Saskatchewan
Labour Relations Board

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

LRB File No. 200-23; September 9, 2024
Vice-Chairperson, Carol L. Kraft (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Appellants, Olympic Motors (SK) Corporation and Thomas Glen:	Moira Keijzer-Koops
The Respondent, Cassandra Fowler:	Self-Represented
Counsel for the Respondent, Government of Saskatchewan, Director of Employment Standards:	Alexa LaPlante

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

Allegations – Error of Law Based on Disregarding Evidence of Time Theft – Error of Law for Failure to Assess Credibility Determination – No Error of Law demonstrated

REASONS FOR DECISION

Background:

[1] **Carol L. Kraft, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to a Notice of Appeal filed on December 27, 2023 by Olympic Motors (SK) I Corporation [the "Company"] and Thomas Glen [together, the "Appellants"], pursuant to section 4-8 of *The Saskatchewan Employment Act* [the "Act"].

[2] On May 25, 2022, a Delegate on behalf of the Director of Employment Standards issued Wage Assessment No. 1-000570 representing unpaid wages for Cassandra Fowler (the "Employee" or "Cassandra") against the Appellants.

[3] On June 14, 2022, the Appellants filed a Notice of Appeal claiming the Wage Assessment ought to be dismissed because the Employee was not entitled to overtime pay as a salaried

employee. At and after the hearing, the Appellants' grounds of appeal shifted to include time theft on the Employee's part.

[4] An Adjudicator was selected and the appeal was heard on October 13, 2022. On December 29, 2022, the Adjudicator issued a decision dismissing the appeal and upholding the wage assessment ("First Adjudicator Decision").

[5] The Appellants appealed the First Adjudicator Decision to the Board (the "First Appeal") pursuant to subsection 4-8(1) of the Act.

[6] On October 12, 2023, the Board delivered its Reasons for Decision (the "2023 LRB Decision"). The Board ordered that the matter be remitted to the Adjudicator with directions for amendment.

[7] On December 7, 2023, the Adjudicator released her decision which provided additional reasons in accordance with the directions ordered by the Board ("Second Adjudicator Decision"). The Adjudicator maintained that the Appellants did not establish that the Wage Assessment was incorrect. The Adjudicator further stated that her decision dated December 19, 2022, was amended to include the December 7, 2023, Reasons for Decision (the "Amended Decision").

[8] On December 27, 2023, the Appellants appealed the Adjudicator's Amended Decision to this Board pursuant to subsection 4-8(1) of the Act.

[9] An oral hearing was held on July 24, 2024.

[10] For the reasons that follow, the Appellants appeal is dismissed.

Standard of Review:

[11] 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:

> ***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.*

[12] The Board has previously determined that the standard of review to be applied on such appeals is correctness[1].

[13] Findings of fact may be found to be questions of law only if they were based on no evidence, on irrelevant evidence, in disregard of relevant evidence or based on an irrational inference of fact.[2]

[14] It is not sufficient for an Appellant to argue that they disagree with an Adjudicator's interpretation of the facts. Appellants must meet "this very high bar of satisfying the Board that the Adjudicator made her findings of fact on the basis of no evidence or irrelevant evidence, in disregard of relevant evidence, on a mischaracterization of relevant evidence or on an unfounded or irrational inference of fact.[3]

[15] In *Missick v. Regina's Pet Depot*[4] the Board described its jurisdiction with respect to questions of fact as "narrow", and noted that only the Adjudicator has the ability to assess testimony first hand.

Applicable Statutory Provisions:

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

> ***2-1*** *In this Part and in Part IV:*
>
> *. . .*
>
> *(o)* ***"overtime"*** *and* ***"overtime pay"*** *mean:*
>
> *(I) pay at a rate of 1.5 times an employee's hourly wage; or*
>
> *(ii) pay at a prescribed rate for a prescribed category of employees;*
>
> ***2-2*** *For the purposes of this Part, an employer is deemed to have permitted an employee to work within the meaning of the expression "permits to work" or "permitted to work" if the employer:*
>
> *(a) knows or ought reasonably to know that the employee is working; and*
>
> *(b) does not cause the employee to stop working.*

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[1] *Saskatchewan v Martell*, 2021 CanLII 122408 (SK LRB), *Christine Ireland v Nu Line Auto Sales & Service Inc.*, 2021 CanLII 97414 (SK LRB).
[2] *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.
[3] *Christine Ireland v Nu Line Auto Sales & Service Inc.*, 2021 CanLII 97414 (SK LRB) at para. 82.
[4] 2020 CanLII 90749 (SK LRB) at paras 35-36.

2-14*(1) Subject to subsections (2) and (4), an employer shall provide to an employee an unpaid meal break that is of at least 30 minutes' duration within every five consecutive hours of work.*

(2) An employer is not required to grant a meal break pursuant to subsection (1):

(a) in unexpected, unusual or emergency circumstances; or

(b) if it is not reasonable for an employee to take a meal break.

(3) If the employer does not grant the meal break mentioned in subsection (1) and the employee works five or more consecutive hours, the employer shall permit an employee to eat while working.

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

2-17*(1) An employer shall pay an employee overtime pay for each hour or part of an hour in which the employee is required or permitted to work or to be at the employer's disposal that exceeds the hours determined in accordance with sections 2-18, 2-19 and 2-20.*

(2) When calculating overtime pay, an employer:

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

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

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

…

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

(a) 40 hours in a week; or

(b) either of:

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

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

…

The Evidence:

[17] The following is a summary of evidence drawn from the Adjudicator's Amended Decision:

i. The Employee was employed by the Company as a Deal Processor from November 11, 2018 to June 30, 2021.

ii. The Wage Assessment was based on an audit that covered the last 12 months of the Employee's employment.

iii. The Operations Manager of the Company (Josh), testified at the hearing on behalf of the Appellants. He testified that he created a summary of the Employee's non-work hours from her computer browser history. The browser history, also referred to as the internet log, was entered into evidence as Exhibit ER-4 (the "Log"). It covered only the period of time between April 29, 2021 and June 30, 2021 which was the Employee's last two months of employment.

iv. Based on the Log, the Appellants averaged that the Employee conducted non-work-related internet searches for an average of 1.37 hours per workday.

v. Josh explained that the Company could not provide details from the Employee's computer before April 29, 2021, because they disposed of her old computer.

vi. He testified that he thought it was unreasonable to believe that the Employee just started doing non-work related things on April 29, 2021, but admitted that he could not prove it.

vii. He said he only became aware of the Employee's browser history when preparing for the hearing in September 2022.

viii. He testified that he did not raise the issue of her browser history or of non-work-related hours prior to the issuance of the Wage Assessment.

ix. He said he believed there is a written policy regarding personal use of workplace computers in the Employee Handbook but could not remember what it says and did not have the document with him.

x. He also testified that he believed the Employee committed time theft by not recording her lunch breaks. He says she was paid for a number of lunch hours that she did not in fact work.

xi. The Employee testified that she was initially hired by Auto Gallery in October 2018 for accounts payable. She remained in that role until October 2019 when she was promoted to Deal Processor. As a Deal Processor she was responsible for getting deal jackets from finance, entering them into the system, reconciling accounts, making sure payments were

received, etc. She was not just responsible for Auto Gallery but was responsible for the dealerships throughout Canada under the Company's umbrella, maybe 15 dealerships. (p. 11 Decision #1).

xii. As a Deal Processor, her responsibilities increased but she remained responsible for accounts payable. When a co-worker left, she became responsible for accounts receivable too. When the other Deal Processor left in 2020, she was the only one left. She was doing three jobs and testified that this was very stressful.

xiii. The Employee testified that she had no work-life balance, and that Auto Gallery was understaffed. She says she talked to Josh and Karla several time about the unreasonable workload. She was told they were working on it but was not aware of any steps taken to reduce her workload.

xiv. She testified that there were several people who knew she was working extra hours, including Ralph, Melissa (who left in 2020) and payroll. She says she raised the issue of overtime with Jeremy and Lance. Lance told her to keep track of her hours. She testified that she worked a few Saturdays and one Sunday because she and Josh were going through Subaru incentives. He was there so he knew she was working those hours.

xv. She said nobody in management ever told her to stop working the hours she was working, and she was never paid overtime.

xvi. She testified she was unaware of a written policy regarding personal use of work computers and that nobody ever spoke to her about her browser history.

xvii. She testified that the hours in her timecards were higher than what was reflected in her Offer of Employment because she had to work until the work was done and she was doing multiple jobs.

xviii. On cross examination, she acknowledged that online shopping and job searching were unauthorized activities and not part of her employment, but she explained she was still doing her work. She said she conducted non-work related searches as a way of "taking a breather from working stressful hours". She admitted she was unhappy by the time she left.

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

First Adjudicator Decision:

[18] After summarizing the evidence and arguments, the Adjudicator concluded that the Appellants had not established that the Wage Assessment was incorrect. She stated[5]:

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

Grounds of Appeal:

[19] The Appellants' First Appeal to the Board consisted of the following grounds of appeal. Notably, the grounds are the same in the present appeal as they were in the First Appeal.

> *a. Whether the Adjudicator committed errors of law by disregarding the following admissions made by the Employee:*
>
> *i. That she was committing time theft while at work;*
>
> *ii. That she would have worked in the same manner as she did in her last two months of work during the previous year* (also referred to as the extrapolation argument);
>
> *iii. That she took more lunches than were reflected in the Wage Assessment*
>
> *b. Whether the Adjudicator committed errors of law by failing to properly assess the witnesses' credibility.*
>
> *c. Whether the Adjudicator err in interpreting the case law with respect to time theft. Relatedly, whether the Adjudicator considered irrelevant evidence in justifying the Employee's conduct.*

[5] First Adjudicator Decision, p. 16.

2023 LRB Decision:

[20] In the 2023 LRB Decision the Board remitted specific matters back to the Adjudicator. These included:

> *a. Whether the Employee had the requisite intent for time theft;*
>
> *b. The reasoning for not accepting the Employer's evidence with respect to extrapolation; and*
>
> *c. The relationship between the Employee's intent to commit time theft and the Employee's credibility.*

Time Theft

[21] With respect to time theft, the Appellants argued in the First Appeal that the Adjudicator did not properly consider admissions made by the Employee relating to time theft and to taking more lunches than indicated on her time cards. They argued the Adjudicator considered irrelevant evidence when justifying that the Employee was not responsible or accountable for not working for the Employer during regularly scheduled business hours.

[22] The Board noted that the Adjudicator did address the Employee's "admission" that she committed time theft while at work[6]:

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

[23] While the Board noted that excessive internet usage is usually treated as a productivity issue, such as, for example, employees engaged in water cooler conversations or making personal phone calls, the Board found that the Adjudicator's decision did not suggest that it was out of the realm of possibility to find that the Employee's excessive internet usage constituted time theft. Instead, the Adjudicator assessed the evidence and made a determination based on the evidence that the Employee did not have the intent required for a finding of time theft or of fraud.[7]

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[6] 2023 LRB Decision, para 46.
[7] 2023 LRB Decision, para. 59.

[24] The Board's recital of the Adjudicator's findings in this regard is summarized as follows[8]:

> *a. That the Adjudicator considered the definition of "permitted to work" and found that the company permitted the Employee to work the hours that she worked.*
>
> *b. That the Employee raised the issue of overtime and was told to keep track of her hours.*
>
> *c. That the Employee's timecards and timesheets showed that she was consistently recording overtime hours;*
>
> *d. That there was no evidence of a written policy requiring overtime authorization (despite the Appellant's witness suggesting the Employee had not been authorized);*
>
> *e. The Company did not "cause her to stop working those hours";*
>
> *f. The Company even kept records of the total number of hours worked in accordance with s. 2-38 of the Act, but then attempted to distance itself from those records.*
>
> *g. That if the Company did have an internet policy, it was not communicated or enforced.*
>
> *h. That the Appellant's witness did not even become aware of the Employee's internet history until he began preparing for the hearing before the Adjudicator;*
>
> *i. That time theft was not raised by the Appellants' when the Wage Assessment was being prepared;*
>
> *j. That there was no objection to the hours the Employee was recording on her timecards and timesheets, nor any suggestion that the Employee should change her approach;*
>
> *k. The Company approved the Employee's timecards and timesheets which identified the overtime hours she was claiming;*
>
> *l. That the likely explanation for management's apparent disinterest was that the Company had never intended to provide overtime pay, which was consistent with the Company's practice.*

[25] The Board found, however, that in concluding the Employee did not have the intent to commit theft, the Adjudicator did not fully consider all of the factors for assessing intent as suggested in the case law. These factors include the following[9]:

> • *The nature of the internet usage in question, including when the employee was on the internet and using it for personal reasons;*

[8] Ibid, at pp. 2-4.
[9] Ibid, para 60.

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

[26] The Board found that the Adjudicator considered some, but not all of the factors set out in the case law, and, while noting that these factors are not necessarily mandatory, determined that there were "gaps in the Adjudicator's reasoning that equate to an error of law".[10] The Board stated[11]:

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

[27] The Board therefore remitted the matter to allow the Adjudicator to complete the analysis.[12]

Extrapolation

[28] With respect to extrapolation, the Appellants argued that the Employee had admitted that her work habits in the final two months of her employment were reflective of her habits throughout the year, and that the Adjudicator disregarded this admission.

[29] The Board noted that the Adjudicator did not accept the Appellants' characterization of the evidence as disclosing an admission by the Employee to have worked in the same fashion over

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[10] Ibid, para 62 LRB.
[11] Ibid, para 69.
[12] Ibid, para 70.

the wage assessment period. The Board noted[13] that the Adjudicator addressed this argument in her Decision where she stated:

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

[30] The Board also noted[14] the Adjudicator's following summary of the Company's evidence:

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

[31] However, the Board found that it was not sufficient for the Adjudicator to completely reject the Appellants' characterization without providing an explanation as to why. The Board concluded:

> *[74] … To be sure, the Adjudicator was not required to "detail the way in which each item [was] assessed"[39]; however, the absence of an explanation on this central issue means the Board is not aware of the basic contours of the evidence and is unable to review the reasons for correctness, for example, to determine that the inferences made were rational.*
>
> *[75] When the matter is remitted, the Adjudicator shall provide reasons for her interpretation of this evidence.*

Credibility

[32] With respect to credibility, the Board noted[15] that it is well-established that findings of credibility and reliability are findings of fact.[16] The trier of fact is the person who is in the best position to make these determinations. Accordingly, the appeal body, in this case the Board, pays deference to these determinations.

[33] The Board found that the Adjudicator addressed the witnesses' credibility at various points throughout her Decision. The Board noted also that the Adjudicator specifically addressed the

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[13] Ibid, para 71.
[14] Ibid, para 72.
[15] Ibid, para 89.
[16] *R v Schaff,* 2017 SKCA 103 (CanLII) at para 42.

Appellants' arguments that the Employee was not credible because she failed to raise a claim for overtime for some 500 hours while she was still employed and that her co-workers also brought an "overly zealous claim" for overtime. The Board found that none of these were evidentiary matters that the Adjudicator overlooked. Rather, they were inferences that the Appellants asked the Adjudicator to draw despite the Adjudicator finding that there was no evidence of collusion or dishonesty. The Board specifically found that the Adjudicator did not commit an error by choosing not to draw those inferences.[17]

[34] The Board did, however, find that to the extent that the Adjudicator had not yet completed her analysis of the Employee's intent, the credibility assessment was not yet complete.[18]

Appellants Argument:

[35] The Appellants argue that the facts demonstrate the employee did not work the contracted time of 8 hours per day. Instead, the Employee shopped online, used her private email, looked for other jobs and performed other online searches instead of working for the Appellants. They argue the employee created the need for overtime by not completing her work during regular employment hours and that if she had worked during regular work hours, there would have been no need for overtime now being claimed.

[36] The Appellants argue that the Arbitrator erred in law when she disregarded two major admissions on the Employee's part: First, that she spent substantial time, which was shown on the printout from the computer on non-work related activities. Second, that her quality of work in the last year was the same in the last two months when she was committing time theft.

[37] The Appellants argue it would be grossly unfair and unjust to have the Ministry force an employer to pay overtime to an employee who worked on personal business during her normal employment hours which necessitated her to work overtime to complete her tasks that could have been done during the day. They argue this is time theft and that time theft has been considered in the case law, such as *Yorkton Cooperative Association v Retail, Wholesale Department* to be a serious breach of the employment relationship. They argue the Adjudicator failed to properly interpret how the courts have treated time theft.

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[17] 2023 LRB Decision para 95.
[18] Ibid, para 98.

[38] The Appellants argue that the Arbitrator's determination that time theft did not apply to the circumstances of this case was an error of law.

[39] Finally, the Appellants argue that the Employee was not a credible witness, and that the Board ought to assess the credibility of the Employee and the answers she gave. The Employer says:

- *The Employee made an extraordinary claim for overtime hours in the amount of 521.57 hours.*
- *The Employee did not complain about overtime until 10 or 11 months after her employment ended.*
- *The computer printouts from the Employee's computer indicated that the Employee spent on average 1.37 hours per day on non-work related internet searches;*
- *The Employee admitted to performing non-work related activities during working hours.*
- *The Employee admitted that she would have worked in the same fashion throughout the wage assessment period as she did for the period April 29 to June 30, 2021. Here the Employer argues that the Employee "admitted that she committed time theft and that her behaviour was the same throughout her employment therefore admitting that she committed time theft throughout her employment." (Appellants' Brief para. 50)*
- *The Employee did not clock out for lunch for 232 out of the 243 days she worked*
- *That the Employee never asked nor was she ever approved to work over her lunch break;*
- *That the Employee admitted to taking more lunches than recorded.*

[40] The Employer argues that "any reasonable person would understand that not working for 1.37 hours per day is an egregious amount of time to claim.

[41] The Employer argues that the Adjudicator failed to properly interpret how the courts have treated time theft. The Employer argues that characterizing the employee's actions a "simply mismanagement of time is a gross understatement of what was taking place."

[42] The Employer argues that the Adjudicator did have evidence before her of witnesses to the Employee taking lunch breaks without clocking out. Here, the Employer argues that Josh Jors provided evidence as someone who worked with the Employee, just not every single day. The Adjudicator therefore erred in law when she said there was no evidence to question the Employee's credibility regarding taking lunch breaks.

Director's Argument:

[43] The Director argues that this Board should not reconsider matters that have previously been decided in the first appeal. The Director says that the Appellants are challenging the Adjudicator's decision on a number of matters that have previously been decided and that matters that have already been decided are subject to the principle of *res judicata* and should not be re-considered on this appeal.

[44] The Director says that on its first appeal, the Appellant alleged that the Adjudicator disregarded the Employee's admission that she took more lunches than were reflected in the Wage Assessment. This matter was decided in the LRB Decision at paragraph 76-86 and was not remitted to the Adjudicator.

[45] On this issue of credibility, the Director says this Board previously determined that the Adjudicator did not overlook potential motivations for bringing a claim, the relationship between the Employee and her coworkers, and the time of her claim. These were addressed in the LRB Decision at paras 92-95.

[46] Finally, the Director argue that the issues raised by the Appellants are challenges to the Adjudicator's findings of fact and that the Adjudicator did not commit an error of law in making her findings.

Analysis and Discussion:

Whether the Employee had the requisite intent for time theft?

[47] In the Reasons for Decision in the Second Adjudicator's Decision, the Adjudicator provides additional analysis of the evidence as directed by the Board in the 2023 LRB Decision.

[48] First, the Adjudicator notes that she did consider the extent of the Employee's internet usage including her role and whether she was performing the job she was hired to do "while she was surfing the internet".

[49] The Adjudicator accepted that, based on the review of the internet log, the Appellants averaged Cassandra's non-work-related searches at an average of 1.37 hours per day. The Adjudicator also accepted that Cassandra conducted non-work-related searches for an average

of 1.37 hours per day during her last two months of work, which she noted "seems excessive".[19] Significantly, however, the Adjudicator goes on to explain[20]:

> *What this evidence does not reveal, however, is whether Cassandra was working while conducting these searches. Cassandra's evidence was that she "opened tabs but still did the work."*

[50] In addition, the Adjudicator considered the following evidence[21]. She says:

- *Cassandra said she was still doing her work with the internet search tabs open. Cassandra's evidence was that she "opened tabs but still did the work". This evidence was uncontroverted.*
- *The Appellants provided little evidence about the nature of Cassandra's duties, and no evidence about whether personal internet searches would have caused her to be wholly unproductive or to entirely disregard her duties.*
- *She found Cassandra a credible witness and believed her when she said she was working while having internet tabs open*

[51] The Adjudicator reiterated that no evidence from the Appellants was provided which might have contradicted, or at least cast doubt on, the Employee's testimony that (a) she performed her duties while her search tabs were open; and (b) that her responsibilities were such that she could perform her work duties while the search tabs were open. The Adjudicator noted the lack of evidence from the Appellants: She said:

> *The Appellants provided little evidence about the nature of Cassandra's duties, and no evidence about whether personal internet searches would have caused her to be wholly unproductive or to entirely disregard her duties. Were some of her responsibilities passive ones or were they all active ones requiring her full attention? Any of her former supervisors could have testified about this but they did not. Josh did not testify about this either.*

[52] This Board finds that in coming to her conclusion that the Employee did not have the intent to commit time theft, her Reasons for Decision demonstrate that the Adjudicator did consider the extent of the Employee's internet usage, the Employee's role and whether she continued to perform the job she was hired to perform, despite surfing the internet.

[53] The applicable factors that the case law suggest should be considered when assessing intent were considered by the Adjudicator. The Adjudicator's finding that the Employee did not have the intent to commit theft was based on the evidence that was presented at the hearing.

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[19] Second Adjudicator Decision, p. 4.
[20] Ibid, p. 4.
[21] Ibid, p.6.

This Board sees no legal error in the Adjudicator's fact finding on this point. Such a finding was supported by the evidence.

Did the Adjudicator commit errors in relation to extrapolation?

[54] The Appellants argued in the First Appeal that the Adjudicator erred in law when she stated that there was no evidence that the Employee was committing time theft prior to the two months before she quit. They argued that there is relevant evidence which the Adjudicator disregarded. Specifically, they say the Employee admitted that she committed time theft and that her behaviour was the same throughout her employment. Therefore, the Appellants argue, the Employee admitted that she committed time theft throughout her employment. They argue that "the only way to make a finding of fact that there was no time theft prior (to the) two-month period leading up to the employees quitting is by disregarding the evidence of the employee which is an error of law."[22]

[55] In the Adjudicator's Second Reasons for Decision, she provides further analysis explaining why she rejected the Appellants' interpretation of the evidence regarding extrapolation.

[56] First, she reiterated that she did not find "the Employee admitted that she would have worked in the same fashion over the wage assessment period" to be an accurate description of the Employee's evidence or admissions. The Adjudicator stated[23]:

> *I find (and found) no evidence of Cassandra acknowledging that she conducted personal internet searches throughout her last year of employment to the extent evidenced in the log covering her last two months of employment. She did not say she worked in this same fashion over the course of the wage assessment period, as suggested by the Appellants. She said she worked similar hours over the course of her employment, not that she surfed the internet over the course of her employment.*

[57] In her Decision[24], she provided a summary of the evidence of the Employee's cross examination to support her findings which included the following admissions from Cassandra:

- *She conducted personal internet searches but still did the work;*
- *She spent time on her computer doing non-work-related searches near the end of her employment;*
- *She agreed the searches having nothing to do with her employment were inappropriate. She explained that she had been taking a breather from working stressful hours;*

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[22] Appellants' Memorandum of Law, para 50.
[23] Second Adjudicator Decision, p. 8.
[24] Ibid, p. 8.

- *She agreed she was not authorized to do personal stuff;*
- *She said she did not take a lunch break everyday but acknowledged it was possible she took more than 40 lunches in 234 days but said she could not remember that far back;*
- *She acknowledged receiving and signing memos from her employer about areas she needed to improve on in May of 2021;*
- *She agreed she was unhappy when she left.*

[58] The Adjudicator also noted specifically that Cassandra was not at her best during her last two months of employment.[25]The Adjudicator noted: "Aside from the log of personal internet searches introduced by the Employer (ER-4), the evidence shows the employer was beginning to show dissatisfaction with Cassandra's work performance." In this regard, the evidence included Memos written up by Josh on May 4, 2021, May 10, 2021, and May 28, 2021, regarding her work performance.[26] Cassandra was asked to review and sign the memos, all of which said failure to improve would result in further discipline, up to and including termination.

[59] The Adjudicator noted that prior to this point, there was no evidence the employer had issues with Cassandra's work performance.[27] The Adjudicator stated that additional evidence of Cassandra not being at her best towards the end of her employment was found in her own testimony where she talked about the stress she was under and that she felt her complaints regarding her untenable workload were ignored by management. The Adjudicator stated[28]:

> *Despite feeling overwhelmed and demoralized, I find that Cassanrda continued to come in to work early and put in long days just as she had throughout the course of her employment with Auto Gallery. She explained that she dealt with the ongoing stress of her workload by distracting herself with personal internet searches. Although she admitted these searches were inappropriate, she explained that while these searches were open on her computer, she was still available to do her work and was still doing her work. Although Cassandra was not as focused as she could have been at the end, I find she was doing the best she could at the time, under the circumstances. Cassandra was physically at work and at her employer's disposal during the hours reflected on her timecards, timesheets, and in the Audit, and there is no evidence to the contrary. Nobody from management took issue with her starting work early in the morning or with her not clocking out for one-hour unpaid lunch breaks. Based on the evidence, I do not believe Cassandra was attempting to steal time from or defraud her employer.*

[60] Clearly, the Adjudicator found the Employee's workload and its impact on her engagement near the end of her employment to be relevant to her findings. This evidence goes to support the

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[25] First Adjudicator Decision, p. 14.
[26] Ibid, pp.14-15.
[27] Ibid, p. 15.
[28] Ibid.

Adjudicator's rejection of the Appellants' extrapolation argument. The evidence suggests that Cassandra's performance at work in the last two months had declined; she was feeling demoralized and unheard. The Adjudicator found that it was reasonable to accept that she took to the internet to distract herself and while she may have been less productive, she was still working while the browser was open and she was still at the Employer's disposal.

[61] The Board finds that there was evidence and rationale to support the Adjudicator's rejection of the Appellants' argument that the Adjudicator must assume Cassandra spent an average of 1.37 hour per day on personal internet searches throughout her last year of employment with Auto Gallery. It is reasonable to conclude from the evidence (or lack thereof), as the Adjudicator did, that the internet log for the last two months was not a reliable or likely indicator of Cassandra's internet useage over the entire year. The Adjudicator referred to evidence of Cassandra's disengagement and poor performance in the last two months of her employment. There was no evidence to suggest that those factors had been present throughout the entire wage assessment period.

Did the Adjudicator commit errors in relation to credibility

[62] In the 2023 LRB Decision, the Board found that "there is a direct relationship between intention to commit time theft and an employee's credibility" and that the analysis on the matter of the Employee's intent was incomplete.[29] The Board remitted this matter to the Adjudicator on this limited issue with respect to credibility.

[63] The Adjudicator completed her analysis as directed by the Board. In completing that analysis, she also addressed the credibility of the witnesses as is apparent in the following passages[30]

> *Cassandra said she was still doing her work with the internet search tabs open. Without evidence to the contrary from witnesses who supervised Cassandra's work or worked closely to and/or with her, this evidence is uncontroverted. Throughout her testimony, she answered questions in a straightforward and understated manner. She did not appear to tailor her answers to a preferred outcome. For example, see my analysis of her testimony about lunch breaks at the top of page 14 of my decision. Consequently, I believed her when she said she was working while having internet tabs open. However, it is reasonable to conclude that she would have been completing her work in a more accurate and timely manner had she not been distracting herself with personal internet searches and having*

[29] 2023 LRB Decision, para 96.
[30] Second Adjudicator Decision, pp 6-7.

> *them open on her computer. The facts of this case reveal a productivity issue on Cassandra's part – an issue her employer had just started to address with performance management measures in May of 2021, prior to her employment coming to an end in June of 2021.*
>
> ***Relevance of Employee's Stress***
> *The relevance of Cassandra's stress to the inquiry was meant to provide context to her state of mind and credibility. There is a direct relationship between intent to commit time theft and an employee's credibility. I found the reasons she gave for surfing the internet while at work to be believable. She did not deny distracting herself and admitted the searches were inappropriate. She did not try to minimize or justify her behaviour, which lent to her credibility in my view. In most of the cases cited by the Appellants in support of the appeal, employees lied about the nature and extent of their activities, even lying during subsequent hearings. I found Cassandra's explanation for the personal computer searches on company time to be in keeping with the evidence, even the performance Memos from her employer. I accept that she was not coping well by the end of her employment and that her productivity had suffered as a result. I found her stress relevant to her state of mind – she had not set out to defraud her employer but was simply trying to cope with what she considered to be an unmanageable workload. Her method of coping was not productive, and she admitted that. Cassandra's stress did not excuse her behaviour, and I did not intend to suggest that it did.*

[64] The Adjudicators states that the relevance of the Employee's stress was meant to provide context to her state of mind and credibility. The uncontradicted evidence from the Employee was that she was initially hired for accounts payable put promoted to Deal Processor in October 2019. She said she was still responsible for accounts payable and when a co-worker left she also become responsible for accounts payable. When the other Deal Processor left in 2020, she was the only one left. She was doing three jobs.

[65] The Adjudicator found that the Employee was not coping well by the end of her employment and that her productivity had suffered. She found that the Employee had not set out to defraud the Appellants but was simply trying to cope with what she considered to be an unmanageable workload. The Adjudicator says that "Cassandra's stress did not excuse her behaviour, and I did not suggest that it did."

[66] It is clear from the Adjudicator's reasons that the Employee's stress was only relevant to her state of mind, demonstrating that she did not have the requisite intention to commit time theft. The Adjudicator found this to be a believable explanation for why she was conducting personal internet searches on work time. The Adjudicator found that the Employee did not have the intention to commit time theft, and also found her to be a credible witness.

[67] Additionally, the Board previously determined in the 2023 LRB Decision that the Adjudicator did not overlook potential motivations for bring a claim, the relationship between the Employee and her co-workers and the timing of the claim being near the end of the time set out

in the Act.[31] The Second Adjudicator Decision does not make any new findings on these issues. The Board finds no basis for interfering with the Board's previous findings on these matters

[68] The Adjudicator's credibility finding demonstrates a coherent chain of reasoning. She referred to the Employee's testimony and outlined her reasons for concluding that the Employee did not intend to commit time theft. She found the reasons given by the Employee to be believable.

[69] The Adjudicator's findings of credibility were exhaustive and clear. The Appellants suggest that the Board should overturn the Adjudicator's findings of credibility; however, there is no basis upon which the Board can do so. The Adjudicator's reasons have been examined by the Board in the 2023 LRB Decision and again in the present appeal.

[70] This Board finds that there has been no legal error in the Adjudicator's assessment of the credibility of the Employee.

Lunches

[71] The Board found in its first Decision that the Adjudicator committed no errors in relation to the lunches and that there was no basis to interfere with the Adjudicator's conclusion on this issue.[32]

[72] The Second Adjudicator Decision makes no new findings on the lunch issue, or any issue for that matter. It simply provides more detailed reasoning based on the evidence and findings outlined in the First Adjudicator Decision. Accordingly, there is no basis to interfere with the Board's previous decision on this matter.

Whether the Adjudicator Erred in Interpreting the Case Law

[73] The Appellants argue that the case law regarding time theft describe it as a serious matter facing employers. They refer to the decision of Mr. Justice Kalmakoff in *Yorkton Cooperative Association*[33] where he stated:

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[31] 2023 LRB Decision, paras 92-95.
[32] Ibid, paras 76-86.
[33] *Yorkton Cooperative Association v Retail, Wholesale Department Store Union,* 2016 SKQB 296 at para 48 referred to in Appellant's Memorandum of Law and Argument, para 20.

> *A review of relevant arbitral jurisprudence leads me to conclude that there is a consensus that time theft, or falsification of hours for the purpose of receiving pay for time not worked, is a serious breach of the employment relationship. It constitutes fraud and theft against the employer.*

[74] The Adjudicator, however, specifically reviewed the evidence to determine whether or not the Employee had the requisite intent to commit time theft. She did not ignore or disregard the case law as the Appellants suggest.

[75] In fact, the Adjudicator provided further analysis in accordance with the directions from the Board in the 2023 LRB Decision demonstrating that she had considered the factors that appeared to be absent from her consideration in the First Adjudicator's Decision.

[76] Further, the Adjudicator reviewed the case law and concluded that there were numerous facts distinguishing the cases relied upon by the Appellants from the case at hand[34]. She noted:

- *In Yorkton Co-operative Association v Retail, Wholesale Department Store Union, 2016 SKQB 296 (CanLII), the grievor had intentionally falsified her time sheets claiming pay for time she had not worked (she closed the store and left early), so fraudulent intent was easy to find. To make matters worse, when confronted by her employer, she lied, and she continued to lie at the hearing.*

- *In Canada Safeway Ltd. And U.F.C.W. Loc. 200 (Mastin) (Re), 2002 CanLII 78947 (BC AL) the grievor left her shift two hours early and claimed for a full shift, deliberately falsifying her timecard. Five witnesses were called to testify about the grievor's actions, about relevant company polices and about the effect of her actions on the workplace. The evidence of the witnesses showed the grievor lied and was continuing to lie about her intentions and actions. Her evidence was assessed agains the other witnesses who testified on behalf of the employer, and she was found to be unbelievable. The issue turned on her credibility, which was clearly shown to be lacking.*

- *In Andrews v. Canada, 2011 CarswellNat 3564, 2011 PSLRD 100 (Can PSLRB), the grievor was spending more than half of his workday viewing pornographic materials on his work computer. Both of his supervisors were called to give evidence about the nature of the grievor's duties and his work performance. In the end, the adjudicator found a lack of fraudulent intent on the grievor's part.*

[77] The Board finds that there is no merit to this ground of appeal.

Conclusion and Decision:

[78] The Appellants are asking this Board to take the evidence that was before the Adjudicator and interpret it differently.

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[34] Second Adjudicator's Decision, pp. 5-6.

[79] The Appellants are asking this Board to conduct a review of all of the evidence and come to a conclusion different than the conclusions reached by the Adjudicator. An appeal is not, however, simply another opportunity to argue the merits of the claim to another decision maker.

[80] The Board is limited to reviews on questions of law alone. 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. Where there is some relevant evidence to support a finding of fact, that finding may not be disturbed on appeal.

[81] The arguments set out by the Appellants relate to findings of fact made by the Adjudicator. The Appellants assert that the Adjudicator was wrong in her decision on the facts. In essence, the Appellants assert that the Adjudicator did not find the facts as they suggested she should have.

[82] However, there was evidence to support the Adjudicator's factual decisions and all of her findings. The Board in the 2023 LRB Decision found that the Adjudicator had not made it clear in her Reasons for Decision as to whether she considered various facts and therefore remitted the matter to the Adjudicator to complete the analysis. The Adjudicator did that. This Board has reviewed those additional reasons which form part of her Amended Decision, and this Board is satisfied that there is indeed evidence to support her findings of fact.

[83] Further, the Adjudicator has not made any irrational inferences of fact. Again, the Board in the 2023 LRB Decision found that the Adjudicator had not explained her reasons for rejecting the Appellants' interpretation of the evidence regarding extrapolation and remitted the matter back to the Adjudicator to complete the analysis. The Adjudicator did that. This Board has reviewed those additional reasons and is satisfied that the Adjudicator did not disregard any relevant evidence nor draw any irrational inferences of fact.

[84] Finally, the Board in the 2023 LRD Decision reviewed and summarized the case law with respect to time theft. The Board found at that time that the Adjudicator had not considered all of the factors that the case law suggests are relevant to a determination of intent to commit time theft and remitted the matter back to the Adjudicator. As noted, the Adjudicator provided further analysis demonstrating that she had considered the factors that appeared to be absent from her consideration. She also reviewed the case law in her further analysis and concluded that there

were numerous facts distinguishing the cases relied upon by the Appellants from the case at hand.

[85] In this case, there was evidence to support the Adjudicator's factual decisions and all of her findings. It is not open to this Board to overturn those findings of fact. In my view, it cannot be said that the Adjudicator's findings were irrational or based upon no evidence or based on a mischaracterization of the evidence. Nor can it be said that the Adjudicator failed to take into account relevant evidence. The Adjudicator provided justification for her findings, and she pointed specifically to evidence supporting her findings. I find there is no error of law and no basis for this Board to interfere with the Adjudicator's decision.

[86] As a result, with these Reasons, an Order will issue that the Appeal in LRB File No. 102-22 is dismissed.

[87] The Board thanks the parties for the helpful submissions they provided, all of which were reviewed and considered in making a determination in this matter.

DATED at Regina, Saskatchewan, this **9th** day of **September, 2024.**

LABOUR RELATIONS BOARD

Carol L. Kraft
Vice-Chairperson