

An appeal

- by -

Golden Heights Estate Inn & Restaurant  
("Golden Heights" or "Employer")

- 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:** Paul E. Love

**FILE No.:** 2003A/137

**DATE OF DECISION:** July 29, 2003

## DECISION

### OVERVIEW

This is an appeal by an employer, Golden Heights Inn and Restaurant Ltd. (“Golden Heights” or “Employer”), from a Determination dated March 31, 2003 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). The principals of the Employer placed the business of Golden Heights into the hands of a prospective purchaser prior to the completion of a sale of the business. At all material times, the Employees remained the Employees of Golden Heights. The purchase did not complete, and a principal shareholder and officer, Graeme Wilson, re-took possession and operation of the business. The business ultimately closed in December of 2002. The Delegate found that eight employees were owed \$10,815.45. Some of the amounts owing to the Employees arose as a result of cheques payable to the employees which were dishonoured by the drawer’s bank.

The Employer advanced grounds of appeal related to new evidence, errors of law, and natural justice. None of the “new evidence” offered by the Employer advanced the Employer’s case on appeal. I did not admit or consider information provided by the Employer, which was inadmissible by virtue of section 87(1) of the *Legal Professions Act, S.B.C. 1998, c. 9*. The Employer alleged that three employees quit, and were not entitled to compensation for length of service. The Employer’s “bare allegation” of a quit, did not demonstrate that the Delegate erred in finding an entitlement for compensation for length of service. The Employer alleged an error with regard to the pay rate for an Employee, but this allegation was without evidentiary foundation. With the exception of cash advances to two employees, which the Employer did not disclose to the Delegate during the course of the investigation, the balance of the allegations of error were without foundation. I confirmed the Determination and referred to the Delegate for calculation the wage claims of Dean Engen and Eileen Frederickson, which shall be adjusted to reflect credit for cash received by each employee in the amount of \$300 and \$525 respectively.

### ISSUE:

Did the Employee establish the Delegate erred in the Determination with regard to amounts determined to be owing to Employees for wages, and compensation for length of service?

### FACTS

I decided this case, on the basis of written submissions, after considering the notice of appeal filed by the Employee, the written submissions of the Employer and Employees, and reading the Determination and the record supplied by the Delegate. The Delegate conducted an investigation and issued the Determination and written reasons on April 4, 2003.

The material facts in this matter are very straightforward. Golden Heights Estate Inn and Restaurant Ltd. (“Golden Heights”) operated a restaurant and inn in Grand Forks, British Columbia. The directors and officers of that company were Graeme Wilson and Sonia Wilson. Graeme Wilson and Sonia Wilson, also the shareholders of Golden Heights, entered into an arrangement, dated for reference September 16, 2002, for 653702 B.C. Ltd. to purchase the shares of Golden Heights. The sole director and officer of 653702 B.C. Ltd. was B.L. B.L. was placed into the general manager position of the restaurant and effectively

operated the restaurant from August 1, 2002 to October 30, 2002. Graeme Wilson and Sonia Wilson did not receive payment for the sale of the business and the transaction did not complete. Mr. Wilson removed B.L. from the operation of Golden Heights on or about October 30, 2002. Golden Heights ceased operations in December of 2002, and a receiver has been appointed. Mr. Wilson makes certain allegations against B.L. relating to the running of the business, which are immaterial to the disposition of this appeal, and may well be the subject of other judicial proceedings.

The Delegate determined that eight employees, Dean Engen, Eileen Frederickson, Anna Lactin, Alisa Mehmam, Laurie Nichols, Darlene Oliver, Lorri Lee Pereverzoff, and Jesse Ritco were entitled to wages. Part of the evidence was NSF cheques issued by Golden Heights and signed by B.L. The amount found to be owing by the Delegate was the sum of \$10,815.45, consisting of wages in the amount of \$10,621.10 and interest in the amount of \$194.35. The Director did not impose an administrative penalty as Golden Heights was no longer operating and was placed into receivership.

The Delegate found that the following employees were entitled to the following amounts:

**Alisa Mehmam**

Wages	\$524.48
Interest	<u>\$10.60</u>
Total owing	\$535.08

**Laurie Nichols**

Wages	\$260.00
Compensation for length of service	\$340.00
Vacation pay	\$24.00
Interest	<u>\$11.62</u>
Total owing	\$635.62

**Darlene Oliver**

Wages	\$450.44
Interest	<u>\$7.94</u>
Total owing	\$458.38

**Lori Lee Pereverzoff**

Wages	\$280.00
Statutory Holiday pay	183.46
Compensation for length of service	\$287.50
Vacation pay	\$192.84
Interest	<u>\$17.57</u>
Total owing	\$961.37

**Jesse Ritco**

Wages	\$2284.69
Compensation for length of service	\$358.13
vacation pay	\$14.33
Interest	<u>\$48.81</u>
Total	\$2705.96

**Dean Engen**

Wages	\$2310.00
Vacation pay	\$134.00
Interest	<u>\$43.39</u>
Total	\$2487.39

**Eileen Frederickson**

Wages	\$1122.72
Vacation pay	\$44.91
Interest	<u>\$20.73</u>
Total	\$1188.36

**Anna Lactin**

Wages	\$1740.00
Vacation pay	\$69.60
Interest	<u>\$33.69</u>
Total	\$1843.29

**Employer's Submission:**

Mr. Wilson alleges that Golden Heights is not responsible for wages during the operation of the restaurant by B.L. He further alleges fraud by B.L. in the operation of the restaurant. He alleges that he paid two employees, Dean Engen and Eileen Frederickson, in cash in the amount of \$300 and \$525 respectively, and that the Determination in respect of those employees should be reduced for the cash received.

The Employer alleges under the head of error in law:

section 63 - employees did quit and have had a change statement. I did not set up the targeted wage subsidy, I was phoned by Community Futures and offered the money to keep the business open.

The Employer alleges under the head of "failure to observe the principles of natural justice":

All staff quit, we needed them to keep operation open & now all staff are agreeing with us

The Employer alleges under the head of new evidence that:

Fraud charges have been layed, see attached: news clipping  
- the Director accepted the verbal statement of a now jailed fraud  
- target wage subsidy was offered to us by phone call from community futures, "saying, we could use the money that [B.L.] applied for to run our business to keep things going"

The Employer seeks to have the Determination changed or varied:

adjust amounts owing to staff who were paid cash (see attached receipts)

Anna Lactin told me she was paid 8.00 p.Hr. and should not receive 15.00 p.Hr

The Employer checked the box on the appeal form requesting other relief. Beside this section of the appeal form the Employer notes:

The previous staff are mostly sorry, and have apologized to us, saying it took [B.L.] being put in jail, charged with fraud, they told us, the staff were listening to [B.L.], because he told them we were lying.

The Employer's note, however, does not invite the Tribunal to adjust, or alter any portion of the Determination. In reading the Employer's note it may be that the Employer is inviting the Tribunal to find B.L. rather than the Employer responsible for wages incurred during B.L.'s operation of Golden Heights. I have addressed this point under the heading of "Who is the Employer?" in the Analysis portion of the Decision.

### **Employee's Submission:**

The Employee, Dean Engen submits that he received the sum of \$300 in cash from Mr. Wilson, but is otherwise entitled to wages determined by the Delegate. Eileen Frederickson confirmed that she received the sum of \$525.00 from Mr. Wilson.

The Employee, Alisa Mehmam concurs with the amounts set out in the Determination. Lori Lee Preverzoff states that she was fired by Mr. Wilson, and is entitled to the amounts set out in the Determination. The Employee, Jesse Ritco, submits that he was fired by Mr. Wilson, and that he is entitled to the amounts set out in the Determination. Ann Lactin, submits that she was hired by B.L., at a wage of \$15.00, and that B.L. represented himself as the owner of Golden Heights. Ms. Lactin had no contact with Mr. Wilson, but was advised by a co-worker that Mr. Wilson had instructed her not to return to work, or have contact with him. Ms. Lactin denies that she ever admitted to Mr. Wilson that she earned \$8.0 per hour as he alleges. Darlene Oliver states that she did not return to work as there was "no patronage and no money for wages. I did not come back as I did not want any more moneies (sic) owed to me. I would appreciate recieveing (sic) the wages that are owed".

Laurie Nichols submits that when Graeme Wilson took over operations of the restaurant on October 31, 2002 and told her she could either leave Golden Heights, or accept a demotion from head waitress to waitress and a two dollar per hour pay cut. She left the business on October 31, 2002 thinking that she was terminated because B.L. was terminated. Ms. Nichols also relates verbal abuse of her by Graeme and Sonia Wilson, some of which occurred in public in front of customers, and some of which occurred in a private meeting on October 31, 2002.

### **Delegate's Argument:**

The Delegate provided the record, and a submission dated May 29, 2003. The Delegate denies that the Director failed to observe the principles of natural justice. The Delegate says that the Wilsons were fully informed of the allegations against Golden Heights, the evidence, and were provided opportunities to respond to the evidence. The Delegate says that for the period December 28, 2002 to May 7, 2002 the Wilsons had re-located and could not be located.

The Delegate submits that there is no error in law with regard to her Determination that Laurie Nichols, Lori Lee Pereverzoff, Jesse Ritco were entitled to compensation for length of service. The Delegate says

that she correctly placed the burden of proof on the Employer. The Delegate states that the evidence did not show a voluntary quit by any employees.

With regard to Golden Heights' allegation of new evidence, the Delegate says that she has now considered the cash payments, and attached calculations. The Delegate says that new evidence related to "fraud charges laid against B.L." is immaterial to whether the employees were owed wages by Golden Heights. The Delegate states that she did not err in finding Lactin's rate of pay was \$15.00 per hour rather than \$8.00 per hour as alleged by Golden Heights, as the documentary evidence in the pay stubs, and Ms. Lactin's evidence supported a pay rate of \$15.00 per hour.

## **ANALYSIS**

In an appeal of a Determination, the burden rests with the appellant, in this case the Employer, to demonstrate an error such that I should vary or cancel the Determination.

Section 112 (1)(c) of the *Act* provides for an appeal on grounds that:

- (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.

The Employer has filed an appeal alleging all three grounds of appeal. Given the minimal development of any cogent appeal points or argument by the Employer, it is my view that there is no substance to the appeal filed by the Employer. There was minimal development of any thoughtful submission on any of the appeal points "checked" on the notice of appeal. I note that the Employer does not dispute the calculation of the amounts found to be owing by the Delegate with the exception that the amounts to Dean Engen and Eileen Frederickson should be reduced for cash paid, the amount to Anna Lactin should be reduced and re-calculated based on a lower hourly rate, and the amounts to Laurie Nichols, Lori Lee Pereverzoff and Jesse Ritco should be reduced by eliminating compensation for length of service. I have dealt with these appeal points below.

I note that the Employer has not raised any ground of appeal which relates to the entitlement of Darlene Oliver or Alisa Mehmäl to wages. The Delegate determined that claim, in part, on the evidence of an NSF cheque(s) to Ms. Oliver and two NSF cheques to Ms. Mehmäl. The appeals of the Determination in respect to the claims of Ms. Oliver and Ms. Mehmäl are dismissed.

The Employer raises a new evidence argument, which I will deal with below.

### **New Evidence:**

The Employer makes two points under new evidence which are set out in the argument portion of this Decision. It is difficult, however, to see what relevance these points have to the findings made by the Delegate in the Determination.

The Employer alleges that Community Futures offered to it "money applied for by B.L." to keep its business running. There is no information presented by Community Futures to this effect in the Employer's appeal submission. If such an offer were made, it does not appear to have been taken up by

the Employer. This allegation might have some slight bearing on the issue of “dismissal of the employees” or “whether the employees quit”, in respect to the appeals related to amounts owing to Laurie Nichols, Lori Lee Pereverzoff, and Jesse Ritco for compensation for length of service. In order to consider the evidence, however, it must be “credible and trustworthy”. The submission that the Employer had access to funds and could have remained in business seems to be based on speculation as well as “double hearsay”. I am not prepared to place any weight on such an allegation, particularly when there is uncontradicted evidence of

- (a) NSF paycheques;
- (b) that certain employees had not been paid wages for a substantial period of time;
- (c) a business dispute between B.L. and Mr. Wilson and a “failed sale” of a business;
- (d) a business failure as evidenced by closure of the business, foreclosure proceedings in respect of the Inn property, and the appointment of a receiver.

The speculation that the Employer could have remained in business is of little assistance in resolving any of the issues in this case. The fact is that the Employer ceased operations, owing its Employees wages.

### **Allegation of Fraud:**

The Employer alleges that the “fraud” of B.L. is a factor which should be considered in this appeal. For the purposes of disposing of this appeal it is unnecessary for me to comment on the allegations made by Mr. Wilson of B.L.’s actions in running the business after August 1, 2002. Apparently, these allegations form the subject of further investigations and legal action against B.L, the outcome of which has not yet been determined by the courts.

These are allegations which are immaterial to the obligation of Golden Heights to pay wages to its employees. The Employees were not employed by either Mr. Wilson or by B.L. It is apparent that, at all material times, the Employees were employed by Golden Heights Estate Inn and Restaurant Ltd. It is apparent, from a reading of the Determination, and a consideration of the record before the Delegate, that the Delegate reached her conclusions by considering documents and the evidence of all persons. There are no findings of fact which rest on accepting the credibility of B.L. over Mr. Wilson.

As part of its submission, Golden Heights submitted a letter from a staff lawyer of the Law Society of British Columbia. The staff lawyer apparently wrote a letter, which also contained a report obtained by the Law Society in the conduct of an investigation. This material should not have been submitted by Mr. Wilson as part of this process. The correspondence and the attachment falls within the definition of “report”, contained in section 87(1) *The Legal Professions Act, S.B.C. 1998, c. 9*. This section provides that any such documents generated by the Law Society during the investigative process, may not be used in a subsequent proceeding, without the consent of the Executive Director:

#### **Certain matters privileged**

87 (1) In this section:

“proceeding” does not include a proceeding under Part 2, 3, or 4;

“report” includes any document, minute, note, correspondence or memorandum created or received by a person, committee, panel or agent of the society in the course of an investigation, audit, inquiry or hearing, but does not include an original document that belongs to a complainant or respondent or to a person other than an employee or agent of the society.

- (2) If a person has made a complaint to the society respecting a lawyer, neither the society nor the complainant can be required to disclose or produce the complaint and the complaint is not admissible in any proceeding, except with the written consent of the complainant.
- (3) If a lawyer responds to the society in respect of a complaint or investigation, neither the lawyer nor the society can be required to disclose or produce the response or a copy or summary of it and the response or a copy or summary of it is not admissible in any proceeding, except with the written consent of the lawyer, even though the executive director may have delivered a copy or a summary of the response to the complainant.
- (4) If a person, committee or panel acting under the authority of this Act makes a report or conducts an investigation, audit, inquiry or hearing into the conduct, competence or credentials of a lawyer, that report must not be required to be produced and is not admissible in any proceeding except with the written consent of the executive director.
- (5) The society, its employees or agents, or persons who are members of committees or panels established or authorized under this Act must not be compelled to testify in any proceeding or to disclose information that they may have acquired during the course of an investigation, audit, inquiry, hearing or the performance of other duties authorized by this Act or the rules.

There is no evidence of any consent of the Executive Director, and therefore the document is inadmissible in these proceedings.

### **Who employed the Employees?**

The Delegate considered the issue of who was the employer of the Employees. In essence, Mr. Wilson's submission before the Delegate was that B.L. was responsible to pay the Employees' wages. In conducting the investigation the Delegate was alive to the issue of whether it was B.L. or Golden Heights that was responsible to pay the wages of the employees. The Delegate sought and obtained information from both B.L. and Mr. and Mrs. Wilson. The only possible finding in this case was that Golden Heights was the Employer.

In my view, most of the submissions of Mr. Wilson are irrelevant to the issue of liability of Golden Heights for wages to its Employees. Mr. Wilson and Golden Heights put B.L. into the position as the operator of the restaurant. At all material times, however, Golden Heights owned the assets, had entered into employment contracts with employees, and was carrying on the restaurant business. There was no change in the identity of the Employer. The employment of the Employees was not disrupted by any sale. It cannot be seriously disputed that Golden Heights employed the employees. It cannot be seriously disputed that the employees were unpaid by Golden Heights. Unfortunately for Mr. Wilson, he took a risk in placing the operation of the business of Golden Heights into the hands of B.L. before Golden Heights or Mr. Wilson was paid the purchase price. That, however, is no defence to claims by the Employees against Golden Heights.

It appears that the Delegate rested her conclusion (at page 2 of the Determination) that employees Pereverzoff and Engen were employees of Golden Heights because Mr. Wilson sought and accepted payment of money under a wage subsidy program. Mr. Wilson apparently disputes this point. The issue of whether Wilson sought or accepted payment is irrelevant to the identify of the Employer. At all material times, Golden Heights carried on the inn and restaurant business. Pereverzoff and Engen were employed in the business of Golden Heights. In my view, there was an ample basis to conclude that Pereverzoff and Engen were employees of Golden Heights. This finding does not depend on a wage subsidy program.



**Error of Law alleged in findings of Wage Rate of Ms. Lactin:**

The Employer alleges that Ms. Lactin's wage rate was \$8.00 per hour. Ms. Lactin alleges a wage rate of \$15.00 per hour. The Delegate considered the complaint form, and the hours worked, and the amount of the NSF cheque issued to Ms. Lactin, as a basis for concluding that the pay rate was \$15.00 per hour. In particular, the NSF cheque in the amount of \$1,200.00 corresponded to 80 hours at \$15.00 per hour. In my view, the Delegate's conclusion on this issue of fact was correct, and certainly not unreasonable. There was a satisfactory evidentiary basis for the finding and, therefore, the Employer has not established an error in law or fact with regard to Ms. Lactin's wage rate.

**Error in calculations of amounts for Dean Engen and Eileen Frederickson:**

The Employer has established that the Delegate erred with regard to the calculations of wage entitlements of Dean Engen and Eileen Frederickson. Dean Engen and Eileen Frederickson received cash amounts from Mr. Wilson, in the amount of \$300, and \$525.00 respectively. Golden Heights ought to be credited with the payment of that cash. These credits will effect the calculations of vacation pay and interest with regard to amounts owing by Golden Heights to Dean Engen and Eileen Frederickson. I refer back to the Delegate, the calculations with regard to the entitlements of Dean Engen and Eileen Frederickson.

**Compensation for Length of Service:**

The Delegate found that Laurie Nichols, Lori Lee Pereverzoff and Jesse Ritco did not voluntarily quit and therefore were entitled to compensation for length of service. It is apparent that the Delegate investigated the issue of quit. The Employer's submission constitutes a bare allegation of a quit. There is no supporting evidence or argument of a quit. I note that the Tribunal has held, on numerous occasions, that the decision to quit is a voluntary act of the employee. It is for the Employer to prove that the Delegate erred in determining that the Employees did not quit.

As outlined under new evidence, I find that the Employer's suggestion that "it could have remained open" was speculative. There is no cogent evidence to support a voluntary quit by any of the employees. The most probable reason for the departure of the Employees was that the business of the Employer failed, and failed to the point that Employees received cheques that were NSF. Employees are not required to remain at a workplace and work without the receipt of wages.

With regard to all the Employees, it is apparent that the Employees had not received all their wages at the time the employment relationship ended. Some of the Employees pay cheques had "bounced". The Employer appears to have been in difficult financial circumstances and was not paying its employees as required by the *Act*. The failure of the Employer to pay wages as required by the *Act*, in my view amounts to a constructive dismissal of the employees.

Further with regard to Jesse Ritco, the Employer discharged Mr. Ritco on the basis that he had stolen knives, which were the property of the Employer. The evidence, however, fell short of proof to a balance of probabilities standard that Mr. Ritco had stolen knives.

With regard to Ms. Nichols, it appears that she was subject to verbal abuse by Mr. Wilson when he re-took possession of the business. Further, she left under circumstances where Mr. Wilson indicated that she could keep her job, only if she accepted a \$2.00 per hour cut in pay and a demotion from the position of head waitress to waitress. In my view, the Employer constructively dismissed Ms. Nichols when it

unilaterally attempted to alter her wage rate, which was a fundamental condition of the employment relationship.

For the above reasons, I dismiss the arguments of the Employer relating to errors alleged with regard to compensation for length of service for Laurie Nichols, Lori Lee Pereverzoff and Jesse Ritco. These employees worked for a sufficient time period to qualify for compensation for length of service in the amount determined by the Delegate, pursuant to section 63(1) of the *Act*.

### **Natural Justice:**

The Employer's argument with regard to natural justice is set out above. The Employer's statement on the notice of appeal,

All staff quit, we needed them to keep operation open & now all staff are agreeing with us

does not raise any issue of breach of natural justice. The Delegate gave ample opportunity to the Employer to participate in the investigation of this matter. I have considered the issue of compensation for length of service above. I note that as a matter of "natural justice", the Employer alleges that all employees now agree with him. I place little weight on the Employer's submission that all the Employees agreed with him. This allegation has no connection to "natural justice". From the appeal submissions filed by each of the Employees, it is apparent that the Employer has had little or no contact with each Employee to whom it owes wages since the employment relationship ended. Each Employee has affirmed that the claim advanced for wages is being maintained. Most, if not all, of the Employees deny ever agreeing with Mr. Wilson, as alleged by him.

In summary, with the exception of adjustments to wages for Dean Engen and Eileen Frederickson, for cash received in the amounts of \$300 and \$525 respectively, this appeal fails.

### **ORDER**

Pursuant to s. 115 of the *Act* the Determination dated March 31, 2003 is confirmed, with the exception that I refer to the Delegate the calculation of the entitlements of Dean Engen and Eileen Frederickson, which shall be adjusted to reflect credit for cash received by each employee in the amount of \$300 and \$525 respectively.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**