

An appeal

- by -

492907 B.C. Ltd. operating Slumber Lodge Motel
("Slumber Lodge")

- 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: David B. Stevenson

FILE No.: 2005A/60

DATE OF DECISION: July 13, 2005

4. Slumber Lodge says the Director failed to observe principles of natural justice by:
 - (a) failing to provide Slumber Lodge a reasonable opportunity to respond to the assertion by Debra Thiessen that she was not a manager and the evidence submitted by Debra Thiessen to support that assertion; and
 - (b) failing to investigate the claim in an unbiased manner,
5. Slumber Lodge says there is evidence which has come available which was not available at the time the Determination was made. That evidence has been submitted with the appeal in an affidavit sworn by Elizabeth Carhoun, a director of Slumber Lodge, and in documents attached to the affidavit.
6. No oral hearing has been requested. The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

7. The issues in this appeal are whether the Director made any error in law and whether the Director failed to observe principles of natural justice in making the Determination.

THE FACTS

8. Slumber Lodge operates a motel in 100 Mile House. Debra Thiessen was employed by Slumber Lodge from March 1, 2002 until September 27, 2004 at a rate of \$900.00 semi-monthly. William J. Thiessen was employed by Slumber Lodge from March 9, 2002 until September 26, 2004 as front desk relief at the rate of \$8.50 an hour.
9. When their employment terminated, Debra Thiessen and William J. Thiessen filed complaints under the *Act*. Debra Thiessen claimed she was owed regular and overtime wages, annual vacation and statutory holiday pay and length of service compensation. William J. Thiessen claimed he was owed regular wages, annual vacation pay and length of service compensation.
10. The claim made by Debra Thiessen raised three issues for the Director:
 - (i) whether Debra Thiessen was a “manager” for the purposes of the *Act*;
 - (ii) whether she was owed regular and overtime wages, annual vacation pay and statutory holiday pay; and
 - (iii) whether she was entitled to compensation for length of service.
11. The claim made by William J. Thiessen raised two issues for the Director:
 - (i) whether William J. Thiessen was entitled to statutory holiday pay; and
 - (ii) whether he was entitled to compensation for length of service.
12. The Director found that Debra Thiessen was not a “manager” for the purposes of the *Act*. The Director accepted that while Debra Thiessen was performing the functions of a manager when she was first hired, changes were made by Slumber Lodge to her authority and employment responsibilities at the end of

2002 which had the effect of moving her outside of the definition of “manager” in the *Employment Standards Regulation*.

13. The Determination notes the following:

Thiessen further stated that by the end of 2002, the employer instructed her that she was not to spend petty cash without approval, she was not to adjust room rates without approval and further that she was to do all the maid work herself, perform required repairs and clear snow as required.

The employer stated during the investigation that Thiessen was a manager and not therefore entitled to statutory holiday pay. The only information provided by the employer in this regard was contained in the explanation of why Thiessen was terminated wherein the employer stated that Thiessen was “*ordering things without our approval, renting a room out to people without our approval and changing locks without our approval*”.

14. Based on the finding that Debra Thiessen was not a manager for the purposes of the *Act*, the Director determined entitlement to overtime wages and statutory holiday pay. Debra Thiessen had kept time sheets of hours worked which she said had also been submitted to Slumber Lodge semi-monthly and provided copies of those sheets to the Director during the investigation of her complaint. The Director accepted those records as an accurate reflection of her hours of work. The regular and overtime wage calculations were based on those records. Employment records provided by Slumber Lodge did not include the daily hours worked by Debra Thiessen.
15. The Director found that Slumber Lodge had made deductions from Debra Thiessen’s final pay without authority or authorization. In making this finding, the Director noted that Slumber Lodge had asserted the amount deducted represented statutory deductions that should have been made on a bonus paid to Debra Thiessen in 2003, but had provided no support for that statement.
16. The Director found that Slumber Lodge had dismissed Debra Thiessen without written notice or just cause, noting that Slumber Lodge had failed to submit letters of complaint, which they said were available and which were requested by the Director, or any other information relating to the issue of just cause.
17. The Director found that Slumber Lodge had failed to pay William J. Thiessen all vacation pay owed. This conclusion was based on a calculation of vacation pay earned by him during his employment applied to what he had been paid by Slumber Lodge as of the termination of his employment.
18. On the issue of compensation for length of service, Slumber Lodge asserted that William J. Thiessen had quit his employment and accordingly was not entitled to any compensation. The Director stated that the burden of showing a quit was on Slumber Lodge and they had not met that burden.

ARGUMENT AND ANALYSIS

19. Slumber Lodge has the burden of persuading the Tribunal there is a reviewable error in the Determination. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

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 made.*

20. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the complaint process, hoping the Tribunal will reach a different conclusion. An appeal is an error correction process with the burden of showing the error being on the appellant.
21. Following the exchange of submissions, Slumber Lodge has advised the Tribunal that their appeal of the Determination relating to William J. Thiessen was being withdrawn. The Tribunal accepts their withdrawal. Slumber Lodge has also advised it was withdrawing its appeal against the finding that Slumber Lodge contravened Section 28 of the *Act* and its the allegation of bias against the Director. The Tribunal also accepts those withdrawals and will not address either of those matters in this decision. There was also some reference to withdrawing some part of the appeal concerning statutory holiday pay, but I view that matter as being bound to the issue of the status of Debra Thiessen as a manager for the purposes of the *Act* (see Section 36 of the *Regulation*).
22. As a result of Slumber Lodge withdrawing parts of the appeal, the following errors of law remain to be considered:
- the finding that Debra Thiessen was not a “manager” for the purposes of the *Act*, and in the consequent findings that she was entitled to overtime wages, annual vacation pay on the overtime wages and statutory holiday pay;
 - the finding that Slumber Lodge had contravened Section 21 of the *Act*; and
 - the finding that Debra Thiessen was dismissed without cause and without notice or, alternatively, by not deferring consideration of the issue of just cause until that question had been dealt with by the Court.
23. The remaining natural justice issue is whether the Director failed to observe principles of natural justice in making the Determination without providing Slumber Lodge with adequate notice that the status of Debra Thiessen as a manager was being considered by the Director and without providing Slumber Lodge with a reasonable opportunity to respond on that issue as required by Section 77 of the *Act*.

New Evidence

24. I shall first address this ground of appeal. Slumber Lodge says that evidence has come available that was not available at the time the Determination was made. This evidence consists of the affidavit sworn by Ms. Carhoun and the attached copies of the following documents;
1. three pages of the Employment Standards Self-Help Kit prepared by Debra Thiessen and delivered to Slumber Lodge on, or about, October 24, 2004;
 2. a Demand for Employer Records delivered by the Director to Slumber Lodge on, or about, December 16, 2004;
 3. a letter from the Director to Slumber Lodge dated January 18, 2005;

4. a letter from Ms. Carhoun to Debra Thiessen dated June 18, 2004 and some documents relating to the subject matter of the letter;
5. copies of maids' daily work sheets and a checklist prepared by Debra Thiessen in June and July, 2004;
6. a fax from Gary Thiessen to "Ellie & Joe" on September 7, 2004;
7. a fax dated September 21, 2004 from Debra Thiessen to "Ellie & Joe";
8. a letter, delivered to the Director, setting out the reasons for Debra Thiessen's dismissal from Slumber Lodge;
9. a note included with seventeen pages of information provided to the Director by Slumber Lodge and received on February 4, 2005;
10. several letters of complaint from customers of Slumber Lodge, the 100 Mile House Chamber of Commerce and the 100 Mile House Visitors Centre; and
11. invoices for photocopy services and snow removal.

25. It is apparent that the affidavit filed in support of the appeal and the exhibits attached to the affidavit speak to two matters: the status of Debra Thiessen as a manager for the purposes of the *Act* and the question of just cause. Slumber Lodge does not say this evidence was not available at the time the Determination was made. They submit the evidence was not provided to the Director before the Determination was made because the Director had not requested that evidence in terms that were specific enough to be understood as being required in order to discharge the onus of proof. Slumber Lodge also says the information was not readily available because it was in the possession of their legal counsel and was being used for the purpose of defending a civil action brought by Debra Thiessen against Slumber Lodge and others.
26. Many of the above documents are included in the Record and were considered by the Director in making the Determination. Their inclusion as evidence in this appeal is not an issue.
27. In reply to this ground of appeal, the Director submits that all of the evidence Slumber Lodge is seeking to introduce, that is not included in the Record, is encompassed within the Demand for Employer Records and was available at the time the Determination was made. The Director argues the failure of Slumber Lodge to provide that evidence when demanded is fatal to their attempt to introduce it on appeal. The reply filed on behalf of Debra Thiessen follows the same argument as the Director. Both refer to the Tribunal's decisions in *Tri-West Tractors Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97 to support their arguments.
28. The Tribunal has taken a relatively strict view of the "new evidence" ground of appeal, indicating in several decisions that it is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal retains a discretion to allow new evidence. In addition to considering whether the evidence was reasonably available and could have been provided during the complaint process, the Tribunal also considers whether the evidence is relevant to a material issue arising from the complaint and if it is credible, in the sense that it is reasonably capable of belief.
29. It is apparent that all of the attachments to the affidavit which Slumber Lodge seeks to introduce with the appeal that are not already part of the Record were available at the time the Determination was made and would not be accepted if they were simply going to the merits of the Determination.

30. The Tribunal has recognized, however, in the context of an appeal grounded in an alleged failure to observe principles of natural justice, including an alleged failure to provide a reasonable opportunity to respond, that fairness requires an appellant be allowed to adduce evidence seeking to prove those allegations. The following excerpt from the Tribunal's decision *J.C. Creations Ltd, (c.o.b. as Heavenly Bodies Sport)*, BC EST #RD317/03 (Reconsideration of BC EST #D132/03) is applicable:

Section 112(1)(c) of the Amended Act states that a person may appeal a Determination based on an error of law, a failure to comply with natural justice, or where "evidence has become available that was not available at the time the Determination was being made". Clearly, the intent of that provision is to support the finality of the Director's Determinations by not allowing a party to not present its whole case before the Director and then raise evidence, which could and should have been put before the Director, on Section 112 appeal before the Tribunal. The intended "relatively quick and cheap means of resolving employment disputes" (*Danyluk, supra*) under the Act would otherwise be undermined by needless appeals.

Equally clearly, however, it is essential to the purposes of the legislation that parties who have been denied a chance to be heard not be prevented from proving a breach of procedural fairness on appeal by not being able to submit the relevant evidence in support. To not allow a party to do so would put them in a "catch 22" situation, and would be inconsistent with the purpose of the Act to provide fair as well as efficient procedures: Section 2(d) of the Act. Adducing evidence to show a breach of procedural fairness is a very different matter from adducing evidence for the first time on appeal for the purpose of having the truth of the evidence accepted "on the merits".

This distinction, which reinforces the fairness requirement in the Act, is consistent with elementary administrative law principles. Even on judicial review, courts allow "new evidence" to be tendered to show jurisdictional error such as a breach of procedural fairness: *Evans Forest Products Ltd. v. British Columbia* (Chief Forester), [1995] B.C.J. No. 729 (S.C.). Brown and Evans, in *Judicial Review of Administrative Action in Canada* (2003) at pp. 6-56, 57, accurately summarize the law as follows:

. . . any evidence that relates to an excess of jurisdiction is admissible, as is evidence in support of the allegation that there was "no evidence" in support of a material finding of fact made by an administrative tribunal, evidence establishing an insufficient basis for the administrative action taken, or evidence of a breach of duty of fairness

Breaches of procedural fairness are often not apparent on the record. Courts have long recognized that the traditionally restrictive "fresh evidence" principles cannot apply to evidence adduced to demonstrate a breach of procedural fairness. Justice and necessity require that evidence concerning such alleged breaches can be received so that procedural fairness allegations can be meaningfully raised and addressed.

31. Accordingly, I accept the evidence as it bears on the natural justice ground of appeal. I reject it for all other purposes, including the purpose of showing there was just cause for Debra Thiessen's dismissal. I am satisfied Slumber Lodge had adequate notice of that issue and a reasonable opportunity to respond. I specifically note that Slumber Lodge was *ordered* by the Director to provide "any and all documents relating to the termination of [Debra Thiessen] including any and all documents that the employer relies on to establish just cause to terminate the employee. . ." and contravened the *Act* by failing to do so. Notwithstanding the contravention, additional opportunities to provide evidence on the just cause issue were offered to Slumber Lodge by the Director, but were not taken.
32. The submission of Slumber Lodge suggests there was some responsibility on the Director to advise Slumber Lodge that the documents provided were not sufficient. I am not aware of any authority indicating there is any such responsibility on the Director. Indeed, as the Tribunal pointed out in *James Hubert D'Hondt operating as D'Hondt Farms*, BC EST #RD021/05 (Reconsideration of BC EST

#D144/04), for the Director to take a pro-active role in advising a party that its evidence was insufficient could reflect on the Director's impartiality and give rise to allegations of bias from the other party or parties.

Errors in Law

33. Turning to those matters where Slumber Lodge has submitted the Director erred in law, and leaving aside for the moment whether the Director erred in law in finding Debra Thiessen was not a manager for the purposes of the *Act* and those matters which derive from that finding, I am not persuaded there are any errors of law in the Determination.
34. Slumber Lodge says the Director erred in law in finding they contravened Section 21 of the *Act* by deducting \$831.37 from Debra Thiessen's final pay cheque. The Determination indicates that Slumber Lodge stated during the investigation that this amount reflected statutory deductions on a bonus paid to Debra Thiessen in 2003, but provided no evidence to support that statement.
35. Slumber Lodge argues the burden of showing a contravention of the provision is on the Director and, in any event, they were not given any indication from the Director that evidence showing the amount was a required statutory deduction was needed.
36. In reply, the Director says if Slumber Lodge was required to make statutory deductions, that requirement arose more than 13 months before the deduction was actually made. The failure to make such deductions when required does not transform into "permission" to make the deduction 13 months after the fact. I take the Director's position to be that Slumber Lodge was not "required" by any enactment to make the deduction at the time it was made and there was no "permission" from Debra Thiessen to make that deduction from her final pay cheque.
37. I do not agree with Slumber Lodge that the burden of showing a contravention of Section 21 rests with the Director. In *Health Labour Relations Association of British Columbia (Prince George Regional Hospital) v. Prins*, (1982) 140 D.L.R. (3d) 744 (B.C.S.C.), McEachern C.J.S.C. (as he then was) characterized the provision as an absolute requirement with certain permissible exceptions. Where the facts indicate a deduction from wages has been made, the party seeking to support the deduction will be required to bring their action within one of the permissible exceptions. In this case, the facts showed a deduction of \$831.37 from Debra Thiessen's wages. That was confirmed by evidence provided by Slumber Lodge. On its face, those facts demonstrate a contravention of Section 21 of the *Act*, which proscribes any deduction for any purpose except "*as permitted or required by . . . any other enactment of British Columbia or Canada*". It was open to Slumber Lodge to bring themselves within the exception but they did not do so. This approach to the application and administration of Section 21 recognizes the *Act* is remedial legislation that should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtiger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.).
38. My response to the second part of the argument made by Slumber Lodge has been provided above - there was no responsibility on the Director to advise Slumber Lodge what evidence was needed to show the deduction was not a contravention of Section 21 of the *Act*.
39. Slumber Lodge says the Director erred in law in several respects on the question of length of service compensation.

40. Slumber Lodge says the Director erred in stating they had submitted “no evidence” of just cause. They say evidence of just cause was submitted and based on that “evidence”, the Director should have allowed them a reasonable opportunity to provide the proof required to substantiate the “evidence” of just cause. I pause to note the submission of Slumber Lodge has confused “evidence” with “allegations”. The Record does not support the assertion that anything more than allegations of misconduct justifying dismissal were provided by them to the Director. No evidence supporting those allegations was ever provided and, it logically follows, the allegations were never proved. It is trite that the failure of Slumber Lodge to prove just cause is fatal when the burden of proof is on them.
41. In reply, both the Director and Debra Thiessen say Slumber Lodge had ample opportunity to establish there was just cause to terminate Debra Thiessen but failed to meet their burden in that regard.
42. This aspect of the appeal does not raise a question of law at all, but rather seeks to have the Tribunal revisit the decision on just cause and change findings and conclusions of fact. The Tribunal has no authority to consider an appeal based on errors of fact.
43. Slumber Lodge submits the Director erred in not deferring the issue of just cause until that question had been dealt with by the Court. The Director says he was not made aware by either party that the question of just cause was the subject of an action before the Court. That is the short answer to this argument. In any event, the *Act* does not prohibit the Director from considering a claim under the *Act* that is also the subject of a proceeding before the Court. The Director has a discretion under Section 76(3)(f) to refuse to investigate or to stop or postpone an investigation where a proceeding relating to the subject matter of a complaint has been commenced before a Court, but for obvious reasons that discretion was not exercised in this case. No error in law has been shown on this point.
44. The third argument raised by Slumber Lodge on the issue of length of service compensation is that the Director erred in law in finding the dismissal was without notice. They say written working notice was provided to Debra Thiessen on September 7, 2004 and her last day worked was September 26, 2004. The Record confirms Slumber Lodge gave Debra Thiessen two weeks written notice on September 7, 2004.
45. In reply, the Director says the notice had no effect because the notice period ended on September 21, 2004 and Debra Thiessen continued her employment after that date. The Director says that in those circumstances Section 67(1)(b) applies:
67. (1) *A notice given to an employee under this Part has no effect if*
(b) the employment continues after the notice period ends.
46. The argument of Slumber Lodge does not address the above provision, which in my view provides a complete answer to this aspect of the appeal. No error has been shown.

Natural Justice

47. I return to the matter of the finding by the Director that Debra Thiessen was a manager for the purposes of the *Act*. The central argument made by Slumber Lodge on this matter is that the Director failed to make reasonable efforts to give them an opportunity to respond. This matter raises a question of law only to the extent that a failure to observe principles of natural justice is recognized as a species of error of law and a failure to observe the statutory requirement of Section 77 of the *Act* is an error of law.

48. Slumber Lodge has supported this argument with evidence submitted through an affidavit sworn by Ms. Carhoun. In the affidavit, Ms. Carhoun says:

5. At no time did I receive a copy of the actual complaint filed by Debra Thiessen nor did I receive any copy, or notice of, the information that she provided to the Director's Delegate alleging that her functions or responsibilities as manager had been changed. I received no indication of any kind that Debra Thiessen was claiming that she was not a manager while employed by the company, that she was entitled to overtime, or that she had prepared and submitted time records to the Director's Delegate, until I received a copy of the Determination dated March 11, 2005.

49. In reply to the natural justice ground of appeal, the Director submits:

The employer had ample opportunity to respond to the issues raised, both in letters and during telephone conversations. The employer chose to provide only minimal information despite being told on more than one occasion that a Determination was going to be made and the employer should provide any and all information that they wanted the Director to consider.

50. The Director does not challenge the assertion made by Ms. Carhoun that she received no indication from the Director, or otherwise, that Debra Thiessen was claiming she was not a manager and was not provided with any of the information on that issue which was given by Debra Thiessen to the Director. A review of the Record confirms that none of the documents, communications or correspondence that was received by Slumber Lodge indicated Debra Thiessen's status as a manager was an issue or that a claim for overtime wages was being made.

51. The circumstances of this case are not dissimilar from those faced by the Tribunal in *J.C. Creations Ltd, (c.o.b. as Heavenly Bodies Sport)*, *supra*, where the employer was not provided an opportunity to respond to allegations made by the complainant concerning the termination of her employment. The reconsideration panel of the Tribunal considered whether the basic statutory obligation found in Section 77 of the *Act* was satisfied in those circumstances. In examining that question, the Tribunal stated:

Section 77 of the *Act* requires that the Director "... make reasonable efforts to give a person under investigation an opportunity to respond". Section 77 is thus a legislated, minimum procedural fairness requirement. It is consistent with the purposes of the *Act* "to promote the fair treatment of employees and employers" and "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*" (Sections 2(b) and (d) of the *Act*). The issue here is whether the Director's Delegate made "reasonable efforts" to give the Employer an opportunity to respond to the investigation being conducted by the Delegate.

The requirement under Section 77 of the *Act* in no way requires that an oral hearing be held. That is recognized by the Tribunal in the already cited *BWI Business World* decision. It is also reflected in the following comments by the Tribunal in *Milan Holdings Ltd.*, *supra*, at para. 30:

An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77, which requires only that "If an investigation is conducted, the director must make reasonable efforts to a give a person under investigation an opportunity to respond".

Having acknowledged the unique features of an investigation under the *Act*, and the fact that an opportunity to respond does not require a formal adjudicative hearing, it is nonetheless also true that basic to any conception of fair process or a reasonable effort to give an affected person a chance to respond is the notion that a person subject to an adverse finding must be given adequate notice of the case he or she has to meet and an opportunity to be heard. That is the minimum requirement set forth in the plain words of Section 77 of the Act. As rightly stated by Adjudicator Orr in *Cyberbc.Com AD & Host Services Inc. (c.o.b. 108 Temp and La Pizzaria) (Re)*, BC EST #RD344/02:

While the Tribunal has indicated that Section 77 does not necessarily require the production of the whole investigative file prior to issuing the determination and it is not intended to allow for a form of "discovery", there still must be meaningful disclosure of the details of the complaints in order to make the opportunity to respond reasonable and effective. (para. 36)

...

While it was not unfair for the Delegate, during an investigation, to make separate contact with the Complainant, to receive documents from her and get her side of the story in full without the Employer present, the Delegate was under a Section 77 duty of fairness to the Employer to put the key elements of the employee's complaint to the Employer so that the Employer could respond. There is no material before us that the Employer was, verbally or otherwise, made aware of the key points or representations that arose in the communications between the Delegate and the Complainant. The evidence is to the contrary.

...

It is often said that the rationale for procedural fairness lies in both the procedural justice a person affected by an adverse decision is entitled to have and in its ability to ensure that a decision maker can get to the truth and thus make a sound decision. Both rationales are clearly implicated here.

52. My view of this case echoes the above comments. The Director was under a Section 77 duty of fairness to disclose sufficient details of the complaint to Slumber Lodge to allow them "to make the opportunity to respond reasonable and effective". I return to the *J.C. Creations Ltd.* decision for a final comment:

As we have tried to be careful to note, neither section 77 of the *Act* nor procedural fairness in administrative law is intended to be formal and burdensome. That is particularly true in the employment standards context which, as has also been noted, is designed to be "a relatively quick and cheap means of resolving employment disputes" *Danyluk, supra*. However, even in investigations, there are minimal fairness requirements, in this case those set forth in Section 77 of the Act. Basic fairness requires those charged with the responsibility of making statutory decisions to ensure that a party who may be adversely affected by a decision is given notice of and a chance to respond to the essentials of the case they have to meet.

53. The failure of the Director to disclose to Slumber Lodge in a meaningful way that the status of Debra Thiessen as a manager under the *Act* was an issue and to provide them with details of Debra Thiessen's position on that issue denied them an opportunity to know the case they had to meet and effectively denied them an opportunity to respond. For that reason, the Determination on this issue, and on matters flowing from this issue, cannot stand.
54. This ground of appeal succeeds.
55. All other aspects of this appeal are dismissed.

Remedy

56. The appropriate remedy is to confirm the Determination on those matters where the appeal was unsuccessful and refer the question of the status of Debra Thiessen under the *Act*, and those matters related to that question, back to the Director.

ORDER

57. Pursuant to Section 115 of the *Act*, I make the following orders:
- (i) the Determination dated March 11, 2005 will be varied by cancelling the decision of the Director on the issue of the status of Debra Thiessen as a manager under the *Act* and by cancelling those aspects of the Determination that are based on the Director's decision on that issue, including overtime wages and statutory holiday pay and the annual vacation pay calculation on those amounts;
 - (ii) the issue of the status of Debra Thiessen under the *Act* is referred back to the Director;
 - (iii) the Determination dated March 11, 2005 relating to the complaint filed by Debra Thiessen is confirmed on the annual vacation pay unrelated to those matters identified in paragraph (i), the claim under Section 21 of the *Act* in the amount of \$831.37 and the claim for compensation for length of service under Section 63 of the *Act* in the amount of \$640.00, together with any interest that has accrued on those amounts under Section 88 of the *Act*;
 - (iv) the Determination dated March 11, 2005 relating to the complaint file by William J. Thiessen is confirmed in the amount of \$354.10, together with any interest that has accrued on those amounts under Section 88 of the *Act*; and
 - (v) the Determination dated March 11, 2005 relating to the administrative penalties imposed under Section 29 of the *Regulation* is confirmed in the amount of \$3000.00.

David B. Stevenson
Member
Employment Standards Tribunal