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

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| **APPELLANTS:** | **ONSITE OILFIELD SERVICES INC. and BRAD WALKER, as director of Onsite Oilfield Services Inc.** |
| **RESPONDENTS:** | **WILLIAM CUNNINGHAM and DIRECTOR OF EMPLOYMENT STANDARDS** |

**Karen Walker**, Appearing for Onsite Oilfield Services Inc. and Brad Walker

**Daniel Corbett,** Employment Standards Officer, Appearing for the Director of Employment Standards, Employment Standards Division, Ministry of Labour Relations and Workplace Safety

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| **DATE OF HEARING:** | **May 3, 2017** |
| **PLACE OF HEARING:** | **3rd Floor Boardroom 1870 Albert Street Regina, Saskatchewan** |

LABOUR RELATIONS BOARD
MAR 26 2018
RECEIVED
SASKATCHEWAN

**LRB File No.s 019-17 and 071-18; Wage Assessment No. 8121**

## I. INTRODUCTION

This is an appeal of a Wage Assessment brought by Onsite Oilfield Services Inc. (the Company or Onsite) and its director, Brad Walker. Wage Assessment No. 8121 directed the Company and its director to pay $18,435.40 to William Cunningham or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act).

On May 3, 2017, the following individuals attended the hearing:

- Karen Walker (Karen), Onsite Owner, representative, and witness for the Company/Appellants;
- William Cunningham (Will), Complainant, former employee, and witness for the Respondents (appeared by telephone);
- Daniel Corbett, Employment Standards Officer; and
- Leesa Pankewich, Intake Officer for Employment Standards (observer).

## II. PRELIMINARY MATTERS/OBJECTIONS

The parties agreed that Will would appear and testify by telephone.

In addition to deciding issues arising from the Wage Assessment, Karen asked me to order Will to return $700 in travel expenses to Onsite. Before this hearing, Will started a Small Claims action for travel expenses to the United States owed pursuant to his Employment Contract. The matter was settled by way of a case management settlement conference. Onsite agreed to pay Will $1,000, $700 of which was paid up front and the remaining $300 was to be paid once he reached his destination. Karen claims he did not make the trip and therefore wants him to return the $700.

I advised Karen that any issues arising out of the Small Claims action and its settlement are beyond the scope of my authority. I do not have jurisdiction to order the return of travel expenses negotiated through a Small Claims settlement. I am limited to considering issues relating directly to the Wage Assessment.

## III. THE DISPUTE

On December 16, 2016, a Delegate on behalf of the Director of Employment Standards issued Wage Assessment No. 8121 in the amount of $18,435.40 against the Company and its director. The Appellants appealed pursuant to section 2-75 of the Act.

The Appellants filed their appeal by way of a letter dated January 19, 2017 (the Notice of Appeal). Aside from the travel expense issue addressed above, the Notice of Appeal raises several grounds for appeal, including:

- Will was not a heavy duty mechanic and is therefore not entitled to pay in line with industry standards for heavy duty mechanics. Mr. Corbett ought not to have included vehicle mileage compensation amounts and discretionary bonus amounts in calculating Will's hourly wage.
- Will was given almost 4 weeks' notice of lay off (3 weeks, 5 days).
- Will failed to clock out for his ½ hour lunch breaks while employed at Onsite resulting in an overpayment to him in the amount of $4,480, plus associated vacation and holiday pay amounts paid on these wages.
- Onsite's administration department improperly calculated overtime (compensating Will for shifts in excess of 8 hours but not for weeks where he worked over 40 hours) and the Company therefore owes him $2,495 for unpaid overtime, plus applicable vacation and holiday pay.
- Onsite paid discretionary bonuses to Will and these bonuses should not be considered as regular wages and should not be included when calculating overtime rates.

- Short Shift Bonus and Shift Travel Allowance amounts should also not be included when calculating overtime rates. These amounts did not form part of Will's regular hourly rate.

The main and most contentious issue under appeal involves overtime pay and how overtime is properly calculated under the circumstances. This appeal also involves issues relating to meal breaks, public holiday pay, vacation pay, and pay instead of notice.

## IV. THE FACTS

In these types of cases, the parties often begin by agreeing to a set of facts including, but not limited to, the start and end date employment, the nature of the position held, and the hourly wage earned. In this case, however, the parties agree on very little. The only areas of agreement are:

- Onsite Oilfield Services Inc. is a registered business in Saskatchewan.
- Will worked for Onsite starting in 2014 and ending August 26, 2015.
- Will is a US citizen who was already working in Canada when he was hired by Onsite. The Company ultimately hired him through the Temporary Foreign Worker Program (TFWP or the Program).

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

The following exhibits were entered into evidence:

**Employer Exhibits (Appellants)**
ER1 – Copy of Employment Contract dated June 30, 2014 (3 pages);
ER2 – Copy of Onsite Oilfield Description of Pay Structure dated December 2014 (1 page);
ER3 – Documentation relating to Small Claims action (6 pages);
ER4 – Copy of Labour Force Survey (1 page);
ER5 – Copy of Time Clock Sheets (3 pages);
ER6 – Copy of Notice of Temporary Layoff dated August 1, 2015 (1 page);
ER7 – Copy of demand letter to Karen Walker from Daniel Corbett dated April 25, 2016, with attachments, and emails exchanged on May 20, 25, 26, 31 and June 15, also with attachments (16 pages);
ER8 – Copy of demand letter dated May 17, 2016, with attachments (4 pages);
ER9 – Copy of demand letter dated June 16, 2016, with attachments, emails exchanged on June 16, 20 and 29, and letter to Service Canada dated July 1, 2014 (15 pages);
ER10 – Copy of demand letter dated November 14, 2016, with attachments, and emails exchanged on November 23 and 24, 2016 (19 pages);
ER11 – Copy of emails dated November 28 and December 5, 2016 (10 pages);

ER12 – Copy of appeal package including Notice of Appeal and Small Claims documentation (24 pages); and
ER13 – Copy of email dated June 27, 2014 from Immigration Consultant to Karen Walker with William Cunningham's resume attached (4 pages).

**Employee Exhibits (Respondents)**
EE1 – Copy of Labour Market Opinion through the Temporary Foreign Worker Program for two Oilfield Equipment Mechanics for Onsite (6 pages);
EE2 – Copy of offer of employment letter to William Cunningham (1 page);
EE3 – Copy of letter to Citizenship and Immigration Canada dated June 30, 2014 from Karen Walker (1 page);
EE4 – Copy of William Cunningham's Time Sheets (28 pages);
EE5 – Copy of William Cunningham's pay stubs from August 2014 to August 2015 (28 pages);
EE6 – Copy of Record of Employment (1 page);
EE7 – Copy of SaskJobs posting (2 pages); and
EE8 – Copy of William Cunningham's Canadian work visa (1 page).

Karen Walker's testimony is summarized as follows:

- She has never met Will. Onsite's Operations Manager hired him in February of 2014 because a mechanic vouched for him. He was hired as a shop labourer at a base rate of $20 per hour and earned this throughout his time at Onsite.
- In May of 2014 Onsite received approval to hire 2 foreign workers under the Temporary Foreign Workers Program (TFWP). They needed an oilfield mechanic/heavy duty mechanic and were looking at an Egyptian candidate so they hired an immigration consultant. The consultant advised them to apply for 2 foreign workers because the cost was almost the same.
- Will was already working for Onsite and said he would qualify for the program because he was a US citizen who had been previously working in Saskatchewan under a Labour Market Opinion (LMO) with Greenwood Farms. He was not qualified as an oilfield mechanic/heavy duty mechanic but he did have some related skills. The immigration consultant said his resume would likely not qualify so he changed his resume accordingly or "spiced it up" and then it was approved.
- The LMO said the heavy duty mechanic would earn $35 per hour (ER13). Since Will was not qualified, Onsite offered to pay him $35 per hour with no opportunity for overtime (40-hour week at $1,400 per week) or he could choose to continue earning $20 per hour plus $6 per hour performance bonus and a $10 per hour short shift bonus with the opportunity to earn overtime. He had been earning more than $1,400 per week up to this point so he chose to stay with the existing pay structure.
- Since Onsite had not used the TFWP before, they used Will's previous employment contract with Greenwood Farms (where he had earned $20 per

hour with no other benefits) and modified it to reflect Onsite's pay structure (ER1). He signed it on June 30, 2014 and they sent a copy of it to Service Canada. They advised Service Canada of the nature of his position, what he was actually being paid, and asked that they notify Onsite if there was a problem. They received no objection so Onsite continued to pay him as they had been since he started in February.

- By December of 2014, work slowed and they were starting lay-offs. In April of 2015, Will was advised he would be kept on as long as possible but that he should start to look for other work. In late July, Brad told him his position would have to be eliminated in the next month but also offered him the opportunity to stay on as a boilermaker where he would earn a slightly better rate of pay but he would need to take some training (boiler ticket).
- Brad asked her to provide Will with a temporary layoff notice for the shop position so she prepared it on August 1, 2015 (ER6). She mailed it to his address on file and left a copy in the drop box at the shop a few days later. Will received almost 4 weeks' notice. They kept him on at the shop doing odd jobs until August 26.
- Will did not pursue his boiler ticket. When demand improved in early March 2016, Brad left messages for Will to call him. He was going to ask him to come back to work since he had been a good worker other than complaints of him sitting on the clock (clocking in and then having coffee, going on his phone, etc.). They did not hear back from him so they hired another person mid-March.
- Will sued them in Small Claims court for travel costs to return to Georgia and filed a complaint with Employment Standards for unpaid wages.
- They were first contacted by Mr. Corbett in March 2016 and asked to provide information. Many emails were exchanged, including demand letters and Officer Worksheets (ER7-11). Each time Onsite received a new demand the amount owing changed. The April 25 demand letter said they owed $13,753.93. The May 17 demand letter said they owed $13,735.93. The June 16 demand letter said they owed $24,757.68. The November 14 demand letter said they owed $18,435.40.
- Onsite is appealing based on the numerical inaccuracy of the assessments. At least, the amount owing by Onsite should have been constant throughout the changing assessments but it was not. In April and May, Mr. Corbett said Onsite had paid $93,381.69, in June that number changed to $103,921.09, and by November it was $112,579.69. The numbers are not reliable.
- Will was paid $20 per hour, plus overtime, plus mileage in the amount $80 per shift based on a 160km average, plus a discretionary bonus of $6 per hour if expectations were met. This discretionary bonus could be earned or lost daily. Will earned it throughout even though he was warned not to sit on the clock.
- Although he was eventually hired under the TFWP as an oilfield equipment mechanic, he really was not one (EE1, EE2 and EE3). He was a shop labourer

who helped with truck maintenance. These documents were formalities but they also sent Service Canada his actual Employment Contract (ER1).

- Will was already working in Canada when they hired him. He needed a LMO-approved employer.
- The purpose of the $10 per hour short shift bonus (ER1) was to cover employee's travel expenses. It was basically a travel bonus. Employees are on call sometimes and may work 2 to 3-hour shifts. On October 19, 2014, they changed the short shift bonus because of another assessment where Mr. Corbett used it in the calculation for overtime pay on the basis that they were paying it hourly ($10 per hour for every hour worked up to 8 hours). They changed it to $80 per shift worked. The travel bonus is automatically paid to employees who are on call. It is meant to cover mileage/travel expenses because they are driving their own cars. There is nothing discretionary about it. As long as an employee shows up, it is paid. It was paid to Will.
- The performance bonus is discretionary and every employee was told this and it was reiterated every 2 weeks when they received their paychecks. Employees earn it if they meet their primary job responsibilities. She does not know a time when Will did not earn it.
- She admits their administration staff made an error by only calculating overtime over 8 hours per day and not weekly when hours exceeded 40 hours. The error was corrected in June of 2016.
- Although Will's pay stubs (EE5) reference a "Living Allowance," he wasn't paid a living allowance. It was a tax deduction with CRA for temporary workers living in remote locations. The living allowance was eventually changed to meal allowance at CRA's direction.
- The pay stubs do not show how much overtime was paid.
- Vacation pay may not have been calculated properly and if this is the case Onsite will correct it going forward.
- She is not sure about statutory holiday pay and whether it was calculated correctly.
- Will's ROE (EE6) does not show that he began working in February of 2014. She is not sure whose SIN he used initially but it was not his own.
- She left a copy of his Notice of Temporary Layoff (ER6) in a drop box in the shop and sent a copy to him by regular mail. She knows he received it because Brad talked to him about it several days later. She did not have him sign it and has no documentary proof that he received it.

William Cunningham's testimony is summarized as follows:

- Onsite is an oilfield rental company in Arcola, Saskatchewan. He started working there in August of 2014 as a mechanic and traveled from Lampman, Saskatchewan, where he was living at the time. He has an electrical background and mainly worked on light towers and flameless heaters at Onsite. The heavy

mechanics (semi and trailer maintenance) were handled by the certified mechanic.

- He found out about the job through a mechanic at Greenwood Farms where he had previously worked as a construction foreman.
- He usually worked 12-hour days. Sometimes he punched out for lunch but other times he did not. He worked through lunches too. This was okayed by Brad and his supervisor.
- Onsite had to post positions on SaskJobs (EE7) - Oilfield Equipment Mechanic - for immigration reasons. The job was advertised at $35-45 per hour. He applied in March 2014 but knew they had to do the LMO because he was a foreign worker. He could not legally work in Canada without it.
- The first time he saw the LMO (EE1) and offer of employment letter (EE2) was when he was stuck at the border trying to get back into Canada in February of 2015 and Karen sent them to him. He later admitted under cross-examination that he had seen them before but this was the first time he received copies of the documents.
- EE8 lists his occupation as "Heavy Duty Equipment" and it allowed him to work for Onsite and live in Canada.
- ER1 is his second contract but he never received the first one. The first contract reflected the hourly wage outlined in the LMO ($35 per hour).
- He was told he would be getting paid more under the new contract. He did not understand it. Brad said he would be making about $3 more per hour this way than the LMO would allow. He did not understand the bonus structure.
- He always got the performance bonus. There were no discussions about it. Nobody was checking his work. He just got it. He was never warned he might lose his bonus. He was never disciplined.
- He had to get Service Canada's help to get his ROE (EE6). The dates worked are accurate.
- On August 26, 2015, he was painting at the office and Brad told him it was his last day. He had no warning. He had not heard anything about layoffs and had not had any discussions with Brad.
- The first time he received a copy of the Notice of Temporary Layoff (ER6) was when Mr. Corbett gave him a copy. He had not seen it before.
- He resigned from Greenwood Farms on February 22, 2014 but did not start working with Onsite until August. He was unemployed from March to August, 2014. He resigned from Greenwood Farms because as a construction foreman he was not being backed by the owner to discipline other foreign workers and the owner was thinking of closing down the constructions side of his operations. When he resigned without another job in place, his plan was to search SaskJobs. He ended up talking to a mechanic at Greenwood Farms who told him about a potential job at Onsite.
- He signed the Employment Contract because he was stuck with what Onsite agreed to pay him. He did not have anywhere else to go. Onsite changed the

contract. It used to say he was earning $35 per hour and $52.50 for overtime. They kept the pages where he printed his name and signed but changed the others. Onsite would not give him a copy of the first contract so he does not have a copy of it.

- He does not know how much he was being paid but knows he always received the bonus.
- He is not a certified mechanic. He is not certified to work on heavy trucks. He is an electrical generator repair specialist and this is mainly what Onsite needed him for.

## V. ARGUMENT

The parties exchanged and filed written arguments on May 17, 2017.

The Appellants' argument is summarized as follows:

- Will was hired in late February 2014 and was paid the same throughout his employment with Onsite.
- He was hired as a shop labourer but he did have some mechanical skills. In the process of hiring a heavy duty mechanic through the TFWP in May of 2014, Onsite agreed to include Will under the LMO and applied for two workers instead of one. He changed his resume to fit the position.
- The LMO listed a rate of pay of $35 per hour for a Heavy Duty Mechanic. Because he was not qualified, Onsite offered to pay him $35 per hour with no overtime or he could stay at his current rate of pay of $20 per hour plus $6 per hour performance bonus and $10 per hour short shift bonus, plus an additional $10 per hour overtime pay. In his previous months of employment, he had been making more than the $1,400 per week offered under the LMO arrangement so he chose to stick with the existing arrangement, as long as Service Canada did not object.
- Under the TFWP, the filing of an employment contract was a requirement. Because Onsite had not dealt with the program before, Will offered to provide them with a copy of his employment contract so that they could use it and modify it accordingly. At Greenwood Farms, he had been earning $20 per hour with no other benefits. They changed the contract to reflect his current working arrangement with Onsite and he signed it on June 30, 2014 (ER1). They forwarded it to Service Canada with a cover letter advising of the "requested wage change" and asking to be notified of any objection to it. Onsite received no objection from Service Canada so they continued to pay him in the same manner and amount. The official hiring date under the contract was August 1, 2014 but he had been working for them since late February.
- When work demand began to slow in January of 2015, they kept him on as long as they could but let him know in late July that his shop position would be

eliminated in the next month. They offered him another opportunity but he chose not to take the training necessary to do it. The Notice of Temporary Layoff (ER6) was prepared and mailed to his address on file on August 1, 2015. A few days later Karen delivered a copy of the notice to the employee drop box at the shop in Arcola. His last day of work was August 26, 2015, and he had received almost 4 weeks' notice of termination.

- They tried to call him back to work in late February, 2016 but he did not return their messages.
- In March, Onsite was contacted by Mr. Corbett about Will's complaint. Since then each of Mr. Corbett's demand letters have listed different amounts owing and paid. His calculations are not reliable.
- Onsite miscalculated overtime and may have miscalculated public holiday pay and vacation pay but they do not owe $18,435.40.
- Will consistently provided false testimony at the hearing. He was at all times paid sums equal to, or greater than, the amounts reflected in his Employment Contract and the timesheets and pay stubs support this.
- Will was overpaid by Onsite due to his failure to clock out for meal breaks ($4,480) and on two separate pay periods where an administrative error led to overpayment for his performance bonus ($2,085).
- The reason for hourly performance bonuses is that most of Onsite's employees are seasonal and in order to mitigate negative employee performance issues, they introduced a discretionary performance bonus. Employees only get it when they meet the job expectations outlined in Onsite's Primary Job Responsibilities handout. For Mr. Corbett to suggest that in order for a bonus to qualify as "discretionary," it must be withheld is absurd.
- Onsite's short shift bonus which was paid until November 2014 and daily mileage rates paid from November onward were established to compensate employees for the time and expense required to attend "short" shifts (less than eight hours). Employees are on call and shifts may be cancelled shortly after they arrive. Employees are expected to drive to work sites in their own vehicles. The bonus/mileage rates is meant to reimburse employees for the cost of travelling in their own vehicles. It is not paid to employees traveling in Company vehicles. There is no provision in the Act that supports payments for travel expense reimbursements to be considered in the calculation of an hourly rate to establish overtime.
- Mr. Corbett has applied his own calculations to establish an hourly wage rate that is not in line with the Employment Contract or the Act. He exhibited biased and unprofessional conduct throughout the audit.
- Will came to work for Onsite in February of 2014, where he earned almost double the weekly amount he had been earning at his previous position with Greenwood Farms. He eventually sued Onsite in Small Claims court and filed an Employment Standards complaint. He is seeking a windfall.

The Respondents' argument is summarized as follows:

- Will is owed $18,435.40 in unpaid wages. Onsite failed to consider all applicable wages when determining hourly overtime rates and it improperly calculated overtime hours. Annual vacation pay was not paid on all relevant earnings and public holiday pay was not paid properly. Pay instead of notice is also owed.
- The LMO (EE1) shows Onsite was looking for an Oilfield Mechanic at an hourly rate of $35 per hour with an overtime rate of $52.50. Will was offered this job (EE2). When he started work, however, his wage rate as promised in the LMO and Offer Letter were not honored. Instead, he was presented with a contract showing the following pay structure: $20 per hour base rate plus a $10 per hour "short shift bonus" and a $6 per hour "performance bonus" with overtime payable on the $20 per hour base rate (ER1). Although enforcing an LMO is the responsibility of immigration authorities, the pay structure as outlined in the Employment Contract still results in outstanding wages.
- Section 2-6 of the Act says employees cannot enter into agreements that would deprive them of the benefits of the Act. The pay structure outlined in the Employment Contract resulted in Onsite avoiding the overtime requirements of the legislation and this is not something an employee can agree to.
- Will was qualified as an Oilfield Mechanic and the evidence supports this. Karen's letter to Immigration (EE3) refers to his experience. Even the contract (ER1) states "Oilfield Mechanic" as the job title.
- Will was told by Brad Walker that he would be making more than the wage listed in the LMO. It is understandable that Will would think he was earning $36 per hour ($20 base, $10 short shift bonus and $6 performance bonus) but he did not truly understand the pay structure. The paystubs (EE5) are confusing and not in compliance with section 2-37(2)(a) of the Act. The pay stubs list the total wages earned as "maintenance" with no breakdown of the bonuses or overtime pay.
- The overtime rate was not calculated in accordance with the Act. Onsite did not include bonuses in its calculations. Section 2-1(o) defines overtime as 1.5 times the hourly wage. Section 2-1(v) defines wages as "salary, commission and any other monetary compensation for work or services or for being at the disposal of an employer." Section 2-(t)(i) notes that discretionary bonuses are not included in wages. Onsite's bonuses were not actually discretionary and instead fall under "any other monetary compensation." These payments must therefore be included in the overtime calculation.
- The "short shift bonus" was a non-discretionary bonus paid hourly for the first 8 hours of a shift. Karen admitted it was automatically paid. It was a normal part of Will's hourly wage and must be included in the overtime calculation.
- Beginning October 19, 2014, Onsite replaced the "short shift bonus" with a "shift travel allowance" of $80 per shift. The change was made to alter how Employment Standards assessed their compensation package. The same

compensation was done in a different way and ought to be included in the overtime calculation.

- According to the evidence, the "performance bonus" was not discretionary. It was automatically paid on every hour Will worked for the length of his employment. Case law says that where a bonus becomes an integral part of an employee's wage structure, it is considered part of an employee's normal wages. Will received his performance bonus even though Karen testified his supervisors complained about his job performance. There is no evidence he was warned about losing his bonus. It was a regular component of his hourly wage.
- Will's pay structure resulted in him being paid at straight time and allowed Onsite to avoid its legislative requirements to pay overtime. For example, if he worked 10 hours, for the first 8 hours he would be paid the base rate of $20, the short shift bonus of $10, and the performance bonus of $6, for a total of $36. For the 2 hours of overtime, he would be paid time and a half the base rate which equals $30, and the performance bonus of $6, for a total of $36. When the short shift bonus became the shift travel bonus, the result was the same. When employees work overtime hours, they are entitled to be paid time and a half whatever they were paid for the first 8 hours of work or 40 hours in a week.
- In addition to the overtime rate, overtime hours were not calculated in accordance with the legislation. Onsite did not count all hours after 8 hours in a day and 40 hours in a week (or 32 hours in a week with a public holiday) as per section 2-18 of the Act. Karen acknowledged this. Will worked 926.75 overtime hours but was only compensated for 677.75, leaving 249 still owing.
- The hours Will worked on public holidays were not paid in accordance with section 2-32(3) of the Act. His timesheets (EE4) show he worked the following public holidays without receiving time and half: Thanksgiving, Remembrance Day, and Christmas Day in 2014, and Family Day, Good Friday and Canada Day in 2015. Additionally, public holiday pay was only taken into account at the base rate and did not include the bonuses when calculating 5% of the previous 4 weeks.
- Karen testified that the "living allowance" and "meal allowance" on Will's paystubs are part of his wages and are labelled that way for CRA tax purposes only. However, Onsite did not calculate annual vacation pay on these amounts. This violates section 2-27 of the Act.
- To complete its audit, Employment Standards first had to establish Will's hourly wage. Prior to October 19, 2014, the hourly rate was calculated by adding the regular rate, short shift bonus and performance bonus. After October 19, 2014, the hourly rate was calculated by adding the regular rate and performance bonus and adding the shift travel allowance (broken down into an hourly rate by dividing it by the number of hours worked each week). Using these rates, the audit showed an outstanding balance of $15,626.75.
- Will testified that Brad Walker told him his employment was done on the afternoon of August 26, 2015. There is no evidence Will received prior notice of

termination. Karen's testimony about Brad having spoken with Will a month earlier is hearsay and there was no evidence that Will received the termination letter prepared by her (ER6). Even if he received it (which is disputed), the letter did not contain a clear termination date or "clear and unequivocal" notice. It states his employment will end "within the next 4 weeks" which is too vague.

- He is entitled to 2 weeks' pay instead of notice in accordance with sections 2-60 and 2-61 of the Act. Based on Will's average weekly earnings of $1,327.73 (as per the audit), he is owed $2,808.66.
- Onsite presented no evidence to support its claim that Will took lunch breaks and failed to clock out. Section 2-38(1)(c)(v) of the Act requires an employer to keep records of when each meal break begins and ends but Onsite failed to keep theses records. The timesheets (EE4) were used for the audit and are the only accurate record of hours worked.
- Regarding inconsistency in the audit amounts, it is normal for audits to change as new evidence is provided. This case was complex due to the various payments, bonuses, and allowances as well as the non-compliant paystubs. There has only ever been one Wage Assessment and it is accurate.
- Onsite's credibility is in question because it hired Will under a government-approved LMO then changed the pay structure to a confusing and less profitable one for him. Bonuses were used to avoid overtime requirements. These behaviours were dishonest and deceitful.

## VI. ANALYSIS AND DECISION

The level of disagreement and distrust that exists between the former employee, employer, and Employment Standards Officer in this case is unfortunate. The parties could not even agree over the start date of employment, let alone the terms of employment. It is uncommon for credibility to become an issue over something as basic as the start date of employment. Karen views Will as an employee trying to take advantage of his former employer, with Employment Standards as his accomplice, while Mr. Corbett sees Onsite as an employer who is taking advantage of its employees and acting in a deceitful manner.

I understand the concerns raised by the parties. The employer made mistakes. The Company had not hired foreign works through the TFWP before and handled it rather poorly. However, based on the evidence, I do not believe Onsite or its owners were attempting to deceive or defraud Service Canada or Will. The Company needs to improve upon some of its practices, including the preparation and distribution of its employment contracts and termination notices. It also needs to improve payroll in general and the transparency/readability of its paystubs. At the end of the day though, I believe they were attempting to treat and pay Will fairly.

Mr. Corbett also made mistakes but this was understandable given confusion over how and when Will was hired, for what position, and at what rate of pay. Usually, these

matters are relatively straight forward but they were not in this case. It is unfortunate the parties could not have worked together more and tried to see the other's point of view rather than assuming the worst.

With that said, I believe Will is responsible for some of the confusion mentioned above. I do not believe he was telling the truth about when he was hired by Onsite or about his understanding of his job and rate of pay. I do not believe that he started working for Onsite in August of 2014. It does not make any sense. At the beginning of February 2014, he was a US citizen living in Lampman, SK. He was working under a LMO with Greenwood Farms as a construction foreman. He is asking me to believe that he voluntarily resigned from that position on February 22, without having another job lined up. He says he was unemployed until August of 2014, when he started working for Onsite under another LMO.

Karen has a very different story. She says Onsite hired Will in February and that he was paid the same throughout his employment with them. I prefer Karen's testimony on this point because it makes more sense and because it is backed up by documentary evidence. Will's paystubs (EE5) show that for the pay period covering August 10-23, 2014, he had already earned (YTD Amount) $49,185.78. This was not his first or second paystub. I understand that he would want to avoid creating immigration problems but his dishonesty negatively affected his credibility in the context of this appeal.

Will said he was hired as an Oilfield Equipment Mechanic in August of 2014 under Onsite's LMO at a regular rate of pay of $35 per hour and an overtime rate of pay of $52.50 per hour. He said Onsite unilaterally changed the Employment Contract and that he had to agree with the changes because he had nowhere else to go. I do not believe this for several reasons. There is no doubt Onsite misled Service Canada, at least initially, about the second mechanic's position that Will ended up filling. This did not come as a surprise to Will though. He was already working with Onsite as a shop labourer doing mechanical work (working on light towers and flameless heaters but not heavy duty mechanics) when he participated in the LMO application process. He provided his contract from Greenwood Farms as a template to help with the application process. He did not sign the Employment Contract under duress, as suggested by Mr. Corbett. He new he was not qualified for the position. He was not a certified mechanic. As noted by the Immigration Consultant, his resume (ER13) contained, "no related experience or educational programs related to oilfield equipment mechanics" leading her to conclude he would not qualify for Onsite's LMO. Will agreed to "spice up" his resume as a result. It benefited him just as much is it benefitted Onsite since he was working illegally at the time. The LMO that he was covered under was with Greenwood Farms and not Onsite. Both employer and employee should have known and done better but, at the hearing, Karen was honest about how things were done and Will was not.

At one point during Employment Standard's assessment of Onsite's liability for unpaid wages, Mr. Corbett took the position that Onsite owed unpaid wages in accordance with the LMO and assessed outstanding wages at $24,757.68 (ER9). Mr. Corbett later abandoned this position explaining they believed they lacked jurisdiction to enforce the LMO. I think this was the correct decision but, based on the evidence, I do not believe the employer or employer ever intended to follow the terms of the LMO in the first place. Will was not qualified for that position. Had Employment Standards taken the position that it had jurisdiction to enforce the terms of the LMO and issued the Wage Assessment on this basis, I would have found that the terms of the Employment Contract accurately reflected the employment relationship, not the LMO.

**Overtime**

The bulk of the Wage Assessment relates to unpaid 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 pubic holiday.

Karen admitted Onsite's administration staff made an error by only calculating overtime over 8 hours per day and not weekly when hours exceeded 40 hours. This mistake, however, does not form a substantial portion of the wages claimed in the Wage Assessment. The bulk of the wages arise from a disagreement over how overtime should be calculated in this case given that Will earned a base wage plus bonuses. Onsite does not believe the bonuses should be included as part of Will's wages for purposes of calculating overtime pay. Employment Standards takes the opposite approach. It says that bonuses paid to Will on every paycheck (performance bonus and short shift bonus/shift travel bonus) were not discretionary and should therefore be included as a part of Will's wages when calculating overtime.

What was Will's hourly wage for purposes of calculating overtime pay? His Employment Contract (ER1) states:

> WAGES AND DEDUCTIONS
> 8. The employer agrees to pay the employee for his/her work, wages of $20.00/hr regular rate + $10.00/hr short shift bonus for all or part of an 8 hour shift + $6.00/hr performance bonus shall be paid for all hours worked, if applicable. Overtime of $10.00/hr (50% regular rate of $20.00hr) shall be paid after 8 hrs. This shall be paid at bi-weekly intervals.

Section 2-6 of the Act prevents agreements from depriving employees of the benefits conferred by the Act. In other words, just because Onsite said overtime would be paid at a rate of $10 per hour, does not mean that this is the amount to which Will is

entitled, even though he signed the Employment Contract. He is entitled to the benefits prescribed by the Act and cannot contract out of these benefits.

Onsite argues the $6 per hour performance bonus is not part of Will's regular wages because it is discretionary and falls under the exception for discretionary bonuses set out in section 2-1(t)(i) of the Act. Employment Standards argues the $6 per hour performance bonus is part of Will's regular wages and was not, in fact, discretionary. Consequently, the bonus falls under the definition of wages as "any other monetary compensation" (section 2-1(v)) and is not excepted by section 2-1(t)(i).

The evidence presented at the hearing revealed that despite some concerns about Will's job performance, Karen was unaware of an occasion where he did not receive the performance bonus as part of his bi-weekly paycheck. Karen provided additional information about this point in her written argument, but this was not evidence at the hearing, and in any event, was hearsay. Although the performance bonus was meant as an incentive for a seasonal workforce, it appears it was paid almost as a matter of course. According to the Employment Contract (ER1) and Onsite Oilfield's Description of Pay Structure (ER2), if an employee showed up and performed the duties of his job, he was entitled to receive the bonus. This means the bonus was promised and earned by Will. It makes sense then that he would have relied on it as part of his regular wages.

As opposed to a bonus "payable at the discretion of the employer", the performance bonus was promised in the Employment Contract. If Will fulfilled the duties of his job, Onsite could not withhold it. The amount of the performance bonus was clearly set out in the Employment Contract and Onsite did not retain discretion to determine the amount of the performance bonus. Further, Onsite did not have discretion to determine when the performance bonus would be paid. As long as Will showed up and did his job, he received the $6 per hour bonus paid out bi-weekly, in accordance with his Employment Contract. There is nothing on Will's paystubs to suggest the $6 per hour performance bonus was anything other than regular wages. It is lumped in with the rest of his salary.

An example of a discretionary bonus would be if Onsite performed well during a particular period and decided to give every employee a 10% bonus. Other examples might be a holiday or spontaneous bonus. These types of bonuses are typically given without any expectations and are not promised in advance. They are totally discretionary and not dependent on an employee's individual work performance. Because they are not promised by the employer, they are not relied upon by the employee as part of his wages.

Whether a bonus is a discretionary bonus or not is a question of fact to be determined on a case by case basis. Based on the evidence, I find Will's $6 per hour performance bonus was non-discretionary and therefore does not fall within the exception set out in

section 2-1(t)(i) of the Act. The $6 hourly performance bonus must therefore be included in the calculation for overtime pay.

The Employment Contract also references a "$10.00 per hour short shift bonus for all or part of an 8 hour shift" as part of Will's wages. Karen said that Onsite's short shift bonus was changed to an $80 per shift payment or shift travel bonus in November 2014. She said the purpose of the travel bonus was to compensate employees for the time and expense required to attend short shifts. In an email to Mr. Corbett dated December 5, 2016 (ER11), Karen states:

> After removing the short shift bonus we were still confronted with the issue of fair compensation for any employees being asked to report for short shifts. To address this we introduced a travel allowance of $80/day (the $80 dollar amount being based on employees averaging 160kms/day to travel to and from their rotating work sites, with kms calculated at a rate of $.50). The full compensation is paid regardless of the number of hours worked/shift and the amount should not, without exception, be subject to overtime calculation. An example of the effectiveness of the travel allowance, to address the dilemma of fair compensation for short shifts, is clearly demonstrated when an employee is called out to a shift and is then released within 2 hours. If the employee had to rely on just his hourly rate he would earn $40 to $60 for the shift and likely would have also incurred between one and two hours of travel time."

Karen admitted there was nothing discretionary about the travel bonus. If an employee showed up for work, it was paid.

I am not sure how Karen's explanation of the purpose of the travel bonus even relates to Will's position at Onsite. Karen led no evidence to suggest that Will travelled to rotating work sites or that he worked many short shifts as a shop labourer/mechanic at Onsite. A review of Will's Timesheets (EE4) reveals that out of a total of 291 shifts, only 7 of them were 4 hours or less. Most of his shifts were 8 to 12 hours in length. Karen testified that work began to slow by December of 2014. Even with less work, most of Will's shifts continued to range between 8 to 12 hours in length. In any event, Will was promised and received the short shift/travel bonus as part of his wages.

The evidence shows the $10 per hour short shift bonus and $80 per shift travel bonus were paid to Will throughout his employment with Onsite. This amount was paid to him bi-weekly as part of his regular wages. Again, there is nothing on Will's paystubs to suggest the short shift or travel bonus were anything other than regular wages. Clearly, he relied on this bonus as part of his regular wages. In my view, the short shift/travel bonus falls within the definition of "wages" found at section 2-1(v) of the Act. Because this bonus was non-discretionary, it does not fall within the exception set out in section 2-1(t)(i) of the Act. The short shift bonus (which later became the travel bonus) was

promised to Will as part of his wages in the Employment Contract and was paid to him as part of his regular wages.

Section 2-6 of the Act prevents Will from being deprived of the benefits prescribed by the Act. The Act requires an employer to pay overtime. I find that the portion of the Employment Contract purporting to limit the overtime payable to Will to $10 per hour deprives him of the overtime benefits provided by the Act. Will is entitled to overtime pay in accordance with the Act and his wages include the short shift/travel bonus.

**Lunch Breaks**

Although the Employment Contract provides for unpaid meal breaks, none of Will's supervisors or co-workers testified about the breaks he took (without clocking out or deducting them from his recorded hours) while working at Onsite. Karen said that Will either sat in the lunch room during meal breaks or went to a local eating establishment. She said he did not work through meal breaks and frequently took additional time for personal activities. Prior to the hearing, Karen had never met Will so Karen's testimony and argument on this issue is hearsay. As Mr. Corbett pointed out, section 2-38(1)(c)(v) of the Act requires an employer to keep records of when each meal break begins and ends. Onsite failed to keep and/or introduce such records as evidence. There is no mention of lunch breaks on Will's timesheets and no other documentary evidence to show the number or length of Will's lunch breaks.

Even if I accept that Will was taking lunch breaks without clocking out, there is no evidence that anybody at Onsite required him to clock out during meal breaks and deduct this time from his reported hours. If he was supposed to do this, his employer acquiesced because they always paid him (for at least a year) in accordance with his recorded hours, without subtracting time for meal breaks, and without talking to him about the problem and forcing him to correct it. Under the circumstances, Will is not responsible for reimbursing Onsite for any lunch breaks he may have taken with pay while employed at Onsite.

**Premium Pay for Public Holidays**

Section 2-32(3) of the Act requires an employer to pay an employee 1.5 times his hourly rate for each hour and part of an hour in which he is required or permitted to work or to be at the employer's disposal on a public holiday. Karen said she was unsure about how statutory holiday pay was calculated. She did not call anyone from Onsite's payroll department to testify on the Company's behalf. Based on the uncontroverted evidence (Will's timesheets (EE4)), Will worked on the following public holidays without premium pay: Thanksgiving, October 13, 2014 (10 hours worked); Remembrance Day, November 11, 2014 (12 hours worked); Christmas Day, December 25 in 2014 (8.5 hours worked); Family Day, February 16, 2015 (4.5 hours worked); Good Friday, April 3, 2015 (10 hours worked); and Canada Day, July 1, 2015 (9 hours worked).

**Vacation Pay**

Sections 2-27 and 2-29 of the Act say that an employer must pay vacation pay at a rate of three fifty-seconds of the employee's wages. Karen said she was unsure whether vacation pay was calculated properly but indicated Onsite would correct the problem going forward if it was not. Based on the paystubs, it appears that vacation pay was calculated only on what payroll listed as "Maintenance" and not on the portion of the wages listed as "Living Allowance."

**Pay Instead of Notice**

The Appellants argue that Will was given almost 4 weeks' pay instead of notice. Karen testified that Brad told Will he should start looking for other work months before he was laid off. She said Brad then gave Will at least a month's verbal notice that his job was coming to an end. This is hearsay and I cannot rely on it. Brad ought to have testified to the notice he gave to Will if Onsite wanted me to rely on this evidence.

I believe Karen when she says she prepared the temporary layoff notice at Brad's request on August 1, 2015. I also believe that she mailed a copy to Will and delivered a copy to the drop box at the shop in Arcola several days later. Unfortunately, there is no proof that he received the notice. The suggestion that Karen knew Will had received it because he talked to Brad about it several days later is hearsay, as is the suggestion that Brad had verbally warned him about the impending loss of his job at least a month prior. Even if I accept that Will received the notice, it is impossible to know when he received it. I also acknowledge Mr. Corbett's point about the vagueness of the notice itself. Onsite ought to ensure that any future termination notices are clear and unequivocal. In this case, there is no clear evidence that Will received written notice of termination. Based on the circumstances, Will is entitled to 2 weeks' pay instead of notice in accordance with sections 2-60 and 2-61 of the Act.

**The Calculations**

The Employment Standards Inspection Report, Hourly Rate Calculations, and Officer Worksheet (ER10) formed the basis for the Wage Assessment. The Employment Standards Inspection Report lists Will's start date as August 1, 2014 and his end date as August 26, 2015. The assessment covers August 24, 2014 to August 26, 2015. When I initially wrote this decision on July 13, 2017, I failed to recognize that the dates do not match up for a reason. Section 2-89(2) of the Act limits recovery of wages to the last 12 months of employment. As a result of this oversight, I incorrectly credited the employer for payment of wages falling outside of the last year of employment ($114,278.95 instead of $112,579.69) and lowered the Wage Assessment accordingly (from $18,435.40 to $16,736.14). On appeal, the Chairperson of the Labour Relations Board noted this error of law, cancelled the decision, and remitted the matter back to me with directions for correction.

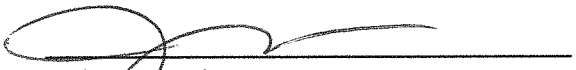
Section 2-75(9) of the Act states that a Wage Assessment "is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and

owing...". The Appellant presented no evidence to establish the amount stated in the Wage Assessment is incorrect. Given the evidence and the law, the Wage Assessment must stand.

## VII. CONCLUSION

The appeal is denied and the Wage Assessment is upheld. The Appellants are ordered to pay $18,435.40 to William Cunningham.

DATED in Regina, Saskatchewan, this 26th day of March, 2018.



Jodi C. Vaughan
Adjudicator

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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.