit an error in law in assessing the evidence?

[40] The Appellants argue that the Adjudicator disregarded the following evidence:

a. The Employee met with management to discuss remuneration, and yet, he presented no evidence that he had ever complained about not being paid overtime, whether at that meeting or otherwise;

b. He delayed in bringing his application and when he did bring it, the claim was for an inordinate number of hours and was filed close in time to those of the other employees;

c. The employees who brought claims were all connected;

d. The Employee had admitted to eating lunch when it was brought in, and yet he claimed that he had never taken a lunch break;

e. The Employee started work according to his own preferences, knowing that the Company had a policy against paying overtime unless specifically approved;

f. The Company did pay overtime once and then never after that. This is evidence that the Company paid overtime.

[41] The first issue is that the Adjudicator disregarded the fact that the Employee did not complain about not being paid for overtime. The Board finds no error of law in relation to this issue. The Adjudicator considered the relevant evidence and found the Employee's explanation compelling.

[42] At the hearing before the Adjudicator, the Appellants presented one witness, Josh Jors, the Operations Manager for the Company. In the course of her reasons, the Adjudicator summarized Jors' testimony and that of the Employee. According to that summary, Jors had testified about a meeting in which the Employee had asked for greater remuneration but did not raise overtime as an issue.[15] The Employee had also explained why he did not ask to be paid for the overtime he was working:[16]

> *Jeremie explained that he worked overtime hours on a regular basis due to staffing shortages. It was hard for him to get everything done that needed to be done and it was stressful. He should have been home more where he was also needed. He spoke with Donnie about the extra hours and talked to Carajo too. Donnie said Auto Gallery did not pay overtime but maybe they could adjust the commission structure. Jeremie met with Donnie and Josh about a raise in commission, but nothing came of it. He admits that he asked for a raise rather than asking for overtime because he knew they would not pay him overtime and he did not want to lose his job. He was only paid overtime once, and it was by mistake. For a moment he thought Carajo's influence might have led to a change in how the Company dealt with overtime but admits to feeling "robbed" when it did not continue. Jeremie was worried they would make him pay it back.*

[43] The Employee had testified that he knew he would not get paid overtime and he did not want to lose his job.

[44] More specifically, the Adjudicator directly and expressly considered whether the Employee's credibility was impacted by not complaining. She found that it was not. She found that there was no evidence that the Company was open to paying overtime; to the contrary, there was evidence that the Company had a general policy of not paying overtime.[17] In other words, the Employee provided a plausible explanation for his choice not to complain.

[45] The next issue is whether the Adjudicator disregarded relevant evidence in relation to delay. The Board finds that she did not.

[46] The Adjudicator considered whether the Employee's credibility was impacted by his delay in filing the complaint. She considered the limitation period for claims with respect to unpaid wages.[18] She found that the Employee made his claim within the limitation period and should not be faulted for exercising his rights under the Act. In other words, it would run counter to the intent

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[15] *Decision,* at 9.
[16] *Ibid* at 10.
[17] *Ibid* at 12.
[18] S. 2-89 of the Act.

of the Act to impugn the Employee's credibility for a delay that falls within the statutory limitation period.

[47] Furthermore, the Employee's last day of work was in August 2021. The assessment covered the time period from August 2020 to August 2021.[19] Subsection 2-89(2) limits the recovery of wages to the 12 months preceding the day on which the claim was made. This suggests that the Employee filed the complaint shortly after his last day of work. As such, if the Employee delayed, he delayed in raising the issue while working for the Company, for which he provided a plausible explanation.

[48] Next, with respect to the connection between or among the employees, the Adjudicator had this to say:[20]

> *Another of the Appellants' claims is the employees' evidence might not be credible because they were friends. Presumably, the suggestion is they may have conspired or colluded to exaggerate and/or fabricate evidence against their former employer, and that they had a financial motive to do so. Obviously, the witnesses knew each other since they worked together. They admitted they were acquaintances and friendly, but not friends. I did not discount the weight I gave their evidence because they once worked together and were friendly. If there were evidence of collusion, or anything dishonest it was not before me.*

[49] The Adjudicator considered the relationship among the employees but found that there was no evidence of collusion or dishonesty. The Appellants suggest that the Adjudicator did not go far enough, that is, she did not consider the employees' financial motives to bring claims, did not consider the timing of the claims, and did not consider their quantum.

[50] However, the Adjudicator found that there was no evidence of collusion or "anything dishonest". Clearly, the Adjudicator was not willing to draw an inference on the basis of motive in the absence of evidence to support same. The Adjudicator committed no error in proceeding in that fashion.

[51] The Appellants also suggest that it is not reasonable to find that an employee would work as much overtime as was claimed by this Employee while knowing that the Company had a policy against overtime. Again, the Appellants are seeking that an inference be drawn about the Employee's credibility, an inference that was contrary to the evidence. The Adjudicator did not draw said inference or explicitly reject the invitation to do so. Instead, the Adjudicator assessed

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[19] See, *Decision* at 6. EE-2, EE-4, EE-9.
[20] *Decision,* at 12.

the evidence before her and found that the Employee did work the overtime claimed. The Adjudicator committed no error.

[52] Furthermore, it is not necessary, or in many cases even realistic, for a decision-maker to address every argument raised by a litigant. While the duty of fairness may include a duty to provide reasons, the content of that duty will depend on the exigencies of the case. The question is whether the reasons respond to the live issues, taking into account the evidence as a whole and the submissions of the parties.[21] The requirement is basic fairness, not perfection. The fact that the Adjudicator did not explicitly deal with this argument is not an error of law.

[53] The next issue is whether the Adjudicator failed to consider the evidence pertaining to the Employee's hours of work, specifically: that the Employee had admitted to eating lunch when it was brought in and yet he had claimed that he had never taken a lunch break. Related to this is the allegation that the Employee worked hours according to his own preferences, contrary to Employer policy.

[54] The Adjudicator did not disregard relevant evidence pertaining to the Employee's hours of work. The Adjudicator assessed the witnesses' testimony and preferred that of the Employee.

[55] On the topic of lunch breaks, the Adjudicator summarized Jors' evidence:[22]

> *With respect to lunch breaks, Josh's office was twenty feet away from Jeremie's desk and he saw him eating lunch "almost every day." He admitted that he did not watch him for the entire hour, but that he saw him several times per day and estimated he saw Jeremie eat lunch 4 out of 5 days per week. Josh also testified that he bought breakfast or lunches for the staff 2 or 3 times per month and that [Jeremie] would have participated in the group lunches.*

[56] The Adjudicator then made a number of observations that undercut the reliability of Jors' testimony on this issue, which were: Jors had significant responsibility that took him away from the Employee's place of work, he was not supervising the Employee, and he had never accessed the Employee's timecards.

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[21] *R. v Dinardo*, 2008 SCC 24 (CanLII), [2008] 1 SCR 788 [*Dinardo*], at para 25. See also, *J.M.H.* relying on *R. v Walker*, 2008 SCC 34 (CanLII), [2008] 2 SCR 245, at para 20.
[22] *Decision,* at 9.

[57] In contrast with Jors' testimony, the Adjudicator also heard from the Employee that he had wanted to earn as much money as he could, and therefore, instead of taking time off for lunch, he would "just grab a quick bite and work through lunch":[23]

> *…Jeremie says he did the best he could to get his work done and often wore multiple hats. It was a busy service department and he wanted to earn as much money as he could. He earned most of his salary through commissions so rather than taking time off for lunch, he would just grab a quick bite and work through lunch. He always ate lunch but did not stop working to eat. Nobody told him to work less. The only lunch breaks he took were during his last month of employment. By then, Donnie had been directed by Jason from HR that they had to take their breaks and Jeremie no longer felt his employer valued him.*

[58] The Adjudicator later made the following comments:

> *….Josh said he saw Jeremie eating lunch many times and estimates he took a lunch break 4 out of 5 days a week. I find this evidence to be exaggerated at best. Josh admitted to being in charge of 11 other dealerships that required him to be away from Auto Gallery often. In any event, if at any point during Jeremie's employment, Josh was concerned about Jeremie not punching out for lunch breaks, he could have had a conversation with him and directed him to punch out for lunch. He did not talk to Jeremie about it; nobody from management did. It is the employer's responsibility to supervise and direct its workforce.*[24]

[59] The reasons make clear that the Adjudicator had concerns about the reliability of Jors' testimony, which resulted in her preferring the Employee's testimony. Moreover, Jors had been characterizing the Employee's time as a "lunch break" but had not directed him to record it as such while employed.

[60] As for the issue about the Employee's hours generally, the Adjudicator preferred the Employee's evidence. The Adjudicator considered the fact that Jors was not the Employee's direct supervisor, that the Employee's direct supervisor was not called to testify (although no longer employed), and found there was no supporting evidence for Jors' theory that someone other than the Employee was clocking him in.

[61] The Adjudicator found that the payroll records supported the Employee's testimony, the Company had "ample opportunity" to raise any concerns with the way he was recording his hours but did not, and the Company was attempting to distance itself from its own records.

[62] The Employee had testified that he had spoken to his supervisor, Donnie Thompson, about his hours. Thompson was aware of the hours he was working and did not ask him to work

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[23] *Ibid* at 10.
[24] *Ibid* at 11.

fewer hours. Instead, Thompson had told him that although the Company did not pay overtime, they might be able to adjust the commission structure.[25]

[63] In summary, the Board treats credibility findings with deference.[26] It is not the role of the Board to reassess the credibility of witnesses, but instead to determine whether the Adjudicator erred in law. The Adjudicator is not required to refer to every item of evidence she considered in arriving at that determination. The question is whether the reasons respond to the live issues, taking into account the evidence as a whole and the submissions of the parties.

[64] In this case, the Adjudicator found that there was no evidence of collusion or dishonesty, she considered the Appellants' primary arguments and inferences, and she reviewed and assessed the evidence as a whole. She found issues with the credibility of the Appellants' only witness, observed that the Appellants did not call the Employee's supervisor as a witness[27] (a person who could have testified about the legitimacy of the Employee's hours), and observed that the payroll records and timesheets showed that the Employee was "consistently recording overtime hours"[28]. She made a decision based on her findings of fact, which included the finding that the Employee was concerned about his hours of work and sought additional remuneration.

[65] Next, the Appellants argue that a one-time payment to the Employee (and nothing after) demonstrates that the Company did pay overtime. A similar position was presented at the hearing. It is clear that the Adjudicator considered the evidence of the one-time payment of overtime, placed it in context, assessed the credibility of the witnesses, and drew a conclusion with respect to that evidence. It cannot be said that the Adjudicator committed an error of law in relation to this evidence.

[66] The Adjudicator found that the most likely explanation for the one-time overtime payment was that management did not flag the payment when it was made but "when they saw a larger amount of overtime was going to be paid out for a second pay period, they caught it and talked to [Carajo Fox, the payroll administrator]."[29]

[67] The Adjudicator had heard testimony from Fox indicating that she had never seen a written policy about overtime,[30] that the Company did not pay overtime to most employees, other than in

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[25] *Decision*, at 10.
[26] See, *Dinardo*, at para 26.
[27] *Decision*, at 11.
[28] *Ibid*.
[29] *Ibid*.
[30] *Ibid*.

relation to a few specific exceptions, and that, after running her second payroll, Fox was told to stop and that she complied with the Company's direction.[31]

[68] The Adjudicator concluded that the Company's general practice was not to pay overtime to employees. She drew this conclusion based on the Company's own payroll records and on the testimony of the Employee and Fox, finding their testimony to be "credible, consistent, and supported by the Company's records".[32] There is no error in this reasoning.

b. Did the Adjudicator commit an error in law by maintaining the assessed overtime amount despite the evidence about the Employee's working hours?

[69] Here, the Appellants argue that, because the Employee was working hours based on his own preferences, the Adjudicator erred in finding that he was "permitted to work", as that phrase is defined in the Act.

[70] The Adjudicator committed no error of law in relation to this issue.

[71] Relevant to this argument are sections 2-2 and 2-17 of the Act. Section 2-17 indicates that an employer shall pay overtime for each hour or part of an hour "in which the employee is required or permitted to work or be at the employer's disposal" that exceeds the regular hours as otherwise set out in the Act.

[72] Section 2-2 defines "permitted to work":

> ***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.*

[73] Taken together, these provisions mean that if an employer ought reasonably to have known that the employee was working and did not cause the employee to stop working, the employer shall pay overtime for each hour or part of an hour over regular hours that the employee worked.

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[31] *Ibid* at 10.
[32] *Ibid* at 11.

[74] Referring to section 2-2, the Adjudicator found that the Company "ought reasonably to have known that Jeremie was working overtime hours and they did not cause him to stop working those hours".[33] The Adjudicator explicitly made this determination after listing the following findings of fact: the busy environment of the workplace; the payroll records or timesheets on which his overtime hours were listed; and the absence of any written policy requiring an employee to obtain authorization to work overtime hours. There was also evidence that the payroll administrator had assessed and paid the Employee for overtime on one occasion and was told to stop because the Company did not pay overtime to its employees.

[75] The Adjudicator had also found that, despite having knowledge of the hours that the Employee was working, his supervisor did not direct him to reduce those hours.[34] With respect to the lunch breaks, the Adjudicator stated that nobody from management spoke to the Employee and directed him to start punching out for lunch breaks.[35] In other words, the Employee was not told to stop working these hours. It was the Employer's responsibility to manage the workplace including by ensuring that the employees were taking their breaks.

[76] The analysis of whether an employer ought reasonably to have known that an employee is working is fact specific. In this case, the Adjudicator properly considered the relevant evidence, made applicable findings of fact, and determined that the Company ought reasonably to have known that the Employee was working. The Adjudicator identified the correct test and applied it correctly. There is no error of law based on this ground.

[77] Furthermore, the fact that the Employee admitted to "eating lunch" does not have the impact that the Appellants suggest it does.[36] To illustrate, section 2-14 requires an employer who does not grant a meal break to an employee to permit the employee "to eat while working". Clearly, "eating while working" does not constitute a lunch break. The Adjudicator's reasoning is consistent with this understanding.

c. Did the Adjudicator commit an error of law in determining which rate applied to the overtime calculation?

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[33] *Ibid* at 12.
[34] *Ibid* at 10.
[35] *Ibid* at 11.
[36] As demonstrated by the Appellants' argument and by Jors' testimony that "he saw Jeremie eating lunch many times and estimates he took a lunch break 4 out of 5 days a week".

[78] In defending the application of subsection 17(1) to this case, the Director relies on *Onsite Oil*. The decision in *Onsite Oil* is consistent with an interpretation that "other monetary compensation" is included in the calculation to determine wages to which an employee is entitled. It is limited, however, in that it does not deal with commissions and neither the Adjudicator nor the Board considered the significance of sections 16 or 17 of the Regulations.

[79] The Board's assessment of this issue necessarily begins with a review of the relevant statutory provisions.

[80] As is required, the Board will consider the statutory provisions in accordance with the modern principle of statutory interpretation, which has been adopted by the Legislature in section 2-10 of *The Legislation Act*:

> ***2-10****(1) The words of an Act and regulations authorized pursuant to an 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.*
>
> *(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.*

[81] The Court of Appeal in *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77 (CanLII) [*Arslan*] provided helpful guidance on how to apply the modern principle:

> *[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.*
>
> *…*
>
> *[62] As noted, even where the court's initial impression of a legislative provision is readily arrived at, the court is required to consider the broader context to read the provision "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." In Atco Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board), 2006 SCC 4 at para 48, [2006] 1 SCR 140, Bastarache J., for the majority, wrote:*
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> > *This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.*
>
> …

[82] In line with *Arslan*, the Board will first consider its initial impression of the legislation from its text.[37]

[83] Section 17 of the Regulations is the main provision in question. Section 17 establishes a calculation of an employee's hourly wage on a basis other than hourly, daily, weekly, or monthly for the purpose of determining the wages to which the employee is entitled.

[84] Section 17 is to be interpreted in accordance with section 2-1 of the Act, which defines the terms, "hourly wage", "overtime", and "wages". The definition of "hourly wage" allows for a deemed amount to constitute an hourly wage; "overtime" specifies the rate of overtime pay in reference to an employee's hourly wage; and "wages" means "salary, commission and any other monetary compensation for work or services or for being at the disposal of an employer".

[85] Section 17 is also to be interpreted in accordance with section 16 of the Regulations, which sets out the calculation of the wages of an employee on an hourly basis for the purpose of Part II entitlements in cases in which an employee is paid on a daily, weekly, or monthly basis. It specifies that the rules set out in sections 16 and 17 apply for the purpose of calculating those wages.

[86] Subsection 17(1) provides the calculation that applies to an employee who is paid wages on a basis other than an hourly, daily, weekly or monthly basis. The basic calculation requires dividing the wages earned during the pay period (excluding overtime, vacation, and public holiday pay) by the actual number of hours worked (exclusive of overtime).

[87] Section 17 is subject to subsections (3) and (4). Subsections (3) and (4) provide for two alternative methods of determining an employee's hourly wage. Subsection (3) applies to an employee whose wages are paid on the basis of distance travelled – not a category that is relevant in the current case. Subsection (4) applies to an employee who is employed "as a salesperson who receives all of his or her remuneration as commissions". It is this latter provision which is relevant to the present case.

[88] Subsection 17(4) sets out a deemed hourly wage, being the minimum wage, for salespersons who receive all of their remuneration as commissions. The initial impression of subsection 17(4) is that the deemed wage does not apply to salespersons who receive only part of their remuneration as commissions.

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[37] *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77 (CanLII), at para 59.

[89] As a whole, the initial impression of section 17 is that if an employee receives remuneration on a basis other than an hourly, daily, weekly or monthly basis, the calculation of the hourly wage of that employee is to be calculated in accordance with subsection 17(1), unless the employee is paid based on distance travelled or is a salesperson paid only in commissions. This interpretation is in alignment with the Adjudicator's decision in this case.

[90] However, even if the "initial impression of a legislative provision is readily arrived at"[38] the Board must consider the provision in its entire context, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.

[91] Furthermore, the Appellants argue that, in this case, the application of subsection 17(1) has resulted in an absurdity. They rely for this argument on the amount of the calculated hourly wage, observing that it is approximately four times higher than both the Employee's contracted hourly wage and the minimum wage.

[92] It is well established that the Legislature does not intend its legislation to have absurd consequences. The late Professor Sullivan explained that the "presumption against absurdity includes the following propositions":[39]

> 1) *It is presumed that the legislature does not intend its legislation to have absurd consequences.*
>
> 2) *Absurd consequences are not limited to logical contradictions or internal incoherence but include violations of established legal norms such as rule of law; they also include violations of widely accepted standards of justice and reasonableness.*
>
> 3) *Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.*
>
> 4) *The greater the absurdity, the greater the departure from ordinary meaning that is tolerated.*

[93] The presumption against absurdity can be used to resolve ambiguity, vagueness, overlapping provisions, or other problems. For the following reasons, however, the Board has found that the application of subsection 17(1) in this case has not resulted in an absurdity. The manner in which it has been applied is consistent with the intention of the Legislature.

[94] The object of Part II of the Act is the establishment, compliance with, and enforcement of minimum employment standards that apply to most, but not all, workers in the province.

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[38] *Ibid* at para 62.
[39] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) [*Sullivan*] at 10.5.

Subsection 2-10(2) of *The Legislation Act* requires every enactment to be interpreted in a remedial fashion and to be given a "fair, large and liberal interpretation" that best attains the objects of the statute. Part II is benefits-conferring legislation and, as such, "ought to be interpreted in a broad and generous manner".[40]

[95] The Appellants make the point, however, that the Act has another purpose in that it is intended to ensure a fair and balanced labour and employment environment. In support of this argument, the Appellants rely on an excerpt from the Speech from the Throne given in the Saskatchewan Legislative Assembly, on October 25, 2012, keying up the government's eventual introduction of the Act. The relevant paragraph, with slightly more context, reads:[41]

> *My government remains on track with its four-year plan to reduce the size of the public serve by 15 per cent. That objective will be met in the upcoming fiscal year, fulfilling the government's commitment to become smaller and more efficient. This fall, my government will introduce a new Saskatchewan Employment Act that will support economic growth by clearly outlining the rights and responsibilities of employers, employees and unions in the workplace. With this legislation, Saskatchewan will have the most modern, competitive, fair and balanced labour and employment environment in Canada. My government will continue efforts to increase the head office presence of major companies operating in Saskatchewan, such as Mosaic, which established its potash headquarters in Regina in 2010, creating 120 new jobs in the city.*

[96] The Appellants also rely on an excerpt from a publication apparently entitled, "Understanding Saskatchewan's Employment Standards – A Guide to Your Rights and Responsibilities", which it submits was issued by Government when the Act was passed:

> *The Employment Standards Branch serves employers and employees in Saskatchewan in support of fair and equitable workplace practices. Employment Standards sets, promotes and enforces employment standards and ensures that employees and employers are aware of their rights and responsibilities. Employment Standards does not represent the employer or the employee in any situation - their role is to ensure compliance with the legislation.*

[97] The Court in *Arslan* confirms that extrinsic aids, such as debates and proceedings before the Legislature, are admissible for the purpose of interpreting legislation because they "are often part of the legal context or they provide evidence of external context"; may serve as "a source of authoritative opinion about the meaning or purpose of legislation"; or provide "an understanding of the *understanding* on which the Legislature enacted the provision or statute in question".[42]

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[40] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 [*Rizzo Shoes*], at para 21.
[41] Saskatchewan, Legislative Assembly, *Debates and Proceedings* (*Hansard*), 27th Leg, 2nd Sess (25 Oct 2012) at 4 (online) (Hon. Solomon Schofield).
[42] *Arslan*, at paras 63-4.

[98] While, in the Board's view, it is preferable for parties to provide a more complete record of the debates and proceedings that are on point (as opposed to one or two references from the record) there is really no question that the Legislature introduced the Act with the aim of creating what was understood to be a more "modern, competitive, fair and balanced labour and employment environment" in the province.[43]

[99] An issue with the Appellants' argument in the current case, however, is that section 17 of the Regulations has existed in substantially the same form since 1995.[44]

[100] However, assuming the Board can accept that the Legislature achieved its object of a fair and balanced employment environment by maintaining the status quo, the Board must ask whether the result about which the Appellants complain is contrary to this purpose and therefore absurd.

[101] To be sure, the relevant provisions certainly demonstrate a Legislative intent to place specific limitations on overtime pay. For instance, subsection 17(4) provides for a cap on the hourly wage for employees who are employed as salespersons and are receiving all of their remuneration as commissions. Furthermore, subsection (3) sets a limit on the hourly wage for an employee who is paid wages on the basis of distance travelled.

[102] Subsections 17(3) and (4) provide exceptions to subsection 17(1). However, both sets of employees are clearly defined. The specificity of the exceptions to subsection 17(1) is noteworthy and should not be overlooked. It suggests that the Legislature intended that the exceptions be narrowly construed, or at least, not unjustifiably inflated. If anything, these provisions suggest that the Legislature considered the appropriate balance, and clearly outlined the limitations on relevant employment standards.

[103] Similarly, "wages" mean "salary, commission and any other monetary compensation" and "includes overtime, public holiday pay, vacation pay and pay instead of notice". Given the definition of "wages", subsection 17(1) explicitly excludes "overtime, vacation pay and public holiday pay" from the calculation of the hourly wage. The provision does not exclude "commission". Again, the specificity of the exclusions and inclusions (re: commission) cannot be disregarded.

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[43] See, for example, *Saskatchewan v Saskatchewan Federation of Labour*, 2012 SKQB 62 (CanLII) [*SFL*]. Albeit focused on labour law, *SFL* touches on similar themes.
[44] See, s. 10, *Labour Standards Regulations, 1995*, L-1 Reg 5 (Repealed).

[104] Furthermore, subsection 17(2) contemplates that the calculation set out in subsection (1) may result in a calculated hourly wage that is significantly higher than the minimum wage, and in these cases, the guaranteed hourly wage for purposes of the overtime calculation is capped. As such, in theory, even applying the 1.5 multiplier, the guaranteed overtime pay for an employee earning a significant salary could be less than the employee's calculated hourly wage.

[105] Subsection 17(2) suggests that the Legislature placed limits on overtime pay when employees are earning relatively larger sums of money. Subsection (2) does not apply to the current case – here, the hourly wage determined further to the calculation is not high enough to be subject to capping. Where it does apply, the statutory guarantees granted to employees give way to considerations of fairness for employers. This illustrates that the Legislature undertook, many years ago, to achieve a balance between employee and employer interests in relation to specific scenarios of apparent concern.

[106] However, despite engaging in this exercise to cap large sums of overtime, the Legislature did not enact a provision that specifically contemplates and prevents the consequence that the Appellants are protesting (wage rates that are greater than the hourly wage and minimum wage for "other" categories of salepersons or sales-adjacent jobs).

[107] Instead, the Legislature has chosen to create a distinction for only those salespersons who receive all of their remuneration as commissions. Consistent with this, section 14 of the Regulations exempts from certain employment standards salespersons who receive all of their remuneration as commissions and whose sales are usually made at a place other than the employer's establishment.[45] Again, it is only those salespersons who receive all of their remuneration as commissions whose benefits are abridged.

[108] Clearly, the Legislature made a choice to treat this category of salesperson distinctly, whether due to their relative autonomy compared to other employees, or another characteristic.

[109] The phrase "all of his or her remuneration" as set out in subsection 17(4) recognizes that circumstances will arise in which an employee who is employed as a salesperson may receive

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[45] The full text of the definition is:

> …(c) employees who:
>
> (i) are employed as salespersons;
> (ii) travel regularly in the course of their duties to two or more cities, towns or villages that are at least 20 kilometres apart; and
> (iii) receive all of their remuneration as commissions with respect to sales of goods or services or offers to purchase that usually are made at a place other than the employer's establishment;

remuneration other than and/or in addition to commissions. This recognition suggests that there is an existing, other method in the legislation for determining the hourly wage for an employee who comes within those "other" circumstances. There is no existing method that would fit said circumstance, other than that which is described in subsection 17(1).

[110] The wage rate that results from applying subsection 17(1) in the present case is not an anomaly. It is not a unique or unforeseen circumstance, but one that arises in every case in which an employee's contracted hourly wage is equivalent to minimum wage and the same employee earns *any additional* commissions during regular time in a pay period. In every one of these cases, the application of subsection 17(1) will result in a base hourly wage for purposes of the overtime calculation that is greater than each of the contracted hourly wage and the minimum wage.

[111] To illustrate this, assuming for the sake of the exercise that minimum wage is $11.50 per hour, an employee earns $11.50 per hour plus commissions, worked two hours of regular time in a pay period, and earned four dollars total in commissions, the numbers are as follows:

Hourly Wage: [(11.50 x 2.00) + 4] / 2 = 13.50

[112] In this scenario, the employee's contracted hourly wage is $11.50, minimum wage is $11.50, and the employee's hourly wage for purposes of the overtime calculation is $13.50. This is despite the assumption that the employee has earned only $2.00 per hour in commissions. Described in the terms used by the Appellants in this case, this amounts to an 8.5 per cent increase in the employee's contracted hourly wage and in the minimum wage for purposes of the overtime calculation. This is not an anomaly but a predictable result of the statutory formula.

[113] Finally, the Appellant's argument raises an issue as to when one would be justified to not apply subsection 17(1) based only on an excessive hourly wage calculation. There is no satisfactory answer. In short, it would create an irrational distinction to not apply the provision due solely to what is perceived as an excessive hourly wage calculation.

[114] Lastly, it would have been a straightforward exercise for the drafters of the Regulations to have included the phrase "or any part" after "all" within subsection (4), as in the Ontario employment standards regulations that provide for an exemption for certain salespersons.[46] If that amendment had been made, subsection 17(1) would not have applied to this case.

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[46] See, s. 2(1)(h), *Exemptions, Special Rules and Establishment of Minimum Wage*, O Reg 285/01.

[115] In summary, the consequence of which the Appellants complain does not frustrate the legislative purpose, thwart the legislative scheme, result in contradictions or anomalies, or create irrational distinctions. Rather, it is consistent with deliberate choices made by the Legislature to strike a balance between the rights of employees and fairness to employers. It is not absurd. There is no basis to depart from the ordinary meaning of subsection 17(1). It was appropriate to apply the provision to the circumstances in the present case.

[116] Furthermore, the Board is not persuaded that affirming the application of subsection 17(1) will fuel economic insecurity for employees. The Appellants' argument on this point is speculative; to the extent that the Board can consider this type of argument, there are likely to be speculative counterpoints (for example, competition for the labour market). This speculative exercise does not defeat the ordinary meaning of the legislation.

[117] Next, the Appellants argue that the Employee had more than one role, only one of which was as a salesperson, and that as a salesperson only, the Employee was paid in commission. To be sure, the Appellants do not suggest that the Employee was subject to two separate contracts, but rather, that he had separate roles. The Appellants concede, however, that an employee whose contract specifically provides for a blended rate could come under subsection 17(1). They say that the contract in this case did not.

[118] The Adjudicator addressed whether it was appropriate to calculate the Employee's wage based on his hourly rate or the minimum wage (subsection 17(4)), as follows:[47]

> *I find neither of the approaches suggested by the Appellants for calculating Jeremie's hourly wage to be acceptable in this case. Using either his base hourly salary or the minimum wage does not accurately reflect Jeremie's hourly wage. Calculating his hourly wage by either of these methods would be unfair to the employee and is therefore not in keeping with the purpose and intent of the Act. The Appellants filed no caselaw in support of their position.*
>
> *The uncontroverted evidence regarding Jeremie's remuneration is that he was paid a base wage of $11.50 per hour plus commissions and bonuses, as set out in the Remuneration Schedule (EE-3). For the first 3 months of his employment, he was guaranteed a minimum of $4,400.00 per month (EE-3), meaning he was earning far more than $11.50 per hour, or minimum wage, from the very beginning. According to the payroll records (EE-2), during his last year of employment Jeremie's earnings far exceeded $4,400.00 per month, and in several months even exceeded $8,000.00. Based on his remuneration arrangement with the Company, it would be unfair to Jeremie to characterize him as an hourly employee earning $11.50 per hour. This does not accurately reflect the situation and would lead to an absurdly low hourly wage for purposes of calculating his overtime pay. I find Jeremie falls within the "other" exception contemplated by section 17(1) of the Regulations.*

[47] *Decision,* at 13.

> *The Director's approach, in using a blended rate to calculate an hourly wage reflective of Jeremie's true hourly wage, is supported by the Act, its Regulations, and applicable caselaw. The complicating factor in this case is there was no plausible way to separate commissions earned during regular hours from overtime hours. The employer's records do not reveal at what point of the day (during regular or overtime hours) Jeremie earned his commissions. Consequently, for purposes of calculating his hourly wage, the Director assumed commissions were earned uniformly over the total hours worked in each pay period and divided his wages (base wage plus commissions and bonuses) by the total hours. I find the Director's approach to be reasonable under the circumstances, and in keeping with the purpose and intent of the Act.*

[119] Although the Adjudicator did not explicitly address whether the Employee was performing separate roles, her reasoning makes clear that his wage structure included multiple inputs. She described his remuneration as follows: "he was paid a base wage of $11.50 per hour plus commissions and bonuses". He was also guaranteed a minimum amount for the first three months. The Remuneration Schedule (EE-3), which forms a part of the record and is what the Appellants describe as the contract, states:

> *Hourly Salary $11.50/Hourly*
> *$1 per Individual Retail Hour Sold*
> *PLUS Individual Customer Pay Effective Labour (NOT STACKABLE)*
> *…*
> *PLUS Individual Average Customer Hours per RO (NOT STACKABLE)*
> *…*
> *PLUS 7% of Individual Customer Pay Labour Gross*
> *PLUS Total Department Labour Gross Sales*
> *…*
> *PLUS CSI BONUS – QUALIFYING CONDITIONS INDIVIDUAL CSI 95% OR GREATER*
> *....*
> *$4,400.00 Guarantee per month for first 3 months*

[120] The Appellants rely on the Remuneration Schedule for their argument that the Employee was performing separate roles but do not point to any aspect of that Schedule that the Adjudicator disregarded. Nor are there any aspects of the Schedule that the Adjudicator could be found to have disregarded. The Adjudicator's reasoning is consistent with this evidence, and it is persuasive.

[121] The Appellants also rely on the payroll charts, which show that on the one occasion when the payroll administrator calculated overtime to be paid to the Employee, she based it on the Employee's hourly rate of $11.50. However, in finding that the Employee was neither an hourly wage earner nor a strictly commission-based salesperson, the Adjudicator took into account the

facts that she found were relevant – his remuneration arrangements and his actual earnings. This was a matter for the Adjudicator to determine, which she properly did based on these facts. It would not have been appropriate for the Adjudicator to have deferred to the payroll administrator's one-time methodology.

[122] Finally, the Appellants argue that the Employee worked overtime only to earn commission and therefore should be considered a commissioned employee for overtime purposes. This argument overlooks the fact that the Employee was guaranteed an hourly wage (plus commission) for all of the hours he worked. The Appellants ask the Board to disregard the Adjudicator's findings with respect to the payment arrangement and overturn her conclusions based on irrelevant evidence of the Employee's motivation.

[123] The Adjudicator found that the "blended rate" (or, subsection 17(1)) was appropriate given the relevant facts as found. This was a conclusion based on mixed fact and law. The Adjudicator made no extricable error of law in her reasoning or her determination on this issue.

Conclusion:

[124] In conclusion, the Adjudicator did not commit an error in law in assessing the evidence, by maintaining the assessed overtime amount, or in determining which rate applied to the overtime calculation.

[125] For all of the foregoing Reasons, the Board affirms the decision of the Adjudicator. The Appeal is dismissed.

[126] 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