



**DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION PURSUANT TO SECTION 2-75
AND 4-6 OF *THE SASKATCHEWAN EMPLOYMENT ACT***

APPELLANTS: **BOULEVARD REAL ESTATE EQUITIES LTD. and CARL DIODATI, MICHAEL GIUFFRE and ANTHONY GIUFFRE, as directors of Boulevard Real Estate Equities Ltd.**

RESPONDENTS: **VALERIE BOLDT and DIRECTOR OF EMPLOYMENT STANDARDS, EMPLOYMENT STANDARDS DIVISION, MINISTRY OF LABOUR RELATIONS AND WORKPLACE SAFETY**

Jeff Villamil, Lawyer, Appearing for the Appellants

Andrew Langgard, Employment Standards Officer, Appearing for the Director of Employment Standards, Employment Standards Division, Ministry of Labour Relations and Workplace Safety

DATE OF HEARING: **October 12, 2016**

PLACE OF HEARING: **3rd Floor Boardroom
1870 Albert Street
Regina, Saskatchewan**

LRB File No. 153-16; Wage Assessment No. 8041

I. INTRODUCTION

This is an appeal of a Wage Assessment brought by Boulevard Real Estate Equities Ltd. (the Company) and its directors, Carl Diodati, Michael Giuffre and Anthony Giuffre. Wage Assessment No. 8041 directed the Company and its directors to pay \$5,459.38 to Valerie Boldt (Valerie) or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act). Prior to the hearing, Wage Assessment No. 8041 was revised to \$5,663.43.

On October 12, 2016, the following individuals attended the hearing:

- Lindsay Winslow (Lindsay), HR Leader and employee of the Company (witness for the Appellants);
- Jeff Villamil, Lawyer for the Company;

- Valerie Boldt (Valerie), Complainant and former employee (witness for the Respondents);
- David Didych, Valerie's spouse (observer);
- Andrew Langgard, Employment Standards Officer; and
- Jas McConnell, Employment Standards Officer (observer).

II. PRELIMINARY MATTERS/OBJECTIONS

Although he would lead Valerie's case, Mr. Langgard advised he was representing the Director of Employment Standards and not Valerie.

III. THE DISPUTE

On May 26, 2016, the Director of Employment Standards issued Wage Assessment No. 8041 in the amount of \$5,459.39 against the Company and its directors. The Appellants appealed pursuant to section 2-75 of the Act.

The Company filed its appeal by way of a letter dated June 9, 2016 (the Notice of Appeal) and it includes the following statements:

We are appealing this on the basis that in the employment contract (attached) which Ms. Boldt signed it clearly states in section 3, hours of work "you will not be permitted to work overtime hours unless approved in advanced by the Company. Approved overtime will be paid in accordance with the Employment Standards Code (Saskatchewan)." Ms. Boldt never contacted anyone in a leadership capacity to get approval for any worked overtime thus going against the contract in which she signed on August 18, 2014.

Much of the correspondence that Ms. Boldt claims as overtime is not work related nor solicited work. She has included overtime for things such as sending a friends resume to recruiting (Feb3/15, complaining about her supervisor (June 24, 2015), she was even asked on August 28th to stop emailing as she was on a doctor prescribed sick leave (August 28-September 5). In your assessment that also shows as calculated work time but should not have been scheduled as time worked as she was on vacation time as we don't have short term disability.

You have calculated overtime for a number of stat weeks, all employees including Ms. Boldt are given a paid lieu day when the stat falls on a regular day off this is also the case for Ms. Boldt so she would not be entitled to overtime for the weeks of October 18, 2014, February 21, May 23, August 8 or September 12, 2015 as she would have gotten a lieu day to use at a later date.

On September 15, 2016, the Director of Employment Standards amended Wage Assessment No. 8041 to reflect total wages owing of \$5,663.43. The amendment added wages for two days where Valerie worked public holidays but was not paid premium pay (January 1 and July 1, 2015).

The main issue is whether or not Valerie is entitled to overtime pay. There is also an issue relating to whether or not Valerie is entitled to premium pay for public holidays.

IV. THE FACTS

At the beginning of the hearing, the parties agreed to the following basic set of facts:

- Boulevard Real Estate Equities Ltd. is a registered business in Saskatchewan.
- Valerie was employed at the Company initially as a cleaner in Moose Jaw and then as a Sales & Service Associate in Regina.

The parties tendered evidence by way of sworn testimony and documents. Lindsay testified for the Appellants and Valerie testified for the Respondents.

The following exhibits were entered into evidence:

Employer Exhibits (Appellants)

- ER1 – Copy of Statement of Earnings and Deductions for Valerie dated September 9, 2015 (1 page);
- ER2 – Copy of statement for Vacation Pay on Valerie's final check (1 page);
- ER3 – Copy of statement for Pay in Lieu for Valerie (1 page);
- ER4 – Copy of statement for Outstanding Bonuses owed to Valerie (1 page);
- ER5 – Copy of Employment Contract dated August 18, 2014 (6 pages); and
- ER6 – Copy of Leave of Absence Form (1 page).

Employee Exhibits (Respondents)

- EE1 – Copy of the Company's Corporate Registry Profile Report as of May 26, 2016 (6 pages);
- EE2 – Copy of letter from Andrew Langgard to Lindsay Winslow dated December 29, 2015 (2 pages);
- EE3 – Copy of email exchange between Valerie and Liam Nelson, Sales Coordinator for the Company (2 pages);
- EE4 – Copy of email dated January 18, 2016 from Valerie to Andrew Langgard containing a summary of hours worked (2 pages);
- EE5 – Copy of Saskatchewan Employment Audit Sheet/Officer Worksheet for Valerie (2 pages);
- EE6 – Copies of Valerie's emails to support claim for overtime hours (39 pages); and
- EE7 – Valerie's calendar from November 2014 to October 2015 (11 pages).

Lindsay's testimony is summarized as follows:

- Boulevard is a property management company operating in Alberta, Saskatchewan and Manitoba and she is the HR Leader. The operations side of the Company involves preparing and maintaining suites for occupation while the sales side involves rent collection, showing apartments, tenant relations, leases, etc. The Company has regional managers for each sector and sales managers for each area.
- The Company has 1 office in Regina and many buildings with roughly 600 doors/units.
- Valerie was initially hired as a cleaner in Moose Jaw and then became a Sales & Service Associate in Regina.
- Valerie's supervisors were in Calgary but travelled to Regina every 4 to 6 weeks. Typically, sales personnel dealt with supervisors via email. They acted as a team and were in daily contact.
- All Sales & Service Associates sign employment contracts. Valerie's employment contract (ER5) stated she was not permitted to work overtime without advance authorization. She was entitled to 3 weeks paid vacation (15 days) and 3 sick days per calendar year.
- Valerie's work week was not a normal work week. Her hours accommodated periods when tenants were more likely to be home – early evenings and weekends. The sales team generally worked Tuesday to Saturday from 9:30 to 6:00. Valerie was also entitled to two 15-minute paid breaks plus a half hour unpaid lunch break each day. She worked an 8-hour workday unless she was authorized to work overtime.
- When employees were required to work statutory holidays, they were entitled to take 2 days in lieu for the weeks where the stat holiday fell. Employees were allowed to bank those days and take them with vacation days. Banked days would be tracked and approved by Valerie's supervisor. Accrued days, time off, sick days, vacation days, etc. were tracked by the supervisor and reported to HR. Employees were paid semi-monthly. A Leave of Absence form was required for any days taken by an employee (time off, sick day, vacation day). The forms allowed HR to keep track.
- There is nothing in Valerie's file to indicate she had accumulated 10 days in lieu for 5 stat weeks. Nothing was reported to HR in this regard.
- If an employee wanted to work overtime, the employee would ask the supervisor and if approved it would be submitted to HR where the necessary documents would be created to support the overtime hours for audits.
- From September 2014 to September 2015, Valerie's supervisors were Renee Mullins and Morgan Rockney. Renee was her original supervisor until she moved to another role and then Morgan Rockney took over from Renee.
- When Valerie was terminated by Morgan Rockney and Audra Watamanuk (HR Support for the sales team), she was paid for her unused vacation days (ER2), unused sick days (ER1) and outstanding bonus pay (ER4). She was also given 2

weeks' pay in lieu (ER3). During her employment, Valerie took 17 vacation days and 2 sick days (ER1). When Valerie was terminated, she was entitled to payment for 2 sick days because she was terminated before the year was up and sick days accrued one every four months. She was also entitled to 2 vacation days (\$333.63).

- Valerie did not complain to her about overtime hours or pay. Valerie did complain to the owners via an email that she wasn't being treated fairly after which Valerie was provided with contact information for EAP and HR.
- Andrew Langgard's December 29, 2015 letter was the first time she became aware that Valerie felt entitled to overtime pay.
- Timesheets were not provided to Employment Standards in response to the letter because Valerie was not asked to keep timesheets in the first place since she was not authorized to work overtime. Hourly employees are asked to keep timesheets but salaried employees are not.
- To track overtime, the Company relied on pre-approval forms or Leave of Absence forms that were prepared from information relayed by supervisors. An hour here or there was approved by email by the supervisor then reported to HR for recording purposes. Supervisors had authority to approve overtime. Supervisors forward the email chain to HR as proof of the overtime request and approval. The process for pre-approval of overtime was not written down anywhere but it was discussed at manager's meetings and communicated to the teams who were in daily communication.
- She did not ask Valerie if she was working overtime. She wasn't aware that Valerie was working overtime.
- The clause about pre-approval for overtime is in all employment contracts and would have been in the cleaning contract too. It is standard for the Company to ensure employees are not working overtime. It's about work-life balance.
- The circumstances where overtime might be approved are where a showing is after hours and there is potential to make money for the Company.
- Valerie's work hours were meant to accommodate tenants who could only meet at night but the Company didn't want employees working late due to safety concerns.
- Valerie's hours of work were well-suited for the job. She did need to manage her time well though. Others seem to be able to handle it. The Company does not want to overburden their employees so if they knew someone was working overtime more than rarely, they would have considered adding an employee.
- The first and end of the month are the busiest times with move-ins and move-outs. Rent payments are mostly handled electronically but there is some rent-collection required. Summer is generally a busier season but it depends on the number of occupied suites.
- There are occasions where overtime would be approved after the fact. For example, in case of emergency such as water leak, fire or flood. These situations wouldn't really be Valerie's department though.

- Valerie would know her schedule well in advance (rent collection, showings, etc.) and should have been able to predict overtime if it was going to be an issue. Her hours allowed for early evening appointments to accommodate potential tenants' schedules.
- Valerie's supervisors would have had access to Valerie's Google Calendar which contained showings and anything else she put in (office time, meetings) but they couldn't alter it. The Call Center had access to Valerie's calendar and could add bookings to it. The Call Center would only contact Valerie if they were booking a showing outside of her regular hours.
- The bigger centers, Saskatoon and Edmonton, authorize overtime more often than Regina. She is not sure if there were any pre-approvals for overtime in Regina while Valerie was an employee but thinks there would have been a couple of instances every payroll.
- The number of Sales & Service staff in Regina varied. While Val was there, there were sometimes 2 or 3 employees. There was turnover of staff but no more than in other centers. It is a commissioned-based role so turnover is to be expected.
- She believes it is fair to place the onus of pre-approval on the employees because they are in charge of their schedules. It would be unfair to direct no overtime under any circumstances. The overtime approval process is meant to ensure employees are compensated for any overtime hours worked.
- In cases where excessive overtime has become a problem, they have asked employees to not take their cell phones and/or laptops home. This rarely happened.
- Valerie had a Company laptop, cell phone, bank card and keys.
- She admitted that Valerie's emails from June 16 to June 30 referenced Valerie working overtime and that overtime hours could be deduced from Valerie's July 9th email.

Valerie's testimony is summarized as follows:

- She worked as a Sales & Service Associate from August 18, 2014 to Sept 15, 2015. She started with the Company a few weeks before that in housekeeping in Moose Jaw. There was no union and she was not management.
- As a Sales & Service Associate, she initially earned \$35,000 per year and this was increased to \$37,000 per year in March.
- Her job involved collecting rent, working office hours in case tenants needed to talk to her, posting ads about rentals, creating move-in and move-out packages, answering calls and emails, showing suites, checking on unoccupied units, moving people in and out, walk-throughs, and completing the paperwork for all of this.
- She was scheduled for 2 office hours per week day that she worked. The office hours were posted on the office door and on notices handed out to tenants.

When she told Morgan about her stress in June, Morgan had her schedule in an extra ½ hour office time at the end of each day.

- When she started, her supervisor was Renee until January 13, 2015, then Morgan from January 14 to Aug 3, 2015, and then Rena Sinclair from August 4 on.
- She attended training for her job in Saskatoon from August 18-23 and in Regina from August 25-29. In Saskatoon, her training consisted of reading manuals on how to operate the computer, how to process rents, applications, and complete paperwork because management was busy dealing with emergencies. She met with Renee in Saskatoon and signed her employment contract on the August 19, 2014 (ER5).
- In the beginning, she was scheduled to work Tuesdays and Wednesdays from 10:30 a.m. to 7:00 p.m., Thursdays and Fridays from 9:30 a.m. to 6:00 p.m. and Saturdays from 9 a.m. to 5:30 p.m. In September of 2014, her hours were changed to Tuesday to Friday from 9:30 a.m. to 6:00 p.m. and Saturday from 9 a.m. to 5:30 p.m. This change was to accommodate her. She has an autistic daughter who suffers from separation and anxiety disorders and needed more time with her. In the summer of 2015, her hours changed again to Tuesdays 9:30 a.m. to 6 p.m., Wednesdays from 8 a.m. to 4:30 p.m., Thursdays and Fridays from 9:30 a.m. to 6 p.m. and Saturdays from 9 a.m. to 5:30 p.m. Despite her scheduled hours, she says she worked every day of the week.
- From August 29 to Oct 20, 2014, she was working by herself. She was also working alone from November 29 to December 15, 2014 and again from January 23 to March 3, 2015. During these periods, she was in charge of all 500 doors.
- In between periods of working alone she was training new staff for 1 month on each of these occasions. She answered questions and filled in for them. They were not as quick because they were new. It was overwhelming. She rushed around everywhere, working long hours, 7 days per week.
- She didn't raise concerns about her hours until she sent an email in February of 2015. She told her employer that she was running tired and couldn't do it anymore. After this, they hired 2 new staff in March 2015.
- While she was there, 9 other Sales & Service Associates came and went. Three of them were fired. Some lasted for only a few days and another lasted only a month. She believes they left due to stress and high workloads.
- When she was fired for lack of productivity, they hired 4 staff to replace her. Her last day of work was Sept 15, 2015.
- At the end of August, 2015, she had a car accident at work and was then reprimanded by Rena for not being on time for her appointment. After that she went on a 1-week stress leave. She emailed her managers during her stress leave and then used a week of her holidays. When she returned to work, she was fired.
- She kept a work schedule on the computer and the Call Center could add appointments for showings to her schedule. She might add 1 or 2 appointments

per week but most appointments were booked by the Call Center. They often scheduled appointments over her lunch break and she had no other time to take her lunch break or her two 15 minute breaks. They also booked her showings too close together, not allowing her enough travel time between appointments. In June of 2015, she raised a concern about this and so they started allotting 45-minutes travel per appointment. The Call Centre might also book more than 1 perspective tenant to see the same unit and sometimes the appointments overlapped.

- She had a key for the office and for most suites. She opened and closed the office. Operations staff didn't open doors or collect rent. Tenants would show up throughout the day and would call her after hours sometimes. She might be in the office until 9 p.m.
- Even when she was working with other Sales & Service Associates, she was the one who worked late. She had so much to do and had to catch up on others' work each time they quit. There was nobody else there to do it. She couldn't delegate because other staff had such a high turnover rate that there was nobody else to delegate to.
- The Company had 26 buildings located throughout city. She was responsible for all of the doors when she was by herself. Otherwise, she was responsible for half.
- Aside from office hours and showings, she had to door knock for outstanding rents. Most people were not home until 6 p.m. so she had to do this on evenings and on Sundays. She was asked to put stickers on doors saying how much rent they owed. She then had to deal with upset tenants because of this. Collecting rent was a challenge but when she started rent collection was at 60% and when she left it was above 90%.
- After receiving rents, she had to process them at the end of each day and deposit the cheques at the bank on the way home. Morgan got upset with her if she didn't do the deposits daily.
- She was supposed to answer her phone at all times. Both Morgan and Renee told her to answer all emails and phone calls even if they were outside of office hours. On November 19, she did not answer an evening call from management and was given a "final warning" as a result (EE3). She had been spending time with her daughter.
- She often received calls from tenants even when others were working because they knew her and were comfortable with her. She would also receive calls regarding tenants who were locked out if maintenance staff couldn't be reached. She let people in in the middle of the night about 6 times.
- The Call Centre would also call her at night asking for evening appointments. She felt she had to take them or she would get in trouble. Each one could take up to an hour. If a contract were to be signed, it could take up to 3 hours. This might happen once per week. The Call Centre should have known when it was causing her to work overtime. Head office had access to her schedule too.

- She showed about 8-10 suites per day.
- There needed to be at least 3 Sales & Service people in Regina. For two periods there was – March 3 to May 6 and July 6 to August 3. There were too many doors for 1 or 2 people to handle.
- She wasn't asked to record her hours so she didn't until June when Morgan said her job was on the line. She was told she was inefficient. She told Morgan she was overwhelmed and doing her best. After this, she had to provide daily reports and had to write a letter about how she could improve.
- She is basing her claim for overtime hours on her emails (EE4 and EE6). She worked more overtime than this but these are the hours she could prove. When she was emailing, she was working from the office and/or doing showings etc. She worked around the clock. She worked 7 days per week and on those days she would get home between 7 and 9 p.m.
- Working on the first and end of each month was mandatory regardless of whether it was a regular work day or not. When she asked for one of these days off, her request was denied.
- On June 10, she received a phone call from Morgan saying that she had to get more done. Morgan asked her to provide daily activity reports. Morgan said she needed more accountability for her hours and that she should be able to organize her days better. On June 16, she began recording her hours.
- Nobody had ever asked her why she was working late if, for example, she sent an email at 8 p.m. Nobody ever told her not to take her phone and laptop home.
- She knew her contract said that overtime had to be pre-approved but she didn't know the process for getting approval. She did know the process for approval for sick and vacation leave. Having to ask for pre-approval for overtime would have just added time to her day. And she couldn't just hang up if a tenant called after hours.
- She was not paid premium pay for statutory holidays or overtime.
- She was good at her job and the tenants liked her but she never received positive comments about her job performance. She loved her job.
- Morgan had to be aware of her overtime hours just based on the emails.
- She was in daily contact with her supervisors, although she did not communicate well with Morgan since she felt her job was on the line. She admitted that she did not communicate or claim for after-hour tasks such as last minute walk-ins to her supervisors. She did, however, let them know that she was swamped and tired.
- She felt that it was part of her job to provide her opinions on co-workers or on how the day went (November 1, 2014 and April 7, 2015 emails).
- She claimed overtime for January 26, 2015, which was a Monday even though there is no corresponding email. She said she had to go to the office that day because Hank had taken money and double-booked an apartment and she had to help. She recorded it in her agenda although she did not record her hours (EE7).

- On March 22 and 23, 2015, she worked 8-hour shifts on her days off and her supporting evidence is an email on Sunday, March 22 to IT and cc'd to Morgan about a phone issue and a response from Morgan on Monday, March 23.
- On Saturday, May 9, 2015, she sent an email to Morgan advising that she was exhausted and was just leaving the office at 9:16 p.m. She also had phone conversations with her supervisors where she told them she was tired and needed help.
- On January 1, 2015, she does not have emails to support it but says she was on-call with her phone and had to let drunk tenants in even though the offices company-wide were closed.
- She thinks she may have taken a total of 1½ days off in lieu of the extra days she worked.

V. ARGUMENT

The parties exchanged and filed written arguments on October 26, 2016.

The Appellants' argument is summarized as follows:

- The Company's overtime policy was set out in its employment agreement (EE5). Section 3 says she "will not be permitted to work overtime hours unless approved in advance by the Company." There is no evidence of Valerie requesting or being granted authorization to work overtime.
- Valerie unilaterally worked overtime hours without seeking pre-approval or authorization despite knowing the Company's policies regarding authorization for overtime and accumulating/using lieu days. An employee cannot foist services upon an employer and expect to be paid for them.
- There are certain dates where Valerie claims she worked overtime for which no substantiating evidence was produced: November 30, 2014; December 1 and 26, 2014; January 1 and 26, 2015; June 6, 2015 and July 1 and 2, 2015. Valerie conceded she was no longer pursuing her claim for December 26, 2014 and January 1, 2015.
- There are certain dates where Valerie claims she worked overtime where the evidence provided by Valerie does not contain the requisite degree of specificity in order to make a reasonable determination of what overtime hours may have been actually worked: November 1, 2014; December 15 and 28, 2014; January 12, 13, 27 and 31, 2015; March 7 and 23, 2015; April 7 and 27, 2015; May 3 and 6, 2015; and June 14, 2015. On these dates, Valerie sent an email to her employer containing general musings or complaints that were either not work related and/or not at the immediate request of her supervisor. The emails do not contain a request for authorization for overtime, raise overtime as an issue, or record or log of hours of overtime worked.
- Valerie was a salaried employee and was not required to track her hours.

- The Company's policy for a work week containing a statutory holiday was that where she worked a full 5-day week, she was provided 2 banked/lieu days. If she worked on the stat, she was paid 1.5 times her normal pay. The Leave of Absence Form (ER6) shows she was aware of this policy. She submitted a request to use a lieu day accumulated by working her full work week containing the Thanksgiving holiday in order to take October 31 off.
- Valerie's schedule could generally be pre-determined as showings were pre-booked into her online schedule by the Call Center.
- Valerie had daily contact with her supervisors by phone and email.
- In *Kindersley Transport Ltd. v. Semchyshen*, 2002 CanLII 61317 (CA LA), a claim for unpaid overtime wages was upheld where the employee was able to show the Company was aware of the overtime hours being worked.
- In *Scipione v. Sutherland-Schultz Ltd.*, 2011 CanLII 52901 (ON LRB), a claim for unpaid overtime wages was dismissed where the employee supported his claim with vague emails and a chart he had created summarizing his hours based on a personal calendar that was not produced. The evidence was found to lack the requisite degree of specificity to support the claim for overtime.
- Valerie had access to her work email as long as she had access to the internet via her cell phone, laptop or any tablet or desktop computer. Emails could have been composed in no time at all and sent from her home and/or for out of the office.
- The evidence provided by Valerie shows the Company may have become aware of her overtime hours towards the end of her employment. On May 9, 2015, her email indicates she was still in the office and was set to leave at 9:16 p.m. Very detailed information regarding her hours are included in emails dated June 16, 17, 19 (incorrectly noted in the Audit Spreadsheet as the 18th), 23, 24 and 27, 2015. Her claim for overtime is substantiated on these days because the requisite degree of specificity is met and the employer was made aware of her overtime hours.
- Valerie should also be compensated for 12 hours on July 9, 2015 although the Audit Sheet notes 8 hours. Valerie provided an email on that date logging her hours. It shows she made her supervisor aware of the overtime being worked.
- Regarding lieu days, there are 4 weeks (October 18, 2014, February 21, 2015, May 23, 2015 and August 8, 2015) on the Audit Sheet indicating Valerie worked her usual Tuesday to Saturday shift during weeks where a stat holiday fell on the Monday. In these instances, it was the Company's policy to grant 2 days in lieu. The Company confirms these lieu days (8 total) were not used or paid out and are therefore owing.
- For the most part, Valerie has failed to provide substantive evidence demonstrating with the requisite degree of specificity and on a balance of probabilities that she worked the amount of overtime claimed.
- The Wage Assessment should be amended.

The Respondents' argument is summarized as follows:

- Valerie was employed by the Company as a Sales & Service associate from August 19, 2014 to September 15, 2015. The Audit Sheet forms the basis for the Wage Assessment and covers her last year of employment, from September 16, 2014 to September 15, 2015. It calculates wages owing as: \$4,933.44 for unpaid overtime; \$421.08 unpaid public holiday pay (premium pay); and \$308.91 unpaid vacation pay calculated at 3/52nds on the unpaid overtime and premium pay under s. 2-27 of the Act.
- Valerie is entitled to overtime pay after 8 hours in a day or 40 hours in a week (sections 2-17 and 2-18) "where the employer requires or permits the employee to work or be at the employer's disposal." Valerie was not paid overtime wages.
- Valerie testified she worked 7 days per week and often more than 8 hours in a day or 40 hours in a week. She had regular and ongoing discussions with her supervisors regarding the number of hours she was working and her stress and exhaustion. The Company was aware she was working overtime.
- Valerie had to work overtime to accomplish her duties.
- Section 2.2 of the Act states that an employer has permitted an employee to work if the employer knew or ought reasonably to have known the employee was working and did not cause the employee to stop working. This threshold has been met.
- The Company gave Valerie a laptop and cell phone and required her to answer calls at all hours. She testified she was called out on several occasions to assist tenants. She said evenings and weekends were the best times to collect rents because tenants were home. The Company regularly scheduled showings late in the day or in the evening and she had to drive across town to get there. She had to deposit rents at the bank on the day she collected them and was reprimanded if she waited. The Company had access to her online calendar containing all of her appointments. Valerie sent numerous emails to her supervisors about her daily activities and describing overtime hours.
- The Company did not keep timesheets for Valerie. Section 2-38 of the Act requires an employer to keep records of the time when an employee's work begins and ends each day and the total number of hours worked by the employee each day and week. The Company failed to maintain proper records and should not be allowed to defend an overtime claim by relying on its own recordkeeping failures.
- Valerie provided a summary of her overtime hours in an email to the Employment Standards Officer on January 18, 2016, and this is the best evidence of the hours she worked. Valerie supported her claim through oral testimony and emails sent at the end of her workdays.
- The Company's only witness, Lindsay, had no direct knowledge of Valerie's hours of work.
- In *The Queen v. The Carpet Warehouse [Saskatoon] Ltd.*, the trial judge held the employee was "not in a position to dispute the records submitted by the

employee” where it had failed to meet its statutory obligation to maintain time records.

- Section 2-75(9) of the Act states a Wage Assessment is proof, in the absence of evidence to the contrary, that the amount stated in the Wage Assessment is due and owing. The Company cannot establish the contrary without proper payroll records.
- In *101203208 Saskatchewan Ltd., operating as Ultimate Floor Installations v. Sandra Grant and The Director of Labour Standards*, the adjudicator held the employer did not keep proper time records and failed to meet its burden to prove the Wage Assessment was incorrect.
- Section 2-32(3) of the Act requires an employer to pay an employee 1.5 times her hourly rate for each hour and part of an hour in which she is required or permitted to work or to be at the employer’s disposal on a public holiday. This is referred to as premium pay. The amended Wage Assessment includes hours worked by Valerie on 2 public holidays: January 1, 2015 and July 1, 2015. She testified she worked on the first and last day of every month. The Company claims Valerie was required to take days off in lieu where a public holiday coincided with her scheduled day off but produced no evidence of a tracking sheet or other documentation of any days in lieu taken by Valerie. Valerie testified she was not paid premium pay.
- The Company used the pre-approval clause in Valerie’s contract to avoid its obligation to pay for overtime work.
- Valerie testified she was unaware of the pre-approval requirement for overtime hours although she acknowledged the clause’s existence in her contract. She said the Company never informed her of the procedure for authorizing overtime hours.
- A pre-approval clause existed in *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148 (CanLII). The judge in this case stated that protecting an employee against working uncompensated hours should be a paramount consideration and that the employer has an onus to take active measures to prevent uncompensated overtime. The judge described the pre-approval clause as an “institutional impediment” created by the employer to guard against claims for overtime pay. The judge said placing the onus on the employee to obtain pre-approval does not adequately reflect the realities of the workplace since it puts the emphasis on protecting the employer’s interests instead of protecting the employee to whom a duty of good faith is owed. This duty could require the employer to take measures to ensure hours of work are properly recorded and that employees are compensated for those hours.
- Lindsay testified that the Company did not take any active measures to ensure Valerie did not work uncompensated overtime hours. The Company could have and should have taken steps to manage Valerie’s hours of work so that she would not work uncompensated overtime.

- Section 2-6 of the Act establishes that employers and employees cannot contract out of the Act and any provision that deprives an employee of any right, power, privilege or other benefit conferred by the Act is void and has no effect. Valerie cannot be deprived of the right to overtime pay by a clause in her contract if it is found the Company knew she was working overtime hours and did not cause her to stop working.
- The Amended Wage Assessment should be confirmed.

VI. ANALYSIS AND DECISION

The starting point for this appeal is the Wage Assessment. Typically, an Employment Standards Officer prepares a worksheet outlining the calculation for wages forming the basis of a Wage Assessment. Mr. Langgard's Officer Worksheet (EE5) calculated the total wages (including overtime, public holiday and annual holiday pay) owed from September 15, 2014 to September 15, 2015 as \$5,663.43, comprised of overtime pay of \$4,933.44 + premium pay for January 1 and July 1, 2015 of \$421.08 + vacation pay on these amounts of \$308.91. The initial Wage Assessment claimed outstanding wages of \$5,459.38, but Mr. Langgard amended the Wage Assessment prior to the hearing because it did not include outstanding premium pay. Section 2-75(9) of the Act states a Wage Assessment is proof, in the absence of evidence to the contrary, that the amount stated in the Wage Assessment is due and owing.

The bulk of Valerie's claim relates to overtime. She claims she worked many overtime hours while employed with the Company. She is claiming compensation for 186.5 overtime hours but says she actually worked more overtime than this. Valerie's employment contract required her to seek pre-approval for overtime. Despite the clause in her employment contract, there is no evidence that Valerie ever asked her employer if she could work overtime.

Sections 2-17 and 2-18 of the Act provide that an employee is entitled to overtime pay calculated on a daily or weekly basis, whichever is greater, "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 40 hours in a week or eight hours in a day. Section 2-7(3) of the Act requires an employer to pay an employee a minimum of 1.5 times the employee's hourly wage for overtime or hours worked on a public holiday.

The main issue is whether the Company permitted Valerie to work overtime. The Company cannot rely on the pre-approval clause in the contract as a defense if it, in fact, permitted Valerie to work overtime without compensating her. Section 2-6 of the Act prevents agreements from depriving employees of the benefits conferred by the Act. If the Company knew she was working overtime and did nothing to stop her, then she is entitled to overtime pay regardless of what the employment contract says.

Based on the evidence, I make the following findings of fact:

- Valerie worked as a Sales & Service Associate from August 18, 2014 to Sept 15, 2015, initially earning a salary of \$35,000 per year, or \$16.83 per hour. In the middle of March of 2015, she received a raise to \$37,000 per year, or \$18.26 per hour.
- All of the Company's Sales & Service Associates sign employment contracts. Valerie's employment contract (ER5) was a standard contract containing a clause requiring her to obtain advance authorization before working any overtime. Valerie knew about the clause and knew how to go about seeking approval for overtime (by emailing her supervisor).
- Valerie's work schedule varied slightly throughout her employment but the Company generally expected her to work 8-hour shifts, Tuesday through Saturday, with an unpaid ½ hour lunch break and two 15-minute paid breaks.
- The Company did not keep track of Valerie's hours. The Company asked hourly employees to keep timesheets but not salaried employees. The expectation was that salaried employees would work their regular hours only unless they sought approval to work more.
- Valerie was in daily contact with her supervisors by email and phone. She was expected to carry her cell phone and answer calls and emails promptly.
- Valerie was expected to work the first and end of the month because it was their busiest time with move-ins, move-outs, and rent collections. Regardless of her regular work schedule, when a statutory holiday fell on the first of the month, it was important for her to work. The Company's policy was for Valerie to accumulate 2 days in lieu to be taken some time later.
- Valerie's supervisors tracked her banked days but none of her former supervisors testified. Lindsay had no direct knowledge of how many hours Valerie worked or how many days in lieu Valerie accumulated and/or took. Although Valerie's supervisors were responsible for reporting her days in lieu to HR, there was no record of any days in lieu on her file.
- There were periods of time when Valerie was the only Sales & Service Associate in Regina including August 29 to Oct 20, 2014, and November 29 to December 15, 2014, and January 23 to March 3, 2015. During these periods, she was in charge of all 500 doors.
- Valerie was overwhelmed with the amount of work she had to do. She liked her job and tried not to complain. Despite daily contact with her supervisors, she did not tell them she was working overtime, at least initially.
- Valerie did her best but ultimately her employer felt she was inefficient and decided to fire her. When Valerie was terminated, she was paid for her unused vacation days (ER2), unused sick days (ER1) and outstanding bonus pay (ER4). She was also given 2 weeks' pay in lieu (ER3). She was not paid any overtime or premium pay.
- Valerie worked overtime hours and statutory holidays for which she was not compensated.

Overtime

I accept that Valerie worked overtime while employed by the Company. She knew about the overtime policy but did not want to jeopardize her position by complaining about, or even revealing, the extra hours she was putting in. Valerie liked her job and did not want to lose it. I accept that the Company did not want its employee's working overtime. They did not want to pay overtime rates but, more than that, they also placed value on having their employees achieve a work/life balance. When Valerie raised concerns about her job, the Company tried to address them. For example, according to Valerie's testimony, when she told her employer in February of 2015 that she was running tired, they responded by hiring new staff in March of 2015. On another occasion, after raising a concern about the Call Centre booking her appointments too close together, they started allowing for 45-minutes of travel time for each appointment. I believe the Company's goal was to have competent staff in Regina who could complete the work within regular work hours.

The question is, at what point did the Company become aware that Valerie was working overtime? Once the Company became aware that Valerie was struggling to complete her daily tasks within her regularly scheduled hours of work and/or was having to put in overtime hours in order to fulfill her duties, then the onus was on the Company to take steps to manage her hours so that she did not work uncompensated overtime. The Act does not allow an employer to permit an employee to work overtime without compensating her.

According to the Officer Worksheet (EE5), the first day where Valerie claims overtime is Saturday, November 1, 2014 (1.5 hours). Although there is a corresponding email from Valerie to her supervisor at 6:26 p.m. where Valerie expresses an opinion about a co-worker, there is no mention of overtime. A short email sent after hours that starts, "just an opinion..." does not lead me to the conclusion that the Company should reasonably have assumed she was working overtime that day.

Valerie claims to have worked overtime on Sunday, November 30 (8.5 hours), Monday, December 1 (11.5 hours), and Monday December 15, 2014 (2 hours). There are no corresponding emails for November 30 and December 1, but there are some brief emails Valerie exchanged with a superior on the 15th. What we do have, however, is Valerie's testimony that she was the only Sales & Service Associate in Regina during this timeframe (November 29 to December 15, 2014). This means she would have been responsible for all 500 doors. On this basis, I find the Company ought reasonably to have known that Valerie would be working overtime in order to complete her daily tasks during this period and should have followed up with her about the number of hours she worked. Under the circumstances, the onus was on the Company. Although there is little to no supporting evidence for the actual number hours of worked on these days, I take Valerie at her word.

Valerie's next claim for overtime was 8.5 hours on Sunday, December 28, 2014. On this day, she sent an email to the Call Center from her Blackberry asking them a couple of questions. She cc'd the email to her supervisor. This email would have taken no time to write and send, and does not contain any reference to long hours or overtime. I do not find the Company would reasonably have deduced from a copy of a two-line email that Valerie was working overtime.

Valerie claims she worked overtime on January 12 (5.5 hours) and 13 (2 hours), 2015. Valerie sent a brief email from her Blackberry on each of these days. Other than the fact that Valerie chose to send the first email on her day off and the second after hours, there is nothing in these communications that should have led the Company to conclude she was working overtime. To be clear, I am not saying that Valerie did not work overtime on these days – only that her employer would not reasonably have known that she did. I do not believe they permitted her to work overtime on January 12 and 13, 2015.

On the other hand, I do find the Company permitted Valerie to work overtime on January 26 (8 hours), 27 (3 hours), 31 (2 hours) and Feb 1 (9 hours), 2015. According to Valerie's testimony, this was another period of time where she was the only Sales & Service Associate in Regina. From January 23 – March 3, 2015, it should have come as no surprise to the Company that Valerie was having to work overtime in order to get everything done. Valerie's February 6, 2015 entry on her calendar says, "expressed frustration being on my own." Given that she was on her own, they ought to have at least followed up with her about the hours she was working. An employer cannot look the other way and then claim it did not authorize the overtime. I again take Valerie at her word regarding the number of hours worked on these days.

The overtime hours claimed for March of 2015 include 4 hours on 7th and 8.5 hours on each of the 22nd and 23rd. By March, the Company had responded to the frustration expressed by Valerie in February by hiring new Sales & Service Associates for Regina. Although Valerie submitted emails sent outside of regular work hours in support of her claim for these days, they were all initiated by Valerie and do not contain any information that would lead the Company to conclude she was working overtime. In fact, her email to Morgan sent from her Blackberry on Saturday, March 7th, reports that things are going well with Ethan and, "I am finally caught up on most paperwork just have move outs left." I do not believe the Company would reasonably have known she was working overtime on March 7, 22 and 23.

On Tuesday, April 7, 2015, Valerie claims 2.75 overtime hours. Valerie's email to Morgan at 8:46 p.m. that night starts, "It has been a long and frustrating day" and ends, "Anyways it's 845 and I just got home at 815. Just sending a vent your way." Likewise, on Monday, April 27, Valerie claims 8.5 hours of overtime and her claim is backed up by a lengthy email presumably sent from the office which states, in part: "I am having a horrific time dealing with Ethan....Today after I was called and texted several times on

my day off....I went down there....I am so stressed out with Ethan that my health is suffering very badly. I am ready to pack it in with this company as I am way too stressed. Something needs to change and fast.” Based on her emails, her claim for overtime in April is substantiated. Her evidence regarding the number of hours she worked is the best and only evidence we have. The Company cannot deny that she advised them she was working overtime. They needed to follow up with her regarding the number of overtime hours she was putting in and how to address it. They failed to do this. She is entitled to be compensated for these hours.

After Valerie’s email on April 27th, I do not find it credible for the Company to maintain its position that it was unaware Valerie was working overtime. After receiving an email describing hours worked on a day off, followed by a statement that its employee was ready to “pack it in” due to stress, the Company bore the onus to ensure Valerie was not working overtime going forward, or that if she was, she was properly compensated for it. Despite Valerie stating she was stressed to the point of quitting, the Company failed to even ask about her hours. There are many emails after April 27th which prove she was continuing to work overtime. On May 9, 2015, Valerie sent an email at 9:23 p.m. stating: “I am still in the office just ready to leave now at 9:16 p.m....I have been here 14 hours and am exhausted!” On June 16, 2015, she ends an email with, “3 hours overtime.” On June 17, states: “1 hour overtime.” On June 18, she states: “1.5 hours overtime.” These are just a few of the emails.

I find that all overtime hours claimed after April 27, 2015 are compensable because the Company knew or ought to have known by this point in time that she was working overtime on a regular basis. The compensable overtime hours after April 27th include: 9.5 on the 3rd, 2.5 on the 6th, 4.5 on the 9th, and 8.5 on the 31st of May; 4.5 on the 6th, 12.5 on the 14th, 3.5 on the 16th, 1.5 on the 17th, 2 on the 18th, 1.5 on the 23rd, 2.5 on the 24th, 3 on the 27th, and 2.5 on the 30th of June; and 2.25 on the 2nd and 4 on July 9th. The overtime hours from July 9, 2015 were not included in the Officer Worksheet or the amended Wage Assessment but there is an email outlining Valerie’s hours on this day and the Appellants concede these overtime hours are owing for July.

The Appellants argue that many of the overtime hours claimed by Valerie ought to be disallowed due to a lack of specificity. I do not accept this argument. Valerie was not asked to record her hours. The Company did not keep track of her hours. None of her former supervisors or co-workers testified about the hours she was working. Under the circumstances, where the Company ought to have been aware that she was working overtime, Valerie’s evidence (testimony and emails) is the best evidence we have. She recreated her hours as best she could and I do not believe she exaggerated her claim for overtime.

In summary, all of the overtime hours claimed by Valerie are compensable except the 38.5 hours claimed on November 1 and December 28, 2014, January 12, 13, March 7, 22 and 23, 2015. These hours are not compensable because the Company did not know

she was working overtime and, therefore, did not permit her to work these hours. Mr. Langgard argues that it was the Company's responsibility to keep track of her time. While this is true, the fact that she was a salaried employee who was supposed to seek approval for any overtime somewhat excuses, or at least explains, why they did not keep track of her hours. This explanation only goes so far though. Once they realized (or ought to have realized) that she was in fact working overtime hours, it was the Company's responsibility to address the issue of overtime and compensate her for the overtime hours she worked. All overtime hours after April 27, 2015 are compensable because the Company knew or ought to have known she was working overtime on those days. Additionally, Valerie is entitled to the 4 overtime hours she worked on July 9, 2015.

According to the Officer Worksheet, Valerie claimed a total of 186.5 overtime hours. This amount includes 8 hours for each of the weeks where a statutory holiday fell on her day off but that she had already worked a full work week (October 18, 2014, February 21, 2015, May 23, 2015 and August 8, 2015), or 32 hours. Although Company policy dictated that Valerie was entitled to 2 lieu days for each of these weeks, the Company acknowledges that she did not take and/or was not paid out for her accumulated lieu days. Based on my analysis, Valerie is entitled to 186.5 overtime hours, less the 38.5 hours I disallowed (21.5 of which are calculated at \$25.25 per hour and 17 of which are calculated at \$27.39 per hour), plus the 4 hours missed from July 9th (at a rate of pay of \$27.39 per hour), or 152 overtime hours in total. Instead of \$4,933.44 in overtime pay, Valerie is entitled to \$4,029.12.

Premium Pay

Based on the evidence, Valerie worked on 2 public holidays for which she did not receive premium pay -- January 1 and July 1, 2015. Section 2-32(3) of the Act requires an employer to pay an employee 1.5 times her hourly rate for each hour and part of an hour in which she is required or permitted to work or to be at the employer's disposal on a public holiday. Valerie testified she worked on the first and last day of every month and that she had not received premium pay for the holidays she worked. Based on the evidence, I find Valerie is owed premium pay in the amount of \$421.12 (\$25.25 per hour x 8 hours + \$27.39 per hour x 8 hours) for January 1 and July 1, 2015. My calculation is \$.04 higher than Mr. Langgard's.

Vacation Pay

Vacation pay on the outstanding wages owed to Valerie is \$256.74, calculated at 3/52 of \$4,450.24 (\$4,029.12 + \$421.12).


Total Wages Owed

$\$4,029.12 + \$421.12 + \$256.74 = \$4,706.98$

VII. CONCLUSION

The appeal is allowed, in part. The Wage Assessment is varied to \$4,706.98. The Appellants are ordered to pay \$4,706.98 to Valerie Boldt.

DATED in Regina, Saskatchewan, this 22 day of December, 2016.


 Jodi C. Vaughan
 Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at www.saskatchewan.ca.

Right to appeal adjudicator's decision to board

- 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.
- (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 persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.
- (4) The record of an appeal is to consist of the following:
- (a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;
 - (c) the notice of appeal filed with the director of employment standards pursuant to Part II;
 - (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

Appeal to Court of Appeal

- 4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

- (2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.
- (3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards has the right:

- (a) to appear and make representations on:
 - (i) any appeal or hearing heard by an adjudicator; and
 - (ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and
- (b) to appeal any decision of an adjudicator or the board.