

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-

Wiltshire Estates Ltd. operating as Agassiz Mini Mall & Laundromat
(the "Employer")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE NO.: 96/796

DATE OF HEARING: May 1, 1997

DATE OF DECISION: May 13, 1997

DECISION

APPEARANCES

Lloyd Timm for Wiltshire Estates Ltd.

Erna Hohl for herself

OVERVIEW

This is an appeal by Wiltshire Estates Ltd. operating as Agassiz Mini Mall & Laundromat (the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination file number 55438 dated December 12, 1996. Under the Determination the Director's delegate found that the Employer had contravened Sections 40(1), 40(2) and 63 of the *Act*. The Employer appeals the Determination that overtime pay and termination pay is due and owing to the complainant.

ISSUES TO BE DECIDED

Is the complainant a manager and thereby excluded from the hours of work and overtime provisions of the *Act*?

Is the complainant entitled to compensation for length of service?

FACTS

The employer operates a small business known as the Agassiz Mini Mall. Mr. Timm, the owner, lives in Surrey and would attend at the premises on a weekly basis. At the relevant time the operation had three employees. One of those employees was Erna Hohl (the "complainant"). The employer classified her as the manager. Ms. Hohl was hired on June 19, 1995 and her last day of work was January 11, 1996.

At the point of hire the employer wanted Ms. Hohl to consider herself a contractor. Ms. Hohl refused to accept that classification but rather took the position that she was an employee/manager. Regardless, some months into the employment relationship the employer accepted that she was not a contractor and started to view her as a contract manager. He testified that it did not matter to him what her title was as long as he had someone to "run the place". It is notable that for the first four months of employment the employer did not make statutory deductions of C.P.P., U.I. and Income Tax. However, those deductions were made during the latter portion of the term of employment. The employer acknowledged that the complainant was a hard worker, conscientious, and performed her duties well. He did acknowledge that towards the end of 1995 there was some dissatisfaction by the other employees with the complainant and that is what led to her termination. On January 6, 1996 the employer notified the complainant that her employment would be terminated on January 11, 1996.

The employer presented a document entitled "contract" which, on its face, appears to be a standard form contract that the employer used as the basis of an employment relationship with persons who had previously held the complainant's position. The document was not signed but both the employer and the complainant agreed that it fairly outlined the complainant's duties. Those duties included a requirement that the complainant ensure the cleanliness of the floors, windows, walls, shelves, counters, equipment, stock, kitchen, office, storage areas, and the outside porch, parking lots and grounds. It also required her to keep accurate and readable financial and statistical records. She was also required to conduct all the daily functioning of the business including handling customer services, dealing with ordering and wholesalers and salespersons, paying the bills on time and when required, handling any advertising, keeping stock up to date, servicing equipment and handling other functions that may be required. She was also required to maintain the security of the premises. The complainant did banking as required and kept accurate records of those transactions. She was also responsible for recommending hiring and firing of new staff. She had a discretion to hire staff on an emergency basis as long as prearranged financial concerns were followed. She did the scheduling for herself and the other two employees.

The business operated from 10:00 a.m. until 8:00 p.m. during the winter and from 10:00 a.m. until 9:00 p.m. during the summer. The complainant testified that the only overlap of hours would occur between one and three p.m. when she was on duty with the person who worked the regular morning shift. The complainant testified that it was during this time that she would do the bookkeeping and other administrative duties.

During the complainant's employment one person was terminated. The employer testified that he terminated the employee but it was on the recommendation of the complainant. The complainant testified that she was indeed keeping the employer informed about this employees performance but that she had shown great tolerance with this employee and had in fact prolonged that persons employment by showing this tolerance. The complainant agreed that the point had come with the employee when the employment relationship could no longer be sustained and that it was the employer that ultimately terminated her.

When the complainant was terminated she wrote herself a cheque for her final salary payment and her holiday pay. This was not unusual as she wrote payroll cheques for herself and the other employees during the course of her employment. She also had the authority to pay smaller bills and suppliers either by cheque or cash receipts. The complainant testified that she did not know the amount of severance pay that she would be entitled to and therefore did not pay herself any severance pay. The employer testified that he forwarded to the complainant, upon her termination, a cheque in the amount of \$1084.33 net which was based on \$497.37 wages, \$347.27 holiday pay and \$307.00 in severance. The complainant, upon receiving this cheque realized that it covered obligations for which she had already paid herself and returned the cheque. The employer, upon receiving the cancelled cheques that the complainant had written, assumed that the amounts included severance pay. The complainant testified that she did not pay herself any monies on account of severance pay.

The complainant kept payroll records on a daily basis. The records indicate that over the course of her employment she worked one hundred and twenty-five hours of overtime. The complainant

claims overtime pay for those hours. It should be noted that the complainant clarified at the hearing that she had paid herself straight time for the hours worked and that her overtime claim was for the premium portion only.

ANALYSIS

The Employment Standards Regulations Section 1 states:

"manager" means

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

Section 34(1)(f) of the *Employment Standards Regulations* specifies that a "manager" is excluded from hours of work and overtime requirements.

The issue in this case centers on whether Ms. Hohl is a manager. Clearly the complainant is not employed in an executive capacity. She is neither an officer nor a director of the corporation nor does she play any significant role in the direction and control of the corporation. The analysis must therefore focus on whether her primary employment duties consisted of supervising or directing other employees. I conclude that her primary duties did not consist of supervising or directing other employees. I accept that she did the scheduling and was responsible for insuring that the premises were staffed during regular hours. However, aside from the bookkeeping and banking her duties were very similar to the duties of the other employees. She attended at the ice cream bar and in the laundromat to service customers. Her primary duties, as outlined in the document entitled "contract", set out that she was responsible for the day to day functioning of the business more than the direct supervision of the other employees. Indeed the evidence indicated that if one of the other employees was to be absent that the complainant would discuss the matter with the employer. I find that the complainant's primary duties did not consist of supervising and directing other employees. (*Leather Ranch Ltd.* BC EST # 237/96; *Harbour International Foods Ltd.* BC EST # 129/96) Therefore, the complainant is not excluded from the overtime provisions of the *Act*. However, as stated earlier in the decision, the complainant clarified at the hearing that she had received straight time pay for the overtime hours worked. Therefore, the determination of the amount of overtime required to be paid by the employer should reflect that the complainant has received straight time pay for those hours.

The second issue is the entitlement to termination pay. By letter dated January 6, 1996 the employer gave Mrs. Hohl one week's notice. However, her last day worked was January 11, 1996. The employer couldn't remember whether severance pay was paid at termination. It is not clear which days Mrs. Hohl worked between January 6 and 11, 1996. Section 62(3)(b) contemplates that liability resulting from length of service may be discharged by an employer if an employee is given a combination of notice and money equivalent to any amount an employer is required to pay. I refer this issue back to the Director's delegate for calculation.

ORDER

I order pursuant to Section 115 of the *Act* that the Determination 55438 dated December 12, 1996 be varied.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal