Employment Standards TRIBUNAL

An appeal

- by -

Homayon (Henry) Tofangchi

- 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 (as amended)

TRIBUNAL MEMBER: Sheldon Seigel

FILE No.: 2008A/126

DATE OF DECISION: January 20, 2009

DECISION

SUBMISSIONS

Homayon (Henry) Tofangchi (the "Employee")	on his own behalf
Andres Barker	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by the Employee, of a Determination that was issued on September 17, 2008 by a delegate of the Director (the "Director"). The Employer, Telford Properties Ltd., is a property management company that operates apartment complexes. The Determination found that the Employer had contravened sections 21 and 28 of the *Act*, by allowing the Employee to pay the Employer's business costs (s.21) and not keeping Employee wage records (s.28). The Director also determined that administrative penalties were due. He ordered a total payment of $1,284.49 inclusive of interest under s.88 of the *Act*.

2. The Employee submits that the Director erred in law in making the Determination.

3. The Employee seeks a change in the Determination.

ISSUE

4. The issue in this appeal is whether the Director erred in law by misinterpreting or failing to correctly apply the *Act*.

ARGUMENT

5. The Employee says that the Director failed to apply s.36 and s.39 of the *Act* and find overtime pay owing by the Employer. He cites those sections of the *Act* and argues that he was a resident caretaker at all relevant times. The Employee provides copies of two letters that were already contained in the record before the Director at the time of the Determination as evidence of the contract between the parties, and seven pages of a calendar bearing handwritten notations on the space for each day (ie: *9-6*). These calendar pages were not before the Director at the time of the Determination.

6. No submissions were provided by Telford Properties Ltd. notwithstanding that the Tribunal provided the customary written notice of the Employer's right to reply, dated October 27, 2008.

7. The Director submits that the calendar pages that the Employee submitted were not before the Director at the time of the Determination but do not meet the conditions of new evidence that the Tribunal may consider on appeal, and that he made no error in law.

ANALYSIS

8. The Director considered evidence of the employment contract between the parties, the Employee's job description, and the location of the Employee's apartment. The Director found that the Employee was a resident caretaker with respect to one of the buildings for which the Employee provided services (Telford Building) but was not a resident caretaker with respect to another building (Walker Building), which he determined to be too far removed from the Telford Building to be considered part of a single apartment for the purposes of the *Act*. The Director's reasoning is set out in unambiguous terms and discloses no obvious error. The Employee provides no argument that undermines that reasoning.

9. As a resident caretaker of the Telford Building, the Employee was excluded from the provisions of Part 4 of the *Act* (s.35) with respect to overtime pay other than the stated exceptions of sections 36 and 39. The Employee claims that he is entitled to overtime pay as a result of these sections.

10. The *Act* says:

> **Hours free from work**
>
> **36** (1) An employer must either
>
> (a) ensure that an employee has at least 32 consecutive hours free from work each week, or
>
> (b) pay an employee 1 1/2 times the regular wage for time worked by the employee during the 32 hour period the employee would otherwise be entitled to have free from work.
>
> (2) An employer must ensure that each employee has at least 8 consecutive hours free from work between each shift worked.
>
> (3) Subsection (2) does not apply in an emergency.
>
> **No excessive hours**
>
> **39** Despite any provision of this Part, an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee's health or safety.

11. The Director considered s.35 and cited the exceptions of s. 36 and s. 39. The Determination does not make further reference to s.36 and s.39. The Director does analyze the Employee's evidence and concludes with careful reasons, that the Employee's evidence as to hours worked was not credible in the face of contradictory evidence from witnesses for the Employer. I conclude that the Director did not consider the Employee's entitlement to overtime pay in accordance with s.36 and s.39 of the *Act* because either no evidence or argument was provided to cause the Director to consider the relevance of those sections, or because any such evidence was determined to be not credible.

12. Section 36 requires that overtime pay be provided if the employer is not allowed at least 32 consecutive hours free from work each week or 8 consecutive hours free from work between each shift worked. The Determination says:

> Mr. Tofangchi produced a record of hours, which he stated were taken from a calendar upon which he recorded his hours of work each day. A copy of the calendar was not provided.

13. The record of hours provided did not cause the Director to analyze the Employee's entitlement to overtime pay under s.36, notwithstanding that he clearly turned her mind to that provision of the *Act*. I find that the evidence that the Director accepted did not place the facts within the gambit of that section.

14. The calendar excerpts that the Employee provides for the appeal were not before the Director at the time of the Determination. There is no evidence that these calendar entries present different information from the record of hours the Employee presented to the Director, or that they were not readily available to the Employee prior to the Determination. Further, the Employee has not provided sufficient narrative of the entries for me to consider the entries probative or significant to the outcome of this appeal. I find that the new material is not new evidence that should be considered in this appeal.

15. Section 39 is a prohibition against an employer requiring an employee to work excessive hours or hours detrimental to the employee's health or safety. There is insufficient evidence before me for a finding that the Employer required this of the Employee. Further, this section does not provide a threshold over which overtime wages are payable, and is therefore not relevant to the Employee's claim for pay owing.

16. With respect to the Walker building, the Director found the Employee not to be a resident caretaker. The appeal materials provide no significant evidence to support a different finding. The Director decided that the Employee was entitled to be paid for his work at the Walker building, and that no exemptions for overtime entitlement applied. He weighed the evidence and made findings of credibility based on the evidence before him. He was in the best position to make those findings. He found the Employee's evidence insufficient to establish an entitlement to overtime pay. In light of my decision regarding the presentation of the Employee's calendar pages, I have no new evidence on which to base an alternative finding. I accept the Director's decision in this regard. The Director also conducted a thorough analysis of the Employee's entitlement to regular wages as a result of the work he did at the Walker building. He found no wages owing.

17. I find that the Director did not make an error of law. The Appeal fails.

ORDER

18. Pursuant to section 115 of the *Act*, I confirm the Determination.

Sheldon Seigel
Member
Employment Standards Tribunal