

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Heinz Benecken  
("Benecken")

- of Determinations issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** David Stevenson  
**FILE NOS.:** 1998/665  
**DATE OF HEARING:** March 2, 1999  
**DATE OF DECISION:** March 10, 1999

**DECISION**

**APPEARANCES**

For the appellant:

Robert A. Lundberg, Esq.  
Heinz Benecken  
Waltraud Benecken

For the Golden Gate Motel Ltd.

Glen Ewan, Esq.  
George Poulos  
Gus Poulos

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Heinz Benecken (“Benecken”) of a Determination of a delegate of the Director of Employment Standards (the “Director”) dated September 29, 1998.

The Determination was issued following a complaint by Benecken that his former employer, Golden Gate Motel Ltd. (“Golden Gate”), had not complied with the minimum wage and overtime requirements of the *Act*. The Director investigated the complaint. Following the investigation, the Director communicated with Golden Gate and advised them that he had calculated an amount owing to Benecken of \$8204.09 and made a demand for that amount. After some further communication between Golden Gate and the Director, Golden Gate paid the amount of \$8204.09 to the Director and that amount has been placed in trust with the Director pending this appeal. Benecken disagreed with the amount, asserting it should be higher, and asked a Determination be issued confirming the amount paid and stating the reasons for reaching that conclusion. The Director has complied.

**ISSUE TO BE DECIDED**

The issue raised by the appeal is whether the appellant has met the burden of persuading the Tribunal that any or all of the Determinations ought to be varied or cancelled because the Director erred in fact or in law in reaching the conclusions upon which the Determination is based. The nature of that burden, in the circumstances of this case, will be discussed below.

Before considering the appeal, a preliminary matter needs to be addressed. At the commencement of the hearing, Mr. Ewan, representing Golden Gate, indicated he wished to argue the conclusion of the Director that Benecken was an employee for the purposes of the *Act* and not a “manager” as that term is defined in Section 1 of the *Regulations*. The Determination states:

The Employer [Golden Gate] acknowledges the Employer/Employee relationship.

Golden Gate has not appealed any aspect of the Determination. I advised Mr. Ewan at the hearing that he faced two hurdles in seeking to raise the employment status of Benecken under the *Act*. The first was that his client had not appealed the Determination; and second, the Tribunal had extensively analyzed the circumstances of motel managers in the context of the definitions of employee and manager found in the *Act* and *Regulations*. Mr. Ewan did not press the issue, but it is important to convey why the Tribunal would not allow the appeal to be expanded in the manner sought by Mr. Ewan.

First, the *Act* contemplates the Director, who is given broad investigative powers and discretion under the comprehensive complaint procedure found in Part 10, will be the first level of authority in administering applications for relief under the *Act*. The Tribunal is given an appellate authority to address disagreements arising from the first level of authority. In this case, there was no dispute during the investigative stage about the employment status of Benecken under the *Act*. In a sense, Mr. Ewan is asking me to exercise an originating authority.

That leads to the second concern. While the authority of an adjudicator in Sections 108 and 109 is similar to those of the Director in Sections 84 and 85 there are practical, and possibly jurisdiction, limitations on the scope of that authority. The impartiality of the Tribunal in considering an appeal could be compromised by a requirement to adopt the more adversarial role of seeking out evidence and ensuring compliance with the *Act*. I doubt the legislature, when it established an independent tribunal to consider appeals from determinations of the Director, intended the Tribunal to take as interventionist and investigatory a role as that required of the Director.

Third, the objects and purposes of the *Act* contemplate that appeals shall be dealt with in an expeditious manner. Section 2(d) states:

2. *The purposes and objects of this Act are to*

(d) *provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*

That objective is partially realized in Section 112, which establishes the time limits for appeals. This situation has arisen considerably outside those time limits.

Finally, there is an issue of natural justice involved. The matter raised by Mr. Ewan is not one that arises naturally from existing areas of appeal. It is a completely new matter. There is no indication that the Director is aware that Golden Gate now seeks to take issue with the employment status of Benecken. Consequently, the Director has been denied an opportunity either to investigate that matter or to make submissions on the issue.

I will now address the appeal.

## **FACTS**

There are not many facts in dispute.

Golden Gate is a motel consisting of 38 units located in Golden, B.C. and is owned by George and Gus Poulos, who built it in 1973. Benecken, together with his wife Waltraud, were hired as of February 1, 1996 to manage the motel. Mrs. Benecken terminated her employment on May 31, 1997 and Benecken was terminated from his employment on November 30, 1997.

Their duties were typical of motel managers with one exception. Shortly after he and his wife assumed their duties at the motel, Benecken was visited by a representative of the B.C. Automobile Association. That Association, among other things, rates participating hotels, motels and restaurants for inclusion in Guide Books that are available to members of the Association. The Association has established standards that must be met and maintained by participating hotels and motels in order to be included in the book or identified with a certain rating. The Association representative was, according to Benecken, less than complimentary about aspects of the motel and “recommended” changes and renovations to the rooms, particularly the bathrooms.

This information was conveyed to the owners of the motel and Benecken was authorized to renovate the bathrooms. It is unclear from the evidence when the renovations started, but the parties seem to be in general agreement that the renovations were carried out during 8 months in 1996 and 1997. It is also generally agreed that the renovations, with the exception of work done in June, 1997, were carried out during what was described as the “low” season for the motel, from about mid October to the end of May. Benecken was assisted at different times during the renovation by two helpers. The second helper, Nick Lalayannis, is a nephew of Mr. Poulos and was paid for 886 hours of work on 23 bathrooms over a period of approximately five months, February to June, in 1997.

No record of hours worked were kept by either Golden Gate or Benecken. After reviewing all the available information, the Director applied the reasoning and conclusions of the Tribunal in *Erica Nan Bibby*, BC EST #D493/97, and decided that Benecken worked 12 hours a day during peak periods for the motel, June to September, 10 hours a day during October and 8 hours a day during the low months, November to May. The Director also concluded that Benecken worked 7 days a week during his employment.

## **ANALYSIS**

Benecken says the Director was wrong not to consider that the switchboard at the motel was open 24 hours a day and that he was required to handle 15 to 30 calls a night from Asian and European customers between 12:00 am to 4:00 am. He also says the Director was wrong to apply the reasoning and conclusions from *Bibby* because the employee in that case was not involved in renovating rooms during the low season. Finally, Benecken says the occupancy rate during the low season at the motel was higher than that found by the Tribunal in *Bibby*. He says for these reasons, the hourly requirements of *Bibby* and Benecken were not comparable.

The only witness I heard without an interest in this appeal was Lucy Vollman. Ms. Vollman was working at the motel before Benecken and his wife were hired as managers. During their term as managers, Ms. Vollman was primarily responsible for doing the laundry. In addition, she performed housekeeping work and relieved in the office when Benecken and his wife wished to take some time off.

Her evidence was noteworthy in two respects. First, she confirmed the probability that for 5 days in each week that the renovations were taking place Benecken worked more than 8 hours a day. Second, that Benecken did not work 7 days a week for the last 4 or 5 months of his employment, but was regularly absent on 2 or 3 days of each week for periods of time varying from 3 to 8 hours.

The burden is on Benecken in this case. Meeting that burden requires him to do more than simply establish factual discrepancies that may affect one area of the Determination. I accept there is some evidence suggesting Benecken worked longer than 8 hours a day during the low season, at least while the renovations were taking place. Equally, I accept there is some evidence suggesting he worked less than 12 hours a day, 7 days a week during the peak season. The real question is not whether I accept those facts, but whether either of those facts establishes conclusively that the Determination is wrong in its conclusion and must be varied or cancelled. On this question, I adopt the approach taken by the Tribunal in *Mykonos Taverna operating as the Achillion Restaurant*, BC EST #D576/98:

After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving “efficient” resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and

reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker's Pub and Grill*, BC EST #D511/98).  
(pages 6-7)

Benecken has not met the burden on him in this case. While he may argue that it is clear he worked some hours that have not been included in the calculation made by the Director, Golden Gate can argue it is equally clear he has not worked some hours that have been included in the calculation. In the final analysis, I cannot say the Determination has been shown to be manifestly unfair or that there was no rational basis for its conclusion.

**ORDER**

Pursuant to Section 112 of the *Act*, I order the Determination dated September 29, 1998 be confirmed.

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**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**