Employment Standards TRIBUNAL

An appeal

\- by -

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

\- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: W. Grant Sheard

FILE No.: 2003A/126

DATE OF DECISION: July 22, 2003

DECISION

OVERVIEW

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

ISSUES

1. Did the Delegate err in finding that the complainant was a "manager" within the meaning of the *Employment Standards Act* and Regulation?

2. Did the Director fail to observe the principles of natural justice in levying an administrative penalty without affording the Appellant an opportunity to make submissions on the issue and in issuing a Determination without having given the Appellant the opportunity to cross-examine witnesses?

ARGUMENT

The Appellant's Position

In a written appeal form dated April 30, 2003 and filed with the Tribunal May 1, 2003 the Appellant says that the Director erred in law by finding that the complainant was not a "manager" within the meaning of the *Employment Standards Act* and in levying an administrative penalty without giving the Employer an opportunity to make submissions in that regard. Further, the Appellant says that the Director failed to observe the principles of natural justice in making the Determination by conducting her own investigation and gathering her own evidence without giving the Employer an opportunity to respond to or cross-examine witnesses and in levying an administrative penalty without giving the opportunity to make submissions. The Appellant seeks to cancel the Determination.

The Respondent's Position

In a written submission dated May 8, 2003 and filed with the Tribunal May 9, 2003 the Respondent Employee maintains that he was not a manager within the meaning of the *Employment Standards Act* and, inferentially, that the Director did adhere to the principles of natural justice in investigating and rendering the Determination. The Respondent says that the Determination ought to be varied to allow the full amount he had claimed in his complaint being $32,733.09.

The Director's Position

In a written submission dated May 21, 2003 filed with the Tribunal May 22, 2003 the Delegate says on behalf of the Director that the Appellant did not give any explanation of the "error in law" as it relates to the definition of manager or as it applies to the Complainant. Further, the Director submits that the Appellant was put on notice that it would face an escalating penalty for any further contraventions of the *Act* or *Regulation* by way of a previous Determination issued against it on September 28, 2001. The Director submits that Section 76 of the *Act* allows for investigations and does not require cross-examination of the parties and their witnesses. The Director notes that Section 77 of the *Act* requires the Director to "make reasonable efforts to give a person under investigation to respond" to all allegations, arguments and testimonies. The Director says that the Appellant was given ample opportunity to respond, including correspondence with the Appellant's legal counsel and the Appellant between December 4, 2002 and the end of March 2003. Further, the Director notes that three of the witnesses that the Appellant asserts it was denied the opportunity to cross-examine were witnesses the Appellant itself had named. For all of these reasons the Director submits the Appellant should not succeed.

THE FACTS

The Appellant operates a motel in the Valemont area. The Respondent was employed as a front desk clerk/"manager" from August 3, 2001 to July 5, 2002 at a rate of pay of $2,750.00 per month. The motel was open for service 24 hours a day, 7 days a week. The Respondent was the only regular full-time front desk clerk at the motel up until the beginning of May 2002. The Respondent resided in the motel in a suite which was an extension of the motel office during his employment. The Respondent entered into a written employment contract with the Appellant on April 12, 2002. This contract clearly refers to the Respondent as a manager for the period August 3, 2001 to February 1, 2002 (a date which had already passed) and thereafter until the agreement is terminated by one week's written notice. The contract provided for various duties for which the Respondent was to be responsible. This contract was before the Delegate at the time of the investigation and addressed by the parties.

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

During the investigation the Appellant made submissions to the Delegate through its legal counsel asserting that the Respondent was a "manager" within the definition of the *Employment Standards Act*. The Appellant asserted that, while the Respondent did have some responsibility to work the front desk, he was primarily charged with operating the motel and his responsibilities included scheduling all employees, including front desk employees, keeping records and providing information to the Appellant so that it could prepare payroll and that the Respondent's employment contract clearly made him responsible for managing nearly all aspects of the operation of the motel. The Appellant asserted that the Respondent was in an executive position responsible for scheduling and supervising all other employees

and that he had financial responsibilities and other management authorities at the motel. In a further written submission, the Appellant asserted through its legal counsel that the Respondent was in charge of scheduling workers to work at the front desk and that he did not work any overtime or, if he did, it was not a requirement of the Appellant nor was it authorized by the Appellant. In a response to the Delegate's demand for Employer records the Appellant said through its legal counsel that "because it was the responsibility of (the Respondent), as manager to schedule front desk coverage and keep those records, my client is having some difficulty to recreate the records (the Respondent) either failed to keep or that he has taken or destroyed." During the investigation the Respondent denied that he had taken or destroyed any such records.

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

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

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

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

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

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

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

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

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

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

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

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

I note that there is an error in the Delegate's calculation and that the total amount payable based on these figures ought to have been $20,019.66.

The Appellant filed its appeal form through legal counsel on May 1, 2003 which form includes a direction to explain the errors in law and failures to observe the principles of natural justice, if such assertions are made. The Director and Respondent then filed written submissions in response to that appeal form. On June 24, 2003 counsel on behalf of the Appellant then wrote to the Tribunal acknowledging advice from the Tribunal that this appeal would be decided based upon written submissions. The Appellant's counsel enquired as to when the Tribunal would require written submissions. The Tribunal wrote back to the Appellant's counsel on June 27, 2003 advising as follows:

> "I note from the file that the submissions from the other parties were sent to you accompanied by a letter dated May 27, 2003 in which you are informed that the deadline for final reply was June 10, 2003. When nothing further was received from you I telephoned on June 11, 2003 and left a message asking if we should be expecting anything more from the Appellant. When I did not hear from you I called again on June 16 and spoke with you. At that time you confirmed to me that the Appellant did not see any need to reply and would not be making a final submission. In view of this sequence of events I was very surprised to receive your latest letter when we require your written submissions.
>
> The matter including all written submissions has now been sent to an adjudicator for decision. The purpose of our letter of June 18, 2003 was simply to inform you of that fact."

ANALYSIS

1. Was the Delegate correct in ruling that the Respondent was not a "manager" as defined by the *Employment Standards Regulation*?

The onus is on the Appellant to establish on the balance of probabilities an error in the finding of the Delegate.

As stated by the Director in its submission on this appeal, the Appellant did not give any explanation of the "error in law" as it relates to the definition of manager or as it applies to the Respondent.

As stated by the Delegate in his Determination, "manager" is defined by Section 1 of the *Employment Standards Regulation* to mean as follows:

a) A person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or

b) A person employed in an executive capacity.

The Delegate made reference to *re British Columbia* (Director of Employment Standards) [1997] BCESTD #503 (QL), BCEST #D479/97 (Crampton, Stevenson and Thornicroft, Adjudicators) in reaching his decision and resolving the issue of primary employment duties of a person asserted to be a manager.

I also note the case of *re Northland Properties Ltd.,* [1998] BCESTD #184 (QL), (27 April 1998) BCEST #D004/98 (Stevenson, Adjudicator). In that case it was found that the onus of proving that a person is excluded from the *Act* lies with the person asserting it. There must be clear evidence justifying the exclusion, because of the consequences to an individual being excluded. Resident managers of two motels were found not to be "managers" for the purpose of the *Act*. The following factors were found to be determinative:

1. The employees were not involved in any key decisions relating to the conduct of the business;
2. No extraordinary or capital expense could be made without head office approval;
3. Repairs had to be approved by head office;
4. The employer had systemized the running of the motels to the extent that the duties of the managers were purely administrative;
5. Little room was given to the managers to exercise independent judgment, and the remaining room for judgment did not relate to decisions made by a person in an executive capacity;
6. No significant time was spent supervising other employees; and
7. The managers power authority were limited by policies imposed by the employer.

I cannot find on a balance that the Appellant has demonstrated anything in the evidence before the Delegate or ruling of the Delegate that he erred in ruling that the Respondent was not a manager. Indeed, in applying the factors numerated in the case *re Northland Properties Ltd.* (supra) I am satisfied that the Delegate was correct in ruling as he did.

2. Did the Director fail to observe the principles of natural justice in levying an administrative penalty without giving the employer an opportunity to make submissions in that regard and in conducting an investigation and gathering evidence without giving the employer an opportunity to respond to or cross examine witnesses?

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

Natural justice may require or consist of many things, but at a bare minimum the parties must be given an opportunity to present evidence, question the evidence of the opposing party litigant and make a submission to the adjudicating body with respect to what it ought to find (see *re Rudowski,* [2000] BCESTD #476 (QL), (9 November 2000), BCEST #D485/00 (Love, Adj.); reconsideration of BCEST

#D316/00.). In this case there is evidence that the parties were given an opportunity to present their evidence, question the evidence provided by the Respondent, and make a submission to the Delegate with respect to the issues raised by the complainant. There is evidence that the Appellant had previously been cautioned in a prior Determination that a further contravention of the *Act* would result in a monetary penalty.

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

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

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

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

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

ORDER

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

W. Grant Sheard
Adjudicator
Employment Standards Tribunal