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

APPELLANTS:	**GO2GUYS DEVELOPMENTS INC. and SHANE REGUSH, as Director of GO2GUYS DEVELOPMENTS INC.**
RESPONDENTS:	**BRYAN PAWLACHUK and the DIRECTOR OF EMPLOYMENT STANDARDS**
DATE OF HEARING:	**February 24, 2021**
PLACE OF HEARING:	**Boardroom 9.1** **Sturdy Stone Building** **122 3rd Avenue North** **Saskatoon, Saskatchewan**

Adam Hnatyshyn, Lawyer, Representing the Appellants

Jean-Pierre Seguin, Lawyer, Representing Bryan Pawlachuk

Violet Harris-Tomlin, Employment Standards Officer, Representing the Director of Employment Standards

LRB File No. 145-20, Wage Assessment No. 1-000445

I. INTRODUCTION

Wage Assessment No. 1-000445 directed Go2Guys Developments Inc. (Go2Guys or the Company) and Shane Regush, director of Go2Guys, to pay $3,544.59 to Bryan Pawlachuk or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act). Go2Guys and Shane Regush appealed the Wage Assessment.

On February 24, 2021, the following individuals attended the hearing:

- Shane Regush, owner and director of Go2Guys;
- Tyler Wilson, Project Manager for Go2Guys and witness for the Appellants;
- Adam Hnatyshyn, Lawyer for the Appellants;
- Bryan Pawlachuk, former employee of Go2Guys;
- Jean-Pierre Seguin, Lawyer for Bryan Pawlachuk;
- Doug Long, Employment Standards Officer; and
- Violet Harris-Tomlin, Employment Standards Officer.

II. THE DISPUTE

On August 13, 2020, a Delegate on behalf of the Director of Employment Standards (the Director) issued Wage Assessment 1-000445 against the Company and its director, Shane Regush, representing unpaid wages for Bryan Pawlachuk. By way of a letter dated September 4, 2020, Leanne Godwin, on behalf of Shane Regush and the Company, appealed the Wage Assessment. The Notice of Appeal, along with a cheque dated September 4, 2020, in the amount of $500.00 made payable to the Minister of Finance, representing the deposit, was faxed to the Director of Employment Standards on September 4, 2020. The original documents were then mailed to the Director and stamped "received" by Employment Standards on September 10, 2020.

The Notice of Appeal sets out the grounds for appeal as follows:

> There are no outstanding wages owing to Bryan Pawlachuk due to the embezzlement, fraudulent activity or other criminal actions of Mr. Pawlachuk in defrauding Go2Guys Developments Inc. in the aggregate amount of $282,360.00, the details of which shall form part of our disclosure, to be provided prior to the date of the hearing.
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> There are no outstanding wages owed to Bryan Pawlachuk due to his wage claim being inflated based upon fake hours and/or fraudulent calculations.

III. PRELIMINARY MATTERS/OBJECTIONS

At the beginning of the hearing, I explained the process to the parties and there were no objections to proceeding with the hearing.

Prior to the hearing, Ms. Harris-Tomlin raised a jurisdictional issue. The Director took the position that due to the late filing of the appeal deposit, the appeal is invalid and should be dismissed. I advised the parties that we would begin the hearing with this preliminary issue. I also advised the parties that I would reserve my decision on the matter and hear the merits of the appeal, so as not to waste anybody's time should I ultimately determine that I had jurisdiction.

Ms. Harris-Tomlin, Mr. Seguin and Mr. Hnatyshyn provided written submissions. Mr. Seguin and Mr. Hnatyshyn also made oral submissions. In support of the Director's position, Ms. Harris-Tomlin asked that I consider *Willow Point Financial Services Limited and Rebecca May-Gorges* v. *Angela Sandin and Director of Labour Standards* in coming to my determination. In a situation where the Notice of Appeal was filed on time, but the appeal deposit was not filed, the Adjudicator found she lacked jurisdiction to hear the appeal. In coming to her decision, she relied on Arbitrator Wallace's decision in *Brady* v. *Jacobs Industrial Services Ltd.*, 2016 CanLII 49900 (SK LA), 2016 CarswellSask 481, where the 15-day appeal period was found to be mandatory and strictly enforced.

Mr. Seguin agrees with the Director's position and argues there is no legislated mechanism and authority under the Act for me to cure the non-compliance. Regardless of the manner that the fee is delivered, it must be delivered within that time-period. With respect to the Appellant's position that I ought to look to the surrounding circumstances and assess whether there was substantial compliance with the provision of the Act, Mr. Seguin argues the Appellant failed purposely or by neglect to provide the evidence within its knowledge and control to allow me to properly assess the surrounding circumstances.

Mr. Hnatyshyn takes the position that the Director erred in calculating the appeal period. Ms. Harris-Tomlin served Go2Guys by email on August 17, 2020, but then served Shane Regush by regular mail. Using deemed delivery dates for the mailed Wage Assessment to Mr. Regush as the commencement of the appeal period, would result in both the Notice of Appeal and deposit being received by the Director within the prescribed 15 business days.

Alternatively, Mr. Hnatyshyn argues the *Willow Point* decision is distinguishable on its facts because at no time did the appellant pay the deposit. The *Brady* decision referred to in *Willow Point*, however, is helpful in that Arbritrator Wallace, as part of her reasons, acknowledged the legislature's intention for the mandatory appeal timeline to provide certainty to those directly affected as to when an appeal has been properly commenced. *Brady* does not delve deeper into analysis regarding what actions amount to compliance with the 15-day appeal period, as it was not necessary in that case. Mr. Hnatyshyn argues there is little doubt in this case that the Director had certainty as to the fact that an appeal had been commenced at the point the Notice of Appeal and cheque were faxed to him on September 4, 2020.

Further, Mr. Hnatyshyn asks me to consider the decision of *Saskatchewan (Employment Standards)* v. *Maxie's Excavating*, 2018 CarswellSask 61, where the Saskatchewan Labour Relations Board (the Board) conducted a thorough review of the jurisprudence surrounding substantial compliance when there are no statutory provisions regarding imperfect compliance. He argues that based on the caselaw, the Appellants had substantially complied with the statutory provisions of the Act. The Notice of Appeal was filed, a copy of the cheque was provided, and the cheque was mailed, all within the prescribed period. The sole reason for the Director's objection is that the physical deposit was received two days after the appeal period had concluded. Mr. Hnatyshyn argues that this position subjects prospective appellants to the variable nature of delivery times of the mail and that this is even more troubling due to highly volatile delivery times of mail during a global pandemic.

I begin my analysis of the preliminary issue by acknowledging that my authority comes from the Act. I accept the proposition that I do not have the authority to extend or waive an appeal period unless the Act specifically provides me with such power. I also agree with the proposition that section 4-4(5) of the Act, while providing me with the

power to overlook and/or correct technical irregularities, does not allow me to extend or waive a statutory appeal period. I must have jurisdiction before I can address any technical or procedural irregularities. In short, there is nothing in the Act that grants me the authority to extend the 15-day appeal period.

The commencement of an appeal to an adjudicator is outlined in section 2-75 of the Act. Section 2(75)(2) of the Act says an appeal must be commenced in writing by filing a written notice of appeal with the director of employment standards within 15 business days after the date of service of a wage assessment. Section 2(75)(4) and (5) say that if the appellant is an employer or corporate director, it has to file a deposit "before the expiry of the period during which an appeal may be commenced."

Methods of service for documents required by the Act are outlined in section 9-9 of the Act. Valid methods of service on anyone other than the Director include, personal service, registered or certified mail, personal service on a person's representative at a place of employment, by any method set out in *The Queen's Bench Rules* for service of documents, by service on a lawyer, and "by sending a copy of the document or notice by electronic transmission if an address for service in a proceeding has been filed respecting the person to be served." *The Queens' Bench Rules* also allow service by ordinary mail.

Valid methods of service of documents on the Director are governed by Section 43(1) of *The Employment Standards Regulations* and include personal service, registered or certified mail, and telephone transmission (fax).

In this case, Employment Standards chose to serve the Wage Assessment on the employer by email and regular mail on August 17, 2020. The Appellants did not confirm receipt of the Wage Assessment. The only evidence about when they may have received the Wage Assessment is Ms. Harris-Tomlin's notice from Microsoft Outlook that says, "Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server: Leanne Godwin (leanneg2g@gmailcom)." This notice is located at Tab 7 of EE1. The Appellants faxed their Notice of Appeal and deposit cheque to the Director on September 4, 2020, and then mailed the original documents, including the cheque, to the Director. Employment Standards marked the documents as "received" on September 10, 2020.

The email containing the Wage Assessment was not addressed to Mr. Regush and was not sent to his email address. Under the circumstances, it makes sense to me to consider ordinary mail as the method of service on Mr. Regush. If we allow five business days for mail delivery of the Wage Assessment (as is done when serving by registered or certified mail), there is no jurisdictional issue. The appeal deposit was received on September 10th, which is within the 15-day appeal period.

Neither Mr. Seguin nor Ms. Harris-Tomlin believe that Mr. Regush ought to be given the benefit of the doubt in this regard. They argued that the appeal period started to run once the Wage Assessment was emailed to the person who had been dealing with the matter on Mr. Regush's behalf, that being Leanne Godwin. They may be correct. Was Ms. Godwin's email address "an address for service in a proceeding [that] has been filed respecting the person to be served?" Arguably, it was. Even if I assume that Mr. Regush, as director of the Company, was validly served by email on September 4, 2020, I find the Appellants were in substantial compliance with the 15-day appeal period.

I find the *Willow Point* decision to be distinguishable on its facts. The appeal deposit was not filed before the appeal hearing in that case. I find the *Maxies* decision to be instructive on the issue of substantial compliance and I thank Mr. Hnatyshyn for bringing it to my attention. The Board reviewed the Saskatchewan Court of Appeal's treatment of substantial compliance with timelines related to filing of notices of appeal in *Wascana Energy Inc.* v. *R.M. of Gull Lake No. 139*, 1998 CanLII 12344 (SK CA) and *Regina (City)* v. *Newell Smelski Ltd.*, 1996 CanLII 5084 (SK CA). In *Newell Smelski*, the Court held that where there are no statutory provisions regarding the effect of imperfect compliance or noncompliance with the statutory requirement, less than full compliance does not necessarily mean the appeal is a nullity.

In *Wascana Energy*, the Court confirmed this principle and stated:

> But not every failure to observe statutory requirements of a procedural nature...carries with it such effects. If the legislature does not expressly provide for the effect of imperfect compliance or noncompliance with a requirement of this nature, the matter becomes one of implication, having regard for the subject matter of the enactment; the purposes of the requirement; the prejudice caused by the failure; the potential consequences of a finding of nullity;...
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> [I]t is difficult to think the legislature intended that the effect should be fatal when the notice of appeal is posted within the prescribed time and arrives within sufficient time to allow for the hearing and determination of the appeal in keeping with the scheme of the enactment.
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> [34] At worst, this amounts to substantial compliance of a near perfect sort, as was the case here, where notice was mailed on the day before the period expired, was being delivered on the day of expiry, and was delivered the day after. As might have been expected, nothing turned on the fact the notice did not arrive a day or two earlier, for the administrator and the board were still able to act upon it in accordance with the requirements of the statute. This was especially so in the circumstances, for the assessment had not only been completed well in advance of May 31st but had been published several days beforehand, leaving ample time for the performance of these duties. Nor did any other form of prejudice arise.

As in the cases referenced above, this case involves near perfect compliance with the statute. There is no question that the Notice of Appeal was served in a valid manner and within the timeframe prescribed by the Act. The only question is whether the required deposit was "deposited" on time. The cheque representing the appeal deposit was issued on September 4, 2020 and it was faxed, along with the Notice of Appeal, to Employment Standards on the same day. The Appellants live in the Saskatoon area so they mailed the original documents, including the cheque, to the Director of Employment Standards in Regina. Employment Standards marked it as "received" on September 10, 2021.

I cannot believe that the legislature's intent in requiring an employer to file a deposit would have been to prevent prospective appellants from having their timely appeals heard. The Appellants' intention to appeal was clear, they filed their Notice of Appeal on time, and they put their money where their mouth was. They issued the cheque, sent a copy of it to the Director via fax, and then forwarded the original cheque by mail. All of this occurred during a global pandemic where personal service of the documents on the Director would have been difficult and possibly dangerous. There is no prejudice to the Director or Mr. Pawlachuk in allowing the appeal to proceed. They have had ample time to prepare their cases. Determining that the appeal is a nullity, on the other hand, has severe consequences for the Appellants. It deprives them of the right to have the merits of the appeal heard.

There are no provisions in the Act addressing imperfect compliance with appeal timelines. In my view, the facts of this case are even more compelling than those in *Maxies*, *Newell Smelski* and *Wascana Energy*. The facts of this case support a finding of "substantial compliance of a near perfect sort" as described by the Court of Appeal in the *Wascana Energy* decision. I find that the Appellants substantially complied with the statutory timelines for filing the appeal and consequently, I have jursidiction to decide the merits of the appeal.

IV. THE FACTS

The parties tendered evidence by way of affirmed testimony and documents. Shane Regush and Tyler Wilson testified on behalf of the Appellants and Bryan Pawlachuk testified on behalf of the Respondents.

The following exhibits were tendered and entered into evidence:

Employer Exhibits (Appellants)
ER1 – Copy of email dated January 22, 2020 from Violet Harris-Tomlin to Leanne Godwin regarding Bryan Pawlachuk's managerial position (2 pages);
ER2 – Copy of email dated April 5, 2020 from Bryan Pawlachuk to Shane Regush referencing outstanding hours, loans, bills, labour and materials (1 page);

ER3 – Package of documents from Appellants containing 28 groupings of documents; and
ER4 – Copy of Bryan Pawlachuk's paystubs from 2019 and 2018 (31 pages).

Employee Exhibits (Respondents)
EE1 – Package of documents entered by Employment Standards containing 9 tabs;
EE2 – Copy of Corporate Registry documents for Go2Guys Developments Inc. (3 pages, located at Tab 3 of EE1);
EE3 – Copy of letter from Violet Harris-Tomlin to Leanne Godwin dated July 7, 2020, along with Employment Standards Inspection Summary and copy of letter from Leanne Godwin dated June 22, 2020 (5 pages, located at Tab 4 of EE1);
EE4 – Copies of Bryan Pawlachuk's Google Timeline printouts from March 20 to April 5, 2020 (32 pages);
EE5 – Copies of WhatsApp messages between Bryan Pawlachuk, Shane Regush and other Go2Guys employees (57 pages); and
EE6 – Copy of paystubs.

V. ARGUMENT

The Appellants' argument is summarized as follows:

- The Appellants do not deny Mr. Pawlachuk is entitled to remuneration for work performed prior to his dismissal. However, the hours and amounts he claimed are inflated based on the actual hours worked between March 20 and April 5, 2020, and they are inconsistent with the agreement between him and Go2Guys. In addition, the amount is subject to set-off by Go2Guys pursuant to the Act.
- Based on the evidence, the Wage Assessment ought to be varied because it awarded overtime hours that Mr. Pawlachuk was not entitled to, awarded hours where he was not at work, and Go2Guys is entitled to set-off.
- Regarding overtime, the overwhelming evidence is that Mr. Pawlachuk was in a management position and not entitled to overtime pay.
- Mr. Regush testified that Mr. Pawlachuk's duties included supervising or directing other workers, discipling subordinates, evaluating performance of subordinates, hiring and promoting staff, independence and discretion in performing assigned duties, participating in carrying out budgets and having signing authority on company cheques.
- Mr. Pawlachuk acknowledged carrying out some of these duties. Subsequent to issuing the Wage Assessment and based on the information provided by the employer, the Employment Standards Officer concluded that Mr. Pawlachuk was in a managerial position (see correspondence dated January 22, 2021 (ER1)).
- The preponderance of evidence leads to a finding that the agreement between Go2Guys and Mr. Pawlachuk did not included compensation in the form of overtime pay. Mr. Regush testified that Mr. Pawlachuk was to be paid $35.00 per

hour up to a maximum of 40 hours per week. The reason he was hired was to bring Go2Guys' finances under control. Mr. Pawlachuk testified that the company was close to insolvency when he was initially retained. Mr. Regush testified that Mr. Pawlachuk improperly pressured the payroll manager to start paying him overtime in December of 2019, without the Appellants' knowledge or agreement.

- The Director filed paystubs from December 16, 2019 to March 22, 2020 to show that Mr. Pawlachuk received overtime pay (EE6). Mr. Pawlachuk testified that his agreement included overtime hours and that he received overtime pay since he was initially hired. However, paystubs from his entire employment history were filed by the Appellants showing no overtime pay until the December 16, 2019 pay period (ER4). The physical evidence provides support for Mr. Regush's testimony.
- Regarding inflated hours, the Appellants provided oral evidence about Mr. Pawlachuk's manipulation of the employee hour tracking system (Tsheets).
- Mr. Regush testified that Mr. Pawlachuk was not authorized to work from home except for evening scheduling and communications with clients. He was expected to be in the office or at jobsites. Mr. Regush and Mr. Pawlachuk testified that he was one of the few employees authorized to be in the office when the pandemic hit. The Appellants testified that employees are not paid for travel time to and from the office.
- A review of the GPS information provided by Mr. Pawlachuk demonstrates several periods of time where he appears to have manipulated his hours. Specifically, he was in the practice of tracking his hours from home to work and back, and there are significant periods where he claimed to be at work where the evidence undermines these assertions.
- The GPS records reveal:
    - March 23 – 5 extra hours charged to Go2Guys. Mr. Pawlachuk was at home from 12:45 to 3:35 and left the job site at 4:23 but alleged he was working until 6:05 p.m.
    - March 24 – 3 extra hours charged. He leaves Home Depot at 3:05 but claims hours from 3:05 to 6:00 p.m. The only work listed is "5-6 office." GPS says he arrived home at 5:00 p.m.
    - March 25 – 3.5 extra hours charged. He leaves jobsite at 9:48 a.m. and goes home. At 1:13 p.m. he goes to his cabin. There is no work description past 9:48 but he alleges to have been working until 1:30 p.m.
    - March 30 – 2 extra hours charged. He says he left jobsite at 4:37 p.m. but worked until 6:31 p.m. There is no evidence in support of this.
    - March 31 – 1.5 extra hours charged. He left his final jobsite at 5:15 p.m. and alleges to have worked until 6:30 p.m. GPS shows he stopped for food at a Vietnamese diner before arriving home at 6:31 p.m.
    - April 1 – 2.5 extra hours charged. He left the jobsite at 3:38 p.m. and his breakdown says he returned to the office. GPS records indicate he

stopped at Starbucks before returning home. He alleges to have worked until 6:20 p.m.

- The Appellants are not claiming against Mr. Pawlachuk's nightly hours for scheduling or messaging with employees, but he has claimed for approximately 17.5 hours when he was not working. The number of hours worked should be lowered from 80 to 63 hours.
- Regarding set-off, Section 2-36(2)(f) of the Act permits the employer to deduct from an employee's wages "voluntary purchases from the employer of goods, services or merchandise." Mr. Regush testified that Mr. Pawlachuk purchased services from Go2Guys in the approximate amount of $37,000. In an email dated April 5, 2020, Mr. Pawlachuk acknowledged owing "some monies for some labor and materials at my places." (ER2)
- The Appellants submit that once any balance owing to Mr. Pawlachuk is ascertained, it ought to be reduced by way of set-off.

The Director's argument is summarized as follows:

- The hours submitted by Mr. Pawlachuk should be the hours considered. He testified under oath to their accuracy, recorded his hours through an app, and the employer did not provide evidence to the contrary.
- Regarding overtime, he was a manager, however, the unwritten employment contract changed during the December 16, 2020 pay period, when he started receiving payment for overtime. He continued to receive overtime payment until the period in question, March 20 to April 4, 2020.
- Through testimony it became clear that Mr. Pawlachuk erred in calculating his overtime hours. See section 2-18(1) of the Act and audit sheet at Tab 6 of EE1. The Director submits the Wage Assessment ought to be amended from $3,544.59 to $3,905.59 and that this amount is owing.
- Regarding work at a Candle Lake location, the employer suggested there is ongoing civil litigation, so this is not the proper forum to consider that issue.

Bryan Pawlachuk's argument is summarized as follows:

- Mr. Pawlachuk did not have access to the employment timesheets and records following his employment, save for some paystubs evidencing that he was paid overtime, but his evidence was clear, reliable, and credible.
- Mr. Pawlachuk relied on his personal records, primarily google maps, which together with his oral evidence, demonstrated his carrying out his employment duties during the hours identified and submitted to the Director. He determined his employment hours to the best of his ability, honestly, diligently, and reliably.
- Despite requests from the Director, the Appellants failed to provide records in accordance with the Act. The Appellants did provide timesheets on this appeal.

- The timesheets ought to be the preferred evidence of Mr. Pawlachuk's hours as they were completed by him at the time and not created later from memory and re-constructions from google maps.
- On cross-examination, Mr. Pawlachuk's evidence yielded similarity between his reconstructed hours and his hours from his timesheets. Additionally, the Appellants did not submit any evidence demonstrating that Mr. Pawlachuk was not acting in his capacity as an employee for the related time periods.
- Regarding Mr. Pawlachuk modifying his timesheets, he gave clear, honest, and reliable evidence to explain the allegations. He outlined deficiencies on how entries are used and made.
- There is no evidence he altered his timesheets in a malicious manner. All alterations were made to properly reflect the hours that he was working within the existing time system.
- Mr. Pawlachuk explained the nature of his employment and duties, many of which were organizational or logistical in nature. The evidence of the Appellants also confirmed this. He completed work from his workplace office, home office, and in his truck (which was essentially a site/mobile office throughout the day as he traveled between job sites, obtaining supplies, towing company trailers, etc.).
- Regarding the Appellants' argument for set-off pursuant to section 2-36(2)(f) of the Act, there is an ongoing court action concerning multiple related issues and another Employment Standards matter.
- The related issues are alluded to in an email (ER2) that forms the basis for the allegation that Mr. Pawlachuk made voluntary employee purchases from the Appellants. Reference is made to loans, unpaid wages and vacation time, materials and labour, etc. The Appellants did not provide any documents or calculations to determine the quantum alleged but indicated that "Jeff" the accountant had reviewed materials and told Mr. Regush the amount owing. This evidence ought to be given no weight. It is hearsay. There are no supporting documents and the witness could not quantify with any certainty the amount owing.
- In the context of the overall litigation related to this issue, the parties will have the opportunity to prove outstanding loans, labour and goods, if any. Allowing the Appellants' set-off claim here would deny Mr. Pawlachuk the right to set-off loans allegedly owed to him.
- There is insufficient evidence to ascertain and quantify the amount that might be owed for set-off purposes.

VI. ANALYSIS AND DECISION

The starting point for determining the merits of the appeal is the Wage Assessment. It represents unpaid wages for Bryan Pawlachuk's last two weeks of work with Go2Guys, March 20 to April 5, 2020. Ms. Harris-Tomlin calculated the Wage Assessment as follows:

$35 per hour x 80 hours = $2,800.00
10.5 overtime hours at time and one-half or $52.50 per hour = $551.25
Vacation pay at rate of 3/52's = $193.34

Total = $3,544.59

Without evidence to the contrary, the Wage Assessments stands (section 2-75(9) of the Act).

According to Ms. Harris-Tomlin, Mr. Pawlachuk's evidence revealed he had miscalculated his overtime hours when he initially reported them to her. He mistakenly reported 10.5 overtime hours instead of 25 overtime hours. To account for the additional overtime hours, the Director submits the Wage Assessment ought to be amended to $3,905.59, pursuant to section 2-18(1) of the Act (see audit sheet at Tab 6 of EE1).

Based on the evidence, the following facts are uncontroverted:

Mr. Pawlachuk was hired in October of 2018 to help figure out where the Company was "bleeding money." The Company had a lot of work but was having trouble paying its bills. Mr. Pawlachuk was an experienced businessman and friend to Mr. Regush before he started working for Go2Guys. Mr. Regush was better at quoting and selling, obtaining clients, and dealing with the outdoor division than he was at running the Company.

There is no written employment contract. For the first two weeks, Mr. Pawlachuk acted in an advisory or consulting role at a rate of $35 per hour. His hourly rate stayed the same throughout his employment with Go2Guys, even though his position changed. Mr. Regush was excited about what Mr. Pawlachuk could do for the Company and, not long after hiring him, he became a Project Manager and/or Operations Manager. The two men talked about eventually becoming business partners.

Mr. Pawlachuk kept track of his hours on the Tsheets App, as did all non-salaried employees. There were problems with the system.

When the pandemic hit, hard decisions had to be made. Mr. Regush decided to lay off Mr. Pawlachuk, whose last day of work was April 4, 2020. Mr. Pawlachuk was not happy with this decision or how Mr. Regush carried it out. Go2Guys did not pay Mr. Pawlachuk for his work from March 20 to April 4, 2020.

The relationship between Mr. Regush and Mr. Pawlachuk was different from a typical employer-employee relationship in that large sums of money were

> exchanged by way of loans and trading of labour and materials. There is ongoing civil litigation between the parties relating to these monies, as well as alleged embezzlement and/or fraud.

The evidence regarding Mr. Pawlachuk's hours of work reveals that Go2Guys needed a more precise time-tracking system. Mr. Regush confirmed they no longer use Tsheets. The Appellants have identified potential inconsistencies with the hours of work claimed by Mr. Pawlachuk. Regardless of whose idea the implementation of that system was (Bryan or Jeff's), the Tsheet system was the time-keeping system the Company was using to track employee's hours at the time in question. It is the employer's responsibility to keep track of its employee's time.

The uncontroverted evidence was that the Tsheet system was not great. Often jobsites had no Wi-Fi. Without Wi-Fi, employees could not access Tsheets, so time entries sometimes had to be done later. The evidence also established that time entries could be manipulated after the fact. I accept that there were occasions where Mr. Pawlachuk altered and added to his time entries.

During his testimony, Mr. Pawlachuk tried to explain the inconsistencies with the hours he had claimed, but these events occurred over a year ago, so I do not fault him for not being able to account for every minute or hour. If the employer had a concern about his time entries, including claims for travel time to and from work and time worked in his vehicle and from home, they ought to have talked to him and/or warned him on or before March of 2020 about keeping more accurate and precise time records. There is not enough evidence to establish conclusively, or on a balance of probabilities, that Mr. Pawlachuk was inflating his hours.

Based on the forgoing, I accept the number of hours claimed in the Wage Assessment. There is no clear evidence to the contrary. I don't find the information contained in the Tsheets particularly reliable, nor do I believe the GPS records establish that Mr. Pawlachuk was always performing work duties. The GPS records give information regarding Mr. Pawlachuk's movements, but the information is not limited to work-related duties and hours. I find that Mr. Pawlachuk worked 80 regular hours at a rate of $35.00 per hour from March 20 to April 5, 2020.

With respect to 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 3(4) of the *Employment Standards Regulations* creates a managerial exemption to overtime pay for an employee who performs services that are "entirely of a managerial character."

Whether or not an employee is a manager is a question of fact. Relevant case law reveals that all aspects of the job must be considered to determine if sufficient managerial character exists. There is no one function or characteristic that is determinative of the issue. One must consider what the person did and what he or she was charged to do in the business enterprise. The degree of autonomy and decision-making authority needs to be significant but not unfettered. (See for example *Westfair Foods Ltd. v. Saskatchewan (Director of Labour Standards)* (1995), 136 Sask. R. 187 (QB), *Balzer v Federated Co-operatives Limited*, 2014 SKQB 32, and *McCracken v Canadian National Railway*, 2010 ONSC 4520.)

What constitutes "of a managerial character" varies according to the facts of each case. In this case, the evidence leads me to conclude that Mr. Pawlachuk was a manager while employed at Go2Guys. He was hired to help save the Company. He started as a consultant but fairly quickly became an Operations Manager. I believed Mr. Regush when he said Mr. Pawlachuk was practically running the Company. He had more business experience. Mr. Regush trusted him to help get the business on track. Mr. Regush's strengths lie in selling, quoting jobs, and the hands-on running of the outdoor division of the Company. Moreover, they talked about becoming business partners and Mr. Pawlachuk even loaned money to Mr. Regush to help with the business.

On cross-examination, Mr. Pawlachuk acknowledged both that he supervised and directed other employees and that he was part of decision-making discussions with Mr. Regush and Jeff when it came to hiring, reviewing, and disciplining employees. He admitted that he had discretion in carrying out his duties and that he had signing authority on Company cheques/accounts. Aside from Mr. Regush, he was one of the few employees permitted to work from home. The evidence suggests he carried out some of his duties, scheduling for example, from home in the evenings.

Mr. Regush testified that he never agreed to pay overtime to Mr. Pawlachuk, who understood the Company's predicament and was adamant about limiting overtime hours of employees. I believed Mr. Regush and Mr. Wilson when they said it was Mr. Pawlachuk who chose not to be on salary. He wanted to be paid hourly but also knew the Company was not in a position to pay overtime. Mr. Pawlachuk testified that he was always paid for his overtime hours except for the hours he banked, but when Mr. Regush contacted his office during the hearing and obtained copies of Mr. Pawlachuk's paystubs from October 2018 to December 2019, the documents did not support this assertion (ER4). According to his paystubs, the first time Mr. Pawlachuk was paid overtime was on his December 16, 2019 paycheck.

Mr. Pawlachuk did not provide any documentary evidence in support of his claim that he had been banking overtime hours. He said Jeff would have a record of it, but Jeff was not called as a witness. I also find it unlikely that Mr. Pawlachuk kept copies of only his paystubs that included overtime pay. However, these are the paystubs he provided to Employment Standards. Clearly, the employer ought to have provided all of the pay

stubs to Employment Standards during the course of the investigation and before the Wage Assessment was issued, in support of its assertion that Mr. Pawlachuk was not entitled to overtime pay. They did not do so. The employer ought to have shared the paystubs with the parties prior to the hearing. Again, they did not do so. In any event, now that all of the paystubs have been produced, and for the above-noted reasons, I prefer the evidence of the Appellants, over Mr. Pawlachuk's evidence, as it relates to overtime pay.

Mr. Pawlachuk's paystubs from December 16, 2019 to March 2020 include overtime pay (EE6). I accept that Mr. Regush did not know or agree to pay overtime to Mr. Pawlachuk. It was only after overtime was paid for several months that Mr. Regush learned about it. None of the paychecks including overtime pay were significantly higher than past paychecks. Mr. Regush may have signed off on these paychecks (or it may have been Jeff and Leanne) but in any event, as Mr. Regush put it, they are "way tighter on these things now."

Based on totality of the evidence, I find that Mr. Pawlachuk was a manager at Go2Guys. I do not believe there was an agreement to pay him overtime. I find that Mr. Pawlachuk falls within the managerial exception for overtime pay and, as such, is not entitled to overtime pay.

There is no doubt that Mr. Pawlachuk is owed vacation pay on his last two week's wages (March 20 to April 5, 2020) at a rate of three fifty-seconds in accordance with section 2-27 of the Act. The calculation is as follows:

> $35 per hour x 80 hours = $2,800.00
> Vacation pay at rate of 3/52's = $161.54
>
> Total = $2,961.54

The remaining issue is whether the Appellants are entitled to set-off. Section 2-36(2)(f) of the Act provides that employers can make deductions for "voluntary employee purchases from the employer of any goods, services or merchandise" from an employee's wages. There is evidence that Mr. Pawlachuk used Go2Guys' goods and services at his properties while employed by the Company.

While I accept that employers can make such deductions, the voluntariness of any purchases are in question here. The employer and employee do not agree on the amount of goods and services used by Mr. Pawlachuk. Further, they do not agree on how much, if any, of these goods and services have already been "repaid" given that Mr. Regush borrowed money from Mr. Pawlachuk to put into the Company. There is ongoing civil litigation between the parties. Under the circumstances, any set-off should be dealt with in that case. Presumably, more evidence will be led in the civil matter to allow the trier of fact to quantify any outstanding amounts.

VII. CONCLUSION

The appeal is allowed, in part, and the Wage Assessment is varied to $2,961.54. The Appellants must pay the amount of $2,961.54 to Mr. Pawlachuk.

DATED in Regina, Saskatchewan, this 3rd day of May, 2021.

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.