ALPHA PHYSICAL THERAPY & HEALTH CENTER P.C. LTD., Appellant v CAREY DALE, Respondent and DIRECTOR OF EMPLOYMENT STANDARDS, Respondent

LRB File Nos. 078-25 and 250-24; July 24, 2025
Chairperson, Kyle McCreary (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*
Citation: *Alpha Physical Therapy v Director of Employment Standards*, 2025 SKLRB 32

For the Appellant, Alpha Physical Therapy and Health Center P.C. Ltd.:	David R. Barth
For the Respondent, Director of Employment Standards:	Savannah L. Downs
For the Respondent, Carey Dale:	Self-represented

Appeal of a Wage Assessment – Disputed Findings of Fact – No Error in Principle – Appeal Dismissed

Appeal of a Wage Assessment – Matters Not Raised Before Adjudicator – Cannot Raise Matters for the First Time on Appeal – Appeal Dismissed

Appeal of a Wage Assessment – Onus of Proof on Quantum – Appeal dismissed as Adjudicator did not err in finding wage assessment quantum disproven on a balance of probabilities

REASONS FOR DECISION

Background:

[1] **Kyle McCreary, Chairperson:** Alpha Physical Therapy & Health Center P.C. Ltd. (the "Corporation") appeals pursuant to Section 4-8 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 (the "Act"), a decision of an adjudicator dated April 21, 2025 ("The Adjudicator's Decision"). The Registrar selected the adjudicator to hear the appeals of the Corporation and Carey Dale on March 12, 2025 ("the Adjudicator"). The Adjudicator allowed Ms. Dale's appeal raising the wage assessment issued by the Director of Employment Standards ("the Director) in favour of Ms. Dale from $5,204.36 to $8,320.72 and dismissed the Corporation's appeal.

[2] The hearing before the Adjudicator included evidence from Ms. Dale, Mohammed Nazari on behalf of the Corporation, and the Director's wage assessment.

[3] The Corporation argued that Ms. Dale was only entitled to a commission if certain conditions were met. The Adjudicator found that the conditions were not a part of the employment

contract and that Ms. Dale was entitled to commission as it fell within the definition of "total wages" under Part II of the Act. As it relates to quantum, the Adjudicator found on a balance of probabilities that the commission owed was greater than had been estimated by the Director in the wage assessment and fixed the amount based on the evidence before the Adjudicator.

[4] This matter was scheduled to be heard by the Board on July 21, 2025, with the parties given deadlines to file written submissions. The Director filed written submissions. The Corporation did not file written submissions and instead filed cases with the Board.

Argument on behalf of the Appellant:

[5] In the Appeal before this Board, the Corporation argues that the adjudicator erred in law in the following ways:

1. *The Adjudicator's Decision fails to properly assess the evidence in amending the wage assessment;*
2. *The Adjudicator's Decision erred in the approach to interpretation of the contract;*
3. *The Adjudicator's Decision erred in jurisdiction as discretionary bonuses lie outside of the Adjudicator's jurisdiction; and*
4. *The Adjudicator's Decision erred in finding that the employer's retention bonus was within the definition of "total wages" as defined in s. 2-1 (v) of the Act.*

Argument on behalf of the Director:

[6] The Director argues that the Board is limited to questions of law and the Corporation has not raised an issue of law. The findings related to commission and the interpretation of the contract are mixed fact and law and supported by the factual record before the Adjudicator.

[7] As it relates to the interpretation of discretionary bonus, the Director argues that this was not raised at the hearing before the adjudicator and should not be permitted as a new issue. Further, the Director argues that even if considered that the commission does not meet the definition of discretionary bonus.

[8] The Director takes no position on the amendment of the wage assessment in the Adjudicator's Decision.

Argument on Behalf of Ms. Dale:

[9] Ms. Dale argues against the Corporation's appeal. Ms. Dale maintains the position from before that Adjudicator that it was a commission and she never agreed to it being contingent on staying with the Corporation until a specific date. Ms. Dale supports the Adjudicator's amendment of the wage assessment.

Relevant Statutory Provisions:

[10] The jurisdiction of the Board to hear this appeal is pursuant to s. 4-8:

> ***Right to appeal adjudicator's decision to board***
> *(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:*
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> *(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*
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> *(b) serve the notice of appeal on all parties to the appeal.*
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> *(4) The record of an appeal is to consist of the following:*
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> *(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;*
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> *(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;*
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> *(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;*
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> *(d) any exhibits filed before the adjudicator;*
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> *(e) the written decision of the adjudicator;*
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> *(f) the notice of appeal to the board;*
>
> *(g) any other material that the board may require to properly consider the appeal.*
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> *(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.*
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> *(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.

[11] The authority of an adjudicator when hearing an appeal are set out in s. 4-6 of the Act:

Decision of adjudicator
4-6*(1) Subject to subsections (4) and (5), the adjudicator shall:*

(a) do one of the following:

(i) dismiss the appeal;
(ii) allow the appeal;
(iii) vary the decision being appealed; and

(b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.

(2) Repealed. 2020, c 12, s.12.

(3) Repealed. 2020, c 12, s.12.

(4) If, after conducting a hearing concerned with section 2-21, the adjudicator concludes that the employer has breached section 2-21, the adjudicator may exercise the powers given to the Court of King's Bench pursuant to sections 38 to 41 of The Saskatchewan Human Rights Code, 2018 and those sections apply, with any necessary modification, to the adjudicator and the hearing.

(5) If, after conducting a hearing concerned with section 2-42, the adjudicator concludes that the employer has breached section 2-42, the adjudicator may issue an order requiring the employer to do any or all of the following:

(a) to comply with section 2-42;

(b) to pay any wages that the employee has lost as a result of the employer's failure to comply with section 2-42;

(c) to restore the employee to his or her former position;

(d) to post the order in the workplace;

(e) to do any other thing that the adjudicator considers reasonable and necessary in the circumstances.

[12] The Director's authority to issue wage assessments is pursuant to s. 2-74 of the Act:

Wage assessments
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, c 12, s.5.

(5) Repealed. 2020, c 12, 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.

[13] The Act defines “wages” and “total wages” in ss. 2-1(t) and (v):

***2-1** In this Part and in Part IV:*

…

(t) “total wages” means all remuneration that the employee is paid or entitled to be paid by his or her employer but does not include:

(i) bonuses payable at the discretion of the employer; or
(ii) tips or other gratuities;

…

> *(v) "wages" means salary, commission and any other monetary compensation for work or services or for being at the disposal of an employer, and includes overtime, public holiday pay, vacation pay and pay instead of notice;*

Analysis and Decision:

Standard of Review

[14] Pursuant to s. 4-8(1) of the Act, the Board's jurisdiction is appellate in nature and limited to questions of law. The standard of review on identifiable and extricable questions of law is correctness: *Tysdal v Cameron*, 2025 SKLRB 1 (CanLII); and *Buchanan (Rural Municipality) v Veldman*, 2024 SKCA 111 (CanLII).

[15] On questions of fact and questions of mixed fact and law, the Board only has jurisdiction where there is an extricable question of law, or the Adjudicator errs in principle in its findings of fact. The Saskatchewan Court of Appeal discussed errors in law in findings of fact in *P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission)*, 2007 SKCA 149 (CanLII):

> *[68] It follows that a tribunal cannot reasonably make a valid finding of fact on the basis of no evidence or irrelevant evidence. Nor can it reasonably make a valid finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence.1 To do so is to err in principle or, in other words, to commit an error of law. (In addition to the cases referred to above, see Toneguzzo-Norvell v. Burnaby Hospital, 1994 CanLII 106 (SCC), [1994] 1 S.C.R.114 at 121; Wade & Forsyth, Administrative Law (7th ed.) (Oxford: Clarendon Press, 1994) at pp. 316—20; Jones & de Villars, Principles of Administrative Law (4th ed.) (Toronto: Thomson Carswell, 2004) at pp. 244—43 and 431—36; and Hartwig v. Wright (Commissioner of Inquiry), 2007 SKCA 74). Nor can a tribunal reasonably make a valid finding of fact based on an unfounded or irrational inference of fact.*

[16] The Appellants appear to have raised three distinct issues. Whether the onus of proof on the calculation of a wage assessment was misapplied; whether it was an error to find the commissions at issue to be within the definition of wages, and whether the contract was properly interpreted.

[17] All three of these issues are primarily issues of mixed fact and law and require the Corporation to demonstrate an error in principle in the Adjudicator's Decision. To the extent that there are extricable issues of law, those are considered on a standard of correctness.

Did the Adjudicator err in varying the amount of the wage assessment?

[18] The Corporation alleges that there was a breach of procedural fairness in relation to the Adjudicator's Decision allowing Ms. Dale's appeal on the amount of the wage assessment. The Corporation argues that Adjudicator's decision was procedurally unfair and arbitrary in discrediting the only available calculations and still finding an amount owing. The Corporation further argues that the evidence could not have supported the conclusion as to amount in the Adjudicator's decision. The Board disagrees that there was a breach of procedural fairness. Further, based on a consideration of onus of proof imposed by s. 2-75(9) of the Act, there is no error in the Adjudicator's Decision as it relates to the quantum of the wage assessment.

[19] As it relates to procedural fairness, there was disclosure of the case to meet and an opportunity to meet it. Ms. Dale appealed the quantum; the Corporation was aware that quantum was in issue. The Corporation had an opportunity to respond to the evidence the Adjudicator relied upon. There is no breach of procedural fairness on the quantum.

[20] The Corporation argued that the Adjudicator should have ordered a recalculation of the assessment. The Adjudicator has the power to allow, dismiss, or vary decisions being appealed. Adjudicators do not have the authority to remit decisions to the Director. However, when considering the application of the onus imposed by s. 2-75(9), a recalculation was unnecessary.

[21] The starting point for a wage assessment is that the Director's wage assessment is presumptive proof of the amount owing unless an Appellant disproves that the amount is owing. This onus was discussed by the Board in *Gina Meacher (Gee's Family Restaurant) v Hunt,* 2017 CanLII 43925 (SK LRB):

> *[33] As already stated, subsection 2-75(9) of the SEA stipulates that "in the absence of evidence to the contrary", the Wage Assessment is deemed to be accurate. This statutory provision creates a statutory presumption that can be rebutted by an appellant. However, an appellant bears the onus to prove on a balance of probabilities, i.e. it is more likely than not, that the amount identified in a wage assessment is inaccurate. In order to satisfy this burden, an appellant must present evidence that "is sufficiently clear, convincing and cogent". See: FH v McDougall, [2008] 3 SCR 41, 2008 SCC 53, at para. 46 per Rothstein J.*

[22] If the initial onus is met to rebut the presumption in favour of the wage assessment, the normal civil standard applies, that is, is it more likely than not that a specific amount is owing.

[23] The Adjudicator's Decision does not explicitly reference the initial onus to disprove the wage assessment. However, the decision does apply a balance of probabilities analysis to whether the wage assessment has been disproven. After reviewing the two commission

calculations done by the Corporation, and the evidence in relation to the previous year's commission, the Adjudicator's Decision concludes:

> *It is clear that Alpha owes Carey Dale money for commissions earned in 2024, and I don't have much confidence in Mohammad's calculations. However, on the balance of probabilities, I believe Carey's commission for 2024 would be closer to $10,000 than $5,000. Therefore, my decision is that the Employers appeal is dismissed. I am allowing the Complainants appeal to the extent that the figure from August 4, 2024, email from Mohammad that indicated Carey had earned $7790.96 from January 1 to June 30, 2024, is correct. For the months of July and August I will accept the figures Mohammad puts forward in EE5, since his figures from the August 4 email are assumptions and I have no other sources to draw from. Those being $374.28 for July and $155.48 for August.*

[24] The Adjudicator's Decision applies the correct legal test as it relates to onus, it needed to be proven on a balance of probabilities that the wage assessment was incorrect. The Adjudicator's Decision found that it was. Once that was found, the Adjudicators' Decision relies on the best evidence available to vary the assessment amount. There are no extricable errors in law in relying on the only available evidence.

[25] The Corporation complains the evidence was deficient for the conclusion reached and that the Adjudicator should not have relied on the earlier calculation of commission by the Corporation as that calculation was done to induce Ms. Dale to remain with the Corporation. It was a tactical choice of the Corporation to present the evidence it did related to the calculation of the commission. The Corporation is in the best position to present evidence on how to calculate 10 percent of its net profit. The Adjudicator's Decision is based on the evidence that was presented and the evidence presented is capable of supporting the calculation used. The weighing of evidence to prefer the earlier calculation of the commission by the Corporation does not constitute an error of law. A party which chooses not to put its best foot forward risks an adverse ruling, it does not have a right to re-litigate when its initial evidence is unsuccessful.

Did the Adjudicator err in Contractual Interpretation?

[26] The Corporation argues that the Adjudicator failed to interpret the contract and misinterpreted the contract. The Director and Ms. Dale take contrary positions. The Corporation relies on *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 (CanLII), [2014] 2 SCR 633("*Sattva*"), and *Moose Jaw Board of Education v. Langstaff et al*., 1984 CanLII 2446 (SK KB), to argue that errors in contractual interpretation constitute errors of law.

[27] Errors of contractual interpretation are rarely issues of law. As stated by the Supreme Court of Canada in *Sattva*, issues of contractual interpretation are very often issues of mixed fact and law:

> *[50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.*
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> *[51] The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, Southam identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:*
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> > *If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, Standards of Review Employed by Appellate Courts (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]*
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> *[52] Similarly, this Court in Housen found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.*
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> *[53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (Housen, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (King, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.*
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> *[54] However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the AA, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that*

> *the proposed ground of appeal has been properly characterized. The warning expressed in Housen to exercise caution in attempting to extricate a question of law is relevant here:*
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> > *Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" . . . . [para. 36]*
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> *[55] Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the AA from an arbitrator's interpretation of a contract.*

[28] This Board must be cautious in finding an error of law in the contractual interpretation of the Adjudicator. As it relates to the allegation that the Adjudicator failed to interpret the contract as it relates to the commission, the Board disagrees. At page 6, the Adjudicator reached the conclusion that the commission was 10% on net profit:

> *Mohammed's evidence regarding his commissions retention policy starts off as a 10% of monthly net profit to be paid on June 1 of the following year, then becomes that it will be paid only if still employed, then to be paid only if he has had time to recruit and train a replacement in the event the current employee leaves. His first rendition was in writing, the second and third were verbal and appear in e-mails only after Carey gave her notice.*
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> *Carey received her 2023 commission but never received her January-August 2024 commission. Her testimony that she thought the June 1st pay-out, was the company's year end policy is credible. Mohammad's ever changing commission pay-out policy lacks credibility, therefore Carey's expectation to be paid her commission was a legitimate expectation.*

[29] As is evident from the credibility findings behind this conclusion, it is a question of mixed fact and law. The Board finds no extricable error of law in the question of interpreting the amount of the commission or whether the commission was contingent on remaining employed until a certain date. The Board dismisses this ground of appeal.

Did the Adjudicator Err in Jurisdiction?

[30] The Corporation argues that the Adjudicator's Decision exceeded the jurisdiction provided by the Act because discretionary bonuses are outside the definition of "total wages". The Board finds this issue is properly discussed under the next heading. The Act grants the Adjudicator the authority to hear appeals of wage assessments. The wage assessment was issued and appealed within the required timeline and in the required form. The Adjudicator had jurisdiction to determine

the validity of the wage assessment. It is within the Adjudicator's jurisdiction to uphold the wage assessment.

Did the Adjudicator Err in the interpretation of a Discretionary Bonus?

[31] The Corporation argues that the Adjudicator erred in law in finding that the commission was part of total wages and failed to do the analysis of whether this was a discretionary bonus. The Director argues that this is a new issue and the Corporation should not be permitted to raise it pursuant to the Boards decision in *Carrier v SIGA*, 2025 SKLRB 7 (CanLII) ("*Carrier*"). In *Carrier*, the Board stated that there is a general prohibition on new issues, subject to the Board's discretion to permit new issues in the interest of justice:

> *[16] The general prohibition against new arguments on appeal was discussed by the Court of Appeal in Zunti v Saskatchewan Government Insurance, 2023 SKCA 82 (CanLII):*
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> > *[29] As a general rule, this Court does not permit new arguments to be raised for the first time on appeal: see, for instance, Silzer v Saskatchewan Government Insurance, 2021 SKCA 59 at paras 35–39 [Silzer]; Ernst v Saskatchewan Government Insurance, 2019 SKCA 12 at para 8, 34 MVR (7th) 180 [Ernst]; and Farr-Mor Fertilizer Services Ltd. v Hawkeye Tanks & Equipment Inc., 2002 SKCA 44 at para 3, 219 Sask R 148. The theory underlying this stance rests in the desirability for finality in litigation and that the law "requires litigants to put their best foot forward" (Barendregt v Grebliunas, 2022 SCC 22 at para 38, 469 DLR (4th) 1 [Barendregt], quoting Danyluk v Ainsworth Technologies Inc., 2001 SCC 44 at para 18, [2001] 2 SCR 460) and that they not get a "second kick at the can" (S.F.D. v M.T., 2019 NBCA 62 at para 24, 49 CCPB (2nd) 177). Where a similar bias-type argument was raised on appeal in Ernst, this Court observed that it would be unfair to SGI to be required to "respond where that party might have adduced additional evidence at trial if it had been aware of the issue" (at para 8).*
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> *[17] Similarly, this Board also took the position that it is inappropriate to raise new issues on appeal in Stimco Services Inc. v Robert Steman and Director of Employment Standards, Government of Saskatchewan, 2021 CanLII 51233 (SK LRB):*
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> > *[24] It is generally inappropriate to raise new issues for the first time on appeal; issues should be raised at the first opportunity so that they can be addressed in a timely manner. The Employer has provided no explanation for why it could not have raised this issue during the prior proceedings, whether at the time of the wage assessment or before the adjudicator. The Board notes that there is nothing in the record that could have alerted the adjudicator to any jurisdictional issue. . .*
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> *…*
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> *[19] These rules are not to be applied with too much rigidity. The Board has discretion to consider issues that were not raised at first instance where it would be in the interests of justice to do so. The Board does not consider it to be in the interests of justice in this case as the Appellant was aware of the issues, could have raised them to the Adjudicator, and it is reasonable to expect that the Appellant should have raised issues as to the hearing procedure to the Adjudicator.*

[32] The Board does not consider it to be in the interests of justice to permit the raising of new issues in this case because the Corporation was aware of the terms of its own contract and could have raised the argument that it was not a commission but a bonus to the Adjudicator.

[33] However, in the interests of completeness, the Board will consider the merits of whether the commission should have been considered a discretionary bonus. The Director relies on Rosscup *v. Westfair Foods Ltd*., 1999 ABQB 629 (CanLII)("*Rosscup*"), *Christie v CitiFinancial Canada Inc.,* 2015 ABQB 487 (CanLII), and *Grainger v Pentagon Farm Centre Ltd.*, 2019 ABQB 445 (CanLII), in arguing that the commission was not a discretionary bonus. The Corporation does not disagree on the applicable law but argues that the test for a discretionary bonus is met.

[34] While the wording of statutory exceptions in the Act differs from the Alberta legislation at issue in those cases, the Board finds the comments in *Rosscup* to be helpful in this analysis:

> *[45] In determining whether or not the bonus was discretionary, I found the comments of Hutchinson J. in Williams v. Westfair Foods Ltd. (1996) Unreported. Calgary Action No. 9501-13571 (Q.B.), to be instructive when he quoted from Turner v. Canadian Admiral Corporation, (1980) 1 C.C.E.L. 130 at 133:*
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> > *Persons at the plaintiff's level received an annual increase and bonus as a matter of course. Historically, increases and bonuses were forthcoming every year. The immediate past president of the company testified that these sums were regarded as part of the total compensation package of senior management. As I view the pattern, they formed and integral part of the applicable salary structure; and as far as the plaintiff and others in comparable positions were concerned, they were 'money in the bank' so to speak. The defendant is not entitled to deny the plaintiff the salary increase and bonus that would have accrued to him during the notice period. While technically there may be a discretion as the defendant argues as to whether these payments should be made to a particular employee, that discretion has never been exercised against an employee; and it would be unfair here in my opinion to deprive the plaintiff of these salary payments.*
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> *[46] Hutchinson J. went on to find that:*
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> > *The size of the bonus as a component of the total remuneration package is a strong indication that it did form an integral part of the plaintiff's expected remuneration paid as it was over the past three years.*
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> *[47] In the present case, Westfair's discretion to withhold or reduce a bonus payment had never been exercised in the eleven years of Ms. Rosscup's employment. The bonus was calculated using a widely known formula and duly paid every quarter. Ms. Rosscup testified that she believed the bonus was a part of her regular remuneration, and that she was therefore entitled to receive it. The fact that Westfair paid Ms. Rosscup the bonus both during her maternity leave and on her final pay cheque after her 1986 resignation is evidence that the defendant also regarded the bonus as a nondiscretionary component of employee wages.*

[35] Based on this analysis, and the ordinary and grammatical meaning of discretionary bonus, the question the Board must determine is whether a payment is a bonus or ordinary pay and whether it is actually discretionary. In determining this, the Board should consider the pattern of previous conduct as it relates to payments, the relation of the bonus to total remuneration, and whether there is actually discretion in the contractual term.

[36] In this appeal, the question of discretion is determinative. The commission was not discretionary. This was a finding of the Adjudicator, and it is supported by the evidence. In particular, the wording of the original offer of employment dated March 12, 2023. In that offer, it is stated "Pay will be $28.00 an hour plus a commission." There is no discretion in this formulation of Ms. Dale's compensation. Even in the Corporation's interpretation of the commission being contingent on specific events, there is no evidence that if those conditions are met that the Corporation had discretion not to pay the earned commission.

[37] This ground of appeal is dismissed as a new issue. Even if considered on the merits, it would also be dismissed.

Conclusion:

[38] The Corporation has not established an error of law. The appeal is therefore dismissed. The Corporation may seek leave to appeal to the Court of Appeal in accordance with s. 4-9 of the Act.

[39] As a result, with these Reasons, an Order will issue that the Appeal in LRB File No. 078-25 is dismissed and the decision of the Adjudicator in in LRB File No. 250-24 is affirmed.

[40] 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 **24th** day of **July, 2025.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson