

An appeal

- by -

Happy Day Inn Ltd. & Bhupal Hotels Ltd. &
Royal West Management Ltd. operating as Happy Day Inn

- and by -

Navtej Singh Bhupal aka Bob Bhupal,
a Director or Officer of Royal West Management Ltd.

- and by -

Satpaul Singh Bhupal,
a Director or Officer of Happy Day Inn Ltd. & Bhupal Hotels 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

ADJUDICATOR: Mark Thompson

FILE No.: 2001/604, 2001/605 & 2001/606

DATE OF HEARING: November 20 and December 17, 2001

DATE OF DECISION: March 12, 2002

DECISION

APPEARANCES:

Victor Leginsky	For Happy Day Inn.
Lesley A. Christensen	For the Director of Employment Standards
Claire Stewart	For herself, by telephone

OVERVIEW

This is an appeal by a business known as Happy Day Inn and associated companies Bhupal Hotels Ltd. and Royal West Management Ltd. (“Happy Day” or the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards on July 27, 2001. In addition, Navtej Singh Bhupal aka Bob Bhupal and Satpaul Singh Bhupal appealed separate Determinations, also dated July 27, 2001. The principal Determination (File No. 2001/604) found that Happy Day owed Claire Stewart (“Stewart”), a former employee, a total of \$103,647.56 for unpaid wages, overtime pay, pay for the lack of 32 hours free from work, statutory holiday pay and vacation pay, plus interest for the period August 1998 to December 26, 1999. The Determination also found that Happy Day Inn, Bhupal Hotels Ltd. and Royal West Management Ltd. (“Royal West”) were associated companies under the *Act*. In separate determinations issued on the same date (File No. 2001/604 and 2001/605), the Director’s delegate found that Satpaul Singh Bhupal and Navtej Singh Bhupal aka Bob Bhupal were directors or officers of Happy Day Inn Ltd. and Bhupal Hotels Ltd. and each was liable for the amount of \$17,911.58, as a portion of the sum owed to Stewart under the principal Determination.

At the hearing, Happy Day argued first that Stewart was a manager under Section 34(1)(f) of the *Employment Standard Regulation*. In the alternative, if Stewart was not a manager under the *Regulation*, while she was on call on the night shift she was in her residence and was entitled to straight time pay for time worked. Thirdly, Happy Day argued that the hours of work calculation on which the Determination was based were incorrect and failed to take seasonal fluctuations in the occupancy rate of the hotel that affected Stewart’s workload.

The Director’s Delegate objected to the Employer’s counsel raising the issue of Stewart’s status as a manager at the oral hearing and the argument that the companies were controlled by a trust on the grounds that these matters had not been raised during her investigation.

The appeals of the two determinations that found that Satpaul Singh Bhupal and Navtej Singh Bhupal were directors of Happy Day were based on the outcome of the appeal against the corporate Determination.

ISSUE TO BE DECIDED

The issues to be decided in this case were: should Happy Day be permitted to produce evidence and argument on Stewart's status as a manager; was Stewart a manager under the *Regulation*; if Stewart was not a manager, did the Determination correctly state her hours of work and if Stewart was entitled to payment pursuant to the Determination, could those monies be recovered from the associated companies identified in the Determination.

FACTS

Stewart was employed as a "live-in front desk manager" at Happy Day from August 28, 1998 until December 26, 1999. She was paid \$692.30 biweekly from the beginning of her employment until June 1999 and \$769.23 biweekly from August to December 1999. Stewart interrupted her employment between June to August 1999 by mutual agreement with her employer. In addition to her cash compensation, Stewart lived in one unit of the Happy Day Inn during the period of her employment. This unit had amenities the other rooms lacked, including two bedrooms, a stove, a refrigerator and normal furnishings.

Happy Day operates a 32-unit motel by that name in Burnaby. Stewart had also worked for Happy Day between 1992 and 1994. The motel operated 24 hours per day, with three shifts scheduled each day, 7 a.m. to 3 p.m., 3 p.m. to 11 p.m. and 11 p.m. to 7 a.m. According to her agreement with the Employer, Stewart covered seven shifts per week and was on call from 11 p.m. to 7 a.m. each day. Stewart was to have seven shifts off work each week. Another employee or the owner of Happy Day covered the seven shifts Stewart was off. The motel was "open" 24 hours per day. Evidence on how the business presented itself to possible customers or guests after midnight was not clear, but the person at the front desk could be called by guests in case of emergency or check in guests who arrived late in the evening.

The parties agreed that the employee at the front desk was responsible for checking guests in and out, answering special requests for services and dealing with complaints. The occupancy rate in the motel varied by season. Some evidence presented by witnesses called by the Employer referred to that period and was not directly relevant to this case.

Stewart filed her complaint on March 31, 2000. She did not have any records of her employment at that time, but she reconstructed records of the time she worked after the fact, a process that did not end until October of 2000. Stewart returned to Niagara Falls, Ontario, which she regarded as her home, after the termination of her employment, and her absence from the province complicated the investigation of her complaint. The Director's delegate advised the Employer of Stewart's complaint in November 2000. The Employer referred the delegate to legal counsel, who did not act for it. Happy Day then referred another representative, K. R. Johnston ("Johnston"), to act on its behalf. Johnston contacted the Director's delegate and attempted to settle the complaint.

On May 7, 2001, Johnston wrote to the delegate, stating that Stewart had been hired as a “live-in manager” and had established a residence provided by the Employer. Her contract of employment stated that she would be “on call” from 11 p.m. to 7 a.m. “most days.” He relied on Section 1(2) of the *Act* to support his argument that Stewart was on call in her residence during the 11 p.m. shifts at Happy Day Inn. By his calculation, Stewart worked 56 hours per week, i.e. 7 shifts of 8 hours each, plus 56 hours per week on call. He estimated that Stewart was called to the front desk of the motel an average of 53 times per month. The Employer stated that each call required 5 minutes to deal with a customer. Johnston then made a settlement offer without prejudice.

Efforts at settlement did not succeed, and in June 2001 the delegate advised the Employer that a Determination would be issued. She requested any additional information the Employer could provide. The Employer did produce information that the delegate incorporated in the Determination. The Determination setting out the Employer’s liability to Stewart was issued on July 27, 2001. Stated briefly, the Determination found that Stewart had worked 112 hours per week and was paid for only 40 hours per week. In addition, Stewart had failed to pay Stewart overtime pay, vacation pay, statutory holiday pay and had not given her 32 hours free from work. The total owed to Stewart, including interest, was \$103,647.56.

A number of enterprises had some connection with the Happy Day Inn motel. The Determination found that Royal West owned the property in Burnaby and leased it to Happy Day Inn Ltd. Bhupal Hotels Ltd. represented Happy Day Inn and the Seatac Skyway Inn in Washington. Happy Day Inn Ltd. was a company incorporated in British Columbia in 1989. Navtej Singh Bhupal (known as “Bob Bhupal”) was listed as the sole director or officer at that time. In 1993, Satpaul Singh Bhupal (known as “Paul Bhupal”) became the sole director or officer. On January 5, 2001, Bob Bhupal again became the sole director or officer. Bhupal Hotels Ltd. was incorporated in British Columbia in 1988, originally named Bhupal Construction Ltd. Bob Bhupal was the sole director until 1993, when Paul Bhupal became the sole officer or director. In 1999, the company changed its name to Bhupal Hotels Ltd., and Paul Bhupal remained the sole director or officer.

Royal West was incorporated in British Columbia in 1989. Bob Bhupal was one of two directors or officers. Later that year, the second director withdrew from the enterprise, leaving Bob Bhupal as the sole director or officer. Royal West was the owner of the property on which Happy Day Inn is located. The delegate found no record of any other property owned by Royal West.

Bob Bhupal testified that his brother, Paul Bhupal, owned Happy Day Inn in the early 1990s. In 1994, Bob Bhupal asked his brother for a job and became the live-in manager in 1994 or 1995. Subsequently, Paul Bhupal assumed more responsibilities for running a motel near Seattle, so the business needed another employee. Bob Bhupal then contacted Stewart, who had previously worked for the Employer, and asked her to return in mid-1998.

Based on her review of the Employer's web sites, the business card of Shabbir Gilani ("Gilani"), the director of sales and marketing for Happy Day Inn, and the roles of Bob and Paul Bhupal as directors, the delegate found that Happy Day Inn Ltd., Bhupal Hotels Ltd and Royal West were controlled by Bob Bhupal in conjunction with Paul Bhupal. Consequently, she found that the three enterprises were associated corporations under section 95 of the *Act*.

The Determination addressed the Employer's position that the suite in the motel where Stewart lived was her residence for the purposes of the *Act*, so that she should be paid for the work she performed on an on-call basis, pursuant to Section 1(2) of the *Act* for work outside of the seven shifts assigned to her in the morning or afternoon. Stewart and the Employer differed substantially on the amount of time she spent responding to requests from guests during the 11 p.m. to 7 a.m. shift. The delegate found that Stewart was required to respond to duties at the front desk from 7-10 times per night in the slow winter season and 15-20 times per night during the spring and summer seasons. She was an employee who was required to provide services regularly during the night shift and could not be away from the Employer's premises. Thus, Stewart was on a regular shift requiring payment for all hours worked between 11 p.m. and 7 a.m. The delegate calculated the number of hours Stewart worked based on the records of other employees, including front desk clerks. Happy Day acknowledged that Stewart worked 112 hours per week, seven shifts during the day and seven shifts beginning at 11 p.m.

Johnston filed an appeal against the Determination on August 20, 2001. The bases of the complaint were: it was vexatious because the Employer had issued a T4A to federal tax authorities including an allowance for Stewart's living quarters; Stewart had not provided any record of hours worked; the Determination failed to take into account the low occupancy rate between December 20 and 26, 1999; Stewart lived in a "residence" in accordance with Section 1(2) of the *Act*; Stewart received the minimum wage for her work between 7 a.m. and 11 p.m., while the suite in which she lived compensated her for the call outs between 11 p.m. and 7 a.m.; Stewart should have brought the number of calls she was receiving to Bob Bhupal's attention, so that the Employer could have provided additional help.

The appeal expanded on the argument that Stewart's suite in the motel was her "residence" under Section 1(2) of the *Act*, basically relying on the physical characteristics of the rooms (kitchen, living room, bathroom and bedroom) and the permanence of Stewart's stay there. These were essentially the same arguments that Johnston had presented on May 7, 2001. Johnston relied on Section 76 of the *Act* to allege that the reason behind Stewart's complaint was the Employer's declaration of the value of her suite as taxable income and that she did not provide evidence to support her complaint. He also provided statements of the number of units rented in December 1999 to support the contention that Stewart had performed very little work between December 20 and 29, 2001. He further pointed out that the Employer had provided records to support its argument that Stewart "was not busy" between September and June, citing the occupancy rate for the motel. Johnston gave notice that he would make a further submission when Gilani returned to Canada from a trip overseas. The appeal also dealt with the determinations against Bob Bhupal and Paul Bhupal as directors or officers addressed elsewhere in this decision.

In reply to the August 20, 2001 appeal, the delegate stated that the Employer had not kept any records of the time Stewart had worked, so she was forced to use Stewart's records, which were prepared by extrapolating from the records the Employer maintained for other front desk staff. Happy Day did not provide a factual basis for its allegations that the complaint was not in good faith. The delegate pointed out that her Determination had found that Stewart was not working on call from 11 p.m. to 7 a.m., so the issue of her residence was not relevant.

In separate replies, the delegate pointed out that an appeal against a determination that assesses liability to an individual director or officer of a company is limited to the issues of the individual's status as a director and the amount of the wages that fall within the two-month limit. The appeals of August 20 did not raise either issue.

In her reply to the appeal, dated September 11, 2001, Stewart stated that she was on call constantly during the 11 p.m. shift at the motel. A sign posted outside of the motel stated that it was open 24 hours per day. She further argued that the suite in the motel reserved for her use was not her residence, first because she maintained a permanent residence in Niagara Falls and the kitchen and living room in the suite were not private, i.e., others used the space and she could not have visitors. She pointed out that her separation papers from 1993 listed Royal West Management as her employer. Gilani did work approximately 30 hours per week for the Employer, but not necessarily at the front desk.

Stewart asserted that her agreement with the Employer when she returned to work for the second time, she was to receive \$20,000 per year, half of the round trip air fare from Ontario for herself and her daughters, a loan of \$5,500, 20 per cent of Bob Bhupal's October bonus and 40 hours per week off work.

Johnston replied to Stewart's statements on September 28, 2001 on behalf of the Employer. Citing Mr. Bob Bhupal, he alleged that Stewart's calculation of the hours she worked and enclosed a diary for Gilani containing his records of hours he worked at the front desk. Again citing Bhupal, Johnston stated that Stewart was hired on a fixed salary as a live-in manager and was required to run the motel, including hiring and supervising staff, ordering supplies, checking guests in and out. Bhupal and Gilani relieved Stewart consistently, and the Employer hired additional help when the business was busy. The response also added:

As per a decision in the 'Sandman case', she would probably not be considered a manager as she could not hire to cover her shifts.

Johnston further stated that a reasonable value for the accommodation the Employer provided Stewart would be \$1000 per month. The Employer issued a tax statement for \$14,000 for the 10 months of Stewart's employment, reflecting compensation for her covering the 11 p.m. shifts.

A major element in Johnston's reply was that Stewart was living in her residence during the 11 p.m. shifts, so she was in an on-call situation, and thus covered by Section 1(2) of the *Act*. Stewart's residence was at the motel, not in Niagara Falls, where her boyfriend lived. According

to Johnston, Stewart was able to sleep and “carry on her own activities” during the 11 p.m. shifts. At the motel, she had access to two guestrooms, one with a private en-suite bathroom and a kitchen. Stewart and her daughter lived there. There were two refrigerators, one for her use and the other for continental breakfasts served to motel guests. Bhupal stated that he used Stewart’s room on a few occasions, with her permission, to relax.

Johnston argued that Stewart’s complaint was frivolous in that she was angered when federal taxation authorities required the Employer to issue a T4A to Stewart for the value of her accommodation. Stewart also alleged that Bhupal failed to complete a condition of employment, which was a loan of \$5,000. Bhupal asserted that he attempted to guarantee a loan, but Stewart would not release her financial information to his bank.

The reply stated that Royal West leased its property and equipment to Happy Day Inn in 1993 or 1994. At the time of the complaint, Royal West held “some” shares of Happy Day Inn. Paul Bhupal turned the Happy Day Inn over to Bob Bhupal to operate, as he owns a motel in Seattle. The two brothers had a trust agreement, and Royal West and Happy Day were “not related companies under a trust agreement.” According to Johnston, Bhupal Hotels Ltd. provides marketing services for the Happy Day Inn and has no assets or liabilities.

Bhupal further claimed that Stewart’s hours were exaggerated, based on Gilani’s records and his own recollection of relieving Stewart during her normal working hours. In particular, he covered for her on December 25, 1999, while Stewart spent the day with her children.

Paul Bhupal testified that while a manager of Happy Day he hired Stewart to work at the front desk in 1992. His role with the company was from 1991 until January 1996. He stated that he was impressed with her work and agreed with her that she would be the live-in manager after January 1, 1995, the slow season for the business. Her duties then were to manage and supervise other staff, including housekeepers and clerks, check the quality of the rooms and keep an inventory of materials needed for the business. In consultation with Paul Bhupal, Stewart was in charge of maintenance. She found contractors to make any repairs necessary in the facility. Before the Employer had the right crew, there was lots of turnover. Stewart hired and fired. She hired one employee and fired her after a guest complained about missing liquor. Stewart scheduled hours of work for other staff. According to Bhupal, under the compensation system for managers, it is unusual to hire one person for the position. It is more common to hire a couple to carry out the duties. Bhupal offered to take Stewart’s mother or brother to make a couple, but she declined. Stewart was paid a monthly salary with the possibility of a bonus if the business met performance targets. Bhupal acknowledged that Stewart had never received a bonus.

Bhupal stated that Stewart remained as manager until February or March 1995, when she was replaced by a couple. They left after three months, and Stewart returned in May 1995 for two months, after which another couple took the position, and Stewart reverted to the hourly clerk

position. While she was live-in manager, Bhupal recalled that Stewart received \$1800 per month, plus the use of living quarters and utilities.

Paul Bhupal had no knowledge of Stewart's work during the period covered by her complaint.

Gilani worked with Stewart for 18 months. He was the manager of sales and marketing, a position he had held for four years. He worked at the front desk three days per week, each for one shift. When he arrived to begin the 7:00 a.m. shift, Stewart normally was asleep in her room. She returned at 3:30 p.m. when the shift was over.

Gilani understood that Stewart was hired as the manager of the motel, with responsibility for supervising other units in the operations department, front desk, housekeeping and maintenance. There were 2 to 3 maids, 2 to 4 front desk clerks and ultimately one maintenance person. The head maid trained the housekeeping staff. In addition to operations, the business had a sales and marketing department (apparently consisting only of Gilani) and administration, which Bob Bhupal handled, consisting of business development and accounts.

Gilani's office is in the basement of a separate building from the main part of the motel. He and Stewart generally were in contact by telephone. Gilani met with Stewart and Bob Bhupal weekly to discuss sales and operations. Front desk clerks attended part of the meetings. According to Gilani, Stewart kept a file of resumes. Jobs at the Employer were posted at a Human Resources Canada web site, and applicants for vacancies contacted Stewart. She called and interviewed the candidates. Gilani was not present when Stewart hired any employees, and he had no role in those decisions. The Employer employed between two and four front desk clerks. According to Gilani, Stewart hired and trained them. She inspected the rooms and told the housekeeper or maids if the work was done correctly. He was aware of staff being laid off when the operation was not busy. He recalled Stewart hiring Vin Tran as a front desk clerk and Lila Hurst as a housekeeper.

Initially, a maintenance person came to the property two to four times per week. Stewart scheduled and supervised his work. She told him what needed to be done. Gilani stated that Stewart had the authority to improve rooms, although he did not know about her authority to incur expenses. She did decide the colour scheme when rooms were re-painted.

Gilani did not discuss Stewart's duties with the Director's delegate.

Cheryl Lowrie ("Lowrie") was the head housekeeper for Happy Day from July 1998. She had also worked for the Employer a decade earlier. Bob Bhupal hired Lowrie and Stewart was the live-in manager. Lowrie testified that she reported to Stewart, who scheduled work, obtained extra staff for housekeeping. The front desk clerk told Lowrie which rooms needed to be cleaned, and she would report to the clerk if something in a room was not right. A maximum of two other housekeepers worked in the motel unless one was in training. One other person worked at the front desk and a John Harwood ("Harwood") was the maintenance person. According to Lowrie, Stewart supervised everyone. Lowrie oversaw the other housekeepers,

trained new staff, and ordered supplies. Lowrie participated in the hiring of Lila Hurst (“Hurst”). Bob Bhupal was not present when she and Stewart interviewed Hurst. Lowrie preferred another candidate, but Stewart decided to hire Hurst, who became a good employee. Lowrie did not recall any employee being laid off or dismissed when Stewart was working at Happy Day.

Lowrie knew that Stewart’s boyfriend came to visit her for about a month. They stayed in Stewart’s quarters in the motel, though Lowrie believed that Stewart had to obtain permission for him to live there.

Hurst testified that she had been a chambermaid at Happy Day for about a year before resigning. She also had worked for the Employer previously for about a year. Hurst knew Stewart as the manager of the motel. According to Hurst, Stewart hired her. Stewart called her to arrange a job interview. Although Lowrie was present for the job interview, Stewart asked questions about her work experience. After the interview, Stewart told her to come back for a tryout. She never spoke to Bob Bhupal before she started work. Stewart told Hurst to come to her if she had problems at work. In turn, Stewart told her if she was taking too long to complete her work. Stewart scheduled work in housekeeping. Hurst left orders for supplies that were needed at the front desk. Stewart was more likely to give her instructions than Bob Bhupal. When Gilani was at the front desk, he gave her the list of rooms to be cleaned.

Vin Tran (“Tran”) worked for the Employer for 18 months in 1998-1999 as a front desk clerk. He stated that Stewart was his manager. The position was posted on the Internet, with the instruction to applicants to send their resumes to Stewart. She interviewed and hired Tran on the spot. He came to the interview expecting only to leave his resume, but Stewart conducted the interview and told him when to report for training. He met Bob Bhupal a week after he was hired. Stewart trained him and scheduled his working time. Tran took questions or problems to her. He did not order supplies or even know who performed that task. This position was Tran’s first in a hotel, so he made a few mistakes. Stewart and Bob Bhupal corrected him. He resigned his employment to take a job elsewhere. He had not been interviewed during the investigation of Stewart’s complaint, although he was available.

Bob Bhupal testified that he hired Stewart to run the motel with his assistance. He relied more on the staff to run the business than his brother. He did not recall how he explained Stewart’s authority to her. He told her to work with Gilani and Lowrie, and offered her a bonus if revenues increased, although he could not recall ever paying a bonus. He stopped by the motel each day, but Stewart quickly took charge of the operation. Stewart was the first person hired by the Employer for a year and a half, as the business was unable to afford additional personnel. He told Stewart to hire someone if she needed help and as the finances permitted. Under cross-examination, Bob Bhupal said that he could not recall if he had refused Stewart’s request to hire more staff. He did testify that Stewart hired “a couple” of front desk staff. He did not recall anyone being fired during Stewart’s employment with Happy Day. When Bhupal went to India, family members made bank deposits for the business. In general, Bhupal estimated that he spent 25 per cent of his time on Happy Day matters and the rest of his time on other businesses. The

Determination found that Stewart monitored room attendants, checked the cleanliness of rooms and replaced staff when employees could not work because of illness.

During the slow season, there was not much supervising to do. When Bob Bhupal was not available, Stewart spent all of her time in supervision. He approved expenditures on supplies and generally focussed on the financial side of the business. Because Stewart did not have a car, he picked up supplies where prices were lower. He, Stewart and Gilani discussed new ideas for the business, including improvements to the guestrooms. Stewart kept track of the other employees. Bhupal said that he told Stewart to ask Gilani for extra help if necessary.

According to Bhupal, the employment relationship came under stress first when he told her not to smoke marijuana on the job, but more importantly when the Employer issued a T4A that included an allowance for housing, i.e., the rooms in the motel Stewart and her children occupied. The tax statement was issued in January or February 2000. Stewart wanted repayment for the tax liability she incurred, and Bhupal refused. Stewart then filed her complaint. In addition, Stewart began work in 1999 with the understanding that Bhupal would assist her in getting a bank loan to pay other debts. For a variety of reasons not relevant to this case, the loan was never accomplished.

When the Director's delegate began her investigation, Bhupal told her that he did not have any payroll records for Stewart. He testified that he told the delegate that because Stewart was a manager, he did not record her time. Bhupal turned to the B. C. Hotel Association for assistance, and it recommended Johnston. Bhupal also contacted his MLA, who referred him to the Ministry of Tourism. The Ministry also suggested that he hire Johnston.

Stewart, who testified by telephone, stated that she was a front desk clerk. Bob Bhupal and Gilani worked a total of 20 hours per week at the front desk, basically in relief of her. According to Stewart, she had no authority to hire or fire other employees or to change the décor in any of the guestrooms. She was told to hire Tran and Hurst. In Tran's case, she received his resume and was told to hire him because he was bilingual. Paul Bhupal gave her name to the Internet job search service when new employees were to be hired. Her primary duties were not managerial. Once or twice Lowrie came to her with housekeeping problems, as did other staff, because she spent so many hours at the front desk. She met with Gilani and Bob Bhupal periodically. An outside contractor did the bookkeeping for the business.

Under cross-examination, Stewart acknowledged that Tran's description of his selection was correct.

In her testimony, Stewart confirmed the statement in the Determination that estimates of the hours she worked were based on her records, which she described as conservative. In general, Stewart believed that she worked 125 hours per week, including the night shifts. During the night shift, she answered questions, checked guests in, received donuts for the motel's continental breakfast and the like. In September a new telephone system was installed that enabled guests to receive calls directly, but it did not work initially. She also did laundry for the

motel while she was on duty. During her first period of employment, Stewart was a desk clerk on the night shift, and she had the same duties when she worked in 1998-1999.

Stewart maintained that she did not have the authority to hire or fire other employees. A front desk clerk and his mother who spoke Punjabi were hired during her tenure, and Bob Bhupal made the decision. In the case of the mother, the decision was over Stewart's objections. Bob Bhupal testified that he did not recall hiring a Punjabi-speaking desk clerk during Stewart's employment. According to Stewart, the procedure was that Bob Bhupal went over the resumes of applicants and told her whom to hire, including Tran. No one was fired or laid off while she was employed, although she recommended firing the maintenance worker. Both Stewart and Bob Bhupal testified about the hiring of Harwood. Bhupal maintained that Stewart supervised him, and she concluded that he was taking goods belonging to the business. Stewart wanted to fire Harwood, but Bhupal refused, hoping the employee would improve his performance. In fact, Harwood did become a satisfactory employee.

Redina Borros ("Borros") worked as a desk clerk from 1992 to 1994. She was aware of Stewart's duties, which were similar to hers, except that Stewart lived on the premises. The manager at the time, "Adam" hired her. Later Paul Bhupal took his place. Her duties consisted of checking guests in and out, answering questions and the like. She also helped train new staff. Borros took on extra work herself, including checking rooms. If damage had occurred, she told Paul Bhupal. After a time, she was allowed to interview and recommend applicants to Paul Bhupal for employment. She never fired an employee, but would have taken such a matter to Paul Bhupal. She worked nights, and she was often busy answering questions, assisting guests and accepting the donuts. There was no live-in staff person then, so she had to be awake all night on the 11:00 p.m. shift.

Annette Jensen ("Jensen") was employed by Happy Day from September 2000 until February 2001 as a live-in front desk clerk. Her compensation was \$1500 per month. She estimated that she worked 96 hours per week, with two afternoon shifts off. She did not receive any bonuses or other pay for performance. She had no involvement with hiring other staff. During her five months of employment, she took three days and two nights off. During the night shift, she was interrupted constantly, although she could occasionally take a nap.

After two months of employment, she was offered a live-in manager position. She agreed, but the arrangement was unsuccessful. In December 2000, Bob Bhupal returned to the business, and her duties changed. She was required to admit prostitutes and drug addicts as guests and was concerned about her own safety.

Gilani produced a letter offering Jensen the position of "live-in manager" at Happy Day. The duties included "managing front desk shifts and other such duties as management would assign you from time to time . . ." The offer referred to relief for 9 eight-hour shifts, with other coverage to be her responsibility. Compensation was \$18,000 per year, plus furnished accommodation. Jensen signed the letter, indicating her acceptance of the offer.

According to Gilani, Jensen was given more responsibilities during her period of employment. She interviewed applicants and made recommendations about hiring. She supervised the housekeeping and maintenance functions. While she was employed between 3 and 6 clerks were hired and several maids were terminated because of lack of work. Jensen did not make those decisions.

Counsel for the Employer asked Gilani to compare Jensen to Stewart. According to Gilani, Stewart was more experienced and had more responsibility. Jensen was young and still learning her job while she worked for the Employer. Jensen was being groomed to assume the position that Stewart had held. Both persons had responsibility for supervising maintenance, but Stewart took more initiative. She also had authority to do purchasing, which Jensen never exercised. Under cross-examination, Gilani explained that Stewart gave lists of supplies to be purchased to Bob Bhupal, who actually bought the goods.

ANALYSIS

The first issue to be decided is whether the Employer should be permitted to rely upon the evidence summarized above to support its argument that Stewart was a manager. In the hearing, I ruled that I would hear the evidence and reserve judgment on the principle involved. The hearing was difficult to schedule, and the volume of evidence on Stewart's duties was substantial, so I was unwilling to cause further delay by issuing a considered decision on the initial point of difference between the Employer and the Director's delegate.

Stated briefly, the delegate argued that a lengthy investigation of Stewart's complaint had occurred, and the Employer had not claimed that she was a manager. Johnston, a professional advocate in employment standards matters, represented Happy Day. Not only did he not raise the issue of Johnston's status as a manager, in his letter to the delegate of September 28, 2001, he stated that Stewart was not a manager. Therefore, counsel for the Employer was not permitted to rely on that argument at an oral hearing.

The delegate cited two of the Tribunal's leading cases on this subject, *Kaiser Stables Ltd.* BC EST #D058/97 and *Tri-West Tractor Ltd.* BC EST #D268/96. In both cases, the employer refused to cooperate with the investigation. In *Kaiser Stables Ltd.*, the adjudicator noted (at p. 4) that the employer "ignored the Director's concerted efforts to give him the opportunity to participate." In *Tri-West Tractor Ltd.* the employer did not submit information to the Director during the investigation and sought to rely on that information on appeal to the Tribunal. The Tribunal has consistently held that if an employer consistently refuses to participate in an investigation, it will not be permitted to rely on evidence that was available and could have been presented to the Director's delegate.

By contrast in *Specialty Motor Cars (1970) Ltd.*, BC EST #D570/98, the employer sought to introduce employees' affidavits and three documents in support of its appeal. The adjudicator found that the employer "took an aggressive and determined position throughout" the

investigation. He concluded that this was not an appropriate case to apply the *Tri-West/Kaiser Stables* rule. In *Syncon Investments Ltd.* BC EST #094/97, the adjudicator found that the employer had not cooperated in the investigation, but the resulting determination contained an error, so the appeal was heard.

In the case before me, no evidence or argument was advanced that Happy Day had refused to cooperate in the investigation of Stewart's complaint. Bob Bhupal testified, without contradiction, that he responded to requests for information from the delegate. The Determination described the rather tortuous process by which records of the hours Stewart worked were constructed. Indeed, the Employer seems to have sought counsel to deal with the complaint almost immediately. The evidence summarized above contains numerous examples of communication between the Employer's representative and the delegate.

From the outset of the investigation, Stewart's job appears to have been described as "live in manager" or "live-in front desk manager." The Determination referred to her by the latter title in the introduction. Neither the delegate nor the Tribunal is bound by the title of a position, but the use of the term in this case illustrates that the issue of Stewart's managerial status was never concealed from any of the parties to the investigation.

After considering the evidence and argument presented, I must conclude that this is not an appropriate case to apply the *Tri-West/Kaiser Stables* rule. The Employer participated in the investigation. It may not have been well served by the advocate it engaged, but Bob Bhupal cooperated with the delegate in her efforts to issue a determination. The evidence in question is central to the Employer's case, and I do not find that Stewart's case is prejudiced by admission of the evidence at the hearing. I note that she left the province shortly after she resigned her employment, which in itself caused difficulty in completing the investigation.

In *Specialty Motor Cars, supra*, the adjudicator stated (at p. 4):

However, it should also [be] recognized that the *Kaiser Stables* principle relates only [to] the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigating officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure. . . .

I conclude that the importance of the evidence on Stewart's status and the circumstances under which the evidence became available require that the Tribunal consider this issue. An appeal under Section 112 of the *Act* must establish whether the Determination is correct, given the facts of the case and the requirements of the *Act*.

This conclusion leads to the second issue, whether Stewart was a manager under the *Act*. For the reasons set out below, I find she was a manager.

“Manager” is defined in Section 1(1) of the *Employment Standard Regulation* (the “*Regulation*”) as follows:

‘**manager**’ means

- (a) a person whose primary employment duties consist of supervising and directing other employees, or
- (b) a person employed in an executive capacity.

Section 34 of the *Regulation* exempts a manager from the provisions of Part 4 of the *Act*.

The Tribunal has examined the status of a manager on many occasions, especially in situations such as this case, where the employer was a small organization and the employees in question performs non-managerial duties.

A major statement of the Tribunal’s position on this issue was *Director of Employment Standards (Amelia Street Bistro)* BC EST #479/97, reconsideration of BC EST #D170/97, in which the Tribunal reviewed the application of the *Regulation* as follows:

Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.

A similar approach was taken in *Cathay Traditional Chinese Medical Centre Ltd.* BC EST #D169/01.

Counsel for the Employer referred the Tribunal to *Betty Nga-man Tsoi Tang*, BC EST #D368/99. In that case, which involved a small restaurant, the Tribunal found that Mrs. Tang interviewed and made decisions about hiring new staff, made staff schedules and assigned work to staff, supervised staff, dealt with advertisers, distributed tips, handled cash and received customer complaints. The adjudicator, paraphrasing the paragraph quoted above, found that Mrs. Tang was a manager.

Applying those principles to the facts of this case, the evidence is that Stewart performed the duties outlined as characteristic of a manager. She was not subject to direct supervision by Bob Bhupal or Gilani most of her working time. Bhupal stopped by the premises at most once per day and was gone for several weeks on at least one occasion. Gilani worked in another building and had contact with Stewart when she requested help, when he covered shifts for her or at management meetings. Lowrie, the head housekeeper, regarded Stewart as her manager. Housekeepers reported to Lowrie.

Stewart hired two employees, Hurst and Tran, although Bhupal overruled her recommendation to fire Harwood, the only person terminated during Stewart's period of employment. Hurst testified that Stewart scheduled work, not a major responsibility since the number of rooms occupied determined the volume of housekeeping work. Hurst said that Stewart scheduled work for the housekeeping staff and told her if she was taking too much time to complete her work. Stewart trained new front desk staff in the duties of that position. The Director's delegate found that Stewart scheduled staff when employees were absent due to illness. Stewart also checked the condition of the rooms.

Stewart participated in management meetings with Gilani and Bhupal. She was responsible for money only to the extent of any other front desk clerk. Stewart ordered supplies for Bhupal to purchase. Bhupal seems not to have been concerned with supplies beyond driving to a store to make the purchases.

The Employer maintained throughout the case that Stewart was on call from her residence during the 11:00 p.m. shifts. Section 1(2) of the *Act* states:

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 Determination pointed out that an employee is compensated while on call because he or she is not free to pursue his or her own interests while at the employer-designated location. Conversely, an employee on-call at her residence is free to pursue personal interests while waiting for a call. The employee may not be physically present, but available to respond to a call on a cellular telephone or pager.

In *Double 'R' Safety Ltd.* BC EST #D193/01, the Tribunal dealt with a situation in which the employer claimed that a first aid trailer, which also had living quarters, was an employee's residence under Section 1(2) of the *Act*. The decision in that case found against the employer. The key principle in the case was:

An employee in a remote camp, who is required to be present, and who cannot leave, and must provide service when requested, is on call in a place designated by the employer.

In this case, the location where Stewart lived was, of course, not remote. But she could not leave at night, was not free to pursue her own interests and was required to provide service when requested. These requests were common, even if one accepts the Employer's evidence about the number of calls per night. The suite in the motel was not her residence as anticipated by Section 1(2).

Evidence was led to challenge the Delegate's calculation of the hours that Stewart worked. It is beyond the scope of the Tribunal to re-calculate time worked by a complainant. Since this decision finds that Stewart was not covered by Part 4 of the *Act*, most of this evidence is not relevant to Stewart's entitlements. It appears that some adjustment of holiday pay may be necessary, since Bob Bhupal testified, without contradiction, that he worked on Christmas Day 1999.

The Director's delegate issued determinations that concluded that Bob Bhupal and Paul Bhupal were directors of Happy Day. Both determinations were appealed. No new evidence or argument was offered in support of the appeal, which essentially repeated the positions taken on the corporate Determination. The purpose of the appeals of the directors' determinations apparently was to preserve their rights if this decision altered the corporate Determination.

Counsel for the Employer argued that the Royal West was the subject of a family trust and could not be affected by the Determination. Counsel for the Employer and the Director made written submissions on that point after the conclusion of the oral hearing.

Counsel for the Employer presented evidence that the Bhupal Family Trust (the "Trust") had been created. The beneficiaries of the Trust were various relatives of Bob Bhupal. Counsel stated, without providing any evidence, that the Trust held non-voting shares in Royal West. It was not active in the management of any of the enterprises mentioned in the Determination, but was a shareholder or investor in Royal West. The Employer further argued that neither the Trust nor Royal West should be associated in the corporate Determination.

Counsel for the Director pointed out that the Determination did not mention the Trust. The Employer had not presented any evidence to attack the conclusion in the Determination that Royal West, Happy Day Inn and Bhupal Hotels Ltd. were associated companies under Section 95 of the *Act*. The Determination stated that Royal West owned the real estate on which Happy Day Inn is located and that Happy Day leased the property from Royal West. A search of the property title did not produce any reference to the Trust.

After analyzing the argument presented, I conclude that Happy Day Inn, Bhupal Hotels Ltd. and Royal West are associated companies under Section 95. The Trust is not subject to the Determination. Nor can its alleged ownership of a portion of the shares of Royal West protect the three companies from the reach of the *Act*. In fact, the argument advanced in support of the position that the Trust should be exempt from the Determination served to strengthen the position of the Director's delegate that the three companies were associated.

ORDER

For these reasons, I order that the corporate Determination of July 27, 2001 be varied and remitted to the Director for a re-calculation of Stewart's entitlements in light of the conclusions of this decision pursuant to Section 115 of the *Act*. The directors' determinations, also issued on July 27, 2001, are varied and remitted to the Director for re-calculation of the amounts for which the directors are liable, based on the results of the re-calculation of the corporate Determination.

Mark Thompson
Adjudicator
Employment Standards Tribunal