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:	**JEREMIE KATZ 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. 103-22, Wage Assessment File No. 1-000568

I. INTRODUCTION

Wage Assessment No. 1-000568 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 $16,581.88 in unpaid wages to Jeremie Katz 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 11, 2022, a Delegate on behalf of the Director of Employment Standards issued Wage Assessment No. 1-000568, representing unpaid wages for Jeremie Katz, 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 for including improperly calculated overtime wages for Jeremie Katz.

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 commencement 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 Jeremie Katz, 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 Jeremie Katz is summarized as follows:

- Jeremie did not work the overtime he is claiming. Jeremie's credibility is in issue. His evidence is unreasonable and self-serving.
- It is incredible that an employee who worked 830 overtime hours over the course of a year would not complain to his employers about not being paid for it. He waited 8 or 9 months after leaving Auto Gallery to make a complaint to Employment Standards.
- Jeremie testified that he met with Josh Jors and Donnie Thompson regarding a request for increased remuneration, but never raised overtime. This is not credible or reasonable.
- Jeremie's claim 8 to 9 months after the fact is unfair to the employer because had he made the claim earlier, the employer would have been in a position to correct the overtime situation so it could control its employment costs and find out why so much overtime was allegedly being incurred.
- Given the amount of overtime Jeremie claims to have worked, it does not make sense that he would have not asked his employer for payment.

- The employer takes issue with the suggestion that it does not pay overtime when there is clear evidence that it does.
- Jeremie's evidence needs critical evaluation. There is no evidence the employer authorized Jeremie to work overtime. What he did was started work ahead of schedule without authority (or had someone clock him in) and allegedly worked through every lunch hour for an entire year and now wants to be paid 830 hours for doing so even though he allegedly knows that the employer does not allegedly pay overtime.
- Josh's testimony about Jeremie's lunch breaks (where Josh admitted he did not watch Jeremie take lunch everyday but saw him eating, and that he sometimes bought and shared lunch with his employees, including Jeremie) was more reasonable than Jeremie's.
- Jeremie's evidence that he never took a lunch break for a year until the last pay period is incredible.
- Jeremie's overly zealous overtime claims are made in consort with his friends and there is a financial motive for them to stick together.
- The overtime hours claimed are too extraordinary to be believable and the assessment ought to be eliminated.
- If overtime pay is owing then the rate of overtime pay is not what was calculated by Employment Standards.
- 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."
- The Supreme Court of Canada states that statutory interpretation cannot be founded on the wording of the statute alone and that you must look at the object and intention of the statute so that an absurdity does not occur.
- *The Employment Standards Regulations* (the Regulations) state:
  Calculation of hourly wage on other basis
  17(1) Subject to subsections (2) to (4), if an employee is paid his or her wages on a basis other than an hourly, daily, weekly or monthly basis, the hourly wage of the employee is the amount obtained by dividing the wages of the employee earned during the pay period, exclusive of overtime, vacation pay and public holiday pay, by the actual number of hours worked during the pay period, exclusive of overtime.
  (2) In making a calculation for the purposes of subsection (1), an hourly wage is to be determined as being not greater than five times the minimum wage and not less than the minimum wage.
  (3) If an employee is paid wages on the basis of distance travelled, the employee's hourly wage is deemed to be the product of 64 and the rate per kilometre.

(4) If an employee is employed as a salesperson who receives all of his or her remuneration as commissions, the employee's hourly wage is deemed to be the minimum wage.

- The Employment Standards Officer postulates the employee's hourly rate is calculated by adding together the employee's earnings from his hourly rate with the earnings he earns as a salesperson and dividing by the number of hours in the pay period. This creates an hourly rate that depending on how much the employee earns from commissions each pay period that is as high as $43.46 per hour before the 1.5 multiplier for overtime under the Act is applied the per hour rate. This is an amount that is 3.78 times his agreed upon $11.50 hourly rate. That interpretation is an absurdity and should not be followed.
- Carajo testified about her qualifications and experience relating to payroll, and when she calculated overtime for Jeremie for the period ending April 5, 2021, she used an overtime rate of $17.25 per hour ($11.50 x 1.5 = $17.25). This was the correct interpretation of the Act.
- Jeremie was a service salesperson who gets paid a commission for writing service orders and gets paid an hourly wage. The remuneration agreement states his hourly rate is $11.50 per hour.
- Jeremie was paid an hourly rate which is reflected in all of his payroll records in evidence and therefore his overtime rate is based on his hourly rate. Section 17(1) of the Regs supports this interpretation. Section 17(4) also supports the employer's position. It provides that a commission salesperson is paid overtime based on the minimum wage and not 3-4 times that amount.
- Regardless of whether Jeremie is classified as an hourly wage employee or a commission salesperson, he only gets paid either minimum wage or his hourly rate of $11.50 per hour. It is an absurdity to suggest that because the employee is paid both an hourly wage and a commission that these two amounts get added together to arrive at an hourly rate that is 3-4 times the hourly rate agreed upon between the employer and employee or the minimum wage rate allowed by law. That is interpreting the Act in a perverse manner that goes beyond its spirit and intent and objects of the Act. The plain reading of the Act and section 17(1) of the Regs is that a blended rate only applies when an employee is paid other than an hourly rate which is not the case here.
- The employee is an hourly paid employee and also a commissioned salesperson. A reasonable reading of the Act is that he earns overtime pay at a rate of either his hourly rate or minimum wage. The simplest way to resolve this interpretive dispute so that no absurdity exists is to characterize the employee as an hourly employee which determines his rate to be $11.50 per hour. This interpretation is fair and reasonable and in accordance with the objects of the Act and its regulations.
- To find that an employee who earns an hourly rate and a commission is entitled to an overtime wage rate at 3-4 times his hourly rate or minimum wage makes no sense and was not the intent of the legislature.

- Accepting the Employment Standards Officer's interpretation will force employers to make sure their employees are only paid one way or the other which does not promote economic growth and it will eliminate employers providing employees with attractive pay compensation plans. That was not the intention of the Legislature.
- The Wage Assessment should be dismissed. There is no credible evidence to determine if any overtime hours were actually worked and the hourly overtime rate is not supported by the law.

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

- Jeremie was employed by the Company as a Service Advisor from October 15, 2019 to August 6, 2021. The Wage Assessment directs the Company to pay the sum of $16,581.88 to Jeremie 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.
- Jeremie's compensation arrangement was based on an hourly wage of $11.50 plus commissions/bonuses for products and services sold to the public.
- 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. Jeremie was not paid strictly on an hourly basis so section 17(1) applies.
- 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.
- Jeremie earned commissions on a regular basis and his hourly wage fluctuated each pay period.
- The Director does not agree with the Appellants' contention that Jeremie's rate of overtime pay should be 1.5 times his base hourly wage of $11.50. The majority of Jeremie's compensation was in the form of commissions for products and services he sold. To calculate the overtime rate exclusively on his base hourly wage without factoring in commissions does not accurately reflect his total compensation arrangement with the Company and is contrary to the method set out in section 17(1) of the Regulations.

- 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.
- There is no factual basis for the Appellants' assertion that Jeremie falls within the scope of subsection 17(4) of the Regulations. Jeremie's compensation was not entirely commission based. He earned a combination of a base hourly rate ($11.50) and commissions as outlined in his remuneration schedule (EE-3). Subsection 17(4) is inapplicable to Jeremie's hourly wage calculation.
- 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 Jeremie regularly exceeded the overtime thresholds in the Act. The records show Jeremie was only paid overtime once during his employment.
- 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). On cross-examination, he struggled to explain how Jeremie could work 125 hours in the April 6-20, 2021, pay period without being paid overtime. He blamed the payroll clerk. 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*).
- Jeremie's evidence regarding his hours of work was more detailed than Josh's evidence and ought to be given more weight. Jeremie testified Donnie Thompson was aware of the hours he was working. Josh suggested another employee may have been punching Jeremie in before 7 a.m. This is speculative and inflammatory. The time records align with Jeremie's testimony.
- The employer could have avoided issues regarding hours of work 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 Director submits that the time to address those concerns is before the employees are paid.
- 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 Jeremie in the amount of $16,581.88. The basis for the wages claimed is found in the Saskatchewan Employment Standards Audit Sheet (EE-4). 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 issues to be determined in this case are whether Jeremie Katz worked overtime hours entitling him to overtime pay, and if so, did Employment Standards calculate his overtime pay properly?

With respect to Jeremie's hours of work, the Appellants allege there is no credible evidence that Jeremie worked overtime. Josh Jors, the Operations Manager of the Company, testified that Jeremie had time to complete his tasks during regular work hours and there was "zero reason" for him to have worked in excess of 830 overtime hours over the course of a year. Josh often started work early in the morning and did not see Jeremie there before 7 a.m. Josh suspects someone else may have been punching him in before his shift. Josh says they never authorized Jeremie to work overtime hours. If Jeremie was working overtime, this ought to have been communicated to management in writing, and it wasn't. Overtime must be approved because the Company needs to control its labour costs. They even had a meeting where Jeremie asked for more money, but he never raised overtime as an issue. Josh was not made aware of Jeremie's overtime hours until they were contacted by Andrew Langgard. Josh says Jeremie's claim for overtime is not credible.

With respect to lunch breaks, Josh's office was twenty feet away from Jeremie's desk and he saw him eating lunch "almost every day." He admitted that he did not watch him for the entire hour, but that he saw him several times per day and estimated he saw Jeremie eat lunch 4 out of 5 days per week. Josh also testified that he bought breakfast or lunches for the staff 2 or 3 times per month and that Jeremy would have participated in the group lunches.

On cross-examination Josh acknowledged that he was responsible for 11 dealerships, and therefore was not at Auto Gallery every day. He also acknowledged that Donnie Thompson was the department head who would have been supervising Jeremie, and that it was not his role to supervise Jeremie on a daily basis. He admitted that while he could have accessed Jeremie's timecards, he did not do so. When asked how one of Jeremie's paystubs could show 125 hours of work without any overtime being paid, Josh said the Company trusted the payroll clerks to do it right. He said the fact that Jeremie received overtime pay on one occasion and that they did not ask him to pay it back, shows that Auto Gallery pays overtime to its employees.

Jeremie acknowledged his scheduled hours were 9-hour shifts, with an unpaid 1-hour lunch break, rotating from open to close. He recorded his hours of work with a punch card. He would punch in at the beginning of his shift, punch out and back in if he was taking a lunch break (which he almost never did), and then punch out when he was finished for the day. Jeremie says he did the best he could to get his work done and often wore multiple hats. It was a busy service department and he wanted to earn as much money as he could. He earned most of his salary through commissions so rather than taking time off for lunch, he would just grab a quick bite and work through lunch. He always ate lunch but did not stop working to eat. Nobody told him to work less. The only lunch breaks he took were during his last month of employment. By then, Donnie had been directed by Jason from HR that they had to take their breaks and Jeremie no longer felt his employer valued him.

Jeremie says customers would often line up before they opened at 7 a.m., so he would punch in as soon as the building was unlocked, fire things up, and start dealing with the customers. He said he "would have heard about it" if he was not keeping the customers happy. Sometimes he had to stay later than close, when customers were late picking up vehicles or when Thom Glenn asked him to stay for a vehicle that was being prepared for sale. He and Donnie Thompson spoke about the hours they were working, including arriving early to get everything ready when it was busy. Donnie was aware of the hours Jeremie was working and did not ask him to work less.

Jeremie explained that he worked overtime hours on a regular basis due to staffing shortages. It was hard for him to get everything done that needed to be done and it was stressful. He should have been home more where he was also needed. He spoke with Donnie about the extra hours and talked to Carajo too. Donnie said Auto Gallery did not pay overtime but maybe they could adjust the commission structure. Jeremie met with Donnie and Josh about a raise in commission, but nothing came of it. He admits that he asked for a raise rather than asking for overtime because he knew they would not pay him overtime and he did not want to lose his job. He was only paid overtime once, and it was by mistake. For a moment he thought Carajo's influence might have led to a change in how the Company dealt with overtime but admits to feeling "robbed" when it did not continue. Jeremie was worried they would make him pay it back.

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. Other than the very first payroll she ran, she did not pay overtime to Jeremie again.

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 on the testimony of Jeremie Katz and Carajo Fox. I found their testimony to be credible, consistent, and supported by the Company's records (EE-2 and ER-2). The payroll records show that despite many overtime hours recorded on Jeremie's timesheets and paystubs, he was only 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 Jeremie was recording his hours, then it had ample opportunity to address the issue with him. Jeremie worked for the Company for almost 2 years.

Aside from the payroll records and timesheets, which clearly show Jeremie was consistently recording overtime hours, the Company chose not to call his direct supervisor as a witness. I understand that Donnie Thompson no longer works for the Company, but he is a person that would have been able to shed light on why Jeremie was recording so many hours and whether they were legitimate or not. Josh Jors doubts Jeremie worked the hours he claimed, and even suggested someone else may have been clocking him in, but there is no supporting evidence for this theory. Josh did not see another employee punch Jeremie's timecard. Josh said he saw Jeremie eating lunch many times and estimates he took a lunch break 4 out of 5 days a week. I find this evidence to be exaggerated at best. Josh admitted to being in charge of 11 other dealerships that required him to be away from Auto Gallery often. In any event, if at any point during Jeremie's employment, Josh was concerned about Jeremie not punching out for lunch breaks, he could have had a conversation with him and directed him to punch out for lunch. He did not talk to Jeremie about it; nobody from management did. It is the employer's responsibility to supervise and direct its workforce.

Jeremie was working as part of a team in a busy environment so it should have come as no surprise to management that he was working extra hours. A quick glance at Jeremie's payroll records or timesheets would have told them everything 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 Jeremie was working overtime hours and they did not cause him to stop working those hours (section 2-2 of the Act). In other words, the Company permitted him to work the hours he worked.

In their written argument, the Appellants emphasize that Jeremie's evidence is not credible because he failed to raise overtime as an issue while he was employed by the Company and because he waited so long before filing a complaint with Employment Standards. I do not find either argument persuasive. It is not surprising that Jeremie tried to negotiate a raise in commissions rather than discussing overtime pay with his employer. Despite the requirements of the Act, there is no evidence to suggest the Company was open to paying overtime to Jeremie. The only time it paid him overtime was as a result of Carajo's 'mistake.' Excepting this one occasion, Jeremie's payroll records establish the Company did not pay overtime even though he was putting in extra hours. Jeremie 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 his employment (section 2-89 of the Act). When he filed his claim, he was exercising his rights under the Act, and should not be faulted for doing so.

Another of the Appellants' claims is that 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 totality of the evidence, I find that it is more likely than not that Jeremie worked the hours he claimed, as set out in the Audit Sheet (EE-4). The Company's payroll records support Jeremy's testimony and the Appellants failed to establish the hours claimed were incorrect. The question then becomes, did Employment Standards calculate overtime pay correctly? If yes, the Wage Assessment ought to be upheld, and if no, it ought to be varied.

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. The complicating factor here is that Jeremie was neither strictly an hourly wage earner nor strictly a commission-based salesperson. He was both. Considering his total wages, Jeremie's base hourly wage made up a relatively small part of his overall compensation.

In calculating the Wage Assessment, Employment Standards considered the Act's Regulations to determine how to calculate wages for blended or mixed compensation, and in particular section 17(1) of the Regulations, which sets out how to determine an employee's hourly wage for employees who are not paid hourly, daily, weekly or monthly. The hourly wage of employees who fall into this category is calculated by "dividing the wages of the employee earned during the pay period, exclusive of overtime, vacation pay and public holiday pay, by the actual number of hours worked during the pay period, exclusive of overtime."

Given that Jeremie earned commissions, his hourly rate fluctuated each pay period. In attempting to calculate Jeremie's hourly rate in accordance with section 17(1) of the Regulations, Employment Standards ran into a problem. They could not determine what portion of Jeremie's commissions were earned during regular hours versus overtime hours. Because it was not clear from the employer's records, the Director divided Jeremie's wages (hourly rate and commissions/bonuses) by the total hours, regular and overtime, and assessed for what was owing in excess of what was paid.

The Appellants argue the Employment Standards Officer's approach of adding the employee's hourly earnings with the earnings he earned as a salesperson and dividing by the number of hours in the pay period, created an absurdly high hourly rate to which the 1.5 multiplier was then applied. They argue this approach involves interpretating the Act in a perverse manner. The Appellants argue the simplest way to avoid this absurdity is to characterize Jeremie as an hourly employee and calculate overtime based on his hourly rate of $11.50 (1.5 x $11.50 = $17.25 per overtime hour). Alternatively, Jeremie could be treated as a commissioned salesperson whose hourly rate is deemed to be the minimum wage for purposes of calculating overtime pay.

I find neither of the approaches suggested by the Appellants for calculating Jeremie's hourly wage to be acceptable in this case. Using either his base hourly salary or the minimum wage does not accurately reflect Jeremie's hourly wage. Calculating his hourly wage by either of these methods would be unfair to the employee and is therefore not in keeping with the purpose and intent of the Act. The Appellants filed no caselaw in support of their position.

The uncontroverted evidence regarding Jeremie's remuneration is that he was paid a base wage of $11.50 per hour plus commissions and bonuses, as set out in the Remuneration Schedule (EE-3). For the first 3 months of his employment, he was guaranteed a minimum of $4,400.00 per month (EE-3), meaning he was earning far more than $11.50 per hour, or minimum wage, from the very beginning. According to the payroll records (EE-2), during his last year of employment Jeremie's earnings far exceeded $4,400.00 per month, and in several months even exceeded $8,000.00. Based on his remuneration arrangement with the Company, it would be unfair to Jeremie to characterize him as an hourly employee earning $11.50 per hour. This does not accurately reflect the situation and would lead to an absurdly low hourly wage for

purposes of calculating his overtime pay. I find Jeremie falls within the "other" exception contemplated by section 17(1) of the Regulations.

The Director's approach, in using a blended rate to calculate an hourly wage reflective of Jeremie's true hourly wage, is supported by the Act, its Regulations, and applicable caselaw. The complicating factor in this case is there was no plausible way to separate commissions earned during regular hours from overtime hours. The employer's records do not reveal at what point of the day (during regular or overtime hours) Jeremie earned his commissions. Consequently, for purposes of calculating his hourly wage, the Director assumed commissions were earned uniformly over the total hours worked in each pay period and divided his wages (base wage plus commissions and bonuses) by the total hours. I find the Director's approach to be reasonable under the circumstances, and in keeping with the purpose and intent of the Act.

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.