Employment Standards **TRIBUNAL**

An appeal

\- by -

Mumtaz Fazal
(“Fazal”)

\- 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

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/559

DATE OF HEARING: October 18, 2000

DATE OF DECISION: February 7, 2001

DECISION

OVERVIEW

This appeal is pursuant to section 112 of the *Employment Standards Act* (the "*Act*") and by Mumtaz Fazal (who I will refer to as "Fazal", "the employee" and also "the appellant"). Fazal appeals a Determination by a delegate of the Director of Employment Standards ("the Director") which is dated July 24, 2000. That determination awarded Fazal no moneys at all, it being the conclusion of the delegate that Fazal's former employer, Kenneth Barclay, paid her as the *Act* requires.

Fazal had complained that she worked 15 hour days, that she is entitled to pay of $50 a day for personal care and another $50 a day for housekeeping, and that she is owed overtime, vacation pay and statutory holiday pay. The delegate found that Fazal was paid a monthly salary, not by the day; that the evidence before him did not show that Fazal is entitled to $50 a day for housekeeping, or that she worked overtime; that Fazal was paid what she is due in the way of statutory holiday pay and vacation pay; and that, room and board considered, Fazal was paid more than the minimum wage. In rejecting Fazal's claim for wages, the delegate explains that the employee's record of work is a record of what she did, not hours worked, is mostly repetitious, and that it is not contemporaneous with the work.

In appealing the Determination, Fazal claims the delegate is wrong on the rate of pay; her record of work is contemporaneous with the work; she did work 15 hour days; and that, as such, she is owed a substantial amount of wages, overtime pay included. She claims additional statutory holiday pay on the basis that she was not given a day off in lieu of each of the statutory holidays that she worked. And she claims further vacation pay as it is a percentage of earnings.

APPEARANCES

Tami Friesen	Counsel for Fazal
Mumtaz Fazal	
Shamim Poonja-Jiwany	Witness for the employee
Don Barclay	Appearing for Kenneth Barclay
Marilyn Lofgren	Witness for the employer

ISSUES TO BE DECIDED

Conclusions with respect to the agreed rate of pay, total hours worked, the employee's calendar record, and statutory holiday pay are at issue.

The employer claims that the appeal is groundless and that it should be dismissed for that reason and because it represents further harassment of the employer.

What I must ultimately decide is whether the employee does or does not show that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS AND ANALYSIS

The employer is Kenneth Barclay ("Barclay") but the deciding mind of the employer is Don Barclay and Marilyn Lofgren, Barclay's son and daughter. Barclay suffered a debilitating stroke in October, 1997 and his son and daughter have been handling his affairs since that time. They have power of attorney. They hired Fazal for their father and they made the decision to terminate her employment.

The stroke left Barclay paralyzed, confined to a wheel chair, incontinent, and in need of personal care. The employer advertised for a live-in caregiver. Fazal responded to the ad and was interviewed for the job by Don Barclay and Marilyn Lofgren in the home of Shamim Poonja-Jiwany and Ali Jiwany, Fazal's sister and brother-in-law. The employer went on to interview a number of other people and it then offered Fazal the employment. Fazal has training in the care and support of elderly and disabled persons and she had some experience in the work. She was her mother's caregiver.

On starting work, Fazal moved into the home of Mr. and Mrs. Kenneth Barclay. Their home, a house of approximately one thousand square feet in North Vancouver, has a spare bedroom on its upper floor and a basement suite. Fazal chose to live in the basement suite and so the employer installed a telephone and an intercom. The basement suite remained as her place of residence until well after the employment's termination.

The employment ran from mid-December, 1997 to May 3, 1999.

Fazal worked a 5 day week. She attended to Barclay as and when required, at night when the need arose. She did housekeeping throughout the employment although the amount of housekeeping, and whether the housekeeping was part of taking care of Barclay, is disputed. She did some of Barclay's laundry. On weekends, a worker employed by Paramed took over the job of caring for Barclay. The Paramed worker slept in the spare bedroom.

On being terminated, Fazal was allowed to remain in the basement suite on a temporary basis and the employer continued to store her belongings, also on a temporary basis. The charge for the room was at that point set at $325 a month. The charge for storage was $75 a month.

In June of 1999, Fazal was asked to vacate the basement suite but refused to do so. The employer, pursuant to the *Residential Tenancy Act*, R.S.B.C. 1996, obtained a notice to end the tenancy and was ultimately, although not immediately, successful because of appeals by Fazal to the Arbitration Review Board, pursuant to the *Residential Tenancy Act*, and the Supreme Court of British Columbia pursuant to the *Judicial Review Procedure Act*, R.S.B.C., 1996. In June, 1999, Fazal personally served court documents on the senior Mr. Barclay while he was at physiotherapy and she made statements which left him visibly upset. He was upset to such an extent that Gunnel Gavin Physiotherapy Associates instructed its staff that they were to deny Fazal further entry to the clinic. Fazal in June filed a complaint with the B.C. Human Rights Commission and in September she filed the complaint which is pursuant to the *Employment Standards Act*. The Human Rights Commission decided that "there is no reasonable basis … to warrant referring your complaint to a (Human Rights) Tribunal hearing" and that "Donald Barclay has provided reasonable, non-discriminatory reasons for requesting that you vacate the basement premises …".

The Agreement on Pay

Fazal, on filling out her complaint form, claimed that her rate of pay was at all times $50 a day for personal care and $50 a day for housekeeping. According to the employer, it was initially agreed that Fazal would be paid $1,000 a month plus room and board and subsequently agreed that she would be paid $1,200 a month plus room and board starting March 1, 1998, and $2,000 a month plus room and board beginning August 1, 1998. The delegate has decided, through inference, and on the basis of the employee's paycheques, that the rate of pay is as the employer claims. He found that, except for raises, Fazal was paid the same amount month after month. And he found "no evidence to support the complainant's contention that there was an agreement to pay her $50 a day for the housekeeping duties".

Fazal, on appeal, claims that she was not asked to provide proof of the agreement on pay and that, had the delegate done so, she would have produced witnesses to corroborate her claim. According to Fazal, both Shamim Poonja-Jiwany and Ali Jiwany were "present at the time I was interviewed … and can testify as to what the initial agreement was between me and my employers when I was originally hired".

At the appeal hearing, Fazal modified her claim. At the outset of the hearing, she claimed that the agreement on pay was $50 a day for personal care and another $50 a day for housekeeping but I found that she later described it as $1,000 a month for personal care and another $50 a day for housekeeping. When I questioned her on that, she said that she was in fact claiming the latter.

I heard from Poonja-Jiwany, the delegate not advancing an argument against doing so. Poonja-Jiwany's recollection of matters is that the employer, at the interview, agreed to pay her sister "$1,000 a month for personal care plus $50 a day for housekeeping".

The position of the employer is that the initial agreement on pay provides for $1,000 a month plus room and board. According to Don Barclay and Marilyn Lofgren, it was made clear to Fazal that the job that they were offering included light housekeeping but not any "heavy work". They say that it was not until 1998, and (what I am going to call) "the Paramed incident", that they agreed to pay anything extra for housekeeping. And, according to the employer, they did so because Fazal took on additional housekeeping duties at that point. They say that they were going to bring in a cleaning service person for one day of work a week but Fazal asked that they allow her to do the work for what a cleaner would charge. Fazal was paid another $200 a month because that is what Lofgren thought that a cleaner would charge ($50 a day x 4).

Given such widely divergent claims, it cannot possibly be that what the employer and the employee have to say on the rate of pay can both be true in every respect. I must decide which of two competing claims is the more credible and that is seldom an easy task. There are many factors to consider. The manner of a witness is of some interest (Is the witness clear, forthright and convincing or evasive and uncertain?) but of greater importance are factors like the ability of the witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other motive; and capacity to know. As the Court of Appeal in *Farnya v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A., has said, the essential task is to decide what is most likely true given the circumstances.

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions."

I find that, in this case, I much prefer the employer's explanation of matters regarding pay. It is clear and reasonable. It has remained consistent over its many tellings and it is consistent with what is known to be fact. The employee's version of matters, on the other hand, is found to be inconsistent and improbable, too much so to be believed. Indeed, I am led to the conclusion that the employee has lost sight of the truth.

The employee's paycheques are fully consistent with the employer's claims.

I find that the first of the employee's two raises did follow on the heels of the Paramed incident and I am satisfied that it most likely reflects the changes that were brought about by Paramed at that point. Paramed objected to the amount of work which was being left for its

weekend caregiver and it at the same time complained of the general level of cleanliness in the Barclay home. It demanded action, indeed, it threatened to pull its caregiver out of the home unless there were changes. And changes were made. From that point on, the Friday/Saturday night bedding and clothing became the responsibility of the Paramed worker and the Sunday/Monday night bedding and clothing became the responsibility of Fazal. Fazal also took on additional housekeeping at that point. According to Fazal, it was at this point that she began to do ironing and vacuuming. I find that Paramed was evidently satisfied. It still supplies a caregiver for Barclay.

According to the employee, she said that if there was housekeeping of any sort to do, she wanted to be paid another $50 a day for the housekeeping, the employer agreed to pay her an extra $50 for housekeeping on a 5 day a week basis but did not for the first several months of the employment. Fazal states, "From August 1998 and onwards, I was paid $50 a day for housekeeping."

I find that in fact the employer never did pay Fazal $50 a day for housekeeping. Fazal was paid $1,200 a month after the Paramed incident and at a rate of $2,000 a month after August. She was not at any point in the employment paid by the day. Her paycheques clearly show that.

I find that there is in fact no evidence to confirm that the employee ever complained during the employment that the employer was not paying her as agreed.

I find that the employee cannot remember important specifics regarding the agreement on pay. First the agreement on pay for personal care is said to be $50 a day, then she changes that to $1,000 a month.

Both Fazal and Poonja-Jiwany, at the appeal hearing, claim that it was at the interview that the employer agreed to pay $1,000 a month for care and another $50 a day for housekeeping. That is contrary to what Fazal has had to say in written submissions to the Tribunal which are dated August 15, 2000 and September 25, 2000. In those submissions, she claims that she was told that she did not have to do housekeeping and that the employer agreed to pay for housekeeping after she had begun the employment. She writes, "I was asked by Marilyn Lofgren to do the housework for her father and mother when I first began my job. I told Ms. Lofgren at that time that I had not been told during the interview that I would be expected to do the housework, and that if I was to do the housework in addition to taking care of her father, I should be compensated for doing the housework. She agreed to pay me $50 extra a day to do the housework".

In that Fazal's written statements precede her oral testimony by several months, and as Fazal's written statements are in keeping with the employer's version of events except for the claim that Lofgren agreed to the paying of another $50 for housekeeping, I am led to believe that Fazal was in fact told at the interview that she was not expected to do much of any housekeeping. I am also led to believe that it was not until the Paramed incident that

employer agreed to pay extra for housekeeping. I am prepared to accept that terms of the employment were discussed at the interview but I am not prepared to accept, as it is so very unlikely, that the employer and the employer reached any agreement on pay at that point. The agreement on pay would then predate the offer of employment. And I very much doubt, as it is so very unlikely, that the employer would make it clear to Fazal that she was not expected to do housekeeping to any great extent and then agree to pay extra for housekeeping.

I have further trouble believing that Don Barclay, a successful businessman, would have agreed at the interview, or on hiring Fazal, to pay more for housekeeping than his father was to be charged for personal care. It is too much given the work. And, from what I can see, neither he, nor Lofgren, nor anyone else for that matter, knew if much of any housekeeping was required. Given that, it is unlikely that an experienced businessperson would then agree to pay such a substantial amount for housekeeping without first seeking to establish exactly what was required in the way of housekeeping and then whether there was not some way of having the work done for less.

I am satisfied that the agreement on pay, as modified over time, calls for pay of $1,000 a month initially, $1,200 a month after March 1, 1998 and $2,000 a month after August 1, 1998.

Hours Worked

Fazal claims 15 hour work days. The delegate did not find any evidence which would support a conclusion that Fazal worked beyond 8 hours a day, at least consistently, and that overtime pay was owed. It also appears that it is his conclusion that there is not a way to determine the extent of work done at night, at least, with any reasonable degree of accuracy.

The *Act* requires that employers keep a record of hours worked.

> **28** (1) For each employee, an employer must keep records of the following information:
> (a) the employee's name, date of birth, occupation, telephone number and residential address;
> (b) the date employment began;
> (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
> (d) **the hours worked by the employee on each day**, regardless of whether the employee is paid on an hourly or other basis;
> (e) the benefits paid to the employee by the employer;
> (f) the employee's gross and net wages for each pay period;

> (g) each deduction made from the employee's wages and the reason for it;
> (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
> (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
> (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken. (my emphasis)

We do not know how many hours the employee worked and that is in part due to the fact that the employer did not keep a record of hours worked. According to the employer, it had no practical way of keeping a record of hours worked as Don Barclay lives in Abbotsford and Marilyn Lofgren lives in Richmond. That would seem to demand that the employer put a cap on Fazal's hours of work but the employer did not do that as well.

It is the employee's argument that as the employee's calendar record is the only record of work, it should have been accepted by the delegate and used as a basis for the Determination. I disagree. Where an employer fails to keep a record of hours worked, the Director may rely on other evidence which indicates the extent of work, including records kept by an employee. But not just any record will do. There must be some reason to believe that the record is essentially accurate.

In this case, the delegate has decided that he should not accept the employee's calendar record and, in setting out reasons for the decision, he states that the record is mostly repetitious and is not contemporaneous with the work. On hearing the appeal, and on examining the original record, I am also led to doubt the accuracy of the employee's record of work. It is suspiciously repetitious. That in itself indicates that the record may not be contemporaneous with the work. Other features of the calendar record also lead me to doubt that it is contemporaneous with the work and accurate. Two are as follows:

- There are notes on the page for December, 1997 which pertain to events in March, July and August of 1998 but they are not in black ink like all of the entries found on the pages for March, July and August of 1998. The notes are in blue ink like the December, 1997 entries.

- I find that start and finish times for a number of days in December, 1997 are written in black ink, unlike the other notes which are for those days, notes which are in blue ink. I asked Fazal for an explanation and I found that she does not have what is a credible explanation for why the different inks are used. According to Fazal, it is all due to Mrs. Barclay, who, I am told, had a habit of wandering into Fazal's room and taking her pens.

> I find that rather unlikely. I am satisfied that the likely explanation is that all of what is written in black on the December record has been added at some later date.

I find that there is in fact no evidence to show that the employee worked 15 hours a day. I am not led to believe that the employee performed anything like that amount of work. Barclay used paper diapers, not cloth diapers. According to Fazal, it was her job to care for both Mrs. Barclay as well as Mr. Barclay and she was paid to be their companion but that is not shown to be true, indeed, the evidence is that Mrs. Barclay was able to look after herself and her home, indeed, she was determined to do so. Lofgren regularly visited her parents and she assisted with the cleaning and tasks like shopping. The Barclay home is a thousand square foot house and it does not appear that Fazal did much of any housekeeping prior to the Paramed incident. And while I accept that Fazal had to attend to Barclay as and when required, and at night on occasion, he did not require constant attention and, as such, he could be left unattended for hours at a time.

I find that there is in fact no evidence to show that Fazal worked beyond 8 hours a day or 40 hours a week prior to the Paramed incident. I accept that she occasionally assisted Barclay in the night but find that there is no evidence of the extent to which that was done. I am only satisfied and prepared to accept that, starting March 1, 1998, additional housekeeping was performed and that Fazal, as such, had to work longer hours. Given the pay, $200 a month, I am led to believe that she worked at least another 7 hours each week from that point on.

<u>The Nature of the Employment</u>

Counsel for Fazal argues that Fazal is a "domestic" as that term is defined by the *Act* and that, as such, she is entitled to overtime pay.

In deciding the matter of the rate of pay and the matter of total hours worked as I have, it follows that Fazal is not owed anything like the amount which is claimed. I have found, however, that she worked another 7 hours a week after March 1, 1998. And I am satisfied that from that point on she began to work beyond 8 hours a day or, at least, 40 hours a week. It does not necessarily follow, however, that she is entitled to overtime pay.

The *Act* covers and defines "employee" and a worker called a "domestic". The *Employment Standards Regulation* (the "*Regulation*") refers to and defines a "live-in home support worker", a "night attendant", a "residential care worker" and a "sitter". Section 32 of the *Regulation* excludes sitters from the *Act*. Under section 34 of the *Regulation*, live-in home support workers, night attendants and residential care workers are excluded from the hours of work and overtime requirements of Part 4 of the *Act.* The *Regulation* in section 22 requires that residential care workers receive rest periods of 8 hours and also that they be paid 2 hours of regular wages, or for the length of the work which interrupts the rest period, whichever is longer.

While a domestic is defined as follows:

> **"domestic"** means a person who
> (a) is employed at an employer's private residence to provide cooking, cleaning, child care or other prescribed services, and
> (b) resides at the employer's private residence;

I am satisfied that Fazal plainly fits the definition of "residential care worker" as that term is defined in the *Regulation* and that she is not entitled to overtime pay.

> **"residential care worker"** means a person who
> (a) is employed to supervise or care for anyone in a group home or family type residential dwelling, and
> (b) is required by the employer to reside on the premises during periods of employment, but does not include a foster parent, live-in home support worker, domestic or night attendant; … .

Fazal was employed to care for Barclay. The work was in a house, what is clearly a "family type residential dwelling". And Fazal was required to reside on the premises during the employment.

While Fazal performed cleaning and I am satisfied that it can be argued that she performed a service prescribed by the employer which is rather similar in some respects to child care, namely caring for an elderly, disabled person, she is not a domestic, in my view, because she was not hired to assist with the household but as a caregiver, first and foremost. "Domestic" in the ninth edition of the *Concise Oxford Dictionary* is defined as "of the home, household, or family affairs" and "a household servant". The *Canadian Dictionary of the English Language* also defines "domestic" as "of or relating to the family or household and also as "a household servant". And I note that Fazal is not a domestic as Professor Thompson described domestic workers in his report, *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia*, Mark Thompson, Commissioner (1994), the report which recommended that changes be made to the former Employment Standards Act. He speaks of nannies and he indicates that the majority of domestics are immigrant workers who enter Canada under programs administered by the Federal Government.

Fazal is also not a foster parent, "live-in home support worker", "night attendant" or a "sitter". A night attendant, while similar to a residential care worker, provides disabled persons with care and attention for periods of 12 hours or less in any 24 hour period, and primarily during the night. A live-in home support worker, while similar to a residential care worker, is a person who is employed by an agency, business or other employer providing, through a government funded program, home support services for anyone with an acute or chronic illness or disability not requiring admission to a hospital.

A sitter is similar to a residential care worker and, indeed, a domestic, but the term "sitter" is defined in the *Act* as follows:

> **"sitter"** means a person employed in a private residence solely to provide the service of attending to a child, or to a disabled, infirm or other person, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of
> (a) a business that is engaged in providing that service, or
> (b) a day care facility

And the common meaning of "sitter" is "baby sitter" and, as such, I find that the term refers only to persons engaged in casual employment while parents, or other persons who are in effect parents, are away. According to the *Concise Oxford Dictionary*, the ninth edition, "sitter" is the equivalent of "babysitter" and a babysitter is a person who looks after a child or children while parents are out. The *Canadian Dictionary of the English Language* defines "sitter" as a person who cares for young children when the parents are not home.

Statutory Holiday Pay

Fazal did not work on B.C. Day but she worked 11 other statutory holidays.

Section 46 of the *Act* governs the payment of statutory holiday pay where the employee works the statutory holiday.

> **46** (1) An employee who works on a statutory holiday must be paid for that day
> (a) 1 ½ times the employee's regular wage for the time worked up to 11 hours, and
> (b) double the employee's regular wage for any time worked over 11 hours.
> (2) In addition, the employer must give the employee a working day off with pay according to section 45.
> (3) The employee may choose to have the pay for the day off credited to the employee's time bank, if one has been established.
> (4) The employer must schedule the day off with pay
> (a) before the employee's annual vacation,
> (b) before the date the employment terminates, or
> (c) if the pay for the day off is credited to the employee's time bank, within 6 months after the date of the statutory holiday,
> whichever is earliest.

Fazal was not given a working day off with pay in lieu of the 11 statutory holidays that she worked. She was, however, paid for each of those statutory holidays as if it were a normal work day and she was later paid an extra $1,100 of statutory holiday pay as further compensation for the 11 statutory holidays that she worked. According to the delegate, the total amount paid is what the employee is due in the way of statutory holiday pay under sections 46(1)(a) and 46(2) of the *Act*.

The appellant on appeal is not claiming that the delegate is wrong in his calculations but that she is owed further compensation because she did not receive another working day off as is required by section 46 (2). I find that she is not. I accept that the employee was not given a day off with pay but it is not as if she did not receive the pay. She did. It is just that she did not receive the day off. In my view, the consequence of a failure to give an employee a day off is not the payment of an additional amount of compensation to the employee but the possibility that the Director may chose to impose a penalty, the *Act* providing the Director with a discretionary power to impose penalties in cases where there is a failure to comply with the requirements of the *Act*.

The employee does not show that she is owed further statutory holiday pay.

The *Employment Standards Act* and Its Application

According the employer, the appeal is groundless and it should be dismissed in that it represents a further attempt at harassing the employer and the employer's family. The mere fact that the employee has battled the employer on a number of other fronts and lost is not, however, reason to dismiss the appeal.

I have found in regard to the particular appeal which is before me that the employer is to be preferred in regard to what is said on the agreement on pay, indeed, I have concluded that the employee has lost sight of the truth. The employer agreed to pay Fazal $1,000 a month, then $1,200 a month after March 1, 1998 and $2,000 after August 1, 1998 and it was agreed that the employer would provide Fazal with room and board. I have found that the employee was in fact paid just that and that Fazal was provided with a room if not board.

I have found that there is not evidence to establish that the employee worked anything like 15 hour days or that there is in fact no evidence to show that Fazal worked beyond 8 hours in a day or 40 hours a week before March 1, 1998.

I have found that Fazal began to perform only another 7 hours of work each week beginning March 1, 1998 but I have found that she is not a "domestic" but a "residential care worker" and that as such she is not owed overtime pay.

I have found that the employee is not entitled to further statutory holiday pay as claimed.

In reaching the conclusions as I have, I have ended up finding that the employer is in essence correct, the appeal is groundless and unsubstantiated in all of its important respects. It is not that the appeal is just wrong, however. What stands out about this appeal is that it is incongruous and misleading and devoid of real support. I have therefore decided that it is the only appropriate that I dismiss the appeal pursuant to section 114 (1)(c)of the *Act*.

> **114** (1) The tribunal may dismiss an appeal without a hearing of any kind if satisfied after examining the request that …
>
> (c) the appeal is frivolous, vexatious or trivial or is not brought in good faith.

ORDER

I order that the appeal be dismissed and, pursuant to section 115 of the *Act*, that the Determination dated July 24, 2000 be confirmed.

LORNE D. COLLINGWOOD

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal