

**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 -

Erica Nan Bibby  
("Bibby")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton  
**FILE NO.:** 97/489  
**DATE OF HEARING:** October 8, 1997  
**DATE OF DECISION:** November 7, 1997

**DECISION**

**APPEARANCES**

Erica Nan Bibby	on her own behalf
Janet John Brian Lutz	on behalf of Valley View Motel

**OVERVIEW**

This is an appeal by Erica Nan Bibby, under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued on June 5, 1997 by a delegate of the Employment Standards. The Determination showed that no wages were owed to Mrs. Bibby by her former employer, Janet John and Brian Lutz operating as Valley View Motel (“Valley View” or “the Employer”). It also contained a finding the Mrs. Bibby was a “manager” for purposes of the *Act*.

Mrs. Bibby’s appeal asserts that she was not a “manager” and that she is owed overtime wages, statutory holiday pay and vacation pay.

A hearing was held in Cranbrook, B.C. on October 8, 1997.

**ISSUES TO BE DECIDED**

1. Was Mrs. Bibby a “manager” for purposes of the *Act* during the period of September 1, 1996 to December 15, 1996 ?
2. Is Mrs. Bibby entitled to overtime wages ?
3. Is Mrs. Bibby entitled to statutory holiday pay ?

**FACTS**

The Determination which is the subject of this appeal contained the following findings:

“The complaint filed has been investigated and I can find no funds owing. The regular wages have all been paid as well the annual vacation pay. A copy of the payroll records are attached.

On the issues of overtime and statutory holiday pay no funds are owing there either because you were employed as a manger during the time giving rise to your complaint.

Factors considered in concluding that you were a manager include;

- You had direction and control of the business on a day to day basis
- You had the authority to and did hire staff to help at busy times
- You had the authority to set room rates dependent upon occupancy levels
- You did the banking for the business

Based on the decision that you were a manager you are excluded from Part 4 of the employment Standards Act and as such are not entitled to overtime pay or statutory holiday pay.”

The Determination did not set out the facts on which those findings were made.

Mrs. Bibby was employed by Valley View as a cleaner during August, 1995 and during the months of June, July and August, 1996 at a wage of \$ 8.00 per hour. There is no dispute between Mrs. Bibby and Valley View concerning those periods of employment. The dispute, and this appeal, is concerned solely with her employment between September 1, 1996 and December 15, 1996 when she resigned her employment.

There is a hand-written contract dated August 31, 1996 which is signed by Brian Lutz, Janet John and Erica Bibby. The terms of the contract call on Mrs. Bibby to manage the Valley View Motel (effective September 1, 1996) with the following duties:

- “Room rentals
- Cleaning rooms
- Laundry
- Assure that someone is in attendance at all times
- Caring for the grounds (e.g. watering, sweeping, garbage, mowing, snow-plowing as required.) Help will be provided with mowing, planting, and weeding
- General maintenance (e.g. small repairs, changing light bulbs, ect. Major repairs and renovations are responsibility of owners.”

The contract provided that Mrs. Bibby be remunerated as follows:

- “\$2,000.00 / month
- 1 bedroom furnished living quarters including cable, phone, & utilities
- Holidays: in lieu of the 32hr / week labour relations time off requirements plus 2 week holiday / year, the following would be provided : 4 weeks holiday with pay per year
- 1 weekend off per month.” (sic)

One of the terms of the contract gave Mrs. Bibby “ ... authority to hire cleaning help, when required, for September and May long week-end and June July and August.” Another term provided that “(d)uring the summer months, after 4 hours of cleaning/day (or 120 hours /month), (Mrs. Bibby) will be paid for the extra hours of cleaning.” (sic)

Mrs. Bibby occupied the living quarters at the motel along with her youngest son. On her scheduled days off (2 days per month according to the contract) she vacated the premises and Mr. Lutz assumed responsibility for her duties.

There is no dispute that Mrs. Bibby was paid according to the terms of the contract. That is, she received gross wages of \$2,000.00 per month during September, October and November, 1996 and \$1,000.00 (gross) in December, 1996. In addition, she received \$344.00 (gross) on September 30, 1996 for 43 hours of cleaning work (at \$8.00 per hour) and was paid \$460.00 vacation pay.

Valley View Motel consists of 9 cabins and 15 guest rooms which are located on a 1.0 acre (approx.) piece of property. Certain rooms and cabins are rented on a long-term basis while others are available for daily rentals. There is no dispute in the evidence that the number of daily room rentals during the latter half of 1996 was as follows:

August	251
September	154
October	70
November	24
December (1-15)	5

The evidence is unclear concerning the number of long-term rentals during the same period. Mrs. Bibby was required to clean short-term rentals each day. Long-term rentals were cleaned once each week. In addition, she “made-up” rooms for short-term guest who stayed longer than one day. During September, 1996 and early October there were between 1 and 4 “make-ups” each day and none thereafter.

According to Mrs. Bibby’s evidence, her typical day was structured as follows for each of the days that she was on duty each month:

**7:00 a.m.**

Unlock lobby and office doors.

**7:30 - 8:30 a.m.**

Begin to clean rooms and do laundry

**Afternoon and evening to 11 p.m. or 12:00 (Midnight)**

show rooms, rent rooms, answer phone, clean rooms, laundry ect.

**11 p.m. or 12 Mdn.(Time dependent upon season)**

Lock office and lobby doors.

**11 p.m. to 7 a.m.**

Sleep in office to be on call for room rentals, phone, disturbances and emergencies.

Mr. Lutz gave evidence that he had asked Mrs. Bibby to close the office between 10:00 p.m. and 8:00 a.m. daily.

Mrs. Bibby's evidence also included a written summary of a number of hours which she spent cleaning rooms each day during September and October, certain days during November and submitted no records for December, 1996. According to these records, Mrs. Bibby typically spent between 4 and 8 hours per day cleaning rooms during September, 1996 and between 2 and 6 hours per day during October, 1996. Valley View's payroll records do not record any daily hours of work for Mrs. Bibby during the period in question.

There is no dispute in the evidence that Mrs. Bibby was Valley View's sole employee except when she hired a temporary assistant (her daughter or her daughter's friend) to assist with cleaning duties on 5 occasions between September 1, 1996 and December 15, 1996. On each occasion the temporary assistant worked less than 6 hours and usually worked for 4 hours. There is also no dispute that one of Mrs. Bibby's sons(Andrew) lived in the motel for a short time (at a reduced rate) and that he assisted with general maintenance duties from time to time. This is consistent with Mr. Lutz's evidence that managing the motel was "... a great situation for a couple or a family so that the spouses could 'spell each other off'." He also expected that Mrs. Bibby's family would "itch in as needed."

There is also no dispute that between September 1, 1996 and December 15, 1996 Mrs. Bibby was not at work on the following occasions:

DAYS OFF (per contract)

Sept	20 - 22	(4 p.m. - 4 p.m.)
Oct	25 - 27	(4 p.m. - 4 p.m.)
Nov	22 - 24	(3:30 p.m. - 3:30 p.m.)

LEAVE OF ABSENCE

Nov	25, 26, 27, 28,	(In Vancouver for son's surgery)
Fri Dec	13	8 a.m. - 7 p.m.
Dec	14	2 p.m. - 6 p.m.

Dec 15            2 p.m. - 5 p.m.

Mrs. Bibby's evidence concerning her typical duties and responsibilities was uncontradicted in large measure and they were as set out in the contract (see page 3 above). However, she also testified that she did not make policy decisions, did not have cheque signing authority, could not order supplies and did not have authority to open the motel's business mail. All of those responsibilities, she testified, were undertaken by the owners. Mr. Lutz and Ms. John.

Mr. Lutz testified that Mrs. Bibby had authority to adjust room rental rates and to offer discounts in order to secure a rental. According to Mrs. Bibby, she could adjust room rates but only "within parameters."

## **ANALYSIS**

*Was Mrs. Bibby a "manager" for purposes of the Act ?*

Section 1 (1) of the *Employment Standards Regulation* (the "Regulation") defines a manager 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 issue in dispute is whether Mrs. Bibby's **primary** employment duties consists of supervising and directing other employees. The title given to a position is not relevant in determining whether the incumbent is a "manager" or an "employee" for purposes of the *Act*. Thus, the fact that Valley View considered the position to be a manager is not relevant. Mrs. Bibby's employment duties determine whether she was a manager or not.

In a recent reconsideration decision (BC EST #D479/97), the Tribunal dealt with the meaning of the term "primary employment duties" as it is used in defining a manager for the purposes of the *Act* and *Regulation*. The Tribunal stated, at page 6:

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 to the conclusion 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 understood by some third party.

When I review the Determination, the contract of employment, the parties' written submissions and the oral evidence I am unable to conclude Mrs. Bibby's duties and responsibilities bring her within the definition of "manager" in Section 1(1) of the *Regulation*. There is no dispute that Mrs. Bibby hired a temporary assistant on 5 occasions between September 1, 1996 and December 15, 1996 and on each occasion the person worked 6 hours or less. In my opinion, that cannot be said to create a situation where Mrs. Bibby's primary employment duties consisted of supervising and directing other employees. Her primary duties were set out clearly in the employment contract as: room rentals, cleaning rooms, grounds maintenance and general maintenance, etc. While the contract gives Mrs. Bibby the authority to hire temporary help, it does not purport to make that a primary duty or responsibility. This was confirmed by the evidence which I heard and by the parties' submissions.

I am also unable to find any grounds on which to conclude that Mrs. Bibby was employed in an executive capacity. There is no evidence to support a finding that she had direction and control of the business. Again, the employment contract speaks for itself in describing her duties. Mrs. Bibby was Valley View's sole employee for the period in question, except for the five occasions when she hired a temporary assistant.

There is no evidence to support a finding that Mrs. Bibby " .. did the banking for the business" although she did make deposits to Valley View's bank Account. Her limited ability to adjust room rates or to give rooms without a rental charge does not bring her within the definition of "manager" in Section 1(1) of the *Regulation*.

For all these reasons I find that Mrs. Bibby was not a "manager" for purposes of the *Act*.

*Wages owing to Mrs. Bibby*

The Director's delegate found that Mrs. Bibby was a "manager" and, therefore was not entitled to overtime wages [*Regulation* Section 34(1)(f)] nor statutory holiday pay [*Regulation* Section 36]. Given my finding that Mrs. Bibby was not a "manger", I must know decide her entitlement to wages under the *Act*.

Section 4 of the *Act* prevents any employer or employee from agreeing to waive the requirements of the *Act* by stating as follows:

**4. Requirements of this Act cannot be waived**

The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

I must, therefore, consider whether the contract of employment was an agreement which sought to waive the minimum requirements of the *Act* or *Regulation*.

Section 36 of the *Act* states:

**36. Hours free from work**

- (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.

As noted at page 4 above, the employment contract required Valley View to give Mrs. Bibby 4 week's vacation with pay in lieu of requirements set out in Section 36 of the *Act* and her entitlement to annual vacation and vacation pay under Section 57 & 58 of the *Act*. This suggests that the employer did not intend to comply with the provisions of Section 36 of the *Act*. The evidence shows clearly that Mrs. Bibby received only 48 hours free from work each month a clear violation of Section 36(1) and, therefore, that term of the contract is unenforceable.

As noted earlier, the employer did not keep a daily record of Mrs. Bibby's hour of work. Mrs. Bibby's complaint (dated January 13, 1997 ) alleged that she was owed wages for 24 hours per day for all the days she was at work between September 1 and December 15. At the hearing she admitted candidly that was not an accurate reflection of her actual hours of



work because she was “on call” while she slept at night. Her evidence also shows that she had meal breaks and that she fed and cared for her youngest son who stayed with her at the motel. In addition, I note that the amount of time which Mrs. Bibby spent cleaning rooms or laundering bed linen and towels varied each day according to the written records she submitted to the Tribunal. From that evidence and the fact that room rentals declined significantly in October, November and December I find that Mrs. Bibby’s daily hours of work, except for her days off and leaves of absence (see page 5/6), were as follows:

September, 1996	12 hours per day
October, 1996	10 hours per day
November, 1996	8 hours per day
December, 1996	8 hours per day

Section 40 of the *Act* sets out an employee’s entitlement to overtime wages when a flexible work schedule has not been adopted.

Given my finding concerning Mrs. Bibby’s hours of work I am also led to find that the contractual provision under which she was to be paid \$2,000.00 per month is unenforceable because it contravenes both Section 40 of the *Act* as well as the minimum wage provisions in Section 16 of the *Act* and Section 15 of the Regulation which establish a minimum wage of \$7.00 per hour.

Due to my earlier finding that Mrs. Bibby was not a “manager” she is entitled to overtime wages according to the requirements of Part 4 of the *Act*. She is also entitled to statutory holiday pay according to Part 5 of the *Act*.

**ORDER**

I order, under Section 115 of the *Act* that the Determination be cancelled. I also refer the matter back to the Director’s delegate to calculate all wages owing to Mrs. Bibby based on my findings concerning her entitlement to receive a minimum wage of \$7.00 per hour.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**

GC:sr