

An appeal

- by -

Shannon Motel Ltd.

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C.113* (as amended)

**TRIBUNAL MEMBER:** Robert Groves

**FILE No.:** 2007A/133

**DATE OF DECISION:** January 15, 2008

## DECISION

### OVERVIEW

1. This is an appeal brought by 692886 Alberta Ltd. o/a Shannon Motel from a determination dated July 16, 2007 (the "Determination") issued by a delegate of the Director of Employment Standards ("Delegate Manarin") which found that an entity identified as Shannon Motel Ltd. had contravened sections 21, 28, 40, 46 and 58 of the *Employment Standards Act* (the "Act") in respect of complaints filed by Christine Kenmuir and Doug Kenmuir. The Delegate found that the Kenmuirs were entitled to wages and interest in the amount of \$3,200.74. The Delegate also imposed four administrative penalties of \$500.00 each against Shannon Motel Ltd. pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation* (the "Regulation"). The total found to be owed was therefore \$5,200.74.
2. Correspondence generated during the course of this appeal reveals that the Director received a certified cheque on August 22, 2007 from a Kevin Heo, identified as a representative of the Kenmuirs' employer for the relevant period, in the amount of \$5,200.74, representing the total sum found to be owed to the Kenmuirs in the Determination. Following that payment, the Tribunal informed the parties and the Director that the Determination was suspended pursuant to section 113 of the *Act*, and ordered that the funds so paid be held in trust pending the disposition of the appeal on its merits.
3. Following my review of the documents and submissions filed initially on this appeal I issued a decision dated October 16, 2007 (the "Original Decision") in which I ordered that the Kenmuirs' complaints be referred back to the Director for reinvestigation and reconsideration of the question whether Shannon Motel Ltd. was properly identified as the legal person responsible for the contraventions of the *Act* set out in the Determination. The concern underlying the Original Decision was that the Determination did not, in my opinion, adequately address the question whether Shannon Motel Ltd., or 692886 Alberta Ltd. o/a Shannon Motel, the entity identified as the appellant on the Appeal Form delivered to the Tribunal following the Determination, was the legal person that should have been found to have violated the *Act* in respect of the complaints filed by the Kenmuirs.
4. Following receipt of the Original Decision, the Director made further inquiries through a second delegate ("Delegate Suhr") who prepared a report dated October 25, 2007 concerning the issue of the identity of the Kenmuirs' employer (the "Report") for the purposes of the complaints. Following receipt by the Tribunal the Report was circulated to the other parties to the appeal. The Tribunal then received further submissions from Mr. Heo, the Kenmuirs and Delegate Suhr.
5. The appeal has now been referred to me for final decision on the merits. I have before me the original Tribunal file containing the Appeal Form, the Determination, the Reasons for the Determination, the record that the Director has provided pursuant to section 112(5) of the *Act*, the original submissions of the parties to the appeal, the Report, and the submissions which followed it.
6. The Tribunal has determined that I will decide the appeal on the basis of the written materials submitted by the parties, pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act* and Rule 16 of the Tribunal's Rules of Practice and Procedure.

## FACTS

7. In October 2005 the Kenmuirs were hired to perform work at the Shannon Motel in Fort Nelson, BC. They reported to Mr. Heo.
8. As I have indicated, there is a dispute whether the legal entity which employed the Kenmuirs was Shannon Motel Ltd., or 692886 Alberta Ltd. o/a Shannon Motel. In the Determination Delegate Manarin decided that the correct employer was Shannon Motel Ltd. Delegate Suhr seeks to support this conclusion in the statements he makes in the Report, and the materials he has attached to it. Mr. Heo asserts that the correct employer was 692886 Alberta Ltd. o/a Shannon Motel.
9. There is also a dispute between Mr. Heo and the Kenmuirs whether the latter were "managers" for the purposes of the *Act*. Delegate Manarin decided they were not. Mr. Heo asserts that they were.
10. The Kenmuirs resigned from their positions of employment in February 2006. They filed complaints under section 74 of the *Act* within the time stipulated. Delegate Manarin conducted an investigation, but no hearing, before issuing her Determination.
11. The principal argument of the Kenmuirs was that while it was represented to them that they were to be hired as resident managers of the motel, and that they were provided with a job description which contained duties one would expect managers to perform, they did not actually perform those managerial duties. Instead, they worked primarily as caretakers, without authority to make decisions of consequence, toiling at largely menial tasks under the close supervision of Mr. Heo, who paid them a fixed monthly salary in an amount that the Kenmuirs believed was entirely inadequate having regard to the prolonged hours of overtime the volume of work regularly required them to perform, seven days per week.
12. Mr. Heo's position on behalf of the employer was that the Kenmuirs were hired as managers, and that it was expressly agreed that they would not receive remuneration for overtime. In support, he referred to employment agreements, and other documents executed by the Kenmuirs, in which they were described as "an on-site Manager couple" hired at the rate of "\$5,000.00 per monthly (50/50 share)". Mr. Heo further argued that the Kenmuirs were lazy, that they had not worked the overtime hours alleged in their complaints, and that this was borne out by the fact that they had hired their son and daughter-in-law to perform some of the duties that they otherwise would have been responsible to fulfill as managers of the motel.
13. When considering the alleged status of the Kenmuirs as managers, Delegate Manarin accepted, in large measure, the evidence presented by the Kenmuirs that Mr. Heo controlled the affairs of the motel in all of its fundamental aspects, and that the Kenmuirs did not possess the requisite degree of independent power to make final decisions of consequence to the conduct of the motel business. Applying the analysis of relevant previous decisions of the Tribunal to the effect that a person must actually exercise, and not merely notionally possess, the powers of a manager, Delegate Manarin therefore concluded that the Kenmuirs were not managers under the *Act*, and so they were entitled to be remunerated for overtime work and to receive statutory holiday pay.
14. Delegate Manarin rejected Mr. Heo's argument, in the alternative, that the Kenmuirs had expressly agreed to work no overtime hours without approval. In so doing, Delegate Manarin cited section 4 of the *Act*, which provides that any agreement which purports to waive the minimum requirements of the *Act* is of no effect.

15. When calculating the wages she believed the Kenmuirs had not received, Delegate Manarin noted the fact that Mr. Heo had delivered employer records which contradicted each other more than once. She therefore concluded that they were unreliable. At the same time, Delegate Manarin determined that the evidence presented by the Kenmuirs concerning their hours of work was sufficient to establish a claim for but a portion of the wages they had claimed. After a careful analysis of information made available to her, Delegate Manarin decided that the Kenmuirs were owed the sums in respect of overtime, statutory holiday pay, vacation pay, and unauthorized deductions referred to above.
16. The employment agreements executed by the Kenmuirs contained provisions indicating that they were to receive a percentage of the net profits of the motel's vending machine sales. Delegate Manarin decided that as there was no evidence whether this provision was intended to provide further compensation to the Kenmuirs for the work they performed, or to constitute a payment entirely at the discretion of the employer and unrelated to the Kenmuirs' "work, production or efficiency", the Kenmuirs' claim that the sums owed in respect of vending machine sales should be considered "wages" under the *Act* should be dismissed. Delegate Manarin also declined to accept the Kenmuirs' claim for the value of medical benefits unpaid by the employer on the basis that they were discretionary.
17. In a submission filed with the Tribunal along with the Appeal Form identifying 692886 Alberta Ltd. o/a Shannon Motel as appellant, Mr. Heo argued that Delegate Manarin erred in law in declining to find that the Kenmuirs were "managers" for the purposes of the *Act*, and therefore not entitled to overtime pay, and statutory holiday pay. Mr. Heo also asserted that Branch staff, including a mediator, were biased against him, refused to investigate the Kenmuirs' complaints properly, and refused to pay attention to his submissions in response, which resulted in a failure to observe the principles of natural justice. Finally, Mr. Heo stated that he had new evidence of a meeting he had with the Kenmuirs prior to their being employed.
18. The Kenmuirs' initial submission on the appeal asserted that while their employment agreements described them as managers, they performed few, if any, managerial duties in practice. The submission also described the long hours they were obliged to contribute preparing paperwork for Mr. Heo, and performing housekeeping and maintenance functions at the motel, principally due to the lack of other staff.
19. In the Report, Delegate Suhr argues that Delegate Manarin was correct in deciding that the correct employer in this instance was Shannon Motel Ltd. In support of this conclusion he refers to the fact that the employment agreements and other associated documentation executed by the Kenmuirs clearly identify Shannon Motel Ltd. as the employer. Delegate Suhr also refers to corporate searches revealing that at all times relevant to these proceedings Shannon Motel Ltd. was an active British Columbia registered company, and that Mr. Heo was its president. Other searches presented by Delegate Suhr show that 692886 Alberta Ltd. was an Alberta company the registration for which was struck in that province in late 2007 for failure to file annual returns. Mr. Heo was also a director of 692886 Alberta Ltd.
20. The Report goes on to discuss other records which demonstrate that Shannon Motel Ltd. was the legal entity that paid property and utility taxes to the Town of Fort Nelson. It also refers to an occasion on which Mr. Heo corresponded with Delegate Manarin, purportedly on behalf of "692886 B.C. Ltd. Op. Shannon Motel". Delegate Suhr conducted a corporate search with the British Columbia Registrar of Companies and was advised that no such British Columbia corporation exists.

21. In his material filed in response to the Report, Mr. Heo describes 692886 Alberta Ltd. as the "mother firm" and Shannon Motel Ltd. as the "daughter firm". He advises that 692886 Alberta Ltd. purchased the shares of Shannon Motel Ltd., but subsequently restructured the transaction as an asset purchase. Mr. Heo says that the share sale occurred as of May 1, 2007, and the re-structuring as of January 13, 2006. However, he also attaches a form of contract dated January 13, 2006 entitled "Commercial Real Estate Purchase Contract", purportedly between "Shannon Motel Ltd." and "692886 Alberta Ltd. and Nominee" which states that the share purchase contract was entered into on January 4, 2005, and amended on March 15, 2005. The Commercial Real Estate Purchase Contract states that both parties had concluded that the nature of the transaction should be modified to read "as an Asset Sale in lieu of Share sale", and so the sale of "Shannon Motel...is now modified to read as an Asset Sale." A letter dated November 16, 2007 which Mr. Heo attaches from his solicitors, Jina Kim Law Corporation, says this, in part:

...we are the solicitors acting for the current owner of the business of Shannon Motel and received a request from our clients to confirm the following in order to assist you with your decision on the subject case.

The sale and purchase of the subject business has been completed on April 30, 2005 when 692886 Alberta Ltd. has acquired all the outstanding shares in Shannon Motel Ltd.

It is the understanding of the writer that our clients have agreed with the previous owner to restructure the transaction from the sale share sale to the asset sale. The writer received the instruction from our clients to discuss this issue with the solicitor for the previous owner to finalize the agreement between the parties, which the writer has complied with.

22. Mr. Heo's submission also attaches copies of correspondence between 692886 Alberta Ltd. o/a Shannon Motel and the Canada Revenue Agency, the British Columbia Ministry of Finance and Corporate Relations – Consumer Taxation Branch, and WorkSafe BC, together with a copy of a Scotiabank bank statement for the numbered company, dated either in 2006 or 2007, all in support, I infer, of his assertion that the true owner of the motel at the relevant time was 692886 Alberta Ltd. o/a Shannon Motel, and not Shannon Motel Ltd.
23. As for Delegate Suhr's calling the Tribunal's attention to the fact that Shannon Motel Ltd. continues to pay local taxes to the Town of Fort Nelson, Mr. Heo suggests that this is due to the fact that the title to the motel property has remained in the name of Shannon Motel Ltd. until "the lawyer completes the registration of an alternation, then it will be amend of course." Mr. Heo says the amendment to the title is "currently underway".
24. Delegate Suhr's reply to Mr. Heo's submissions concerning the Report asserts that since Mr. Heo acknowledges the sale of Shannon Motel Ltd. to 692886 Alberta Ltd. was a share sale, which was not restructured as an asset sale until May 1, 2007, that is, until after the Kenmuirs' employment ceased, it is obvious that the proper employer is Shannon Motel Ltd. Delegate Suhr also finds support for this position in the fact that the employment agreements name Shannon Motel Ltd. as the Kenmuirs' employer, and that no new employment agreements were ever executed involving 692886 Alberta Ltd. as a party. Finally, he points out that no one challenged the identification of the Kenmuirs' employer as Shannon Motel Ltd. in the Determination until the Tribunal addressed it in the Original Decision.
25. In their final reply submission, the Kenmuirs' do not address the issue of the identity of their employer. Instead, they reiterate their position outlined earlier, that they were hired as managers but did not function as such, and that they were never paid for the many extra hours they worked at the motel.

26. In his final submission delivered to the Tribunal, Mr. Heo argues again that the Kenmuirs were managers under the *Act*, contrary to the findings of Delegate Manarin in the Determination. He also states that "692886 Alberta Ltd. dba Shannon Motel" successfully withstood an audit by "Revenue Canada" in the spring of 2007.

## ISSUES

27. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh, either because the Director erred in law, or failed to observe the principles of natural justice, or because evidence has become available that was not available at the time the Determination was being made?

## ARGUMENT

28. 692886 Alberta Ltd. o/a Shannon Motel has appealed the Determination on the three grounds set out in section 112(1) of the *Act*, which reads:

112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made.

29. Section 115(1) of the *Act* should also be noted. It says this:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

30. 692886 Alberta Ltd. has requested that the Determination be cancelled on each of the grounds set out in section 112. I propose to deal with those grounds in order.

### ***Did the Director err in law?***

31. The first issue to be considered under this heading is the identity of the Kenmuirs' employer. The Report furnishes significant information concerning the corporate histories of Shannon Motel Ltd. and 692886 Alberta Ltd. that was not contained in the record at the time I considered this matter prior to issuing the Original Decision. The information provided reveals that Shannon Motel Ltd. has at all relevant times been an active British Columbia corporation and that during the time the Kenmuirs were employed at the motel premises Mr. Heo was the company's president. That information also shows that 692886 Alberta Ltd. was an Alberta registered company, and that Mr. Heo was one of its directors, but that its registration was struck late in 2007 for failure to file annual returns. In one of his submissions delivered to the

Tribunal for the purposes of this appeal Mr. Heo makes reference to the fact that 692886 Alberta Ltd. is an "Extra-Provincial Company", but he does not say for which jurisdiction, and this bald statement is nowhere supported with documentation from the relevant corporate registry. I am not persuaded, therefore, that 692886 Alberta Ltd. was ever a company that was properly registered in British Columbia so as to permit it to carry on business in this province.

32. Mr. Heo's references to the sale of Shannon Motel Ltd. in the form of a share sale, which was later restructured as an asset sale to 692886 Alberta Ltd., are cryptic, and therefore confusing. It is trite to say that an appellant has the burden of establishing the sufficiency of its appeal, and on the material submitted by Mr. Heo, I am left wondering concerning the exact nature of the transactions concerning the motel and involving Shannon Motel Ltd. and 692886 Alberta Ltd. In my view, this should not be so, given that it appears Mr. Heo was a principal of both companies at all relevant times. In any event, while I am prepared to conclude that Mr. Heo's reference in one of his submissions to May 1, 2007 as the date when the deal was restructured must be an error, given that the Commercial Real Estate Purchase Contract which purports to evidence it as an asset purchase is dated January 13, 2006, the fact remains that on the basis of the information provided by Mr. Heo, the Kenmuirs were hired, and worked the majority of their tenure at the motel, during a period prior to any purported acquisition of the assets of the motel by 692886 Alberta Ltd.
33. I am also of the opinion that Mr. Heo's references to his opening accounts for the motel in 2006 and 2007 with the various government agencies, and Scotiabank, in the name of 692886 Alberta Ltd., is of little import. In the first place, much of this activity appears to have been generated by Mr. Heo himself, rather than as a result of any conclusion on the part of the authorities involved that 692886 Alberta Ltd. was the legal entity operating the motel. Secondly, the bulk of this activity seems to have occurred at the end of the Kenmuirs period of employment, or afterwards.
34. At the same time, there is compelling evidence supporting Delegate Manarin's conclusion that Shannon Motel Ltd. was the legal entity which employed the Kenmuirs. It lies in the form of the "Temporary Employment Agreement" and other documentation executed by the Kenmuirs at the behest of Mr. Heo at the time they were hired to work at the motel, and designed to cover the period from October 15, 2005 until January 14, 2006. It also lies in a second "Continuation Employment Agreement", essentially in the same form, that appears to have been executed later, and which sets out the Kenmuirs' terms and conditions of employment from January 15, 2006 onwards, a date which followed the Commercial Real Estate Purchase Contract that Mr. Heo says restructured the transaction involving the motel between Shannon Motel Ltd. and 692886 Alberta Ltd. as an asset sale. All of that documentation refers specifically to Shannon Motel Ltd. as the Kenmuirs' employer. It nowhere refers to 692886 Alberta Ltd., either alone, or "o/a Shannon Motel". That documentation was prepared by Mr. Heo. He insisted the Kenmuirs sign it, and abide by it. It is important evidence because the times at which it was generated appear to be the only occasions on which all the parties were in possession of, and apparently *ad idem* regarding, documents which defined the terms and conditions of the Kenmuirs' employment. The Kenmuirs do not appear to have had any input into the creation of the other documentation relied upon by Mr. Heo implicating 692886 Alberta Ltd. as the employer. That includes the Records of Employment the Kenmuirs received when they ceased working at the motel, stating that 692886 Alberta Ltd. o/a Shannon Motel was the Kenmuirs' employer, and which were again prepared at the behest of Mr. Heo,

35. The term "employer" is defined in section 1 of the *Act*. The definition says that it:
- ...includes a person
  - (a) who has or had control or direction of an employee, or
  - (b) who is or was responsible, directly or indirectly, for the employment of an employee
36. As with the *Act* as a whole, this definition should be given a broad and liberal interpretation, so as to encourage employers to make available the minimum protections of the legislative scheme to as many employed persons as possible (see *Machtinger v. HOJ Industries Ltd.* (1992) 91 DLR 4th 491). In aid of this purpose, more than one person may at times be treated as an employer for the purposes of the *Act* (see *McPhee* BC EST #D183/97).
37. The question whether a person employs another for the purposes of the *Act* is, in my opinion, a question of mixed law and fact. Questions of mixed law and fact are questions about whether the facts in a case satisfy the relevant legal tests. A question of mixed law and fact involves an error of law where an extricable error on a question of law can be identified in the legal analysis under review (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* [1996] SCJ No.116; *Britco Structures Ltd.* BC EST #D260/03). By way of example, an extricable error on a question of law would occur if the decision-maker has applied an incorrect legal standard to the facts as found.
38. Questions of fact, *simpliciter*, are questions about what actually took place between the parties. They are only reviewable by the Tribunal as errors of law in situations where it is shown that a delegate has committed a palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's finding of fact if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).
39. The fact that the dispute is over a question of mixed law and fact counsels deference. Appellate bodies should be reluctant to venture into a re-examination of the conclusions of a decision-maker on questions of mixed law and fact (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, *supra*).
40. In this case, Delegate Manarin's conclusion that Shannon Motel Ltd. was the Kenmuirs' employer was largely fact-driven. It followed a review of the documents and submissions tendered by the parties during the course of the investigation. It relied in particular on the employment agreements executed by the Kenmuirs and on behalf of Shannon Motel Ltd. to which I have referred. That conclusion is bolstered by the corporate records attached to, and the statements contained in, the Report prepared by Delegate Suhr. Even Mr. Heo does not categorically state that the Kenmuirs were never employees of Shannon Motel Ltd.
41. Can it be said, then, that the Determination, supplemented by the Report, makes any error of fact that amounts to an error of law on the issue of the proper identity of the Kenmuirs' employer? I do not think so. The evidence supports the conclusion in the Determination that Shannon Motel Ltd. hired the



Kenmuirs in 2005. Whatever purchase and sale arrangements were made between Shannon Motel Ltd. and 692886 Alberta Ltd. thereafter – and Mr. Heo's submissions on this point raise more questions than answers, in my view – there is no evidence that the original employment agreement between Shannon Motel Ltd. and the Kenmuirs was ever revised or replaced with an agreement naming any other legal entity as their employer before their employment at the motel ceased. Indeed, as I have said, the Continuation Employment Agreement executed by the parties, and designed to cover the period of the Kenmuirs' employment commencing on January 15, 2006, again names Shannon Motel Ltd. as the employer. That agreement refers to a period of employment which follows the January 13, 2006 date of the Commercial Real Estate Purchase Contract, the document Mr. Heo says evidences the purchase by 692886 Alberta Ltd. of the assets of the motel. It is hardly perverse, or inexplicable, to conclude on these facts that even after a purported asset sale, it was intended that the Kenmuirs would continue to be employed by Shannon Motel Ltd.

42. Given that I have decided that Shannon Motel Ltd. is properly named in the Determination as the Kenmuirs' employer, the question arises whether 692886 Alberta Ltd. o/a Shannon Motel has standing to bring this appeal. In my view, it does not, for several reasons. First, the Report attaches corporate records material emanating from Alberta indicating that while 692886 Alberta Ltd. may have been an active company when the appeal was filed, it was struck from the register thereafter for failure to file annual returns. There is, in addition, no compelling evidence that 692886 Alberta Ltd. was ever extra-provincially registered to carry on business in British Columbia. Second, the Determination was issued against Shannon Motel Ltd., a different legal entity. Shannon Motel Ltd. has filed no appeal in respect of the Determination. Assuming that 692886 Alberta Ltd. wished to appeal because it believed that it was an employer of the Kenmuirs, the appeal cannot proceed as no determination was ever issued against 692886 Alberta Ltd.
43. If I am wrong in this conclusion, for example, on the basis that 692886 Alberta Ltd. filed the appeal as an authorized agent for Shannon Motel Ltd., or on some other basis, I propose to deal with the merits of the appeal as presented in the materials delivered by Mr. Heo who, as I have said, is the president of Shannon Motel Ltd. and was a director of 692886 Alberta Ltd.
44. The next issue under the category of error of law, therefore, is whether Delegate Manarin erred in law in deciding that the Kenmuirs were not managers under the *Act*. The resolution of this issue is also a question of mixed law and fact.
45. Under section 1 of the *Employment Standards Regulation* the term "manager" means:
- (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
  - (b) a person employed in an executive capacity.
46. Whether a person is a manager under the *Act* is important because managers are excluded from the hours of work and overtime requirements contained in Part 4 of the *Act*, and the provisions relating to payment of statutory holiday pay in Part 5 of the *Act*, by sections 34(1)(f) and 36 of the *Regulation*, respectively.
47. It is clear from the Reasons for the Determination, and the record delivered by Delegate Manarin, that she conducted a long and detailed investigation of the type of duties performed by the Kenmuirs for Shannon Motel Ltd., and the nature of their working relationship with Mr. Heo, the representative of the company with whom they dealt. She determined that the Kenmuirs' hours of work were spent attending to the front

desk, making recommendations to Mr. Heo concerning the hiring and firing of housekeeping staff, ordering supplies, performing tasks on approval from Mr. Heo regarding the day-to-day maintenance and renovation of the motel premises, and laundry and housekeeping functions where necessary. She found as a fact that Mr. Heo made all the final decisions on issues of consequence relating to the operation of the motel, and that it was Mr. Heo, in the end, who had control over the administration and supervision of the affairs of the business. Weighing the evidence presented by the parties, and the submissions received in support, Delegate Manarin decided that the duties the Kenmuirs' performed were not primarily related to supervising and directing other employees or performing an executive function, but more properly resembled the functions performed by caretakers.

48. All of these conclusions drawn by Delegate Manarin were conclusions of fact. While Mr. Heo protests that Delegate Manarin was wrong, in whole or in part, in coming to these factual conclusions, I cannot say they are irrational, inexplicable or perverse. There was at least some evidence before Delegate Manarin to support those conclusions. It is obvious that Delegate Manarin preferred the bulk of the evidence that was tendered by the Kenmuirs, where it conflicted with that presented by Mr. Heo. That was a decision she was entitled to make. In the circumstances, it is not open to the Tribunal to second-guess Delegate Manarin on the proper inferences of fact to be drawn from the documents and submissions presented by the parties.

49. Having made findings of fact, it was then necessary for Delegate Manarin to apply the law correctly in deciding whether the Kenmuirs were managers under the *Act*. In this regard, the Reasons for the Determination refer specifically to decisions of the Tribunal which have considered the proper legal tests which must be considered before one may determine if an individual qualifies as a manager, including *429485 BC Ltd (cob Amelia Street Bistro)* BC EST #D497/97, *Northland Properties Ltd.* BC EST #D423/98, and *Howe Holdings Ltd.* BC EST #D131/04. I think it important in this case that she did so, because the substance of the position taken by Mr. Heo throughout was that since the Kenmuirs had signed employment agreements which referred to them as "an on-site Manager couple" they must be excluded from the protections afforded to employees under Parts 4 and 5 of the *Act*. The portions of the Tribunal decision in *Amelia Street Bistro* quoted in the Reasons for the Determination are entirely apt, because they make it clear that it is not sufficient for an employer to say that a person is a manager, or that the person is identified at work in that way. The crux of the matter is whether the person actually performs the functions of a manager, as defined in the *Regulation*, regardless of the person's job title. I see nothing in Mr. Heo's submissions, or the record, which demonstrates that Delegate Manarin misapplied the language of the definition of "manager" in the *Regulation*, or the Tribunal's jurisprudence interpreting it, to the facts as found.

50. If, as I have concluded, Delegate Manarin did not err in deciding that the Kenmuirs were not managers, Mr. Heo asserts that the evidence does not support a finding that they actually worked the hours claimed. Indeed, Mr. Heo alleges that the timesheets presented to Delegate Manarin by the Kenmuirs were prepared long after they ceased to be employed at the motel, and were, in effect, forgeries. He also submits that the employment agreements the Kenmuirs signed required them to submit timesheets to him, and to obtain his approval, before any extra hours were worked, which did not occur.

51. Part of the difficulty for Shannon Motel Ltd. on this aspect of the proceedings was that the records presented by Mr. Heo to Delegate Manarin contradicted themselves at times. Another difficulty was that Mr. Heo believed the Kenmuirs had been hired as managers, and so he did not see that proper records were kept by Shannon Motel Ltd. concerning their hours of work, as section 28 of the *Act* requires. On those facts, it is not surprising that Mr. Heo's assertion that the Kenmuirs could not have worked the hours

they claimed did not resonate with Delegate Manarin. At the same time, Delegate Manarin subjected the Kenmuirs' evidence regarding their hours of work to detailed scrutiny, weighed it against the other information she had received during the course of her investigation, and concluded that there was sufficient evidence to determine but a part of the extra wages the Kenmuirs claimed they were owed. I discern no error of fact amounting to an error of law in Delegate Manarin's analysis on this point.

52. Furthermore, I agree with Delegate Manarin that section 4 of the *Act* precluded Mr. Heo from arguing convincingly that the Kenmuirs' employment agreements, which stipulated that they would not be entitled to paid overtime in the absence of approval, should act as a bar to their recovering payment for the extra hours they could prove they worked.
53. I am not persuaded that Delegate Manarin erred in law.

***Did the Director fail to observe the principles of natural justice?***

54. A plea that the Director failed to observe the principles of natural justice raises a procedural concern that the proceedings which preceded the making of the Determination were in some manner conducted unfairly. Typically, a challenge on this ground asserts that a party did not have an opportunity to know the case against it, or an opportunity to be heard in its own defence. This aspect of the obligation is imported directly into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond. Another principle of natural justice that is oft-cited is that a person who decides a complaint must be free from bias, both actual and apprehended.
55. I have reviewed the record that has been provided to me for the purposes of this appeal. It is voluminous. It reveals that Mr. Heo was entirely aware of the issues of concern to Delegate Manarin raised in the complaints, and that he availed himself of multiple opportunities to convince her that his position should be accepted. Delegate Manarin wrote Mr. Heo on June 19, 2007 explaining her preliminary findings, essentially in the same terms as those later incorporated into her Reasons for the Determination, and invited Mr. Heo's further response. I am entirely unconvinced that the Director can be said to have failed to observe the principles of natural justice on the basis that Mr. Heo did not know the case against Shannon Motel Ltd., or was denied an opportunity to respond.
56. The substance of Mr. Heo's submissions on this aspect of the appeal are that the representatives of the Director with whom he dealt, whether it was a mediator, or Delegate Manarin, abused their positions of power, with the result that the Determination is tainted by bias. I observe on this point that in his submissions Mr. Heo asserts, *inter alia*, that the Director's representatives did not listen to him, were prejudiced against him, covered up for each other's mistakes, investigated inadequately, ignored telling evidence he presented, did not give him an opportunity to explain his position, took advantage of the fact that Mr. Heo's first language is not English, and, therefore, discriminated against him.
57. Allegations of this sort are serious. They should not be made lightly. In my opinion, Mr. Heo makes these statements on no substantive basis other than that he believes the Director's representatives came to wrong conclusions regarding the complaints, and so they must have been biased against him, and therefore against his company. Accusations advanced on this basis are wholly speculative, and can in no way ground a plausible argument in favour of a finding of bias.

58. I can discern no basis for concluding that the Director failed to observe the principles of natural justice in making the Determination.

*Has evidence become available that was not available at the time the Determination was being made?*

59. Mr. Heo's submission under this head is to the effect that after the Kenmuirs applied for employment at the motel he interviewed them in front of another couple at another motel in Chetwynd. He states that he presented a "manager contract form" to them during the interview, which they signed. They also faxed him a signed application form.

60. I am perplexed by this submission. I assume, but I do not know, that it is designed to bolster Mr. Heo's argument that the Kenmuirs knew they were to be hired as managers. If so, it assists him little. The Kenmuirs have acknowledged that they thought they were being hired as managers. The critical point is, however, that the work they actually performed was not management work.

61. Further, Mr. Heo's submission says nothing to convince me that this evidence was unavailable to him after diligent search at the time the Determination was being made.

62. I see no basis for concluding that evidence of value has become available that was not available at the time the Determination was being made.

**ORDER**

63. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated July 16, 2007 be confirmed.

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**Robert Groves**  
**Member**  
**Employment Standards Tribunal**