

An appeal

- by -

Kadidja Ali

("Ali")

-and by-

Nechako Investments Ltd. operating as Econo Lodge and West One Enterprises  
Ltd. operating as Anco Motel (associated pursuant to Section 95 of the  
Employment Standards Act)

("Econo")

- 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:** Wayne R. Carkner

**FILE No.:** 2001/444 and 2001/459

**DATE OF HEARING:** September 24 2001

**DATE OF DECISION:** October 17, 2001

## DECISION

### APPEARANCES:

For Ali	Kadidja Ali (“Ali”)
For Econo	Manjeet Grewal (“Econo”) Sharon Panu Neene Grewal
For the Director	No Appearances

### OVERVIEW

These are appeals by Ali and by Econo pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by the Director of Employment Standards (the “Director”) on May 24, 2001. The Determination concluded that Ali was an “employee”; Econo was an “employer” and that Ali had performed “work” pursuant to Section 1 of the *Act*. As a result of this finding the Determination concluded that Econo had contravened Sections 16, 20, 34, 36, 40, 46, 57 & 58 of the *Act*. As a result of these contraventions the Determination ordered a remedy of \$18,198.59 in wages and, pursuant to Section 88 of the *Act*, an interest payment of \$283.08 for a total remedy of \$18,481.67. This was based on Ali working a minimum day, seven days a week (primarily) for an extended period of time. The appeal was held by means of an oral hearing as well as by extensive written submissions from all of the parties.

### ISSUES

#### Ali’s Issue:

Did the Determination error in finding that Ali was only entitled to payment for a minimum day and not entitled to all hours claimed in her complaint?

#### Econo’s Issues:

1. Did the Determination err in law by providing a remedy for a period of in excess of the 24 month period outlined in Section 80 of the *Act*?
2. Did the Determination err in a finding of fact that Ali was an “employee” under the *Act* and had performed work for Econo seven days a week from January 8, 1999 to March 31, 1999?

3. Did the Determination error in a finding of fact regarding the configuration of Rooms 21 & 29 and the location of the buzzer when concluding that Ali would have responded to emergency calls?
4. Did the Determination error by not considering the fact that Ali lived at the motel and that her presence there was not for the benefit of Econo and was not evidence that Ali had performed work for Econo?
5. Did the Determination error in the dates upon which Ali worked at the Anco Motel commencing on March 19, 2000 and not April 24, 2000, as well as finding that Ali worked on April 30, December 25 and December 31, 2000.
6. Did the Determination error in including in the calculations wages for the period extending from January 19, 2001 unto and including March 4, 2001.

## **ARGUMENT**

### **Ali's Issue:**

Ali argued that based on the evidence she should be entitled to a full day and not the minimum day as provided in the Determination. She states that she is entitled to this as she had to remain at the motel and could not leave the premises until 07:00AM each morning. Ali argues that on this basis alone the Determination should be varied to provide her payment for all hours that she was required to be available. The Director argued that pursuant to Section 2 of the *Act* that Ali was on call at her residence and therefore was only entitled to a minimum day for responding to calls to perform work. The Director stated that all the evidence supports this finding and that Ali's appeal should be denied.

### **Econo's Issues:**

#### 1. Section 80 Application

Econo argues that the Director has contravened Section 80 of the Act by ordering a remedy that is in excess of the 24 month period outlined under the *Act*. The Director's submission conceded that an error was made regarding the time limit for the remedy and requested that the Determination be varied to read a remedy of \$16,135.62. This calculation includes \$247.14 in interest. The Director provided detailed sheets that proved accurate upon review. The Director identified the appropriate time frame for the remedy as March 5 1999 to March 4, 2001. Ali made no submission on this issue.

## 2. 7 Day Week Issue

Econo argued that the evidence did not support a finding that Ali performed work each and every night she was at the Econo lodge from January 8, 1999 until March 31, 1999. Econo submitted that Ali only responded to emergencies twice and phoned the employer on those occasions. Econo further submitted that there was no evidence to support that Ali performed work 7 days a week from January 8, 1999 until February 29, 2000. The Director submitted that in accordance with the application for a variance of the Determination, as outlined above, the time frame from January 8, 1999 to March 4, 1999 is now without relevance. Turning to the period March 5, 1999 to March 31, 1999, the Director submitted that Econo was not clear on the issue during the investigation and had failed, and still does fail, to provide a date that Ali started to provide after hours services to Econo. The Director further stated that the evidence of Econo supported this finding. The Director further submitted that, because Econo kept no records of the days and hours worked by Ali, the Determination, based on a balance of probabilities and given the evidence of the witnesses, Ali and Econo, concluded that Ali was entitled to wages for the period she resided at the Econo Lodge.

## 3. Error Of Fact Regarding The Location Of Rooms 21 & 29 And The Buzzer.

Econo submitted that Room 29 did not have a Buzzer. The Buzzer was located in a kitchen that was situated between Room 29 and Room 21 and could be accessed from either room. Further, the door between Room 29 & the kitchen could be locked from either side to allow Room 29 to be rented out. The Director submits that the Determination did not find that the buzzer was in Room 29 but that the activation device for the buzzer was located above the door to Room 29 to allow anyone sleeping in that Room to respond to it.

## 4. Evidence of Ali Residing At The Motel Supporting A Finding That She Provided Services For Econo.

Econo submits that the Director did not take into account that Ali was present at the motel as it was her residence, not because she performed work for Econo. This is the overriding reason that other employees of Econo saw Ali's constant presence at the motel. The Director responded, that based on the overriding evidence, the determination could only conclude that Ali performed worked for Econo. The Director further submitted that the fact that the motel was Ali's residence was the prime reason that only minimum days were credited to Ali.

## 5. Error On Dates That Ali Worked At The Anco Motel.

Econo submits that the Director erred when concluding that Ali's night shift at the Anco Motel commenced on March 19, 2000 as the evidence showed that she commenced the night shift at the Anco Motel on April 30, 2000. However Econo made no submission on how this error would effect the Director's calculations. The Director made no submission on this issue. Econo further submitted that the Director erred by including April 30, 2000, December 25, 2000 & December 31, 2000 in the calculations. The Director responded that April 30, 2000 was indeed

in error and that the application to vary the remedy had excluded this date from the calculations. The inclusion of December 25 & December 31, 2000 was as a result of the information provided by Econo in the form of circled dates on a calendar that indicated the days worked by Ali.

#### 6. January 19, 2001 to March 4, 2001

Econo submitted that the Director erred in extending the period of Ali's wages past January 19, 2001 to March 4, 2001. The Director replied that Ali was credited with January 28, February 4, 11, 18 & 25 based on the calendar of days worked that was provided by Econo.

In summation Ali requested that the Determination be varied for payment of full shifts for the period in question. Econo requested that the Determination be canceled as no evidence had been provided to show Ali was an employee of Econo. Econo alternatively requested that if the Determination was not canceled that it be varied as requested by the Director and further varied to reflect Econo's submissions. The Director requested that the Determination be varied as outline above and that both appeals be dismissed.

### **FACTS AND ANALYSIS**

It should be noted that Ali called six witnesses under summons. These witnesses were interviewed by the Delegate of the Director during the investigation and their evidence is outlined in detail in the Determination. The evidence of these witnesses directly supported the evidence in the Determination and did not add any additional information that was of any use to the Tribunal. Ali also gave evidence that was consistent with the evidence detailed in the Determination. Econo called no evidence.

The burden of proof to show that the Determination erred in fact(s), conclusion(s) or law is placed on the appellants (Econo & Ali). There is no conflict in the evidence within the Determination. The facts show:

- Ali commenced living at the Econo Lodge on January 8, 1999 and that Room 29 served as her primary residence until March 13, 2000.
- Prior to Ali moving to the Econo Lodge Glen Laliberte covered the night shift calls at the Econo lodge.
- The Econo Lodge required someone present to respond, if required, to emergencies, late check ins and telephone calls.
- Ali performed these functions, when required, seven days a week.
- The Employees of the Econo Lodge perceived Ali as another employee and observed Ali performing tasks and functions that were normally performed by employees.

- Ali continued to perform these functions at the Econo Lodge until she moved to the Anco Motel on March 14, 2000. This occurred as a result of Econo leasing out the Econo Lodge.
- Ali provided her services as a night shift worker once a week at the Anco Motel from March 19, 2000 until March 4, 2001.

### **Ali's Grounds For Appeal**

Ali's appeal to extend her wages from a minimum day to a payment for a full shift each day must fail. The evidence shows that Ali was on call at her place of residence and was only required to perform work functions when called to do so. This is clearly detailed under Section 1 of the *Act*, which reads:

#### *Definitions*

*(2) An employer 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.*

This is clearly the case here as Ali, based on the unchallenged evidence, only responded to perform functions as/if they arose. The evidence shows that she was called only occasionally and therefore was not entitled to wages for a full shift. As Ali normally performed minimal functions each night, the Director correctly concluded that pursuant to Section 34 Ali was entitled to minimum daily hours.

### **Econo's Grounds For Appeal**

The Section 80 application to vary the timeframe that the remedy applies to is granted. The Director's application to vary the amount of remedy to reflect the amount outlined in the Director's submission is granted due to the error contained in the Determination's original calculations that reflected a timeframe in excess of 24 months.

Turing to Econo's second issue, the Director's submission identified that due to the variance on the timeframe of the remedy the dates in dispute are March 5, 1999 until March 31, 1999. I concur. However, Econo failed to produce any evidence whatsoever to contradict the Director's conclusions regarding these disputed dates for which Ali was to receive wages as a remedy. Regarding the reference to an error in the Determination by finding that Ali was an "employee" as defined under the *Act*, Econo presented no evidence or argument to support this statement. This ground of appeal is dismissed.

The third issue of appeal put forward by Econo regarding the configuration of Rooms 21 & 29 and the location of the buzzer has no merit. Upon reviewing the Determination I have concluded that the Determination was referring to the activation device that triggers the buzzer and not the

physical location of the buzzer itself. I fail to see where this issue would have any bearing on the main issues in dispute. This ground of appeal is dismissed.

The fourth issue put forward by Econo was that Determination did not provide enough credence to Ali's presence at the motel being primarily due to the fact that the motel was her residence. Econo's submission doesn't take into account the overwhelming evidence provided by the employees of the motel that stated that Ali performed work functions that were performed by other employees. The Determination clearly recognizes the motel as Ali's residence and this consideration is the only reason that wages for a minimum day were awarded. This ground of appeal is dismissed.

The fifth ground of appeal related to the dates that Ali commenced work at the Anco Motel on the night shift as well as three specific dates that were credited to Ali. After reviewing the Determination, submissions and documents, I can find no evidence to support Econo's position nor did Econo provide any evidence to support this position with the exception of April 30, 2000, which the Director identified as an error and indeed identified this error in the application to vary the remedy and included the reduction of this date in the variance calculations. Except for the April 30, 2000 date this ground of appeal is dismissed.

Turning to the last issue of Econo's appeal relating to payment of some shifts from January 19, 2001 to March 4, 2004, these claims were established by documents that were provided to the Director by Econo. Econo presented no evidence to substantiate that these dates were included in error. This ground of appeal is dismissed.

Both Ali and Econo have failed to meet the onus of establishing errors in the Determination that would be fatal to the Determination. Econo has met the onus of the Section 80 application regarding the timeframe of the Remedy. The Director's application to vary the dates of the remedy and the amount of the remedy is granted.

## **ORDER**

Pursuant to Section 115 of the *Act* the Determination dated May 24, 2001 is varied to reflect the timeframe for wages owed to read March 5, 1999 to March 4, 2001 and the remedy is varied to read \$16,135.62 plus any interest accrued pursuant to Section 88 of the *Act*. With the exception of these variances I order that the Determination be confirmed.

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**Wayne R. Carkner**  
**Adjudicator**  
**Employment Standards Tribunal**