

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

Eddy Haymour
(" Haymour ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR	Alfred C. Kempf
FILE No.:	97/847
DATE OF HEARING:	March 16, 1998
DATE OF DECISION:	May 4, 1998

DECISION

APPEARANCES

A hearing was held in Kelowna on March 16, 1998. Haymour appeared with counsel, Brian B. Norton. Nicole Turcotte ("Turcotte") appeared on her own behalf. Dominga Steven ("Steven") appeared with her husband. Stan Meyers ("Meyers") and Jennifer Hallmark ("Hallmark") did not appear.

OVERVIEW

This is an appeal by Haymour, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against Determination of the Director of Employment Standards (the "Director") issued on October 29, 1997. In this appeal the employer claims that no wages are owed to the employees referred to above. Since there are separate issues in each appeal each employee's situation will be dealt with separately (Hallmark and Meyers will be dealt with together) after a brief statement of facts in common to each situation.

COMMON FACTS

Haymour owned and operated a small inn near Peachland, British Columbia known as the Castle Haymour. Each of the above noted individuals performed services for Haymour. The inn has seven rooms as well as a 26-seat restaurant and a small spa (Turkish bath) facility. The inn is very seasonal in the sense that the summer months are quite busy. Spring and fall are slower seasons. In the winter there is very little business.

There was some conflicting evidence as to the operations of the dining room. Generally it can be concluded that the dining room was open for breakfast only for guests of the inn. In the busy season it also opened for lunch. The dining room was open more frequently for dinner but was only busy during high season and on special occasions throughout the year.

The inn operated with minimal staff. Haymour was intricately involved in the day to day operations of the inn. Haymour and some others who performed services at the inn lived in the inn from time to time.

STEVEN

ISSUE TO BE DECIDED

The issue regarding Steven is whether she is an independent contractor or an employee.

FACTS

Steven worked as a chambermaid at the inn from August 16, 1996 to October 13, 1996. Her hours are not in issue. Haymour contends that, because she was an independent contractor, the provisions in the *Act* calling for payment for a minimum four-hour shift do not bind him.

Steven would be called into work in the morning by Haymour based upon the anticipated workload that day. Some days the work could be completed in less than four hours. During the busy season it might take more than four hours to complete her work.

Steven also cleaned hallways and cleaned in the kitchen and even did some light work on the grounds of the inn.

Steven did not provide any tools necessary in the performance of her work. She was under the direct supervision of Haymour. Haymour says that Steven was compensated on a per room basis no matter how long it actually took to clean the room. Haymour testified that the rate was calculated having reference to the average time it should take to clean a room. He testified that the additional cleaning work in the kitchen and hallways was simply part of the bargain.

It is clear that Steven had to be available for call-in to the inn. She was the only chambermaid and as such she was integral to the operation of the inn.

Steven testified that she understood that she would be paid \$7.50 per hour. She regularly submitted statements of her hours prepared by her husband to Haymour. Haymour paid Steven from time to time but was usually late in paying.

Haymour and Steven had a disagreement about the quality of her work regarding one of the rooms in the inn. As a result she quit her employment. In discussing matters with the Branch she came to realize that Haymour should have paid her for minimum four-hour shifts on the days she worked less than four hours. She filed a complaint in this regard.

ANALYSIS

Later in this decision I will outline in greater detail the test to be used in determining whether a worker is an employee or independent contractor.

Having regard to those factors particularly the issues of exclusivity, risk of profit or loss, integration and ownership of tools, I conclude that, notwithstanding Haymour's belief about the nature of the employment relationship, Steven was an employee.

TURCOTTE

ISSUE

The threshold legal issue is whether she was an employee or whether she was an independent contractor. Haymour contends she was neither and that she was his common-law spouse.

If it is determined that Turcotte was an employee it will be necessary to examine in some detail her claim for hours worked and overtime hours worked. It will also be necessary to determine whether she was a manager for the purposes of the *Act*.

FACTS

Turcotte started her association with Haymour on June 1, 1996. She terminated that relationship on November 1, 1996. One of the only other things the parties agreed about was that Haymour advanced Turcotte \$3,595.00 during her time at the inn.

Haymour's evidence

Haymour testified that he was looking for a masseuse for his spa facility at the inn. Turcotte met with Haymour. She had experience as a reflexologist. The initial agreement was that she would provide reflexology services to the patrons of the inn. Turcotte would keep the revenues.

Turcotte's role quickly changed however. She moved into Haymour's suite at the inn and an "intense personal relationship" ensued. They resided together as "husband and wife". Haymour informed Turcotte of the financial struggles that he was undergoing and she agreed to pitch in where she could. Haymour assisted Turcotte financially, for example, to have some of her jewellery released from a pawnshop. He also advanced funds for other expenditures. He provided her, without charge, with room and board.

Haymour wanted to enter into a contract with Turcotte. She did not want a contract.

Haymour introduced Turcotte as his wife or "Queen of the castle". He had a sexual relationship with her during the time she lived and worked at the inn and after she left the inn.

Because of the nature of Haymour's relationship with Turcotte he did not think it necessary to keep any time records. He believed that she would be entitled to 50 percent of the profit earned by the inn during the time that she was there.

He testified that Turcotte did a variety of jobs around the inn. He testified that she would start her day at approximately 8:30 a.m.. She would prepare and serve breakfast to the guests of the inn. Later in the morning she would tend to various business including shopping for provisions for the inn. During the season when lunches were offered she would prepare the lunches and clean up the kitchen. She would then have a few hours off before preparations for dinner became necessary. She would prepare dinners, serve dinners, perform bar tending duties, and cleanup the restaurant and kitchen. Haymour would assist in these duties as well. They typically finished for the day during the busy season around 10:00 p.m.

During September and October there was far less to do. Lunches were no longer served and dinners were infrequent except on weekends. There were very few guests in the inn and as result very few breakfasts had to be prepared.

Turcotte and Haymour would take reservations for the restaurant and the inn over the telephone during the day. Haymour testified that Turcotte essentially could come and go as she chose throughout the day. He says she frequently had time away from the inn.

Under cross-examination he testified that she had no room to do reflexology until a room was finished for her in August.

He said in written submissions that she received \$80.00 to \$130.00 per day although he attempted to resile from this position at the hearing.

He admitted that Turcotte had separate accommodations in the inn, however, maintained that she spent most nights with him.

There were no discussions about wages after Turcotte began her association with Haymour. Turcotte did much of the work preparing the reflexology room although Haymour paid for the materials. He admitted placing an ad in the newspaper for a manager prior to interviewing Turcotte in the spring of 1996.

Turcotte's evidence

Turcotte was living with friends in Westbank and looking for employment in early 1996. She had recently given up a small business, which had not been profitable.

She went out to see Haymour. They had a long and productive meeting. Haymour was impressed with Turcotte's experience with Arabian cooking. Turcotte had a number of ideas as to how the operation of the inn could be improved. There was discussion about Turcotte's difficult financial situation. Haymour showed her a suite in the inn where she could live. He thought she could save expenses of an automobile as well as rent by residing at the inn. The job was described as waitressing, cooking, bar tending and at times to take reservations.

While there was discussion about her reflexology there were no immediate plans for her to carry on reflexology. It was discussed that a room in the spa could be prepared for her to perform these services.

The parties had a discussion about wages on the day they first met. They agreed to agree on some arrangement in the future. Profit sharing was discussed. Turcotte knew that business was slow although she expected to receive a salary of approximately \$1,000.00 per month plus room and board.

She ended up spending that night with Haymour at the inn. She had a few sexual encounters with Haymour over the next several months. She denies any ongoing relationship other than a mutual fondness. She did accompany Haymour to events like weddings and family gatherings. They usually took their meals together. They did not share finances.

The next day she moved her personal possessions into a room at the inn. She set out to clean the kitchen and immediately commenced food preparation duties.

Turcotte considered herself to be a manager of the operation. She planned improvements to the operation which she discussed with Haymour. She sometimes supervised the chambermaid. She planned the menu and was in charge of purchasing supplies. In all important matters she consulted with Haymour. She did bank deposits infrequently. She did not want to get involved in the financial aspects of the operation because she felt that Haymour's records were not sufficiently organized.

Her day started at 7:30 a.m. to prepare breakfast. (The delegates investigation concluded that she started her day at 8:00 a.m.) On the mornings that there were no breakfast served she often performed cleanup duties in the kitchen left over from the night before. After serving breakfast she cleaned up in the kitchen. She then helped sort out the linens for the rooms.

Lunch times were quite busy in June but less busy in July and August. By September there were no more than 12 days per month on which any lunches were served.

Turcotte would have to begin preparations for lunch at approximately 11:30 a.m. in the morning. In the afternoon and in other spare time she would do landscaping and gardening as well as light maintenance and cleaning of the inn. She cleaned fridges, dusted, cleaned up after Haymour, and ironed tablecloths. She assisted in the renovation of rooms, showed people around, and did marketing for the inn.

At 4:30 p.m. to 5:00 p.m. she started to prepare the kitchen for dinner. Her duties in the kitchen were usually not complete until 11:00 p.m. in June, July, and August. After August dinners fell off considerably and she was usually finished in the kitchen by 9:00 p.m. While Turcotte was working in the kitchen Haymour spent considerable time entertaining the patrons of the restaurant.

She did not take much time off - she recalls taking a two hours off one day to go to the beach. She took two days off to visit with her family. Every two weeks or so she took a few hours off to visit her mother in Penticton.

In the fall when the tourist traffic slowed down the spa business picked up somewhat. Haymour hired a male and female masseuse. She at this time began to do more reflexology. Haymour wanted Turcotte to do massage but she resisted this idea.

She received \$20.00 per reflexology session when she did it as part of the package offered by the inn. She did this 15 to 30 times. It would involve 1.5 to 2 hours of her time per session.

Beginning in August she took on her own reflexology clients at the rate of approximately six per week. It would take 40 to 50 minutes to complete a session. For this she received \$30.00 per session. She carried out 40 to 50 of such sessions during her time at the inn. She testified that most of the reflexology was done after her duties in a restaurant were complete commencing at 10:00 or 11:00 p.m.

In September and October she would finish her kitchen duties at approximately 9:00 p.m. She testified that her tips averaged \$10.00 per day.

Between June and August she attended a course on reflexology for two days a month.

After she left the inn she discovered from materials she read that she was likely owed some wages and filed a complaint.

ANALYSIS

The Relationship

I accept that Turcotte and Haymour were involved in a personal relationship.

The *Act* defines employee as including the following:

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee.

Employer is defined as including a person:

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible directly or indirectly, for the employment of an employee.

I am satisfied that Turcotte falls within the definition of employee (subject to my discussion of independent contractor status below).

There is nothing in the *Act* or *Regulations* excluding a person in a relationship with an employer or even a spouse or other relation of an employer from the protection of the *Act*. There is no reason why an employee in a relationship with an employer would not be entitled to the protection of the *Act* by reason of that relationship alone.

It is not necessary for me to decide the precise nature of the relationship, however, if it were, I would prefer the evidence of Turcotte. There was no corroborative evidence offered by Haymour as to the nature of the relationship. The burden is on him to show that the determination was wrong. In all of the circumstances I conclude that the relationship was more of mutual friendship than the stronger relationship described by Haymour.

Independent Contractor Status

There is a great deal of legal discussion concerning the difference between an employee and an independent contractor. Some of the factors considered in making this determination are:

1. Ownership of tools;
2. Degree of control of the work being performed;
3. Risk of profit or loss;
4. Exclusivity or economic dependence (i.e. is the worker free to work for others);
5. Integration (is the worker an integral part of the operation or enterprise);

I see no basis for the suggestion that Turcotte was an independent contractor having regard to these factors. She was key to the operation of the business and could not have worked elsewhere while performing duties for Haymour. Her presence was required on a regular basis.

I do accept, however, that the provision of reflexology services was done as an independent contractor.

Manager status

The *Regulations* under the *Act* define 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.

Turcotte did much of the work required to keep the inn operating. She did not normally supervise or direct other employees. It cannot be said that she was employed in an executive capacity even though she did have some autonomy and had input to management decisions. She was not a manager even though she thought herself to be.

Hours of Work

The determination calculated entitlement to wages based on 14 hours of work per day from June 1, 1996 to November 1, 1996. Only two days off were allowed for during this entire time period. The evidence does not support this calculation.

The difficulty is that the place of employment was also Turcotte's home. While I accept that she worked long hours I do not accept that throughout the entire period she worked 14 hours per day virtually every day. There is no doubt that during September and October, and to a lesser extent June, there was far less work to do and she worked less than 14 hours a day and 7 days a week.

There were no records of hours kept by either Turcotte or Haymour. It is clearly the employer's responsibility to keep such records for employees. Unfortunately for Haymour he did not believe that Turcotte was an employee. Given the unusual circumstances of this case I accept that he genuinely, albeit mistakenly, held that belief.

I accept that there were times during the day when Turcotte had no duties or that she occupied herself preparing the room which she was to use for her own reflexology business. She also had meal and rest breaks. During June, September, and October her days started later and ended earlier and she would have had far more free time.

I conclude that her entitlement to wages should be calculated in accordance with the following schedule:

MONTH	Hours worked per day	Time off in days permonth
June	12	2
July	14	1
August	14	1
September	10	2
October	10	2

I agree that Turcotte worked on statutory holidays and agree with the calculation of wages received.

I see no basis in the *Act* for deduction of room and board received by Turcotte and that part of the Determination is upheld.

While Haymour's submissions prior to the hearing raised the issue of denial of natural justice this was not pursued at the hearing and I do not find it necessary to deal with these issues. I find as a matter of fact that Haymour was given ample opportunity to communicate with the Branch prior to the Determination being issued.

The sum of \$3,595.00 should be deducted as an advance from the wages owed by Haymour to Turcotte.

MEYERS AND HALLMARK

ISSUES

The issues concerning Meyers and Hallmark are whether they were independent contractors or whether they were managers.

FACTS

In February of 1997 Haymour more was looking for people to lease his operation or to enter into a management contract for the operation of the inn. Meyers and Hallmark faxed a letter and resume to Haymour expressing interest in a lease or management contract. Haymour's evidence was that the precise basis for the compensation of these two individuals had not been agreed on, or at least finalized, during the period they worked at the inn between February 1 and 17 of 1997. There was a falling out at that time and Meyers and Hallmark left the inn.

There is no doubt that Hallmark and Meyers were to take over complete operation of the inn and that Haymour was to step aside. Hallmark and Meyers were to have free reign in the management of the inn including the right to hire and fire employees, set hours of operation, establish menus, etc.

The reservation sheets for the inn during the period of Hallmark and Meyer's time at the inn show almost no overnight guests and, with the exception of Valentine's day, virtually no dinner reservations. If Hallmark were working the extensive hours that they claimed it seems unlikely that they were performing hands-on work.

ANALYSIS

The intention may well have been for Hallmark and Meyer to be independent contractors. However, in the absence of any agreement as to the nature of the business relationship, I am not satisfied that they were independent contractors at the time of the termination of the relationship. I cannot on the evidence before me determine issues such as the risk of profit or loss, or exclusivity.

I do, however, find that Hallmark and Meyers were employed in an executive capacity and were therefore the co-managers of the inn. In a small business like an inn or motel it is conceivable that employees who perform a large percentage of the physical work and do little supervision of other employees can still be managers for the purposes of the *Act* if they are employed in an executive capacity. Where, as in this case, the entire operation is left to the managers I find that they were employed in an executive capacity.

ORDER

In summary, I order under Section 115 of the *Act*, that the Determination #7057 be varied as follows (together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.):

Steven: The Determination is confirmed.

Turcotte: The Determination is varied as to the number of hours worked and the advances made by Haymour and is referred back to the Director for calculation.

Hallmark and Meyers: The Determination is varied to categorize these two individuals as managers which will require a recalculation to exclude compensation for overtime rates of pay and referred back to the Director for this purpose.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal