

**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 -

333976 B. C. Ltd. operating the Hart Hotel  
("Hart Hotel")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Norma Edelman

**FILE NO.:** 97/407

**DATE OF HEARING:** August 22, 1997

**DATE OF DECISION:** September 2, 1997

**DECISION**

**APPEARANCES**

Del Folk	for 333976 B.C. Ltd.
Marlene Hall	for Virgie Miller
Rob Joyce	for the Director of Employment Standards

**OVERVIEW**

This is an appeal by 333976 B.C. Ltd. operating the Hart Hotel (the “Hart Hotel”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards on April 17, 1997. The Determination required the Hart Hotel to pay \$3859.21 (including interest) to Virgie Miller (“Miller”) on account of unpaid overtime, statutory holiday pay and compensation for length of service.

The appeal was heard in Dawson Creek, B.C. on August 22, 1997. I heard evidence and submissions from Miller and from Del Folk (“Folk”) and Grace Hawkins (“Hawkins”) on behalf of the Hart Hotel. The Director of Employment Standards was represented at the appeal hearing by Rob Joyce, Industrial Relations Officer. With him, as an observer, was Donna Fleming, Employment Standards Assistant.

**ISSUE TO BE DECIDED**

The issues to be decided are whether Miller is owed overtime pay, statutory holiday pay and compensation for length of service.

**FACTS AND ARGUMENTS**

Miller was continuously employed by the Hart Hotel from September 1990 to January 1997. Folk is the owner of the Hart Hotel. He purchased the business approximately two and one-half years ago. Prior to that, he was a minority shareholder in the hotel. Shortly after Folk took over the business he increased Miller’s rate of pay from \$8.00 per hour to \$9.00 per hour. Folk terminated Miller’s employment in January of 1997 without written notice or compensation for length of service. A Record of Employment (“ROE”) was issued on January 27, 1997 which indicates that Miller’s last paid day of work was January 7, 1997.

In the Determination Miller was awarded overtime pay, statutory holiday pay and compensation for length of service. The Director's delegate relied on the employer's records to calculate the amount of overtime and statutory holiday pay owing to Miller. He found that notwithstanding the employer's claim that Miller had padded her hours and was paid for hours she had not worked, Miller was entitled to be paid the overtime and statutory holiday pay because the hours were accepted and paid by the employer at the time. He also found that the employer did not have just cause to terminate Miller's employment.

During the hearing, Folk took two positions on the issue of whether Miller was owed overtime and statutory holiday pay. He argued that Miller was not entitled to overtime and statutory holiday pay because she was a manager, but if the Tribunal were to find she was not a manager, then he would not dispute the Determination as it related to overtime and statutory holiday pay. He also argued that Miller's hours were padded and she never worked the hours claimed in the Determination and, therefore, she is not entitled to any overtime pay. Regarding Miller's dismissal, Folk argued he had just cause and therefore the Hart Hotel is not liable for compensation for length of service.

Folk testified that he increased Miller's rate of pay to \$9.00 per hour as a result of Miller becoming the manager of the hotel. Her duties increased from bartending and waitressing to looking after two or three other barmaids, scheduling, training, approving days off and time sheets, inventory control, ordering and hiring. Folk stated that Miller did no firing while she was employed at the hotel. Firing staff was his responsibility. Folk also stated that Miller usually worked four to five days per week and except for Friday nights and Saturdays she worked alone. He was unable to remember the name of anyone that Miller hired and he admitted that staff often handled days off on their own by getting a co-worker to cover their shift.

Folk further testified that effective April 30, 1996 Miller refused to do stock and ordering so these duties were performed by either him or his bookkeeper, and then he had to take over the scheduling as well because of staff complaints. This lasted until approximately November of 1996 when he appointed Hawkins as the new manager and she took over all Miller's duties including ordering, scheduling and inventory.

Folk also contends that Miller padded her hours. He said that Hawkins advised him in late November of 1996 that Miller was adding one-half hour to her time slips. He said when he brought this to Miller's attention she stopped the practice.

With respect to Miller's dismissal Folk argued that he had just cause for several reasons. First, Miller gave away free drinks. A letter from Taunia Murray dated February 13, 1997 was submitted which states Miller gave away about \$60.00 worth of free drinks on November 23, 1996. Second, Miller cashed a NSF cheque for herself on December 10, 1996 and was late opening the hotel on that day. Third, in mid December Hawkins advised him that Miller had altered the time book to lose a record of a \$100 advance. Fourth, Miller gambled on the job.

In mid June of 1996 Folk put pull tabs machines in the hotel. He said he signed an agreement with the B.C. Lottery Corporation prohibiting staff from playing it while working and he posted a sign behind the bar advising staff of the prohibition. Miller, however, constantly played pull tabs while working. Specifically, she gambled on June 18, 1996, August 12, 1996, December 11, 12 or 13, 1996, January 8, 1997 and January 9, 1997. On August 12, 1996 he questioned her about winning \$100. She said she won the money when she wasn't working. Folk said he knew this was not true and told her "please don't". On December 12, 1996 he posted a memo addressed to all staff which said Miller had been playing the breakopen lottery machine while on shift which is prohibited by the B.C. Lottery Corporation and advised that engaging in this activity will result in dismissal. On January 8, in defiance of the memo, Miller asked the hotel handyman to buy her a ticket. The handyman told Folk and Folk in turn told Miller "please don't". Folk stated that he was told that Miller again asked the handyman on January 9 to buy her a ticket. When he refused, she bought a ticket herself. Folk stated at this point he decided to dismiss Miller. He scheduled someone else to open on January 10, 1997 and it was fortunate because Miller did not show up for work on time. She called about 45 minutes after opening to say she had just woke up. In reply, Folk told her not to come in.

Folk initially stated that he never threatened to fire Miller over the gambling and that when he spoke to her about it he would just say "please don't". Later, during the hearing, he said he did tell Miller on several occasions, beginning around December 12, that he would replace her if she didn't stop. On one occasion he issued a written reprimand for gambling. Folk said he never used the word "fire" at anytime.

Folk called one witness, Hawkins, who has worked on and off at the hotel since December 1994. In March of 1996 she returned to work and was then off work for 5 months. After she returned to work she became the manager of the hotel. According to Hawkins she replaced Miller as the manager on October 1, 1996. Hawkins confirmed Folk's testimony regarding Miller adding one-half hour to her time sheets, not entering the \$100 advance, and gambling on the job. Hawkins stated that staff were not to gamble on the job, but could do so as a patron of the hotel.

Hawkins also stated that after the Director's delegate commenced his investigation of Miller's complaint she realized that Miller did not work certain days that she was paid. However, she was unable to indicate the exact days. She said she often, but not always, worked back to back with Miller so she knew her start and end times. She also said she does not accept that Miller worked 10 hours per day as claimed by Miller on several occasions because two other staff worked these hours on those days and only two staff should be working not three.

Miller testified that she “sort of” assumed she was the manager when Folk increased her rate of pay and gave her extra duties such as ordering, scheduling and inventory. She said that she was never actually told she was a manager and she thought a manager was responsible for hiring, firing and training and she claims she had none of these responsibilities. She said she worked alone for the most part and she denies she approved any time sheets beyond her own. Miller said that after Hawkins took over the scheduling and inventory she realized she was not the manager. She also said that Folk was always at the hotel and lived upstairs.

Miller stated that she never submitted any hours or was paid for hours that she did not work. She said she was always putting in extra hours on her days off so she often added these hours on the time sheets. She did this with the approval of the accountant and during her employment no one ever indicated there was a problem with her time sheets.

Miller also stated that she was never told by Folk or Hawkins that her job was in jeopardy or that she would be replaced and she said she never received a written reprimand. She said when Folk called her on January 11, 1997 and told her she was dismissed she was shocked. She said she never worked on January 8 or 9, nor was she at the hotel as a patron on those days. She said the first time she saw the December 12, 1996 memo was after Folk filed his appeal. She said she was never told there was a problem with playing pull tabs while on the job. She admits she did play pull tabs while she was working, but she claims everyone did, and Folk even gave her pull tabs to open while she was on the job. She also stated she had no knowledge of the \$100 advance, free drinks, NSF cheque and lateness issues.

## **ANALYSIS**

The burden is on the Appellant to show that a Determination is in error. On the evidence presented, I am unable to find that burden has been met.

Miller claims she worked all the hours listed in the Determination. Although Folk and Hawkins contend that Miller never worked all these hours they have not adduced sufficient evidence which would cause me to find against Miller. First, there evidence was non-specific. They could not identify a specific day or hour that Miller had not worked. Second, Hawkins didn't even work at the hotel for a substantial period of time during Miller's employment. Third, their evidence concerning Miller's overpayment of half-hours is of little assistance given they agreed the practice ended at some point. Finally, there was no evidence put before me that the wages paid to Miller were adjusted at any time during her employment, which would indicate that her employer had some questions about her hours of work. Accordingly, I am unable to conclude that Miller did not work the hours for which she has already been paid by the Hart Hotel.

I am also unable to conclude that Miller should be excluded from overtime and statutory holiday pay as a result of her being a manager.

Section 1 of the *Employment Standards Regulation* (the “*Regulation*”) defines a 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

The title given to a position is not relevant in determining whether Miller was a manager as defined by the *Regulation*. Rather, Miller’s employment duties must determine whether she was a manager or not.

Based on the evidence before me, I am not persuaded that Miller was a manager. Supervising and directing other employees were not Miller’s primary employment duties. The evidence indicates that Miller worked alone for the majority of the time and therefore her primary duties would not be supervising and directing other employees. Although Miller had some extra duties such as ordering, inventory, and scheduling, she ceased doing these duties, according to Folk, at the end of April 1996. However, even if she had not ceased doing these duties I am not satisfied that they would cause Miller to be a manager. Hiring and firing employees is more indicative of being a manager and it is undisputed that Miller had no authority to fire and there is no evidence to confirm Folk’s claim that she hired any staff. Indeed, Folk was unable to provide the names of the persons Miller allegedly hired. Moreover, both Folk and Hawkins contend that Hawkins took over as the manager in October or November of 1996. Finally, there was also no evidence that Miller had executive responsibilities such as the exercise of authority/control in decisions affecting the business.

For these reasons, I conclude that Miller was not a manager as defined by the *Regulation* and is entitled to the overtime and statutory holiday pay as set out in the Determination.

I further conclude that Miller was not dismissed for just cause.

In order to establish just cause for termination of employment the employer normally must show that a reasonable standard of performance was established and communicated to the employee; the employee was given sufficient time to meet the standard and demonstrated that he/she was unwilling to do so; the employee was adequately warned his/her employment was in jeopardy by a continuing failure to meet the standard; and the employee continued to be unwilling to meet the standard. In exceptional circumstances, a single act of misconduct by an employee which is a deliberate flouting of the employment contract may be sufficient to justify summary dismissal without the requirement of a warning.

In this case, there is no evidence to confirm that Miller gave away free drinks (T. Murray was not at the hearing to give direct evidence and be cross-examined on this point) or that Miller cashed a NSF cheque, was late for work or altered the time book. There is also no

evidence that Miller was given clear and unequivocal warnings prior to her dismissal about any of the foregoing and in particular about gambling on the job.

Folk claims that Miller gambled on the job on January 8 and 9. However, the ROE supports Miller's position that she wasn't at work on those days. Folk also claims he told Miller she would be replaced if she gambled and he gave her a written reprimand and posted the December 12, 1996 memo. However, Miller denies ever seeing the memo prior to the appeal, no copy of the reprimand was provided, and I do not find Folk's testimony about telling Miller she would be replaced to be credible given the first time he ever mentioned this fact was midway through the hearing. It is more likely he told her "please don't" which does not constitute a warning that if she continued she would lose her job. Furthermore, if Folk did tell Miller beginning around December 12, that she would be replaced and then she gambled on January 8 as he claims, by not dismissing her for that incident, he condoned her conduct. Finally, there is no evidence that Miller engaged in any willful misconduct or that she engaged in certain conduct knowing it would result in her dismissal.

For all these reasons, I must conclude that the Director's delegate did not err in finding that Miller is owed compensation for length of service by the Hart Hotel.

**ORDER**

Pursuant to Section 115 of the *Act* I order that the Determination dated April 17, 1997 be confirmed.



**Norma Edelman**  
**Registrar**  
**Employment Standards Tribunal**