

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

APPELLANTS: **LEPAGE CONTRACTING INC. and LYNDEN
LEPAGE as director of LEPAGE
CONTRACTING INC.**

RESPONDENTS: **LANCE McCUTCHEON and the DIRECTOR
OF EMPLOYMENT STANDARDS**

DATE OF HEARING: **April 17, 2024**

PLACE OF HEARING: **Room 849
122 – 3rd Avenue North
Saskatoon, Saskatchewan**



LRB File No. 052-19, Wage Assessment No. 1-000177

I. INTRODUCTION

Wage Assessment No. 1-000177 directed Lepage Contracting Inc. (Lepage Contracting or the Company) and Lynden Lepage, director of the Company, to pay \$13,921.81 in unpaid wages to Lance McCutcheon or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act). Lynden Lepage and the Company appealed the Wage Assessment.

The Wage Assessment was issued on January 17, 2019. Lynden Lepage and the Company (referred to collectively as the employer) filed a notice of appeal on January 22, 2019, stating, in part:

The main argument of the appeal is that Lance's wage was originally negotiated at \$28/hr with vacation and holiday pay, however upon agreement between both parties it was agreed that he would earn a straight \$30/hr. This was agreed to work to his benefit at the time of the agreement. As per the attachment it can be seen that Lance was also benefitted over and above the assessed amount. I will be filing a civil court claim against Lance for restitution on the balance outstanding at the bottom of the benefits spreadsheet.

An adjudicator heard the appeal on April 9, 2019, and issued a decision upholding the amended Wage Assessment on April 25, 2019. The employer appealed the Adjudicator Decision to the Saskatchewan Labour Relations Board (the Board). On February 5, 2020, after hearing the appeal, the Board acknowledged some errors but affirmed the

Adjudicator Decision. The employer appealed to the Saskatchewan Court of Appeal. The appeal was heard on March 6, 2023, and the Court of Appeal released its decision on March 8, 2023, setting aside the Board Decision and remitting the matter back to the Board. The Court of Appeal directed the Board to cancel the Adjudicator Decision, requiring the selection of a new adjudicator by the Board Registrar. On February 12, 2024, the Board Registrar selected me as the adjudicator to re-hear the wage assessment appeal.

On April 17, 2024, the following individuals attended the hearing:

- Lynden Lepage, owner and director of the Company;
- Lance McCutcheon, former employee of the Company; and
- Doug Long, Manager of Compliance and Investigations (North) and former Employment Standards Officer, and representative for the Director of Employment Standards.

II. THE DISPUTE

On January 17, 2019, a Delegate on behalf of the Director of Employment Standards issued Wage Assessment No. 1-000177 against the Company and its director for unpaid wages for Lance McCutcheon. As summarized above, the employer appealed the Wage Assessment, the Adjudicator Decision, and the Board Decision, ultimately arguing its case before the Court of Appeal. The main ground of appeal was that the adjudicator had failed to consider the evidence and decide whether the employer had, in fact, paid vacation and public holiday pay to the employee.

Throughout the appeals process, the employer maintained it had an agreement with the employee whereby the hourly rate of pay included vacation and holiday pay. In *McCutcheon v. Lepage Contracting Ltd.* (25 April 2019) Moose Jaw, LRB File No 52-19, Wage Assessment 1-000177, the adjudicator found that due to a lack of employer records supporting its position, wages and other amounts were deemed not to have been paid. The Act states that such wages are deemed not to have been paid “unless the contrary is established.” Without showing how he came to his decision, the adjudicator concluded: “...I am not satisfied there is any evidence to the contrary.” The adjudicator made no direct finding as to whether there was an agreement between the employer and employee or if vacation pay had in fact been paid.

On appeal, the Board in *Lepage Contracting Ltd. v. The Director of Employment Standards*, 2020 CanLII 10515, LRB File No 111-19 (Sask LRB), recognized the adjudicator’s reasons “do not provide a description of how the testimony of the witnesses informed this finding, for example, through an assessment of the witnesses’ credibility.” While recognizing the adjudicator’s reasoning was deficient, the Board upheld the Adjudicator Decision on the basis that the result was correct. The Board found the alleged agreement operated in direct conflict with Part II of the Act, and

determined that even if it did exist, it was invalid. The Board held the adjudicator was correct in upholding the Wage Assessment because public holiday pay and vacation pay were not set out in the statements of earnings and were therefore still owed to the employee.

The Court of Appeal in *Lepage Contracting Ltd. v. McCutcheon*, 2023 SKCA 83 (CANLII), framed the key issue as “whether the Board erred by saying, in essence, that it did not matter whether the employer had paid its employee vacation pay because the agreement permitting this to occur was invalid.” The Court held the wording, “unless the contrary is established,” in section 2-37(3) “allows an employer to prove that wages and other amounts that are not included in a statement of earnings have in fact been paid.” Also, “the Act does not provide that the penalty for the failure to keep proper records is that the employer will be required to pay the vacation pay twice, which would be the effect of the *Board Decision*.” The Act does not expressly prohibit all-inclusive employment agreements on wages and vacation pay or declare them invalid. In allowing the appeal on this basis, the Court of Appeal cautioned: “It bears saying, however, that where the employer has no documentary evidence to support either the existence of an all-inclusive agreement or that monies were paid in accordance with that agreement, it may be difficult to persuade an adjudicator through oral testimony, but that is a matter for the adjudicator to decide, based on the evidence presented.” With respect to the set-off issue raised by the employer in its appeal, the Court found the adjudicator’s lack of reasons involving payments to third parties and lack of findings of credibility meant these issues ought also to be revisited.

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.

Doug, on behalf of the Director, applied for an amendment to the Wage Assessment from \$13,921.81 to \$15,927.42. I granted the amendment conditional on the introduction of evidence supporting the amendment.

IV. THE FACTS

Before tendering evidence, the parties agreed to the following facts:

- Lance was a construction foreman with the Company.
- He worked with the Company from April 1, 2015 to December 12, 2018.

The parties tendered evidence by way of affirmed testimony and documents. Neither the employer nor the employee attended the hearing with witnesses they intended to call. Lynden indicated the passage of time made it more difficult for him to produce witnesses. In recognition of the significant amount of time that had passed and the

logistical problems this caused, both Doug and Lance agreed that the testimony of the two former employees called by Lynden at the original hearing, as summarized in the Adjudicator Decision, could be adopted as evidence in this hearing. They stipulated to the fact that both former employees said they had agreements with Lynden regarding their hourly pay including vacation pay. Aside from the foregoing, the parties tendered evidence by way of affirmed testimony and documents. Lynden testified on behalf of the Appellants, followed by Lance who testified on behalf of the Respondents. Given that both witnesses were parties to the appeal and entitled to remain in the hearing room, an order for exclusion of witnesses was unnecessary.

The following documents were tendered and entered into evidence:

Employer/Appellants Exhibits

ER1 – List of items and benefits taken by Lance from the employer.

Employee/Respondents Exhibits

EE1 – Binder of Exhibits with 7 Tabs;

EE2 – Officer Audit Sheet calculated at \$30.00 per hour (2 pages);

EE3 – Officer Audit Sheet calculated at \$28.00 per hour (2 pages); and

EE4 – Email from Doug Long dated April 19, 2024 with explanation of AVP calculations by Employment Standards (4 pages).

Although it is not my ordinary practice to provide a detailed summary of each witness's testimony, I am making an exception in this case due to the employer's concern that the process and system were stacked against him from the beginning, and that his evidence has fallen on deaf ears or been misconstrued. By summarizing the evidence before me, I hope that both Lynden and Lance will feel they have been heard and, moreover, that they will see where argument was supported by evidence and where it was not.

Jesse Peddle gave evidence at the original hearing and his testimony is summarized as follows:

- He was a former employee of the Company.
- He reached an agreement with the employer that he would be paid \$25/hour and that this sum included vacation pay.
- He said that timesheets were not prepared by him or the employer but that he kept a notebook he gave to the employer every two weeks for the purpose of preparing his paycheck.

Tim Martin gave evidence at the original hearing and his testimony is summarized as follows:

- He was a former employee.
- Prior to his employment, he had a discussion with the employer relating to being paid \$24/hour plus vacation pay or \$26/hour including vacation pay.
- He opted for \$26/hour.

Lynden Lepage's testimony is summarized as follows:

- Lance and Lynden had an agreement that Lance's pay included vacation pay. Lance had worked for him before, and this had always been the deal.
- Lynden started his construction business out of a car in 2009 and grew from there. He figured things out as they went. In the beginning, he didn't know about vacation pay.
- Once he realized that vacation pay was owed, he determined that \$2 per hour worked out to more than 3/52's. A few of them (Lynden and other staff members) did a calculation way back when. At a certain point, it wouldn't work out to more, but at \$30/hr, it did. For employees earning \$18 per hour, getting paid \$20 is getting even more of a benefit.
- All of Lynden's guys worked on a similar deal to Lance's deal once Lynden realized vacation pay was owed. He used an online payroll calculator.
- His deal with Lance was that Lance would earn \$28/hr plus a \$2 top-up to cover the 3/52's vacation pay.
- No timesheets were produced before now. He doesn't know how Doug came up with his numbers. There were no timesheets before and no original paystubs. He asked to see the timesheets but never saw them. And now, here they are.
- Lance kept track of his own hours and told Lynden what he owed him. Lynden and the Company didn't have or keep copies of timesheets. Lance sent his hours (the total) to him by text or told him over the phone and he paid Lance accordingly. He was usually just given a number and he would only question it if there was a discrepancy. If, for example, an employee had taken time off and then was suddenly claiming he had worked full hours, then Lynden would question the hours. Otherwise, he trusted the numbers reported by his employees.
- Lynden couldn't match timesheets to paystubs because he didn't keep any paystubs—he gave them to Lance. Lynden got a paystub with every cheque. Lynden didn't keep a copy because there was red pen all over the place because of garnishees. Lynden did the best he could to balance the accounts. Lance got the only copy with his paycheck and Lynden wasn't overly concerned about not keeping a copy because he just had to balance his books. Trying to balance out garnishees etc. in QuickBooks wouldn't make sense so he just inputted what was paid out.

- The payroll records would still be on his QuickBooks.
- His guys would calculate their hours and calculate their own overtime and he'd pay it out. This was confirmed by staff members during the original hearing.
- Paychecks also included any overtime pay that was owed. For example, employees would send in their hours, including public holidays worked, and he'd pay. Employees marked down their own pay and calculated it themselves. For example, they calculated time and a half on their own and he just paid it.
- What he paid in total was balanced with the company account. He didn't work backwards like Employment Standards did. Their calculations added overtime pay, public holiday pay and annual holiday pay to paychecks that already included these amounts.
- All of his employees were paid in the same manner. None of his employees chose to go with the lower hourly rate that didn't include the holiday pay top-up.
- Lynden did pay Lance's unpaid regular hours but not on his last day. From what Lynden can remember, Lance wanted to be paid the day he quit but Lynden would have needed to be paid before he could pay Lance, so he probably paid him two weeks from his last day of work.
- The fact there aren't five other claims from his employees supports that Lance's hourly pay included vacation pay.
- Jesse Peddle and Tim Martin testified at the first hearing about their work agreements with him.
- Lynden had to pay Lance's bills and fines if he wanted Lance to keep working for him.
- The Company paid fines relating to Lance's license. A blower device was put on the Company vehicle that Lance used for work. This was not a gift. The deal was that Lance would pay it back. Any form of payment would have been better than nothing.
- Lance didn't pay his rent, so the Company had to pay it for him. Lance didn't pay the taxes and insurance on the house which was a rent to own situation. Lynden had vouched for Lance with the owner/seller of the house so when owner called Lynden and asked what was going on, and Lynden was told that Lance hadn't been paying the rent, Lynden paid it. Lance said he'd pay it back.
- When Lance took the work truck to Saskatoon and hit a deer, Lynden got a call from the police and Lynden paid the deductible.
- On another occasion, Lance was using a Company vehicle for personal use and caused damage to the rear door, so Lynden again paid the deductible.
- Lynden bought Lance a cell phone and paid the bills. He needed Lance to have a phone for work. He needed to be able to get a hold of him, tell him where to go, what to do, etc. Lynden doesn't care about the phone so much. Lance was a foreman and needed a phone. If he had gifted it to him, Lance would have had to pay tax on it as benefit on his income tax. Lance should have paid for the phone, but Lynden would've said he would pay the cell bill.

- In addition to the construction business, Lynden owned a retail store that sold lumber, concrete, tires, gas and cigarettes. It's a general store/service station and Lance had a tab that he charged his cigarettes to. Lance marked as he was taking the cigarettes but then quit and never paid the tab.
- Twice per week Lance had to travel to another town to pick up a prescription. It was a 1-hour round trip. Lance used his employer's fuel and vehicle, and Lynden did the math on it. This would also be a taxable benefit. It cost Lynden money so why should he pay the bills? He says he and Lance had this conversation. When asked how the Company kept track of fuel for its vehicles, Lynden said he and his employees would write up bills, but he doesn't know if Lance did, and Lance had keys to the business and vehicles.
- Regarding the damage to the house, when Lance left, he left the doors open and the pipes burst. There were other house expenses on another sheet too. For example, Lance would grab a door from the lumber yard for the house and the Company paid for sewer work while Lance was living there.
- None of these expenses were ever deducted from Lance's pay but they should've been taking money off each paycheck.
- They even moved a garage into Lance's backyard. Lynden and his Company tried to do everything they could to accommodate Lance.
- Since Lynden had co-signed/vouched for Lance and had money invested in the house, when Lance left Lynden paid off what was owing on the house and became the owner of the house, even though this wasn't the original plan.
- On cross-examination, Lynden confirmed that Lance kept track of his own hours. He said he wasn't there with him, so Lance had to do it. He admitted that he didn't keep records. He didn't keep copy of pay stubs. He gave his employees their paychecks and didn't keep a copy.
- Lynden said he doesn't remember a deal about deducting 8 work hours (or \$240) for rent from every bi-weekly paycheck from January of 2016 on. If they had this type of agreement, he says it would not have happened every two weeks. If it did happen, it likely happened once or twice then more than likely stopped. He wanted to be paid back but says there's no evidence it happened every two weeks. Lynden is fairly certain Lance was paid for all of his hours worked. Lance sent in his hours, and he was paid for them. Lynden knows it didn't happen every single pay period.
- Lynden confirmed he paid the overtime and public holiday pay calculated and submitted by his employees. He thinks anything after 40 hours would have been paid at 1.5 times, but it's been so long.
- Lynden admitted he didn't have a witness to his verbal agreement with Lance (\$30 including holiday pay instead of \$28) but Lance had previously worked for him under this same agreement a year or two prior, so it should have come as no surprise. They had the same arrangement for years.

- When asked if they had an agreement about Lance's rent, Lynden said Lance was supposed to be paying the guy he was buying the house from, and Lynden only paid the rent after it hadn't been paid for a full year.
- When asked if he had any receipts to support the amounts claimed in ER1, he said it could be reconciled on his bank statements from cheques written and charges to his credit card. When asked if all the amounts identified related to Lance's last year of employment, Lynden said some expenses would be from 2015 and some from 2018. He wasn't sure when the DUI course was, but it was during Lance's course of employment.
- Lynden admitted the numbers relating to the home (for windows, doors, overhead door, siding, fencing, lumber) were estimates but that he might have some receipts on his computer. He said there would've been a bill for the fencing at \$5 per board. Windows and doors were purchased voluntarily by Lance and there was a sheet they had going where they were keeping track, but he doesn't know what happened to it. What he does know is that none of it was paid back.
- Because he had vouched for Lance, Lynden confirmed he ended up owning the house Lance was renting to own. After Lance defaulted and got kicked out, Lynden fixed damage to the house, then worked for the rancher (owner) to pay off the balance owing on the house. He never planned on owning another house and he didn't need it, but he tried to salvage the loss and make the best of it.
- He didn't file a claim in civil court because you can't get blood from rock. He knew it was pointless.
- Lynden said he had to delete bills off QuickBooks because it was triggering PST.
- Lynden doesn't believe there was any outstanding overtime. He always paid hours as they were reported to him. Lance did not give timesheets to Lynden and Employment Standards withheld this information from him, so he had no way to double-check. Lynden said he only required totals unless he needed to look behind it. And when he asked Lance for timesheets, Lance didn't comply.
- Lynden assumed his employees knew how to calculate overtime themselves. For somebody like Jesse who kept better track, it was easier. Lynden said he was doing his own job and didn't have the time to keep an eye on everybody's hours. He wasn't always on site to physically check hours. He relied on people's integrity. Fraud is fraud.

Lance McCutcheon's testimony is summarized as follows:

- Lance filed a complaint because he thought he had been treated unfairly and that he was owed money.
- His writing appears on his formal complaint and the issues he identified include unpaid regular wages, overtime and holiday pay.
- He wasn't paid overtime. He knows it would be time and ½, but he doesn't know when stat days are or when it becomes double time.
- If he worked more than 8 hours in day, say 9, he would submit 9 hours.

- When he worked on public holidays, he kept track of them as if they were any other day. If he worked 6 hours on a public holiday, then wrote 6 hours.
- They had a conversation when he was hired about how much he would be making. He doesn't remember discussing anything else. He believes he was earning \$28 per hour.
- There was no written contract.
- He kept track of his time by scratching his hours on a piece of paper. He would tally up hours and take off 1 day's pay (or 8 hours) for rent, and then text or call Lynden. When he messaged Lynden for his 2-week period, he would normally say, for example, 70 hours that's minus the one day for rent.
- When Doug asked him to look at Tab 7 and then asked: If we divide 1,800 by 30, would you have worked 60 hours or 68 hours? Lance said it meant he would have worked 68 but 8 hours went towards his rent.
- To report his hours, he said he would text or phone Lynden or see him at shop.
- When asked about the first page of Tab 4 where it shows 85.5 hours, he would tell Lynden 85.5 hours and that he took off the 8 hours for rent.
- He admits his memory regarding the rental agreement is fuzzy, but he thinks 8 hours went towards rent every 2 weeks, so approximately $\$240 \times 2 = \480 , so maybe he was paying \$500 per month in rent.
- Regarding the things listed by Lynden on ER-1, Lance says there are things he doesn't owe that are on there.
- Lance thinks he had paid for the \$750 sewer thing even though Lynden says he had to pay Cody for the work.
- Lance can't remember all the details but says he knows he paid for windows.
- Lynden bought the fence, but he isn't sure what the deal was for the \$3,500. He can't remember.
- Lance believes he paid back a lot of these items with his checks.
- Regarding taxes and insurance on the house, Lance says he didn't know he was supposed to be paying these.
- Lance says he owed for the blower removal on the truck (Interlock) but he thought he paid it.
- Regarding his trips to Central Butte, he did make these trips but lots of times they were going that way to dump garbage etc., so mostly these trips were not just personal trips for a prescription, but there would have been a few. He was usually killing two birds with one stone.
- He guesses he owes for beer and lunches, but he thought these things were given to him. He isn't aware of an agreement that he owed for beer or lunch or trips.
- Aside from deck boards, he's not sure he owes Lynden any money. He thinks he paid for fencing and that he paid Lynden back for the power line bill. He thinks he paid Cody directly for the sewer work. Lance says he used offcuts of lumber which Lynden wasn't selling anyway. He took extras, offcuts and a window from a burned house. The big window was a used window, and he thinks he bought all

the other windows. If Lynden is charging him for labour for the work on the house, he doesn't see where his labour is accounted for.

- He got kicked out of the house, so he lost it all. Lynden took it back. Lynden ended up owning the house.
- He says he worked 8 hours more than he was paid on every 2-week paycheck because of the deduction for rent. He says he testified to this at the original hearing too.
- He says the difference between he and Lynden's other employees was that they worked mostly 9-5 shifts, and he worked most weekends. The other employees didn't have as much to lose because they hadn't worked as many hours as him. Lance is not saying the other employees lied at the first hearing. Those could have been their arrangements with Lynden. Lance never added holiday pay or overtime when he reported his hours to Lynden.
- It was a long time ago so there's a lot he can't remember.
- When Lynden asked him if the 8-hour thing was new evidence because he didn't remember it coming up before or that it happened, Lance said it wasn't new. He said he testified about it at the original hearing. Lance thinks Lynde also testified that he had taken 8 hours off each paycheck. Lance thinks he took 8 hours off every 2 weeks when he reported his hours.

Explanations by Employment Standards

Because the employer had no timesheets or records of Lance's hours and because Lance's personal timesheets (EE1, Tab 4) were incomplete and too hard to follow, Doug explained that he calculated unpaid wages (EE1, Tabs 5 and 6) by using the Payroll Transaction Detail (EE1, Tab 4) provided by the employer back in 2019 and extrapolated the \$30 per hour wage from each amount. For example, he took \$1,800 gross pay and divided it by \$30 per hour. Doug took the maximum number of hours before overtime would kick in. He assumed that all hours were paid at the straight hourly rate and not at the overtime rate. These hours had been agreed to and paid by Lynden. Doug's calculations were not reconciled with Lance's timesheets because he could not do it—they were too hard to decipher.

By way of explanation for the revised audit (EE2, located at Tab 6 of EE1), Doug explained that Lance had testified at the original hearing about working 8 hours more on every 2-week pay period. Doug explained that these hours needed to be added back in for purposes of calculating overtime and annual vacation pay, etc. He said that Employment Standards subtracted the \$6,000 for rent and \$500 for cigarettes after the necessary calculations were made. Doug says an amendment to the Wage Assessment was made at the original hearing but that he didn't have his computer with him which would have allowed him to put them into a spreadsheet and do the calculations properly. He did a manual calculation at that hearing, and the numbers ended up being a bit off. Once he put the information into the spreadsheet, the numbers came down slightly from \$16,403.73 to \$15,927.42. Some of the additional hours were regular hours and some were overtime hours. Overtime started at 80 hours per 2-week period, except

where a public holiday fell within that 2-week period, resulting in overtime after 72 hours. Doug said Employment Standards claimed regular pay only for public holidays because they were not sure if Lance had worked on those days or not.

V. ARGUMENT

After presenting their evidence, the parties agreed to file written arguments by email to me by 4:00 p.m. on May 1, 2024. On April 22, 2024, Lynden requested an extension of time for filing his written argument due to a medical matter, resulting in a one-week extension. I received the Director's written argument on April 29th and Lynden's on May 8, 2024. Lance did not file a written argument. I shared the written arguments amongst the parties on May 8, 2024.

The employer/Appellants' argument for dismissing the Wage Assessment is summarized as follows:

- This has been a long and flawed process, where evidence has fallen on deaf ears and has been confused and misconstrued. Lynden is appalled that Doug was sent as the Director's representative again.
- Lynden and Lance have known each other since they were children and have worked together and for each other over the years.
- Lynden moved to Elbow in 2009 and started his business. Lance would come work for him on weekends (2011-2013). Later, Lance came to work with him full time (2015-2019).
- Lynden considered Lance a friend and colleague. He has never tried to short his employees, let alone friends, of their wages, vacation pay or stat pay. Lynden is sad to say things he doesn't wish to say about Lance.
- The "facts" presented by Lance and Doug have changed since the last hearing. In the first hearing before the adjudicator, they argued Lance didn't know the wage he was being paid and that he did not receive vacation pay or stat holiday pay or overtime. Lynden argued then that it was highly unlikely that a person would come to work not knowing what he was being paid, and not be paid overtime, stat holidays or vacation pay for a Company he had worked for two times previously.
- They argued Lance was paid \$30 per hour with no vacation pay, and no stat pay and no overtime. Lynden argued that Lance agreed to work for a wage of \$28 per hour plus \$2 per hour vacation pay. When calculated, this actually worked out to \$.39 an hour higher than what the legislation would require ($.0576923 \times \$28 = \1.61).
- Lynden also argued that stat and overtime pay were paid out, as verified by his witnesses over the telephone.
- Doug and the adjudicator concluded that because these amounts were not laid out in a statement of earnings, the amounts were deemed not to have been

paid. Lynden asked them to produce one of the original statement of earnings given to Lance which they could not produce. Lynden wanted them to reconcile the hours on Lance's timesheets against the hours entered in his QuickBooks which they did not do. Lynden argues that they took the payroll information from QuickBooks and manipulated the data to suite their narrative. They argued the lack of timesheets was the employer's fault because Lynden didn't provide Lance with a way to record his hours.

- Now the legislation states that with no timesheets, Lynden must pay Lance for whatever hours he says he worked including stat holidays and overtime, yet Lynden says he already paid these amounts. Other employees testified at the first hearing about how they were to mark down their stat holidays, and they were to add up their overtime to their hours, and that this same way of paying vacation pay was the same for all staff members.
- The new facts presented at this hearing are that Lance seems to recall he was making \$28 per hour plus \$2 an hour for vacation pay, which is the truth. The wage assessment seems to be way out of line with this. Is the \$.39 overpayment of vacation pay not sufficient?
- Another new "fact" is that Lance worked an additional 8 hours per pay period. The timesheets have "magically appeared" but Doug doesn't wish to reconcile them against the payments made. If Lynden again proves he owes Lance nothing, will they make up more new evidence? They lied about not having timesheets and now they are claiming extra hours, without reconciling the claims to actual evidence.
- Lance worked on his own sites with other employees. Lynden wasn't working with him during the audit period. Lance should've been fired for not showing up to work. Lynden could have called other witnesses to testify about this.
- None of the employees who testified at the original hearing were still Lynden's employees and they had nothing to gain from giving testimony for or against his company. The testimony established Lynden paid the amounts claimed by Lance to him. The witnesses didn't have anything against Lance but he self destructed and is unfortunately taking Lynden down with him.
- Lynden argues that Doug hasn't acted professionally, previously threatening to bankrupt his company and making an unreasonable settlement offer before the hearing started at far above what Lance privately offered to settle for.
- Lynden argues there are materials in the possession of the LRB that were not forwarded to me, including invoices and better outlines of things Lance took and didn't pay for.
- Lynden says Lance owes money to his store and that he didn't pursue Lance in small claims court because you cannot get blood from a rock. Lynden argues that during the first flawed process, his business was discredited and the invoices were misconstrued, and during the second process the adjudicator "maybe did not quite understand my business either and does not seem to grasp the magnitude" of what he does.

- Lynden's business, now Diefenbaker Building Supplies Limited (DBS), started in 2009 as Lynden Lepage General Contractor out of a 1992 Chev Geo Metro with \$40 to his name. Today, DBS is open 8-5:30, Monday to Friday. The store sells gas and diesel and convenience store items such as confectionary, sandwiches and chocolate bars. The store also sells automotive supplies, parts, batteries, and hardware items such as nails, screws, glues, spray paints, door locksets, etc. The store also has a 3-bay shop, with two hoists, a tire machine and balancer, a hydraulic hose press and fittings and so forth. The store also stocks commodity doors and windows, and currently there is approximately \$150,000 worth of lumber in stock for sale. DBS is also a general contractor and full-service home builder. Lynden feels his business has been discredited throughout this process and that he has been discriminated against as an employer.
- Lynden says he has fought long and hard and has proven Lance was fully paid, but "no matter what I prove Doug and Lance will come up with some new lie to make some new claim." He believes in this second process that he was "again denied having witnesses, Jodi did wish to do any new fact finding by telephone either." Lynden feels he is up against a system that is stacked against him and that he is being discriminated against as an employer "by the LRB, and that the LRB has endless staff, lawyers, adjudicators and judges all taxpayer funded to continue fighting" with him. Lynden "will not settle with letting tyrants run their own court against me, judge jury and executioner, basing their case on lie, misconception and perjury."

The employee/Director's/Respondents' argument for upholding the Wage Assessment is summarized as follows:

- The wage assessment should be amended to \$15,927.42. This amount includes the 8 hours every 2 weeks that were applied to Lance's rent and not paid out as wages. It also includes overtime, public holiday pay and annual vacation pay payable during his last year of employment.
- The audit considers the voluntary purchase of \$500 in cigarettes as well as \$500 per month for rent.
- The employer has not proven the employee accepted \$30 per hour with annual holiday pay instead of \$28 per hour without it. There is no written employment contract or agreement regarding the terms of any verbal conversations.
- Section 2-37(2)(a)(iii) of the Act is applicable and it says: A statement of earnings required pursuant to subsection (1) must clearly set out the number of hours of work for which payment is being made for each of wages, overtime and public holiday pay and work on a public holiday, vacation pay and pay in stead of notice.
- Section 2-6 of the Act also applies and states: "No provision of any agreement has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by the Part."

- The employer did not provide evidence that a statement of earnings was provided that indicated the payment of overtime, public holiday pay or annual vacation pay, and the Act does not have a provision for an “all-inclusive salary” therefore any entitlements have to be clearly identified on a paystub or they are deemed not paid.
- Section 2-37(3) states: “Unless the contrary is established, wages and other amounts that are not included in a statement pursuant to subsection (2) are deemed not to have been paid.” The Director argues the contrary has not been established and that Lance is entitled to his hourly rate of pay and other entitlements provided by the Act including annual vacation pay, public holiday pay and overtime.
- Lynden testified that he did not keep timesheets. Section 2-38 requires an employer to keep records of wages and hours worked. He left it up to the employees to calculate overtime and public holiday pay when they communicated the number of hours worked per pay period.
- Lance testified that he didn’t calculate overtime or public holiday pay when he reported his hours and simply reported his hours. Therefore, the Director submits these amounts remain outstanding and the calculations on the revised audit sheet should be considered.
- Regarding deductions from pay, section 2-36(2)(f) provides for deductions from pay of “voluntary employee purchases from the employer of any goods, services or merchandise.” Despite any documentation to support the voluntary purchase, Lance and the Director agree the \$500 bill for cigarettes was legally deducted. The employee also agrees his rent was a lawful deduction because he agreed to make payments to cover the costs of the home purchased for him to live in.
- The other deductions claimed by the employer are not considered legal deductions as they relate to third parties and the courts have been clear that such deductions are not lawful. The Director argues a charge account should have been set up and the items should have been signed for so that the employee is aware of the cost of the items before charging them to his account and subsequently agreeing to a deduction from his wages. Many of the deductions presented by Lynden might have been owing and considered in a civil suit; however, they are not legal deductions under the Act.
- Furthermore, as the employer claims to have co-signed for the home and ultimately ended up paying for the home, many of the deductions he now wishes to deduct were in fact for a home he co-owned and ended up purchasing outright when the employee was evicted.
- Regarding vacation pay, section 2-24(1) states that employees are entitled to three weeks of holidays after the completion of each year of employment and there are three occasions when vacation pay must be paid out:
 - (a) When vacations are taken (on the normal payday or, if the employee requests, before the vacation period begins);

- (b) If no vacations are taken, not later than 11 months after the day on which the employee becomes entitled to vacation; and
- (c) If an employee is terminated or resigns, within 14 days after the day on which the employment ends.
- The legislation doesn't require that an employer grant an employee their holidays during the first year of work. Annual holiday pay accrued prior to the employee's first anniversary does not need to be paid out until the employee takes holidays during the second year. If an individual resigns or is terminated prior to completing one year of service, then all vacation pay earned to date must be paid out.
- If an employee takes annual vacation or is paid out annual vacation pay during the year, the amount received becomes part of that year's earnings.
- Section 2-89(2) provides for time limits for claims to the director of employment standards. It says recovery is limited:
 - (a) to wages that became payable in the 12 months preceding the day on which the claim was made to the director of employment standards; or
 - (b) if the employment with the employer has ended, to wages that became payable within the last 12 months of employment with that employer.
- Lance started on April 1, 2015 and his last day of work was December 12, 2018.
- April 1, 2015 to March 31, 2016 – AVP 11 months later falls on February 28, 2017. As February 28, 2017 falls outside of the December 13, 2017 to December 12, 2018 eligible audit period, wages earned during that period are not included in the calculation for owed AVP.
- The eligible audit period – December 13, 2017 to December 12, 2018: April 1, 2016 to March 31, 2017 annual holiday pay which would have become payable as of February 28, 2018 became payable within 14 days of the employee's last day of employment, December 12, 2018.
- April 1, 2017 to employee's last day of December 12, 2018 became payable as it fell within the audit period.
- The audits presented indicate the eligible periods April 1, 2016 to December 12, 2018 for calculating accrued annual holiday pay. The employee's start day of April 1, 2015 to the period of March 31, 2016 fell out of the one year limitation for wages payable and therefore wages earned in that period were not included in the calculation.
- The Director submits the employer owes Lance \$15,927.42.

VI. ANALYSIS AND DECISION

I wish to start by acknowledging the employer's frustration with the process. He feels he has been discriminated against as an employer. Lance's personal timesheets which Employment Standards had in their possession ought to have been produced to the

employer, especially if/when he asked them to do so. Without getting into hearsay, I regret that Lynden ever felt his business was threatened or that the system was stacked against him. We all make mistakes, but everyone deserves to be treated fairly and respectfully.

With that said, some of the mistakes contributing to Lynden's frustration, were mistakes that he made. He failed to have or keep important records, such as written employment contracts, timesheets, paystubs and information about employee purchases. He said that Employment Standards ought to have been able to reconcile what was owed and/or paid to Lance and yet Lynden had not done the basic things the law requires him to do, such as keep track of the hours worked by his employees, including overtime and public holiday pay and work on a public holiday and vacation pay. Reconciliation would have been much simpler had the employer created and kept the records he was required by law to keep. As the employer, Lynden had an important part to play if he wanted things to run smoothly and efficiently. It is not entirely fair for Lynden to hold everybody else responsible for what has transpired over the past six years, without accepting his role in the process he now refers to as flawed.

I asked Lynden to attend the hearing with any witnesses and documents he wanted me to consider as part of his appeal. I explained the effect of the Court of Appeal's decision was that the Adjudicator Decision was cancelled and that we were starting over. Because he did not attend the hearing with any witnesses, we agreed to accommodate him by adopting into evidence the testimony of two of his previous employees from the first hearing. It seemed like a good and fair compromise given that so much time had passed since the initial hearing. But, in his Written Argument, he wrote: "In this second process I was again denied having witnesses, Jodi did not wish to do any new fact finding by telephone either." I am unaware of any witnesses Lynden was intending to call or was prevented from calling at either hearing.

The only document introduced by Lynden and entered into evidence on his behalf was the list of items taken/used by Lance from Lynden's business and store (ER1). He mentioned bank records but did not produce them. He mentioned cheques and credit card statements but did not produce them. He said he might have receipts on his computer but did not produce them. He mentioned paystubs but said he had not kept them. He mentioned a sheet showing Lances purchases but did not know what happened to it. He said he would still have records on QuickBooks but did not produce them. Lynden admitted he did not provide timesheets to his employees for them to fill out and that he only required a reporting of total hours worked. In any event, aside from the information he provided to Employment Standards as part of its investigation in early 2019, and the list of items taken by Lance (ER-1), Lynden did not introduce any documentary evidence for my consideration. If Lynden had documentary evidence or witness testimony that he wanted me to consider, he needed to produce those documents and witnesses. My fact-finding is limited to the evidence the parties present to me.

The amended Wage Assessment claims that Lynden and his Company owe wages to Lance in the amount of \$15,927.42. The outstanding wages calculation or audit is found at Tab 6 of EE1 and is also identified as its own exhibit EE2. The assessment includes outstanding regular wages (\$2,085.00), overtime wages (\$5,872.50 + \$1,687.50), public holiday pay (\$2,296.80) and annual vacation pay (\$10,485.62), less credits to the employer for rent (\$6,000.00) and cigarettes (\$500.00).

Regular Pay

The audit shows unpaid regular wages of \$2,085.00, comprised of 69.5 hours multiplied by an hourly rate of \$30.00 per hour. With respect to Lance's last two weeks of work, the employer filed no documentary evidence in support of his position that Lance was paid in full. Lynden said he would not have paid him on his last day of work. Lynden believes he would have paid him once the Company got paid and likely within two weeks of Lance's last day of work. On cross-examination, Lynden said he was "fairly certain" that Lance was paid for all the hours he worked. Lance says he never received his final paycheck. On his complaint form filed with Employment Standards on December 12, 2018 (EE1, Tab 1), Lance said that his hourly rate of pay was \$30 and beside "[d]etails of the complaint" he wrote: "I am not being paid for my last two weeks of work he says I owe him for all these things if I quit but we had never agreed on or signed anything of these matters."

I find it difficult to believe that Lynden would have paid Lance anything after he quit because Lynden felt Lance owed him more than \$40,000 (see ER1). When asked why he did not pursue a civil action against Lance, Lynden said: "You can't get blood from a rock." Lance says he was not paid for his last two weeks of work and Lynden says he probably paid him two weeks after his final day of work. Without more evidence to support the employer's position, I find it more likely than not that Lynden withheld Lance's last paycheck. Consequently, the employer owes the employee for 69.5 hours of unpaid regular pay for hours worked during Lance's last two weeks of work.

Rent

The audit shows that rent in the amount of \$6,000 was subtracted from the wages owed to Lance. Lynden believes the evidence about monies being deducted from Lance's pay for rent has changed over the years. He said he does not remember them having an agreement and thinks that if they did, it only applied to a few paychecks. He says he did not deduct 8 hours of regular pay from every paycheck.

Lance said he would subtract 8 hours during every 2-week pay period from his hours then report the total, less the 8 hours, to Lynden. He admitted his memory about the rental agreement was also fuzzy, but he thinks he was paying about \$500 per month for rent. He says 8 hours of work was taken off each paycheck or approximately \$240 (one-day's pay at \$30/hour x 8 hours) for rent. When Lance said this, Lynden interjected to say that this happened after the first year because Lance had not paid his rent. Lynden testified that he paid Lance's rent for the last year. Lynden said it was up to Employment

Standards to reconcile Lance's timesheets and paystubs which they had not done, so they should not have added the 8 hours per pay period back in.

I believe Lance's testimony about 8 hours having been deducted from every paycheck for rent. Both Lynden and Lance were fuzzy on some of the details, but I believe that Lance would remember that 8 hours' pay was coming off every paycheck. \$240 per paycheck was not an insignificant deduction for Lance and it would have made an impression. Moreover, this arrangement makes sense given that Lynden had vouched for him with the owner of the house Lance was renting to own, and that Lynden was trying to keep Lance around. When Lynden was told by the homeowner that Lance had not been paying his rent, Lynden stepped in. He felt he had to since he had in effect co-signed the rent to own arrangement. Also, he wanted to keep Lance as an employee and without somewhere to live, Lance would likely leave town. It makes sense that Lynden would require Lance to contribute to his rent, especially since Lynden said he never planned on buying the house. It was supposed to be Lance's house.

I agree with Doug that Lance's personal timesheets are quite impossible to decipher and reconcile. Doug chose to extrapolate Lance's hours using his hourly rate of pay and the payroll information given to him by the employer (EE1, Tab 7). Given the employer did not keep track of his employee's hours, I find that Employment Standards did the best they could with the information they had. I accept that Employment Standards correctly added 8 hours per pay period back in for purposes of assessing unpaid regular and overtime pay, as well as public holiday and annual vacation pay. Employment Standards then subtracted, or credited the employer, \$6,000 for rent after the necessary calculations were made. This appears to be the correct approach.

Overtime Pay and Public Holiday Pay

From the beginning, Lance has maintained he was not paid overtime or holiday pay. On Lance's complaint form filed with Employment Standards on December 12, 2018, he wrote that Lynden "has never paid overtime he said I could just work there or not but hes not paying overtime and the same goes when I asked for holiday pay etc." Lance testified that he had not calculated his own overtime. He said he knew overtime was time and a half but didn't know when the statutory holidays were or how to calculate what he should have been paid for them. When he worked more than 8 hours in a day, he said he simply recorded it. He did not calculate how much overtime his employer might owe him. The same went for public holiday days. If he worked, he recorded it but did not do any calculations on what he ought to be paid for them.

Although Lynden owned the Company, he admitted to having a limited understanding of his responsibilities as an employer, especially in the beginning. He recalled an example of not knowing he had to pay vacation pay to his employees. He learned as he went. Lynden did not provide his employees with a timesheet to fill out. He did not keep copies of the time they recorded and reported to him and did not even keep copies of their pay stubs. He relied on his employees to tally and report their hours. They

provided him with the number, usually by text or phone, and he paid them accordingly. He said it was up to them to calculate their own overtime and public holiday pay.

When it comes to overtime and public holiday pay, where there are discrepancies in the evidence, I prefer Lance's evidence to Lynden's. I believed Lynden when he said he paid his employees based on the numbers they reported. What I do not believe is that he ever had a conversation with Lance explaining when he should be claiming overtime pay or how he should report and/or calculate it. There is no evidence that this occurred. It is an employer's responsibility to keep track of an employee's hours and to calculate overtime. Likewise for public holiday pay. There is no evidence to suggest that Lynden or Lance even knew that an employee working on a public holiday is entitled to an increased hourly wage (1.5 times pursuant to section 2-32(3)).

Lance presented as having a very basic knowledge of employment standards in Saskatchewan. I believe Lance trusted his employer and friend to figure out what he was owed. I believe that Lance tallied his hours without calculating overtime pay and public holiday pay. I find that Lance was paid for the hours he reported but not for overtime or public holiday pay. Lynden did not accept the hours used by Employment Standards in its assessments and argued that Lance's hours ought to be reconciled with his timesheets. It is the employer's responsibility to keep track of his employee's hours and the employer failed to do so. Doug stated that he was unable to reconcile Lance's personal timesheets and, having reviewed them, I agree with Doug. Again, because the employer did not keep track of his employee's hours, I find that Employment Standards did the best they could with the information they had. I accept Employment Standards' calculations for unpaid overtime pay and holiday pay as set out in EE2, located at Tab 6 of EE1.

Annual Vacation Pay

The largest portion of the assessment relates to unpaid annual vacation pay (AVP). It accounts for \$10,485.62 of the \$15,927.42 amended assessment. Whether or not AVP had been paid was also the main issue before the first adjudicator, the Board and the Court of Appeal. Section 2-24 of the Act sets out an employee's entitlement for AVP and section 2-27 prescribes when and how an employee is entitled to receive vacation pay. Upon request, Doug provided a detailed explanation of the Director's position regarding AVP entitlements and how AVP was calculated in this case. I have identified the four-page document as EE-4. In summary, employees are entitled to three weeks of holidays after completion of their first year of employment and vacation pay is calculated at 3/52's of the employee's wages for the year. Doug's calculation includes vacation pay for April 1, 2016 to December 12, 2018.

Section 2-37(2) of the Act provides that a statement of earnings must clearly set out "the amount paid for each of wages, overtime and public holiday pay and work on a public holiday, vacation pay and pay instead of notice". There is no doubt the employer failed to provide proper statements of earnings in this case. Section 2-37(3) provides

that “unless the contrary is established, wages and other amounts that are not included in a statement pursuant to subsection (2) are deemed not to have been paid.” In accordance with the Act and the Court of Appeal’s decision, the lack of a statement does not end the inquiry. I must determine whether the employer’s evidence established the contrary position referenced in section 2-37(3). In other words, did Lance’s \$30 per hour wage include AVP as alleged by the employer? If so, the employer is not required to pay it twice simply due to poor record keeping.

I prefer Lynden’s evidence to Lance’s when it comes to the existence of an agreement increasing Lance’s \$28 per hour wage to \$30 per hour to account for a \$2/hour top up for AVP. Lynden testified that he offered to pay Lance \$28 per hour or \$30 per hour including vacation pay, and that this is the same arrangement they had previously when Lance worked for him. Lynden said that Lance chose the higher hourly rate inclusive of vacation pay just like every other employee he had. Both witnesses called by Lynden at the first hearing testified to agreeing to a \$2-higher hourly wage that included holiday pay. Doug and Lance stipulated that this was their testimony and agreed that it could be adopted as part of the evidence at this appeal hearing. Lynden said he paid all his employees in the same manner. Although they were paid different hourly rates depending on their position with the Company, they all received a \$2.00 per hour top-up for vacation pay. Lynden’s testimony about vacation pay forming part of his employee’s hourly wages never waived and two of his former employees corroborated his testimony.

Lance admitted his memory was fuzzy given the passage of time. He believed he was earning \$28 per hour. Lance may have meant to say \$30, but the evidence establishes he was in fact earning \$30 per hour. The question was whether the \$30 per hour included AVP or not. Lynden explained that when he first started his Company, he had not realized that he owed vacation pay to his employees. Once he realized it, he and some staff members did a calculation and determined that a \$2.00 top up to an employee’s hourly wage more than covered the 3/52’s vacation pay. The calculation was as follows: $3/52$ ’s or $.05769231 \times \$28 = \1.61 . It was an agreement that benefitted his employees financially and made things easier for him, or so he thought. Doug confirmed that if I accepted there had been a \$2.00 top-up for AVP as part of Lance’s hourly rate, and if I determined the same was allowed by law, that the \$2.00 top-up would have covered the AVP owing to Lance.

Lynden included the existence of this agreement as his main ground of appeal in his notice of appeal filed on January 22, 2019, and testified to its existence at both hearings. I find the existence of an agreement with Lance makes sense given Lynden’s agreements with other employees, and the corroborating evidence from the other employees tips the scale in favour of Lynden’s evidence over Lance’s on this point. On a balance of probabilities, I find they had an agreement. Obviously, having this type of agreement in writing would have made things much easier, and going forward I trust Lynden will commit any similar agreements to writing.

Despite the employer's failure to record payment of AVP on Lance's statements of earnings in contravention of the Act, I find that Lance was in fact paid annual vacation pay on every paycheck because it was included in his hourly rate of pay. This finding extends to the "unpaid" AVP back to April 1, 2016 that was included as part of the assessment. As Lynden said, he had the same agreement with Lance for years. I do not find the employer owes Lance for annual vacation pay as it was paid in full by way of Lance's elevated hourly wage, excepting the last few days of work for which Lance alleges he was not paid at all.

In short, the employer established the contrary position as contemplated by section 2-37(3). Employment Standards was incorrect in deeming that the employer had not paid AVP due to the lack of statements showing the same without further consideration of the circumstances as required by the Act. To be fair to Employment Standards, as well as the first adjudicator and the Board, there are sections of the Act that led them to believe that even if there was such an agreement that other provisions would render the agreement invalid. However, the Court of Appeal has now considered and ruled on the matter: The Act does not expressly prohibit all-inclusive employment agreements on wages and vacation pay or declare them invalid. Under the circumstances, I find the AVP owed to Lance was paid in full by the employer by way of the \$2.00 top up to his hourly wage throughout the course of his employment.

Set-off for Voluntary Purchases

Section 2-36(2)(f) of the Act provides that "an employer may deduct from an employee's wages . . . voluntary purchases from the employer of any goods, services or merchandise." The adjudicator in the first hearing concluded an offset for the cigarettes in the amount of \$500.00 was the only valid deduction because the other payments were "made by the employer to third parties" and were therefore not voluntary purchases from the employer. The Court of Appeal held the set-off issue ought to be revisited because of the adjudicator's lack of reasons involving payments to third parties and lack of findings of credibility.

Lynden provided a list of items and benefits received by Lance throughout the course of his employment with the Company. The list was attached to his notice of appeal and entered into evidence as Exhibit ER1. According to his numbers, I believe the total should read \$49,229.69 instead of \$39,229.69. Without subtracting overtime, vacation and holiday pay in the amount of \$13,921.81 as he did near the bottom of the document, and adding the \$22,000.00 garage he mentions at the bottom left of the page, Lynden alleges that Lance received extra benefits from him in the amount of \$85,151.50.

The first group of items on Lynden's list relate to rent, taxes and insurance for the house Lance was renting to own. The total for these items is \$21,000. Firstly, the rent, taxes and insurance for 2015 is outside the audit period and I heard no evidence about any agreement surrounding rent, taxes or insurance in 2015. Secondly, I already made

findings about the rent for 2018, including that it was deducted from Lance's pay. Employment Standards added the hours back in and then deducted \$6,000 for rent from the audit and I found this to be the correct based on the evidence. See my analysis above under the "Rent" heading. Thirdly, even if I assume that rent, taxes and insurance on the house amounted to a purchase from the employer, the only concrete evidence of the agreement or its voluntariness relates to the 8 hours of work being deducted from Lance's paychecks in 2018 for rent. Fourthly, Lance testified that he was not even aware that he was supposed to be paying taxes and insurance on the house and I believed him. Fifthly, there is no documentary evidence to support these claims. I do not find these items to be voluntary purchases from the employer as contemplated by the Act.

The second grouping on the list relates to fines, courses, blower and truck damage in the amount of \$6,300.00. It is likely but not entirely clear that these "benefits" relate to charges occurring outside of (before) the audit period. Lynden testified that he estimated the value of the benefits, and he provided no documentary evidence in support of these expenses. Lance said the blower removal was on his "bill," but he thought he paid it. Lance did not think he should have to pay the deductible for accidents occurring in the Company truck—there was no meeting of the minds here. Lynden does not think it is fair that he should be responsible for Lance's accidents, especially on occasions where Lance was using the truck for personal use. I find that Lynden condoned Lance's use of Company vehicles for work and personal purposes. There is no evidence to the contrary. Lynden said he paid the fines and expenses so Lance could keep working for him. Neither Lynden nor Lance testified to when these expenses were incurred or paid or exactly how much they were. At the end of the day, these items appear to be expenses paid to a third party and not employee purchases from the employer and I do not have enough evidence to say that any of these items were voluntary purchases from the employer as contemplated by the Act.

The third grouping is cell bills, cell phone and cigarettes in the amount of \$2,680.00. Lynden said that Lance kept a tab at the store, and he charged cigarettes to his tab. When he quit, he did not pay his tab. Lynden did not provide documentary evidence of Lance's tab, but Lance admitted to owing \$500.00 to his employer for cigarettes. Employment Standards deducted \$500.00 for cigarettes from the assessment. The timing of the cell bills and lost cell phone is unclear other than that the list says the bills were from 2017 and 2018. Lynden did not provide any documentary evidence, including receipts or cell phone bills. Further, there is no evidence of an agreement about who was responsible for paying for the cell phone and bills. Lynden testified that he bought Lance a phone and paid the bills because he needed to be able to get a hold of him so he could tell him where to go, what to do, etc. He needed Lance to have a phone for work and admitted that he did not care so much about being reimbursed for the phone expenses. Aside from the cigarettes which were already accounted for, the costs relating to the phone do not appear to be voluntary purchases from the employer.

The next grouping of items is referred to as benefits, truck usage and meals totalling \$21,317.50. Lynden estimated all of these expenses and provided no documentary evidence in support of his claim. He does not think it is fair that Lance used his Company truck for personal use without having to pay him back. He also said he bought lunches and beer for Lance and ought to be compensated. Lance admits he sometimes used the truck to go to Central Butte for personal reasons but usually tried to combine the trip with a work trip. For example, they might be dumping garbage there so it would not just be a trip for his prescription. He said he was usually killing two birds with one stone. He did not know what to say about the lunches and beer other than he did not know he would have to pay Lynden back. He thought they were gifts. They did not have an agreement about any of it. Based on the totality of the evidence, I believe that Lynden bought lunches and beer for his employee and friend and allowed him to use the Company vehicle with Company fuel, without the expectation of being reimbursed. I believe he did these things for Lance because he cared about him and wanted to keep him around. I do not believe they had a repayment agreement and therefore these items cannot be considered voluntary purchases.

The last group of items on the list relates to supplies and work for the house totalling \$11,800.00. The basic story about the house is that Lynden wanted Lance to have a place to stay so that he would keep working for him. They found a house that Lance could rent to own from a local rancher. Lynden helped Lance with improvements to the house and Lance was permitted to use items from Lynden's store and business for the house. They even moved a garage which he valued at \$22,000.00 into the backyard. Lynden said he vouched for Lance so when he was contacted by the owner and told that Lance was not paying his rent, Lynden took over. Eventually, Lance was evicted and Lynden made arrangements with the homeowner to work off the amount owing on the house. He became the owner although this was not his original intention.

Lance admits that while he was living in the house, he made improvements to it with Lynden's help but that there are things on the list for which he does not owe any money. Lance thinks he paid for the sewer bill and knows he paid for the windows. He said he could not remember the details about the electrical work and new meter and line, but that Lynden did pay for the fence. He also said he thought he paid Lynden back for a lot of the items. The only thing he thought he owed Lynden for were the deck boards.


The numbers provided by Lynden for the items are again estimates and he filed no documentary evidence in support of his claim. Lynden said he might have some receipts on his computer, but he did not tender them as evidence. He said there would have been a bill for the fencing but did not produce it. He said there would have been a sheet where they kept track of items such as windows and doors purchased by Lance, but he did not know what happened to it. There is no indication in the evidence about when most of the work on the house was done or when any of these expenses were incurred. When Lance left, Lynden had to repair damage caused by his leaving the door open.

Since Lance left in December of 2018, I would assume the timeframe for the estimated repair expense was early 2019; however, I cannot see how damage to the property Lynden fixed after Lance's employment ended could be considered a voluntary purchase by Lance from his employer. Had Lynden introduced further and better evidence regarding some of these items, with proof that he or his Company owned them, and that Lance agreed to purchase them, then some of these items could have been set-off from wages owed to Lance. There must be a meeting of the minds for a purchase to be considered voluntary. I simply do not have the requisite evidence before me that would allow me to conclude that any of the items or expenses listed by Lynden constitute a voluntary purchase by Lance from him. At the end of the day, Lance ended up owning the property and presumably benefited from the improvements made to it.

VII. CONCLUSION

The employer has proven the annual vacation pay assessed as owing to the employee was in fact paid in full. The appeal is allowed in part and the Wage Assessment is varied to reflect that the Appellants owe Lance McCutcheon wages in the amount of \$5,441.80, consisting of unpaid regular pay, overtime pay and public holiday pay, less set-offs for rent and cigarettes.

DATED in Regina, Saskatchewan, this 24 day of July, 2024.



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.