Employment Standards TRIBUNAL

An appeal

- by -

Patara Holdings Ltd. operating as Canadian Lodge Motel
(the "Appellant")

- 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

ADJUDICATOR:	W. Grant Sheard
FILE No.:	2003A/290
DATE OF DECISION:	January 27, 2004

DECISION

SUBMISSIONS

Elizabeth A. Harris, Counsel	on behalf of the Appellant, Patara Holdings Ltd.
Trevor W. Crouse	Respondent, on his own behalf
Berhane Semere	on behalf of the Director

OVERVIEW

This is an appeal based on written submissions by Patara Holdings Ltd. dba as The Canadian Lodge Motel (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on April 1, 2003 wherein the Director's Delegate (the "Delegate") found that the complainant was entitled to wages including overtime and vacation pay, statutory holiday pay, compensation for length of service and vacation pay, and accrued interest for a sub-total of $19,719.66 and a penalty of $300.00 for a total amount payable of $20,217.66.

In an initial appeal of that Determination this Tribunal rendered a Decision dated July 22, 2003 under number BC EST#D234/03 varying the Determination to provide that the total amount payable was $20,019.66 plus interest accrued since the Determination, but otherwise dismissing that appeal. The Appellant then requested a reconsideration of that original appeal Decision which resulted in a further Decision dated November 17, 2003 BC EST#RD316/03 wherein this Tribunal found that, prior to the original appeal, counsel for the Appellant may have been confused about the process for submissions to the Tribunal and referred the matter back to the Adjudicator to consider a final written submission from the Appellant with an opportunity for the other parties to reply.

ISSUES

1. Is an oral hearing required for this appeal?
2. Did the Delegate err in finding that the complainant was not a "manager" within the meaning of the *Employment Standards Act* and Regulation?
3. Did the Director fail to observe the principles of natural justice?

ARGUMENT

The Appellant's Position

In a written submission dated December 8, 2003 Counsel for the Appellant submits that the Director erred in finding that the Respondent was not a "manager" within the meaning of the Employment Standards Regulation and that, contrary to the Directors finding that there was no evidence presented by the Appellant to show that the Respondent's primary duties involved such things as supervising other

employees, the ability to hire or fire, authorizing overtime, disciplining, and calling employees in to work or laying them off, there was such evidence before the Director. The Appellant also submits that accordingly, the Respondent was not entitled to collect overtime wages. In the alternative, the Appellant says that if the Respondent was entitled to claim overtime wages then the calculation of hours and extent of overtime awarded was erroneous. The Appellant says that, as the Respondent originally claimed he was working 24 hours a day, 7 days a week, such an assertion was so incredible that an adverse credibility finding ought to have been made against the Respondent in respect of the calculation of hours worked and description of job duties. The Appellant also asserts that the Director breached principles of natural justice in refusing or failing to provide the Employer with a reasonable opportunity to be heard and to meet the case against it and that the Director erred in levying an administrative penalty without giving the Employer the opportunity to make a submission in that regard. The Appellant seeks to either cancel the Determination or vary it and, notwithstanding the Decision that the appeal would be based on written submissions, that an oral hearing be held.

The Respondent's Position

In a written submission dated December 27, 2003 the Respondent requests that the original Determination be varied in his favour to adjust the award upward to the full amount he had originally claimed of $32,733.09. In support of his assertion that he was not a manager he refers to the evidence of two witnesses and employees of the motel who were called at the hearing prior to the Determination and reiterates their evidence and his own that he did not exercise authority over anyone or make major or minor decisions regarding the motel. The Respondent says that if he had had the authority to hire additional help to relieve himself he would have. He asserts that the Appellant promised all kinds of help with lots of time off when he was hired but neither of these promises materialized. The Respondent says that he abandoned his original claim for compensation for the midnight to 8:00 a.m. shift as well as the Director's Delegate had told him he would not likely be able to sustain such a claim.

The Director's Position

In a written submission dated December 29, 2003 the Director says that the Appellant is now repeating essentially the same arguments it made during the investigation as well as the original appeal of the Determination. The Director says that the Appellant continues to fail to provide any evidence to support its position as it relates to the definition of manager under the Regulations or as it applies to the Respondent. The Director notes that three letters which were referred to by the Appellant in its appeal submission do not assist. The Director notes that the first of those letters referred to a front desk clerk who the Delegate did contact and testified during the investigation that the Respondent did not supervise her. In the second letter referred to, the Appellant informed the Delegate that it was attempting to reconstruct employment records, but the Delegate notes that the Appellant failed to provide the names of any employees who were apparently supervised and scheduled by the Respondent. The third letter indicated that an employee was hired by the son of a principal of the Appellant, but the Director notes there was no information with the letter that the Respondent had any managerial or supervisory authorities over that employee (the same one who the Director had contacted in the investigation and had indicated that the Respondent did not supervise her).

The Director notes that a Ms. Dennis did testify during the investigation that the Respondent did not hire or supervise her or the chambermaids. Further, a Ms. Devinder, an individual the Respondent identified as the supervisor of the chambermaids, testified during the investigation that the Respondent did not have

any supervisory authority over her and that she, as supervisor to the chambermaids, reported to Major Patara.

The Director notes that the Appellant referred to the Decision of BC EST#D091/02 (Happy Day Inn Ltd.) (re:)). In that case this Tribunal found that a person similarly working as a desk clerk was a " manager" within the definition of the Regulation as that person performed duties characteristic of a manager including hiring employees, scheduling work of employees and directing employees. The Director says that none of these characteristics apply to the matter at hand.

Regarding overtime and the Appellant's assertion that "the Director ignored relevant, probative evidence…..with respect to the bookings…….(of rooms)", the Director says that all relevant information provided by the parties was taken into consideration when arriving at the Decision as evidenced by the contents of the original Determination.

With respect to the maintenance of employment records the Director says that the Appellant attempts to place the onus of keeping such records on the Respondent contrary to Section 28 of the *Act*. The Director says that the requirement to maintain such records is placed clearly on the employer, not on the employee. The Director quotes BC EST#D279/98 saying "An employer's responsibility to structure its affairs to ensure that it complies with the Act."

With respect to the assertion that the Director failed to comply with natural justice by refusing or failing to provide the Appellant with a reasonable opportunity to be heard and meet the case against it, the Director says that these contentions are false and without grounds. The Director maintains that the Appellant was advised of the claims made against it and given a full opportunity to respond with a Determination being issued four to five months after a letter was sent to the Appellant regarding these matters. Similarly, the Director says that the Appellant's assertions about threats regarding settlement are far from the truth. Responding to the Appellant's complaint that the Director contacted the Employer directly requesting information rather than going through counsel, the Director notes that, as was indicated in the Determination, the Delegate called the motel to talk to a witness employee, but the Employer answered the telephone and volunteered information regarding the hours of work and the demand for service during the busy season.

Lastly, regarding the administrative penalty, the Director submits that the Appellant was put on notice that it was on escalating penalty by way of a Determination issued against it on September 28, 2001 insofar as that Determination noted that "escalating monetary penalties will be imposed if there is any future contravention of ……. sections within Parts 4, 5, or 7 of the *Act*."

The Director submits that the appeal should not succeed.

THE FACTS

The Appellant operates a motel in the Valemont area. The Respondent was employed as a front desk clerk/"manager" from August 3, 2001 to July 5, 2002 at a rate of pay of $2,750.00 per month. The motel was open for service 24 hours a day, 7 days a week. The Respondent was the only regular full-time front desk clerk at the motel up until the beginning of May 2002. The Respondent resided in the motel in a suite which was an extension of the motel office during his employment. The Respondent entered into a written employment contract with the Appellant on April 12, 2002. This contract clearly refers to the Respondent as a manager for the period August 3, 2001 to February 1, 2002 (a date which had already

passed) and thereafter until the agreement is terminated by one week's written notice. The contract provided for various duties for which the Respondent was to be responsible. This contract was before the Delegate at the time of the investigation and addressed by the parties.

The Respondent gave evidence during the investigation that, although he acknowledged he was a "so called manager", in reality he was a front desk clerk and utility employee. He said that he never managed anyone, or had any authority over anyone. He asserted that the owner, Mr. Patara, made all decisions. He gave evidence that during his interview for the job he was told that his responsibilities would be restricted to organizing the front end and that he would work 8 hours a day, 5 days a week. He was told that there would be a night auditor, day help at the front desk and a maintenance person. However, none of these promises materialized and, as a result, he ended up being responsible for services 24 hours a day, 7 days a week with his responsibilities including front desk, check in/out of guests, booking reservations, answering the phone, checking, treating and cleaning the pool, shoveling snow and ice, sweeping the front entrances, building and ground maintenance, and setting up security.

During the investigation the Appellant made submissions to the Delegate through its legal counsel asserting that the Respondent was a "manager" within the definition of the *Employment Standards Act*. The Appellant asserted that, while the Respondent did have some responsibility to work the front desk, he was primarily charged with operating the motel and his responsibilities included scheduling all employees, including front desk employees, keeping records and providing information to the Appellant so that it could prepare payroll and that the Respondent's employment contract clearly made him responsible for managing nearly all aspects of the operation of the motel. The Appellant asserted that the Respondent was in an executive position responsible for scheduling and supervising all other employees and that he had financial responsibilities and other management authorities at the motel. In a further written submission, the Appellant asserted through its legal counsel that the Respondent was in charge of scheduling workers to work at the front desk and that he did not work any overtime or, if he did, it was not a requirement of the Appellant nor was it authorized by the Appellant. In a response to the Delegate's demand for Employer records the Appellant said through its legal counsel that "because it was the responsibility of (the Respondent), as manager to schedule front desk coverage and keep those records, my client is having some difficulty to recreate the records (the Respondent) either failed to keep or that he has taken or destroyed." During the investigation the Respondent denied that he had taken or destroyed any such records.

During the Delegate's investigation he interviewed several witnesses. These included a Mr. Pardeep Sandhu, who took over from the Respondent as the front desk clerk and began his employment in May 2002, a Ms. Dennis, who worked on an "on call" basis as a front desk clerk and a Ms. Saind Devinder.

Mr. Sandhu provided evidence that, during the slow season there may be about 4 hours of work per day. He said that it gets busy during the months of May to August and that during this time period there is work of about 12 to 13 hours a day at the front desk. He and the helpers provided to him by the owner put in about 12 to 13 hours in total between them during the busy season. After 11:00 p.m. there was a telephone line and buzzer to the manager's suite.

Ms. Dennis provided evidence that she worked on and off and on an "on call" basis as a front desk clerk and that the Respondent was the only one at the front desk except a day or two per month. He manned the front desk all day every day sometimes receiving help from his wife. The front desk is open 24 hours a day, 7 days a week and the owner required the motel lobby to be open 24 hours per day. During late hours the Respondent responded to the buzzer. The Respondent did not hire or supervise her or the

chambermaids and did not have supervisory responsibility. She stated that Ms. Devinder did all the hiring and supervising of chambermaids.

Ms. Devinder provided evidence that Mr. Patara hired her as the supervisor of chambermaids and that she reported to or was supervised by Mr. Patara. She provided evidence that the Respondent did not supervise anybody and that he worked as the front desk clerk "day and night" with some help from his wife.

The Respondent gave evidence to the Delegate that he did not report his daily records of hours of work to the Appellant because he was on "salary" and therefore not expected to do so. The Appellant initially argued before the Delegate that he was entitled to overtime wages based on 24 hours a day, 7 days a week because he could not leave the motel during those hours to attend to his personal needs. In other words, those hours were controlled by the Employer and therefore payable. The Respondent later decided to forego his claim for the late night hours and restricted his claim before the Delegate to overtime wages of 8 hours a day. In the Determination the Delegate considered the issue of whether or not the Respondent was a "manager" as defined in Section 1 of the Employment Standards Regulation. The Delegate found that no evidence was presented by the Employer to show that the Respondent's primary duties involved supervising and directing employees with reference to Tribunal decisions on this point. The Delegate noted that, according to witnesses, the Respondent's primary responsibility was the front desk and the related duties. The Delegate ruled that the Respondent was not a manager as defined in Section 1 of the Regulation. Accordingly, the Delegate then turned to the issue of overtime wages.

The Delegate noted that the Employer failed to produce records of hours of hours of work as it was required to maintain under Section 28 of the *Act* and noted that the Appellant failed to produce evidence to support its position that it provided relief or coverage for the Respondent at the front desk. The Respondent had submitted daily records of hours of work that he had recreated indicating 16 hour days based on the fact that he was "on duty" and/or working every day throughout the day. The Delegate referred to Section 1(2) of the *Act* which states as follows:

> 1 (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

The Delegate went on to find that, while the fact was that the motel was open 24 hours a day, 7 days a week which in itself was an indication there was a demand for service during those hours, he was unable to conclude that the demands for service required 16 hours of work a day every day as alleged. He also noted that there were no daily records of hours of work presented that could help distinguish between the hours of actual work and the hours the complainant was in his suite or "on call". The Delegate found that "under such circumstances and where the Employer fails to produce the necessary records the Director relies on the available evidence to make her decision in this instance, the information provided the complainant and the testimonies from the witnesses will be taken into consideration vis-a-vis the information provided by the Employer." The Delegate noted the Appellant's evidence that the Complainant was hired to work 8 hours a day, 5 days a week while other witnesses indicated that he worked more than 8 hours a day every day. The Delegate found that he was satisfied that the evidence established that the Respondent was working at least 12 hours a day during the months of May, and June and the first week in July. He therefore found that the Respondent was entitled to overtime wages pursuant to Section 40 of the *Act.* He calculated an hourly rate payable of $15.87. The Delegate found that the Respondent was entitled to premium pay pursuant to Section 36 of the *Act* as the Respondent was not being given at least 32 consecutive hours free from work each week. The Delegate also found that the Respondent was entitled to statutory holiday pay for several days during the relevant time period.

With respect to the issue of compensation for length of service the Delegate noted that the Respondent was not given written notice of termination and that the Appellant had failed to prove the Respondent had initiated or caused the termination of employment. In fact, in a letter dated June 28, 2002 produced to the Delegate, the Appellant indicated that the Respondent had been laid off due to a "slow down" and that he had done this at the Respondent's request to assist him in his intention to obtain E.I. benefits. However, the Record of Employment issued by the Appellant indicated the reason for issuing that record was that the Respondent had quit. The Respondent had given evidence to the Delegate that he was terminated without notice and that the Employer had started to accuse him of things "going wrong" not long after he hired a couple to provide night shift coverage at the front desk. He gave evidence that around the end of May 2002 the Appellant advised him that he was planning to lay him off around June 2002 and have family members run the motel. The Appellant then extended that termination of employment until July 5, 2002. The Delegate ruled that the Respondent was entitled for one weeks wages for compensation for length of service pursuant to Section 63 of the *Act*.

Lastly, the Delegate also ruled that, contrary to Section 21 of the *Act*, the Appellant had wrongfully withheld $300.00 of the Respondent's wages.

The Delegate found that the *Employment Standards Act* had been contravened and that the Respondent was entitled to the following:

Wages including overtime and vacation pay	$18,059.01
Statutory Holiday Pay	$ 380.88
Compensation for Length of Service and Vacation Pay	$ 660.19
Accrued Interest required under Section 88	$ 619.58
Sub total	$19,719.66
Penalty	$ 300.00
Total Amount Payable	$20,217.66

In the original appeal herein I noted that there was an error in the Delegate's calculation and that the total amount payable based on these figures ought to have been $20,019.66.

ANALYSIS

1. Is an oral hearing required for this appeal?

This Tribunal is established and governed by the provisions of the *Employment Standards Act* which addresses the issue of oral hearing in Section 107 as follows:

> **107.** Subject to any rules made under section 109(1)(c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.

This section has been considered by the Tribunal on a number of occasions and the Tribunal has developed the principle that generally the Tribunal will not hold an oral hearing on an appeal unless the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral

hearing is the only way of ensuring that each party can state its case fairly; *D. Hall & Associates Ltd.* [2001] BCSC 575; *Re National Credit Counsellors of Canada Inc.* [2003] BCEST #D102/03.

In this case extensive evidence was heard and reviewed by the Delegate prior to the Determination in the form of both viva voce testimony and written submissions. In its written submission on this appeal the Appellant has not disclosed any new evidence or material which would tend to indicate that an error may have been made in the facts found based upon the evidence heard. Further, although the Appellant asserts there is an issue regarding credibility I find that the Respondent's explanation for abandoning his claim for payment of the graveyard shift from 12:00 a.m. to 8:00 a.m. is credible and that the nature of this issue is not such that it would effect the findings of fact in other areas in any event.

I do not find the submissions raise a serious question of credibility on one or more key issues or that it is clear on the face of the record that an oral hearing is the only way of ensuring that each party can state its case fairly. I find that an oral hearing is not required for this appeal.

2. Did the Delegate err in finding that the Complainant was not a "manager" within the meaning of the *Employment Standards Act* and Regulation?

I find that the Appellant has failed to meet the onus upon it to demonstrate that the Director erred in finding that the Respondent was not a manager as defined by the Regulation. I find that the evidence received by the Director and facts found in the Determination are distinguishable from the facts found by this Tribunal in the case relied upon by the Appellant, Happy Day Inn Ltd. (Re) BC EST#D091/02. Indeed, the evidence received and facts found by the Director suggest that this Respondent was not involved in key decisions relating to the conduct of the business, there was no ability to make extraordinary or capital expenses without approval, no authority for repairs without approval, no significant time spent supervising other employees, and little room for exercising independent judgment.

3. Did the Director fail to observe the principles of natural justice in rendering the Determination and in levying an administrative penalty?

It is apparent from the material that the Appellant was given an opportunity to respond to the evidence the Delegate obtained from the various witnesses.

Natural justice may require or consist of many things, but at a bare minimum the parties must be given an opportunity to present evidence, question the evidence of the opposing party litigant and make a submission to the adjudicating body with respect to what it ought to find (see *re Rudowski,* [2000] BCESTD #476 (QL), (9 November 2000), BCEST #D485/00 (Love, Adj.); reconsideration of BCEST #D316/00.). In this case there is evidence that the parties were given an opportunity to present their evidence, question the evidence provided by the Respondent, and make a submission to the Delegate with respect to the issues raised by the complainant. There is evidence that the Appellant had previously been cautioned in a prior Determination that a further contravention of the *Act* would result in a monetary penalty.

Recent amendments to Section 98 of the *Act* and Section 29 of the Regulation, which came in to force on November 30, 2002 have eliminated the former discretion held by the Director to impose a penalty for a contravention of the *Act.* Thus, at the time the penalty was imposed in the instant case the Director had a discretion as to whether or not impose a penalty. In the Determination, the Delegate correctly referred to Section 29 of the Regulation as it then was where, under s.s. (2) the Regulation provided as follows:

> (2) The penalty for contravening a specified provision of a part of the *Act* or a part of his Regulation is the following amount:
>
> (b) $150.00 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that part on one previous occasion.

The Appellant had been placed on notice in the earlier Determination that a subsequent contravention of the same sections of the *Act* or Regulation would result in a monetary penalty. Although not specifically alerted to this once again in the Determination now appealed from, the Appellant could have made a submission to the Delegate on this point. Further, in this appeal, aside from asserting a breach of the principles of natural justice by failing to provide the Appellant an opportunity to make such a submission, in the appeal form filed the Appellant does not make any submission regarding the proprietary of imposing this penalty or any submission as to why the penalty is not warranted.

In the circumstances, I find that the Appellant has failed to demonstrate on a balance of probabilities that the Director failed to adhere to the principles of natural justice during the course of her investigation and issuing of the Determination appealed from.

Aside from the error in the Delegate's calculations, I find that the Appellant has failed to demonstrate an error in the Determination and I will vary the Determination only to the extent of correcting the total payable at $20,019.66 plus accruing interest.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of the Director of Employment Standards, dated April 1, 2003 and filed under number ER#107-701, be varied to provide that the total amount payable is $20,019.66 plus interest accrued since the date of the Determination.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal