Saskatchewan
Labour Relations Board

JEFFERSON FREEMAN, Appellant v DORIS MUNCH, Respondent and GOVERNMENT OF SASKATCHEWAN, DIRECTOR OF EMPLOYMENT STANDARDS, Respondent

LRB File No. 125-22; May 31, 2023
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

The Appellant, Jefferson Freeman:	Self-Represented
Counsel for the Respondent, Doris Munch:	Ryan M. Nagel
Counsel for the Respondent, Government of Saskatchewan:	Alyssa Phen

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

Jurisdiction to Review Questions of Law – Alleged Errors of Law on Findings of Fact – Allegedly Disregarded Relevant Evidence.

Establishing Relationship between Employer and Employee – Definition of Employer – Fourfold Test – Application of Test to Facts – No Disregard of Relevant Evidence Found.

No Error of Law – Decision of Adjudicator Affirmed – Appeal Dismissed.

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 July 25, 2022 by Jefferson Freeman, carrying on business as the Lancer Hotel, pursuant to section 4-8 of *The Saskatchewan Employment Act* [Act]. Freeman appeals an Adjudicator's decision, dated June 29, 2022, in LRB File No. 062-21 with respect to a wage assessment issued in favour of Doris Munch. At the time of filing, Freeman requested a stay of the Adjudicator's decision. A stay was ordered by the Board on October 17, 2022.

[2] The background to the present appeal is as follows. In or around September 2020, Munch submitted a formal complaint with employment standards over wages that were allegedly owing to her in the amount of $4,000. Apparently, the Employment Standards Officer [ESO] sent a letter to Freeman on January 25, 2021, a letter which is not before the Board but purportedly outlined

the results of the wage audit. On February 8, 2021, the ESO again wrote to Freeman referring to the letter dated January 25, 2021, and indicating that she had found an additional $12,818.94 in wages owing to Munch. On February 19, 2021, the ESO wrote to Freeman to advise of an amendment to the amounts owed to Munch, as follows:

> *…When reviewing the file, it was noticed that the amount received for the rental of the room was not included in the assessment and it is reasonable to allow this deduction. Doris Munch did receive rental accommodations from you. You stated previously that the rental accommodations were valued at $800.00 per month. Therefore, during the Audit period, Doris Munch was provided $8,800.00 in accommodation.*
>
> *Due to this amendment and based on the evidence provided thus far, I have found an additional $4,018.94 owed to Doris Munch. The reason for these outstanding wages is Unpaid Regular Wages, Unpaid Public Holiday Pay and unpaid Annual Vacation Pay. Overtime was not considered in this assessment as I have deemed Doris Munch to be a Manager…*

[3] Then, on April 13, 2021, the ESO wrote Freeman to advise that there had been another revision of the amounts for a total of $9,818.94:

> *The Audit has been amended recently to change the amount of room and board that was included in the Employment agreement. This is due to the fact that the past Employee, Doris Munch was not in agreement with the value of the room and board being $800 per month. To provide a fair and reasonable assessment on the room and board portion of the agreement, Employment Standards has again amended the assessment and Audit to show the room and board equaling $250 per month in accordance with section 22 of The Employment Standards Regulations. This section reads:*
>
> *22 The charge for boarding and lodging received by a live-in care provider or a live-in domestic worker from the employer of the live-in care provider or live-in domestic worker must not exceed $250.00*
>
> *Although I am aware that the position that Doris Munch held was not that of a caretaker, [room] and board is classified as an illegal deduction in The Saskatchewan Employment Act. To provide a fair and reasonable assessment, as Doris Munch was in receipt of the room and board which does carry a value, I have found that section 22 of The Employment Standards Regulations holds a numeric value to the room and board agreement…*

[4] Then, on April 27, 2021 the Director of Employment Standards [Director] issued to Freeman a wage assessment in the amount of $9,818.94.[1]

[5] Freeman commenced an appeal of the wage assessment pursuant to section 2-75 of the Act. That appeal was set for a hearing before the Adjudicator and was heard on November 26, 2021 and March 1, 2022 with final submissions by March 16, 2022. The Adjudicator dismissed the appeal and upheld the wage assessment.

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[1] Wage Assessment No. 1-000482.

[6] The hearing before the Board on the appeal of the Adjudicator's decision was held on March 15, 2023. Freeman, the Director, and Munch filed written submissions, appeared at the hearing, and made oral arguments.

Adjudicator's Decision:

[7] At the hearing of the initial appeal, the Adjudicator identified the following issues to be determined:

i) Was Munch an employee of Freeman?
ii) If so, what was her lawful entitlement to minimum wage, vacation and holiday pay, taking into account room and board, during the relevant period?

[8] According to the decision, Munch worked and lived at the hotel from June 24, 2019 to July 30, 2020 pursuant to a verbal agreement with Freeman. She agreed to work for $800 cash per month plus room and board in the hotel. After the last day that she worked on the premises, Munch asked that she be paid $4,000 for the previous months (March through July 2020).

[9] The Adjudicator found that the room and board arrangement contravened section 2-6 of the Act because it deprived Munch of the minimum wage.

[10] She also found that Freeman's evidence and the evidence of his witnesses were unreliable:

> *24. Considering the evidence presented by Freeman himself, I find his testimony and the documents he filed to shore it up warrant little weight. This is especially so because Freeman and Berryman's versions of events are contradicted by other objectively reliable and trustworthy information. Internal and external inconsistencies corrode Freeman's testimony and credibility. Most significantly, comparing the contents of Freeman's lengthy letter (D-1 tab 4) to his hearing testimony reveals numerous and irreconcilable contradictions and gaps. While the letter may well contain errors or inaccuracies, Freeman presented it to Smith as his response to Munch's claim and it is reasonable to infer Freeman wanted Smith to rely upon its contents.*
>
> *25. When this letter was put to Freeman during cross-examination, he struggled to explain the obvious inconsistencies between it and his oral testimony in direct examination. Freeman provided several long, animated, responses to Smith's and my questions which were rambling and unintelligible. Ultimately, he blamed "inaccuracies" on his neighbor who typed the letter for him in a hurry, that he was "in a rush" to have it done, and that he was a poor proofreader. Freeman provided no credible explanation for how or when Berryman's role at the Hotel changed from a person who installed countertop and flooring to him being a lessee responsible for hiring and managing Munch. Freeman simply insisted that his testimony and documents filed prior to the hearing were true.*

[11] The Adjudicator applied both the "four-fold" test and the organization test to determine whether Munch was an employee, finding she was:

> *37. As a result, I find the preponderance of evidence leads [to] my conclusion, on a balance of probabilities, that Munch was Freeman's employee, working at the Hotel. I agree with the conclusion reached by Smith when she finished her investigation and issued the wage assessment. For the purposes of applying the provisions of the SEA, Munch was not self-employed nor was she a lessee of the premises in her own right.*

[12] Finally, the Adjudicator concluded that there was no evidence upon which she could find the Director's valuation of Munch's room and board to be inappropriate.

Preliminary:

Timeliness:

[13] Munch had initially raised the timeliness of the appeal but withdrew this issue at the hearing of this appeal.

[14] To be sure, there is no issue of timeliness. The decision was served on July 4, 2022 and the Notice of Appeal was filed on July 25, 2022. Subsection 4-8(3) of the Act requires that a person who intends to appeal pursuant to section 4-8 file a notice of appeal with the Board within 15 business days after the date of service of the decision of the adjudicator. The Notice of Appeal was filed within this timeframe.

Arguments:

Freeman/Employer:

[15] The focus of Freeman's argument is that the Adjudicator ignored or explained away the evidence that demonstrated that Munch was self-employed and the evidence that Munch had agreed to $800 for room and board as opposed to the $250 valuation provided by the wage assessment.

[16] Freeman says that it is not possible for the Board to fairly and fully review the appeal record because only the second day of evidence was recorded. On the first day of the hearing, which was not recorded, Munch made an admission that directly contradicted her position that she was an employee. Due to the partial recording the Board does not have the testimony containing this admission before it. This alone justifies ordering a *de novo* hearing.

[17] Further, the Adjudicator erred by relying on section 22 of *The Employment Standards Regulations* and, in so doing, characterizing Munch as a domestic worker. Munch is not a domestic worker. Section 22 of these Regulations is wholly inapplicable to her circumstances.

Munch:

[18] First, Munch accepts that, in appropriate situations, errors based on findings of fact may be characterized as errors of law. However, such errors cannot be inferred. A finder of fact is not required to refer in the decision to every item of evidence that she considered. For an error to be found, the decision subject to appeal must positively reveal a failure to consider the relevant evidence. The decision in question does not. Much of what Freeman describes as "ignored evidence" was expressly considered by the Adjudicator and is contained in the decision. To the extent that some aspects of the evidence were not expressly mentioned, the absence alone does not ground an error of law.

[19] In support of these arguments, Munch relies on *R v Necroche*, 2018 SKCA 24 (CanLII) [*Necroche*]; *R. v J.M.H.*, 2011 SCC 45 (CanLII), [2011] 3 SCR 197; *R v Poon*, 2012 SKCA 76 (CanLII); *R v Turpin*, 2012 SKCA 50 (CanLII); and *R. v Dinardo*, 2008 SCC 24 (CanLII), [2008] 1 SCR 788.

[20] Second, there was no error of law in the valuation of room and board at $250 per month. Neither the ESO nor the Adjudicator classified Munch as a domestic worker. *The Employment Standards Regulations* were used as guidance to determine the appropriate value to assign to room and board. The valuation at $250 was a finding of fact, not a legal finding.

Director of Employment Standards:

[21] The Director argues that the Adjudicator identified the correct test for determining employee status and that there is no extricable error of law demonstrated by the Adjudicator's reasoning. The findings of fact that are in issue are simply not reviewable as questions of law.

[22] The notion that the wage assessment was calculated incorrectly because of supposedly contradictory evidence does not raise a question of law. The Director raises no issue with the set-off for room and board valued at $250 per month. Munch made a written representation in which she agreed to the reduction. There is no reason why the wage assessment should be further reduced. The Adjudicator found that there was no evidence to support a different valuation.

Applicable Statutory Provisions:

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

> ***2-1*** *In this Part and in Part IV:*
> *. . .*
>
> *(f)* ***"employee"*** *includes:*
>
> *(i) a person receiving or entitled to wages;*
>
> *(ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;*
>
> *(iii) a person being trained by an employer for the employer's business;*
>
> *(iv) a person on an employment leave from employment with an employer; and*
>
> *(v) a deceased person who, at the relevant time, was a person described in any of subclauses (i) to (iv); but does not include a person engaged in a prescribed activity;*
>
> *(g)* ***"employer"*** *means any person who employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who, in the opinion of the director of employment standards, either:*
>
> *(i) has control or direction of one or more employees; or*
>
> *(ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees;*
>
> ***2-6*** *No provision of any agreement has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Part.*
>
> ***2-36****(1) Except as permitted or required pursuant to this Act, any other Act or any Act of the Parliament of Canada, an employer shall not, directly or indirectly:*
>
> *(a) make any deductions from the wages that would be otherwise payable to the employee;*
>
> *(b) require that any portion of the wages be spent in a particular manner; or*
>
> *(c) require an employee to return to the employer the whole or any part of any wages paid.*
>
> *(2) In addition to deductions permitted or required pursuant to law, an employer may deduct from an employee's wages:*
>
> *(a) employee contributions to pension plans or registered retirement savings plans;*
>
> *(b) employee contributions to other benefit plans*
>
> *(c) charitable donations voluntarily made by the employee;*

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

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

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

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

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

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

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

2-74*(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.

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

(4) Repealed. 2020, c12, s.5.

(5) Repealed. 2020, c12, s.5.

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

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

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

(7) A wage assessment must:

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

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

(i) pay the amount claimed; or

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

(c) in the case of a wage assessment issued after money has been received from a third party pursuant to a demand issued pursuant to Division 4, set out the amount paid to the director of employment standards by the third party.(8) The director of employment standards may, at any time, amend or revoke a wage assessment.

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.

…

(7) An appeal filed pursuant to subsection (2) is to be heard by an adjudicator in accordance with Part IV.

(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.*

(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.*

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

> ***22*** *The charge for board and lodging received by a live-in care provider or live-in domestic worker from the employer of the live-in care provider or live-in domestic worker must not exceed $250 per month.*

Analysis:

Jurisdiction and Standard of Review:

[25] 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.[2]

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

[26] A question of fact may be grounded in an error of law if the finding is based on no evidence, is based on irrelevant evidence or in disregard of relevant evidence or is based on an irrational inference of fact.[3]

[27] In applying the correctness standard of review to questions of law, the Board's role is to determine whether the Adjudicator identified the correct test and applied it correctly[4], whether the Adjudicator erred in law in relation to a factual matter, and whether the Adjudicator was correct in finding that the procedure followed was fair and whether the Adjudicator followed a fair procedure.

Review of Decision:

[28] The Notice of Appeal lists 17 grounds. Most of these grounds allege errors made in relation to the Adjudicator's findings of fact. In respect of these grounds, the question before the Board is whether any of the allegations raise errors of law. A finding of fact is an error of law if it is based on no evidence, irrelevant evidence or in disregard of relevant evidence or on an irrational inference of fact. Freeman primarily alleges that in making the impugned findings the Adjudicator ignored evidence, which evidence Freeman believes to be relevant.

[29] As context for the Board's assessment of these grounds, it is useful to review the legal test that the Adjudicator was required to apply in coming to a decision.

[30] The starting point is section 2-1 of the Act which defines the terms "employee" and "employer". The predominant excerpt is subclause 2-1(g)(i), which indicates that Freeman (or Lancer Hotel) qualifies as an employer by virtue of having "control or direction of one or more employees". Clause 2-1(g)(ii) is not in issue.

[31] In applying subclause 2-1(g)(i), the applicable case law was canvassed by the Board in *Missick v Regina's Pet Depot*, 2020 CanLII 90749 (SK LRB). There, the Board confirmed the applicability of the fourfold test, as set out in *671122 Ontario Ltd. v Sagaz Industries Canada Inc*., 2001 SCC 59 (CanLII), [2001] 2 SCR 983 [*Sagaz*]. The fourfold test was applied by the Court in *Director of Labour Standards v Acanac Inc*., 2013 SKQB 21 (CanLII) [*Acanac*]. The Board followed *Acanac* in *Saskatchewan (Employment Standards) v Black Gold Boilers Ltd*., 2016 CanLII 98643 (SK LRB) and *Burton Aggregates Ltd. v Saskatchewan*, 2017 CanLII 20063 (SK LRB).

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[3] *Canadian Natural Resources Limited v Campbell*, 2016 SKCA 87 (CanLII) [*CNR*] at para 12*; P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149, at paras 60–65.
[4] *Abbey Resources Corp. v Saskatchewan Assessment Management Agency*, 2022 SKCA 63 (CanLII), at para 14.

[32] The essence of the fourfold test is captured at paragraphs 47 and 48 of *Sagaz*:

> *47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.*
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> *48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.*

[33] In *Acanac*, a wage assessment decision that turned on the existence of an employment relationship, the Court explained that it was appropriate to adopt the fourfold test but that it would also consider "the organization of the company to the extent that it informs the analysis of the fourfold test".[5] The Court acknowledged that the intention of the parties is relevant but accepted that "'on the ground' conduct may be more determinative of the true relationship".[6] The Court described the critical question as "whether [the individual in question] was in business on his own account or not".[7]

[34] In the present case, the Adjudicator did not refer to the definitions of "employee" and "employer" in the Act. Nonetheless, she reasoned that it was necessary to find that an employer/employee relationship exists to confirm the validity of the wage assessment. In assessing whether that relationship existed, the Adjudicator referred to and applied the fourfold test. She observed, appropriately, that the test is fact specific. She correctly identified the four aspects of the test. In applying the test, the Adjudicator considered each of these factors and based on the application of these factors concluded that Munch was an employee. After drawing this conclusion, she then considered the organization test, which she found to support this conclusion. In applying both tests, the Adjudicator's conclusions were highly dependent on her factual findings, credibility determinations, and the relative weight she assigned to the evidence.

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[5] *Acanac*, at para 55.
[6] *Ibid,* at para 54.
[7] *Ibid,* at para 55.

[35] In the Board's view, the allegations that the Adjudicator ignored evidence raise two interrelated issues. The first is whether the Adjudicator breached the duty of fairness by failing to provide sufficient reasons, thereby preventing a meaningful review of the findings made at the hearing. The second is whether the Adjudicator disregarded relevant evidence in making a finding of fact. The first issue is implicit in the Notice of Appeal before the Board. If the reasons do not provide for a meaningful review of the findings of fact that have been put in issue, then the Board is prevented from considering Freeman's argument that the Adjudicator ignored certain evidence, rendering the decision unfair. The second is explicit. Freeman directly alleges that the Adjudicator ignored relevant evidence.

[36] For the following reasons, the Board has found that the reasons were sufficient to allow a meaningful review of the findings made at the hearing and that the Adjudicator did not ignore relevant evidence.

[37] It is well established that the duty of fairness may include a duty to provide reasons. The content of the duty will depend on the exigencies of the case. As explained by the Supreme Court in *R. v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869, "the requirement of reasons is tied to their purpose and the purpose varies with the context". 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.[8] There is no need for the decision-maker to show that she was "alive to and considered all of the evidence" nor is there a need to "answer each and every argument" put forward.[9] The issue is basic fairness, not perfection.

[38] A mere failure to record specific evidence in the decision does not alone justify the Board's intervention. It is not necessary for an adjudicator to expressly list each piece of evidence that has been considered. As explained by the Court of Appeal in *Necroche*:

> *[38] The failure by a trial judge to consider evidence relevant to the ultimate issue is an error of law. See: R v J.M.H., 2011 SCC 45 at para 31, [2011] 3 SCR 197. However, before appellate intervention is warranted, the trial judge's reasons must positively reveal such an oversight. A mere failure to record evidence in a decision is not enough to allow an appellate court to step in. See: R v Ahenakew, 2008 SKCA 4 at para 33, 289 DLR (4th) 59.*

[39] In *Necroche*, the Court of Appeal ordered a new trial after finding that the trial judge had overlooked or failed to consider evidence essential to the defense. The trial judge had summarized the evidence of each of the witnesses who had given *viva voce* testimony but had

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[8] *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.
[9] *Ibid*, at para 30.

not summarized written statements that had factored prominently in the defense of the accused. The Court concluded that the trial judge would have referred to those statements if they had been taken into account. The notion that the trial judge had discounted the statements as lacking in reliability or probative value was entirely inconsistent with the prosecutor's characterization of the statements at trial.

[40] In the present case, the Adjudicator expressly considered much of the evidence that Freeman suggests was ignored.

[41] First, Freeman alleges, as the initial ground of appeal, that the Adjudicator ignored or misconstrued third party evidence of the lessee. However, the Adjudicator expressly considered the reliability of the evidence of the respective parties and witnesses and found that Munch's evidence was to be preferred. Furthermore, the Adjudicator expressly considered the lessee's evidence in paragraphs 19, 20, 21, 22, 24, and 26 of the decision.

[42] Next, Freeman alleges, by way of the third ground, that the Adjudicator ignored evidence that Munch had taken all the revenues from the business she was operating, which Freeman argues was evidence of self-employment. However, at paragraph 16 of the decision, the Adjudicator explained that Freeman had contended at the hearing that Munch had been stealing money from the hotel "by keeping profits for herself". The Adjudicator found Freeman's evidence, overall, to be unreliable. The only available inference is that the Adjudicator did not believe Freeman's allegations that Munch had been stealing money from the hotel. The Adjudicator did not ignore relevant evidence; she found that Freeman's evidence was unreliable and did not accept it.

[43] Moreover, at paragraph 30 of the decision, the Adjudicator stated that Freeman had testified that he had "expected to receive profits coming from the operation of the Hotel". Then, at paragraph 32, the Adjudicator concluded that "Munch did not make independent decisions about where and how to allocate incoming funds". The Adjudicator expressly considered the evidence about the receipt of the hotel revenues and factored that evidence into the assessment of whether Munch was an employee.

[44] In the fourth ground, Freeman alleges that the Adjudicator ignored evidence that Munch had hired other employees to help her run the business. Although not expressly factored into the analysis of Munch's status as an employee, the Adjudicator did not ignore the fact that Munch had hired other staff, referring specifically to this fact in paragraph 14 of the decision. The

Adjudicator explicitly accepted that Munch was managing the hotel, which involved occasionally hiring casual staff when necessary.[10] The Adjudicator was alive to the fact that Munch had hired other employees to help her run the business.

[45] Furthermore, the reasons do not positively reveal an oversight with respect to these facts. This is not a case like *Necroche* where the absence of a reference means that she did not consider the issue. It was entirely appropriate for the Adjudicator to review the relevant facts at the outset and then include in the principal analysis those facts which factored most prominently in her determination. The weight that was to be assigned to each of the factors was for the Adjudicator to determine.

[46] Finally, Freeman alleges in the tenth ground that the Adjudicator ignored evidence that Munch's rent included all meals and utilities. However, the Adjudicator expressly considered this issue at paragraph 12, finding that Munch was "verbally guaranteed $800 cash per month plus room and board (lodging and meals within the Hotel)."

[47] Each of these foregoing occurrences contradicts the listed assertions that the Adjudicator ignored specific relevant evidence.

[48] Furthermore, when credibility is the primary issue, the Board should consider the sufficiency of reasons in light of the deference owed to the Adjudicator when making determinations of credibility.[11] Here, the Adjudicator's decision relied greatly on her determination of the relative credibility of the parties and the reliability of their respective evidence. The Adjudicator clearly articulated her reasons for preferring Munch's evidence. Moreover, the credibility findings were not isolated to discrete pieces of evidence, but were extensive and fundamental, going to Freeman's entire evidence, including his testimony, the "documents he filed to shore it up"[12] and his witness's version of events.[13]

[49] The Adjudicator decided, based on her credibility determinations, that where Freeman or his witness's "version[s] of events conflicts with Munch's version" that she would prefer the latter and "give it substantially more weight".[14] Many of the alleged errors in the Adjudicator's factual findings turn on this determination. The first, third, eleventh, and fifteenth grounds can be

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[10] *Decision*, at para 14.
[11] See, *Dinardo*, at para 26.
[12] *Decision*, at para 24.
[13] *Ibid*, at para 26.
[14] *Ibid*.

disposed of on this basis alone. In each of these cases, it is obvious that the Adjudicator preferred Munch's evidence and that the relative reliability of the evidence had been dispositive of the central issue.

[50] This leaves for consideration the second, fourth, fifth, sixth, seventh, eighth, ninth, twelfth, thirteenth, fourteenth, sixteenth, and seventeenth grounds.

[51] The Board will begin with the sixteenth. Although this ground directly alleges that the Adjudicator "misunderstood" the evidence, it indirectly alleges that the Adjudicator was wrong to conclude, based on the entirety of the evidence, that Freeman was supervising Munch. Essentially, the allegation is that the Adjudicator made an error in weighing and assessing the entirety of the evidence. This allegation does not disclose an error of law and is disposed of on that basis.

[52] The remaining grounds can be grouped as follows. The second and thirteenth grounds pertain to Munch's representations about her employment status. The fifth, sixth, seventh, fourteenth, and seventeenth grounds relate to allegations that Munch chose her hours of work and the hours of the restaurant, and claimed for hours worked when she was not on the premises or when the restaurant was closed. The eighth, ninth, and twelfth grounds pertain to the valuation that was made in relation to room and board.

[53] The Board will consider each of these categories, in turn.

[54] The first category, which includes the second and thirteenth grounds, puts in issue Munch's representations about her employment status. Freeman suggests that the Adjudicator ignored evidence that Munch was treated and treated herself as self-employed for tax purposes.

[55] The Adjudicator did not ignore this evidence, generally, but concluded that it was irrelevant. At paragraph 35 of the decision, she noted Munch's acknowledgment that she "may have described herself as 'self-employed' in her personal income tax return for 2019 and/or 2020'". Then, at paragraph 36, the Adjudicator expressly considered this evidence (and the evidence that Munch may have received CERB payments during the relevant period). She found that the characterization of employment may change depending on the statutory lens that is applied. She reasoned that Munch's representations, her tax treatment, and her receipt of benefits are not relevant facts for determining her employment status in the context of employment standards entitlements.

[56] If, however, this evidence is relevant for determining Munch's employment status, then by discounting it as irrelevant the Adjudicator committed an error of law. For the following reasons, the Board has found that she did not.

[57] The Adjudicator's reasoning is logically consistent with the treatment of admissions of law as either binding or non-binding. As Sopinka explains, unlike admissions of fact, an "admission relating solely to a question of law… may be withdrawn at any time".[15] Moreover, "[f]ormal admissions are only binding for the purposes of the particular case in which they are made".[16] By extension, a legal admission pertaining to self-employment for purposes of a tax assessment (or federal benefits) is not binding for purposes of an employment standards assessment.

[58] It is also supported by the B.C. Court of Appeal's rationale and review of the case law in *Beach Place Ventures Ltd. v Employment Standards Tribunal*, 2022 BCCA 147 (CanLII), an employment standards case in which the panel had chosen to disregard a tax-related decision about an individual's employment status.[17] The B.C. Court of Appeal upheld the tribunal's decision on this issue.

[59] And, the Adjudicator's reasoning is in alignment with the Supreme Court's finding in *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 (CanLII), [2014] 2 SCR 108, that is, that "while significant underlying similarities may exist across different statutory schemes dealing with employment, it [whether there is an employment relationship] must always be assessed in the context of the particular scheme being scrutinized."[18]

[60] Finally, it is consistent with *Acanac*. There, the Court found that the employee had never asked for or received T4s and had filed tax returns that described his income as business income. In the Court's application of the fourfold test, it disclosed no explicit consideration of this tax evidence. Relatedly, the Court found that an independent contractor's agreement would not "rule the day in terms of decision".[19] Instead, it was "the actual facts of the operating arrangement" that would determine the relationship.[20] The Court found that "the analysis leads inexorably to the conclusion that [the subject individual] was, in real terms, an employee of Acanac."[21]

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[15] Sidney N. Lederman, Alan W. Bryant, Michelle K. Fuerst, *Sopinka, Lederman, & Bryant: The Law of Evidence in Canada*, 5th ed (LexisNexis Canada Inc., 2018), at para 19.2 [*Sopinka*].
[16] *Sopinka*, at para 19.6.
[17] Application for leave to appeal dismissed: *Beach Place Ventures Ltd., et al. v Employment Standards Tribunal, et al*., 2023 CanLII 8264 (SCC).
[18] *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 (CanLII), [2014] 2 SCR 108, at para 25.
[19] *Acanac*, at para 60.
[20] *Ibid*, at para 61.
[21] *Ibid*, at para 86.

[61] In summary, the Board finds no error in the Adjudicator's reasoning on this issue.

[62] The next category pertains to the allegations that Munch chose her hours of work and the hours of the restaurant, and claimed for hours worked when she was not on the premises or when the restaurant was closed. Freeman alleges that the Adjudicator ignored that evidence in the decision. In his written submissions he submits that the arbitrator erred "in relying on Ms. Munch's hand scribbled work time record when they were shown in many places to be fabricated".

[63] First, there is no error of law raised by the Adjudicator's reliance on Munch's time records. The Adjudicator's findings of credibility were exhaustive and clear. By raising this issue, Freeman suggests that the Board should overturn the Adjudicator's findings of credibility. There is no basis upon which the Board can do so.

[64] Second, the Board is not persuaded as to the relevance of evidence that Munch claimed for hours worked when she was not on the premises or when the restaurant was closed. A person may be found to be working whether on or off premises – the circumstances are key. The Adjudicator found that Munch was working under alternative arrangements even while the hotel was subject to a pandemic-related closure. If it is, as it appears, that Freeman is using these allegations to further impugn Munch's credibility, they do not raise questions of law.

[65] Third, the Adjudicator found that the hotel was Freeman's business, that it was he who had control over the operation, that he provided direction to Munch, that Munch's work supported Freeman's organization (business), and that he expected to receive profits from the operation of the hotel.[22] The Adjudicator heard evidence that Munch had worked very long hours to keep the hotel afloat during the pandemic[23] and found that the evidence supported the ESO's finding that Munch had worked 40 hours per week, "and likely much more".[24] Freeman's argument that Munch had directed her own hours had to be considered within this context, including Freeman's expectation of a profit.

[66] The Board finds no error in the Adjudicator having focused on these facts, and not on whether Munch "directed" her own hours. The decision suggests that Munch was working the hours that she needed to work to keep the hotel afloat under Freeman's general direction and expectation of profit.

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[22] *Decision*, at paras 28,29,30.
[23] *Ibid*, at para 16.
[24] *Ibid*, at para 44.

[67] The next issue relates to the valuation of room and board.

[68] To begin, it is necessary to take note of the letter from Munch to the ESO, dated April 7, 2021, which states:

> *This letter is to consent to as per our discussion on April 6th, 2021. That I Doris Munch am in agreement and feel that $250 per calendar month is a fair price for room & board for my term of employment at Lancer Hotel, Lancer Saskatchewan.*

[69] On April 13, 2021, the ESO wrote to Freeman stating that the assessment had been amended to account for the value of room and board at $250 per month. The ESO had previously found, based on Freeman's evidence, that the value of room and board was $800 per month.

[70] The ESO found that the deduction for room and board was an illegal deduction, citing section 2-6 of the Act, which states:

> ***2-6*** *No provision of any agreement has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Part.*

[71] The ESO then made a deduction, apparently based on the letter provided by Munch and taking into account section 22 of *The Employment Standards Regulations*.

[72] In the decision, the Adjudicator stated that the room and board arrangement contravened section 2-6 of the Act because it deprived Munch of the minimum wage. The Adjudicator concluded that there was no evidence upon which it could be found that the valuation of $250 was inappropriate. In other words, there was no evidence upon which it could be found that the valuation of room and board should have been greater than what was determined.

[73] The following excerpt from the decision is relevant:

> *40. Third, Freeman takes issue with the Director's valuation of room and board for Munch at $250, rather than $800 monthly. This objection is based entirely on Freeman's estimation that an "ordinary outlay" for living expenses far exceeds $250, but Freeman provides no authority for his alternative suggestion that the sum should be $800.*
>
> *41. The Director acknowledges that the SEA has only one section which deals with quantifying room and board for employees. Section 22 of the SEA Regulations indicates that the charge for boarding and lodging provided to live-in caregivers or domestic workers cannot exceed $250 monthly. Using this section as a guide, the Director's delegate deemed the value or "cost" of Munch's room and board to be capped at $250 monthly.*
>
> *42. The SEA includes no other mechanism by which Munch's room and board should be calculated and the parties' verbal agreement which may have included an $800 valuation*

> *for room and board is unenforceable. These circumstances created a challenge for Smith as she was investigating the complaint and endeavoring to quantify Munch's potential claim. Before finalizing the wage assessment, Smith sent Freeman preliminary assessments in letters to which she sought his comments and reply. Ultimately, Smith settled on applying Regulation section 22 to quantify Munch's room and board which effectively reduces the "set-off" amount Freeman claims against her outstanding wages.*
>
> *43. There is no evidence upon which I could find that the Director's valuation of Munch's room and board at $250 is inappropriate.*

[74] There is an apparent contradiction in the approach adopted by the ESO in this matter. By allowing a deduction in the amount of $250, the ESO proceeded on the basis that it was permissible to allow a deduction from wages for the value of room and board but did so while taking the position that room and board was an illegal deduction. Then, at the hearing, the ESO defended the value she had assigned to room and board in her deduction.

[75] It can be inferred that Freeman takes the position that it is not illegal to deduct the value of room and board from wages based on an agreement or otherwise. He advocates for what he describes as a verbal agreement between himself and Munch in the amount of $800 per month.

[76] In answer to this, the Adjudicator concluded based on section 2-6 of the Act that an agreement would deprive the employee of the minimum wage and would therefore be prohibited. The Adjudicator then considered only whether a different deduction amount was supported by the evidence, excluding the possible agreement.

[77] This reasoning is consistent with an interpretation of the relevant provisions made in accordance with 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.*

[78] Section 2-6 of the Act, which protects an employee from a deprivation of "any right, power, privilege or benefit" provided by Part II, is to be considered in its entire context, including other relevant statutory provisions. Section 2-16 sets the minimum wage. Section 2-36 permits an employer to make specific deductions, in addition to deductions permitted or required pursuant to law, from an employee's wages. Voluntary donations, contributions, and purchases, in particular, may be treated as exceptions to the prohibition in section 2-6.

[79] However, none of the listed deductions contemplate circumstances equivalent to a lease. The ordinary meaning of the phrase “purchase”, at clause 2-36(2)(f), involves the acquisition of goods, services or merchandise, but not their rental. To the extent that there is any ambiguity in the term “purchase”, it should be resolved in favour of the employees, whose protection is an objective of the benefits-conferring employment standards regime. There are no relevant purposes or categories of purposes specified by regulation or by special order, pursuant to clause 2-36(2)(g).

[80] It follows that the Adjudicator was left to determine whether there was any other evidence, other than a possible agreement, of the value to be assigned to room and board. She found that there was not. That conclusion, which was based on the evidence before the Adjudicator, is not reviewable as an error of law. It does not disclose a finding based on no evidence, based on irrelevant evidence or in disregard of relevant evidence or based on an irrational inference of fact. The Adjudicator discounted the agreement because it was prohibited and therefore irrelevant. The Adjudicator’s decision on this issue must stand.

[81] Finally, whether or not the ESO “applied” the domestic worker provision, the apparent contradiction in the ESO’s approach has benefited Freeman. It is also one to which the employee who is now represented has consented and has not challenged in this or the underlying appeal.

[82] As an aside, the Adjudicator observed that Freeman had also initiated a civil action claiming in excess of $30,000 for “unlawful occupation” of his property. The Board has no information before it about the progress of that matter.

Part of Hearing Not Recorded:

[83] Next, Freeman alleges that due to the partial recording of the evidence it is not possible for the Board to fairly and fully review the record and make a determination on this appeal, and that therefore, the Board should order a *de novo* hearing.

[84] The record of an appeal as set out in clauses 4-8(4)(a) to (f) of the Act does not include a recording or a transcript of the hearing. Furthermore, there is no requirement, in the statute or otherwise, for adjudicators to record their hearings. Therefore, the Board does not interpret clause 4-8(4)(g), which lists as part of the record “any other material that the [Board] may require to properly consider the appeal”, as including either a recording or a transcript of the hearing before the Adjudicator in this matter. The Board cannot now require that an item be included in the record

that does not exist in its complete form for no other reason than that there was no requirement to create it.

[85] Therefore, to the extent that this ground could be found to have been properly raised by Freeman in his cover letter to the Notice of Appeal, instead of in the Notice of Appeal proper, it is dismissed.

CERB set-off:

[86] Freeman alleges in his written submissions that the Adjudicator erred by disallowing the evidence that Munch collected $2,000 per month from March to July 2020 in CERB.

[87] Freeman did not raise this issue in the Notice of Appeal. This issue cannot be read into any of the grounds that were raised there. It is not raised in the cover letter to the Notice of Appeal. Although he does appear to have raised it in his submissions before the Adjudicator, in the present appeal Freeman raised the CERB benefits only in a submission dated March 6, 2023 “in further reply to Ms. Munch’s [counsel’s] submission”.

[88] The Board will not allow this ground. It was raised for the first time in written reply submissions. Given this, it is understandable that Munch’s submissions are not responsive to this new issue (which concerns the Adjudicator’s assessment of the quantum of the wage assessment) but are instead responsive to an issue that is raised in the Notice of Appeal (which concerns the Adjudicator’s conclusion on the employee/employer relationship based on tax dealings, deductions, and related matters).

[89] This ground has not been properly raised, is not properly before the Board, and must be disposed of on that basis.

Conclusion:

[90] For the foregoing reasons, the Board finds that the Adjudicator’s reasons were sufficient to allow a meaningful review of the findings made at the hearing and that the Adjudicator did not err in law by ignoring or disregarding relevant evidence. Nor is there any other error of law raised or demonstrated by this appeal.

[91] Pursuant to clause 4-8(6)(a) of the Act, the decision of the Adjudicator is hereby affirmed. The appeal is dismissed.

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

DATED at Regina, Saskatchewan, this **31st** day of **May, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson