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

APPELLANTS:	**OLYMPIC MOTORS (SK) I CORPORATION, operating as AUTO GALLERY SUBARU, and THOMAS GLEN, as Director of OLYMPIC MOTORS (SK) I CORPORATION**
RESPONDENTS:	**CASSANDRA FOWLER and the DIRECTOR OF EMPLOYMENT STANDARDS**
DATE OF HEARING:	**October 13, 2022**
PLACE OF HEARING:	**3rd Floor Boardroom 1870 Albert Street Regina, Saskatchewan**

LRB File No. 102-22, Wage Assessment File No. 1-000570

I. INTRODUCTION

Wage Assessment No. 1-000570 directed Olympic Motors (SK) I Corporation operating as Auto Gallery Subaru (Auto Gallery or the Company) and Thomas Glen, director of the Company, to pay $13,173.03 in unpaid wages to Cassandra Fowler or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act). Auto Gallery and Thomas Glen appealed the Wage Assessment.

On October 13, 2022, the following individuals attended the hearing:

- Josh Jors, Operations Manager for the Company and authorized representative for Thomas Glen and the Company;
- Kevin Mellor, lawyer for Thomas Glen and the Company;
- Amanda Griffin, employee and Service Advisor for Auto Gallery;
- Carajo Fox, former Payroll Administrator for Auto Gallery;
- Cassandra Fowler, former employee and Deal Processor for Auto Gallery;
- Jeremie Katz, former employee and Service Advisor for Auto Gallery;
- Andrew Langgard, Employment Standards Officer; and
- Allysia Finn, new Employment Standards Officer, appearing as observer.

II. THE DISPUTE

On May 25, 2022, a Delegate on behalf of the Director of Employment Standards issued Wage Assessment No. 1-000570, representing unpaid wages for Cassandra Fowler, against the Company and its director, Thomas Glen. On June 14, 2022, Thomas Glen and

the Company filed a Notice of Appeal claiming the Wage Assessment ought to be dismissed because Cassandra Fowler was not entitled to overtime pay as a salaried employee. At and after the hearing, the Appellants' grounds of appeal shifted to include an unaccounted-for payment of $1,750, time theft on the employee's part, and a lack of overtime hours worked by the employee.

III. PRELIMINARY MATTERS/OBJECTIONS

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

Prior to the start of testimony, the parties reached a settlement relating to payment of wages for Amanda Griffin. Mr. Mellor objected to her remaining as an observer for the appeals relating to two former co-workers, including Cassandra Fowler, on the basis that confidential information would be shared. Amanda Griffin was excused.

The parties discussed how to proceed with the hearing in a manner that would allow the appeals to take place at the same time for efficiency, but still protect confidential information wherever possible. We agreed the complainants (witnesses for the Director of Employment Standards) would be in the hearing room only when evidence relating to that individual was being presented. The parties agreed that Carajo Fox, who was the Payroll Administrator for the Company from March to June of 2021, would testify first, and that she would leave after giving her testimony. Since Carajo Fox's testimony would relate to both former employees, the parties agreed the exclusion of witnesses would take effect after her testimony. For Josh Jors' testimony, Cassandra Fowler would be excused from the room for the portion of testimony relating to Jeremie Katz, and vice versa.

IV. THE FACTS

The parties tendered evidence by way of sworn testimony and documents. Josh Jors (Josh) testified on behalf of the Appellants. Carajo Fox (Carajo), Jeremie Katz (Jeremie), and Cassandra Fowler (Cassandra) testified on behalf of the Respondents.

The following exhibits were tendered and entered into evidence:

Employer Exhibits (Appellants)

ER-1 Letter from Mr. Mellor to Director of Employment Standards, outlining terms of payment of Wage Assessment for Amanda Griffin, dated October 13, 2022;
ER-2 Time Sheets for Jeremie Katz;
ER-3 Memos regarding Jeremie Katz;
ER-4 Summary prepared by Employer and Browser History for Cassandra Fowler; and
ER-5 Memos regarding Cassandra Fowler.

Employee Exhibits (Respondents)

EE-1 Employment Standards Wage Assessment Form dated and signed October 13, 2022 for Amanda Griffin;
EE-2 Employee history detail journal (payment history) for Jeremy Katz;
EE-3 Schedule "B" Remuneration for Jeremie Katz;
EE-4 Saskatchewan Employment Standards Audit Sheet for Jeremie Katz;
EE-5 Offer of Employment for Cassandra Fowler;
EE-6 Time Cards for Cassandra Fowler;
EE-7 Saskatchewan Employment Standards Audit Sheet for Cassandra Fowler;
EE-8 Saskatchewan Corporate Registry Profile Report for Olympic Motors (SK) I Corporation;
EE-9 Emails between Employer and Employment Standards regarding wage calculations for Jeremie Katz and Cassandra Fowler (October of 2021 to April of 2022);
EE-10 Audit Adjustment (Regular/Overtime Wages) for Cassandra Fowler;
EE-11 Calculation of Hourly Wages for Cassandra Fowler;
EE-12 Employee history detail journal (payment history) for Cassandra Fowler; and
EE-13 Timesheets for Cassandra Fowler.

V. ARGUMENT

After presenting their evidence, the parties agreed to file written arguments via email to me by 5:00 p.m. on October 31, 2022. The parties filed their written arguments on time, and I then shared them.

The Appellants' argument in favour of dismissing the Wage Assessment for Cassandra Fowler is summarized as follows:

- The Employment Standards Officer made a mathematical error in calculating the wage assessment by only giving the employer credit for 4 payments of $1,750 instead of 5 payments of $1,750. When you compare the paid column of the Audit Sheet (EE-7) to the actual Employee History Detail Journal (EE-12), the first two payments under EE-12 are excluded as they are prior to the July 1 wage assessment period. However, when you add up the remaining 5 payments of $1,750, only 4 of these payments makes it into the paid column under EE-7. There has to be five for both exhibits to correspond with each other. As a result, the wage assessment needs to be reduced by $1,750.
- When the Act was passed, the Ministry put out a bulletin that stated it: "...will support economic growth by clearly outlining the rights and responsibilities of employers, employees and unions in the workplace. With this legislation,

Saskatchewan will have the most modern, competitive, fair and balanced labour and employment environment in Canada."

- Cassandra committed time theft and it would be grossly unfair and unjust to have the Ministry force an employer to pay overtime to an employee who did not work for the employer during regular business hours for the benefit of the employer and instead worked on personal business during her normal employment hours during the day which necessitated her to work overtime.
- In the *Yorkton Cooperative Association* v. *Retail, Wholesale Department Store Union* decision, Mr. Justice Kalmakoff (now with the Court of Appeal for Saskatchewan) upheld an employee's dismissal and described time theft or "falsification of hours for the purpose of receiving pay for time not worked," as a serious matter facing employers. It is a breach of the employment relationship and constitutes fraud and theft.
- The employee has made an extraordinary claim for overtime in the amount of 521.57 hours. The claim was made 10-11 months after she left. The amount claimed is exorbitant and makes one question why she waited so long to raise the overtime issue. It is not credible that two employees make identical overtime claims in close proximity of time. They are trying to seize upon an opportunity to receive money from the employer.
- Cassandra spent 1.37 hours of her workday not working and is trying to claim overtime to increase her compensation for work that ought to have been done during regular work hours. Not only does she get paid for hours not worked at regular time, she gets paid for hours in overtime at an increased rate that should have been worked during regular business hours at the regular rate of pay.
- It is contrary to the spirit and intent of the Act to pay out such exorbitant overtime claims that were never identified to the employer as it was allegedly occurring and then 10-11 months after ceasing employment bring a claim for $13,000 in wages the employer did not authorize.
- The overtime claim needs to be strictly and critically analyzed for fairness.
- Cassandra committed time theft by online shopping during work hours and by not recording her lunch breaks. The employer's report prepared from the employee's computer (ER-4) documents time spent searching the internet while she was at work for the period April 29 to June 30, 2021. The report indicates she spent 3,546.5 minutes or 59.10 hours (3556 minutes – 9.5 minutes adjusted by the employee = 3,546.5 minutes/60 minutes = 59.10 hours) on her personal affairs.
- It is an express and implied term of the employment contract (section 5 of EE-5) that the employee work for the employer's benefit while at work.
- In order to calculate how many hours the employee would not have worked on employer's business for the wage assessment period of July 1, 2021 to June 30, 2021, an extrapolation has to be performed as her previous computer was destroyed. This does not limit our analysis because the employee admitted she

would have worked in the same fashion over the wage assessment period that she did during the April 29 to June 30, 2021 time period.

- The relevant employee numbers to extrapolate the number of hours the employee did not work during regular business hours during the wage assessment period are as follows:
  (a) Regular hours worked during the wage assessment period (EE-7 page 2): 1907.5
  (b) No. of days worked during April 29 to June 30, 2021 (less May stat): 43
  (c) No. of regular hours worked during April 29 to June 30, 2021 (43 days x 8 hours = 344 hours): 344
  (d) No. of hours not worked during April 29 to June 30, 2021: 3,556 minutes – 9.5 minutes adjusted by employee = 3,546.50 minutes/60: 59.10
  (e) No. of times 344 hours is of the total regular hours worked of 1907.50 (1907.5/344=5.54): 5.54
  (f) No. of hours extrapolated over the 1,907.5 regular wage assessment period not worked by the employee for entire wage assessment period: 5.54 x 59.10 hours = 327. 41
- The relevant numbers to deduce the number of lunch hours the employee did not work during regular business hours during the wages assessment period but claimed for is:
  (a) No. of one hour lunch hours taken during the wage assessment period (EE-13): 11
  (b) No. of lunch hours during the wage assessment period: 243
  (c) No. of lunch hours at 1 hour not recorded as taken (243-11): 232
- The employer is deducting 232 hours at lunch time because it states the employer took lunches everyday. Section 3 of the employment contract says she gets a unpaid 60-minute lunch break.
- The employer is therefore deducting 559.41 hours (232 + 327.41) from the employees 521.57 hours claimed as overtime under the assessment. The result is the employee owes the employer 37.84 hours (559.41 - 521.57 hours) and is therefore not entitled to any overtime hours as she spent more time on personal business than working for the employer during the wage assessment period and she did not properly clock out for lunches as her employment contract allowed at section 3.
- The employer's evidence was that the employee and other employees making similar claims were friends who together with the accountant made these alleged and overly zealous overtime claims.
- The employee's credibility ought to be considered. It is not reasonable to work 521 hours and not say something and it is not reasonable to take only 11 lunches in a year. The employee was searching online for skip the dishes but never clocked out for lunch which is not reasonable.
- The hours claimed are too extraordinary to be believable.
- The Wage Assessment should be dismissed in its entirety.

The Respondents' argument in favour of upholding the Wage Assessment for Cassandra Fowler is summarized as follows:

- Cassandra was employed by the Company as a Deal Processor from November 11, 2018 to June 30, 2021. The Wage Assessment directs the Company to pay the sum of $13,173.03 to Cassandra and the audit sheets tendered as exhibits form the basis for the Wage Assessment. The audit covers the last 12 months of the complainant's employment.
- Cassandra's compensation was in the form of a semi-monthly salary plus commissions/bonuses for vehicles sold.
- Section 2-1(o)(i) of the Act defines "overtime" and "overtime pay" as pay at a rate of 1.5 times an employee's hourly wage. Section 2-1(j) defines the term "hourly wage" as an amount an employee earns or is deemed to earn in an hour as determined in the prescribed manner. The Act provides regulation-making authority to calculate an employee's hourly wage for employees with blended or mixed compensation, i.e. a fixed rate plus incentive-based rate.
- Section 17(1) of the Regulations sets out how to determine an employee's hourly wage for an employee who is not paid, hourly, daily, weekly, or monthly. This is used to determine an employee's true hourly wage reflecting both base compensation as well as incentive compensation such as bonuses or commissions. Cassandra was not paid strictly on an hourly, daily, weekly or monthly basis so section 17(1) applies to the calculation of her hourly wages.
- Once the hourly wage (with commissions/bonuses) is determined, the employer is required to apply a multiplier of 1.5 times to that hourly wage to arrive at the employee's overtime rate, which applies to any overtime hours worked.
- Cassandra earned commissions infrequently, so it was not always necessary to rely on section 17(1) of the Regulations to calculate her hourly wage.
- During the occasions where Cassandra did not earn any commissions, the Officer used section 16(4) of the Regulations to determine her monthly salary based on a semi-monthly payroll cycle ($1,750 x 2 = $3,500 per month and after the September 6, 2020 wage increase it is $1,875 x 2 = $3,750 per month). Once the monthly amount is determined, this number is multiplied by 12 to get an annual salary. The final step is to divide the annual salary by 40 hours per week and 52 weeks per year to arrive at the hourly wage ($20.19 per hour up to September 5, 2020 and $21.63 per hour starting on September 6, 2020 until the end of her employment).
- The procedure for calculating an hourly wage according to section 17(1) of the Regulations assumes it is possible to determine what amounts the employee earned during regular versus overtime hours. Practically speaking, employers rarely have records to indicate precisely what time the employee's commission was earned and are therefore unable to specify whether this amount was earned in regular or overtime hours. This complicates the calculation of the hourly wage

since section 17(1) excludes both overtime hours and pay, vacation pay and public holiday pay from the calculation. Where the Director doesn't know how much was earned in regular versus overtime hours, the Director's approach is to assume the wages were earned uniformly over the total hours worked in the pay period. If it was clear that all of the employee's wages were earned during regular hours, the Director would divide the wages by the regular hours only. However, as this is not clear from the available payroll records, the Director divided the regular wages and commissions/bonuses by the total hours (regular and overtime) to arrive at the hourly rate. This was then applied to the regular and overtime hours and assessed for what was owed in excess of what was paid.

- The Director was only able to find one case in Saskatchewan that dealt with the issue of calculation of an employee's hourly wage where the employee earned blended compensation: *Onsite Oilfield Services Inc.* v. *William Cunningham (2018)*. In this case the employer failed to include non-discretionary performance and travel bonuses in the employee's hourly wage when calculating overtime pay. The Adjudicator held these bonuses must be included in the hourly wage.
- Case law from other jursidictions supports the Director's approach that section 17(1) requires the Company to include bonuses/commissions when determining an employee's hourly wage for overtime purposes. In *Hart Hentschel Inc. o/a Auto House Honda* v. *Lynn Whitesell and Director of Employment Standards*, the Ontario Labour Relations Board held Ontario's *Employment Standards Act* requires the employer to include commissions earned when determining the employee's overtime rate.
- The effect of section 2-75(9) of the Act is that the wage assessment is considered *prima facie* correct. The onus is on the Appellants to demonstrate the wage assessment is incorrect.
- An employer is required to pay overtime if pursuant to section 2-2 of the Act, the employer knows or ought reasonably to know that the employee is working and does not cause the employee to stop working. Sections 2-17 and 2-18 of the Act require an employer to pay overtime to employees scheduled for 5 days per week for hours worked in excess of 8 hours in a day or 40 hours in a week, whichever is greater.
- The employer's records show Cassandra exceeded the overtime thresholds in the Act and that she was never paid overtime pay. The evidence shows she is entitled to the wages set out in the audit sheet.
- Carajo testified that excepting front counter administrative staff, she was directed by Josh not to pay overtime pay. Josh denied giving this directive. Carajo's testimony is more credible and ought to be preferred over Josh's.
- Josh's testimony that Auto Gallery has always paid its employees overtime pay is at odds with the Company's payroll records (EE-2 and EE-12). He blamed the payroll clerk for missing any overtime pay that ought to have been paid. His evidence was self-serving and not supported by the evidence.

- Carajo, who was in charge of payroll from March to June of 2021, testified that she processed her first payroll for March 22 to April 5, 2021, in accordance with the Act which led to overtime pay for Jeremie. After the next payroll run, she met with Josh Jors and Karla Stewart and they instructed her to reverse the overtime pay she had calculated for the April 6-20, 2021, payroll. She was directed to pay straight time for all hours for the non-administrative employees. The payroll evidence showing only one overtime payment to Jeremie for March 22 - April 5, 2021, is consistent with her testimony.
- The Company's past practice regarding overtime pay should be considered in assessing credibility (*Labour Standards Act* (*Auto Gallery 1994 Ltd.* v. *Jeff Marcynuk*).
- It should come as no surprise that Cassandra was working overtime hours. She testified that after her wo-worker Melissa left, she was effectively doing three jobs: deal processor, accounts payable and accounts receivable. Moreover, her deal processing responsibilities were not limited to Auto Gallery but included 15 Olympic Motors dealerships throughout Canada. This is a significant workload for one employee. She gave clear testimony that her supervisor Lance and Mr. Jors were both aware of the hours she was working. She was never instructed to stop working.
- The employer could have avoided issues regarding hours of work like start times and meal breaks had it reviewed employees' timesheet submissions on a regular basis. Josh testified that the employer wasn't required to scrutinize employee timesheets prior to them going to payroll for processing.
- There was a clear pattern established whereby the complainants submitted, and were paid, for the hours recorded in their timesheets. In doing so, the Company acquiesced to those hours without making any adjustments for the supposedly incorrect start times or additional meal break times. The lack of any systematized oversight process is the Company's error. Having failed to review the complainants' timesheets and paying them for the hours they submitted, it is not reasonable to go back months or even years after the fact to question those records. If the appellants had concerns regarding the hours of work in the complainants' timesheets, the time to address those concerns is before the employees are paid.
- There is no basis in law for the appellant's ground of appeal that Cassandra was paid salary and therefore not eligible for overtime pay.
- Cassandra's wage assessment should not be reduced for personal use of her computer during work hours. The Company never raised the issue with her or took any action regarding her web browsing habits during her employment. The Company produced no written policy regarding personal use of computers. It is the employer's responsibility to manage its workers. It can't claw back time from wages owing to Cassandra.
- The amounts determined in the web browsing summary (ER-4) for the period of April 29 to June 30, 2021, can not be "extrapolated" to reduce the amount of the

wage assessment for the remainder of the audit. No evidence of other web browsing was tendered.

- Section 2-16 of the Act requires an employer to pay an employee at least the prescribed minimum wage for every hour or part of an hour the employee is required or permitted to work or to be at the employer's disposal. Section 2-17 and 2-18 of the Act contain similar wording with respect to overtime pay. According to the Supreme Court of Canada's direction in Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 SCR 27 (at para. 36), employment standards legislation is to be interpreted broadly and generously, and any difficulties arising from the statutory language are to be resolved in favour of the employee.
- Cassandra was "at the employer's disposal" while she was at her workstation. Although not all of Cassandra's web browsing was work-related, she was ready and able to perform work tasks as needed for the Company. An employer can engage in progressive discipline if an employee is not meeting the requirements of the job. An employer can not refuse payment (or deduct any amounts from wages already paid or assessed as owing) if the employee was at the employer's disposal. Cassandra must be paid for this time in accordance with the Act.
- The Wage Assessment should be upheld and the appeal should be dismissed.

VI. ANALYSIS AND DECISION

The Wage Assessment claims that Auto Gallery owes wages to Cassandra in the amount of $13,173.03. The basis for the wages claimed is found in the Saskatchewan Employment Standards Audit Sheet (EE-7). Section 2-75(9) of the Act says the wage assessment before me is "proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing."

The issue to be determined in this case is whether Cassandra worked overtime hours entitling her to overtime pay. The Appellants did not disagree with the method of calculating Cassandra's overtime pay, but rather took issue with her entitlement to any overtime pay in the first place. Due to an alleged missed credit for payment received from the employer and time theft on the part of the employee, the Appellants argue there is no unpaid overtime and therefore the Wage Assessment ought to be dismissed.

I agree with the Director's position that there is no basis in law for the Appellants' assertion in the Notice of Appeal that Cassandra is not entitled to overtime pay as a salaried employee. The Appellants did not pursue this ground of appeal at the hearing or in their written argument filed 18 days after the hearing.

The first argument made by the Appellants in their written submission filed on October 31, 2022, relates to an issue that was neither raised in the Notice of Appeal nor at the appeal hearing. It would have been preferable for the Appellants to have raised the issue at the hearing so I could have heard testimony on the issue and so I could have heard Mr. Langgard's position on it, given that he is the one alleged to have made a

calculation error. With that said, I will do my best to address the Appellants' argument relating to a missed $1,750 payment the Appellants' say ought to have been credited to the Company. Obviously, I do not want a calculation error to stand if one was indeed made.

The Appellants say the Employment Standards Officer made a mathematical error in calculating the Wage Assessment by only giving the employer credit for four payments of $1,750, instead of five. They compared the paid column of the Audit Sheet (EE-7) to the actual Employee History Detail Journal (EE-12) and noted the first two payments under EE-12 are excluded because they were prior to the July 1 wage assessment period. However, they point out when adding up the remaining five payments of $1,750, only four of these payments made it into the paid column under EE-7.

When I review the documents, I do not come to the same conclusion. I see the $1,750 payment to which the Appellants are referring—it is the third payroll entry on page 1 of EE-12. This particular summary relates to "Period ending: 07/05/2020." While the Director could have technically included July 1 to 5 of 2020 in its assessment, in accordance with section 2-89 of the Act, the Audit Sheet (EE-7) shows Employment Standards used July 6, 2020 as the start date and June 30, 2021 as the end date for the Audit. I am guessing (because it was not raised as an issue at the hearing) Mr. Langgard made this decision for ease of reference and calculations, since going back to July 6, instead of to July 1st corresponds with Auto Gallery's pay periods. I believe the payment referred to by the Appellants falls outside the scope of the audit. Having said that, it bears repeating that I would have benefited from hearing from the parties at the hearing on this issue. If the Appellants are in fact correct in arguing that the $1,750 payment in question ought properly to have been credited to them, then I trust Employment Standards to make the necessary adjustment.

The Act defines "overtime" and "overtime pay" as pay at a rate of 1.5 times an employee's hourly wage or at a prescribed rate for prescribed employees. Cassandra earned a semi-monthly salary plus commissions/bonuses for vehicles sold. Section 17(1) of the Regulations applies to Cassandra because she was not paid on strictly an hourly, daily, weekly or monthly basis. Employment Standards only relied on Section 17(1) of the Regulations to calculate Cassandra's hourly wage when she earned commissions. Otherwise, they used section 16(4) of the Regulations yielding an hourly rate of $20.19 up to and including September 5, 2020, and $21.63 per hour from September 6, 2020 to June 30, 2021. This approach to calculating Cassandra's hourly rate for purposes of calculating overtime pay aligns with the legislation.

The Appellants' main argument on behalf of dismissing the Wage Assessment relates to time theft by the employee. This issue was not raised in the Notice of Appeal; however, it was raised, and addressed through evidence, at the hearing. With respect to Cassandra's hours of work, the Appellants allege Cassandra did not work any overtime. Josh Jors, the Operations Manager of the Company, testified that Cassandra's browser

history (ER-4) proves she is not owed overtime pay. He pointed out that she says she had to come into work early to catch up, but that there was so much non-work-related activity before and after regular work hours. Josh believes Cassandra could have completed all of her work between 8 to 5 had she been working during those hours. If she was at work for 10 hours but only worked 8 of those hours, she is owed no overtime.

To Josh's knowledge Cassandra was friends with Carajo, Jeremie and Amanda Griffin. He said it was Cassandra's responsibility to fill out her timecards properly and that she never complained about not being paid overtime. He also said the Company did not authorize her to work overtime, and he was not even aware she was working those hours. When asked if he saw her eating lunch, he said, "every day." He also said he knows she ate lunch because she ordered skip the dishes from her computer.

On cross-examination, Josh admitted he was not Cassandra's supervisor and that she did not report to him. He said she would have reported to the Controller, who would have been John at first and then Lance. They are the ones who would have been overseeing her work on a daily basis. He admitted that John and Lance did not raise concerns about Cassandra's hours. He also acknowledged that he was responsible for 11 dealerships, and therefore was not at Auto Gallery every day. He said Cassandra's pay would have been reviewed and paid by Tom, although he would not have been referring to the source documents (timecards and payroll journal). Cassandra and the payroll clerk were "unfortunately" the only people who would have seen her hours.

Josh confirmed he was the person who created the summary of Cassandra's non-work hours (ER-4). He explained the Company could not provide details from Cassandra's computer before April 29, 2021, because they disposed of her old computer. He thinks it is unreasonable that she just started doing non-work-related things on April 29th but admitted he could not prove it. He only became aware of Cassandra's browser history when preparing for the hearing, around the week of September 26, 2022. He did not raise the issue of her browser history or of non-work-related hours prior to issuance of the Wage Assessment. He believes there is a written policy regarding personal use of workplace computers in the Employee Handbook but could not remember what it says and did not have the document with him.

Cassandra testified that she was hired by Auto Gallery in October of 2018 for accounts payable. She remained in this role until October of 2019, when she was promoted to Deal Processor (EE-5). As Deal Processor she was responsible for getting deal jackets from finance, entering them into the system, reconciling accounts, making sure payments were received, etc. She was not just responsible for Auto Gallery but was responsible for the dealerships throughout Canada under the Company's umbrella, maybe 15 dealerships. She was also still doing accounts payable. And, when a co-worker left in 2020, she had to take on accounts receivable too. She was basically doing three jobs and says this was very stressful. She had no work-life balance. Auto Gallery was

understaffed. She says she talked to Josh and Karla several times (approximately six she thinks) about the unreasonable workload. She was told they were working on it but is not aware that any steps were taken to reduce her workload.

She earned bonuses after posting deals if everything was complete. She earned more bonuses in the beginning, but they became less regular. She says she did her job to the best of her ability but sometimes was told vehicle cheques were missing or not done. She recorded her hours by punching a timecard (EE-6) in the shop. To the best of her knowledge, her timecards accurately reflect her hours. She explained the hours were higher than what is reflected in her Offer of Employment (EE-5) because she had to work until the work was done and she was doing multiple jobs. As a salaried employee, she was paid twice per month, and was paid to the end of June 30, 2021.

Cassandra said there were several people who knew she was working extra hours, including Ralph Stobbe, Melissa (who left in 2020) and payroll. She says she raised the issue of overtime with Jeremy Dann and Lance Kopan. Lance told her to keep track of her hours. Cassandra says she worked a few Saturdays and one Sunday because she and Josh were going through Subaru incentives. He was there so he knew she was working those hours. Josh was usually out of the office during the week which is why they got together on the weekend days for the Subaru incentive work. Nobody in management ever told her to stop working the hours she was working, and she was never paid overtime by Auto Gallery.

On cross-examination Cassandra ackowledged that online shopping and job searching were unuathorized activities and not part of her employment but explained she was still doing her work. She said she conducted non-work-related searches as a way of "taking a breather from working stressful hours." She admitted she was unhappy by the time she left. When asked if she took lunch every day, she said no, but then agreed she may have taken more than the 40 lunch hours indicated on her timecards but could not remember that far back.

On re-direct Cassandra's explanation regarding the two May 10, 2021 Memos from Josh (ER-5) were that cheques were sometimes slow because they were waiting for Tom's signature and that she missed some incentives because she was "playing catch up." She said she was unaware of a written policy regarding personal use of work computers and that nobody ever spoke to her about her browser history.

With respect to how the Company approached overtime during her tenure, Carajo Fox, who was the Payroll Administrator from March to June of 2021, testified that most employees were not paid for overtime hours. She learned this after running her second payroll near the end of April of 2021. She was called by Karla Stewart, the Manager of Administration, to Josh Jors' office where they told her they don't pay overtime and to re-run the payroll. She explained she was following labour standards, but they again told her to redo it. She felt she had protected herself professionally by providing

management with the pertinent information but ultimately followed their direction regarding non-payment of overtime pay. She later learned there were a couple of exceptions to the "no overtime" rule, including the employees of a dealership which the Company had acquired where there was a pre-existing practice of paying overtime, and the front administrative staff. Otherwise, the Company did not pay overtime to its employees. Carajo never saw a written policy regarding overtime and other than the very first payroll she ran, she did not pay overtime to Jeremie. She never once paid overtime to Cassandra.

Based on the evidence, I conclude the Company did not make it a general practice to pay overtime pay to its employees. In coming to this conclusion, I gave no consideration to the 2004 *Marcynuk* v. *Auto Gallery* case filed by the Director. It is not probative of what Auto Gallery's practices are in the 2020's and would be prejudicial to the employer if I were to rely on it. I base my conclusion about the Company's overtime pay practices on its own payroll records (EE-2 and EE-12) and on the testimony of Cassandra, Jeremie Katz and Carajo Fox. I found their testimony to be credible, consistent, and supported by the Company's records (EE-2, EE-12, EE-13, and ER-2). The payroll records show that despite overtime hours recorded on Cassandra's timecards and timesheets, she was never paid overtime. Jeremie was paid overtime once. Josh Jors' assertion that the one overtime payment to Jeremie in April of 2021 proves the Company pays overtime is not convincing. The most likely explanation is that the overtime paid out by Carajo on her first payroll was not flagged by management, but when they saw a larger amount of overtime was going to be paid out for a second pay period, they caught it and talked to her. Carajo says she was told not to pay overtime, and I believe her.

Section 2-38 of the Act requires an employer to keep records of the total number of hours worked by its employees each day and week. The employer did this but is now attempting to distance itself from its own records. If the Company had a problem with the way Cassandra was recording her hours, then it had ample opportunity to address the issue with her. Cassandra worked for the Company for over 2 1/2 years.

Aside from Cassandra's timecards and timesheets, which clearly show Cassandra was consistently recording overtime hours, the Company chose not to call any of her direct supervisors as witnesses. Presumably, there are members of management, present and former, who might have been able to shed light on why, from management's perspective at least, Cassandra was recording so many hours and whether they were legitimate or not. Josh Jors says Cassandra did not work overtime and yet her testimony, as supported by her timesheets, establishes he met with her on several weekend days to go over Subaru incentives with her. Cassandra's evidence was plausible and detailed enough to be believable.

Josh said Cassandra ate lunch "every day." This evidence is exaggerated at best. Josh admitted to being in charge of 11 other dealerships that required him to be away from Auto Gallery often. Cassandra said the reason she met with him on weekend days was

because he was often away during the week. I believe she ate lunch but accept that she was working too. There is no clear evidence that she took a one-hour lunch break except on the days that her timecards/timesheets showed she punched out. On cross-examination, when she agreed she may have taken more than 40 lunches but could not remember that far back, I found this to be an honest answer. I would describe her manner as understated—I certainly did not get the impression she was embellishing any of her responses or explanations. In any event, if at any point during Cassandra's employment, Josh was concerned about her not punching out for lunch breaks, Josh, or anyone else in management, could have spoke to her about it and directed her to punch out for lunch. They never did. It is the employer's responsibility to supervise and direct its workforce.

It should have come as no surprise to management that Cassandra was working extra hours. A review of her timecards (EE-6) or timesheets (EE-13) would have told them what they needed to know. Further, there is no evidence of a written policy requiring an employee to obtain authorization, written or otherwise, to work overtime hours. Under the circumstances, the Company ought reasonably to have known that Cassandra was working overtime hours and they did not cause her to stop working those hours (section 2-2 of the Act). In other words, the Company permitted her to work the hours she worked.

The Appellants argue that Cassandra committed time theft because they showed she conducted non-work-related internet searches on her work computer between April 29 and June 30, 2021 (ER-4). The cases filed in support of the Appellants' argument that Cassandra's behaviour amounts to time theft thereby disentitling her to claim for overtime pay, are distinguishable on the facts. In those cases, the employers were not asking for the employee to be docked pay as a result of time theft. They were using evidence of time theft to justify claims of dismissal for cause. There is no evidence that Cassandra was dismissed for cause.

The Appellants are not only asking me to reduce Cassandra's pay for the period in question, but also to assume that Cassandra committed similar time theft throughout her last year of employment with Auto Gallery. They are asking me to extrapolate and reduce her pay over the entire year. In their written argument, the Appellants claim their analyses is not limited to April 29-June 30, 2021, because Cassandra "admitted she worked in the same fashion over the wage assessment period." I reject this characterization of the evidence and find no evidence to support the extrapolation argument. This type of extrapolation would be unfair to the employee.

I accept that Cassandra was not at her best during her last two months of employment. Aside from the log of personal internet searches introduced by the employer (ER-4), the evidence shows the employer was beginning to show dissatisfaction with Cassandra's work performance. On May 4, 2021, Josh Jors wrote up a Memo regarding issues relating to accounts payable. Likewise, he authored two more Memos on May 10, 2021,

relating to issues with the timeliness of vehicle cheques and uncollected Subaru incentives, and one more Memo dated May 28, 2021, about her attitude. Josh had Cassandra review and sign the Memos, all of which said that failure to improve would result in further disciplinary action up to termination. Unsigned copies of the Memos were entered into evidence as ER-5. There is no evidence the employer had issues with Cassandra's work performance prior to this point, but they had clearly started to take issue with her work performance. Additional evidence of Cassandra not being at her best towards the end of her employment with Auto Gallery is found in her own testimony. She talked about the stress she was under and that she felt her complaints regarding her untenable workload were ignored by management. She admitted she was unhappy and had started to look for another job.

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

In their written argument, the Appellants emphasize that Cassandra's evidence is not credible because she failed to raise overtime as an issue while she was employed by the Company and because she waited so long before filing a complaint with Employment Standards. I do not find either argument persuasive. Despite the requirements of the Act, there is no evidence to suggest the Company was open to paying overtime to most of its employees. Carajo testified about paying overtime to Jeremie Katz on one occasion and then being directed to not pay overtime to any employees on the next payroll she ran. Cassandra was never paid for the overtime hours she recorded. It is fair to say that the Company did not worry about the hours she was recording because they were not planning on paying her overtime pay anyway. Cassandra's payroll records establish the Company did not pay overtime even though she was putting in extra hours. Cassandra made a claim to Employment Standards within the allotted time but was limited to recovering wages that became payable within the last 12 months of her employment (section 2-89 of the Act). When she filed her claim, she was exercising her rights under the Act, and should not be faulted for doing so.

Another of the Appellants' claims is the employees' evidence might not be credible because they were friends. Presumably, the suggestion is they may have conspired or

colluded to exaggerate and/or fabricate evidence against their former employer, and that they had a financial motive to do so. Obviously, the witnesses knew each other since they worked together. They admitted they were acquaintances and friendly, but not friends. I did not discount the weight I gave their evidence because they once worked together and were friendly. If there were evidence of collusion, or anything dishonest, it was not before me.

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

In summary, the Appellants have not established the Wage Assessment is incorrect.

VII. CONCLUSION

The appeal is dismissed and the Wage Assessment is upheld.

DATED in Regina, Saskatchewan, this 19th day of December, 2022.

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.