

An appeal

- by -

Howe Holdings Ltd.  
("Howe Holdings")

- 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

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2004A/86

**DATE OF DECISION:** July 28, 2004

## DECISION

### SUBMISSIONS

On behalf of Howe Holdings Ltd.: Justis Raynier, Barrister & Solicitor  
On behalf of the Director of Employment Standards: Ken Elchuk  
On her own behalf: Andrea Halford

### OVERVIEW

This is an appeal by Howe Holdings Ltd. ("Howe Holdings") pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued April 6, 2004.

Andrea Halford filed a complaint alleging that Howe Holdings had not paid her regular wages including overtime pay and compensation for length of service.

The Director's delegate held a hearing into Ms. Halford's complaint on February 11, 2004. Mr. Raynier represented Howe Holdings, Ms. Halford represented herself.

Following the hearing, the delegate issued a decision finding that Howe Holdings had contravened the Act in failing to pay Ms. Halford wages. The delegate determined that Ms. Halford was owed wages and interest in the total amount of \$5,464.43. The delegate also imposed an administrative penalty of \$500.00 for the contravention.

Howe Holdings contends that the delegate erred in law and in fact. It argues that the evidence submitted was not properly considered by the delegate.

Although Howe Holdings sought an oral hearing, because I have concluded there are no issues of credibility and Howe Holdings is represented by counsel, this appeal is based on the written submissions of the parties.

### FACTS

Ms. Halford and her husband were employed as managers of a Travelodge operated by Howe Holdings. Ms. Halford claimed that she worked in excess of eight hours per day and/or forty hours per week and was not paid additional regular wages or overtime wages. She also claimed that Howe Holdings terminated her employment without notice or compensation for length of service.

At issue before the delegate was whether Ms. Halford was a manager, and thus exempt from the overtime provisions of the Act, whether Ms. Halford was entitled to regular wages, and whether she was entitled to compensation for length of service. At the hearing, Ms. Halford conceded that she quit her employment. Thus, the delegate determined that she was not entitled to compensation for length of service. This issue is not under appeal and no further references will be made to it.

I will summarize the evidence and findings of the delegate on each issue under appeal.

Was Ms. Halford a manager?

As set out by the delegate in his decision, Ms. Halford was initially hired as a front desk clerk, and then as motel manager.

There is no dispute that Ms. Halford was hired as the motel manager on September 23, 2002, and that she was paid wages based on a salary of \$2,700 per month. There was also no dispute that Faroz Khan, Howe Holding's general manager, and Ms. Halford and her husband later agreed that Mr. and Ms. Halford would share the motel manager's job duties, and that they would split the total monthly wages between them. Beginning October 1, 2002, Ms. Halford was paid \$850 semi-monthly and Mr. Halford \$500 semi-monthly. The Halfords were also provided with living accommodation at the motel.

Mr. Kahn contended that the wages were split between the Halfords at their request. Both Ms. Halford and Mr. Khan agreed that the wage split was to recognise the income tax implications of the fact that Mr. Halford had other full time employment.

Ms. Halford testified that she had responsibility for hiring, firing, disciplining and directing other staff, and that she was directed in these matters by Mr. Khan, who telephoned her each day at 9:00 a.m. She testified that she was given no input into the general operation of Howe Holding's business. She hired some staff herself, others were hired by Howe Holdings. Wage rates for the employees were set by Howe Holdings. Ms. Halford testified that she fired one employee only after receiving authorization to do so from Mr. Khan.

Ms. Halford decided which motel units were rentable, and reported repair requirements to Mr. Khan. Room rates were set by Howe Holdings, although Ms. Halford had some discretion to approve other rates within a range approved by Howe Holdings. She also had access to \$1000 petty cash to spend on supplies or other business operations, but required approval from Mr. Khan for any expenditures over \$100.

Ms. Halford testified that she operated the business on her own subject to direction from Mr. Khan in his daily telephone calls.

Mr. Khan's evidence was that Mr. Halford and Ms. Halford were both hired as managers and were to share the duties equally. While he was aware Mr. Halford had other full time employment, to his knowledge, Mr. and Ms. Halford did share the duties equally.

Mr. Khan testified that Ms. Halford was responsible for running the motel on a daily basis, including managing the front desk, supervising the front desk and housekeeping staff, setting work schedules, hiring, firing, training and discipline of staff, guest relations, determining maintenance needs, determining room availability and room rates, and managing a \$1000 petty cash fund. Mr. Khan agreed that Ms. Halford reported to him regularly.

Mr. Khan testified that Ms. Halford had full discretion to identify staffing requirements, fill any necessary positions, and to terminate staff. He said that he only asked Ms. Halford to notify him of any staff hires and fires. Staff scheduling, including hours of work and time off was left to Ms. Halford's discretion.

Howe Holdings submitted that Ms. Halford was a manager, as that was defined in the Act, since her principal employment responsibility was in the supervising and directing of employees. Alternatively, Howe Holdings submitted that Ms. Halford was employed in an executive capacity.

The delegate considered the definition of manager in the Employment Standards Regulation, and the Tribunal's decisions in *Amelia Street Bistro* (BC EST #D497/97) and *Northlands Properties Ltd.* (BC EST #D423/98). He also considered the Tribunal's decisions about motel managers in *Northlands (supra)* and *Patara Holdings Ltd. operating as Canadian Lodge Motel* (BC EST #D234/03). He considered the factors set out in *Patara* and concluded that Ms. Halford was not a manager. He found that her authority to hire, fire, discipline, schedule and train other employees was subject to Mr. Khan's approval. He found no evidence that she was involved in key decisions relating to the operation of Howe Holding's business. He found that Howe Holdings limited her ability to spend money, and that she had no authority to make capital expenditures without Howe Holding's approval.

He also found that, while Ms. Halford had some authority to decide on room rental rates, that authority was within a limited range, and that she had no authority to authorize major expenditures. Therefore, the delegate determined that Ms. Halford was not a manager under section 34(1)(a) of the Act, since her primary employment duties did not consist of supervising and directing other employees. He also determined that Ms. Halford was not employed in an executive capacity.

The delegate also examined Ms. Halford's duties in light of the amended definition of manager, which came into effect November 30, 2002. He concluded that there was nothing to distinguish the phrase "primary employment duties" from "principal employment responsibilities" as they applied to the facts. He concluded that the phrase "human" resources likely referred to other employees, and, in that sense, differed little from the previous definition.

The delegate determined that the legislature, by the inclusion of the words "other resources", intended to expand the definition of manager. However, he also determined that, because exclusions from the benefits conferring provisions of the Act were to be narrowly interpreted, "other resources" had to be considered in light of the overall daily operation of the motel and property, or the motel "resource". The delegate determined that Ms. Halford did not have the actual authority to independently manage the motel "resource" in the manner typical of a true manager, and concluded that she was not a manager at any time of her employment.

Was Ms. Halford entitled to regular wages, including overtime pay?

Mr. and Ms. Halford were responsible for the daily operation of the motel on a 24 hour basis 7 days per week with the exception of 40 hours each week in which Howe Holdings provided front desk relief. Ms. Halford contended that she worked from 6:30 a.m. until 11:30 p.m. each day at which time the night auditor arrived. She provided a sworn document from the night auditor that set out her hours of work. Those hours were identified as follows:

Sunday: 6:30 a.m. to 2:00 p.m. and 10:00 p.m. to 11:30 p.m.

Monday: 6:30 a.m. to 11:30 p.m.

Tuesday: 6:30 a.m. to 11:30 p.m.

Wednesday: 6:30 a.m. to 11:30 p.m.

Thursday: 6:30 a.m. to 11:30 p.m.

Friday: 6:30 a.m. to 3:00 p.m.

Saturday: 6:30 a.m. to 7:00 a.m. plus shopping time

Howe Holdings contended that, since Ms. Halford and Mr. Halford were hired to jointly manage the motel, and, given the motel's hours and scheduled time off, they could not have each worked in excess of 40 hours per week.

The delegate was satisfied that, whatever the original agreement was between the parties, Ms. Halford worked in excess of 40 hours per week, and that Mr. Khan was aware that she did so. He determined that Mr. Khan was aware Ms. Halford worked the hours she did, and directly or indirectly allowed her to do so.

Howe Holdings did not maintain a record of the hours Ms. Halford worked. Ms. Halford provided the delegate with a list of hours she worked each week. Although the delegate accepted Ms. Halford's hours of work for Friday, Saturday and Sunday, he found her assertion that she worked 17 hours each day Monday through Friday to lack credibility, since it could not take into account her husband's hours of work. Therefore, the delegate apportioned the number of hours Ms. Halford worked based on the percentage of the monthly wage she received, or, 10.75 hours per day from Monday through Thursday. He also found that she was entitled to an additional one quarter hour per day for the days she assisted with late check-in during hours the motel was not open. The delegate noted that, in arriving at his determination, Ms. Halford did not receive minimum wage for all hours worked.

### **ISSUE TO BE DECIDED**

At issue is whether the delegate erred in determining

1. that Ms. Halford was not a manager and therefore entitled to overtime wages;
2. that Ms. Halford was entitled to wages.

### **ARGUMENT**

Howe Holdings contended that Mr. Halford and Ms. Halford agreed to work 40 hours per week jointly, and that the monthly salary was split between them at their request. It contends that they were hired by Howe Holdings on that understanding.

Howe Holdings says that, at the hearing, Ms. Halford testified that her job hours changed unilaterally because her husband did not carry his share of the duties, but that they did not communicate those changes to Howe Holdings, nor did they have Howe Holdings' consent to do so.

Howe Holdings further submitted that, although the delegate found that the duties were divided between Mr. and Ms. Halford, he failed to take into consideration the evidence of Mr. Halford during the hours of operation of the business. Alternatively, counsel submitted that the delegate failed to take into account the fact that Howe Holdings hired additional help for more than 40 hours per week.

Howe Holdings also contends that the delegate erred in his conclusion that Ms. Halford was not a manager. Counsel contends that the delegate failed to appreciate that the reason Ms. Halford and Mr. Khan were in such frequent contact was because of Ms. Halford's inexperience, and to enable Mr. Khan "to be aware of the business." He further submits that the delegate erred in concluding that Ms. Halford was a manager because she reported to Mr. Khan five times a week. Such reporting, he submits, does not mean that Mr. Khan "closely supervised" Ms. Halford's work. He says that such reporting as a function of management, not a derogation of it.

Howe Holdings argues that the delegate erred in his interpretation of the meaning "principal employment duties" and "primary employment duties". Counsel submits that the motel is part of the Travelodge chain,

and that housekeeping staff had a large role to play in maintaining the Travelodge standard. He says that the evidence was that the housekeeping staff was Ms. Halford's main supervisory responsibility, and that she had independent discretion to hire and fire the staff. He also submits that the evidence was that Ms. Halford hired three staff and fired two during a five month period. Counsel submits that the evidence was that the hiring process was conducted entirely by Ms. Halford and she reported the results to the head office.

Counsel for Howe Holdings also submits that, because Ms. Halford reported to head office on the hiring or firing of staff, this was not truly a managerial function. He submits this is erroneous, since payroll functions were carried out by head office.

Counsel also submits that the delegate erred in applying the test of manager set out in *Amelia Street Bistro* because the definition of manager has been expanded under the new *Employment Standards Regulation*. Counsel submits that Ms. Halford falls within the definition of manager as set out in the revised regulation.

Finally, counsel submits that, although Ms. Halford and her husband agreed to split the manager's duties, the delegate ignored the evidence that they unilaterally altered their work duties without the knowledge and consent of Howe Holdings. He submits that the document regarding Ms. Halford's hours that was introduced into evidence should have been considered hearsay since its maker was not present for cross examination. Counsel submits that the delegate erred in relying on the document and made a finding of fact unsupported by the evidence.

Counsel also argues that the delegate erred in applying the ratio of the wage split, which was unilaterally arranged by Ms. Halford for her and her husband's personal convenience, to determine the number of hours worked, while ignoring the hours worked by other front desk employees. He says that the evidence was that Howe Holdings provided 41.25 hours of front desk relief.

The delegate submitted that no errors of law were made. He contended that findings of fact were made, and that all the conclusions were based on those findings of fact, that all relevant evidence was considered, and that the applicable law was considered. He seeks to have the appeal dismissed.

In her submission, Ms. Halford indicated that, while she disagreed with the determination in respect of the hours she worked, she declined to make any further reply.

## **DECISION**

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made

The burden is on an appellant to demonstrate, on persuasive grounds, that one of the above noted factors exists. I conclude that Howe Holdings not met that burden.

***Did the delegate err in law in concluding that Ms. Halford was not a Manager, and therefore entitled to overtime wages?***

Section 34(1)(f) of the Employment Standards Regulations provides that Part 4 of the *Act* (that part relating to overtime wages) does not apply to a manager.

From September 23, 2002 until November 29, 2002, “manager” was defined in section 1 of the Regulations as

- (a) a person whose primary employment duties consist of supervising and directing other employees, or
- (b) a person employed in an executive capacity.

Effective November 30, 2002, the Regulation was amended so that “manager” was defined as:

- (a) a person whose principal employment responsibilities consist of supervision or direction, or both supervision and directing, human or other resources, or
- (b) a person employed in an executive capacity.

The issue of whether a person’s primary employment duties consisted of supervising and directing other employees was addressed by the Tribunal in *429485 B.C. Ltd.* (c.o.b. Amelia Street Bistro). (see also *Northland Properties Ltd.* BC EST #D423/98, in which sections 1(a) and (b) were comprehensively considered). In *Amelia Street*, the Tribunal said that a conclusion as to whether a person falls within s. 1(a) provisions:

...depends on 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 “manger”. 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.

The Tribunal has said that, in order to be employed in an executive capacity, the person must have duties that relate to active participation in control, supervision and management of the business.

As remedial legislation, the *Act* is to be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects. (see, for example, *On Line Film Services Ltd v Director of Employment Standards* BDEST 319/97 and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4<sup>th</sup>) 336 (B.C.C.A. ) ).

I am not persuaded that the delegate erred in concluding that Ms. Halford was a manager either before November 29, 2002, or after November 30, 2002.

The burden of establishing that a person is excluded from the protection of the *Act* or any part of it, lies with the person asserting it, and there must be clear evidence justifying that conclusion. (see *Northlands*).

The facts of this case are similar to those in *Northlands*. There, resident managers of two Sandman Hotels filed claims for wages. The evidence was that the resident managers had responsibilities related to hiring, firing and scheduling housekeeping and front desk staff and evaluating employees, for all occupancy issues, for day to day operational responsibility, including ordering and purchasing supplies, making bank deposits, and providing operational and financial information to their manager.

The adjudicator concluded that the complainants were not employed in an executive capacity, nor were their primary employment duties consisted of supervising and directing other employees. Their primary responsibilities were administrative and motel maintenance. The adjudicator found that their role amounted to little more than acting as “caretakers” for the property. The Adjudicator’s decision was upheld by the Tribunal on reconsideration.

Like the delegate, I find little to distinguish Ms. Halford’s duties from those of the motel managers in *Northlands*. She did not demonstrate the kind of independent action, authority or discretion typical of a person employed in an executive capacity, and she was not involved in any key decision relating to the conduct of Travelodge’s business.

There is no dispute Ms. Halford supervised the cleaning staff on a daily basis. However, those duties have to be considered along with other, non-supervising employment duties. Furthermore, Ms. Halford’s evidence, which was accepted by the delegate, was that she exercised authority to hire, fire and discipline and train staff only subject to Mr. Khan’s approval.

Although counsel contends that the delegate erred in concluding that Ms. Halford’s daily contact with Mr. Khan was due to Ms. Halford’s inexperience and to enable Mr. Khan “to be aware of the business”, the delegate preferred Ms. Halford’s evidence that her authority was subject to Mr. Khan’s approval. I am not persuaded that the delegate erred in preferring Ms. Halford’s evidence over that of Mr. Khan.

I am also unable to find that the delegate’s analysis of the post November 30, 2002 definition of manager is in error. It is apparent that the legislature intended to expand the definition of manager by including the words “other resources”. Like the delegate, I am unable to find that there is any substantive difference between the phrase “primary employment duties” and “principal employment responsibilities”. *Black’s Law Dictionary*, 6<sup>th</sup> Edition defines “primary” as “First; principal; chief; leading.” “Principal” is defined as “chief; leading; most important or considerable; primary, original”.

The replacement of the phrase “other employees” with “human or other resources” suggest that the legislature intended to include within the definition of manager those employees with responsibilities over other “resources”. I also agree with the delegate that those resources must be linked to the resources of the immediate workplace, or, in this case, the motel itself. While it is clear that Ms. Halford had, as her principal employment duties, responsibility for the motel, the evidence was that she “supervised”, and “directed” only subject to the approval of Mr. Khan. Her spending authority was limited, she required approval to perform any repairs, she had limited discretion in setting room rates, and she did not set wage rates. I find no error in the delegate’s conclusion that Ms. Halford was not a manager, and thus, entitled to overtime wages.

***Did the delegate err in law in determining Ms. Halford’s entitlement to wages?***

I am also unable to agree that the delegate erred in his determination of Ms. Halford’s wage entitlement.



The evidence was that, even though Mr. Khan believed that Mr. and Ms. Halford were to share the manager's duties, and he knew Mr. Halford had other full time employment, Howe Holdings paid Mr. Halford and Ms. Halford unequal amounts. Although Howe Holdings contended that that the Halfords were to share the managers duties equally, the delegate found otherwise.

Section 28(1)(d) of the Act requires an employer to maintain daily hours of work for each employee. Howe Holdings did not do so, and thus could not provide any evidence of the hours Ms. Halford actually worked. The delegate was entitled to weigh all the evidence regarding Ms. Halford's hours, including the auditor's sworn statement, and attribute whatever weight he felt was appropriate. It is clear the delegate considered all of the evidence in arriving at his conclusion, and arrived at a reasoned conclusion based on that evidence.

I also do not agree that the delegate erred in applying the ratio of the wage split, in light of all of the evidence. There is no evidence the wage split was arrived at unilaterally. The fact is that it the wages were paid by Howe Holdings according to that formula, which implies at least acquiescence, if not explicit consent. The delegate arrived at a reasoned conclusion, on the best evidence, in the absence of any actual record of hours by the employer.

## **ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination, dated April 6, 2004, be confirmed.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**