

An appeal

- by -

427881 B.C. Ltd. operating as Sportsman Motel
(“Sportsman”)

- 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: David B. Stevenson

FILE No.: 2001/894

DATE OF HEARING: April 15, 2002 and May 2, 2002

DATE OF DECISION: May 24, 2002

DECISION

APPEARANCES:

on behalf of 427881 B.C. Ltd.	Glen Ewan, Esq.
on behalf of the individuals	John Zimmer, Esq.
on behalf of the Director	Joe LeBlanc

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by 428771 B.C. Ltd. operating as Sportsman Motel (“428771 B.C. Ltd.”) of a Determination that was issued on December 13, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that 428771 B.C. Ltd. had contravened provisions of the *Act* in respect of the employment of Debbie Gleaves (“Mrs. Gleaves”) and Barry Gleaves (“Mr. Gleaves”) and ordered 428771 B.C. Ltd. to cease contravening and to comply with the *Act* and to pay an amount of \$50,559.17.

The appeal submitted to the tribunal raised four grounds:

1. The time period covered by the Determination was both statute barred and too lengthy under the *Act*;
2. The Determination wrongly concluded that the individuals were employees for the purposes of the *Act* and not managers;
3. The Determination improperly relied on preliminary findings of the BC Human Rights Tribunal without noting that Mr. Gleaves Human Rights complaint has been referred to a hearing; and
4. The Determination wrongly concluded that the hours of work of the individuals exceeded eight hours in a day.

At the hearing of the appeal, the evidence and argument addressed only the second and fourth issues - whether the Determination correctly concluded the individuals were employees for the purposes of the *Act* and whether the conclusions on the individuals’ hours of work were correct. The other matters are considered abandoned.

ISSUE

The issue in this appeal is whether 428771 B.C. Ltd. has shown the Determination was wrong in a manner that justifies the intervention of the Tribunal under Section 115 of the *Act* to cancel or vary the Determination, or to refer it back to the Director. The specific matters raised in this appeal are outlined above.

THE FACTS

428771 B.C. Ltd. Owns and operates an 81 unit motel in Golden, BC. Mr. and Mrs. Gleaves worked from September 28, 1999 to January 23, 2001 as Managers of the motel. It is fair to say they were hired as a husband/wife team, not an uncommon arrangement in the travel accommodation industry. A management agreement, dated September 28, 1999, was entered between Lahmber S. Gill and Mohinder Gill, who are referred to in the agreement as the “Owners”, and Mr. and Mrs. Gleaves, who are referred to as the “Managers”. The agreement, among other things, set out the responsibilities of the Managers and their salary. A replacement agreement was signed by the same parties on October 16, 2000, but it does not figure directly in this proceeding as Mr. and Mrs. Gleaves chose not to file any claim under the *Act* in respect of that agreement. The Determination was limited to the period covered by the first contract, September 28, 1999 to October 15, 2000.

Mr. and Mrs. Gleaves had a residence in the motel, just behind the front desk. The Owners also resided in the motel, occupying a suite on the third floor of the motel.

The material on file indicates the complaint was filed within the time limits in Section 74 of the *Act* and the Determination does not exceed the period, found in Section 80(1) of the *Act*, for which wages may be found owing.

The Determination found that Mr. and Mrs. Gleaves were not managers for the purposes of the *Act*. ‘Manager is defined in the Employment Standards Regulations as:

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

The Determination says there was no evidence at all that they were employed in an ‘executive capacity’. There is no dispute about that conclusion. The issue in dispute was whether their ‘primary employment duties consisted of supervising and directing other employees’. The Determination identified several facts and factors in examining that issue, including:

- provisions of the management agreement, which indicated Mr. and Mrs. Gleaves were to operate the motel under the supervision and direction of the owners and that Mr. and Mrs. Gleaves were required to obtain approval on some key matters dealing with the running of the motel, such as prohibitions against signing any contracts on behalf of the owners without consultation and approval, against placing the motel in any advertisements without approval and against making any pledges or donations on behalf of the motel without approval;
- the management agreement did not give Mr. and Mrs. Gleaves authority to hire or fire employees and no evidence was provided during the investigation to support the assertion made by 428771 B.C. Ltd. that they were “free to hire and fire”;
- there was little room for ‘independent discretion’ in scheduling housekeeping staff; and
- the management agreement allowed for supervision of the housekeeping staff in conjunction with the responsibility of Mr. and Mrs. Gleaves to inspect the rooms to ensure they are properly cleaned.

There was evidence given at the hearing by Mr. Gill that Mr. and/or Mrs. Gleaves had hired and fired several employees. Mr. Gleaves denied independently hiring or firing any employees. He said the process for hiring employees was that Mr. Gill would place an ad in the paper and tell him how many

housekeepers were needed. Mr. Gleaves would do the interviewing and recommend certain of the applicants to Mr. Gill. If Mr. Gill had no objection, those were hired. He recalled only one employee that was ever fired and that was done in consultation with Mr. Gill.

In his evidence, Mr. Gill described periods of time being away from the motel during the period Mr. and Mrs. Gleaves were employed there as Managers, which included a 3 to 4 week period around Christmas, 1999 and 1 or 2 trips a month to Vancouver that lasted between 3 days and a week. He said that because of the amount of time he was away, he placed considerable trust and responsibility in Mr. and Mrs. Gleaves to run the motel. He said they could hire and fire, but was not particularly clear about who had been hired or fired by Mr. and/or Mrs. Gleaves and when that had occurred. Frequently, Mr. Gill's inability to provide detail was attributed by him to his frequent absences from the motel. In those circumstances, some documentary support for his evidence might have been helpful. I noted that the payroll was kept by, and Records of Employment for individuals whose employment at the motel had ceased were prepared by, the bookkeeper for 428771 B.C. Ltd., not by Mr. or Mrs. Gleaves. It might also have been helpful to have heard from that person how and by whom they were instructed on those matters, but I did not. It was apparent from the evidence I heard that the employee information provided with the appeal was not a particularly reliable source of information on this issue of fact.

There was a period in January, 2000 when Mr. and Mrs. Gleaves spent some time managing another motel. The Determination noted that this period of time was excluded from the calculations.

On or about November 4, 1999, Mr. and Mrs. Gleaves were joined at the motel by John Duguay, a friend of Mrs. Gleaves. He stayed at the motel until January 23, 2001, the date Mr. and Mrs. Gleaves were terminated. He was never employed by 428771 B.C. Ltd. It was his evidence that he performed several tasks at the motel, including cutting the grass, doing a lot of the snow removal, greeting tours buses and showing the tour guests to their rooms, adapting a computer program to the daily ledger, reservation, invoicing and billing functions, setting up a web site for the motel and assisting in general maintenance at the motel. As well, he said he gave Mr. Gill assistance in learning basic computer skills related to the program he had adapted, sharpened the blades on the mower and helped move furniture when some rooms were being painted.

Gurdip Shergill gave evidence with the aid of an interpreter. He said he was asked by Mr. Gill to do all the outside maintenance work at the motel and that he did so from September 1999 to October 2000 and was paid \$25,000.00 for doing that. Mr. Shergill said he removed snow, cut the grass, swept outside the office, changed light bulbs, changed washers on taps, added salt to the water softener, fixed the tractor and painted rooms. He says he worked anywhere from 1 or 2 hours to eight hours a day during the period described. He kept no daily record of the time he worked. He says the reason he did not keep track of the hours was because he and Mr. Gill had an agreement that he would do all the things he listed and he would be paid. He inferred there was a written agreement for the work he did, but none was produced. He says he was paid for all of his work in a single cheque which he received in December 2000. No copy of the cancelled cheque was produced or identified.

Mr. Gleaves testified that he performed the maintenance work at the motel, including removing the snow from the walks around the motel and salting them, cutting the grass, changing light bulbs, adding salt to the water softener. He cleaned the eaves and soffits, repaired the exterior wall siding, repaired the sign, painted and did other and various minor maintenance work at the motel. He indicated the snow removal in the parking areas was done by an outside contractor. He also said he did some work in the office, did research for items that might actually, or potentially, be required for the motel and assisted in general office tasks, such as answering the phone, taking reservations, inputting information into the computer.

At one point in his evidence, Mr. Duguay was asked if Mr. Gleaves was in the office after January, 2000 and he replied, “constantly”.

Mrs. Gleaves testified that her primary responsibility was to look after the office duties. She said she did no maintenance work.

I heard evidence from David Kusman, one of the managers of Mary’s Motel, a comparably sized motel in Golden. Mr. Kusman testified about the number of hours of work required by he and his wife during various times of the year. He also noted some differences between the motel he managed and the Sportsman, notably that the former had an indoor and outdoor pool and two hot tubs, while the latter (at the relevant time) had none of those and that the latter has more occupancy from bus tour groups. The point was that pool and hot tub maintenance added to the amount of time worked in a day that would not be there if there was no pool or hot tub and tour bus groups were ‘easier’ to handle than individual guests.

I have only commented on a small portion of the evidence I heard. I have given consideration to all of it.

ARGUMENT AND ANALYSIS

As the appellant, 428771 B.C. Ltd. bears the burden of persuading the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact, see *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96).

428771 B.C. Ltd. has not satisfied that burden on the issue of whether there was an error in the finding that Mr. and Mrs. Gleaves were not managers for the purposes of the *Act*. The Determination accurately sets out the analytical framework against which the facts in any particular case are to be tested. None of the evidence has satisfied me that Mr. and Mrs. Gleaves exercised the degree of authority and independence typical of a manager under the *Act*. More specifically, there is insufficient evidence demonstrating that the primary employment duties of Mr. or Mrs. Gleaves either was to supervise and direct other employees. In that respect, the following statement in *429485 B.C. Limited., operating Amelia Street Bistro*, BC EST #D479/97 is both relevant and applicable to this appeal:

Any conclusion about whether the primary employment duties of a person consists of supervising and directing employees depends upon a total characterization of that person’s duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person’s other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant that the person is described by the employer or identified by other employees as a “manager”. That would be putting form over substance. The person’s status will be determined by law, not by the title chosen by the employer or the perception of some third party.

The Determination considered the responsibilities of Mr. and Mrs. Gleaves in the context of that reference and, in my view, accurately reflected the key elements of the evidence in its conclusion.

Much attention was directed at whether Mr. and Mrs. Gleaves hired and fired employees, but what must be kept in perspective is that such authority, even if it had been clearly shown to exist in this case, is not, of itself, determinative of the individual’s status under the *Act*. As stated in *Amelia Street Bistro*, it is the ‘total characterization’ of the individual’s duties that will decide that question of whether an individual is a manager for the purposes of the *Act* and in all cases it is a matter of degree. Simply examining one or

two aspects of the duties and responsibilities of the employee is not necessarily determinative. It is a broader examination, as described in the following comment from Amelia Street Bistro:

Making final judgements about such matters as hiring, firing, disciplining, authorizing overtime, time off, 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 responsibility and discretion about all of these matters. It is a question of degree, keeping in mind that the object of the exercise is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager.

(emphasis added)

There is, simply put, no sufficient factual basis to allow a conclusion that Mr. and/or Mrs. Gleaves were exercising a power and authority typical of a manager or to disturb the finding of the Director on that issue.

I turn to the other issue raised in this appeal, whether the Determination wrongly concluded Mr. and Mrs. Gleaves worked more than eight hours in any day. I will commence by making some general comments about the evidence. I am not inclined to give much weight to the evidence of Mr. Gill or Mr. Gleaves in this area. The evidence of Mr. Gill was much too vague to be of assistance in deciding this issue.

I found the evidence of Mr. Gleaves to be sometimes exaggerated, sometimes inconsistent and in some areas at odds with other evidence that I found much more compelling. The evidence of Mr. Kusman, Mrs. Gleaves and Mr. Duguay was helpful. None of these witnesses' evidence was seriously challenged, either in cross-examination or in the evidence of other witnesses and their evidence was, generally speaking, both reasonable and within the range of acceptable probabilities.

I do not accept much of Mr. Shergill's evidence. Mr. Gill struck me as having more business sense than exhibited in the arrangement described by Mr. Shergill, where Mr. Shergill received a \$25,000.00 lump sum payment in December, 2000 for work done between September, 1999 to October, 2000 with no accounting of the work that was done and no apparent record of the agreement. I am also concerned that this information about the work he performed, which infers that Mr. Gleaves did not perform it, was not provided during the investigation of the complaints, but I need not specifically address that concern in light of the weight I give to that evidence.

Based on an examination of the evidence, I find that 428771 B.C. Ltd. has not, for the most part, met its burden in respect of Mrs. Gleaves. I accept the validity of the approach taken by the investigating officer, who considered the obligations on Mr. and Mrs. Gleaves under the management agreement, the office hours maintained by Mr. and Mrs. Gleaves, the monthly sales summaries, credit and debit summaries, daily ledgers, payroll records, guest registrations, transaction receipts and the monthly room rental figures, and applied that information against the analysis applied in *Erica Nan Bibby*, BC EST # D493/97 and *Northland Properties Ltd.*, BC EST # D004/98. Some adjustment must, however, be made in respect of Mrs. Gleaves hours. She conceded that she was away from the motel for two periods of time, one in December, 1999 and the other in June, 2000. The period in December, 1999 would have no impact on the daily hours of work calculations done by the Director, but might impact the weekly overtime calculations and the application of Section 36 of the *Act*, which states:

36. (1) *An employer must either*
- (a) *ensure that an employee has at least 32 consecutive hours free from work each week, or*

- (b) *pay an employee double the regular wage for time worked by the employee during the 32 hour period the employee would otherwise be entitled to have free from work.*
- (2) *An employer must ensure that each employee has at least 8 consecutive hours free from work between each shift worked.*
- (3) *Subsection (2) does not apply in an emergency.*

The period in June, 2000 would affect both the daily and weekly hours of work calculations and may also impact the application of Section 36. She was also away from the motel for a period around November 4, 1999, although arguably she was performing work for part of that time. I will leave that question to be decided by the Director. I would add the following in respect of Mrs. Gleaves. While the evidence indicates Mr. Duguay assisted her with her administrative responsibilities, it did not indicate this assistance affected the amount of work she was required to perform or the probable hours of work she performed.

I find the burden has been satisfied in respect of the calculation of hours worked by Mr. Gleaves and a substantial adjustment is required in the amount found owing in respect of his employment. What must be appreciated when reviewing the conclusions reached in decisions such as *Erica Nan Bibby*, supra, *Northland Properties Ltd.*, supra and *Heinz Benecken*, BC EST # D101/99, is that those decisions are all based on a reasoned and reasonable assessment of specific work performed by the claimant applied to a practical, informed and common sense analysis of the demands of the work environment. In all of the above cases, the work performed by the claimants is identified and tested against how many hours the work was likely to require.

A number of things trouble me about the conclusion reached in the Determination concerning Mr. Gleaves. First, the evidence before me indicates that Mr. Duguay was performing a substantial amount of the routine maintenance work at the motel by December, 1999 and the investigating officer does not appear to have been informed of that. Also, Mrs. Gleaves' evidence indicated a division of responsibility between her and Mr. Gleaves, where Mr. Gleaves was to be performing all the maintenance work and she would be doing the administrative work with assistance from him and both would work on the front desk when required. Without Mr. Gleaves performing all the routine maintenance work, the assumptions concerning hours he might typically have worked in a day are changed. Second, by the end of January, 2000, Mr. Gleaves was not living in the residence behind the office, so it would seem unlikely that he would be getting disturbed by any after-hours demands. If he was, it was never adequately explained to me how that occurred. Once more, the investigating officer does not appear to have been informed of that circumstance. Third, Mr. Duguay said that Mr. Gleaves, notwithstanding he had moved from the residence, was 'constantly' in the office area. Even accepting that comment as hyperbole, the implication is that Mr. Gleaves spent much time in and around the office. That state of affairs effectively left three people doing the office work that was required. I do not accept, and the Tribunal has never accepted in these types of cases, that attending the front desk is a full time demand. The demand at the front desk fluctuates depending on the time of day with little demand from 11:00 am to 3:00 pm. Usually that period of time will be filled by doing the administrative tasks required. Based on the office duties described by Mrs. Gleaves and based on her evidence, as well as the material on file, that she did most of the administrative work, with assistance from Mr. Duguay, I do not find there was much administrative work for Mr. Gleaves beyond providing some additional assistance and doing research. I have considered Mr. Gleaves evidence that he was 'constantly' researching things during the day, but I do not accept that function can be consistently used to typically fill in the void in the work he performed during the day and the number of hours that work would require. Fourth, the evidence suggests that Mr. and Mrs. Gleaves

had little difficulty filling in for the other during their respective absences to manage Mary's Motel or, in Mrs. Gleaves case, to attend to personal matters away from the motel.

The evidence does not, overall, support a conclusion that Mr. Gleaves was required to work a minimum of eight hours a day on office coverage alone. I find that he spent much of his time in the office 'on call' in his residence. No argument was made, and I would not in any event have accepted, that even though Mr. Gleaves had moved out of the residence behind the front desk, that location should not continue to be considered his 'residence' for the purposes of applying the definition of "work" in Section 1 of the Act.

The analysis in *Erica Nan Bibby*, supra, *Northland Properties Ltd.*, supra does not apply to Mr. Gleaves once Mr. Duguay became involved in assisting in the running of the motel. I find that, except for the period September 28, 1999 to November 30, 1999, when Mr. Duguay was not yet involved in assisting Mr. Gleaves with his maintenance responsibilities, and the months of June, July, August and September, 2000, where the volume of motel 'traffic' during those months and the work required justifies a conclusion that Mr. Gleaves should be compensated on the basis of having worked 10 hours in a day, Mr. Gleaves did not work more than 8 hours in a day during the period covered by the Determination while Mrs. Gleaves was also performing her responsibilities at the motel. If she was absent, it is probable, and I find, that Mr. Gleaves was required to put in more hours of work. I shall leave the conclusion about how many hours that might be to the Director. I adjust the conclusions reached in the Determination the following:

September 28, 1999 to November 30, 1999	10 hours
December 1, 1999 to May 31, 2000	8 hours (excluding the period of time worked at Mary's Motel and excepting the period Mrs. Gleaves was away)
June 1, 2000 to September, 2000	10 hours (except during the period Mrs. Gleaves was away)
October 1, 2000 to October 15, 2000	8 hours

The Determination should be re-calculated based on the above conclusions.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 13, 2001 be referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal