BC EST #D423/98
Reconsideration of BC EST #D004/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to
Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Northland Properties Ltd.
("Northland")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL: Geoffrey Crampton

Alf Kempf

Mark Thompson

FILE NO.: 98/327

DATE OF DECISION: September 16, 1998

DECISION

OVERVIEW

This is a reconsideration application by Northland Properties Ltd. ("Northland") under Section 116 of the *Employment Standards Act* (the "*Act*"). Northland applies for a reconsideration of a Decision (BC EST #D004/98) dated April 27, 1998 (the "Original Decision") which dealt with two appeals by Northland arising from two Determinations by delegates of the Director of Employment Standards (the "Director"). The appeals were heard in Kamloops, B.C. on February 26 and March 12, 1998. The Determinations addressed complaints by four individuals: John Majetic and Barbara Early, who were resident managers at Blue River; and Mr. and Mrs. Zaryski, who were resident managers at Vernon.

Northland owns and operates apartment buildings, restaurants, and hotels in Western Canada through three different divisions. Northland has a President and three vice-presidents. Each vice-president also has operational responsibility for one of the three divisions. Mr. Taj Kassam is a Vice President of Northland and President/CEO of Sandman Hotels and Inns Ltd. ("Sandman"). Sandman operates 8 hotels and 12 motels in B.C. and Alberta. It employs approximately 2500 persons, making it one of the largest hotel/motel chains in Canada. Directly under Mr. Kassam in the operational hierarchy of Sandman are two regional directors, who have operational responsibility for two hotels each, and two managers, who have operational responsibility for six motels each. Shirley Grayson ("Grayson") was the manager responsible for the Blue River and Vernon motels. The next level in the operational hierarchy are the general managers at the hotels and the resident managers at the motels. The motels are normally operated by a couple who act as resident managers. Each of the Determinations which were the subject of the appeal before the Adjudicator pertained to one of two couples who were resident managers. One couple were resident managers at the Sandman Motel in Blue River; the other couple at the Sandman Motel in Vernon.

The resident managers' responsibilities were outlined in the evidence of Taj Kassam, Sandman's President and Chief Executive Officer. His evidence concerning their duties was summarized in the Original Decision at page 3:

> Mr. Kassam testified that resident managers of the motels are paid a salary and bonus, the bonus being determined by the annual financial performance of the motel (although none of the individuals remained employed with Northland long enough to qualify for a bonus). Also, resident managers are provided with accommodation at no cost, are given a car allowance, receive free or subsidized meals at any restaurant associated with Sandman or their motel and receive greater benefits than what hourly staff would be entitled to receive.

> The evidence of Northland was that resident managers have responsibilities relating to hiring, firing, scheduling housekeeping and front desk relief, evaluating employees at their motel and have input into the preparation of the annual budget for their motel. Resident managers are also responsible for all occupancy issues and for any emergency situations that might arise on the property. They are expected to perform a public relations function with customers or potential customers, for both Sandman, generally, and their motel, specifically. Resident managers have day to day operational responsibility for their motel, including checking customers in and out of the motel, ensuring the rooms are cleaned and ready for occupancy, ensuring the property is properly maintained and presentable to the public, ordering or purchasing supplies, accounting for daily receipts, making bank deposits and providing operational and financial information to their manager and, for some information, to head office.

Based on his findings of fact and his analysis of the relevant statutory provisions, the Adjudicator made the following order under Section 115 of the *Act*:

> (1) the Determination dated December 9, 1997 (in respect of Mr. Majetic and Mr. Earley) be confirmed in the amount of $5,059.33 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance, and
>
> (2) the Determination dated January 7, 1998 the matter is referred back to the delegate to calculate the wages and interest payable to Mrs. Zaryski based on my findings relating to her entitlement. The conclusions of the delegate relating to the entitlement of Mr. Zaryski are confirmed and additional interest shall accrue on that amount, pursuant to Section 88 of the *Act*, from the date of issuance.

Northland submits that there are two principal grounds for its reconsideration application which, it says, can be summarized as:

> "Error of law" - mistake stating facts; inconsistency with other decisions; incorrect standard of proof applied and misunderstanding or failing to deal with a serious issue in the appeal.
>
> "Failure of natural justice" - denial of a fair hearing.

The Director submits that the Tribunal ought to dismiss Northland's reconsideration application because it " ... has advanced no proper grounds for reconsideration . . ."

Each of the four individual who are affected by the two Determinations oppose Northland's application for reconsideration.

This decision is made following our review and consideration of the parties' written submissions.

ISSUES TO BE DECIDED

Northland's application and the parties' submissions give rise to two issues:

1. Should the Tribunal reconsider the Original Decision; and

2. If we should reconsider the Original Decision, should we confirm, cancel, or vary it or should we refer the matter back to the Adjudicator?

ANALYSIS

Should the Tribunal reconsider the Original Decision?

The statutory authority to reconsider a decision of the Tribunal is found in section 116 of the *Act*:

> **Reconsideration of orders and decisions**
>
> 116.(1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
> (b) cancel or vary the order or decision or refer the matter back to the original panel.
>
> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
>
> (3) An application may be made only once with respect to the same order or decision.

The Tribunal's seminal decision on its reconsideration powers is *Zoltan Kiss* (BC EST #D122/96; reconsideration of BC EST #D091/96). Some of the typical grounds on which the Tribunal ought to reconsider one of its own orders or decisions were set out in *Zoltan Kiss*, and include the following:

- Some *significant and serious evidence* has become available that would have led the Adjudicator to a different decision;
- Some *serious mistake* in applying the law ... (emphasis added).

We are of the view that the phrases on which we have placed emphasis are important and not trivial because they lead us to conclude that we should not reconsider a decision merely because the Adjudicator analyzed and decided the case differently than we may. As, the Tribunal noted in *Zoltan Kiss*, it should exercise its reconsideration powers with "great caution", for several reasons:

- Section 2(d) of the *Act* establishes one of the purposes of the *Act* as providing fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. Employers and employees should expect that, under normal circumstances, one hearing by the Tribunal will resolve their dispute finally and conclusive. If it were otherwise it would be neither fair nor efficient.

- Section 115 of the *Act* establishes the Tribunal's authority to consider an appeal and limits the Tribunal to confirming, varying or canceling the determination under appeal or referring the matter back to the Director of Employment Standards (presumably, for further investigation or other action). These limited options (confirm vary or cancel a determination) imply a degree of finality to Tribunal decisions or orders which is desirable. The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reason.

- It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

- In his report, *Rights & Responsibilities in a Changing Workplace*, Professor Mark Thompson offers the following observation at page 134 as one reason for recommending the establishment of Tribunal:

> *The advice the Commission received from members of the community familiar with appeals system, the staff of the Minister and the Attorney General was almost unanimous.*

> *An appeals system should be relatively informal with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible cost to the parties and the Ministry. The process should not only be consistent with principles of natural justice, but be seen to meet those standards.*

Professor Thompson also noted that the appeal process should not be protracted because many claimants (employees) "...need the monies in dispute quickly to meet their basic needs."

It is important to note that under Section 116 (1) of the *Act*, the Tribunal is given a discretion as to whether to reconsider a decision. Some further comments on the principles which should guide the Tribunal in exercising that discretion were set out in a recent reconsideration decision: *Director of Employment Standards* (BCEST #D313/98; Reconsideration of BCEST # D559/97) at page 6:

> The Tribunal has sought to exercise that discretion in a principled fashion, consistent with the fundamental purposes of the *Act*. One such purpose is to "provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act": s. 2(d). Another is to "promote fair treatment of employees and employers": s. 2(b).
>
> To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where **important** questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the *Act* and Regulations for the final and conclusive resolution of employment standards disputes: *Act*, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An "automatic reconsideration" approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to "litigate": see *Re Zoltan T. Kiss* (BC EST #D122/96) ... (emphasis added).

And at page 7, the Tribunal elaborated further:

> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure **which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.** At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society* (BCEST #D199/96, reconsideration of BCEST #D114/96) ... (emphasis added).

In our view, a reconsideration of the Original Decision is warranted given the grounds of appeal on which Northland relies and given the particular facts of this case. Before turning to address the various grounds upon which Northland makes its application, we will set out the key passages from the Original Decision.

In analyzing the issues raised by Northland's appeal, the Adjudicator adopted a two-stage approach. He dealt first with the issue of whether the resident managers were "managers" for purposes of the *Act*. That part of his analysis began with the definition of a manager in Section 1(1) of the *Employment Standards Regulation* (B.C. Reg 396/95) and included a review of two Tribunal decisions, *Director of Employment Standards (re: Amelia Street Bistro)* [BC EST #D479/97] which dealt with the meaning of "a person whose primary employment duties consist of supervising and directing other employees," and *Sunshine Coast Publishers Inc.* [BC EST #D244/96] which dealt with "a person employed in an executive capacity".

The Adjudicator found that none of the resident managers was employed in an executive capacity (Original Decision, p. 7):

> I cannot conclude from the evidence that any of the individuals are *"employed in an executive capacity"*. None demonstrate the kind of independent action, authority or discretion typical of a person employed in such a capacity. They neither make nor are involved in any key decisions relating to the conduct of the business of Northland or Sandman. Mr. Johnston argued that having day to day responsibility of a significant business asset, the motel, was demonstrative of executive capacity. The

> evidence does not reveal the individuals had any significant responsibility for the asset. The evidence, in fact, showed the individuals had very little input into decisions relating to the asset. No extraordinary operational expense and no capital expense could be made without approval from either Grayson or head office. Repairs on the properties needed the approval of Grayson and decisions about how, when and by whom repairs would be done were made by Grayson or head office. There was evidence that significant repairs to the roof of the motel in Vernon were delayed by Grayson until Northland's maintenance crew were available and could be brought to Vernon.
>
> The evidence also shows that Sandman has routinized the running of the motels and the duties and responsibilities of the individuals are predominantly administrative. Little room is given for the individuals to exercise independent judgment and the circumstances where they are allowed to do so relate to areas that are unrelated to the kinds of business decisions that would be made by a person in an executive capacity. To suggest, in the context of a business such as Northland, which controls millions of dollars in assets and income, that the occasional decision of a resident manager to discount the rate of a room in order to secure a customer for what would otherwise be an empty unit can be characterized as executive decision making would make a mockery of the concept of *"executive capacity"* for the purposes of the *Act*.

On the issue of the resident managers' primary employment duties, the Adjudicator gave the following reasons, at page 8, for dismissing Northland's appeal:

> Also, I have no difficulty concluding that Mr. and Mrs. Zaryski's primary employment duties do not consist of supervising and directing other employees. There was no evidence that any significant amount of time was spent supervising and directing other employees. The primary employment duties of Mrs. Zaryski related to performing administrative tasks, while Mr. Zaryski's primary responsibility was for the maintenance of the motel. While they were employed to "manage" the motel, in the context, their role amounted to little more than acting as "caretakers" on the property.
>
> Considering the remedial nature of the *Act*, as the Tribunal indicated was necessary in *Re Amelia Street Bistro, supra*, I cannot find that either are exercising a power and authority typical of a manager charged with supervising and directing other employees. The totality of the evidence indicates that their power and authority was limited or determined by the policies and operating procedures imposed by Northland.

That finding by the Adjudicator was supported by several examples of the duties typically performed by Mr. & Mrs. Zaryski.

With respect to Mr. Majetic, the Adjudicator found, at page 9:

> It is also clear that Majetic was not employed for the primary purpose of supervising and directing other employees. The evidence showed his primary responsibility was, like Mr. Zaryski, to do the maintenance at the motel. The expectations of Northland about his duties and responsibilities are demonstrated by two facsimiles sent to the motel by Grayson, in which she instructed him to paint the public washrooms, repair the stairs to the basement, weed the flower bed at the back of the building, cut the grass, patch a hole in the ceiling of the washrooms and tidy the area in front of the inn. He was instructed by Grayson to complete these tasks within time limits and authorized, also by Grayson, to acquire paint and other materials necessary to complete the jobs.

The Adjudicator described his analysis of Ms. Early's employment duties as "more difficult" compared to the other resident managers and relied on the reasoning set out by the Tribunal in *Amelia Street Bistro, supra* to arrive at his conclusion that she was not a "manager." After setting out a lengthy excerpt from *Amelia Street Bistro, supra* the Adjudicator reasoned, at page 10:

> There are two points to be drawn from the above excerpt: first, in the context of excluding a person from the *Act* or any part of it, the burden of establishing the basis for the exclusion lies with the person asserting it; and second, because of the consequences to an individual of such a conclusion, there must be clear evidence justifying that conclusion. The scope of exclusion from the *Act* is limited.
>
> In this case, Northland has failed to establish, on balance, that Early was exercising a power and authority typical of a manager. As the Tribunal stated in *Re Amelia Street Bistro,* above, it is a question of degree and the evidence presented does not show a sufficient degree of responsibility and discretion in those relevant matters to allow a conclusion that her primary employment duties consist of supervising and directing other employees.

This finding by the Adjudicator was supported by several reasons and "reinforced" by the evidence advanced at the hearing.

The Adjudicator also relied on the Tribunal's reasoning in *Amelia Street Bistro* to deal with Northland's submissions concerning the scope of the resident managers' duties and responsibilities:

> ... *Amelia Street Bistro* also answers the argument that I should consider that the individuals *might* have performed employee evaluations and become involved in the preparation of the annual budgets for their property had they remained employed for a longer period with Northland. Any conclusion about whether a person is a "manager" will be based upon the actual authority exercised by the person, not on the authority someone says they might have.
>
> (Original Decision, page 11)

Finally, the Adjudicator gave the following reasons for rejecting Northland's submissions that the administrative duties performed by the resident managers justified a finding that they were "managers":

> Mr. Johnston submitted that the administrative duties and responsibilities of the individuals, such as authorizing room rate reductions, engaging in a "public relations" function with customers and potential customers, handling emergency situations, including occupancy issues, and generally performing the volume of administrative tasks associated with the day to day operation of the property justified the managerial exclusion. In support of that argument he presented a U.S. Court of Appeals decision, *Reich v. Avoca Motel Corp.* (3 WH Cases 2d 458). That decision does not assist Northland. It is based on a specific statutory provision in the American labour standards legislation that creates an "administrative" exclusion. The *Act* does not contain such an exclusion. The Tribunal has recognized that a person may have very important administrative responsibilities in their employment without meeting the definition of "manager". Unless the administrative responsibilities are connected with the supervision and direction of employees or are performed by a person in an executive capacity, they will not result in an exclusion under the *Act*. In this case, the administrative responsibilities are neither connected to the supervision and direction of other employees nor are they being performed by a person employed in an executive capacity. Accordingly, the performance of those responsibilities do not advance the position of Northland.

The Adjudicator found that the Determination concerning Mrs. Zaryski's hours of work "...could not be sustained on the material before (him)." He went on to find that:

> Northland demonstrated that commencing in early September, when Mr. and Mrs. Zaryski were hired, business at the motel declined and occupancy

> was low throughout their term of employment, most significantly, between November 1, 1995 and April 30, 1996 it had declined to a level where typical daily occupancy was less than 24 rooms. Based on the number of residents admitted to the motel, I agree with the position of Northland and find it probable that Mrs. Zaryski would have worked fewer hours than what she claimed to have worked as the daily occupancy levels of the motel declined. She claimed she worked an average of just over 10 hours a day throughout her entire period of employment. The delegate accepted she had worked 10 hours a day (when a full day was worked). No adjustment was made, as I find it should have, for the significant decline in the business of the motel leading up to and during the above period. Accordingly, her daily hours of work will be adjusted as follows:
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> | | |
> |---|---|
> | September 6, 1995 to September 30, 1995 | 10 hours a day |
> | October 1, 1995 to October 31, 1995 | 9 hours a day |
> | November 1, 1995 to April 30, 1996 | 8 hours a day |
> | May 1, 1996 to May 30, 1996 | 9 hours a day |
>
> The above adjustments apply only to those days which currently show Mrs. Zaryski working 10 hours a day. It does not affect those days on which the delegate concluded she worked less than 10 hours. Also, it may change the hourly rate upon which the wage calculations will be based.
>
> Northland has not shown the conclusion of the delegates regarding the hours of work of any of the other individuals was wrong or unreasonable and the appeals relating to those individuals are dismissed.

As noted earlier, the Adjudicator referred back to the Director the matter of calculating the wages payable to Mrs. Zaryski based on his findings concerning her hours of work.

We now address the various grounds of Northland's application.

Incorrect standard of proof

There are two branches to this ground of Northland's application.

Northland submits that the Adjudicator " ... erred in applying a standard of proof in excess of what the *Act* provides" by placing on it the onus of establishing the resident managers were, in fact, managers " ... on clear evidence." It submits that such a standard of proof is " ... similar to the arbitral or common law standard of proof in dismissal cases, which requires clear and convincing evidence to sustain a discharge."

The error which Northland alleges was made by the Adjudicator appears at page 10 of the Original Decision:

> There are two points to be drawn from the above excerpt: first, in the context of excluding a person from the *Act* or any part of it, the burden of establishing the basis for the exclusion lies with the person asserting it; and second, because of the consequences to an individual of such a conclusion, there must be clear evidence justifying that conclusion. The scope of exclusion from the *Act* is limited.
>
> In this case, Northland has failed to establish, on balance, that Early was exercising a power and authority typical of a manager. As the Tribunal stated in *Re Amelia Street Bistro*, above, it is a question of degree and the evidence presented does not show a sufficient degree of responsibility and discretion in those relevant matters to allow a conclusion that her primary employment duties consist of supervising and directing other employees.
>
> There are a number of reasons for this finding ...

In our view, the Adjudicator applied the correct standard of proof, contrary to Northland's submission. When the above passage is read in the context of the entire Original Decision, there is no doubt that the Adjudicator found that Northland had failed to make its case "on balance." He did not, despite his use of the word "clear," require Northland to meet the higher standard of "clear and convincing evidence." Our view is reinforced by the following passage from page 12 of the Original Decision:

> As in any appeal before the Tribunal, the appellant bears the burden of persuasion. Along with that burden, they bear an evidentiary burden. The burden is on Northland to establish an evidentiary basis upon which this issue may be argued. In my opinion they have met that burden in respect of Mrs. Zaryski.

Northland also submits that the Adjudicator applied the wrong standard of proof when he decided at page 11 of the Original Decision:

> Any conclusion about whether a person is "manager" will be based upon the actual authority exercised by the person, not on the authority someone says they might have.

It is Northland's submission that " ... the proper test is to determine whether the power rests in the individual or not" and it relies on a decision of the Labour Relations Board to support that proposition (*Vancouver General Hospital*, BC LRB No. B81/93):

> While a case turns on an interpretation under the *Labour Relations Code*, the principle has application in this case. It was not disputed the resident managers were given the power to discipline employees including discharge even if they sought the approval of their general manager. While the resident managers at Vernon had not yet exercised the power as Early did in Blue River, they nevertheless had the authority to do so.
>
> The same analysis applies to budgeting and evaluating employees ...

On this point, the Director submits that " ... the proper test is whether the authority was exercised or not. It is real independence, expressed by action, not sham authority, as set out in a position description."

We are not persuaded that we should be guided by the *Vancouver General Hospital* decision of the Labour Relations Board. There are two reasons for that conclusion. First, the statutory definition of "employee" in the *Act* differs substantially and markedly from the definition of "employee" under the *Labour Relations Code*. Second, "manager" is defined in Section 1(1) of the *Regulations* (BC Reg 396/95) and is not defined under the *Code*. Third, we note that the purposes of the *Act* are not the same as those for which the *Code* was enacted. Finally we note that, while it was not at issue in the *Vancouver General Hospital* decision, Section 29 of the *Code* permits the certification of bargaining units which are compromised, in whole or in part, of supervisory employees.

As noted earlier in this Decision, the Adjudicator relied on the reasoning in *Amelia Street Bistro* (BC EST #D479/97) and the remedial nature of the *Act* to make his finding that none of the resident managers was employed " ... for the primary purpose of supervising and directing other employees" and they were not " ... exercising a power and authority typical of a manager charged with supervising and directing the employees."

Northland agrees that *Amelia Street Bistro* is the seminal decision by this Tribunal on the question of whether an employee is a manager. It goes on to submit:

> ... Further, we do not disagree with the Director's assertion that the proper test of a "manager" status requires an examination of whether the employee's primary duties are to independently manage the business. Our argument was the Original Panel did not consider whether the Complainant's duties were in substance primarily management. Because Northland has a procedure setting out discipline and other procedures, the Original Panel concluded the exercise of management powers were not independent. We submitted that this analysis fails to address whether the powers exercised by the Complainant's were in substance managerial.

Simply put, Northland disagrees with the manner in which the Adjudicator applied the principles in *Amelia Street Bistro* in making the Original Decision.

In our view, the Adjudicator applied the reasoning contained in *Amelia Street Bistro* correctly and he addressed the issue of whether the authority exercised by the resident managers was sufficient to bring them within the statutory definition of "manager". Moreover, the Original Decision contains an extensive description of the resident managers' duties and responsibilities as well as a complete analysis (some 5 1/2 pages in length) of the statutory definition of "manager". Northland's application for reconsideration contains an express acknowledgment that the Adjudicator relied on the reasoning contained in *Amelia Street Bistro* to support his analysis in the Original Decision.

Inconsistency with other decisions

The only substantive point which Northland makes on this ground of its application is that *Amelia Street Bistro* stands for the proposition that "... the amount of time a person spends supervising and directing employees is an important factor but is not determinative" of their status as an employee of a manager. As a result of *Amelia Street Bistro*, Northland submits:

> The analysis now requires consideration of the overall duties performed by the individuals who are the subject of the determination. We submit that an analysis of all of these factors impels the conclusion that the resident managers are "managers" for the purpose of the *Employment Standards Act*. Instead, the Adjudicator concluded the resident managers were little more than caretakers. This fails to address the fundamental question posed by Sandman: if not these individuals, then who is responsible the daily management and operation of the motels ... ?

Northland's submission on this ground of its application does not establish that the Adjudicator committed a reviewable error. We do not find the reasoning in the Original Decision to be inconsistent with the principles set out in *Amelia Street Bistro*. The Adjudicator's reasoning took the statutory definition of "manager" as its point of departure and moved immediately to a discussion of the reasoning in *Amelia Street Bistro* and *Sunshine Coast Publishers Inc.* That was followed by a lengthy exposition of how those principles were applied by the Adjudicator to the evidence as he found it on the "first issue": whether the resident managers were "employees" or "managers" for purposes of the *Act.*

Mistake stating the facts/Failing to deal with a serious issue

Northland submits that "... based on the Tribunal's jurisprudence the factual findings of the Adjudicator are consistent with the conclusion the resident managers were "managers" under the *Act*. It also submits that "... the conclusion that the resident managers were no more than caretakers misread the facts and failed to deal with the Sandman's issue that the

resident managers were solely responsible for the daily operation of the two motels in question." While Northland agrees that *Amelia Street Bistro* is germane to the issues raised in its appeal, it disagrees with " ... the manner in which (the Adjudicator) applied the principles enunciated in this decision to the facts found in (the Original Decision)."

We agree with counsel for Northland that *Amelia Street Bistro* stands for the proposition that a proper determination of whether a person is employed as a manager will depend on a "total characterization of that person's duties." However, on a careful reading of the Original Decision we do not agree with Northland that the Adjudicator made a "... completely inconsistent factual finding."

We note that the Adjudicator heard evidence and argument over two days prior to making the Original Decision. We also note that pages 3 through 6 of the Original Decision contain a lengthy and comprehensive recitation of the relevant facts including the following, at page 6:

> There is no evidence any final decisions relating to the conduct of the business were made by the individuals. There was evidence that some resident managers, though not the individuals, have made suggestions relating to the operation of their motel and these had been acted upon. But there was also evidence that suggestions have been made which were not acted upon. In each case the final decision appears to have been made at head office.

It is clear from the preceding paragraphs that the Adjudicator's reference to "head office" includes the President, three vice-presidents and the various regional directors and managers of which Shirley Grayson was one.

When the Adjudicator made a finding of fact that "... the final decision appears to have been made at head office" he provided a complete answer to the questions posed by Northland in this application for reconsideration:

> ... "who is responsible for the daily management and operation of the motels ..?"
> "who other than the resident managers are directly responsible ..?"

That finding by the Adjudicator is entirely consistent with his finding at pages 7 and 8, that none of the resident managers was employed in an executive capacity (a finding which Northland does not challenge directly.) It is also consistent with the finding that "... no extraordinary operational expense and no capital expense could be made without the approval of either..." Shirley Grayson (the manager responsible for the Blue River and Vernon motels) or head office. The essence of Northland's position is that it assigned two persons 'whose primary employment duties consist of supervising and directing other

employees' to a facility with as few as three other employees in a work setting where all decisions, including minor expenditures, were monitored closely by headquarters through a policy manual, frequent telephone calls and faxes. The Adjudicator found correctly that " ... (t)he totality of the evidence indicates that (the resident managers') power and authority was limited or determined by the policies and operating procedures imposed by Northland."

In short, we are satisfied that the Adjudicator heard sufficient evidence and made appropriate findings of fact to reach conclusions which were based on "... a total characterization" of the resident managers' duties, as required by the Tribunal in *Amelia Street Bistro*. A careful reading of the Original Decision shows that the Adjudicator considered relevant factors such as: power of independent action, autonomy and discretion; authority to make final decisions about the conduct of the business, and making final judgments about employment matters. We are not persuaded by Northland's submission that the Adjudicator made a mistake stating the facts or that he made a "... completely inconsistent factual finding" or that he "misread the facts." Further, we do not agree with the Northland's submission that the Adjudicator failed to deal with "... the fundamental question posed by Sandman" in its appeal.

Denial of Fair Hearing

The central point of Northland's submission on this ground of its application is that the Adjudicator failed to conduct a proper analysis of the calculations made by the Director's delegate in determining the wages owed to the resident managers. That failure, it submits, "... is attributable to a denial of a fair hearing." In support of its submission Northland's Senior vice-president, Taj Kassam, swore an affidavit that he had read counsel's submission and that it " ... accurately sets out the facts that Sandman Hotels & Inns Ltd. was not given an opportunity to provide evidence and argument about the wages which should be paid to the resident managers if they were found not to be "managers" under the *Employment Standards Act*." Northland submits that the Adjudicator was "... wrong and unreasonable" when he found, at page 13 of the Original Decision, that " ... Northland has not shown the conclusion of the delegates regarding the hours of work of any of the other individuals was wrong or unreasonable and the appeals relating to those individuals are dismissed." Northland also submits that it did not provide the relevant information to the Adjudicator because it was not afforded an opportunity to make proper submissions on this point.

The Director submits that this aspect of Northland's application "... has no merit whatsoever ..." and further:

> "... Northland had opportunities to refute testimony by cross-examination, but chose not to do so. Northland, not the Director or the Complainants, chose to rely on a decision which is based on different statutory provisions,

> and therefore not germane to the appeal before the Tribunal. Grayson and Taj Kassam, both senior personnel, testified on behalf of Northland. That Northland's then advocate did not adduce evidence that Northland with the advantage of the Sandman decision, now considers might have been helpful to its case, does not obligate the Tribunal to put the Director and the Complainants to the effort and expense of another hearing."

In reply, Northland argues that since the Director's submission is not supported by a statutory declaration, we should prefer the facts contained in its submission on this point. That is, Northland asserts that it was not allowed an opportunity to adduce evidence concerning the resident managers' hours of work because of the procedure adopted by the Adjudicator. According to Northland, the Adjudicator's procedural rulings resulted in its appeal of the two Determinations being heard together and "... the issue of the calculation entitlement being addressed separately after the evidence and argument on the issue of managerial authority was concluded."

The Adjudicator's analysis of the "hours of work" issue begins at the bottom of page 11 in the Original Decision, as follows:

> The second issue is whether the delegates erred in determining the "hours of work" of the individuals. Northland argued that the burden was on the individuals to prove they were "at work" for all of the hours claimed. In the context of an original complaint, I agree with that statement. However, the delegates concluded that individuals had met that burden, at least to the extent accepted by the delegates in their respective Determinations.
>
> For Early and Majetic, the delegate, while believing Early and Majetic worked for longer than 8 hours a day, concluded it was appropriate and reasonable to accept, for the purposes of the complaint, that each worked 8 hours a day. For Mr. and Mrs. Zaryski, the delegate reviewed the information provided by them and concluded the documents supported a claim that each worked 10 hours a day.
>
> Northland challenges those conclusions. As in any appeal before the Tribunal, the appellant bears the burden of persuasion. Along with that burden, they bear an evidentiary burden. The burden is on Northland to establish an evidentiary basis upon which this issue may be argued. In my opinion they have met that burden in respect of Mrs. Zaryski.
>
> The conclusion of the delegate that Mrs. Zaryski worked the equivalent of 10 hours a day, six and seven days a week cannot be sustained on the material before me ... "

A lengthy analysis of Mrs. Zaryski's hours of work follows a finding by the Adjudicator, based on evidence adduced by Northland, that it was probable that she worked "... fewer hours than what she claimed to have worked as the daily occupancy levels of the motel declined." The Adjudicator also found that Northland did not show that " ... the conclusion of the delegates regarding the hours of work of any of the other individuals was wrong or unreasonable and the appeals relating to those individuals are dismissed."
We conclude that the Adjudicator had sufficient evidence to allow him to concur with the Director's delegate concerning the hours of work for Early, Majetic and Mr. Zaryski. He also concluded, based on the evidence adduced, that the matter of Mrs. Zaryski's hours of should be referred back to the Director to calculate the wages owing to her. We note that the appeal hearing, at which Northland was represented by a consultant, was conducted over two days. There is nothing in the Original Decision nor in Northland's reconsideration application to suggest that its representative at the hearing objected to the Adjudicator's procedural rulings nor that he requested and was denied an opportunity to present evidence related to the resident managers' hours of work. If we were to agree with Northland's request to "remit" the matter to the Adjudicator, that would constitute a third opportunity for it to make its case. That, in our view, is not consistent with the purpose of the *Act* not the principles of natural justice. It is also not consistent with the proper exercise of the Tribunal's discretionary power to reconsider (see pages 4 through 7 above).

In short, we are not persuaded that Northland's application for reconsideration should succeed on this ground because we are unable to conclude that the Adjudicator did not hear sufficient evidence and argument to afford a fair hearing and to make a proper decision. We make this finding while acknowledging that the Original Decision does not set out a lengthy or exhaustive set of reasons for the Adjudicator's decision to concur with the determination made by the Director's delegate concerning the hours worked by Early, Majetic and Mr. Zaryski. However, that omission is not such that it establishes a ground to reconsider the Original Decision.

ORDER

We order, under Section 115 of the *Act*, the Original Decision (BC EST #D004/98) be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

Alf Kempf
Adjudicator
Employment Standards Tribunal

Mark Thompson
Adjudicator
Employment Standards Tribunal